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Supervised Release (Parole): An Abbreviated Outline of Federal Law

(name redacted)

Senior Specialist in American Public Law

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Summary

Supervised release replaces parole for federal crimes committed after November 1, 1987. Like parole, supervised release is a term of restricted freedom following an offender's release from prison. The nature of supervision and the conditions imposed during supervised release are also similar to those that applied in the old system of parole. However, whereas parole functions in lieu of a remaining prison term, supervised release begins only after an offender has completed his full prison sentence.

A sentencing court determines the duration and conditions for an offender's supervised release term at the time of initial sentencing. As a general rule, federal law limits the maximum duration to five years, although it permits, and in some cases mandates, longer durations for relatively serious drug, sex, and terrorism-related offenses. A sentencing court retains jurisdiction to modify the terms of an offender's supervised release and to revoke the term and return an offender to prison for violation of the conditions.

Several conditions are standard features of supervised release. Some conditions, such as a ban on the commission of further crimes, are mandatory. Other conditions, such as an obligation to report to a probation officer, have become standard by practice and by the operation of the federal Sentencing Guidelines, which courts must consider along with other statutorily designated considerations.

Together with these regularly imposed conditions, the Sentencing Guidelines recommend additional conditions appropriate for specific circumstances. Courts also have the discretion to impose "any other" conditions, as long as they involve no greater deprivation of liberty than is reasonably necessary and "reasonably relate" to at least one of the following: the nature of the offense; the defendant's crime-related history; deterrence of crime; protection of the public; or the defendant's rehabilitation.

The conditions of supervised release have been a source of constitutional challenges. Yet a constitutionally suspect condition is also likely to run afoul of statutory demands. In which case, the courts often resolve the issue on statutory grounds.

This report is an abridged version of a longer report, CRS Report RL31653, *Supervised Release: A Brief Sketch of Federal Law*, without footnotes or citations to authority found in the longer report.

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Introduction

Supervised release is the successor to parole in the federal criminal justice system. In 1984, Congress eliminated parole to create a more determinate federal sentencing structure. In its place, Congress instituted a system of supervised release, which applies to all federal crimes committed after November 1, 1987. Both parole and supervised release call for a period of supervision following release from prison and for reincarceration upon a failure to observe designated conditions. Parole ordinarily stands in lieu of a portion of the original term of imprisonment, while supervised release begins only after full service of the original term (less any “good time” credits).

Sentencing courts determine the terms and conditions of supervised release at the same time that they determine other components of a defendant’s sentence, and “[t]he duration, as well as the conditions of supervised release are components of a sentence.” Sentencing courts are said to have broad discretion when imposing the conditions for supervised release, although such discretion must be understood within the confines established for mandatory conditions, the scope of permissible standard discretionary conditions and special conditions, and the deference that must be afforded the Sentencing Guidelines. Except in specified drug and domestic violence cases, courts may technically exercise discretion to decline to impose supervised release altogether for a particular defendant. However, the Sentencing Guidelines, promulgated by the United States Sentencing Commission, recommend that sentencing courts impose a term of supervised release in most felony cases.

A term of supervised release begins when a prisoner is actually released, regardless of when he should have been released. There is a split among the circuits, however, over when the term of supervised release begins for a defendant whose release from federal custody is stayed pending a civil commitment determination. A court may sentence a defendant to several terms of supervised release for each of several crimes, but the terms are served at the same time rather than consecutively. This rule applies even where criminal statutes require a defendant to serve the multiple terms of imprisonment consecutively.

Duration

Section 3583(b) sets the authorized duration for a term of supervised release, subject to exceptions for certain drug, terrorism, and sex offenses. It authorizes a term of supervised release of not more than five years, when the defendant is convicted of a Class A or B felony (e.g., bank fraud); not more than three years, when the defendant is convicted of a Class C or D felony (e.g., bank robbery); and not more than one year, when the defendant is convicted of a Class E felony or a misdemeanor (crimes with a maximum penalty of imprisonment of three years or less). The exceptions for various drug, terrorism, and sex offenses permit supervised release terms for any number of years up to life, and often come with mandatory minimums.

While possession with intent to distribute illicit drugs ordinarily permits a sentence of supervised release for any term of years up to life, the accompanying mandatory minimum terms will vary according to the dangerousness of the drug, the volume involved, and whether the defendant is a recidivist. Similar mandatory minimum terms of supervised release apply in the case of kidnaping a child and certain sex offenses. In those instances, the mandatory minimum is five years, regardless of the triggering offense or the defendant’s criminal record. For federal “crimes of

terrorism,” that is, those listed in 18 U.S.C. 2332b(g)(5)(B), the courts must impose a term of supervised release of any term of years or life. The obligation applies regardless of whether the offense was committed for terrorist purposes.

In any event, the court may terminate a defendant’s term of supervised release at any time after the defendant has served a year on supervised release, based on the defendant’s conduct, the interests of justice, and consideration of several of the general sentencing factors. The circuits are divided over whether the court may dismiss such a petition out of hand or must explain its action. Conversely, a court may extend a defendant’s term of supervised release, unless the term has already run or unless the court initially imposed the maximum permissible term.

Conditions

Conditions for supervised release are determined during a federal defendant’s initial sentencing, based on the nature of the offense, the defendant’s particular history, and other factors. When determining applicable conditions, courts consider both federal statutory requirements and federal Sentencing Guidelines. There are two kinds of conditions for supervised release: mandatory and discretionary.

Mandatory Conditions

Section 3583 insists upon imposition of several mandatory conditions that apply to all defendants, and a few additional conditions that apply only in cases involving domestic violence or sex offenses. All supervised release orders require defendants to (1) refrain from criminal activity; (2) forgo the unlawful possession of controlled substances; (3) cooperate with collection of DNA samples; and (4) submit to periodic drug tests. In addition, prior to release, all prisoners must agree to adhere to the payment schedule for any unpaid fine imposed; however, the statute does not specify that such agreements will be enforced as conditions of supervised release after the agreement is made. To fill this gap, the Sentencing Guidelines identify the payment of fines and restitution as a mandatory condition of supervised release.

Additional mandatory conditions apply to domestic violence and sex offenses. Specifically, first-time domestic violence offenders must attend an approved rehabilitation program if one is located within 50 miles of their residence, and convicted sex offenders must register with relevant authorities if the federal sex offender registry requirements apply.

Discretionary Conditions

Courts have relatively broad discretion to impose supervised release conditions that supplement the mandatory conditions for a particular defendant. Section 3583(d) is very specific about a few of these discretion conditions. For example, it provides that a court may condition an alien’s supervised release upon his deportation and remaining outside the United States. It also authorizes a court, in the case of an offender required to register as a sex offender, to condition supervised release upon the offender’s submission to warrantless, suspicionless searches by his probation officer, or with reasonable suspicion warrantless searches by any law enforcement officer. Section 3583(d) permits a wider range of specific conditions by adopting most of the probation discretionary conditions. Finally, it allows a court to impose any other appropriate condition as long as the condition is reasonably related to one of several sentencing goals and as

long as it involves no greater deprivation of liberty than is reasonably necessary to accommodate those goals.

The Sentencing Guidelines quote some of the statutorily identified discretionary conditions, suggest expanded versions of others, and propose additional considerations in still other situations. They divide the discretionary conditions into three groups—“standard” conditions, which courts impose as a matter of practice in most cases; “special” conditions that may be applied to particular kinds of cases; and “additional” conditions, such as community confinement, curfews, and occupational restrictions.

Standard Discretionary Conditions: For the most part, the Sentencing Guidelines replicate the probation conditions and standard conditions of supervised release. Courts regularly impose the Sentencing Guidelines’ standard conditions as a matter of practice. Many of these conditions ensure that defendants remain in regular contact with their probation officers. For instance, they recommend that courts order defendants to report to a probation officer on a regular basis; allow their probation officer to visit them; respond honestly to their probation officer’s questions and follow the officer’s instructions; notify their probation officer of any change in address or employment; remain in the district unless the court or probation officer approves leaving; and notify their probation officer if they are arrested or questioned by law enforcement officers.

Other standard conditions prevent criminal entanglements. For example, they recommend that courts require defendants to avoid criminal associations; illicit drug markets, stash houses, and crack houses; the use of illicit drugs or the excessive use of alcohol; and becoming an informant without permission of the court. A related condition requires a defendant to stay gainfully employed during the term of supervised release.

The remaining standard conditions instruct defendants to honor specific or general legal obligations. For example, they recommend that courts require each defendant to support his family; pay any unpaid special assessment; advise his probation officer of circumstances that might prevent his making fine, restitution, or special assessment payments; and notify victims and those possibly at risk.

Special or Any Other Discretionary Conditions: The conditions which the statute refers to as “other” discretionary conditions, the Sentencing Guidelines divide into special and additional discretionary conditions. The so-called “special” discretionary conditions address case-specific factors, such as the nature of an offense, the defendant’s character, or another condition contained in a defendant’s sentence. For example, the Sentencing Guidelines recommend that a court ban possession of weapons during supervised release, if the defendant used a weapon in the commission of the crime at issue or had a record including prior felony convictions. Likewise, when a conviction is for a sex or child pornography offense or a defendant has a history of sexual misconduct, a court might mandate sex-offender treatment, limit computer use, or authorize warrantless searches of the defendant’s possessions. Other special conditions based on a particular defendant’s character or history include requiring participation in a drug or mental health treatment program based on a history of substance abuse or mental health problems or ordering deportation if the defendant is an alien who is eligible for deportation under immigration laws.

In cases involving financial offenses, unpaid fees, or restitution orders, the Sentencing Guidelines recommend that a court prohibit a defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in

compliance with his scheduled payments or mandate probation officers' access to a defendant's financial information. Moreover, when reasonably related to an offense, such conditions might include demands to provide information concerning the financial activities of a defendant's spouse or legal entities under the releasee's control.

Additional Discretionary Conditions: "Additional" conditions address defendants' mobility and work activities. They include community confinement; home detention; community service; curfew; and restrictions on a defendant's occupation. Perhaps because many additional conditions restrict defendants' freedom of movement, commentary accompanying these additional conditions in the federal Sentencing Guidelines shows a special caution that such restrictions not become excessive. For example, the commentary advises that "[c]ommunity confinement generally should not be imposed for a period in excess of six months," although "[a] longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation." Likewise, it limits community service conditions to no more than 400 hours.

Limits on Discretionary Conditions

As noted earlier, a court may impose a discretionary condition only if it (1) is "reasonably related" to specified factors; (2) "involves no greater deprivation of liberty than is reasonably necessary"; and (3) is "consistent with" policy statements issued by the U.S. Sentencing Commission.

Reasonably Related: The threshold question for any general discretionary condition of supervised release is whether it is reasonably related to the offense, the defendant, increased public safety, or one of several other sentencing factors. Factors to which the condition must be "reasonably related" include (1) the nature and circumstances of the offense and the defendant's history and character; (2) deterrence of crime; (3) protection of the public; and (4) the defendant's rehabilitation. Thus, since a condition may be reasonably related to a defendant's history or future protection of the public, it need not be related to the offense for which supervised release was ordered. Yet, "reasonably related" may turn on the currency and seriousness of past misconduct. Although the statutory language repeats the conjunction "and" between factors and thus appears on its face to require that a particular condition relate to all, rather than just one, of these factors, courts have sometimes interpreted the statute so that a reasonable relationship to any one factor is sufficient to justify a discretionary condition.

Unnecessary Deprivation of Liberty: The courts' general discretionary authority to order conditions of supervised release is likewise bound by the requirement that it "involve[] no greater deprivation of liberty than is reasonably necessary" for the reasonably related purposes. The assessment is one of balancing. A considerable deprivation of liberty will be considered justified, when a condition is clearly reasonably related to a serious crime of conviction and a criminal history that cries out for close supervision. At the other end of the spectrum, a serious deprivation of liberty will not be considered justified, when the connection between the condition and the defendant's crime and his past is tenuous. Between the two poles, some courts see the standard as "a narrow tailoring requirement," one that compels the district court to "choose the least restrictive alternative."

Consistent with Guidelines' Policy Statements: The third discretionary condition requirement, that it be consistent with pertinent Sentence Guideline policy statements, is rarely mentioned except in passing. It "mandates only that the conditions not directly conflict with the policy statements. Therefore, when considering challenges to supervised release conditions brought under

§3583(d)(3), courts tend to evaluate them under §3583(d)(1), which requires that conditions be reasonably related to certain §3553(a) factors.”

Modification and Revocation

Although a sentencing court’s primary role in supervised release occurs at the time of initial sentencing, it retains an important decision-making function, and broad discretion, throughout a defendant’s term of supervised release. In addition to earlier termination of a defendant’s term of supervised release, a court may modify supervised release conditions at any time, may revoke a defendant’s term of supervised release, require him to return to prison for an additional term of imprisonment, and impose an additional term of supervised release to be served thereafter.

Modification

Modification of supervised release conditions usually occurs following a hearing, although a defendant may waive under some circumstances. In considering whether to modify the conditions of supervised release, the court weighs the same sentencing factors that it considers in an early termination of a term of supervised release. Breach of an existing condition or a change in circumstances may justify modification, but neither is required. In some instances, the courts have greeted objections to the imposition of a condition at sentencing with the observation that it can be changed after the defendant is released from prison. In others, they have observed that this can be an uncertain benefit.

Revocation

Sometimes revocation is required. Sometimes it is not. By statute, a court must revoke a defendant’s supervised release for (1) unlawful drug or firearm possession; (2) refusal to comply with a drug testing condition; or (3) three or more positive drug tests within a single year. The Sentencing Guidelines are far more demanding. They declare that a court must revoke a defendant’s supervised release for the commission of any federal or state crime punishable by imprisonment for more than a year.

Courts may revoke supervised release for breach of any other conditions. A court’s revocation jurisdiction, however, expires when the term of supervised release has expired, unless the government began the revocation process prior to expiration, or unless the defendant is imprisoned for 30 days or more in “connection with” a conviction for a federal, state, or local crime.

The defendant facing revocation of supervised release enjoys many, but not all, of the rights that attend a criminal trial. He must be taken promptly before a magistrate following his arrest for violation of the conditions of supervised release. The federal bail statutes apply to his pre-hearing release, although he has the burden of establishing that he is neither dangerous nor a flight risk. He is entitled to a probable cause preliminary hearing at which he may be represented by appointed counsel if he cannot secure one. He may present evidence at the preliminary hearing and has a limited right to confrontation.

Upon a finding of probable cause to believe that he has violated a condition of his supervised release, the defendant is entitled to a hearing and enjoys the benefit of counsel, appointed if

necessary. As in the case of the preliminary hearing, he is entitled to notice of the charges, to present evidence, to make a statement and offer mitigating evidence, as well as, to a limited extent, confront witnesses against him.

A defendant at a revocation hearing, however, is not entitled to a jury, or to the benefit of proof beyond a reasonable doubt. The court may revoke his supervised release if it finds by a preponderance of the evidence that he has breached one or more of the conditions of his release. Any time served under supervision prior to revocation is erased.

Upon revocation of a term of supervised release, a defendant may be imprisoned for a term ranging from one to five years depending upon the seriousness of the original crime, and upon release from imprisonment may be subject to a new term of supervised release. Appellate courts will uphold the sentence imposed upon revocation, unless it is procedurally or substantively unreasonable.

Constitutional Considerations

The Constitution limits the range of permissible conditions. Even if a condition of supervised release satisfies all statutory requirements, a court will invalidate it if it runs afoul of a defendant's constitutional rights. On the other hand, a condition which raises constitutional concerns is likely to offend statutory norms as well and can be resolved on those grounds.

Article III

The Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress shall ordain and establish. It cannot be exercised elsewhere. The issue arises most often in the context of the extent of discretion which a court assigns a probation officer. In crafting the conditions for a particular defendant, a sentencing court will often delegate initial implementing responsibilities to a probation officer. The line between permissible and impermissible delegation is not always clear. In some cases, it is a question of whether the task assigned a probation officer in a condition of supervised release touches upon a defendant's significant liberty interest. In others, it is a matter of whether the court has declared that a particular condition is to be imposed, even though thereafter the court may have delegated considerable implementing discretion. Yet elsewhere, the issue turns on the level of court oversight of the probation officer when implementing a condition.

First Amendment

The sex offender conditions have generated a number of First Amendment challenges, primarily in two areas: overbreadth and freedom of association. Under the First Amendment overbreadth doctrine, a condition is overbroad if it sweeps in a substantial amount of constitutionally protected speech along with legitimately targeted unprotected speech. The courts also recognize a right to intimate or familial relationships as a component of the freedom of association which extends to "personal decisions about marriage, childbirth, raising children, cohabiting with relatives and the like." Defendants have often contended that a particular condition to which they are subject is overbroad, or improperly intrudes upon their freedom of association. Both doctrines have companions in due process, discussed below. Both challenges are often resolved by recourse to Section 3583(d)'s "reasonably related" and "no unnecessary deprivation of liberty"

requirements, which can provide the narrow tailoring that the First Amendment demands. In fact, cases that have First Amendment implications are often resolved on those statutory grounds.

Fourth Amendment

The Fourth Amendment guarantees a right “against unreasonable searches and seizures.” Following an individual’s criminal conviction, however, the Supreme Court has used a “general balancing” test, in which it assesses “on the one hand, the degree to which [the government action] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate interests.” Because people on supervised release, like others along the “continuum of punishment,” have a “reduced expectation of privacy” under the Court’s Fourth Amendment jurisprudence, their privacy interests carry less weight in this balancing test.

Section 3583(d) and the corresponding Sentencing Guideline authorize warrantless, suspicionless search conditions in the case of offenders required to register as sex offenders. Elsewhere, it has been said a search condition must satisfy the “reasonably related” standards. Yet the courts are divided over the question of whether probation officers may conduct a warrantless search in the absence of a specific condition.

Fifth Amendment

The Fifth Amendment declares that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law....” Due process requires that an individual facing revocation of his supervised release be given a reasonably prompt hearing, and be “given adequate notice, represented at all times, [permitted to] appear[] at the hearing, and ... afforded an opportunity to make a statement and present information in mitigation.” “The minimum requirements of due process [also] include the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).” Due process also colors the extent to which a condition of supervised release may bar an individual’s access to his own children.

One of the more common due process complaints is that a particular condition of supervised release is constitutionally vague. “A condition of supervised release is unconstitutionally vague if it would not afford a person of reasonable intelligence with sufficient notice as to the conduct prohibited.” The popularity of the challenge may have something to do with the fact that the statutory and Guideline conditions are worded generally in order to allow sentencing courts to adjust them to the facts before them.

Sixth Amendment

The Sixth Amendment assures the accused a number of rights during the course of his trial. As just noted, the Fifth Amendment assures the defendant of comparable, if more limited, rights at sentencing and during supervised release revocation hearings. The Sixth Amendment rights, however, do not apply there. More specifically, the Sixth Amendment’s right to a speedy trial is not implicated by the passage of time between a defendant’s conviction and the revocation hearing triggered by allegations of a violation of the defendant’s condition of supervised release. The Sixth Amendment right to a jury trial does not apply to such revocation hearings; neither does the Sixth Amendment Confrontation Clause.

Eighth Amendment

The Eighth Amendment prohibits cruel and unusual punishment. Its proscription encompasses both the inherently barbaric and in rare cases those grossly disproportionate to the crime for which punishment was inflicted. Eighth Amendment challenges of a sentence of supervised release are rare, and thus far, even more rarely successful.

Author Contact Information

(name redacted)
Senior Specialist in American Public Law
[redacted]@crs.loc.gov, 7-....

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