



**STATEMENT OF
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**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY**

**“Oversight of the Bureau of Prisons”
February 2, 2022**

Chairwoman Jackson Lee, Ranking Member Biggs, and members of the subcommittee: Thank you for the opportunity to submit a statement for the record for this critical hearing. On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 230 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, we thank you for holding this hearing on “Oversight of the Federal Bureau of Prisons.” We write to express several key concerns related to the Federal Bureau of Prisons’ (BOP) duties to adequately respond to the COVID-19 pandemic and implement provisions related to the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the release of individuals from facilities.

The Bureau of Prisons Has Failed to Protect Individuals in Facilities and Curb the Spread of COVID-19 in Prisons

The death and trauma caused by the COVID-19 pandemic has left few communities unscathed. Indeed, as of February 2, 2022, the Bureau of Prisons reports that at least 284 people have died in its custody due to the virus.¹ Since the onset of the pandemic, more than 41,000 people in federal prisons and detention, residential reentry centers, and in home confinement have tested positive for COVID-19.² Countless complaints, lawsuits, and personal accounts sadly point to severe inadequacies in the bureau’s response, causing needless pain, illness, and death. These unprecedented circumstances offer an opportunity for the Bureau of Prisons to reevaluate its traditional utilization of early release mechanisms in order to protect public health, with additional benefits and lessons for advancing justice.

The BOP has failed to protect the individuals housed in federal facilities and curb the spread of COVID-19 in prisons. This is particularly troubling as incarcerated individuals are much more likely to be people with disabilities or to have preexisting health conditions, making them exceptionally vulnerable due to

¹ “COVID-19 Coronavirus.” *Federal Bureau of Prisons*. Accessed Feb. 2, 2022. <https://www.bop.gov/coronavirus/>.

² Ibid.

overcrowding, unsanitary prison conditions, and a lack of access to quality health care services.³ Moreover, the emergence of new strains of the virus that are potentially more contagious and deadly means that the need to protect high-risk individuals remains as urgent as ever.⁴

Although the overall BOP population has dropped, as the pandemic continues to rage, many individuals remain crowded together in institutions that are incapable of delivering adequate medical care in the best of times.⁵ In general, the mortality rate among incarcerated individuals is more than twice that of the general population when adjusted for age, sex, and race/ethnicity.⁶ Additionally, infection and death rates have been exacerbated due to misguided attempts to mitigate the spread through increased use of solitary confinement in lieu of medical isolation.⁷ Individuals in prison are nearly five times more likely to become infected and more than two times more likely to die from COVID than the general population, and have other risk factors that put them at increased risk of complications.⁸ For example, approximately 20 percent of the federal prison population is over age 50⁹ and, according to the BOP, approximately 45 percent have multiple chronic health conditions.¹⁰ Moreover, historic patterns of over-policing and the overcriminalization of Black and Brown individuals has created a prison population that overrepresents communities of color and exacerbates the disproportionate impact of the coronavirus on these communities more broadly.¹¹ Depopulating prisons to address the coronavirus pandemic is not only a public health issue and a justice reform issue, but a racial justice issue as well.

³ Vallas, Rebecca. *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons*. Center for American Progress. July 2016. https://cdn.americanprogress.org/wp-content/uploads/2016/07/18000151/2CriminalJusticeDisability-report.pdf?_ga=2.163727420.2027820979.1614090622-1709328763.1614090622.

⁴ Centers for Disease Control and Prevention. "What You Need to Know About Variants." *Cdc.gov*. February 2022. <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>.

⁵ Florko, Nicholas. "Despite Biden's big promises and a far better understanding of the virus, Covid-19 is still raging through the nation's prisons." *Stat News*. Feb. 2, 2022. <https://www.statnews.com/2022/02/02/biden-promises-covid19-prisons/>.

⁶ Schnepel, K. *COVID-19 in U.S. State and Federal Prisons*. National Commission on COVID-19 and Criminal Justice. (Sept. 2020). –need new cites

https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/FINAL_Schnepel_Design.pdf

⁷ "Solitary Confinement is Never the Answer: A Special Report on the COVID-19 Pandemic in Prisons and Jails, the Use of Solitary Confinement, and Best Practices for Saving the Lives of Incarcerated People and Correctional Staff." *Unlock the Box*. June 2020.

<https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf>.

⁸ Marquez, N., Parish, K., Ward, J. A. Saloner, B., & Dolovich, S. "COVID-19 Incidence and Mortality in Federal and State Prisons Compared With the US Population, April 5, 2020, to April 3, 2021." *JAMA*. 326(18):1865-1867. 2021. <https://jamanetwork.com/journals/jama/fullarticle/2784944>.

⁹ "Inmate Age." *Federal Bureau of Prisons*. Accessed Feb. 2, 2022. https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

¹⁰ Bureau of Prisons. *Federal Prison System FY 2022 Performance Budget Congressional Submission*. 2021. Pg. 28. <https://www.justice.gov/jmd/page/file/1398306/download>. ("Approximately 45 percent of offenders have multiple chronic conditions that, despite management with medications and other therapeutic interventions, will progress and may result in serious complications.").

¹¹ Reinhart, R. and Chen, D. *Incarceration and Its Disseminations: COVID-19 Pandemic Lessons From Chicago's Cook County Jail*. HEALTH AFFAIRS. (June 4, 2020). https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.00652?utm_campaign=covid19fasttrack&utm_medium=press&utm_content=reinhart&utm_source=mediaadvisory.

As of February 2, 2022, according to BOP, there were 7,738 coronavirus cases among the approximately 134,896 individuals in BOP custody along with 1,996 cases among federal correctional facility staff.¹² Additionally, 47,211 individuals in BOP custody and 9,793 staff members have recovered from COVID.¹³ Moreover, BOP claims that 284 people in federal custody and seven staff have died.¹⁴ As this committee heard from Professor Alison K. Guernsey a few weeks ago, BOP seems to be underreporting COVID deaths and infection rates to the public, so these numbers may not be entirely accurate.¹⁵ Courts across the country have noted that the BOP has frequently undertreated or ignored COVID-related symptoms,¹⁶ and a lawsuit filed on behalf of individuals incarcerated at North Carolina's Butner Correctional Complex, which includes a medical center, has alleged that when people have gotten sick with COVID-19, "treatment is almost nonexistent" and hospital transfers do not occur until individuals "are already experiencing respiratory failure."¹⁷ By not providing even the bare minimum of appropriate medical care to one of its most vulnerable populations, the United States is failing its duty to maintain safe, secure, and humane detention facilities.

The Bureau of Prisons Has Failed to Implement Key Provisions of the CARES Act

Congress granted the Department of Justice authority in 2020 under the CARES Act to reduce the federal prison population and alleviate crowding by lengthening the period a person can spend on home confinement.¹⁸ Then-Attorney General William Barr severely limited the effect of this new authority, however, by creating a long list of eligibility criteria, including that individuals must have a certain PATTERN risk score, have completed at least 50 percent of their sentence, and reside in a low- or minimum-security facility. Unfortunately, an updated memorandum issued in April 2021¹⁹ only slightly modified the long list of eligibility criteria, despite criminological evidence that if released many more incarcerated people would not pose an unreasonable public safety risk. For example, the department's criteria ignore research that finds older people in prison have very low rates of recidivism upon release regardless of their offense type or history of violent behavior.²⁰ Known as "aging out of crime," this phenomenon has been long established and should be considered in decisions to determine whether or not

¹² "COVID-19 Coronavirus." *Federal Bureau of Prisons*. Accessed Feb. 2, 2022.

<https://www.bop.gov/coronavirus/>.

¹³ Ibid.

¹⁴ Ibid. This number includes deaths in privately-managed prisons, which are reported separately on BOP's website.

¹⁵ Testimony of Alison K. Guernsey. U.S. House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security: The First Step Act, The Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons?

<https://docs.house.gov/meetings/JU/JU08/20220121/114349/HHRG-117-JU08-Wstate-GuernseyA-20220121.pdf>.

¹⁶ See, e.g., *United States v. Cassidy*, 17-CR-1165 (W.D.N.Y. May 13, 2020); *United States v. Cassidy*, CRIMINAL ACTION NO. 2:18cr95-MHT (WO) (M.D. Ala. Jun. 4, 2020).

¹⁷ Complaint, *Hallinan et al v. Scarantino et al*, 5:2020ct03333 (2020).

¹⁸ P.L. 116-136. Sec. 12003.

¹⁹ "Memorandum for Chief Executive Officers." *Federal Bureau of Prisons*. April 13, 2021.

https://www.fd.org/sites/default/files/news/2021.4.13 - bop_home_confinement_cares_memo.pdf.

²⁰ National Research Council. "The Growth of Incarceration in the United States: Exploring Causes and Consequences." 2014. <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

an individual presents a threat to public safety and is suitable for transfers. According to BOP data, approximately 20 percent of its population is age 51 or older.²¹ This population also represents a cohort of individuals most at risk of serious illness if infected by the virus. The data show that releasing individuals has had no deleterious effect on public safety: According to Director Carvajal, of the 9,000 individuals transferred to home confinement under the CARES Act, only 320 have been returned to federal custody due to violations, and only eight of those individuals committed new crimes.²² BOP must act to expand home confinement, loosening the strict eligibility standards and safeguarding the health and wellness of those in BOP custody as well as that of BOP staff.

The Bureau of Prisons Inappropriately Utilizes PATTERN as a Factor Determining Priority Treatment in Transfer and Release

We also take issue with the BOP's failure associated with the implementation and use of PATTERN — a risk assessment system built as a result of the First Step Act — as a factor in determining which currently incarcerated individuals may receive “priority treatment” in transfer and release decisions. On March 26, 2020, as mentioned above, then-Attorney General William Barr issued a memorandum directing the BOP to transfer some vulnerable people from prisons to home confinement in the name of minimizing their exposure to COVID-19.²³ The restrictions identified in this memo for home confinement eligibility were extremely troubling: The memorandum issued guidance that the BOP should rely upon PATTERN, which numerous civil rights and legal organizations have previously warned is problematic and likely to perpetuate racial disparities in decision-making.²⁴ The directive to the BOP regarding PATTERN's use for home confinement decisions during an emergency health crisis was not its intended use, and it limits transfer prioritization to those assessed as “minimum risk.” The use of a tool like PATTERN to make life or death decisions is alarming and serves to only attempt to excuse leaving tens of thousands of people — mainly people of color — unprotected and at the mercy of a deadly pandemic.

The Department of Justice has advanced PATTERN as a new gender-specific risk and needs assessment tool that fulfills the First Step Act's statutory requirement to assign a “recidivism score” to each incarcerated person that predicts their risk of committing a new crime within three years of release.²⁵ In May 2018, The Leadership Conference urged the House Judiciary Committee to vote “No” on the First Step Act because we feared its lack of transformative “front end” reform would stall our justice system in the broken status quo.²⁶ Further, we criticized the bill for “using risk assessment tools in an

²¹ “Inmate Age.” *Federal Bureau of Prisons*. Accessed Dec. 13, 2021.

https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

²² Testimony of BOP Director Michael Carvajal. House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Feb. 3, 2022.

²³ Barr, William. Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic. *United States Department of Justice*. March 26, 2020. <https://www.justice.gov/file/1262731/download>.

²⁴ The Leadership Conference on Civil and Human Rights. “Comment Letter to Department of Justice on PATTERN First Step Act.” <https://civilrights.org/resource/comment-letter-to-department-of-justice-on-pattern-first-step-act/>.

²⁵ 18 U.S.C. § 3632(a).

²⁶ Letter from The Leadership Conference on Civil & Human Rights. “Vote “No” on The FIRST STEP Act.” May 8, 2018. <https://civilrights.org/resource/voteno-first-step-act/>.

unconventional manner [because they] are unreliable and exacerbate racial and socioeconomic disparities.”²⁷ After members of Congress made key changes to move the bill toward meaningful reform, we ultimately supported the legislation while continuing to articulate concerns regarding the use of a “risk and needs assessment tool.”²⁸

It seems that our fears have been substantiated. BOP continues to use PATTERN to make release decisions, even though experts have cautioned that it is scientifically unverified and built on historically biased data resulting in bias against Black people, Latino people, poor people, unhoused people, and people with mental illness. In fact, a January 2021 report by the National Institute of Justice reveals that the Department of Justice was unable to revalidate PATTERN due to errors and inconsistencies — meaning the Bureau of Prisons is using an unvalidated risk-assessment tool to make life and death decisions during a global pandemic.²⁹ The Department of Justice’s development of this tool has been opaque, undermining accountability and frustrating the ability of outside researchers and advocates to effectively test tools and advocate for those who are incarcerated. BOP should abandon the use of PATTERN for any form of release recommendation or decision-making, now and in the future. Given the unprecedented and immediate risk that COVID-19 poses to people in prison and prison workers, we categorically reject the use of PATTERN or any other recidivism risk assessment tool to excuse leaving vulnerable people incarcerated.

The Bureau of Prisons Must Employ Expanded Use of Compassionate Release

Despite the intensity of the pandemic, the BOP has continued to deny Compassionate Release/Reduction in Sentence (RIS) requests at alarming rates and has issued decisions with complete opacity. In the first year following the First Step Act’s enactment, the BOP director granted only 55 compassionate release requests (or 3 percent of the requests filed), without tracking reasons for denials.³⁰ In calendar year 2020, as COVID-19 tore through the Bureau of Prisons, BOP’s director approved only 43 RIS requests; in 2021, as of the release of BOP’s FY22 budget submission, it had approved only nine such requests.³¹

It is deeply concerning that the BOP’s approval rate has decreased during the COVID-19 pandemic, despite the fact that national and international health organizations promptly raised the alarm about the uniquely deadly impact the virus would have on correctional facilities. In the first 13 months of the pandemic, the BOP received more than 30,969 compassionate release requests, yet it approved only 36

²⁷ Ibid.

²⁸ See “The ACLU and The Leadership Conference Urge Members of Congress to Support S. 756, the FIRST STEP Act.” *The Leadership Conference on Civil and Human Rights*. Dec. 19, 2018. <https://civilrights.org/resource/the-aclu-and-the-leadership-conference-urge-members-of-congress-to-support-s-756-the-first-step-act/>.

²⁹ “2020 Review and Revalidation of the First Step Act Risk Assessment Tool.” *National Institute of Justice*. Jan. 2021. <https://www.ojp.gov/pdffiles1/nij/256084.pdf>.

³⁰ “Federal Prison Officials Granted Only 36 of 31,000 Compassionate Release Requests During Pandemic.” *Equal Justice Initiative*. June 6, 2021. <https://eji.org/news/federal-prison-officials-granted-only-36-of-31000-compassionate-release-requests-during-pandemic/>.

³¹ Bureau of Prisons. *Federal Prison System FY 2022 Performance Budget Congressional Submission*. 2021. Pg. 28. <https://www.justice.gov/jmd/page/file/1398306/download>.

cases, or 0.1 percent.³² These shortcomings have had tragic implications: at least 35 of those who have died in BOP custody were waiting for a decision on a compassionate release petition.³³

If a global pandemic that is disproportionately deadly for the elderly and medically vulnerable does not qualify as an “extraordinary and compelling circumstance” for compassionate release, it is difficult to imagine what would qualify under the BOP’s criteria. Indeed, federal prosecutors have followed BOP’s lead by opposing the majority of petitions for compassion release.³⁴ This must change. We urge the BOP to reform its harsh and unjustifiable approach to compassionate release petitions from people in federal custody now and in the future. BOP must bring compassionate release motions for medically vulnerable individuals and DOJ should provide guidance to line prosecutors on how to better support those compassionate release motions filed directly by medically vulnerable individuals.

BOP Must Ensure That Its Rule Relating to Individuals on CARES Act Home Confinement is Fair and Just

On December 21, 2021, Attorney General Merrick Garland announced³⁵ that DOJ would be rescinding the January 2021 Office of Legal Counsel memo³⁶ that determined that thousands of people who are currently serving sentences on home confinement through a provision of the CARES Act would need to return to federal custody after the termination of the federal COVID-19 emergency. The attorney general further announced that the department would embark on a rulemaking process to ensure that those who have “made rehabilitative progress and complied with the conditions of home confinement, and who in the interests of justice should be given an opportunity to continue transitioning back to society, are not unnecessarily returned to prison.”³⁷

We celebrated this reversal of the Trump-era memo,³⁸ but remain concerned about the rulemaking process, especially given the December 10, 2021 BOP memo that showed the agency would instead be focusing on sentence length, rather than compliance and rehabilitation, in deciding who would be re-imprisoned.³⁹ While this memo was written before the attorney general’s announcement, we remain concerned that BOP will advocate for sentence length to be a major factor in re-imprisonment

³² Blakinger, Keri & Neff, Joseph. “31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.” *The Marshall Project*. June 11, 2021. <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36>.

³³ Ibid.

³⁴ Ibid.

³⁵ “Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency.” Office of Legal Counsel. Dec. 21, 2021. <https://www.justice.gov/olc/file/1457926/download>.

³⁶ Mascott, Jennifer. “Memorandum Opinion for General Counsel, Federal Bureau of Prisons: Home Confinement of Federal Prisoners After the COVID-19 Emergency.” Jan. 15, 2021. <https://www.justice.gov/sites/default/files/opinions/attachments/2021/01/17/2021-01-15-home-confine.pdf>.

³⁷ Ibid.

³⁸ “Department of Justice Corrects Course with New Guidance on Home Confinement.” *The Leadership Conference on Civil and Human Rights*. Dec. 21, 2021. <https://civilrights.org/2021/12/21/departments-of-justice-corrects-course-with-new-guidance-on-home-confinement/>.

³⁹ Hyle, Ken. “Memorandum for Christopher H. Schroeder: Views Regarding OLC Opinion “Home Confinement of Federal Prisoners After the COVID-19 Emergency” dated January 15, 2021.” *Bureau of Prisons Office of the General Counsel*. Dec. 10, 2021. <https://www.aclu.org/memorandum-christopher-h-schroeder>.

determinations. In the memo, BOP notes that if an individual has a longer time left on their sentences, that longer time will “provide the agency a more meaningful opportunity to provide programming and services to the offender in a secure facility.”⁴⁰ The assertion that an individual would benefit more from being incarcerated than remaining with their family and community (and receiving services while still in the community) is highly disturbing. There is no reason that BOP should return an individual to prison simply because of supposed services available in BOP custody, especially because the programming and services available in federal prison “varies wildly.”⁴¹ The length of sentence remaining for an individual who has engaged in rehabilitation and has remained in compliance with rules should not be a significant factor in a reincarceration decision. We will be closely monitoring the rulemaking process to ensure the final rule is fair, just, and equitable.

Conclusion

We urge this body to take into strong consideration the concerns with the Federal Bureau of Prisons expressed herein and encourage the Bureau of Prisons to utilize its existing and expanded authority under the CARES Act to adequately protect individuals from the COVID-19 pandemic. This includes transferring as many people as possible into home confinement, without any of the limitations articulated in previous guidance.

We recognize that Director Carvajal will soon step down from leadership of BOP. We hope that the next BOP director will be respectful of human rights and lead BOP into a new era of better care for those in federal custody and for BOP staff. We encourage this body to continue its active oversight of BOP to ensure the bureau is meeting the needs of those in its care.

⁴⁰ Ibid. Pg. 21.

⁴¹ Morton, Jessica, and Spence, Samara. “Home Rule.” *Inquest*. Feb. 4, 2022. <https://inquest.org/home-rule/>.