"To the Greatest Extent Practicable"—Confronting the Implementation Challenges of the First Step Act

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THE PASSAGE OF the First Step Act (FSA) in December 2018 ushered in the most extensive changes to the federal criminal justice system in decades. While significant "front end" sentencing changes were enacted, perhaps the most notable provisions focused on correctional reform. Specifically, Congress directed the federal Bureau of Prisons to develop a dynamic risk assessment that could identify each inmate's risk level and specify needed correctional interventions. The legislation further directed the Bureau of Prisons to provide adequate evidence-based program capacity to reduce the risk of inmate recidivism, and to implement a process in which program participation could lead to additional time in prerelease custody and/or commencing community-based supervision earlier.[1] The legislation's implementation requirements will likely delay the new risk assessment system's impact on the federal probation system, which supervises federal inmates released into the community. However, other FSA changes are already having significant "back end" impact on the U.S. probation system. In this article we first present a comprehensive overview of some long-standing impediments to providing strong continuity of care for inmates between the BOP and U.S. probation. There follows a detailed explanation of five FSA reentry provisions that currently challenge the U.S. probation system. The article concludes with a discussion of macro-level concerns as well as proposals for legislative, policy, and procedural changes which could better ensure that the federal criminal justice system meets the legislative intent of the FSA.

A (Dis)Continuity of Care?

The term "continuity of care," used here in the context of correctional programming, comes from the health sciences. According to the American Academy of Physicians, a continuity of care "is concerned with quality of care over time. It is the process by which a patient and his/her physician led care team are cooperatively involved in on-going health care management toward a shared goal of high quality, cost effective medical care."[2] This concept has been adopted within community corrections, with "care" being understood as those interventions, services, and case management leading to recidivism reduction. Within the U.S. probation policy, officers are identified as the "primary change agents" for those persons under their supervision, with the goal of their achieving "lawful self-management."[3] Officers directly provide some services and broker others. Improving the continuity of care through better coordination between the BOP, halfway house providers, and U.S. probation would greatly enhance the objectives of the FSA. Below we consider both long-standing as well as more recent impediments that disrupt the continuity of care.

Within the federal criminal justice system, criminal defendants begin under the jurisdiction of the judicial branch while their case is pending. Approximately 25 percent are on pretrial release, while the remaining 75 percent in pretrial detention are managed by the U.S. Marshals Service.[4] If convicted and sentenced to a term of incarceration, a defendant is identified as an inmate and comes under the jurisdiction of the Attorney General and the BOP, in the executive branch. Upon release, an inmate is identified as a "person under supervision" and begins a Term of Supervised Release (TSR) with U.S. probation.[5] Jurisdiction then returns to the judiciary. Defendants thus journey across two separate but equal branches of government during the federal criminal justice process.[6] As one might imagine, this structure may not lend itself to a seamless continuity of care. When fashioning a sentence, the court is directed to consider what may be referred to

[1] 18 U.S.C. 3632.

[2] https://www.aafb.org.policies

[3] *Guide to Judiciary Policies*, Volume 8, Part E, Chapter 3, Section 310.

[4] Judiciary Statistical Table H-9.

[5] *Guide to Judiciary Polices*, Volume 8, Part E, Chapter 1, Section 150.

[6] See J.C. Oleson (2014). A decoupled system: Federal criminal justice and the structural limits of transformation, *Justice System Journal*, 35:4, 383-409, http://dx.doi.org/10.1080/00982 61X.2014.965856.

as the four purposes of punishment.[7] Last but not least among the four is the degree to which the sentence can "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[8] It is arguably in regard to this fourth purpose of punishment that the differences between the BOP and the U.S. probation system need to be evaluated.

Federal inmates serve their custody sentences in prisons distributed across six BOP-defined geographic regions, which do not correspond at all to the 12 judicial circuits within which the federal district courts' probation offices are located. Except for 11 facilities, most of BOP's prisons are located in rural areas, far from the urban and suburban areas where most U.S. probation officers (and their supervised post-release population) are located.[9] Although some probation offices provide "in-reach" to the prisons (e.g., assist with mock job fairs, deliver orientations to supervision),[10] the physical distances complicate efforts for U.S. probation officers to engage directly with inmates in advance of their release.[11]

Another challenge to the continuity of care stems from what one might consider cultural differences between the approaches to rehabilitation of the BOP and U.S. probation. Except for GED participation,[12] the BOP does not require inmates to participate in rehabilitative programing. Indeed, the lynchpin of FSA's new correctional approach is to incentivize inmates to pursue self-improvement through "evidence-based recidivism reduction programs."[13] In contrast to traditional BOP practice, when inmates release and begin a term of supervised release with the judiciary, they are subject to a wide variety of court-imposed special conditions, often mandating various interventions (e.g., sex offender, substance abuse, mental health, and cognitive behavioral treatment). Once under the court's jurisdiction, failure to participate in programming constitutes noncompliance and could lead to more restrictive conditions and even revocation and return to prison. Thus, inmates may spend years, and even decades, not taking advantage of programs within the BOP; after their release, perhaps for the first time, they are required to address the risk factors that led to their criminal behavior.

A critical part of federal reentry is the BOP's system of 203 contracted Residential Reentry Centers (RRCs) or halfway houses.[14] These are typically located near U.S. probation offices in the communities to which inmates return. In some judicial districts, U.S. probation officers have reserved space and/or set "office hours" in the RRCs, and begin risk assessment and collaborative case management with inmates and their RRC case managers.[15] This can be helpful, particularly because the level of rehabilitative services offered to (but not required of) inmates under the BOP's Statement of Work is considered by some to be modest.[16] Since the BOP and judiciary have different appropriations, U.S. probation cannot use judiciary financial resources to pay for needed interventions while inmates are in the RRC. Some probation officers will offer RRC-housed inmates access to probation officer-led Cognitive Behavioral Therapy (CBT), but this is not widespread.[17]

BOP inmates who complete the Residential Drug Abuse Program (RDAP)[18] must participate in community-based substance-abuse treatment while at the RRC if they are to receive a 12-month reduction in their sentence. Yet RDAP institutional and contract treatment records are not consistently provided to U.S. probation. Also, within a strong continuity of care, inmates would be able to maintain their treatment with the same provider after they transition from a halfway house to treatment while on supervision with probation. However, because BOP uses the Federal Acquisition Regulations (FAR) to secure contract treatment services and U.S. probation relies on separate judiciary contracting mechanisms, U.S. probation may not "piggy back" on the BOP's contracts, and vice versa, which reduces treatment effectiveness.

The enactment of the Second Chance Act (SCA) in 2008 greatly expanded the breadth of services U.S. probation officers can provide to persons under supervision. Given the vast range of services authorized under 18 U.S.C. 3672, U.S. probation can address nearly the full breadth of criminogenic needs and responsivity factors (barriers)[19] identified in the Post-Conviction Risk Assessment (PCRA) tool that U.S. probation officers use to assess all persons under post-conviction supervision. In practice, sometimes officers assess inmates nearly as soon as an inmate arrives at the RRC. In other circumstances, officers do not conduct the assessment until the TSR has commenced. However, the BOP does not require RRC staff to use a standardized risk assessment once an inmate arrives at the facility. This lack of consistency and coordination with risk assessment across the BOP, RRCs, and U.S. probation decreases the likelihood of dynamic risk factors and responsivity factors being accurately identified and mitigated with programming.[20]

[7] 18 U.S.C. 3553(a)(2).

[8] 18 U.S.C. 3553(a)(2)(D).

[9] BOP has five Federal Detention Centers, three Metropolitan Correctional Centers, and three Metropolitan Detention Centers. BOP website.

[10] See Whetzel et al. (2014). Inter-Agency collaboration along the reentry continuum. *Federal Probation,* Volume 78, Number 1.

[11] FSA amended 18 U.S.C. 3621(b) and directed BOP to designate inmates to facilities within 500 driving miles from their primary residence. Such distances, however, still limit the ability of inmates' families to visit and U.S. probation officers to easily provide "in-reach."

[12] 18 U.S.C. 3624(f).

[13] 18 U.S.C. 3624(g)(1)(d)(i)(II)(bb).

[14] BOP Power Point (2019).

[15] Whetzel et al. (2014). Interagency collaboration along the reentry continuum. *Federal Probation,* Volume 78, Number 1.

[16] The current BOP *Statement of Work (SOW) for Residential Reentry Centers April 2017* requires the RRC staff to provide an Individualized Program Plan (IPP), job placement resources, employment information assistance, resume writing, interview techniques training, individual and group counseling, and employment job fairs. BOP may also authorize outpatient substance abuse, mental health, and sex offender treatment for some inmates. Some RRCs provide programming above and beyond the SOW, others do not.

[17] During the previous administration, an earlier SOW required CBT to be made available to all inmates. This and other provisions were removed in 2017.

[18] See A Directory of Bureau of Prisons National Programs. The RDAP program provides intensive cognitive-behavioral residential drug abuse treatment in a modified therapeutic community. Participants must complete 500 hours of programming over 9 to 12 months. An analysis by the National Institute on Drug Abuse (NIDA) found that over 3 years, male participants were 16 percent less likely to recidivate and 15 percent less likely to relapse than those who did not participate in the program. Outcomes for females were even better, at an 18 percent reduction in recidivism.

[19] Under SCA authority, U.S. probation can offer transitional housing, vocational training, CBT, education assistance, mentoring, work tools, identification, child-care, non-emergency medical assistance, transportation assistance, etc. Funding, however, is very limited. For more about SCA alignment with PCRA identified criminogenic needs and responsivity factors, see Jay Whetzel and Aaron McGrath (June 2019). Ten Years Gone—Leveraging SCA 2.0 to Improve Outcomes, *Federal Probation.* Volume 83, Number *1.*

[20] In a survey of U.S. probation officers in October 2012, only 20 percent of respondents stated that they share PCRA scores with RRC case managers. See Whetzel et al. (2014), ibid., p. 42. The article

Current BOP policy requires RRC residents to secure employment within 30 days of arrival from prison; additional liberties are contingent upon inmates working and contributing 25 percent of their gross income to the BOP.[21] However, if inmates have chosen not to participate in programming while in custody, their dynamic risk factors may not have been addressed at all.[22] While we do not minimize the importance of gainful employment, many inmates are heavily encumbered financially, and the co-pay requirement can be burdensome, particularly as they prepare to become self-sufficient. For example, the federal Office of Child Support Enforcement (OCSE) in the Department of Health and Human Services (HHS) conducted an analysis of 51,000 federal inmates and found that 29,000 had past-due child support.[23] On average, an inmate who enters prison owing $10,000 in child support will owe $20,000 upon release.[24] In recent years, as inmates have learned that U.S. probation can assist with transitional housing upon release through Second Chance Act funds, there has been an increase in the frequency with which inmates report they have no home to return to, perhaps in expectation that U.S. probation will provide them with housing. Better assessment of inmates' post-release needs and collaborative service delivery across the BOP, RRCs, and U.S. probation is needed.

Despite some limitations, the BOP's vast network of contracted RRCs plays an important role in assisting inmates' transition back into society. RRCs also provide home confinement services for inmates who have done well in the RRC and have a viable home plan. U.S. probation officers also provide this function in some courts (see below). As of August 2019, BOP-contracted RRCs housed 7,847 individuals and monitored the home confinement of 1,790. Among these were 1,427 (15 percent) persons under supervision with U.S. probation.[25] In 2016, however, following an apparent change in DOJ priorities, the BOP determined that its previous practice of routinely exceeding RRC contract limits was in violation of contracting law. Shortly thereafter, 16 smaller RRCs had their contracts terminated without advance notice to the judiciary. The loss of this resource was very disruptive to the affected districts and led to the creation of a high-level Judiciary-BOP working group focused on improving inter-branch communication and collaboration. An additional difficulty concerns ensuring the high quality of RRCs. Given the challenges of siting RRCs (due to local community resistance, zoning restrictions, start-up costs, etc.), contract incumbents have an extreme advantage when the BOP solicits for services, even if they have provided sub-par service. While one recent critic's claim of the BOP's "collapsing infrastructure to implement statutorily approved expansion of pre-release custody"[26] seems overstated, federal probation operations and the continuity of care is disrupted when RRC availability is eliminated or decreased or the quality of contracted RRCs is low.

Last, the BOP and U.S. probation use separate databases and case management systems that are not integrated. The BOP's primary system, SENTRY, is an antiquated, DOS-based system. Federal probation uses its own case management system known as Probation and Pretrial Automated Case Tracking System (PACTS). Since 2015, BOP has given U.S. probation weekly access to data on all inmates within 24 months of release, which has been very helpful in decreasing the likelihood of inmates being released into the community without federal probation being notified. However, only basic inmate records are accessible through SENTRY. More detailed medical, mental health, and treatment records are in separate BOP systems and are not routinely provided by BOP case managers to U.S. probation officers receiving the inmate onto supervision in the community. A robust continuity of care would require integrated data systems that would allow access to all needed information for every practitioner assisting inmates.

As shown above, the reentry nexus of the BOP, RRCs, and U.S. probation needs improvement if we are to realize quality service delivery and recidivism reduction. It is important to be aware of these current limitations as we explore FSA implementation.

Enter the First Step Act

On December 21, 2018, President Trump signed the First Step Act into law (P.L. 115-391). The Act brought together a broad spectrum of lawmakers, from those concerned about the BOP's growing percentage of the DOJ's budget to those focused on reducing the disproportionate impact of mandatory minimum sentences on minority populations, and on the need to enhance the delivery of evidence-based recidivism reduction to inmates.[27] During previous years, various criminal justice reform bills had been advanced, but none gained adequate traction. Passage of the FSA was, for some, almost a surprise, particularly given the scale of the changes enacted.

The enactment of the FSA needs to be understood in context, specifically, in the wake of efforts of the Charles Colson Task Force on Federal Corrections, which Congress established in January 2014. The bi-partisan Task Force spent a year exploring the causes of mass incarceration and gathering information to develop guidance for reducing recidivism and improving public safety. The Task Force's effort was informed by research demonstrating that long sentences do not improve public safety goals and that intensive programming should be reserved for higher risk inmates.[28] Prepared in collaboration with the Urban Institute, the Task Force's final report included the following recommendations:

- Reserve the use of prison for people convicted of the most serious crimes.
- Promote a culture of safety and rehabilitation in federal facilities.
- Incentivize participation in risk reduction programming.
- Ensure successful reintegration by using evidence-based practices and supervision and support.
- Enhance the coordination, performance, accountability, and transparency of federal correctional agencies.
- Reinvest savings to support the expansion of necessary programs, supervision, and treatment.[29]

Taken in its totality, the FSA appears to

notes, "To become a more streamlined collaborative reentry system built upon evidence-based practices, it is essential that we share actuarial risk prediction information along the continuum."

[21] BOP Statement of Work (SOW) Residential Reentry Center. (2017). The subsistence requirement, not imposed on inmates deemed indigent, is imposed "to promote financial responsibility."

[22] For an in-depth assessment of BOP's RRCs, see *Residential Reentry Centers Assessment, Recommendations Report*. Deloitte. (August 2016).

[23] *Project to Avoid Increasing Delinquencies.* Office of Child Support Enforcement *Child Support Fact Sheet Series Number 5.*

[24] Nancy Thoennes. (2002, May). *Child Support Profile: Massachusetts incarcerated and paroled parents*. Center for Policy Research.

[25] BOP PowerPoint presentation (August 2019).

[26] Letter from Lisa Hay, Federal Public Defender, District of Oregon, to BOP Director Dr. Kathleen Hawk-Sawyer (October 14, 2019).

[27] Congressional Research Service. (March 4, 2019). The First Step Act: An Overview https://crsreports.congress.gov

[28] Julie Samuels et al. (May 2019*). Next Steps in Federal Corrections Reform: Implementing and Building on the First Step Act*. Urban Institute.

[29] Julie Samuels et al., ibid.

advance many of the Task Force's recommendations. However, as the FSA is implemented over the next few years, we will see if the Task Force's recommendations and Congressional intent are realized. Below we explore five FSA provisions to which federal probation must respond.

Fair Sentencing Act Retroactive Application

The First Step Act mandated that the Fair Sentencing Act be applied retroactively. Since the 1980s, there have been penalties for crack cocaine offenses that were far longer than those for powder cocaine. The Anti-Drug Abuse Act of 1986 created statutory mandatory minimum penalties that differentiated between powder and crack cocaine, requiring 100 times more powder cocaine than crack to trigger the same mandatory minimums.[30] The Anti-Drug Abuse Act of 1988 then made simple possession of crack cocaine the only drug punishable by a mandatory minimum.[31]

The disparity in sentencing had the effect of creating significantly longer sentences for African-American defendants than for people of other races. Of those sentenced for crack cocaine offenses in 2010, 78.7 percent were African American. Hispanics made up the next largest group at 13 percent.[32]

Between 1995 and 2007, the United States Sentencing Commission (USSC) submitted four reports to Congress recommending various changes in the mandatory minimum sentences for crack offenses, particularly in the case of simple possession and in the 100 to 1 ratio, arguing for a reduction to a 20 to 1 or 1 to 1 ratio, depending on the report.[33] In May of 2007, the USSC submitted amendments to Congress that reduced the crack cocaine sentencing range by 20 percent, or two levels,[34] and was retroactive.[35] A study following those impacted by this change for five years following release found that their recidivism rate was lower than that of a prior cohort who received longer sentences, demonstrating that reductions in sentence length and time served do not decrease public safety.[36] In 2008, the Supreme Court found that judges had the discretion to impose lower sentences based on their disagreement with the 100 to 1 crack to cocaine powder drug ratio.[37]

During this same period, Department of Justice policies also affected sentences imposed in crack cocaine cases. Since 2003, policy directed prosecutors to charge the most serious provable offense supported by the facts, meaning the charge that would garner the longest sentence.[38] In 2010, prosecutors were guided to shift from focusing on most serious crime to focusing on the prosecutor's assessment of each case.[39]

On August 3, 2010, President Obama signed the Fair Sentencing Act into law. This law partially rectified the crack/powder cocaine disparity by increasing the quantities that triggered the mandatory minimum penalty for trafficking crack cocaine from 5 grams to 28 grams for a five-year mandatory minimum and from 50 to 280 grams for a ten-year mandatory minimum. The act also removed a mandatory minimum for simple possession of crack cocaine and reduced the crack/powder ratio from 100 to 1 down to 18 to 1.[40]

Although the Fair Sentencing Act made progress toward levelling the penalties for crack and powder cocaine, it only applied to offenders who were sentenced after August 3, 2010, regardless of when the offense took place.[41] Anyone who had been sentenced prior to this date was unable to benefit from the remedy provided.

In May of 2011, the USSC submitted an amendment to Congress permanently implementing the Fair Sentencing Act in the guidelines and making this reduction retroactive. The Supreme Court held that the penalties applied to offenses committed prior to August 3, 2010, but sentenced after that date.[42] By 2014, the Fair Sentencing Act was fully implemented and the USSC separately reduced the guidelines for all drugs, including crack cocaine, by two levels, making this change retroactive.[43]

Following implementation of the Fair Sentencing Act, the number of crack cocaine defendants sentenced decreased by approximately half. In 2010, 4,730 crack cocaine defendants were sentenced, compared to only 2,366 in 2014.[44]

Now, Section 404 of the First Step Act provides for retroactive application of the Fair Sentencing Act. Retroactive application means Sections 2 and 3 of the Fair Sentencing Act are now available to defendants sentenced before August 3, 2010, who did not previously receive the benefit of the statutory penalty changes made by the act. The motion for a reduction in sentence can be initiated by the inmate, the chief judge of the sentencing district, the director of the Bureau of Prisons, or the prosecuting attorney.[45]

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[30] Pub. L. No. 99-570 (1986).

[31] Pub. L. No. 100-690 (1988).

[32] 2015e. *Report to the Congress: Impact of the Fair Sentencing Act of 2010*. Washington, DC: US Sentencing Commission. http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf.

[33] United States Sentencing Commission [hereinafter USSC or Commission], 2007 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007) [hereinafter 2007 Commission Report]; USSC, 2002 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) [hereinafter 2002 Commission Report]; USSC, 1997 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (AS DIRECTED BY SECTION 2 OF PUB. L. NO. 104–38) (April 1997) [hereinafter 1997 Commission Report]; USSC, 1995 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (AS DIRECTED BY SECTION 280006 OF PUB. L. NO. 103–322) (February 1995) [hereinafter 1995 Commission Report].

[34] USSG, App. C, amend. 706 (effective Nov. 1, 2007), as amended by amend. 711 (effective Nov. 1, 2007); *Spears v. United States*, 555 U.S. 261 (2009).

[35] USSG, App. C, amend. 713 (effective March 3, 2008). Under 28 U.S.C. § 994(u), when the Commission reduces a guideline range, it is directed to specify whether, and in what circumstances, the reduction should apply to offenders who had been sentenced under the previous, higher version of the guideline.

[36] Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives* (2016)

[37] *United States v. Kimbrough*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009).

[38] U.S. Dept. of Justice, Attorney General Eric Holder, Memorandum: Department Policy on Charging and Sentencing (May 19, 2010).

[39] U.S. Dept. of Justice, Attorney General Eric Holder, Memorandum: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010 (July 15, 2011).

[40] Fair Sentencing Act of 2010, Pub. L. No. 111-220 (August 3, 2010).

[41] U.S. Dept. of Justice, Attorney General Eric Holder, Memorandum: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (August 12, 2013).

[42] *Dorsey v. United States*, 132 S.Ct. 2321, 2335. (2013).

[43] USSG, App. C, amend. 782 (effective Nov. 1,2014) (reducing drug trafficking offense penalties across all drug types); USSG, App. C., Amend. 788 (effective Nov. 1, 2014) (making the 2-level reduction for all drug types retroactive with the proviso that no offender may be released before November 1, 2015).

[44] U.S. Sentencing Commission, FSA Datafiles.

[45] Pub. L. No. 115-391 (2018).

Impact on Federal Probation

As of October 17, 2019, there have been 2,139 sentence reductions under Section 404 of the First Step Act. To demonstrate further the disparate impact of the crack/powder disparity on people of color, of the 1,987 released, 1,804 were African American. The next most highly represented racial group was Hispanic, at a significantly lower number of 84. Nearly all of those released were male United States citizens, with an average age at resentencing of 45.

Some of the sentencing factors present in this population are relevant to their level of supervision needs. Approximately 42 percent of those released had a special offense characteristic of a weapon, and 11.2 percent had an aggravating role in the offense. More notably, 65.5 percent of those receiving a reduction in sentence qualified for a criminal history category VI, and 57.2 percent were career offenders.[46]

In addition to the importance of releasing over 2,000 defendants, the sentencing factors mentioned above are important when considering workload impacts. Considering the large number of career offenders and high criminal history categories among these defendants, they are more likely to score as moderate or high risk on the PCRA, resulting in increased contacts and higher levels of interventions such as cognitive behavioral therapy, substance use disorder treatment, mental health, and other interventions.

The initial impact of this provision of the First Step Act has largely already been felt. These cases, as approved, have released over time, and therefore their impact has been absorbed differently than the large releases under the good time recalculation provision or the ongoing nature of the earned time credit provision. However, new petitions continue to be filed and granted under this provision. As the application of this provision requires a "covered offense," a finite number of defendants will qualify. This number has been estimated as low as 2,700, while others estimate the number higher. In any case, it is likely that the largest impact of this provision has already been felt by the federal probation system in terms of caseload numbers. However, the impact of the higher risk level of these clients will continue to be felt until their terms of supervision expire.

Good Time Credit

After Fair Sentencing Act retroactivity, granting inmates additional "good time" credit next impacted federal probation. The FSA clarified that 18 U.S.C. 3624(b) directs the BOP to calculate good time on the sentence imposed, not on time served, as had been the practice. The net effect was that inmates on average now receive an additional seven days off for every year imposed, from 47 to 54 days. A surge of 3,100 inmates benefitted from this change and were released on July 19, 2019.[47] According to the BOP, on July 19, 2019, a total of 1,200 inmates were released from RRCs, 800 were released to detainers, and 1,100 were released directly from prison to supervision with federal probation in the community. According to the BOP, the average early release gained was 57 days. The BOP collaborated with federal probation by providing rosters a month in advance so that the federal probation system could work with RRC staff and identified inmates. However, as noted earlier, there are limited means for engaging with inmates who are in institutions. While 3,100 may not seem like an overwhelming number to release at once, consider that on average the BOP releases only 100 inmates per day across the country. Also, a perhaps unintended consequence of the application of credits was that those inmates who had served the longest sentences—perhaps the most institutionalized and most in need of reentry services—went directly into the community with little to no preparation.

From October 11, 2019, through January 2020, another surge of 3,383 inmates was released under recalculated good time. Participants in the 500-hour Residential Drug Abuse Program (RDAP), statutorily established under 18 U.S.C. 3621(b), receive up to 12 months off their sentence. Originally, the BOP took the position that the extra good-time provisions would not be applied to RDAP participants, since they were already receiving a year off. However, Congress did not exclude them in the FSA legislation. While the RDAP program has been demonstrated to reduce recidivism for those who complete it, only inmates with a documented history of serious substance abuse are eligible. The early release of these inmates, most of whom have special conditions for substance abuse treatment by the sentencing court, posed an immediate extra demand for the availability of U.S. probation treatment resources.

Impact on U.S. Probation

The surge of releases through new good-time provisions was not unprecedented. Most recently, beginning in October 2015, approximately 40,000 inmates began releasing months early—over the course of several years—as a result of the United States Sentencing Commission's "Drugs Minus 2" guideline amendment. Going forward, the good-time provision continues, applying to all BOP inmates. As inmates' release dates are updated, U.S. probation should be able to identify subsequent early releases through SENTRY and/or the Offender Release Report,[48] and should be working very closely with the local RRCs and Residential Reentry Managers (RRM).

Expanded Home Confinement

The FSA modified 18 U.S.C. 3624(c)(2), adding, "The Bureau of Prisons *shall* [emphasis added], to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time under this subsection," potentially expanding the use of the home confinement, in which lower risk inmates who have few to no reentry needs bypass RRC placement and return directly to their homes. Previously the statute just noted that home confinement "may be used" and made no mention of focusing on minimum and lower risk inmates. Home confinement is enforced using location monitoring technology and may be provided by either RRC[49] staff or federal probation officers. However, the FSA's expanded language does not *require* the U.S. probation system to accept FLM cases onto their caseloads.

The executive branch (through the U.S. Parole Commission) and the judiciary first collaborated in placing inmates into the community on telephone-monitored curfews in 1986 under the "Curfew Parole Program." In 1988, the BOP and the courts conducted a pilot study using electronic monitoring equipment, with federal probation officers supervising

[46] U.S. Sentencing Commission, First Step Act Datafile.

[47] Some prison reform advocates had argued that the good time provision should have taken effect on the day FSA was enacted, December 21, 2018. Given that the provision was situated in the legislation along with the requirements and deadline for the creation of the risk assessment, 210 days after the passage of the Act, the Department of Justice and BOP took the position that the good time releases would not start until July 19, 2019. For inmates who challenged this perspective and fought for earlier release, courts generally deferred to the BOP's authority to apply the new credit structure.

[48] The Offender Release Report makes some BOP inmate data more easily available to U.S. probation officers.

[49] The average cost of home confinement provided by U.S. probation for the BOP is a third of what the cost is when delivered by RRC staff.

inmates in the community who remained under the jurisdictional authority of the BOP. When the BOP and the courts established a formal interagency reimbursable agreement in 2010, the Federal Location Monitoring (FLM) program was revised. The goal was to move lower risk inmates to their homes in the community in an effort that was more cost effective than halfway house placement and more consistent with application of the risk principle.[50] This program was conducted under the authority of 18 U.S.C. 3624(c)(2), which stated that placing inmates in prerelease status "may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment or 6 months."[51]

For a host of reasons, the program never expanded to its potential capacity, with only about 100 BOP inmates on probation supervision at any given time. For one, the statute directs that the U.S. probation system "shall, to the extent practicable, offer assistance to a prisoner during release." Some probation offices (approximately 20 currently) have chosen not to participate at all in the program, apparently deeming the optional workload not "practicable" given other demands.[52] Some offices noted that the 24-hour on-call demand that location monitoring places on officers makes it difficult to fill the positions, and that they must use their officers for their own location monitoring cases.[53] Nevertheless, in 2016, U.S. probation offices around the country offered to accept up to 1,000 BOP inmates into the program. Another factor limiting growth was that the BOP often turns to their network of RRCs, which also offer location monitoring options, albeit at a much higher price to the government.[54] A structural impediment to FLM growth was created with the Second Chance Act of 2008 that expanded the length of time inmates could serve in an RRC from 6 to 12 months under 3624(c)(1). The length of time was not, however, expanded for home confinement. Thus, inmates could leave prison sooner if they requested placement in an RRC rather than FLM. The biggest obstacle to growth of the FLM program, however, was the lack of referrals from the BOP field offices to federal probation. The BOP and the AO continued to promote the program, and in 2018 again modified the agreement to allow for the release of somewhat higher risk inmates and to provide greater breadth of services upon release to the community.

Impact on U.S. Probation

Preliminarily, the statutory addition appears to be increasing the rate of BOP FLM referrals to U.S. probation. As of November 2019, the average daily number of inmates on FLM had increased 150 percent over the traditional average. Due to FSA, the FLM program now figures more prominently in the BOP's approach to reentry in response to FSA. The BOP has advised that RRMs have been directed to use FLM as their default prerelease recommendation. Whether more districts will now decline to participate given other workload demands and a very challenging fiscal environment facing U.S. probation is unknown.

The BOP and U.S. probation will need to revisit the current interagency agreement to better support FSA implementation and incentivize U.S. probation participation. Also, RRM FLM referral rates, including U.S. probation denials, are now being tracked quarterly, including an assessment of why referrals are denied. Last, the probation FLM workload formula was adjusted in 2018 to encourage participation, and it is again being re-evaluated in the current workload measurement process. Further discussions between the BOP and federal probation will be required to improve implementation, consistency, and interagency communication system wide.[55]

Elderly Home Confinement

The FSA included a reauthorization of the Second Chance Act of 2008, which had established a program in 2009-2010 entitled the Elderly and Family Reunification for Certain Non-Violent Offenders Pilot Program, which authorized elderly inmates to complete a portion of their sentence on home confinement. Under the original Second Chance Act pilot, inmates could be eligible for home confinement if they: (1) were over 65 years old; (2) had never been convicted of a violent, sex-related, espionage, or terrorism offense; (3) were not sentenced to a life term; (4) had served the greater of 10 years or 75 percent of their sentence; (5) were not determined by the BOP to have a history of violence or to have engaged in conduct constituting a sex, espionage, or terrorism offense; (6) had not escaped or attempted to escape; (7) were not determined to present a substantial risk of engaging in criminal conduct or of endangering any person or the public; and (8) the BOP had determined that home confinement would result in a substantial cost savings to the government.[56]

In September 2010, upon completion of the pilot, the BOP reported to Congress and recommended that the program not be continued for several reasons. The BOP stated that too few inmates were eligible based upon the statutory provisions. They noted they only housed 4,000 inmates over the age of 65, and many of those had committed their offenses in advanced age; therefore, they could not determine that these inmates would not present a risk of engaging in criminal conduct. The BOP reported that 855 inmates applied, and that 71 (8 percent) were placed in the program. BOP officials also concluded that the pilot did not result in any cost savings to the government, although the U.S. General Accountability Office (GAO) challenged that conclusion.[57]

In May 2015, the Department of Justice's Office of the Inspector General (OIG) issued a report entitled *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*. The report explored in detail how the aging prison population presented a challenge to the BOP, noting that inmates age 50 and over were the fastest growing portion of its population. OIG estimated that in 2013, 19 percent of the BOP's budget was spent on aging (50 and over) inmates. The OIG report opened by stating:

> *Aging inmates are more costly to incarcerate than their younger counterparts due to increased medical needs. We further found that limited institution staff and inadequate staff training affect the BOP's ability to address the needs of aging inmates. The physical infrastructure of BOP institutions also limits the availability of appropriate*

[50] Trent Cornish and Jay Whetzel. (June 2014). Location Monitoring for Low-Risk Inmates: A Cost-Effective and Evidence-Based Reentry Strategy. *Federal Probation Journal.* Volume 78, Number 1.

[51] For a comprehensive overview of how location monitoring is provided by U.S. probation, see Cornish et al. (2019), Location Monitoring in the Administrative Office of the U.S. Courts, *The Journal of Offender Monitoring* Volume 31, Number 2.

[52] 18 U.S.C. 3624 (c)(3).

[53] Such positions are often, but not always, deemed "specialists" and are more highly paid than line officers with traditional caseloads.

[54] In fiscal year 2018, on average, RRCs charged the BOP $47 per day per inmate, three times the rate U.S. probation charged. BOP PowerPoint, August 2019.

[55] Issues will likely include required frequency of officer/inmate contact, technology requirements, and possibly new funding mechanism.

[56] Congressional Research Service. (March 4, 2019). *The First Step Act of 2018: An Overview.*

[57] It appears from the GAO response that the pilot was limited to home confinement being delivered by the RRCs. There is no record at the AOUSC of U.S. probation participating in the pilot.

housing for aging inmates. Further, BOP does not provide programming opportunities designed specifically to meet the needs of aging inmates. We also determined that aging inmates engage in fewer misconduct incidents while incarcerated and have a lower rate of re-arrest once released; however, BOP policies limit the number of aging inmates who can be considered for early release and, as a result, few are actually released early.[58]

The 2015 OIG report provided detailed examples of their conclusions. Regarding costs, the OIG indicated that BOP institutions with higher percentages of aging inmates spent five times more on medical care than did institutions with the lowest percentage of aging inmates. It noted that while inmates often require assistance with daily living, staff are not responsible for meeting those needs, leaving healthy inmates to care for those who are elderly and more impaired. In looking at one institution's data, the OIG found that, on average, inmates had to wait 114 days to see an outside specialist for cardiology, neurosurgery, pulmonology, and urology. Elderly inmates also need lower bunks and handicapped-accessible cells, but overcrowding makes these increasingly unavailable. Lastly, the OIG's analysis concluded that only 15 percent of aging inmates were rearrested, as opposed to the 41 percent rearrest rate BOP research reported for its entire population.[59]

The FSA reauthorized and expanded the scope of the Elderly Home Confinement (EHC) pilot to all BOP institutions from 2019 to 2023. Notably, the FSA reduced the age requirement from 65 to 60, and the required percentage of sentence completed was reduced from 75 percent to two-thirds. The FSA also authorizes "terminally ill" inmates of any age who have served any portion of their sentence (even life sentences) to be eligible. To meet the terminally ill criterion, a BOP medical doctor must determine the inmate requires a nursing home, intermediate care, or assisted living, or has formally been given a terminally ill diagnosis.[60]

Impact on U.S. Probation

As described earlier, federal probation officers have supervised BOP inmates on location monitoring for years, although the FLM program had not realized the growth that was anticipated. The EHC present several unique challenges compared to the traditional FLM program. Most notably, the two-thirds requirement means that inmates are eligible with significant time yet to serve. Under traditional FLM, inmate participation is limited to 6 months or 10 percent of their sentence, whichever is less. In actuality, most inmates serve two to four months on FLM. However, if an inmate has turned 60 and has completed two-thirds of an 18-year sentence, he or she would be eligible to serve 6 years on home confinement. Typically, within the probation system, location monitoring (including radio-frequency, GPS or voice identification tracking) technologies are reserved for persons under supervision who are higher risk. The limitations on their liberty are intended to mitigate the risk they present to the community. The limited terms and small scale of the FLM program were modest exceptions to this policy. However, supervising low-risk EHC inmates for many months, and even years, with such technology is at odds with U.S. probation's current philosophy and practice. Federal probation can also expect to receive referrals for EHC inmates who are significantly impaired by age-related infirmities and terminal illnesses.

As with traditional FLM cases, elderly inmates remain under the jurisdiction of the BOP. The BOP reported that of the elderly inmates released so far, the longest term to serve is 7 years. Under the statute, federal probation still retains discretion to accept these cases or not. Also, if U.S. probation accepts an inmate, they can send the inmate back to the BOP if the inmate is noncompliant. If EHC inmates have significant medical issues, the BOP has health services administrators in each of the three reentry sectors that coordinate services through the BOP's contract provider NaphCare. For less serious non-emergency medical issues, with the RRM's approval, U.S. probation can provide needed interventions through the Second Chance Act.

Compassionate Release

The FSA amended 18 U.S.C. 3582(c)(1)(A), which directs how the court can modify a term of imprisonment to time served, once it has been imposed. Prior to enactment, the court could only reduce a term of imprisonment if the BOP made a motion when "extraordinary and compelling reasons warrant such a reduction," typically due to an inmate having a terminal illness. The amendment now allows an inmate to petition the court directly if the inmate has exhausted his or her appeals with the BOP, or if 30 days or more have passed without a response from the warden since the inmate requested a reduction. There is no time frame imposed on the court to respond to the petition. The amendment also requires the BOP to inform an inmate's partner, family, or attorney within 72 hours of an inmate being diagnosed with a terminal illness, and to assist an inmate with preparing a petition if requested. Within seven days, partners, family, or attorneys must be granted an opportunity to visit the inmate. The BOP is required to process any such request within 14 days. Last, the FSA directed the BOP to ensure that inmates are aware of the compassionate release process, including their right to appeal to a court if denied by the BOP. Information is to be made available in writing and posted where inmates can access it.[61]

During the previous decade, inmate advocates raised concerns about the way prisons dealt with compassionate release and campaigned to have the BOP improve their processes. Given the FSA provisions, Congress appears to have been convinced that changes were needed to the BOP's traditional response to these requests.

In 2012, Families Against Mandatory Minimums (FAMM) and Human Rights Watch (HRW) released a report entitled *THE ANSWER IS NO—Too Little Compassionate Release in U.S. Federal Prisons*. The report was replete with personal tragic examples of what they considered BOP's unacceptable implementation of compassionate release provisions. The report argued that with the passage of the Sentencing and Reform Act (SRA) of 1984, Congress had given to the judiciary the authority to decide when "extraordinary and compelling" circumstances would justify a reduction in sentence, and to the United States Sentencing Commission (USSC) the job of identifying when those circumstances might exist.[62] However, until passage of FSA, only the BOP had the authority to make a motion to the court to consider a compassionate release request. The FAMM/HRW report noted:

The federal prison system houses over 218,00 prisoners, yet in 2011, the BOP filed only 30 motions for early release, and between January 1 and November 15, 2012,

[58] Office of the Inspector General (OIG), (May 2015) *The Impact of an Aging Inmate Population of the Federal Bureau of Prisons* Department of Justice.

[59] Office of the Inspector General, Ibid.

[60] 34 U.S.C. 60541(g).

[61] 18 U.S.C. 3582.

[62] *THE ANSWER IS NO—Too Little Compassionate Release in U.S. Federal Prisons* (2012), FAMM/Humans Rights Watch.

it filed 37. Since 1992, the annual average number of prisoners who received compassionate release has been less than two dozen. Compassionate release is conspicuous for its absence (emphasis added).[63]

The SRA of 1984 had dramatically restructured sentencing, abolished parole, created the United States Sentencing Commission, and moved the federal criminal justice system to a determinate sentencing structure. While greatly circumscribing judicial discretion in sentencing, the SRA authorized the courts to serve as a "safety valve" in certain circumstances. Under 18 U.S.C. 3582(c)(1)(A)(i), the court was empowered to modify a sentence after imposition if, upon the BOP's motion, the court found there were "extraordinary and compelling reasons," and the reduction was consistent with guidance provided by the USSC. The USSC guidance was to consider whether an inmate suffered from terminal illness, a serious medical condition, age-related medical condition, certain compelling family circumstances, and any BOP-established criteria.[64] The statute likewise directed the court to consider the purposes of sentencing at 18 U.S.C. 3553(a). The FAMM/HRW report argued at length that the BOP, which had sole discretion to move the court for compassionate release and had developed another set of eligibility criterion, had "arrogated to itself discretion to decide whether a prisoner should receive a sentence reduction, even if the prisoner meets its stringent medical criteria. In doing so, the Bureau has usurped the role of the courts. Indeed, it is fair to say the jailers are acting as judges."[65]

Congress had undeniably granted sole discretion to the BOP to make a motion for compassionate release. However, what the FAMM/HRW documented was disturbing to many. Their investigation found that the BOP did not systematically track when inmates made motions for compassionate release. The report successfully accessed data from one federal prison in Butner, North Carolina, which revealed a less than responsive process. In 2011, 164 inmates at Butner made a request to the warden for compassionate release. Of those, 98 were rejected for 1) not being "medically warranted," 2) having detainers, or 3) dying before they could be considered. Sixty-six were referred to the prison's Reduction in Sentence (RIS) Committee and then sent to the warden. Seventeen prisoners died while awaiting the warden's decision. The warden denied 12 for the risk that their release might pose to public safety and sent 15 to the Regional Director for consideration. The Regional Director approved all 15 received, and the BOP director in Washington, D.C., approved 12 of the 15. Another five inmates died, for a total of 22 of the 164 who had made a request, pending a final determination.[66] The FAMM/HWW report prompted further investigation.

In April 2013, the Department of Justice Office of Inspector General (OIG) released a report entitled *The Federal Bureau of Prison's Compassionate Release Program*. The OIG concluded:

> …an effectively managed compassionate release program would result in cost savings for the BOP, as well as assist the BOP in managing its continually growing inmate population and the significant capacity changes it is facing. However, we found that existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before theirs requests were decided.[67]

The 85-page report detailed the problems with the BOP's compassionate release program. The OIG found that the BOP did not have:

- clear standards on when compassionate release is warranted.
- formal timeline standards for reviewing requests; additionally, timeliness standards for inmate appeals do not consider special circumstances of medical release requests.
- effective procedures to inform inmates about the program.
- a system to track all requests, the timeliness of the review process, or whether decisions made by wardens and regional directors are consistent with each other or with BOP policy.[68]

The OIG found lots of variation across BOP facilities. The report notes that in some prisons, only inmates with less than 6 months to live were considered for compassionate release, while in other prisons, 12 months was used as a threshold. Some prisons had no timeliness standards for reviewing inmate petitions, while others had standards ranging from 5 to 65 days. Also, an inmate's appeal of a warden or a regional director's denial of petition for compassionate release could take 5 months. Examining inmate handbooks, the OIG found mention of compassionate release in only 8 of 111. The lack of tracking mechanisms prevented the BOP from assessing if inmate requests were being addressed promptly. The OIG examined a sample of files provided by the BOP. They found that 13 percent of inmates whose petitions had been approved by a warden or regional director died while they were awaiting approval by the BOP director.[69]

The OIG's report included multiple recommendations for the BOP to adopt, including expanding the use of compassionate release to address both medical and non-medical conditions for those who would pose little risk to the community if released. The report specifically recommended that the BOP establish time frames for each step of the review process and for appeals. There was particular emphasis on requiring the BOP to inform inmates about compassionate release and to track each request, status, and final disposition; in addition, wardens should document the specific reasons for denying an inmate's petition.[70] Later that year, in November 2013, The Urban Institute issued a report entitled *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prisons System.* (At that time, the BOP inmate population had reached 219,000.) The report noted that the BOP "already have early release programs for terminally ill inmates and the elderly, but few inmates are offered this option."[71]

Despite the attention drawn to this matter over the years by FAMM, OIG, and The Urban Institute, in fiscal year 2015, the BOP reported that 99 of 216 petitions submitted to the BOP Director were approved. The other 117 were denied. When one considers the history of compassionate release in the federal criminal justice system, Congress's decision to provide an additional route for terminally ill

[63] Ibid.

[64] United States Sentencing Guidelines Section 1B1.13.

[65] FAMM page 3.

[66] FAMM pages 37-38.

[67] Office of the Inspector General. (April 2013). *The Federal Bureau of Prisons Compassionate Release Program*. Department of Justice, page i.

[68] Office of the Inspector General (April 2013) pages ii-iii.

[69] Ibid.

[70] Ibid, page 56.

[71] Julie Samuels et al. (November 2013). *Stemming the Tide: Strategies to Reduce Growth and Cut the Cost of the Federal Prison System*. The Urban Institute.

and elderly inmates does not seem surprising.

Impact on Federal Probation

Prior to FSA, the court granted compassionate release motions, but they always had the support of the BOP and of the United States Attorney's Office, and they only went forward when all arrangements for the inmate's care had been taken care of in advance. In June 2019, the BOP advised the AOUSC that during 2018 they had received 200 compassionate release petitions from inmates, but this number had increased to 600 in 2019. Seventy-nine inmates had been granted compassionate release so far in 2019.

The compassionate release provisions may pose perhaps the largest challenge, not due to the volume of inmates but rather due to their physical condition.[72] When BOP is supportive of an inmate's petition for compassionate release, the assigned social workers go to great lengths to find the inmate appropriate medical care (e.g., nursing homes) should the motion be granted by the court. Indeed, DOJ's OIG had noted that the BOP social workers are "uniquely qualified" to assist with the transition of terminally ill and elderly inmates to the community. The OIG concluded "only social workers have the extensive training in address the unique needs of aging inmates. Licensed Social Workers can proficiently help with aftercare planning, resource brokering and medical continuity of care during reentry."[73] However, can the court and U.S. probation expect BOP social workers to have the means or obligation to investigate medical release options when the BOP itself is not supporting the petition? The BOP has stated that if they do not support a petition, they are not a party to the case, but that they will provide medical records to the U.S. Attorney's Office upon request.[74] Will the court have to direct the U.S. Attorney's Office to secure the records? Additionally, in some cases, the U.S. Attorney's Office is opposing inmates' motions.

One concern is that U.S. probation officers will be tasked by the court to secure appropriate medical accommodations for inmates whose motions the court wants to grant. Generally, federal probation officers do not have the training, community health care networks, or financial resources to accommodate these situations. It is also not clear what the officer's role should be. Is it simply to assess a proposed release plan? Or does the court expect officers to make professional recommendations about whether the motions should or should not be granted on their merits? Also, there is not yet any recommended standard template or set of procedures for courts, U.S. probation, or the parties to follow in handling compassionate release cases. In some districts (but not all) the court is appointing the Federal Public Defender's Office to represent petitioning inmates.

Earned Time Credit

Perhaps the landmark provision of FSA, Title One introduced a fundamental change in federal correctional practice. Congress required that DOJ, within 210 days of passage of the Act, develop a risk and needs assessment system that classified inmates as minimum, low, medium, or high risk. Within 180 days of releasing the new system, the BOP is required to have assessed all BOP inmates with the new tool, begun assigning inmates to recidivism reducing programming, and begun expanding programs called for by the identified needs. Congress mandated that the BOP develop a wide assortment of incentives to encourage program participation, but the primary incentive was to allow inmates to earn 10 days toward prerelease status or early release under the court's supervision for every 30 days of approved programming. Minimum- and low-risk inmates whose risk levels have not increased over two consecutive assessments would be eligible for an additional 5 days, for up to 15 days for every 30 days of programming.[75] However, there are many disqualifying offenses, including homicide, sex offenses, and heroin distribution. The USSC estimated that nearly 40 percent of BOP inmates would be ineligible to earn any credits.[76] Also, only minimum- and low-risk inmates could use credits to begin their term of supervised release early, and that could not exceed more than one year.[77] Congress also imposed a host of requirements on the DOJ to report on how the risk assessment system was performing and how implementation was proceeding.[78]

Congress' directive created a mammoth undertaking for DOJ and the BOP. To ensure that implementation proceeded as they intended, Congress created several fail-safes. Congress gave the National Institute of Justice responsibility to find a non-governmental agency to oversee the BOP's efforts. The selected organization was responsible for creating an Independent Review Committee (IRC) of outside experts who would ensure objectivity in the creation of the risk assessment system and the development of appropriate programming. The IRC was directed to find independent researchers who would work with the BOP and the BOP's data to create the risk assessment system.[79] Congress clearly wanted assurance that the DOJ would deliver a system consistent with its intentions.

On July 19, 2019, the DOJ announced that it had met the first Congressionally imposed deadline with its release of the Prisoner Assessment Tool Targeting Estimated Risks and Needs (PATTERN), a newly developed risk prediction tool predictive of both institutional misconduct and post-release general and violent recidivism.[80] This was completed under very strict time frames, in large part by building off of previous work conducted by the BOP's Office of Research and Evaluation (ORE). In creating PATTERN, the independent researchers removed elements that were not predictive of post-release recidivism, such as offense severity, and added others related to frequency of institutional programming. The DOJ report also explained that much further work needed

[72] To illustrate the challenges in these types of cases, one sentencing court recently granted a compassionate release motion for an inmate with no home and significant medical needs. The inmate had chronic lung disease that requires oxygen treatment and uses a walker. In the order, the court imposed a 60-day term of supervised release to be served at an RRC. Because the probation office was not aware of the motion when it was filed, it was not able to perform prerelease planning in advance. The court subsequently granted a two week stay on the release to develop a release plan. The RRC however refused to accept the inmate due to his medical needs. After hundreds of hours of coordination between the probation office, the BOP, the federal public defender and after four court orders, the local hospital ultimately accepted the person under supervision, assisted him with Medicaid, and placed him in an assisted-living facility. Following his transportation to the hospital, his supervised release was terminated by the court upon motion of the federal defender. In other instances, hospital administrators have threatened legal action against U.S. probation, demanding that the courts assume the cost for the medical care of an inmate released with no pre-planning or resource coordination.

[73] OIG (May 2015), p. 21.

[74] BOP email correspondence to AOUSC.

[75] 18 U.S.C. 3632.

[76] USSC Sentence and Prison Estimate Summary, S. 756, The First Step Act of 2018 (as enacted on December 21, 2018).

[77] 18 U.S.C. 3632.

[78] 18 U.S.C. 3633.

[79] 18 U.S.C. 3624.

[80] The First Step Act of 2018: Risk and Needs Assessment System. (July 2019). U.S. Department of Justice, Office of the Attorney General.

to be done to complete the "needs" dimension of the risk tool, integrate inmate programming information with PATTERN, and incorporate the information into INSIGHT, the BOP's current case management system.[81]

Impact on U.S. Probation

As mentioned earlier, U.S. probation may not feel the impact of the FSA's earned credit system for several years. The BOP has until January 2020 to assess all eligible inmates using PATTERN and to identify evidence-based recidivism-reducing programming. It appears the BOP will apply a stringent hour-for-hour requirement, whereby an inmate must have 8 hours of coursework to earn a day of credit. For comparative purposes, inmates in the popular RDAP program undergo 500 hours of programming over 9 to 12 months. If successful, they receive 12 months off their sentence. If a strict hour-for-hour system were applied to RDAP program participation, inmates would receive only 20 days toward prerelease status, or 30 days if they were scored as minimum or low. This is a curious contrast. It is unknown if this approach will truly incentivize inmates to engage in recidivism-reducing programming. Given an hour-for-hour approach to earning credits and the BOP's need to add programming capacity, the earned credit system will likely impact U.S. probation only modestly.

Once all inmates have been assessed, they then need to participate in evidence-based recidivism-reducing programming in order to decrease their risk scores. This assumes, however, that the BOP has capacity in the needed interventions to address the identified criminogenic needs. BOP is currently seeking to evaluate all of their current programming and assessing what additional programming their population's risks call for. To the extent that the needed programming is not yet available, the BOP will need to develop it.[82] The BOP will continue to develop PATTERN in order meet statutory demands, but much is already known about the needs of the BOP's population.

During the Obama administration, the DOJ hired multiple consultants to help the BOP assess its needed program capacity. One report, prepared by the Boston Consulting Group (BCG), was entitled *Reducing Recidivism through Programming in the Federal Prison Population*. The DOJ specifically tasked BCG to determine if the system was structured to reduce recidivism. BCG used three different methods to assess inmates' needs, since there was not a "robust needs assessment" in use at the BOP. One of the methods was to use data from a cohort of 38,753 BOP inmates released in 2015 using their federal probation PCRA scores. The cohort was re-weighted statistically to reflect the then-current BOP population. The analysis revealed that BOP inmates had high levels of unmet needs in antisocial cognitions, employment, and substance abuse.[83] Another group of consultants, the Bronner Group, prepared a report focusing on the need to increase educational programming within the BOP. Bronner pointed out that the BOP spends 20 percent as much on inmate education as the nearest sized state prison.[84] The report highlighted the link between correctional education and reduced recidivism and increased wages.[85] The report went on to state that:

> *There are significant savings to be secured from expanded education programs that emphasize mastery of basic skills, high school education, post-secondary education, and occupational training and work readiness programs. In order to achieve these benefits, the quality of credentials must be upgraded to those that are recognized as being first tier, such as high school diplomas rather than GED certificates, transferrable post-secondary academic credits and degree, and nationally recognized industry standard vocational certificates rather than local ad hoc certifications*.[86]

Identifying gaps in programming and having the resources and capacity to meet the need are very different challenges. It is unrealistic to believe the BOP will be able to meet those needs without significant assistance from many other quarters. While the eventual impact of the earned credit may be unclear, it is clear that Congress assumes and expects a high level of collaboration between the BOP and the U.S. probation system under this provision in particular. The statute directs that "the Director of the Bureau of Prisons *shall, to the greatest extent practicable* [emphasis added], enter into agreements with United States Probation and Pretrial Services to supervise prisoners placed in home confinement" and that "United States Probation and Pretrial Services *shall, to the greatest extent practicable* [emphasis added], offer assistance to any prisoner not under its supervision during prerelease custody."[87] The statute also directs the Attorney General, in collaboration with U.S. Probation and Pretrial Services, to "develop guidelines for use by the BOP in determining the appropriate type of pre-release custody or supervised release and level of supervision for a prisoner placed in prerelease custody."[88] Last, Congress directed that any agreements between the BOP and U.S. probation "take into account the resource requirements of United States Probation and Pretrial Services as a result of the transfer of Bureau of Prisons prisoners to prerelease custody or supervised release."[89] The BOP and U.S. probation have begun to formally collaborate to support FSA, although the many dimensions of the Act will require an unprecedented level of interagency coordination at both the national and local levels nationwide.

So What Does "Practicable" Mean?

As detailed earlier, the federal reentry continuum does not currently function in an integrated, coherent fashion. Into that continuum, the FSA now imposes an ambitious and complex set of expectations, and a varied set of rules and programs. Congress clearly wanted to advance the quality of institutional-based risk assessment and to ensure that the BOP created a comprehensive portfolio of programs with which inmates may work to address the risk factors that led them to prison in the first place. The requirements, even if adequately funded, will require massive effort. But the FSA should be seen as presenting an opportunity to move federal corrections fully into the 21st century, building upon all that has been learned about behavior change and recidivism reduction during the past few decades. We present below three macro-level issues as well as specific proposals to improve federal reentry generally and support FSA implementation in particular.

[81] Ibid.

[82] 18 U.S.C. 3621.

[83] Reducing Recidivism Through Programming in the Federal Prison Population Report (September 2016). The Boston Consulting Group.

[84] Education Program Assessment (November 2016), Bronner Group.

[85] The RAND corporation found that people who participate in correctional education while in prison were 43 percent less likely to recidivate than non-participants, and 13 percent more likely to obtain employment. (https://www.rand.org/pubs/research_reports/RR266.html)

[86] Bronner Group.

[87] 18 U.S.C. 3624(g)(7).

[88] 18 U.S.C. 3624(g)(6).

[89] 18 U.S.C. 3624(g)(7).

Beware of Cost Shifting

Congress directed that BOP receive $75 million a year to support FSA implementation. It is unclear whether that level of funding is adequate to fulfill the legislative demands. The judiciary is now absorbing the surge of early releases brought by its enactment, and will have to find a means of meeting the unanticipated workload demand. Some provisions, such as Fair Sentencing Act retroactivity, have largely run their course, although the newly released population creates an influx of higher risk inmates. Other provisions, such as the good time change, are now effectively "baked in" to the process. The good time change may continue, though, to bring inmates who have served the most time out with minimal prerelease preparation unless BOP adjusts RRC placement times. In addition, as detailed above, the FSA, through the elderly home confinement program, directs the BOP to move their oldest, sickest, and arguably most expensive inmates out of their institutions. The compassionate release provisions similarly grant inmates an opportunity to ask the court directly for release if the BOP fails to respond or opposes a request. The concern, then, is who will meet the medical needs of this population? The U.S. probation system is not funded to address this—nor are its officers trained to address it. Last, once the earned time credit system is put in place, the BOP will have a choice of paying contractors for prerelease services, reimbursing the judiciary for FLM placement, or paying nothing and releasing inmates to TSR early. Those do not appear to be equally attractive options, at least from a financial point of view.

Communications

Given the sheer size and scale of BOP operations, as well as the decentralized nature of the judiciary and the U.S. probation system, interagency communication very often has been problematic. Effective FSA implementation is unlikely unless there is much more robust and continual system-wide methods to ensure that stakeholders in both the BOP and U.S. probation communicate and share information better. A 21st century, state-of-the art correctional process requires a systems approach where continuity of care and community safety are shared priorities. It seems that this is what FSA intended. That will not be possible without major improvement in communication.

All Hands on Deck

Effective FSA implementation requires other federal criminal justice stakeholders, particularly U.S. probation and the courts, to do whatever possible consistent with their statutory mission to help the BOP and assist inmates in realizing the possible benefits of recidivism-reducing programming. This arguably begins with acknowledging that, at least in terms of the continuity of care described at the beginning of this paper, the current "normal" process is not working particularly well. Improvements are required if we are to realize a public safety benefit as inmates come onto supervision and, hopefully, achieve "lawful self-management."[90] Will FSA be more than a short-term shift? Will it lead to long-term transformation? Will there be subsequent legislation to ensure that Congress' expectations of implementation are met? One observer of the federal criminal justice system commented that "what might prove to be a bona fide watershed in federal criminal justice could also be squelched by budget shortfalls or staffing limitations, divergent agency goals, or an unwillingness of the rank and file to implement the vision of agency leader."[91] Undoubtedly, robust coordinated efforts among all three branches of government will be needed if the intentions of Congress are to be realized. We provide a few suggestions below.

Specific Proposals

- Increase U.S. probation's incentive to accept elderly inmates onto home confinement through workload or reimbursable agreements.
- Advocate for statutory changes that allow elderly inmates on home confinement to earn one day of "good time" toward their custodial sentence for every day of compliance with conditions.
- Advocate statutory changes that allow the court to early terminate supervision for compassionate release inmates and elderly home confinement inmates without waiting a year.
- Advocate for statutory changes and funding for U.S. probation to provide services pursuant to 18 U.S.C. 3672 to inmates while in the RRC that are not currently delivered under the RRC SOW.
- Conduct nationwide shared training to support FSA implementation with BOP and U.S. probation.
- Advocate for authority and funding for U.S. probation officers to co-locate in each RRC and in each RRM's office to improve communication and collaboration.
- Update BOP and U.S. probation interagency agreement to support traditional FLM and elderly home confinement provisions, including allowing flexibility in technology and reimbursable services.
- Clarify roles and responsibilities under compassionate release for BOP, the court, U.S. probation, the United States Attorney's Office, and federal public defenders.
- Advocate legislation authorizing the court to direct the BOP to make sure medical arrangements are in place before the court grants a compassionate release motion.
- Reinstate Pell grants so that inmates can pursue secondary education and increase BOP's ability to meet the education needs of the population.[92]
- Redirect that BOP-required 25 percent subsistence payments paid by RRC residents instead be set aside for the inmates to use for their own transitional needs.
- Move toward full data integration between BOP and U.S. probation through web-services applications so that inmate data is shared across the criminal justice system consistent with each party's need to know, including risk assessment and case management notes.

[90] Judiciary Policy, ibid.

[91] Oleson, ibid., p. 402.

[92] The Restoring Education and Learning (REAL) Act of 2019, which would reinstate Pell Grant eligibility for individuals in federal and State penal institutions, was introduced in the Senate and House in the spring of 2019.