



**Written Testimony of the American Civil Liberties Union
Before the President’s Commission on Law Enforcement and the Administration of Justice**

May 27, 2020

I. A Commission for Law Enforcement “At Its Core”

On behalf of the American Civil Liberties Union and its more than four million members, activists, and supporters throughout the country, we submit this written statement to express outrage at the continued convening of the U.S. Department of Justice (DOJ) led Presidential Commission on Law Enforcement and the Administration of Justice. As the ACLU and coalition organizations have previously conveyed,¹ we are extremely concerned that this body is little more than a sham commission formed only for the purposes of advancing a “Thin Blue Line” law and order agenda.² Upon the Commission’s establishment, Attorney General William Barr said, “[a]t its core, this Commission is for law enforcement” and cited “a continued lack of trust and respect for law enforcement” as a Commission focal point.³

The Commission and its working groups are led exclusively by law enforcement professionals, which limits the perspective and focus of the Commission.⁴ Of the 112 people participating in the Commission working groups, only five are not law enforcement professionals.⁵ We are also concerned that the Commission changed the deadline for submitting public statements from May 31, 2020, to March 31, 2020,⁶ in the midst of the COVID-19 pandemic, when interested stakeholders are adjusting to states of emergency and otherwise responding to a crisis. The March 31 deadline, which has since expired, certainly reduced the number of submissions to the Commission, further limiting the focus and perspective here. The Commission is otherwise not accessible to the public, with its hearings taking place behind closed doors.

¹ ACLU Comments to the President’s Commission on Law Enforcement and the Administration of Justice (Mar. 31, 2020), <https://www.aclu.org/letter/aclu-submits-comments-presidents-commission-law-enforcement-and-administration-justice>.

² Sonam Sheth, *AG Barr said there must be ‘zero tolerance for resisting police’ and went after ‘social-justice reformers’ in a heated speech to the US’s largest law-enforcement organization*, BUS. INSIDER (Aug. 13, 2019), <https://www.businessinsider.com/william-barr-zero-tolerance-fraternal-order-police-speech-2019-8>.

³ DEPARTMENT OF JUSTICE, PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, STATEMENT FROM ATTORNEY GENERAL BARR ON THE ESTABLISHMENT OF THE PRESIDENTIAL COMMISSION (Jan. 22, 2020), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice?utm_medium=email&utm_source=govdelivery.

⁴ DEPARTMENT OF JUSTICE, ATTORNEY GENERAL WILLIAM P. BARR ANNOUNCES THE ESTABLISHMENT OF THE PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE (Jan. 22, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-establishment-presidential-commission-law>.

⁵ Tom Jackman, *NAACP Legal Defense Fund sues national policing commission*, WASH. POST (May 8, 2020), <https://www.washingtonpost.com/crime-law/2020/05/08/naacp-legal-defense-fund-sues-national-policing-commission/>.

⁶ *Id.*

Given the Commission’s approach, the ACLU is particularly concerned with its (1) failure to address police violence, which disproportionately impacts people and communities of color, and coincided with several high profile fatal police shootings; (2) disregard for the COVID-19 pandemic, with a decision to move the Commission forward business as usual without addressing mass incarceration as the cause of virus spread by the thousands in jails and prisons; and (3) attacks on reform oriented prosecutors, significant actors in the criminal legal system who understand that justice and public safety can be achieved without harsh, punitive approaches.

II. Commission Fails to Address Police Violence, Bias, and COVID-19 Practices

It is no coincidence that this Commission was formed as the country continues national discourse around fatal police shootings and police accountability. According to the Washington Post, 1,000 people are killed by police each year.⁷ Black males are almost three times as likely, and Latino males are almost twice as likely, to be killed by police use of force as are white males.⁸ It is estimated that half of the people killed by police have a physical or psychiatric disability at the time they are killed.⁹ The overwhelming majority of law enforcement officers are never charged, let alone convicted, for using excessive force against community members.¹⁰

A. Fatal Police Shootings Continue in Wake of Commission and COVID-19

Even in the wake of a pandemic, the dynamic between law enforcement and Black and Brown people remains soured. Black men have been profiled and brutalized by police for both wearing masks¹¹ and not wearing masks,¹² for example.¹³ Also, fatal police shootings continue to occur at the same rate as they did during the first half of 2019.¹⁴ As of March 30, a total of 228 people have been fatally shot by police and 31 of those killed were Black.¹⁵ Since the Commission was launched in the beginning of 2020, there have been several high profile fatal police shootings.

⁷ 2019 POLICE SHOOTINGS DATABASE, WASH. POST, <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> (last visited May 20, 2020).

⁸ James Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by US Police, 2010–2014*, AMERICAN JOURNAL OF PUBLIC HEALTH, Jan. 11, 2017, <http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303575>.

⁹ Marti Hause and Ari Melber, *Half of People Killed by Police Have a Disability: Report*, ABC NEWS, (Dec. 1, 2015), <https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371>.

¹⁰ See MAPPING POLICE VIOLENCE, POLICE VIOLENCE MAP, <https://mappingpoliceviolence.org> (last visited May 20, 2020) (finding that 99% of cases in 2015 have not resulted in any officer(s) being convicted of a crime); See also Philip Stinson, *Cops shoot and kill someone about 1,000 times a year. Few are prosecuted. What can be done?*, LA TIMES (Dec. 15, 2016).

¹¹ Stephanie Toone, *Black men wearing COVID-19 masks at store reportedly booted out for not removing*, THE ATLANTA J & CONST. (Apr. 7, 2020), <https://www.ajc.com/news/black-men-wearing-covid-masks-store-reportedly-booted-out-for-not-removing/zqrswyCl6Sn4DjxpXz0FjN/>.

¹² Mark Osborne, *Philadelphia police drag man without mask off public bus, prompting policy change*, ABC NEWS (Apr. 11, 2020), <https://abcnews.go.com/US/philadelphia-police-drag-man-mask-off-public-bus/story?id=70104383>.

¹³ Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, NY TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html>.

¹⁴ 2019 POLICE SHOOTINGS DATABASE, WASH. POST, <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> (last visited May 20, 2020).

¹⁵ Statista Research Department, *People shot to death by U.S. police, by race 2017-2020*, STATISTA (Mar. 31, 2020), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/>.

On January 26, in Prince George’s County Maryland, William Green, a 43-year-old Black man, sat in the front seat of a police cruiser with his hands handcuffed behind his back when he was shot seven times and killed by an officer.¹⁶ On February 23, Ahmaud Arbery, a 25 year-old Black man who was outside jogging in Glynn County, Georgia was chased down by a vehicle and then shot and killed by two white men, one of them a former police officer who was decertified for failing to complete use of force training. On March 13, Breonna Taylor, a 26-year-old Black woman and EMT on the frontlines of the pandemic, was killed in her apartment after she was shot at least eight times by Louisville police officers who were executing a “no-knock” drug warrant and entered the home unannounced.¹⁷ On May 6, Dreasjon “Sean” Reed, a 21-year-old Black man, was shot and killed by Indianapolis Metropolitan (IMPD) police. After Dreasjon was killed, an IMPD officer was captured on the video saying, “Think it’s going to be a closed casket, homie.”¹⁸ This past Monday, on May 25, George Floyd, a 46 year-old Black man, was killed as he told the Minneapolis police officer who was suffocating him, “I can’t breathe.”¹⁹

B. This Administration and DOJ Instigate Unconstitutional Policing

In light of continued police violence, this Commission should consider the Administration and DOJ’s indifference around police brutality in the United States. It should also look at the federal government’s failure to adequately respond to police killings and other violence, and in some instances, even instigating such violence. On Friday, January 20, 2017, Inauguration Day, the White House published an issue statement advising the country that “[t]he Trump Administration will be a law and order administration.”²⁰ The brief states that “[t]he dangerous anti-police atmosphere in America is wrong” and promises to “end it.”²¹

On April 17, 2017, then Attorney General Jeff Sessions published an op-ed, calling for “proactive policing” and ending “harmful federal intrusion in the daily work of local police.”²² A few months later, President Donald Trump effectively endorsed police brutality, telling an audience of law enforcement officials they should not “be too nice” when transporting suspects, and should let arrestees hit their heads on police car doors.²³ And last year, on December 3,

¹⁶ Ryan W. Miller, *Family of handcuffed man fatally shot expresses sorrow, relief after officer charged*, USA TODAY (Jan. 29, 2020), <https://www.usatoday.com/story/news/nation/2020/01/29/william-green-family-relieved-prince-georges-maryland-michael-owen-charged/4609709002/>.

¹⁷ Tessa Duvall & Darcy Costello, *Louisville police make major changes to policies in the wake of Breonna Taylor’s death*, COURIER J. (May 18, 2020), <https://www.usatoday.com/story/news/nation/2020/05/18/breonna-taylor-shooting-louisville-police-make-changes-policies/5216174002/>.

¹⁸ Nicholas Bogel-Burroughs, *Indianapolis Police Face Growing Questions After Killing 3 People in 8 Hours*, NY TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/us/sean-reed-indianapolis-shooting.html>.

¹⁹ Audra D. S. Burch & John Eligon, *Bystander Videos Are Policing the Police by Putting Deaths on Display*, NY TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html>.

²⁰ THE WHITE HOUSE, *STANDING UP FOR OUR LAW ENFORCEMENT COMMUNITY* (Jan. 20, 2017).

²¹ *Id.*

²² Jeff Sessions, *Atty. Gen. Jeff Sessions, Avoid harmful federal intrusion*, USA TODAY (Apr. 17, 2017), <https://www.usatoday.com/story/opinion/2017/04/17/jeff-sessions-avoid-harmful-federal-intrusion-editorialsdebates/100579848/>.

²³ Mark Berman, *Trump tells police not to worry about injuring suspects during arrests*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuringsuspects-during-arrests/?tid=a_inl&utm_term=.02af32494e08. President Trump has also signed Executive

Attorney General William Barr said communities “have to start showing, more than they do, the respect and support that law enforcement deserves. And if communities don’t give that support and respect, they may find themselves without the police protection they need.”²⁴

C. Commission Must Recommend Police Oversight Generally and During Pandemic

This rhetoric from the Administration is consistent with DOJ’s refusal to investigate misconduct and systemic unconstitutional policing by departments.²⁵ The Commission must suggest that the Administration and DOJ reverse course here and actively enforce federal laws providing for police oversight and accountability. These laws include 42 U.S.C. § 14141, which gives DOJ the authority to investigate police departments with a pattern or practice of police misconduct, and 18 U.S.C. §§ 241 and 242, which require DOJ to prosecute those, including law enforcement, who deprive a person of his or her civil rights and liberties.²⁶ Enforcement of these laws is critical to reforming the police departments that are the most persistent abusers of the communities they are supposed to protect. DOJ has a critical role to play to ensure that law enforcement across the country are following the Constitution.

The Commission must also acknowledge that COVID-19 requires a change in police practices and provide recommendations that will reduce the spread of the virus and ensure public safety. Police must drastically limit the number of people who are arrested and then detained, which puts people in close proximity to one another and in spaces where maintaining hygiene becomes difficult. Police should cease arrests for low-level offenses and issue citations or desk-tickets in lieu of other arrests so that people can return home, balancing the need for arrest with the overwhelming public safety concerns presented by coronavirus. Such action also limits the risk of bringing someone who may have the virus into a station and potentially infecting other personnel or first responders.²⁷

III. Commission Pushes Dangerous “Rogue Prosecutor” Narrative

The Commission’s charge to study the diminished respect for law enforcement and the effects of the under-enforcement of criminal law on public safety and perceptions of police is particularly concerning. This framing implies the existence of a widespread, arbitrary lack of respect for law enforcement, echoing statements made by Attorney General Barr about elected prosecutors who no longer embrace an outdated and ineffective tough-on-crime approach. As the ACLU commented upon the Commission’s formation in January, “with a mandate to look at ‘refusals by State and local prosecutors to enforce laws or prosecute categories of crimes’ and

Orders directing the Department of Justice to expand the criminal code and establish “new mandatory minimum sentences for existing crimes of violence against law enforcement.

²⁴ Jennifer Rubin, *What to do with an attorney general who disdains justice*, WASH. POST (Dec. 5, 2019), <https://www.washingtonpost.com/opinions/2019/12/05/bar-should-hold-barr-accountable/>.

²⁵ See Justice Roundtable USSCR Comments on Policing, <https://www.aclu.org/letter/usscr-comments-policing> (last visited May 20, 2020).

²⁶ DEPARTMENT OF JUSTICE, ADDRESSING POLICE MISCONDUCT LAWS ENFORCED BY THE DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> (last visited May 20, 2020).

²⁷ Letter from the ACLU to State and Local Officials on COVID-19 and the Criminal Justice System (March 16, 2020), <https://www.aclu.org/letter/aclu-letter-state-and-local-officials-covid-19-and-criminal-justice-system>.

the fact that the commission leadership does not reflect impacted communities, civil rights organizations, or reform-oriented prosecutors, it becomes clear that this is an attempt by the Attorney General to advance a one-sided agenda.”²⁸

A. Attacks on Prosecutors Inconsistent with Public Opinion and Public Safety

The Administration has repeatedly pushed a false, dangerous “rogue prosecutor” narrative. On August 12, 2019, Attorney General Barr assailed prosecutors across the country who he believes undercut police and refuse to enforce the law – warning that their cities will see more crime as a result. On February 10, 2020, he again attacked these elected officials – calling them “rogue” and claiming their policies jeopardize the public safety. The politics of mass incarceration have changed; fear-mongering rhetoric no longer resonates with the public the ways that it did in the ‘80s and ‘90s.²⁹

Polls consistently show that Americans on both the left and right prefer smart justice policies: Three-quarters of voters say they would vote for a candidate committed to criminal justice reform; eighty-nine percent of voters support prosecutors who want to cut mass incarceration.³⁰ This DOJ also suggests that reform policies negatively impact public safety, but decades of data show that, actually, the opposite is true: Between 2007 and 2017, 34 states have reduced both incarceration and crime.³¹ However, this Administration wants the United States to continue imprisoning its people at rates much higher than comparable countries.

B. Barr Directs U.S. Prosecutors to Conduct Business As Usual During Pandemic

Attorney General Barr advised U.S. Attorneys that DOJ’s work “must and will continue.”³² Though U.S. Attorneys were told that COVID-19 should be a consideration when seeking to detain someone pretrial, most are failing to pursue responsible release under the Bail Reform Act.³³ During the pandemic, this undermines efforts to reduce jail populations where people are presumed innocent because they have not been convicted of a crime.

²⁸ ACLU, Statement on Attorney General Barr’s Naming of Commissioners to Trump Administration’s Law Enforcement Commission, Jan. 23, 2020, available at <https://www.aclu.org/press-releases/aclu-statement-attorney-general-barrs-naming-commissioners-trump-administrations-law>.

²⁹ Udi Ofer, William Barr is Stuck in the ‘90s — But Americans Have Moved Forward When it Comes to Criminal Justice Reform, Aug. 14, 2019, available at <https://www.aclu.org/blog/criminal-law-reform/reforming-police/william-barr-stuck-90s-americans-have-moved-forward-when>.

³⁰ David Binder Research, Voter Opinion Towards Prosecutors Prior to 2018 Elections, Dec. 12, 2017, available at <https://www.aclu.org/fact-sheet/new-polling-voters-opinions-towards-prosecutors>.

³¹ Cameron Kimble & Ames Grawert, Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem, Brennan Center for Justice, Aug. 6, 2019, available at <https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem>.

³² Matt Zapotosky, Justice Department’s coronavirus considerations rattle civil liberties advocates, Wash. Po., Mar. 23, 2020, available at https://www.washingtonpost.com/national-security/justice-department-coronavirus-laws/2020/03/23/6b860018-6d01-11ea-b148-e4ce3fbd85b5_story.html.

³³ Josh Gerstein, *Barr says bail decisions should consider virus risks*, POLITICO (April 6, 2020), <https://www.politico.com/news/2020/04/06/william-barr-attorney-general-coronavirus-169232>.

In Louisiana, federal prosecutors opposed – albeit unsuccessfully – the release of a man at the Oakdale prison who has chronic asthma and who had 14 months left on his 15-year sentence. Prosecutors argued that those incarcerated at Oakdale were receiving sufficient care, even after COVID-19 had killed five people there.³⁴ U.S. prosecutors also opposed the release of a 55-year-old man at the federal prison in Butner, North Carolina who had high blood pressure, high cholesterol, sleep apnea, and hypertension, court records show. Prosecutors said the man was not currently ill and had more than 30 days left on his sentence.³⁵

C. Commission Must Recommend Prosecutors Use Discretion Differently

In response to COVID-19, prosecutors at federal and local levels must use their immense discretion to limit the number of people who are held in jails or in other confined facilities. They must drastically reduce their requests for pretrial detention and carceral-based sentences. Prosecutors should move for release in all but the very few cases where pretrial detention is absolutely the least restrictive means necessary to ensure a person’s return to court, or should – at the very least – be doubly sure to comply with recent legal precedents in setting bail with a person’s ability to pay as a paramount consideration. With a special focus on populations who the CDC has identified as particularly vulnerable, during the pandemic, prosecutors should also institute a review-and-release protocol in which bail was sought and imposed over the past thirty days.³⁶

Prosecutors must view incarceration into cramped and often unhygienic facilities as a last resort when seeking a plea or requesting a sentence. They must also refrain from seeking community-based sentences – such as curfews, geographic restrictions, or electronic monitoring – that limit a person’s ability to seek medical help or care for a loved one who has COVID-19. In line with the 1983 *Bearden v. Georgia* case, prosecutors should also temporarily vacate all fines and fees so that people are not at risk of incarceration due to non-payment, or are not required to come into court or wait in processing centers to remove those financial burdens. Finally, prosecutors should dismiss cases involving minor offenses, thereby limiting the amount of time a person must spend in court.

III. Commission Neglects to Consider Impact of Mass Incarceration on COVID-19

As the Commission continues to convene at the height of the COVID-19 pandemic, it is irresponsible for this body to not consider the impact of mass incarceration on virus spread. People incarcerated in prisons, jails, and detention centers are highly vulnerable to outbreaks of contagious illnesses, as are the staff who work in them every day. As many as 200,000 people could die from COVID-19 if the federal government fails to consider the impact of the virus on

³⁴ Joseph Neff and Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, MARSHALL PROJECT (Apr. 25, 2020), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>.

³⁵ *Id.*

³⁶ Letter from the ACLU to State and Local Officials on COVID-19 and the Criminal Justice System (March 16, 2020), <https://www.aclu.org/letter/aclu-letter-state-and-local-officials-covid-19-and-criminal-justice-system>.

the incarcerated population, who will be infected and die at higher rates.³⁷ Furthermore, any prison or jail outbreak will spill over into the broader community, causing more people to die in the general public too.

A. Government Responsible for COVID-19 Spread and Deaths in Jails and Prisons

As of May 25, the Federal Bureau of Prisons (BOP) reports more than 5,000 incarcerated persons and staff have tested positive for COVID-19 nationwide.³⁸ There have been 59 deaths of incarcerated persons,³⁹ and there has been at least one staff death⁴⁰ though BOP refuses to include any staff deaths in its official reporting. Over 70% of all federally incarcerated persons who have been tested for COVID-19 have tested positive.⁴¹ In local jails and state prisons, more than 40,000 people, both those incarcerated and staff, have COVID-19.⁴² Almost 500 incarcerated persons and staff have died.⁴³ Dr. Thomas Pangburn, chief medical officer for Wellpath LLC, the medical contractor to hundreds of jails throughout the country, said, “In health care, jail inmates “are the last and the least and the lost.”⁴⁴

B. People of Color Will Bear Brunt of COVID-19 Outbreak in Jails and Prisons

Additionally, with 70% of the BOP population being Black⁴⁵ and Latinx,⁴⁶ we are concerned that people of color will bear the brunt of COVID-19 outbreaks in federal facilities. Patrick Jones, a 49-year-old Black man, incarcerated for a drug offense, was the first federally incarcerated person to die from COVID-19. He was incarcerated in the Oakdale, Louisiana federal prison.⁴⁷ And with women now the fastest growing segment of the incarcerated

³⁷ Udi Ofer, & Lucia Tian, *New Model Shows Reducing Jail Population will Lower COVID-19 Death Toll for All of Us*, ACLU (Apr. 22, 2020), <https://www.aclu.org/news/smart-justice/new-model-shows-reducing-jail-population-will-lower-covid-19-death-toll-for-all-of-us/>.

³⁸ FEDERAL BUREAU OF PRISONS, COVID-19 CORONAVIRUS, <https://www.bop.gov/coronavirus/index.jsp> (last visited May 25, 2020).

³⁹ *Id.*

⁴⁰ Rebecca Ungarino, *The Federal Bureau of Prisons has confirmed the first staff death linked to the coronavirus, report says*, BUS. INSIDER (Apr. 18, 2020), <https://www.businessinsider.com/report-bureau-of-prisons-first-staff-death-linked-to-coronavirus-2020-4>.

⁴¹ Michael Balsamo, *Over 70% Of Tested Inmates In Federal Prisons Have COVID-19*, THE BERKSHIRE EAGLE (Apr. 30, 2020), <https://hosted.ap.org/berkshireagle/article/cf310ab85b403b1ac9b051b3fb086e4e/over-70-tested-inmates-federal-prisons-have-covid-19>.

⁴² UCLA LAW, COVID-19 BEHIND BARS DATA PROJECT, COVID-19 JAIL/PRISON CONFIRMED CASES AND DEATHS, https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTK/edit#gid=1197647409.

⁴³ *Id.*

⁴⁴ Peter Eisler, Linda So, Ned Parker, & Brad Heath, *Special Report: ‘Death Sentence’ - the hidden coronavirus toll in U.S. jails and prisons*, REUTERS (May 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-jails-specailr/special-report-death-sentence-the-hidden-coronavirus-toll-in-u-s-jails-and-prisons-idUSKBN22U1V2>.

⁴⁵ FEDERAL BUREAU OF PRISONS, STATISTICS: INMATE RACE, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp, (last visited Apr. 20, 2020).

⁴⁶ FEDERAL BUREAU OF PRISONS, STATISTICS: INMATE ETHNICITY, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp, (last visited Apr. 20, 2020).

⁴⁷ Maurice Chammah, *Coronavirus Ended His Shot at a Second Chance*, The Marshall Project, (Apr. 3, 2020), <https://www.themarshallproject.org/2020/04/03/coronavirus-ended-his-shot-at-a-second-chance>.

population,⁴⁸ we are concerned that they could be disproportionately represented among COVID-19 cases in BOP. Andrea Circle Bear, a 30-year-old Native woman, who gave birth on a ventilator just one month before she died, was the first federally incarcerated woman to die from COVID-19.⁴⁹ Ms. Circle Bear was incarcerated for “maintaining a drug-involved premises” and was sentenced to 26 months. She was transferred from a South Dakota jail to Carswell federal prison in Fort Worth, Texas, where she died.⁵⁰

C. Commission Must Recommend Decarceration in Response to Pandemic

The Commission must recommend that jails, prisons, and other detention facilities work with public health officials to develop plans to mitigate the risk of coronavirus in these settings.⁵¹ Facilities must provide soap, hand sanitizer, and cleaning supplies. There must be mass testing of all corrections staff and incarcerated persons, which the federal prison workers’ union has called for.⁵² Data collection and reporting on COVID-19 cases in jails and prisons, which includes demographic information, is critical as well.⁵³ Finally, because crowding increases the potential spread of the virus, law enforcement officials must reduce the number of people in jails and prisons by not incarcerating people who are bail-eligible or for low-level offenses. And people who are vulnerable to the virus, such as those who are pregnant, elderly, or those with underlying medical conditions, must be released to home confinement. Including incarcerated people in our public health response will benefit everyone.

⁴⁸ ACLU, FACTS ABOUT THE OVER-INCARCERATION OF WOMEN IN THE UNITED STATES, <https://www.aclu.org/other/factsabout-over-incarceration-women-united-states> (last visited Apr. 17, 2020).

⁴⁹ Ruth Anna Buffalo & Kimberly Craven, *When a Two-Year Sentence Becomes a Death Sentence*, ACLU (May 19, 2020), <https://www.aclu.org/news/criminal-law-reform/when-a-two-year-sentence-becomes-a-death-sentence/>.

⁵⁰ *Id.*

⁵¹ Letter from the ACLU to State and Local Officials on COVID-19 and the Criminal Justice System (March 16, 2020), <https://www.aclu.org/letter/aclu-letter-state-and-local-officials-covid-19-and-criminal-justice-system>.

⁵² Press Release, ACLU, Groups Call for Extreme Proactive Measures for Most Vulnerable to COVID-19 Infection, May 7, 2020, <https://www.aclu.org/press-releases/aclu-and-council-prison-locals-call-mass-testing-all-employees-and-incarcerated>.

⁵³ Letter from the ACLU to State and Local Officials on COVID-19 and the Criminal Justice System (March 16, 2020), <https://www.aclu.org/letter/aclu-letter-state-and-local-officials-covid-19-and-criminal-justice-system>.