

Report of the Committee on Local Control to the District Task Force on Jails & Justice

August 9, 2019

I. Scope and Purpose of the Local Control Committee of the District Task Force on Jails and Justice

The scope and purpose of the Local Control Committee of the District Task Force on Jails and Justice (“Task Force”) is to determine whether, and if so, how, the District’s criminal justice system (“justice system”) should be returned to “local control.” The Local Control Committee believe that it is in the best interest of the District to run all functions of the justice system. There is consensus among many in the District on this subject.

This Committee and the Task Force fully understands that the justice system is a complex structure of federal and local agencies and requires significant funding. The Committee does not seek, nor endorse, wholesale and abrupt changes to the current justice system. Nor is such change feasible. The logistics are complicated, the costs substantial, and the politics challenging. However, change must occur and there are aspects of the justice system which are ripe for consideration. This memo proposes four recommendations which should be strongly considered in the immediate future to transition the justice system back to local control.

II. Background to the District’s Current Justice System: How We Got Here

Any discussion towards making meaningful changes to the District’s justice system must be considered in the context of two federal laws that define the structure, operations and funding of the system today. These are the *District of Columbia Home Rule Act of 1973* and the *National Capital Revitalization and Self-Government Improvement Act of 1997*, commonly referred to as the Home Rule Act and the Revitalization Act respectively.

By the start of the 1990’s the District had become increasingly insolvent. For example, the District had developed a massive unfunded pension liability. When the District received “home rule” in 1974, it took on members of the D.C. workforce from the Federal Government. Those employees came with a \$2 billion unfunded pension liability.¹ While much of the Home Rule Act focuses on the District’s legislative and executive branches and related budget processes, it also established the framework for many elements of the District’s judiciary and how criminal cases are prosecuted.

By 1995, the city’s budget deficit had reached \$722 million. By 1997, the unfunded pension liability had grown to \$5 billion. Various solutions were proposed and discussed between District and Congressional officials to deal with the District’s critical fiscal issues. The bipartisan legislative package of solutions arrived at—and agreed upon by then President Clinton, House Democrats, including Rep. Eleanor Holmes-Norton, and District officials—became the Revitalization Act of 1997.

¹ It should be noted that this pension liability had been accumulated *entirely by the Federal Government* prior to being transferred to the District.

By agreeing to the provisions of the Revitalization Act, the District received federal assumption of the District's debts, relief for its underfunded employee pensions, and a financially favorable adjustment to the District's budget which directly improved the District's Medicaid reimbursement rate. In return, the District relinquished control and management of most of its justice system, the yearly federal payment it had previously received, and some of its authority and autonomy for self-governance.

Today, the Home Rule Act provisions continue to govern key components of the District's justice system, such as:

- D.C. Superior Court judges are appointed by the President subject to confirmation by the U.S. Senate;
- The D.C. Council is prohibited from passing any act or regulation relating to the duties or powers of the U.S. Attorney or the U.S. Marshal for the District; and
- The D.C. Attorney General has limited criminal jurisdiction confined to certain misdemeanors and regulatory offenses.

While the Revitalization Act provisions were not exclusively related to the District's justice system, the Act has a profound impact on that system because many of the key agencies are federally funded. The result of these agencies being federally-funded include:

- Limitations on D.C. Council's legislative authority to enact any legislation relating to the organization or jurisdiction of the court system;
- D.C. Code Offenders² with felony sentences longer than a year are incarcerated within the federal Bureau of Prisons;
- Post-release supervision and pretrial functions are under the control of the federal agencies CSOSA³ and the Pretrial Services Agency;
- The D.C. Board of Parole was abolished, transferring decision-making authority for grants of parole, revocations of parole and supervised release for prisoners to the U.S. Parole Commission (USPC).

In conclusion, significant parts of the District's criminal justice system are currently being managed by federal agencies, funded by Congress. As a result, the District would have to assume the financial obligations of any federally-funded justice system component it wishes to bring under District control. This presents a significant fiscal challenge given the sizable costs of these justice system components currently under federal control. These fiscal challenges are not prohibitive of the District regaining local control of the justice system.

III. Opportunities to Implement Local Control Over the Justice System

While the Committee is not prepared to make recommendations about the full path back to local control at this time, especially in light of the short time frame of this initial "Phase I" deliberation

² Although we typically seek to use people-first language, we consider people in the District who were convicted or charged under D.C.'s local criminal laws as "D.C. Code offenders" in this memo to ensure clarity and a simple terminology.

³ Court Services and Offender Supervision Agency. CSOSA oversees probationers and parolees and provides pretrial services in the District.

period, we are prepared to make four specific recommendations that would make some of the biggest impacts on the lives of men and women who are justice-involved and their families.

A. Localizing Parole and Supervised Release Decision-Making

Replacing the U.S. Parole Commission (at least vis a vis its powers related to D.C. Code Offenders) with a District-controlled solution may present a unique opportunity as a first step towards migrating the federal components of the District’s justice system back under local control. For one, the issue of restoring local control of decision-making around parole and supervised release has wide support among the D.C. electorate, D.C. Statehood advocates and advocates of criminal system reform. Secondly, Congress only reauthorized the U.S. Parole Commission (“USPC”) through November 2020. This presents the District a real and near-future opportunity to regain control of this crucial piece of the justice system.

The USPC performs two primary functions for D.C. Code Offenders: these are (1) determining whether to release individuals on parole at their parole-eligibility dates, and (2) determining whether individuals are culpable for violations of parole or supervised release, and imposing sanctions (including incarceration). The discussion around moving this agency under local control has largely centered on two approaches to these primary functions: (1) judicial decision-making or (2) a new D.C. Board of Parole.⁴

There has been much discussion about turning over one or both functions to D.C. Superior Court judges’ discretion. Part of the rationale is that judges currently make similar determinations on probation matters and may be the ones who imposed the original sentence and are aware of the underlying facts of the case. The strengths and weaknesses of this approach are being evaluated in the District and should be explored fully. Additionally, establishing a new D.C. Board of Parole to assume decision-making in parole grant hearings should also be strongly considered. Parole grant hearings are held both in person in federal prisons and by video. If judges were to handle parole decision-making, they would likely have all parole hearings done by video; video hearings raise major due process concerns and generally not allowed in the D.C. Superior Court. More relevant however is that such a move would truly return this power to the District.

The current U.S. Parole Commission term sunsets at the end of 2020. The District must move quickly to select a solution and rapidly to put the resources in place to implement that solution. Having the District assume control over all parole grants and release revocation decisions is a relatively small cost (\$13 million annually, assuming the federal budget estimates) and represents one of the most significant, and potentially positive, impacts for the District’s justice-impacted residents. Decisions affecting the lives of individuals in the justice system, and their families, will be made by those who represent the values and priorities of the community and under policies set by District leaders that may better reflect District goals for public safety and fairness.

B. Develop a Concrete Plan to Bring Home (or Closer to Home) D.C. Residents in the Federal Bureau of Prisons

One significant part of the compromises made to pass the Revitalization Act was the agreement to close the Lorton Penitentiary and return it to the control of the State of Virginia. Lorton

⁴ The earlier D.C. Board of Parole was abolished by the Revitalization Act.

Penitentiary was the prison that housed all adult D.C. Code Offenders convicted of felonies and with sentences of longer than a year of incarceration. The closing of Lorton necessitated the distribution of these District residents to federal prisons outside the D.C. Metro area. According to Sept. 30, 2018, Bureau of Prisons (BOP) census data, there were 4,500 D.C. residents in BOP custody, including 4,336 men and 164 women. Currently, *D.C. inmates are incarcerated in over 118 different BOP facilities* and contract facilities across 35 states.⁵ This is in contrast to initial promises made by the BOP to keep most D.C. inmates within 250 miles of the District (at federally owned and/or private contracted prison facilities), but no greater than 500 miles from the city.

Arguably, the closing of Lorton has had the most deleterious long-term consequences of all the changes made by the Act. The distribution of D.C. residents to so many different prisons located so far from the city makes it virtually impossible for families of inmates to visit their loved ones. Access to legal counsel remains a challenge, particularly for inmates with pending appeals, post-conviction issues, other legal matters, and legal issues that concern their incarceration. Additionally, providing pre-release reentry services for D.C. residents in geographically remote prisons is difficult for the BOP staff. For example, BOP officials in these facilities are not equipped with up-to-date information about the District to allow them to provide soon-to-be-released individuals current information on housing resources, possible employment opportunities and other reentry services. BOP's refusal to have a relationship or share information with District stakeholders have further compounded this issue, and present one of the biggest challenges in making a successful transition.

Complex decisions and planning will be required to address how the District will accomplish the return of D.C. Code Offenders to the D.C. area. Anticipated reductions in the number of D.C. people who are imprisoned (with the restoration of local control of parole and changes in D.C. sentencing law) will certainly influence that decision-making process, as will diverse community views on correctional policy in the District. The construction of a new prison is one possible solution, but one that would require enormous financial resources and community support to accomplish. The District should begin considering all options for reducing and localizing our prisoner population and work toward building community support for any approach it takes.

While having the District's imprisoned individuals under federal control benefits from the infusion of federal funds, the drawbacks far outweigh this benefit. As stated above, the incarceration of D.C. Code Offenders throughout the country has a devastating effect on the re-entry process and on entire communities. Research has shown the importance of family visits and the continuity of services between prison and the community for successful reentry, individual health, and several other benefits. The current structure has a devastating effect on family and social connections and is a major factor in increased recidivism. Furthermore, local service providers can't effectively assist prisoners, especially for re-entry purposes.

How to make this transition to local control of the custody of all D.C. Code Offenders is a vital question for the District to seriously and diligently explore right now. Waiting to evaluate the possibility of a local prison, or what, if any, alternatives may address some of the significant problems noted above, until after the discussion of our jail or other justice system challenges would be a mistake.

⁵ Source: *D.C. Corrections Information Council 2018 Annual Report*.
<https://cic.dc.gov/sites/default/files/dc/sites/cic/publication/attachments/CIC%202018%20Annual%20Report%20FINAL.pdf>

C. Localizing Halfway Houses in D.C.

Approximately half of D.C.'s returning citizens spend time in a halfway house at the end of their sentence. While some D.C. Code Offenders in BOP facilities return to halfway houses outside the District, most men have gone to Hope Village, a 300-plus bed complex in Southeast D.C. The women's facility, Fairview Halfway House, is in Northeast D.C. and has approximately 45 beds. The D.C. Corrections Information Council (CIC) is a D.C. agency tasked with inspecting the correctional facilities that house D.C. Code Offenders. In 2013, the CIC inspected Hope Village and found numerous deficiencies. Neither Hope Village nor Fairview are mandated to issue annual reports about improvements, and it is unclear whether the issues that the CIC identified in its 2013 report have even been addressed. Since then, the calls for Hope Village's closure have remained strong throughout the District.

Now Hope Village is on course to cease operations at the end of October 2019 and no alternative men's halfway house has been confirmed to operate in the District. Unwilling to re-open the bid for a new D.C.-based contract following the failure of the 2018 awardee to secure a compliant site, the BOP intends to send eligible D.C. Code Offenders to halfway houses much further away from home, including in Baltimore, Maryland, and Delaware. Others will be released back to the community directly, with no transition. This will be devastating to those being released who intend to return home to the District and trying to reenter their communities gradually and with support services, employment, and housing. With this rapidly declining situation in the District, this may represent a timely – and critical – opportunity to discuss and implement locally-controlled halfway houses as an incremental step towards full local control of our justice system.

D. Begin operations of the local Clemency Board

D.C. Code Offenders experience extraordinary difficulty in trying to receive consideration of their requests for clemency, including pardons or commutations, because they fall under federal review and are ultimately only approved by the President of the United States. The federal clemency system is – unsurprisingly – designed for federal offenders. There is no data about how many D.C. Code Offenders have applied for clemency. D.C. Code Offenders represent about 2.4% of the BOP population, but only account for .037% of clemency grants, as there is only one known person that has received a grant since 1989.

In July 2018, the D.C. Council passed the Clemency Board Establishment Act of 2017. The statute establishes a local process and Board for reviewing applications for pardons and commutations for individuals convicted of D.C. Code offenses. The Board will review and select cases to recommend to the President. To date, Mayor Bowser has not yet announced any of the appointments to the Board. The Board currently sits in the Executive Office of the Mayor's Office of General Counsel without a dedicated staff person nor any published policies or regulations governing its function.

The District should prioritize getting this Board staffed and functioning before the end of 2019 so that District residents with D.C. Code convictions may, for the first time, have a clear process by which to apply for mercy, begin to have their requests for clemency evaluated in a meaningful way, and have the meritorious requests well-presented to the President for consideration. While the establishment and function of the Clemency Board does not return the decision-making power to full local control, it does meaningfully advance the local role in the consideration of who is currently incarcerated and convicted in the District.

IV. Data Gaps and Decision-Points

For all of this Committee's Phase I recommendations, the District will have significant decisions to make in order to implement any changes towards local control. These decisions include policy choices that should be informed by available data, community priorities, best practices, and public safety needs. These decisions also will include how to functionally manage transitions of responsibilities from a federal agency to a locally-controlled body or to a different federal agency (like our Superior Court, for example). Finally, these decisions will also include political strategies, and creating good models to decide what funding is necessary for D.C. to assume a previously federal function. This Committee believes that the federal budget estimates are helpful guidance, but should not be dispositive to how much it would actually cost the District to administer these different functions.

A. Localizing Parole Matters

In January 2019, the Bowser Administration awarded a grant to the Justice Policy Institute ("JPI"), a nonprofit based in D.C. focused on reducing the use of incarceration, to "study reestablishing local control over the federally-run DC Parole Board." With the funding, JPI is assessing the legal and structural framework required for the reestablishment of local control over parole and supervised release grants and revocations. JPI's study is expected to be released in the Fall of 2019, and will likely help equip this Task Force and District leadership with additional data, evidence, and experiences from other jurisdictions to assist in the process of evaluating what option is best for D.C.

There will be a several significant policy and fiscal decisions that need to be resolved in order to localize parole hearings. First, a determination needs to be made whether the District should establish a new parole board, whether these duties should be assumed by the District's Superior Court, or by some other entity. Regarding the former option, the District would have to decide on the structure of a new parole board. Is a new parole board an independent agency or housed with an existing administrative agency? With any option, there would need to be evaluations of staffing and funding needs and the speed with which these powers could be implemented within different existing or new structures.

Other matters that would need to be resolved include (1) the qualifications of the decision-makers, (2) the standard to apply regarding an individual's release conditions pending their revocation hearing, (3) re-consideration of due process rights and appeals, and (4) the range of sanctions available and how to apply them in the most judicious manner.

B. Bringing D.C. Code Offenders Closer to their Community and Support Network

The decision to localize the incarceration of D.C. Code Offenders presents a more significant fiscal inquiry than localization of parole hearings. There exists crucial data that must be known to understand the extent of the fiscal impact. For example, BOP spends approximately \$150 million annually for the incarceration of D.C. Code Offenders. What would the District's operation costs be compared to BOP in this realm? What will the incarcerated population look like in the future if other aspects of the justice system are localized or other policy changes are made?

This Committee also began considering certain unique populations of D.C. Code Offenders when discussing incremental steps. Data requests were submitted to BOP by the Vera Institute regarding specific prisoner populations including their gender, race, and age demographics. The Task Force should not expect to have this information before Fall 2019 for these discussions. However, some of the special populations which should be considered include:

- (1) D.C. Code Offenders currently in BOP that have less than 12 to 24 months to serve;
- (2) D.C. Code Offenders currently in BOP who are parole-eligible and have indeterminate sentences (*i.e.*, have been incarcerated since before change in law in 2000);
- (3) D.C. Code Offenders currently in BOP who have been incarcerated for more than 20 years and were 18 years old or younger when they were first convicted (*i.e.*, are potentially Incarceration Reduction Amendment Act (IRAA) eligible);
- (4) D.C. Code Offenders currently in BOP who have identified Special Education needs and/or are required to receive services under the Individuals with Disabilities Education Act (IDEA),
- (5) D.C. Code Offenders currently in BOP who have been diagnosed with Serious Mental Illness (SMI), Intellectual or Developmental Disabilities (I/DD) and Traumatic Brain Injury (TBI); and,
- (6) D.C. Code Offenders currently in BOP who are housed in a dedicated medical unit.