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Retrieval (Colborn) AIDS parole opinion wp

Office of the
Assistant Attorney General

Washington, D.C. 20530

DEC 14 1987

MEMORANDUM FOR BENJAMIN F. BAER
Chairman, United States Parole Commission

Re: Authority to Impose AIDS-Related Parole
Conditions on HIV-Positive Parolees

You have asked for the opinion of this Office concerning the authority of the United States Parole Commission (the Commission) to impose certain parole conditions on federal parolees who have tested positive for the human immunodeficiency virus (HIV), which causes Acquired Immune Deficiency Syndrome (AIDS).¹ Although we would need more information before we could give a definitive opinion concerning any specific parole condition, for the reasons set forth below we have concluded that as a general matter the Commission does have such authority.

Under the Parole Commission and Reorganization Act (the Parole Act),² the Commission has "the power to . . . impose reasonable conditions on an order granting parole." 18 U.S.C. 4203(b)(2). More particularly relevant to your inquiry, the Commission is authorized to impose parole conditions that "are reasonable to protect the public welfare." 18 U.S.C. 4209(a). On their face, these provisions would appear clearly to authorize the imposition of reasonable parole conditions designed to

¹ The parole conditions might include the following: that the parolees participate in counseling, notify public health authorities of their seropositivity, release medical information to their probation officers, disclose their seropositivity prior to engaging in "transmission-risky" behavior, and make other disclosures concerning their condition as directed by their probation officers.

² Pub. L. 94-233, 90 Stat. 219 (1976). The Parole Act was repealed, effective November 1, 1987, by the Sentencing Reform Act of 1984. Pub. L. 98-473, Title II, secs. 218(a)(5), 235, 98 Stat. 2027, 2031; amended, Pub. L. 99-217, sec. 4, 99 Stat. 1728. The provisions of the Parole Act, however, were extended for an additional five years with respect to individuals who had been convicted of an offense or adjudicated as a juvenile delinquent as of that effective date. Our opinion is limited to the Commission's authority with respect to such individuals.

protect members of the public from exposure to the HIV virus. Preventing the spread of AIDS is a matter of paramount importance for protecting the public welfare.

You have provided us, however, with a copy of a memorandum, dated October 19, 1987, from your General Counsel, Patrick J. Glynn, which concludes on the basis of the legislative history of a separate provision of the Parole Act that the quoted language from section 4209(a) was intended by Congress to have "a much more restrictive meaning." According to Mr. Glynn, the Commission can impose only conditions designed to protect the public "from new crimes by the would-be parolee"; it cannot impose conditions based "on the theory that release of the individual would facilitate the non-criminal spread of a disease." Glynn memorandum, page 2. In light of Mr. Glynn's analysis and your testimony to similar effect, we have reviewed the Parole Act, its legislative history, and relevant case law to determine whether Congress intended the Commission's authority to be narrower than the words of section 4209(a) would otherwise indicate.

We note at the outset that under the Parole Act the imposition of reasonable parole conditions is committed to the Commission's discretion and is not subject to judicial review under the Administrative Procedure Act (APA). As noted above, while section 4209(a) sets forth the specific standards governing the Commission's imposition of parole conditions; it is section 4203(b) that more generally authorizes the Commission to impose conditions. Subsection 4203(b)(2) provides that "[t]he Commission . . . shall have the power to . . . impose reasonable conditions on an order granting parole." Section 4218(d) provides that actions by the Commission pursuant to that subsection "shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of [the APA]," which in turn provides that the APA's authorization of judicial review of agency actions does not apply "to the extent that . . . agency action is committed to agency discretion by law."

The Parole Act's legislative history also stresses the broad, unreviewable discretion given to the Commission to impose parole conditions. The Conference Committee for the Act wrote

3 You have testified that the Commission views its authority as limited "to protect[ing] the public from criminal acts and [that it] does not permit the Commission to impose a condition which is only designed to protect the public from the non-criminal spread of a disease [T]he Commission does not view itself . . . as having the power to take action directed solely to protecting the public from the spread of AIDS, at least to the extent that activity which would spread AIDS is not also criminal activity." AIDS and the Administration of Justice: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 100th Cong., 1st Sess.

that "[i]t is the intent of the Conferees that subparagraphs (1) through (3) of [section 4203(b)] vest authority for parole decision making in the discretion of the [Commission], and that parole decisions made under other sections of this Act are pursuant to authority delegated from section 4203(b)(1)-(3)." H.R. Conf. Rep. No. 838, 94th Cong., 2d Sess. 22, reprinted in 1976 U.S. Code Cong. & Admin. News 351, 354. With respect to section 4209(a), the Conferees stated that "the Commission may impose conditions of parole that limit the parolee's liberty (short of incarceration) if in the Commission's judgment such conditions are reasonably necessary to protect the public welfare." *Id.* at 30, 1976 U.S. Code Cong. & Admin. News at 363 (emphasis added). It should also be noted that nothing in the legislative history purports to define or limit the section 4209(a) authority.

More generally, the Conferees stated their intention

that Commission decisions involving the grant, denial, modification or revocation of parole shall be considered actions committed to agency discretion for the purpose of [the judicial review provisions of the APA]. It is the Conferees' understanding that the exclusion of such decisions from [those provisions] reflects the present law with respect to limitations on judicial review of individual parole decisions.

Id. at 36, 1976 U.S. Code Cong. & Admin. News at 368. The Senate report on the Act also indicated an intention that the long-standing discretionary nature of parole determinations should continue: "The standards for release on parole [in the Act] are not significantly changed from existing law." S. Rep. No. 369, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S. Code Cong. & Admin. News 335, 339. See Hiatt v. Compagna, 178 F.2d 42, 45 (5th Cir. 1949) (characterizing the law existing before the Parole Act as "bristl[ing] with discretion given the [Commission]").

³ (Cont.) 9-10. (October 29, 1987) (statement of Benjamin F. Baer).

⁴ The courts have consistently viewed the Commission's parole determinations to be matters of discretion, both generally, see, e.g., Dufresne v. Baer, 744 F.2d 1543, 1550 (11th Cir. 1984), Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981), cert. denied, 454 U.S. 1153 (1982), Billiteri v. U.S. Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976), as well as specifically with respect to the imposition of parole conditions, see, e.g., Bagley v. Harvey, 718 F.2d 921, 925 (9th Cir. 1983) (upholding condition limiting parolee's right to travel; "Parole conditions must be sustained if there is a rational basis in the record for them."), Rizzo v. Terenzi, 619 F. Supp. 1186, 1189-1190 (E.D.N.Y. 1985) (probation officer's discretion to limit parolee's travel),

Notwithstanding the unreviewable discretion granted to the Commission and the broad, clear authorization to the Commission to impose conditions that "are reasonable to protect the public welfare," Mr. Glynn concludes that the statutory authority extends only to imposing conditions designed to protect the public "from new crimes by the would-be parolee." Glynn memorandum, page 2. This conclusion is based entirely on one sentence of legislative history. The Conferees indicated in that sentence that they included in the Act a separate provision (section 4206(a)) authorizing the Commission to deny parole where release would "jeopardize the public welfare" because they "recognize[d] the incapacitative aspect of the use of imprisonment which has the effect of denying the opportunity for future criminality, at least for a time." H.R. Conf. Rep. No. 94-838, supra, at 26, 1976 U.S. Code Cong. & Admin. News at 358.

The cited sentence does not persuade us that the phrase "protect the public welfare" was intended to authorize the Commission to impose only conditions designed to protect the public from new criminal conduct. First, the cited sentence, by its terms, pertains only to denials of parole. Thus, even if one assumes that the sentence describes the sole reason motivating the Conferees to include in the Act language authorizing denial of parole where it would "jeopardize the public welfare," it is not at all clear that the same exclusive motivation led the Conferees to include separate language on imposing parole conditions to "protect the public welfare." To the contrary, we have found no evidence suggesting that the Conferees' statement about the "jeopardize the public welfare" language in the provision on denying parole has any significance for the "protect the public welfare" language in the parole conditions provision.

Moreover, even if the cited sentence could be said to be relevant to the "protect the public welfare" language, we do not believe the sentence can reasonably be read as setting forth a limiting definition of the phrase "the public welfare." Freedom from crime is certainly one aspect of "the public welfare," but it is obviously not the only aspect, and nothing in the Parole Act or its legislative history, including the sentence of legislative history cited by Mr. Glynn, demonstrates that future criminal conduct is the only aspect that the Commission was authorized to be concerned about. While the legislative history is inconclusive as to whether preventing crime is all that Congress was concerned about, it is clear that Congress did not enact a statutory provision that said the Commission could only be concerned about crime. To the contrary, it enacted a broad, general provision authorizing the Commission to impose reasonable parole conditions to "protect the public welfare," and nothing in the Act or the legislative history defines or delimits the quoted phrase.

⁴ (Cont.) de la Cova y Gonzalez Abreu v. United States, 611 F.Supp. 137, 141 (D. Puerto Rico 1985) ("The Parole Commission

The Commission's existing practice with respect to parole conditions supports the natural, broad reading of section 4209(a). The Commission currently imposes on all parolees a number of parole conditions that bear little or no direct relationship to the prevention of crime. Examples contained in the Commission form entitled "Certificate of Parole" include requiring the parolee to obtain written permission from his probation officer before leaving an identified geographic area; to notify the officer of any change in residence; to "work regularly unless excused by [the] probation officer, and support [the parolee's] legal dependents, if any, to the best of [his] ability"; and not to "drink alcoholic beverages to excess." In our view, these conditions, which are imposed on all parolees and are therefore not offense or parolee specific, cannot be justified under the authorization in section 4209(a) for conditions that are "reasonably related to . . . the nature and circumstances of the offense [or] the history and characteristics of the parolee." They must therefore be based on the section 4209(a) authority to "protect the public welfare."

Finally, a broad reading of section 4209(a) is consistent with the view of parole taken by the Supreme Court. The Court has recognized that parole boards may "properly [subject a parolee] to many restrictions not applicable to other citizens." Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen The conditions of parole serve a . . . purpose . . . [of] prohibit[ing], either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society.

Id. at 478.⁵ As a general matter, the contemplated AIDS-related conditions clearly relate to such behavior.⁶

⁴ (Cont.) has wide discretion to determine under what conditions an inmate is to be paroled.").

⁵ See also id. at 496 (Douglas, J., dissenting) ("The parole boards have broad discretion in formulating and imposing parole conditions. 'Often vague and moralistic, parole conditions may seem oppressive and unfair to the parolee.' They are drawn 'to cover any contingency that might occur,' . . . and are designed to maximize 'control over the parolee by his parole officer.'" (quoting R. Dawson, Sentencing 306-307 (1969))).

⁶ We do not believe that imposing these conditions would give rise to any substantial due process question. While the Supreme Court has indicated that due process "imposes procedural and substantive limits on the revocation of the conditional liberty created by probation," Black v. Romano, 471 U.S. 606, 610 (1985), any procedural due process issues would arise only in the context

In summary, we do not find the sentence that Mr. Glynn cites from the Conference Committee report to be persuasive evidence of a congressional intent that the broad, unambiguous statutory phrase "protect the public welfare" be read narrowly to limit the Commission's authority to protecting the public against crime and to prohibit protecting the public welfare in other ways. To the contrary, we find that Congress intended that the Commission could in its unreviewable discretion impose reasonable parole conditions to protect the public welfare, including aspects of the public welfare that are unrelated to crime, such as protecting the public health.

Moreover, even under the narrower interpretation of the Commission's authority advanced by Mr. Glynn, AIDS-related parole conditions may be imposed on HIV-positive parolees so long as the conditions are rationally related to protecting the public from criminal activity. Under traditional criminal law principles, a person is potentially criminally liable if he intentionally or wantonly infects his unknowing partner with a sexually transmitted disease. Thus, such behavior by HIV-positive individuals could be held criminal in certain circumstances. While we have not undertaken a review of the criminal laws of the various states and other relevant jurisdictions, we do believe that as a general matter criminal prosecutions are sustainable with respect to HIV-positive individuals who purposefully, knowingly, or recklessly expose others to the risk of becoming infected. See generally, Robinson, AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal, 14 Hofstra L. Rev. 91 (1985).

HIV-positive individuals who demonstrate an intent or desire to transmit the HIV virus in the course of an assault can be prosecuted for a variety of crimes ranging from attempted murder to assault with a deadly weapon.⁶ For example, in the case of a

⁶ (Cont.) of individual parole revocation proceedings, and we do not believe, in light of the Commission's broad statutory authority to impose parole conditions and the compelling governmental interest in preventing the spread of AIDS, that a substantive due process challenge to the "fundamental fairness" of AIDS-related parole conditions would be successful. See Black, 471 U.S. at 614-615; Bearden v. Georgia, 461 U.S. 660, 666-673, and n. 7 (1983), and the cases cited therein.

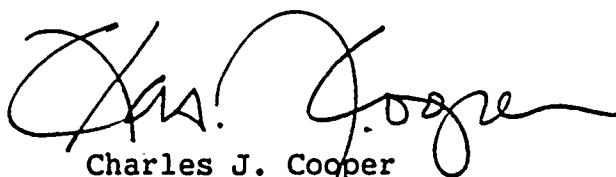
⁷ The statutory requirement that parole conditions be "reasonable" would foreclose severe and wholly unwarranted deprivations of personal liberty. Although not directly analogous, the measures taken by public health officials to deal with the AIDS epidemic might be relevant to your determinations as to whether specific conditions are reasonable.

⁸ See, e.g., United States v. Moore, 669 F. Supp. 289 (D. Minn. 1987) (upholding conviction for assault with deadly weapon); United States v. Kazenbach, 824 F.2d 649 (8th Cir. 1987); AIDS

sexual assault committed with such intent, while the victim may never become infected with the HIV virus, the defendant's intent to inflict harm or death is just as criminal as if the "weapon" used had been something like a syringe filled with poison.

A somewhat more difficult case arises with HIV-positive individuals who do not demonstrate a specific intention to transfer the virus, but who continue to engage in high-risk behavior after learning they are infected with the virus, and yet do not inform their sexual partners of the risk of contracting AIDS. If they take no precautions to prevent transmission of the virus, and do not disclose to their partners that they are infected with the virus, they may be guilty of criminal negligence. Such a depraved disregard for others is worse than simple negligence, and may well be subject to criminal sanctions. See Robinson, supra, 14 Hofstra L. Rev. at 96. Thus, particularly in light of the Commission's broad discretion in this area, measures to prevent such potential criminal activity are justified as a rational means of foreclosing possible future criminality.

In conclusion, we believe that the Commission's broad, discretionary authority to impose parole conditions to "protect the public welfare" extends to reasonable conditions to prevent the spread of AIDS. Moreover, even if you conclude that the Commission's authority is limited to conditions to prevent crime, we believe that some AIDS-related conditions would be rationally related to the prevention of crime and thus fall within this narrower view of the Commission's authority. We are available to assist the Commission in its consideration of whether specific conditions are reasonably related to protecting the public against the spread of AIDS or, alternatively, against crime.



Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

⁸ (Cont.) Criminal Laws, Cases Rise, The National Law Journal, July 20, 1987, p. 3; AIDS Trials: Public Protection or Bad Concept?, Los Angeles Daily Journal, July 21, 1987, sec. I, p. 1; AIDS Cases Turning Up in Criminal Courts, Los Angeles Daily Journal, Jan. 3, 1986, sec. I, p. 3; The Charge: Assault, Newsweek, June 22, 1987, p. 24; HIV-Positive Man Charged With Intent to Kill, AIDS Policy & Law, June 3, 1987, p. 6; Inmates Said to Put AIDS Serum in Coffee, New York Times, July 27, 1986, sec. I, p. 16, col. 6.