March 12, 2021

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland:

Congratulations on your recent confirmation as the 86th Attorney General of the United States. The 32 undersigned organizations write to urge you to augment efforts to transfer federal incarcerated persons to home confinement and pursuant to compassionate release, and to not pursue re-incarceration of released persons. In recognition of the dangers of COVID-19 infections inherent in the Bureau of Prisons (BOP) or any congregate facilities,[1] and acknowledging that the single most effective strategy for minimizing risk to incarcerated individuals, staff, and communities involve reduction of the prison population, this memorandum explores several ways BOP can more robustly implement the home confinement program, compassionate release, and other release programs in place during the pandemic and under relevant provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).[2]

Being that this is a life-and-death issue, we hope this will get the utmost attention it deserves and will be at the forefront of your mind as you begin your tenure as Attorney General.

The next few months are critical to avoiding preventable deaths. The COVID-19 vaccine is a significant step forward, but concerns remain that low adherence rates due to insufficient outreach and education[3] and the emergence of new strains will delay herd immunity in the BOP.[4] Even a vaccine with 90% efficacy will leave many people at ongoing risk for COVID-19, given the extraordinarily high rate of transmission in jails and prisons. Additionally, as we become aware of an increasing range of SARS-CoV-2 variants, we face greater urgency to disrupt the ideal environment that current carceral conditions provide for viral mutations that could undermine the efficacy of available vaccines and threaten health far beyond American borders.[5] Over this ongoing period of high risk, exercising greater discretion to allow for maximum releases of individuals in BOP custody would be especially beneficial. We identify four specific revisions to current BOP policy that would immediately allow for more people to qualify for release.

---

[1] See, e.g., The Justice Collaborative, Guidance on COVID-19 in Release Advocacy, https://thejusticecollaborative.com/wpcontent/uploads/2020/03/TJC_CoronavirusDefenseCourts_Onesheet_02.pdf ; and CDC, FAQs for Correctional and Detention Facilities: https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html#accordion-5fd10f075cc9c-card-1.

[2] H.R. 748, 116th Cong. (2020)

[3] https://www.themarshallproject.org/2021/03/01/we-asked-people-behind-bars-how-they-feel-about-getting-vaccinated

[4] Centers for Disease Control and Prevention. About COVID-19 Variants. (February 2021). https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html

[5] https://www.nejm.org/doi/full/10.1056/NEJMp2100609

As pointed out in a March 19, 2020, letter signed by Chairman Jerrold Nadler and Subcommittee on Crime Chairwoman Karen Bass, the best results will be achieved by being as broadly expansive as possible in exercising the BOP's authority to reduce the BOP population. In particular, the letter stated:

> DOJ and BOP must also do all they can to release as many people as possible who are currently behind bars and at risk of getting sick. Pursuant to 18 U.S.C. 3582(c)(1)(A), the Director of the Bureau of Prisons may move the court to reduce an inmate's term of imprisonment for "extraordinary and compelling reasons." We urge you to use this existing authority and consider moving courts to release federal inmates who are vulnerable to COVID-19 (for instance, persons who are pregnant, who are 50 years old and older, and who suffer from chronic illnesses like asthma, cancer, heart disease, lung disease, diabetes, HIV, or other diseases that make them vulnerable to COVID-19 infection). In addition, the BOP should immediately reassess, under 18 U.S.C. 3621(b), every person with 36 months or less remaining on their sentence to determine if they can serve the last year of their sentence in community corrections and home confinement, rather than in a correctional institution. DOJ should use all available powers and authorities, including executive clemency, commutation, furlough, compassionate release, and parole, to reduce the number of federal prisoners in jails, prisons, and other community-release-based programs housing large numbers of people. Where possible, DOJ should create new emergency mechanisms to reduce imprisoned and incarcerated populations.

Moreover, in a subsequent March 30 letter, Chairman Nadler noted:

> The Department of Justice (DOJ) and BOP presently have the authority to request, under 18 U.S.C. § 3582(c)(1)(A)(i), that courts modify the sentences of prisoners who present "extraordinary and compelling reasons." We call on you, in the most urgent of terms, to do the right thing and exercise this authority and immediately move to release medically-compromised, elderly, and pregnant prisoners in the custody of the BOP. In addition, we urge that you use every tool at your disposal to release as many prisoners as possible, to protect them from COVID-19.

Though prisons are more densely populated than nursing homes, just 7,850 of the 151,735 people serving federal sentences right now have been granted home confinement—about 5 percent.[6] Sadly, the official BOP records show that as of February 28, 2021, 240 incarcerated

[6] https://www.nytimes.com/2021/02/27/health/coronavirus-prisons-danbury.html?referringSource=articleShare.

individuals and four BOP staff members have died from the disease;[7] and 47,714 incarcerated individuals have become or are currently infected, as well as 6,552 BOP staff.[8] Clearly, more needs to be done to address this life and death matter.

There are numerous incarcerated individuals who would have been eligible for release to home confinement if not for extraneous restrictions, promulgated by the Department of Justice (DOJ) under the previous administration, that constrained the BOP from considering people who are legitimately and seriously vulnerable to this deadly virus. The DOJ should lift these ill-considered limits to allow a proper individualized determination of appropriateness for release, while making maximal use of this important tool to control populations safely during the pandemic.[9] **We recommend the DOJ make the following policy changes:**

1) Revise BOP policy and practice limiting consideration of home confinement and compassionate release to individuals who have served more than 50% of their sentences; instead, allow individuals who are at risk of severe COVID-19 infection to be considered *irrespective* of the time remaining on their sentences.

2) Reduce the age for consideration of home confinement and compassionate release to 50 (currently 65). This is in addition to considering all individuals with medical vulnerabilities to COVID-19 for home confinement and compassionate release, regardless of age.

3) Do not use disciplinary infractions to exclude people from consideration of home confinement or compassionate release.

4) Reject the PATTERN tool as a criterion for consideration of home confinement or compassionate release.

COVID-19 Rampant in American Prisons

The reality of the prison system is such that those imprisoned have a greater likelihood of contracting and suffering catastrophic consequences from COVID-19 than those outside of prison. Experience demonstrates that releasing prisoners will help decrease the spread of COVID-19.[10] Prisons that have already reduced their incarcerated populations are anticipating positive results: "States that have begun to reduce their jail populations are quantifiably saving lives. Colorado, for example, has so far achieved a 31% reduction in jail population…this likely will save 1,100 lives—

[7] This includes private prisons contracted by BOP.
[8] See https://www.bop.gov/coronavirus/.
[9] It is worth noting that, except for the proposed lowering of the age to be considered a COVID-19 risk factor from 65 to 50 years old, each of the proposed revisions to DOJ guidance was previously permissible as part of the BOP's "Secondary Review" analysis, and was not considered, on its own, a disqualifying or exclusionary factor in consideration for home confinement.
[10] Rich, J, Allen, S, Nimoh, M. We must release prisoners to lessen the spread of coronavirus. (March 17, 2020). https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/.

reducing total lives lost in the state by 25 percent."[11] Decarceration efforts, paired with basic CDC guideline compliance (e.g., testing, limited visitation), were strikingly effective in achieving reductions in viral transmission. A 9% reduction in the carceral population was associated with a 56% decrease in transmission.[12]

Unfortunately, without diminishing the BOP population, social distancing will remain impossible, in part due to overcrowding. According to a report from the Justice Department, the average federal prison is over capacity by 12 to 15 percent.[13] Attorney General William Barr, under the authority of the CARES Act, directed correctional facilities throughout the country to identify and release "all at risk inmates" who were eligible for home confinement, no longer posed a threat to the public, and were particularly vulnerable to COVID-19 based on CDC risk factors.[14]

As a result of the infectious nature of the virus, COVID-19 spreads quickly in closed spaces, a fact that the CDC took into account when listing residents of nursing homes and long-term care facilities to be "at high risk for severe illness from COVID-19."[15] The congregate nature and medically vulnerable state of individuals living in nursing homes are one of the main reasons for the CDC's special caution to nursing homes and the like. **In conditions remarkably worse than nursing homes, prisons are ideal breeding grounds for rapid spread of viruses and infection.** People in prisons are in constant close proximity to each other. Many are housed in dormitories, sharing the same living space, toilets, showers, and sinks with hundreds of other incarcerated individuals. Even where people are housed in individual cells, the ventilation is often inadequate, and bedsheets and clothes are washed infrequently.[16]

Prisons also have higher rates of catastrophic harm from COVID-19 due to the lack of access to rapid and/or emergent medical care. Prisons are not closed environments, and even with the lockdowns in place, there are vendors, staff, and corrections officers coming into the facilities and returning home who pose a considerable risk of spreading COVID-19.[17] Prison healthcare systems largely act like outpatient clinics, with minimum levels of emergency medical equipment—which means these facilities generally do not have appropriate life support machines required for COVID-19 victims, who frequently end up in profound respiratory distress.[18]

---

[11] Failure To Reduce Jail Population Is The Achilles Heel For The Efforts To Mitigate The Spread Of Covid-19 In The U.S. https://www.aclu.org/press-releases/new-model-shows-covid-19-death-toll-100000-higher-current-projections.

[12] https://www.nejm.org/doi/full/10.1056/NEJMp2100609

[13] U. S. Department of Justice FY 2020 Performance Budget. https://www.justice.gov/jmd/page/file/1143921/download.

[14] AG Barr Memorandum (April 2020).

[15] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html.

[16] Explainer: Prisons And Jails Are Particularly Vulnerable To Covid-19 Outbreaks: https://thejusticecollaborative.com/wpcontent/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf.

[17] An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues; https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html.

[18] This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19, https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19.

Further, those in prison who test positive for COVID-19 are often moved into solitary confinement. As a result of the harsh conditions surrounding solitary confinement, and the sheer terror it triggers in some incarcerated individuals, COVID-19 symptomatic persons are disincentivized from seeking care. This increases transmission and decreases emergency medical attention in prisons. The Marshall Project (a journalistic effort that has been tracking the spread of COVID-19 in prisons across America) discusses the alarming rate of death of prisoners from the beginning of the COVID-19 lockdown measures from March 2020 to present:

> *The first known COVID-19 death of a prisoner was in Georgia when Anthony Cheek died on March 26. Cheek, who was 49 years old, had been held in Lee State Prison near Albany, a hotspot for the disease. Since then, at least 2,313 other prisoners have died of coronavirus-related causes. The week of Jan. 26, the number of deaths reported rose 4 percent in a week. The coronavirus has killed prisoners in most systems*.[19]

Recommendation One: Time left on sentence

Before the CARES Act, home confinement was only available for people with 10 percent or six months remaining on their sentences, whichever was shorter. This criterion was expanded by the CARES Act where "emergency conditions" materially affect the functioning of prisons, as determined by the Attorney General. On April 3, 2020, the Attorney General found that COVID-19 emergency conditions were "materially affecting the functioning" of the Bureau of Prisons, and released guidance directing BOP to immediately assess all prisoners with COVID risk and "maximize" transfer to home confinement.

Today, we are continuing to hear from incarcerated individuals and families that due to guidance from the DOJ, the **BOP is limiting its use of home confinement and compassionate release to individuals with less than 50 percent of time remaining on their sentences and those who have no infractions within the last 12 months of confinement**, among other factors. Each of these immaterial factors are adoptions of earlier restrictions that no longer apply after the CARES Act.

In order to ensure the important individualized determination required in assessment for release, we believe there should be no categorical limitations—such as for age or offense type. If an individual is at great risk for severe disease from COVID and does not present any specific public safety risks, the BOP should not be constrained from releasing that individual based on irrelevant criteria, like the percentage of the sentence thus far served. Nevertheless, the BOP is applying numerous exclusions, and many of them are problematic. Guidance would be appropriate to ensure the goals of the program are met.

First, we are concerned about the limit on how much time remains on a sentence, which is excluding individuals who are elderly and/or have medical conditions that place them in great

[19] "Tracking the Spread of Coronavirus in Prisons" - https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons.

danger from consideration for this program. The Brennan Center, in a letter to the DOJ last year, explained it well: "Even under the best conditions, the final months or even years of imprisonment may not serve any legitimate deterrent or punitive purpose. With the outbreak of COVID-19, the diminishing marginal benefits of those final months of imprisonment must be contrasted with the increasing *risks* associated with prolonged incarceration. Every day behind bars means another day of elevated exposure to a potentially deadly disease."[20]

Accordingly, we ask that DOJ send updated guidance to BOP to no longer consider the amount of time served on the sentence as criteria for home confinement based on the CARES Act.

Recommendation Two: Older incarcerated individuals need special protection

During the initial stages of the COVID-19 restrictions in March 2020, the CDC set forth guidance that individuals aged 65 years or older are at "high risk" for developing serious complications from COVID-19. As research surrounding the virus has expanded, in December 2020, the CDC expanded its warnings regarding age to indicate that the risk for severe illness with COVID-19 **increases with age, with older adults at highest risk**:

> *… people in their 50s are at higher risk for severe illness than people in their 40s. Similarly, people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s*.[21]

Following the CDC's initial recommendations, the BOP has been categorically excluding people who are younger than 65 from consideration for these release programs. This policy is overly restrictive and not in keeping with the current CDC recommendations when it comes to age and high risk. Indeed, the first person to die in BOP custody from COVID-19 was 49 years old, and a large percentage of the BOP deaths have been of individuals less than 50 years old. In fact, CDC guidance relating to "older adults" shows that people ages 50-64 are four times more likely to be hospitalized and 30 times more likely to die from COVID infection.[22] A leading epidemiologist from Johns Hopkins University, Dr. Chris Beyrer, has stated under oath regarding COVID-19 that the "*fatality rate… varies significantly with advancing age, rising after age 50, and above 5% (1 in 20 cases) for those with pre-existing medical conditions including cardio-vascular disease, respiratory disease, diabetes, and immune compromise*."[23]

As trends in the United States (and globally) reveal, people of *any age*[24] can acquire the severe acute respiratory syndrome and catastrophic consequences associated with COVID-19 although

---

[20] Brennan Center for Justice, Letter to AG Barr: Expand the BOP's Response to COVID-19 and Help States Safely Reduce their Prison Populations, https://www.brennancenter.org/sites/default/files/2020-04/BC%20Letter%20to%20DOJ%20final_0.pdf.

[21] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html

[22] See CDC, Older Adults, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html

[23] Declaration of Chris Beyrer, MD, MPH, in Support of Persons in Detention and Detention Staff, COVID-19.

[24] The death of federal incarcerated individual Andrea Circle Bear, a 30-year-old pregnant incarcerated individual imprisoned on non-violent drug charges, who died shortly after giving birth to her baby on a ventilator from COVID-19, is prime example of how the virus can affect any age: https://www.nytimes.com/2020/05/03/opinion/andrea-circle-bear-coronavirus-prison.html

adults of middle age and older are most commonly affected.[25] However, **for prisoners over the age of 50, the risks steadily grow,**[26] due to weakened immune systems making them more vulnerable to infectious disease, increased likelihood of conditions such as heart disease and lung disease that weaken the body's ability to fight infectious disease, and an increased risk of developing acute respiratory syndrome, the acute lung injury that is a common cause of COVID-19 related deaths.[27]

According to a report released from the Osborne Association relating to the crisis of America's aging prison population, by 2030, people over 55 will make up one-third of the U.S. prison population, with an estimated 274,000 people aged 50 or older in U.S. state and federal prisons.[28] There is tremendous agreement among correctional experts, criminologists, and the National Institute of Corrections that 50 years of age is the appropriate point marking when a prisoner becomes "aging" or "elderly."[29] The report continues:

> [A]*lthough there is no commonly agreed upon age at which an incarcerated individual is "old"—definitions range from 50-65—and medical practitioners and corrections professionals agree that adverse life circumstances both during and prior to incarceration lead to accelerated aging.* ***Put simply, people who have been incarcerated very often have the physiological attributes of much older people***.[30]

As current studies and statistics indicate, the number of deaths from COVID-19 for individuals continues to rise with age. According to the most current data,[31] individuals aged 45-54 who died from COVID reached 16,760 individuals, compared with the 6,139 individuals in the 35-44 age group. This number sharply increases to 42,031 for individuals in the 55-64 age group. In fact, the risk of death if infected with COVID-19 in the age group of 50-59 is **nearly triple** that of the lower age group of 40-49. Indeed, Chairman Nadler and Crime Chairwoman Bass urged the release of individuals who are "at risk of getting sick," including individuals "who are 50 years old and older."[32]

Although we would prefer a policy of presumed release for any person who is at great risk of infection and possibly death who does not pose a credible public safety risk, it goes without

---

[25] National Vital Statistics System for Provisional Death Counts for Coronavirus Disease (COVID-19) last updated January 29, 2021. https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm

[26] Letter from Congress https://pressley.house.gov/media/press-releases/rep-pressley-and-senator-warren-call-trump-adopt-guidelines-decarceration

[27] https://www.weforum.org/agenda/2020/03/coronavirus-covid-19-elderly-older-people-health-risk/

[28] "The High Costs of Low Risk: The Crisis of America's Aging Prison Population" - http://www.osborneny.org/resources/the-high-costs-of-low-risk/the-high-cost-of-low-risk/

[29] ACLU. At America's expense: The Mass Incarceration of the Elderly. (June 2012). https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf.

[30] "The High Costs of Low Risk: The Crisis of America's Aging Prison Population" - http://www.osborneny.org/resources/the-high-costs-of-low-risk/the-high-cost-of-low-risk/.

[31] National Vital Statistics System for Provisional Death Counts for Coronavirus Disease (COVID-19) last updated January 29, 2021. https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm.

[32] Letter from House Judiciary Chairman Jerrold Nadler and House Judiciary Subcommittee on Crime Chairwoman Karen Bass, to the Attorney General, dated March 19, 2020.

saying that incarcerated individuals who have medical issues that make them vulnerable to COVID-19 should be considered for home confinement regardless of their age, even if they are under the age of 50. In addition, the current age criterion should be revised based on the latest research to apply to individuals age 50 and above, not just 65 and above.

Recommendation Three: Infractions should not be an automatic disqualification

The practice of automatically excluding individuals who have any infractions within the past 12 months, even minor ones, is problematic.[33] These exclusions especially do not make sense when the infractions were minor and did not cause any danger to anyone in the facility. Instead, we recommend that the BOP be directed not to automatically disqualify individuals based on infractions in their recent records. Minor or singular infractions should especially not cause people to be excluded from consideration. The DOJ should direct the BOP to revise the policy to allow for an individualized determination of the effect any recent infractions should have when assessing a person for release.

Recommendation Four: PATTERN scores should not limit application of the home confinement and compassionate release programs

At present, it seems that BOP is only considering the individuals assessed as "minimum risk" for home confinement under the CARES Act and for compassionate release under provisions of the First Step Act.[34] The PATTERN tool was not designed to determine who should be moved from BOP facilities to a place of relative safety during a pandemic. PATTERN scores and risk levels should have no bearing on CARES Act transfer decisions. Opening up access to consideration for these programs is a win-win proposition for public safety and public health.

Describing this policy, Senator Dick Durbin stated, "I was stunned to learn that many inmates are being denied home confinement, unless they are deemed, 'minimum risk' by the Justice Department's risk assessment tool. It's a formula, it's a mathematical formula, and it's known as PATTERN," citing what he perceived as "shocking" disparities in the calculation of an individual's PATTERN score.[35] Senator Cory Booker echoed these sentiments, stating "using PATTERN for this purpose is not appropriate, particularly when it is an incomplete tool that was designed for a different purpose altogether."[36]

OLC Issue

In the last weeks of the last Administration, the Justice Department's Office of Legal Counsel (OLC) issued a legal memo stating that they interpret the CARES Act to mean that people on home confinement should go back to prison after the Attorney General declares the emergency over. The opinion was poorly reasoned. It simply does not make sense that people who are

[33] The Incarcerated individual Discipline Program identifies four levels of prohibited acts based on severity: Greatest; High; Moderate; and Low.
[34] First Step Act (FSA) of 2018 (P.L. 115- 391)
[35] Senator Durbin's statements before the United States Senate Committee on the Judiciary Hearing, Examining Best Practices for Incarceration and Detention during COVID-19, June 2, 2020.
[36] Senator Booker's statements before the United States Senate Committee on the Judiciary Hearing, Examining Best Practices for Incarceration and Detention during COVID-19, June 2, 2020.

elderly and have serious health issues should be returned to prison. These are people who are following their conditions of home confinement and they should be able to remain on home confinement. The memo should be rescinded, or an Executive Order should be signed over-riding it.

Conclusion

The recommendations in this memo are just a few ways to bolster the important work of releasing people who are at heightened risk of COVID-19 infection and serious disease. People who live and work in prison facilities were not deliberately consigned to dangerous illness and even death, and the BOP and DOJ are responsible for maintaining safe conditions and appropriate medical treatment. These common-sense approaches to increasing safety in the prisons are warranted and modest.

We look forward to discussing these issues with you and Department of Justice officials. To further discuss these matters, please contact Kyle O'Dowd, Associate Executive Director for Policy for the National Association of Criminal Defense Lawyers (NACDL), at kodowd@nacdl.org and/or Rabbi Jacob Weiss, Executive Director of the Tzedek Association, at rabbiweiss@tzedekassociation.org.

Sincerely,

National Association of Criminal Defense Lawyers (NACDL)
Tzedek Association
Aleph Institute
American Civil Liberties Union (ACLU)
Brennan Center for Justice at NYU School of Law
Buried Alive Project
CAN-DO Foundation
The Center for HIV Law and Policy
Church of Scientology National Affairs Office
College and Community Fellowship
CURE (Citizens United for Rehabilitation of Errants)
Drug Policy Alliance
Due Process Institute
Federal Public and Community Defenders
First Step Alliance
Jewish Council for Public Affairs
Justice Action Network (JAN)
Justice Roundtable
The Leadership Conference on Civil and Human Rights
Legal Action Center (LAC)
Life for Pot
National Council of Churches (NCC)
National Council of Incarcerated and Formerly Incarcerated Women and Girls
National Incarceration Association (NIA)

North Carolina for Rational Sexual Offense Laws
StoptheDrugWar.org
Students for Sensible Drug Policy (SSDP)
The Sentencing Project
The Taifa Group
Union for Reform Judaism
Union of Orthodox Jewish Congregations of America (OU)
Wilson Center for Science and Justice