A PROGRESSIVE RESPONSE: JUDICIAL DELEGATION OF AUTHORITY TO FEDERAL PROBATION OFFICERS

Jacy Owens

Abstract

Federal probation officers supervise millions of offenders who must each comply with a multitude of probation conditions. These officers need enough flexibility to deal with the evolving needs of each offender, without having to clog the court system with repeated requests for modifications. Yet federal courts differ in the amount of discretionary authority they grant to federal probation officers. In fact, some courts find a violation of the judiciary’s Article III sentencing power when a court grants any discretionary authority to a probation officer. This Note argues, however, that federal courts can delegate a large degree of discretionary authority to an officer without violating Article III and that the amount of authority that courts delegate to probation officers should be uniform across the circuits.

Part I examines the history of federal probation, focusing on the issue of judicial delegation of authority to probation officers within the context of Article III. Part II expands upon this examination by exploring the current disagreement among the circuits with regard to the amount of discretionary authority that they permit courts to delegate to probation officers. Part II also examines probation officers’ need for flexibility when dealing with offenders. Part III presents an example of how some states have dealt with the delegation controversy and discusses how that model might be helpful in finding a resolution on the federal level. Finally, Part IV presents a workable solution to the problem, directed both at the probation conditions specifically mentioned in the case law and more generally at the overarching necessity for probation officer discretion to respond to offenders under supervision. This Note concludes by emphasizing the need for uniformity in the level of delegation across circuits in order to achieve consistency in sentencing and efficiency within the federal courts.

* J.D. Candidate 2012, University of Florida Levin College of Law; B.A. 2006, University of Miami. I would like to thank my husband Jack for his love and support, and for his invaluable assistance and perspective, without which this Note would not have been possible. I would also like to thank my parents for their love and encouragement. Finally, thank you to the many wonderful people I met and have worked with at the Florida Law Review.
INTRODUCTION

I. BACKGROUND .................................................................................................................. 820
   A. Development of Probation ......................................................................................... 820
   B. Modern Day Probation ............................................................................................... 823
   C. Judicial Authority and the Delegation Doctrine .......................................................... 825

II. FEDERAL COURT DISAGREEMENT: HOW MUCH DELEGATION IS ALLOWED? .......... 827
    A. Need for Flexibility .................................................................................................... 827
    B. Monetary Conditions ............................................................................................... 828
    C. Treatment Conditions ............................................................................................. 833
    D. Other Special Conditions .......................................................................................... 837

III. STATE COURT APPROACH .......................................................................................... 838

IV. SOLUTION ...................................................................................................................... 839

CONCLUSION ....................................................................................................................... 843

INTRODUCTION

The year was 1841. In a Boston, Massachusetts courtroom, a man was dragged before the court to face the charge of being a “common drunkard.”\(^1\) John Augustus, a Boston shoemaker who happened to be sitting in the courtroom, saw something in that drunkard, something worth saving.\(^2\) Augustus offered to post bail for the man, who was ordered back before the court in three weeks.\(^3\) During that three-week period, John Augustus helped the drunkard sober up; and when that drunkard reappeared before the court, he was a changed man.\(^4\) The court, impressed by the man’s sobriety, fined him one cent and ordered him to pay court costs, rather than imprisoning him.\(^5\) With this simple act of kindness, the Boston shoemaker, John Augustus, became the founder of probation.\(^6\)

Probation has undergone many changes throughout the years since its birth in 1841. John Augustus had total discretion in the manner in

---

2. Id. at 5.
3. Id.
4. Id.
5. Id.
which he ran his probation system, choosing both whom and how to supervise. Currently, federal probation is a statutory creation run by the federal courts. Probation is a criminal sentencing option, and as such, is a judicial responsibility under Article III of the Constitution. Federal courts disagree over how much discretion courts may give to federal probation officers without violating the judiciary’s Article III power.

Probation orders typically include some form of special conditions. Some federal circuits give probation officers wide latitude in implementing these conditions, while other federal circuits find that allowing a probation officer to have control over these matters improperly imbues the officer with sentencing powers. Special conditions are commonly a part of probation sentences, so there is a need for uniformity in the federal court system. Probation officers and probationers alike need to know the boundaries of the officer’s authority. It undermines a probation officer’s authority, and ultimately the integrity of the court system, for the officer to give a direction that is later found to be outside the bounds of the officer’s authority when challenged by the unhappy probationer in court.

Additionally, part of the purpose behind sentencing reform was to attain greater consistency in sentencing. To achieve that goal, probationers should face the same terms of probation, and officers should hold the same authority across federal circuit court boundaries. An understanding by both officers and probationers about what authority a court may delegate to an officer can serve to reduce the caseload for the courts that must deal with officer–probationer disputes.

The disagreement among federal circuits seems to arise most often in the context of conditions involving restitution payments and mental health or substance abuse treatment. These conditions are particularly

---

7. See generally AUGUSTUS, supra note 1, for a discussion by John Augustus on the way he ran his probation system. He chose who he would bail out for these “period[s] of probation,” although each probationer was a drunkard. Id. at 5.
9. See id. § 3562.
10. Id. § 3551.
11. See infra Part I.C.
15. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2010).
common in probation sentences, and uniformly implementing them is necessary for a consistent and effective probation system. It is inefficient for the courts to deal with the same issues repeatedly. Thus, courts and lawmakers need to give officers enough discretion to “respond not only to the offender’s needs, but also to the needs of the community.” This issue is particularly important in light of the sheer number of offenders in the federal system. Probation officers are often stretched thin, with shrinking resources and increasing caseloads. The situation will only become worse if officers are uncertain of their authority or are constantly pulled into court.

This Note will look at the history and development of the modern system of probation and the current issues of judicial delegation of authority to probation officers. Part I focuses on the issue of judicial delegation of authority to probation officers within the context of Article III of the Constitution. Part II explores the current disagreement among the federal circuits and the need for flexibility that motivates some circuits to delegate responsibility to probation officers. It discusses in depth the primary conditions at the heart of this disagreement: restitution payments, treatment conditions, and, to a lesser extent, drug testing requirements. Part III of this Note presents an example of how some states have dealt with the delegation controversy and discusses how that example might be helpful in finding a resolution at the federal level. Finally, Part IV presents a workable solution to the problem, directed both at the conditions specifically mentioned and more generally at the overarching necessity for probation officer discretion to respond to probationers under supervision. This Note concludes by emphasizing the need for uniformity in order to achieve consistency in sentencing and efficiency within the federal courts.

I. BACKGROUND

A. Development of Probation

As noted above, probation began with the Boston shoemaker, John Augustus. Augustus continued his mission for many years, working tirelessly to help those facing charges of common drunkenness. His probation system became so common that a rule developed in the court that if someone were bailed on probation (with bail set at thirty dollars)
and was successful, the penalty would be a one-cent fine plus court costs, rather than imprisonment. Massachusetts officially included probation in its court system in 1878, but it was not until 1909 that Congress introduced the first federal bills for probation. Even before probation was an official option, at least one federal court followed the lead of John Augustus by suspending the imposition of sentences in an unofficial grant of probation. In 1916, a judge in the Northern District of Ohio indefinitely suspended the sentence of a defendant during a period of “good behavior.” The Supreme Court reversed, holding there was no inherent judicial power to suspend a sentence permanently. The Supreme Court suggested, instead, that Congress establish a system of probation. Congress responded to the Supreme Court’s request in 1925. The Federal Probation Act of 1925 created the first official federal probation officer positions and enabled the courts to order the imposition of probation. Under the Federal Probation Act of 1925, federal courts could “suspend the imposition . . . of [a] sentence and . . . place the defendant upon probation for such period and upon such terms and conditions as they may deem best.”

The imposition of probation included provisions under which the defendant could be required to pay fines and restitution. The Federal Probation Act of 1925 also allowed the court to create probation officer positions. These positions, similar to the one held by John Augustus, were without pay unless the judge determined that the “needs of the service require that there should be a salaried probation officer,” at which point the judge could hire one officer for pay. Probation officers had a duty to supervise probationers and report their conduct to the court. Officers had the power to conduct warrantless arrests of probationers for any violation of the probation conditions and were required to keep written records for each probationer, detailing their

23. Id. at 5.
27. Id. at 44.
28. Id. at 52.
32. Id. § 1, 43 Stat. at 1259–60.
33. Id. § 3, 43 Stat. at 1260.
34. See Augustus, supra note 1, at 4 (discussing his volunteer work).
36. Id. § 2, 43 Stat. at 1260.
conditions and progress.\textsuperscript{37} Although conditions of probation were set by the court, the officer had the authority to “use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition.”\textsuperscript{38} This language obviously envisioned the courts setting conditions of probation, but left probation officers with wide discretion to determine the “suitable methods”\textsuperscript{39} necessary to do their jobs, provided those methods did not conflict with the court’s orders.

Following the Federal Probation Act of 1925, Massachusetts was once again a front-runner, appointing the “first salaried federal probation officer” in 1927.\textsuperscript{40} After that point, the probation system grew quickly. By 1932 there were sixty-two federal probation officers.\textsuperscript{41} The probation system continued to grow, adding duties such as the preparation of presentence investigation reports\textsuperscript{42} and adapting to subsequent congressional acts.\textsuperscript{43} The federal probation system was initially run through the Office of the Attorney General, but was transferred to the Administrative Office of the U.S. Courts in 1940.\textsuperscript{44} The biggest change, however, came with the Sentencing Reform Act of 1984.\textsuperscript{45} The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission to establish federal sentencing guidelines.\textsuperscript{46} The resulting guidelines “significantly altered judges’ sentencing

\textsuperscript{37} Id. §§ 2, 4, 43 Stat. at 1260–61.
\textsuperscript{38} Id. § 4, 43 Stat. at 1260–61 (emphasis added).
\textsuperscript{39} Id. § 4, 43 Stat. at 1260.
\textsuperscript{40} See A Brief History, supra note 25, at 1.
\textsuperscript{41} See History of the Federal Judiciary, supra note 30.
\textsuperscript{42} Presentence investigation reports were added in 1946. Id.
\textsuperscript{43} See id. (discussing the Speedy Trial Act of 1974 and Pretrial Services Act of 1982).
\textsuperscript{44} Probation & Pretrial Services: History, U.S. COURTS, http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/History.aspx (last visited Jan. 3, 2012). Extensive history exists on the establishment of Parole Boards and the supervision of parolees, but it is beyond the scope of this Note.
\textsuperscript{45} Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). The passage of the Sentencing Reform Act shifted from an indeterminate sentencing system to a determinate one. This shift resulted in a significant change in parole, both on federal and state levels. These changes to the parole system are beyond the scope of this Note. For a discussion of the changes wrought on the parole system due to the shift to determinate sentencing, see generally Dhammika Dharmapala et al., Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing, 62 FLA. L. REV. 1037 (2010) (discussing the reasons underlying the shift to determinate sentencing and its effect on parole boards).
discretion, officers’ preparation of the presentence investigation report, and officers’ overall role in the sentencing process.”47 Ultimately, federal probation became a system more controlled by statute, with less discretion placed in the hands of the sentencing judges and probation officers.

B. Modern Day Probation

Today, federal probation is no longer considered a suspension of a sentence, as it was under the Federal Probation Act of 1925.48 Under the federal sentencing guidelines, probation itself is a sentence that the court may impose.49 The purpose underlying the passage of the Sentencing Reform Act and the development of the U.S. Sentencing Commission, both of which led to the current probation system, was to increase the effectiveness of the federal sentencing system.50 Congress intended to develop a system that would result in honesty and uniformity in sentencing.51 Congress designed probation to further the intent of the sentencing system reform, even though the Sentencing Commission considered probation as an alternative sentence to one of incarceration.52

Currently, probation officers are appointed, as they were historically, by the courts.53 The officer serves under the direction of the appointing court.54 Duties of probation officers are also laid out in statutory form in 18 U.S.C. § 3603.55 Under the statute, the probation officer must instruct the probationer on the “conditions specified by the sentencing court,”56 inform the court as to the probationer’s conduct and condition,57 and as with the 1925 directive, “use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer...and to bring about improvements in his conduct and condition.”58 The statute also leaves room for other duties to be filled in by the court, requiring the officer to “perform any other duty that the court may designate.”59 The duty to prepare presentence reports for the

47. Probation & Pretrial Services: History, supra note 44.
50. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2010).
51. Id.
52. Id. § 5B, introductory cmt.
54. Id.
55. Id. § 3603.
56. Id. § 3603(1).
57. Id. § 3603(2).
58. Id. § 3603(3).
59. Id. § 3603(10).
court also remains in the current statute and is required by the criminal rules of procedure. Courts rely heavily on these reports in determining appropriate sanctions for offenders, and this reliance demonstrates the close ties of probation officers to the probation sentences imposed by the courts.

Federal statutes also establish many requirements for probation sentences themselves, including minimums and maximums. For example, 18 U.S.C. § 3563 provides standard “mandatory conditions” of probation, including that the probationer fulfill restitution or community service requirements, not commit further crime, refrain from the use of drugs, and notify the court of material changes in the probationer’s economic status. In addition, the statute states that the court has the discretion to apply other conditions, including special conditions related to the probationer’s support of dependents, payment of restitution, employment, ability to visit certain places, use of drugs, possession of firearms, participation in specific treatment, and other similar types of conditions. Any discretionary condition imposed must be “reasonably related to the [sentencing] factors” in 18 U.S.C. § 3553, which governs the imposition of a sentence, and must “involve only such deprivations of liberty or property as are reasonably necessary” to fulfill the purposes of the Sentencing Guidelines. Any person sentenced to probation “shall . . . be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.”

60. Id. § 3552.
61. FED. R. CRIM. P. 32.
63. Not less than one year for a felony, not more than five years for a felony or misdemeanor, and not more than one year for an “infraction.” 18 U.S.C. § 3561(c)(1)–(3) (2006).
64. Id. § 3563(a).
65. Id. § 3563(b)(1).
66. Id. § 3563(b)(2).
67. Id. § 3563(b)(4)–(5). The employment conditions may require the defendant to hold suitable employment or to refrain from participating in certain types of employments related to the offense. Id.
68. Id. § 3563(b)(6). Also, this provision allows the court to impose conditions prohibiting the probationer from associating with certain people.
69. Id. § 3563(b)(7). Probationer may also be prohibited from excessive use of alcohol.
70. Id. § 3563(b)(8). The firearm prohibition also includes other “dangerous weapons.”
71. Id. § 3563(b)(9). The specific types of treatment mentioned are “medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency.” Id.
72. Id. § 3563(b). For an example of an unusual and controversial special condition of probation, see James H. Taylor, Court-Ordered Contraception: Norplant as a Probation Condition in Child Abuse, 44 FLA. L. REV. 379 (1992) (discussing court-mandated birth control for certain probationers).
C. Judicial Authority and the Delegation Doctrine

Article III of the Constitution grants the federal courts jurisdiction over cases and controversies arising under federal law. 74 There is no provision in the Constitution that directly addresses sentencing of criminal offenders, 75 and “[b]ecause of this, federal sentencing has never been assigned by the Constitution to the exclusive jurisdiction of any one of the three branches of government.” 76 The Supreme Court has recognized that “Congress, of course, has the power to fix the sentence for a federal crime,” 77 but ultimately the power to impose that sentence lies in the judicial branch. 78 Moreover, the formation of the Sentencing Commission within the judiciary reinforces the belief by Congress that sentencing is a judicial function 79 and “should remain primarily a judicial function.” 80

Within the context of federal probation, an Article III problem arises when a court attempts to delegate its sentencing power to a probation officer. 81 If, for example, a court imposed a special condition stating the offender must comply with any conditions the probation officer determined appropriate, that imposition would be a clear violation of Article III. 82 In that instance, the court delegates its judicial authority to impose a sentence of probation, including conditions, to the probation officer, allowing the officer total discretion to add conditions onto the sentence. Federal circuits would likely agree that such a delegation violates Article III and is therefore an impermissible delegation of

74. U.S. CONST. art. III, §§ 1–2. The pertinent portion of § 1 states: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Thus, § 1 enabled the creation of the federal courts. Then § 2 goes on to state: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . [and] to Controversies to which the United States shall be a Party . . . .”


76. Id. (citing Mistretta v. United States, 488 U.S. 361, 364 (1989)).

77. Mistretta, 488 U.S. at 364.

78. Id. at 388–89 (“That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce . . . seems to be one of those plain propositions which reasoning cannot render plainer.” (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825)) (internal quotation marks omitted).

79. Id. at 390 (“[T]he legislative history of the Act makes clear that Congress’s decision to place the [Sentencing] Commission within the Judicial Branch reflected Congress’s ‘strong feeling’ that sentencing has been and should remain ‘primarily a judicial function.’” (quoting S. Rpt. No. 98-225, at 159 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3342).


81. See, e.g., United States v. Johnson, 48 F.3d 806, 808 (4th Cir. 1995) (discussing the constitutional issues raised by delegation of “core judicial function[s]” to officers).

82. Id.
A probation officer may not impose a sentence because "under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law is judicial." The disagreement among federal circuits is not over whether probation officers can impose totally new conditions, but arises more subtly in determining where to draw the line between what is an impermissible delegation of the court’s sentencing authority and what is merely the use of probation officers for support.

The important factor for distinguishing between a delegation of authority and the permissible use of probation officers for support may involve determining which functions are "core judicial function[s]." The reasoning in opinions that find impermissible delegations of authority often mentions this idea of core judicial functions versus administrative or supportive functions. There is little indication within these opinions, however, as to what differentiates a core judicial function from a supportive function. Given the disagreement among the federal circuits as to what distinguishes these two types of functions, the Supreme Court must draw a clearer delineation.

The Second Circuit developed one possible standard for balancing the need for flexibility with constitutional concerns in United States v. Peterson. There, the court held that if an offender must complete a condition "only if directed to do so by his probation officer," the delegation is improper. However, "if the District Court was intending nothing more than to delegate to the probation officer details" of the condition, the delegation is appropriate. This standard makes use of the core judicial function versus support function dichotomy employed by other courts, but it does so in a more meaningful way by providing a standard by which to measure delegation. Unfortunately, this standard has not resolved variances in interpretation.

83. Id. at 809 ("Cases or controversies committed to Art. III courts cannot be delegated to nonjudicial officers for resolution.").
84. See Ex parte United States (Killits), 242 U.S. 27, 41 (1916).
85. See Johnson, 48 F.3d at 808–09.
86. Id. at 809.
87. 248 F.3d 79, 85 (2d Cir. 2001). The delegation of authority at issue concerned mental health treatment. Id. at 84–85.
88. Id. at 85.
89. Id.
90. Johnson, 48 F.3d at 808–09.
91. See, e.g., id. at 809 (making use of the dichotomy but coming to a different conclusion than the Peterson court).
II. FEDERAL COURT DISAGREEMENT: HOW MUCH DELEGATION IS ALLOWED?

A. Need for Flexibility

The court systems across the United States, both state and federal, are flooded with probationers and parolees, all of whom are supervised by probation officers.92 According to the Bureau of Justice Statistics, in 2008 probation officers were responsible for supervising over five million probationers and parolees, “the equivalent of about 1 in every 45 adults.”93 Probationers constituted 84 percent of this number, or about 4.2 million offenders.94 Although the ratio of probationers to parolees has been increasing less rapidly in recent years,95 the overall number of probationers is still staggering and continues to rise. Most of these probationers in the report were on active probation,96 requiring regular monitoring by a probation officer. The federal system had the largest increase in offenders on community supervision,97 and over 121,000 offenders were reported to be on community supervision in the federal system at the end of 2008.98 This number continues to increase.99 Between 2005 and 2009, the numbers of offenders supervised in the federal system increased by about 10%.100 By September 2009, the number of post-conviction offenders supervised in the federal system was over 124,000.101

There is no argument that probation officers have any authority under the Constitution to sentence an offender to probation, or to determine new conditions totally independently of the court.102 As the Supreme Court has stated:

92. As noted previously, supra note 43, discussions of parole are outside the scope of this Note. It is worth mentioning, however, that probation officers do supervise parolees, because it is relevant to the discussion of their caseloads, and thus the need for flexibility and discretion in daily practice.
94. Id.
95. Id. (“Growth in the probation population has slowed in recent years to an average of 0.7% annually between 2003 and 2008 from an average of 2.5% annually between 2000 and 2003.”).
96. Id. at 6 (stating that 71% of probationers in 2008 were considered on active status).
97. Id. at 8.
98. Id. at 16.
99. See id. at 1 (discussing the level of increase).
101. Id.
102. See U.S. CONST. art. III (placing sentencing authority in the Supreme Court and lower federal courts created).
Indisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law, is judicial, and it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority.  

Thus, it cannot be argued that the right to punish is anything other than a judicial function. Probation officers are not intended to take power from the judiciary and punish offenders. Their purpose is to oversee the details of the probation sentence and monitor the probationer on behalf of the court. Practically, though, because probation officers supervise so many offenders, the officers need flexibility and discretion in order to serve that purpose. If the courts had to handle every issue that arose, one could well imagine the huge backlog of cases slowing the federal court system to a grinding halt. The federal courts have acknowledged this reality and seem to agree that a certain degree of flexibility is necessary. But the federal courts disagree over when and where that flexibility (and discretion) is appropriate, with some courts arguing that deciding certain probation conditions—and setting their parameters—is strictly a judicial function constitutionally reserved to the courts.

**B. Monetary Conditions**

As with other conditions, monetary conditions are controlled by statute. Because these conditions are considered part of the probation sentence, the court must impose them. In the case of restitution, the statutes require that during the preparation of the presentence report, the probation officer recommend the restitution amount and inform the

---


105. Id.

106. See, e.g., United States v. Pruden, 398 F.3d 241, 250–51 (3d Cir. 2005) (recognizing that “probation officers must be allowed some discretion in dealing with their charges,” and finding that the correct standard “properly balances the need for flexibility with the constitutional requirement that judges, not probation officers, set the terms of a defendant’s sentence”).

107. 18 U.S.C. § 3663(a) (2006) (“The court . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim . . . or if the victim is deceased, to the victim’s estate.”). Statutory law also allows the imposition of a fine when the defendant is found guilty of an offense, and specifies allowable amounts. Id. § 3571.

108. See id. §§ 3663, 3664.
court of the defendant’s financial resources.\textsuperscript{109} The court may then order restitution as a lump sum or in installments.\textsuperscript{110}

The language of the statute clearly requires that the court set the amount of restitution,\textsuperscript{111} but the statute does not specify whether the court must also set the amount of each installment—the statute refers to “specified intervals” but not to “specified payment amounts” for those intervals.\textsuperscript{112} In fact, as one court pointed out, the legislative history of a similar statute dealing with the imposition of fines indicates a desire for courts to give probation officers the flexibility to set installment amounts.\textsuperscript{113} The legislative history indicates this desire quite plainly, stating, “[T]he court shall order restitution . . .” (emphasis added)); see also id. § 3556 (“The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A . . .” (emphasis added)).\textsuperscript{114}

In United States v. Johnson, the district court had ordered the defendant to pay restitution between a minimum of $6,000 and a maximum of $35,069.10, “in such amounts and at such times as may be directed by the Bureau of Prisons and/or the Probation Officer.”\textsuperscript{115} The district court further specified that the probationer must make payments of at least $100 per month, subject to the probation officer requiring a higher payment if it were determined that the defendant could afford to pay more.\textsuperscript{116} The defendant

\begin{footnotes}
\item[109] Id. § 3664.
\item[110] Id. § 3664(f)(3)(A) (“A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.”).
\item[111] Id. § 3664(f)(1)(A) (“[T]he court shall order restitution . . .” (emphasis added)); see also id. § 3556 (“The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A . . .” (emphasis added)).
\item[112] Id. § 3664(f)(3)(A).
\item[113] See Weinberger v. United States, 268 F.3d 346, 363 (6th Cir. 2001) (Cohn, J., concurring) (“[T]he legislative history of 18 U.S.C. § 3572 specifically states that the statute is intended to ‘eliminate the . . . requirement that the specific terms of an installment schedule to [sic] be fixed by the court.’” (omission in original) (quoting H.R. Rptr. No. 100-390, § 7 (1987), reprinted in 1987 U.S.C.C.A.N. 2137, 2143)).
\item[114] H.R. Rptr. No. 100-390, § 7.
\item[115] United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995).
\item[116] Id. at 807.
\item[117] Id.
\end{footnotes}
challenged this provision as an impermissible delegation of judicial authority. The Fourth Circuit agreed with the defendant, stating:

The question presented in this case is whether the court may, in accordance with 18 U.S.C. § 3603(9), delegate to a probation officer the authority to determine, within a range, the amount of restitution or the amount of installment payments of a restitution order. We hold that this delegation from a court to a probation officer would contravene Article III of the United States Constitution and is therefore impermissible.

Sections 3663 and 3664 of Title 18 clearly impose on the court the duty to fix terms of restitution. This statutory grant of authority to the court must be read as exclusive because the imposition of a sentence, including any terms for probation or supervised release, is a core judicial function.

The court went on to explain that a probation officer could “support judicial functions, as long as a judicial officer retains and exercises ultimate responsibility.” The court interpreted the condition as giving “the probation officer the final authority” to determine the amount of restitution installments “without retaining ultimate authority over such decisions (such as by requiring the probation officer to recommend restitutionary decisions for approval by the court).” As the court noted in Johnson, most other federal circuits that considered this question came to the same conclusion. Although contrary to the language of the legislative history, the plain language of the statute states that “[i]f the court provides for payment in installments, the installments shall be in equal monthly payments over the period

118. *Id.*

119. *Id.* at 808.

120. *Id.* at 809. The court also explained that “[w]hile the statute does authorize the district court to order the probation officer to perform such duties as the court directs, the type of duty that the court may so delegate is limited by Art. III.” *Id.* at 808–09 (citation omitted) (citing 18 U.S.C. § 3603(9) (2006)).

121. *Id.* at 809.

122. *Id.; see also, e.g.*, United States v. Porter, 41 F.3d 68, 71 (2d Cir. 1994) (holding that the “sentencing court cannot resolve [the dilemma of dealing with an indigent defendant] by authorizing a probation officer to make post-sentencing decisions as to either the amount of restitution or the scheduling of installment payments” (citations omitted)); United States v. Albro, 32 F.3d 173, 174 (5th Cir. 1994) (holding that the court “must designate the timing and amount of payments”); United States v. Gio, 7 F.3d 1279, 1292 (7th Cir. 1993) (holding that the court may not order restitution in payment amounts to be determined by the probation officer).

provided by the court, unless the court establishes another schedule.\textsuperscript{124} Some courts have found the plain language of the statute to be controlling, despite evidence that the legislative intent indicates otherwise.\textsuperscript{125}

The Ninth Circuit, at least for a time, disagreed with the Fourth Circuit’s\textsuperscript{126} Johnson decision about restitution payments.\textsuperscript{126} In United States\textsuperscript{127} v. Barany, the Ninth Circuit stated, “While the court may delegate questions concerning the defendant's ability to pay and the timing and manner of payment to the probation officer, fixing the damage or loss resulting from defendant's conduct is the trial court's responsibility.”\textsuperscript{127} The circuit court determined that, because the district court retained ultimate authority over the restitution based on the district court’s power to modify probation at any time during the probationary period, the delegation to the probation officer to determine the payment schedule was permissible.\textsuperscript{128} Interestingly, in a later decision after the promulgation of the Mandatory Victims Restitution Act of 1996\textsuperscript{129} (MVRA), the Ninth Circuit changed its position, agreeing with the majority of circuits that the MVRA statutory language required the court to set the schedule.\textsuperscript{130}

The Sixth Circuit, on the other hand, has firmly decided that delegating the rate of restitution installment payments to the probation officer is a permissible delegation of authority.\textsuperscript{131} The Sixth Circuit held that as long as the sentencing court sets the total restitution amount, the sentencing court may then delegate authority to the probation officer to

\begin{footnotes}
\item[124] 18 U.S.C. § 3572(d) (2006) (emphasis added). Although § 3572 deals with fines specifically, the Mandatory Victims Restitution Act, codified at 18 U.S.C. §§ 3663A–3664, specifies that “the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid.” Id. § 3664(f)(2).
\item[125] See The Honorable W. Royal Furgeson, Jr. et al., The Perplexing Problem with Criminal Monetary Penalties in Federal Courts, 19 REV. LITIG. 167, 179–80 (2000) (discussing the different approaches taken by federal circuits when interpreting the language of the MVRA).
\item[126] United States\textsuperscript{126} v. Barany, 884 F.2d 1255, 1258–60 (9th Cir. 1989); United States v. Signori, 844 F.2d 635, 641–42 (9th Cir. 1988).
\item[127] Barany, 884 F.2d at 1260. In this case, the court did not determine a maximum restitution amount and remanded it, but the court still held that the probation officer could direct the installment amounts. Id. at 1261.
\item[128] Id. at 1260 (citing Signori, 844 F.2d at 641–42). The Signori court said that if the defendant were unhappy with the restitution payment schedule set, “he may always bring the probation department’s orders concerning restitution to the attention of the district court and seek a modification of any order.” Signori, 844 F.2d at 642.
\item[130] United States\textsuperscript{130} v. Gunning, 401 F.3d 1145, 1149–50 (9th Cir. 2005).
\item[131] Weinberger v. United States, 268 F.3d 346, 359–60 (6th Cir. 2001).
\end{footnotes}
set the payment schedule. The Sixth Circuit, like the Ninth Circuit before it, relied on the fact that the sentencing court retained jurisdiction for probation modifications. The court reasoned that when the sentencing court orders the probationer to pay restitution according to the rate set by the probation officer, the court adopts those terms into its sentencing order and thus does not improperly delegate authority.

The Seventh Circuit, agreeing with the Sixth, pragmatically approached the issue of whether a sentencing court may delegate the task of setting the payment schedule to a probation officer. The court first considered why defendants would even want the court to set the schedule and stated, “One reason defendants want judges to set the schedule is to avoid paying what they owe. It is hard, perhaps impossible, for a judge to know how much a given defendant will be able to pay years later.” The court then, looking at the language of the statute, acknowledged that “[t]he statute requires the judge to set a schedule if the defendant cannot pay in full at once,” but nonetheless recognized the practical problems with the judge setting that schedule. Because the probation officer directly supervises the defendant and is thereby better positioned than the judge to assess the defendant’s financial state as it changes throughout the period of supervision, the Seventh Circuit decided that the probation officer may set the payment schedule. To assuage any fear that probation officers may set overly harsh payment schedules, the court pointed out that “[i]f the probation officer is a tough taskmaster, the defendant may obtain a judicial decision under § 3583(e)(2).”

The approaches taken by the Sixth and Seventh Circuits better reflect the purpose behind the structure of the probation system—efficiency. As the Seventh Circuit noted, probation officers can better monitor the changing economic statuses of their probationers and determine what a particular probationer can afford to pay. As Senior District Judge Cohn pointed out in his concurrence in United States v. 832

132. Id. at 360. The court said “[t]he sentencing court does not abrogate its judicial authority when it delegates the setting of a restitution-payment schedule to the defendant’s probation officer, provided that the court first establishes the amount of restitution” (alteration in original) (internal quotation marks omitted) (quoting United States v. Gray, No. 95-1832, 1997 WL 413663, at *4 (6th Cir. July 17, 1997)).

133. Weinberger, 268 F.3d at 360.

134. Id. at 361. Although in the discussion the court is referring to the Bureau of Prisons’ payment program, the larger point remains in regards to probation as well.

135. United States v. Sawyer, 521 F.3d 792, 797 (7th Cir. 2008).

136. Id.

137. Id. at 796.

138. Id. at 797. 18 U.S.C. § 3583(e)(2) provides the court with the authority to change probation conditions at any point throughout the period of supervision. The thought is that the defendant could seek review of his conditions and have something different ordered if he is unhappy with what the probation officer required.
Weinberger, the approach of the other circuits “does not take into account what a burdensome proposition it would be to require the district courts to micro-manage each defendant whose sentence has a financial component.”\textsuperscript{139} Moreover, because the defendant can always challenge the rate set by the probation officer before the court, the court maintains ultimate jurisdiction over the issue.\textsuperscript{140} To phrase it in terms of what the Johnson court considered important when taking the opposing view, the court allows the probation officer to “support judicial functions” by setting the rate, but the sentencing court “retains and exercises ultimate responsibility” by maintaining the power to modify the probation order.\textsuperscript{141} As Judge Cohn stated in Weinberger, permitting the probation officer to determine payment schedules does not delegate a judicial function, but is “a realistic way of dealing with the uncertainties of the future, particularly the ability of the defendant to meet the financial component of his sentence.”\textsuperscript{142} Contrary to what some federal circuits have held, allowing probation officers to set restitution payment schedules is not an impermissible delegation of a “core judicial function,”\textsuperscript{143} but rather a more efficient way of dealing with the daily demands of probation by not tying up the courts with issues that can most easily be dealt with by the officer.

C. Treatment Conditions

Treatment conditions are also the subject of frequent disagreement in the delegation dispute. A statute provides for the court’s imposition of treatment as a special condition of probation sentences.\textsuperscript{144} In ordering treatment as a special condition, courts are limited to those conditions that are “reasonably related” to the circumstances of the offense.\textsuperscript{145}

\begin{itemize}
  \item[(1)] the nature and circumstances of the offense and the history and characteristics of the defendant;
  \item[(2)] the need for the sentence imposed—
    \begin{itemize}
      \item [(A)] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
      \item [(B)] to afford adequate deterrence to criminal conduct;
      \item [(C)] to protect the public from further crimes of the defendant; and
    \end{itemize}
\end{itemize}
Certain provisions under 18 U.S.C. § 3563(b) allowing the imposition of discretionary conditions specifically mention the probation officer as a part of the condition: the reporting condition in § 3563(b)(15), for example, requires a probationer to “report to a probation officer as directed by the court or the probation officer.” In contrast, the treatment provision reads only “as specified by the court.” This suggests that the legislature intended the court to be the only determiner of whether a probationer should receive some form of treatment. But the legislature must have envisioned some involvement of probation officers during the creation of these guidelines. The U.S. Sentencing Guidelines discuss the discretionary treatment conditions as “requiring the defendant to participate in a program approved by the United States Probation Office.” Setting the treatment condition itself, however, seems to require court pronouncement of the condition.

The federal circuits have considered the level of probation officer authority with regard to the imposition of treatment conditions. The circuits agree that probation officers cannot add new treatment conditions that the court never mentioned in its sentencing order. The circuits disagree, however, as to the appropriate degree of probation officer authority when the court does mention a treatment condition. In United States v. Peterson, the Second Circuit phrased the distinction in terms of whether the probation officer was given the authority to dictate whether the defendant undergo treatment versus the authority to dictate administrative details regarding the court-ordered treatment. The court said:

If [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer. On the other hand, if the District Court was intending nothing more than to delegate to the

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

probation officer details with respect to the selection and schedule of the program, such delegation was proper.\textsuperscript{151}

Some of the disagreement here seems to be over form rather than substance—an issue of semantics. In \textit{United States v. Pruden}, the Third Circuit agreed with the Peterson standard and found a delegation to be impermissible because it allowed the probation officer to determine whether the probationer would participate in treatment when the condition as written required the probationer to “participate in a mental health treatment program \textit{at the discretion of the probation officer}.”\textsuperscript{152} However, in the later case of \textit{United States v. Heckman}, the Third Circuit allowed a similar condition that required treatment “\textit{as directed by}” the officer.\textsuperscript{153} The court denied that the difference was one of semantics, reasoning that although the two conditions were “superficially similar,” they “carry slightly different meanings,” and moreover, the condition at issue in the earlier case was harmed more by the lack of support for the court ordering the condition at all than the language used.\textsuperscript{154} The court’s focus on the exact language used in the order, then, was somewhat disingenuous. The real difference between the order in \textit{Pruden} and that in \textit{Heckman} was the support the court found in the record below indicating whether the probation officer was the one ordering the treatment in the first instance. The issue was the underlying intent of the trial court’s order, not the language itself. The Eleventh Circuit similarly focused on the language of the court’s directive to undergo treatment when determining whether a delegation was impermissible.\textsuperscript{155} The relevant language in that case required the defendant to participate in mental health treatment “\textit{if and as directed by} the probation office.”\textsuperscript{156} Although this condition used the same “\textit{as directed by}” language that the Third Circuit accepted, the Eleventh Circuit focused on the fact that, as written, the condition gave the probation officer authority to determine \textit{if} treatment would be required, in addition to the “\textit{administrative supervision}” of such treatment.\textsuperscript{157} The court held that this was an impermissible delegation of an “\textit{unquestionably . . . judicial function}.”\textsuperscript{158}

\begin{thebibliography}{99}
\bibitem{151} Id. (citations omitted).
\bibitem{152} \textit{Pruden}, 398 F.3d at 251 n.5 (emphasis added).
\bibitem{153} \textit{Heckman}, 592 F.3d at 410 n.13 (emphasis added).
\bibitem{154} Id. In \textit{Pruden}, the presentence report did not recommend mental health treatment. \textit{Pruden}, 398 F.3d at 245. Moreover, the government conceded at oral argument that the discretion allocated to the probation officer was intended to be broader than that of selection and supervision of treatment. \textit{Id.} at 251 n.5.
\bibitem{155} \textit{See United States v. Heath}, 419 F.3d 1312, 1314 (11th Cir. 2005).
\bibitem{156} Id.
\bibitem{157} Id. at 1315.
\bibitem{158} Id. at 1315. The court stated that punishment was strictly a judicial function: “The fate of a defendant must rest with the district court, not the probation office.” \textit{Id.} at 1316.
\end{thebibliography}
Other circuits do not seem to worry over the meaning of each word in the court’s order of treatment conditions and focus instead on the ultimate retention of authority by the sentencing court. This is similar to the reasoning supporting the decisions that allow courts to delegate the setting of payment schedules to probation officers. In United States v. Mickelson, the Eighth Circuit upheld a special condition requiring the defendant to receive mental health treatment “if his probation officer deemed it appropriate.” The court focused on the benefit to the offender of flexible probation conditions, “since they can be tailored to meet [the defendant’s] specific correctional needs.” In addition, the court reasoned that the sentencing court “gave no indication that it would not retain ultimate authority over all of the conditions.” Thus, the retention of ultimate authority appears to be an incredibly important factor. Indeed, in United States v. Kent where a sentencing court indicated that it did not intend to retain ultimate authority, the Eighth Circuit held a condition delegating authority over mental health treatment to a probation officer was “inconsistent with Article III.”

Initially, the imposition of a treatment condition by a probation officer rather than a judge does not seem easily reconciled with the purposes of efficiency and reform underlying the probation system. The determination as to whether treatment should be required seems substantive, a determination that belongs firmly in the hands of the court. Despite this perception, the probation officer is likely in a better position than the court to know if a probationer would benefit from such treatment. The probation officer is the one who prepares the presentence report that makes the recommendation as to various types of treatment, and the one who more closely measures the probationer’s status during the course of the probationary period. The reconciliation between the practical realization that the probation officer is in the better position to know if the probationer requires treatment and the fact that the imposition of treatment conditions rests with the court may depend on the narrowness or breadth of the language used.

159. United States v. Mickelson, 433 F.3d 1050, 1051 (8th Cir. 2006). Three other provisions which arguably delegated authority to the probation officer were also upheld: (1) giving the officer discretion as to the defendant’s participation in an alcohol testing program, (2) authorizing the placement of a GPS device, and (3) prohibiting unsupervised contact with minor children without the officer’s consent. Id.
160. Id. at 1057.
161. Id.
162. United States v. Kent, 209 F.3d 1073, 1079 (8th Cir. 2000). The sentencing court informed the defendant it would not be making the determination of whether treatment was required at that time, but the probation officer would, and said it “[did not] hope to be riding herd on [whether defendant could move for reconsideration if he disagreed with the probation officer’s determination].” Id. at 1075 (citation omitted) (internal quotation marks omitted).
163. See supra notes 56–62 and accompanying text.
The difference seized upon by the Eight Circuit in Kent and Mickelson is perhaps the most illuminating approach to this issue. The only factor distinguishing the mental health condition in these cases is the court’s retention of ultimate authority over the sentence. The Eight Circuit specifically limited its holding in Kent to the circumstances in which the court indicated it would not retain jurisdiction, “realiz[ing] that the federal district courts cannot be expected to police every defendant to the extent that a probation officer is capable of doing.” Practically speaking, it is simply not feasible for the district courts to be involved in minute details of supervision for each probationer. While the court may not allow a probation officer to determine if treatment is required as an initial matter, Congress intended for probation officers to have authority to approve programs and supervise the “administrative” aspects of the probationer completing the treatment conditions as a general part of a probation officer’s duties. If the court retains ultimate authority and imposes the conditions, the details should be within the scope of probation officer duties.

D. Other Special Conditions

Although restitution and treatment conditions are the most challenged conditions (at least as to the permissibility of judicial delegation), other conditions sometimes prompt the same concerns. These conditions include regulations involving contact with minors, residence restrictions, and the number of drug tests conducted during probation. Again, federal circuits disagree over when these conditions constitute an impermissible delegation of judicial authority, and when they are appropriate as part of a probation officer’s duties.

In some cases, even where the court found an impermissible delegation, the court required that the defendant object to the condition

164. Mickelson, 433 F.3d at 1056–57; Kent, 209 F.3d at 1079.
165. Kent, 209 F.3d at 1079.
166. Aside from the presentence report investigation and recommendation to the court, which the court may likely follow.
168. See, e.g., United States v. Heckman, 592 F.3d 400, 411 (3d Cir. 2010) (rejecting a condition requiring the defendant to “follow the directions of the United States Probation Office regarding any contact with children of either sex under the age of 18” because it “delegates full discretion over [the defendant’s] contact with minors to the Probation Office,” and “a probation officer may not decide the nature or extent of the punishment”).
169. See, e.g., United States v. Rodriguez, 558 F.3d 408, 411 (5th Cir. 2009) (upholding, among other things, a residence restriction requiring probationer to obtain prior approval from the probation officer before living within 1000 feet of a school).
170. See, e.g., United States v. Stephens, 424 F.3d 876, 883 (9th Cir. 2005) (finding the failure of the sentencing court to set a maximum number of drug tests an impermissible delegation of authority).
during sentencing before the court would vacate the condition. In fact, some courts have affirmed otherwise impermissible delegations because the probationer failed to object to the condition at sentencing. Generally, though, these cases track the jurisprudence involving the restitution and treatment provisions.

III. STATE COURT APPROACH

Many state courts have struggled with the same delegation issues that the federal courts face. Some states have developed statutes, however, to deal with these issues directly and definitively. For example, North Carolina probation statutes dealing with restitution explicitly state, “[T]he court may delegate to a probation officer the responsibility to determine the payment schedule.” Other states provide flexibility to probation officers with a system that gives officers a chance to deal with violations, at least initially, on a discretionary basis. These systems, although referred to by different names depending on the state, will be referred to here as “progressive response systems.”

The theory underlying progressive response systems is to allow the probation officer to sanction a probationer who commits a technical violation of probation. In Florida, the Department of Juvenile Justice has implemented this system for juvenile probationers. If a youth commits a technical violation of probation, the officer may respond initially without a hearing before the court. For example, if a youth tested positive for drugs, the officer could instruct the youth to have a drug evaluation and participate in any follow-up treatment. If the youth refuses that instruction, the officer would then file the drug use violation (rather than the refusal to seek treatment) with the court and ask the court to sentence the youth on the violation (which could result

171. See Barklage et al., supra note 16, at 38; see also id. (discussing United States v. Padilla, 415 F.3d 211 (1st Cir. 2005)).
172. Id. (discussing United States v. Padilla, 415 F.3d 211 (1st Cir. 2005)).
173. Id. (discussing some of the state cases on point).
174. See, e.g., N.C. GEN. STAT. § 15A-1343(g) (2010).
175. Id.
176. See, e.g., id. § 15A-1343.2(e)–(f); Probation Management Act, GA. CODE ANN. §§ 42-8-150 to -160 (2011); FLA. ADMIN. CODE ANN. r. 63D-8.001(21) (2011) (defining progressive response system).
177. FLA. DEP’T OF JUVENILE JUSTICE CIRCUIT 8, JUDICIALLY-SANCTIONED OPERATIONAL PROCEDURE: PROGRESSIVE RESPONSE PROTOCOL 2 (2010). Generally speaking, a technical violation is any violation of probation that does not involve the commission of a new offense (a “new law” violation). Id. at 3.
178. Id. at 2.
179. Id.
in the court ordering drug treatment, revocation and commitment, or other sanctions). 181 The theory behind this progressive response system is to give officers the flexibility to provide support and services to offenders quickly and without court intervention, ideally reducing the load on the courts in the meantime. 182 However, this process is not the same as the probation officer imposing new conditions—the youth is not legally obligated to comply with the sanction and, upon the youth’s refusal, the violation before the court is the underlying technical violation, not the youth’s failure to comply with the officer’s instruction. 183 The system is beneficial to all parties: the officer deals quickly with the probationer’s problems, the court’s load lessens by not having to hear every violation, and the probationer receives help rather than punishment. The nature of these progressive responses is not punitive, but rehabilitative.

Georgia has a similar system for adult probation. 184 A judge may order a probationer into a “sentencing options system.” 185 If a probationer violates a condition imposed by the court, the probation officer may instruct the probationer to complete certain “administrative sanctions”—community service, treatment, and so forth—in lieu of the violation resulting in a hearing before the court. 186 The system provides for a hearing before probation personnel and review by the court if the probationer disagrees with the sanctions imposed. 187 Presumably, the probationer would rather face an additional administrative penalty rather than be resentenced by the court, facing sanctions that could include revocation and incarceration. North Carolina has a similar system in place. 188

Systems like these allow probation officers to respond quickly to the evolving demands of supervised offenders without overburdening the court system.

IV. Solution

There have been attempts to resolve the delegation dispute, or at least resolve it as to a particular probation condition, but none of the suggested approaches solves the entire problem. One article suggested implementing a procedure allowing officers to impose new conditions on a temporary basis. 189 The probationer could seek review of the new

---

181. Id.
182. Fla. Dep’t of Juvenile Justice Circuit 8, supra note 177, at 2.
183. Id.
185. Id. § 42-8-152.
186. Id. § 42-8-153.
187. Id. §§ 42-8-155 to -156.
189. See Barklage et al., supra note 16, at 41.
condition in court.\textsuperscript{190} This suggestion gives the probation officer wide discretion in responding to the changing needs of supervision. However, there is a difference between imposing a new probation condition and having clear authority to implement court-ordered conditions. Furthermore, this suggested procedure would likely add to the court backlog and could ultimately undermine probation officer authority. Although the suggested procedure allows for revocation of probation if the probationer does not follow the temporary conditions,\textsuperscript{191} it seems unlikely circuit courts would allow such a procedure. Probation officers could temporarily require new conditions, but if the challenge to the condition were successful, it might encourage the probationer not to take the officer’s next direction seriously. Moreover, the article proposing this solution addresses the same types of conditions that are addressed in this Note—namely, restitution schedules and treatment\textsuperscript{192}—and these do not truly involve the probation officer imposing new conditions. A probation officer imposing what are actually new conditions of probation seems a clearer Article III violation than the officer directing how court-ordered conditions are enforced, and as such is likely impermissible.\textsuperscript{193}

Other possible solutions have been suggested for financial conditions specifically. One article, acknowledging that the best solution is a change in the statute to reflect the legislative intent better, offers a workable option for standardizing payment schedule orders.\textsuperscript{194} A sample change to the judgment form would include a provison requiring “maximum payments possible under the supervision of the probation office.”\textsuperscript{195} This provision would theoretically leave the probation officer some discretion in determining the maximum possible payment, given the officer’s more detailed knowledge of the offender’s financial situation.\textsuperscript{196} However, this language may still have the same interpretive problems that exist now, with the circuits divided as to whether the court must determine the exact payment amount required. The “maximum payments possible” language has been on judgment forms previously, and has not resolved the problem.\textsuperscript{197} Ultimately, a

\begin{itemize}
  \item \textsuperscript{190} Id.
  \item \textsuperscript{191} Id.
  \item \textsuperscript{192} See id. passim.
  \item \textsuperscript{193} The imposition of probation conditions is a part of sentencing and is a core judicial function. See supra Part I.C.
  \item \textsuperscript{194} See Furgeson, Jr. et al., supra note 125, at 188.
  \item \textsuperscript{195} Id. at 189.
  \item \textsuperscript{196} The author does note that this language may not work in some circuits, such as the Second Circuit, which “has explicitly required district courts to set a detailed payment schedule.” Id.
  \item \textsuperscript{197} Id.
\end{itemize}
legislative change reflecting the need for probation officer flexibility would be most effective.\textsuperscript{198}

For treatment provisions specifically, one clear resolution to the circuit disagreement is to standardize the language of treatment conditions, requiring the court to impose the treatment condition but leaving the probation officer the discretion to determine approved treatment and supervise the details. This standardization would end any disagreement over language such as “directed by” or “at the discretion of,” when either version could essentially support the same result. In addition, a clear, uniform standard would reduce the challenges made to such conditions, because without the ambiguity of the language there is no confusion about the constitutionality of the directive. The orders could uniformly read that the probationer “shall” participate in treatment “as directed” by the probation order,\textsuperscript{199} or that the probationer “shall” be evaluated and participate in any follow-up treatment “as directed” by the probation officer. Thus, the court would sentence the probationer to serve probation with the condition of treatment, but beyond that, the probation officer would have the discretion and responsibility of designing the probation program and ensuring compliance.

Ultimately, the problem of judicial delegation of authority to probation officers is one with important practical implications. To achieve the best solution, legislatures should use common sense. If the court orders a condition, whether it is restitution, treatment, or drug testing, the probation officer must implement that condition in the most practical and efficient way possible. As one court stated, “it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied.”\textsuperscript{200} The court is not in a position to micro-manage every detail.\textsuperscript{201} Probation officers need flexibility to react quickly to the evolving needs of the probationers they supervise, and the most successful solution to the delegation disagreement will encompass that need. For this reason, the best solution will involve several parts.

First, the legislature should revise the current statute on restitution to reflect the original legislative intent that probation officers may set

\textsuperscript{198} Id. at 189–91 (“[A] long-term remedy is also needed in the form of legislative changes to §§ 3572(d) and 3664(f) and perhaps other sections as well. . . . Ultimately . . . changes must be made to the statute to allow the imposition and enforcement of criminal financial penalties to be effective and successful.”).

\textsuperscript{199} Although the specific word usage may seem like semantics, circuits have struggled with specific words such as these. This particular directive was upheld in \textit{United States v. Nash}, 438 F.3d 1302, 1305 (11th Cir. 2006), because it left the ultimate responsibility to the courts.

\textsuperscript{200} \textit{United States v. Stephens}, 424 F.3d 876, 880 (9th Cir. 2005). The court did require the court itself to determine “whether . . . and how . . . a defendant will be subjected to the condition.” \textit{Id}.

\textsuperscript{201} \textit{United States v. Johnson}, 48 F.3d 806, 809 (4th Cir. 1995)
payment schedules.\textsuperscript{202} Given the number of circuits that abide by the plain language of the statute, no other solution is likely to be effective absent legislative change. Second, the courts should adopt a standardized statement of the delineation between core judicial function and administrative functions. This delineation should follow the \textit{Peterson} standard\textsuperscript{203} and stop adding the label core judicial function after the fact, with no real depth of meaning behind that phrase. Under the \textit{Peterson} standard, the analysis turns on whether the probation officer alone created the condition, or the court pronounced it.\textsuperscript{204} If the probation officer requires the probationer to follow a condition not mentioned by the court at sentencing, the officer is infringing on the judiciary’s Article III sentencing authority. If the court pronounced the provision at sentencing, however generally, the officer is merely implementing the judge’s sentence, and thus acting permissibly. This standard would cover both setting restitution payment schedules and implementing treatment provisions. If the court orders restitution, it has sentenced the probationer to pay that amount of money, and the officer establishing a schedule of payment does not change that obligation. If the court orders a probationer to undergo evaluation and seek treatment as directed by the officer, the court has sentenced the probationer into any recommended treatment. The probation officer is merely supervising the treatment at that point.

Finally, courts and Congress should implement a progressive response system for federal probation, similar to that run by the Florida Department of Juvenile Justice.\textsuperscript{205} This system would give probation officers the flexibility to deal with probationers without overburdening the courts. Furthermore, the system would give probationers an opportunity to correct mistakes made during probation without facing more severe penalties from the court. Such a system would not violate Article III, because as discussed in Part IV of this Note, the sanctions under a progressive response system are not actual conditions of probation. Probationers would not be mandated to comply with these sanctions. However, there would be incentives to comply because upon successful completion of the sanction, the underlying technical violation would be disposed of without ever being brought before the court. This type of progressive response system works practically. For example, if an officer attempts to require a probationer to have more frequent drug tests or seek treatment, it is because the officer has some reason to believe the probationer has a substance abuse problem. With the progressive response system, the officer could try to help the

\textsuperscript{203} United States v. Peterson, 248 F.3d 79, 85 (2d Cir. 2001).
\textsuperscript{204} Id.
\textsuperscript{205} See supra text accompanying notes 178–183.
probationer overcome this problem without resorting to a court hearing. Moreover, there are protections within the system from overreaching by probation officers since the court retains ultimate jurisdiction over the case throughout the probationary term. A progressive response system could provide an adequate solution to all of the delegation disagreements, benefiting all parties: probation officers by providing flexibility, probationers by providing quick assistance and the opportunity to stay out of court, and courts by removing technical violations from the docket and maintaining a uniform approach across circuits without being so rigid as to be unmanageable.

CONCLUSION

Although there have been suggestions for curing the delegation issue as to probation officers, there has not been a workable overall solution. A uniform approach is necessary to resolve the conflicts among the circuits and to provide for consistent and effective fulfillment of duties by probation officers. A uniform approach will also provide a more consistent supervision plan for the probationers to follow while leaving room for individualized determinations. The federal courts that have dealt with these issues struggle to find a feasible framework that ensures mandates are consistent, efficient, and constitutional. The best solution, then, will make use of the dichotomy between core judicial function and administrative duties by applying the standard developed in Peterson, and implement a progressive response system to allow for flexibility without infringing on the Article III powers of the judiciary.

206. *Peterson*, 248 F.3d at 85.