

March 18, 2020

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Mr. Michael Carvajal
Director
Federal Bureau of Prisons
320 First Street, N.W.
Washington, DC 20534



National Political
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Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
*National Political
Director*

**Re: Reducing the Federal Prison Population in
Response to Coronavirus**

Dear Attorney General Barr and Director Carvajal:

The public health crisis presented by coronavirus highlights the need for the Department of Justice (DOJ) and the Bureau of Prisons (BOP) to take immediate action to safeguard the health of those under its care. Time is of the essence and BOP must act swiftly and responsibly to ensure that the 122 facilities in its system housing nearly a quarter of a million people, over 10,000 of whom are over 60 years old,¹ are safe. The public health concerns presented by coronavirus in confined spaces creates an urgent need to ensure the health of those incarcerated, particularly those who are elderly and those with chronic health conditions. BOP must act in conjunction with U.S. Attorneys and the recommendations of public health professionals² to release those most vulnerable to coronavirus and to diminish intake of others to reduce overcrowding.

In addition, DOJ must direct the U.S. Marshals Service (USMS) to release any individuals in their custody who are particularly susceptible to coronavirus, such as the elderly and those with chronic health conditions. The USMS has a total average daily detention population of 61,489 people in USMS state and local, private, and BOP facilities,³ and it is important that people under their authority are not further exposed to coronavirus due to overcrowding in these facilities.

DOJ has the discretion and authority to reduce the number of people entering the BOP and USMS systems. This discretion and authority should be employed with a view toward decreasing the number of people who are unnecessarily incarcerated in BOP or USMS facilities. The same social distancing principles guiding public and private sector responses should guide the BOP's response and ensure that its facilities do not unnecessarily bring people into confined spaces that may lead to greater exposure to coronavirus. Deliberate action must be taken to meet the responsibility to ensure the health of those incarcerated in the federal system. Any delay will only serve to exacerbate the circumstances with possible fatal consequences.

DOJ should immediately seek sentences consistent with retroactive application of provisions of the First Step Act, including the 851 enhancement, safety valve, and 924(c) "stacking" provisions. DOJ should also support federal legislation, U.S. Sentencing Commission guidelines, and executive clemency advancing First Step retroactivity. Public health officials agree that decreasing the number of people in custody is one of the best ways to deal with the inevitable spread of coronavirus in the carceral system.⁴

We call upon DOJ, BOP, and USMS to increase the use of compassionate release⁵ for those who:

- Are 65 and older;
- Have a terminal medical condition;
- Have a debilitated medical condition;
- Suffer from a chronic medical condition; or
- Have suffered a death of a family member who is a primary caregiver to a child of the person incarcerated.

¹ BOP, *Inmate Age*, last updated Mar. 7, 2020, available at https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

² *Calls mount to free low-risk US inmates to curb coronavirus impact on prisons*, The Guardian, Mar. 13, 2020, quoting Josiah Rich, Brown University epidemiologist: "The more people behind bars, the more transmissions you are going to have'... the number one change people can make to minimize this threat is simply to reduce the number of imprisoned people. Temporarily forgiving bail is one way. Another is to release low-level, older offenders," available at <https://www.theguardian.com/us-news/2020/mar/13/coronavirus-us-prisons-jails>.

³ USMS, *Facts and Figures*, Feb. 25, 2020, available at <https://www.usmarshals.gov/duties/factsheets/facts.pdf>.

⁴ *Id.*

⁵ See DOJ, BOP, *Program Statement: Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, Jan. 17, 2019, available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

In addition to utilizing compassionate release, we call upon DOJ, BOP, and USMS to release people who are elderly and/or particularly vulnerable to serious illness or death from COVID-19 due to the following conditions:

- Blood disorders;
- Chronic kidney disease;
- Chronic liver disease;
- Compromised immune system (immunosuppression);
- Current or recent pregnancy;
- Endocrine disorders;
- Metabolic disorders;
- Heart disease;
- Lung diseases;
- Neurological and neurologic and neurodevelopment conditions; and
- Hypertension.

BOP should also immediately move those who are within one year of being transferred to community supervision to their designated communities, as well as utilize the elderly home confinement program for those who are 60 and older.⁶ With the World Health Organization recommending maintaining three feet of distance from anyone coughing or sneezing, accelerating release to reduce the number of people in prison is a common-sense response. Further, we also call upon DOJ to ensure that more people are not admitted to BOP and USMS facilities by:

- Declining prosecution in minor appropriate cases, especially cases involving possession of drugs in which addiction plays a role;
- Declining to seek incarceration in cases prosecuted;
- Offering diversion in appropriate cases prosecuted;
- Not pursuing revocation of minor supervised release infractions; and
- Suspending prosecutions for unauthorized entry or reentry to the United States (8 U.S.C. § 1325 & 1326).⁷

Judges, probation officers, and federal law enforcement should use their discretion to ensure against an increase in incarceration, especially among those most vulnerable to coronavirus. DOJ should encourage state and local actors to take the same

⁶ 18 U.S.C. 3624(c)(2). “The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months.”

⁷ On March 13, 2020, a tweet from Acting Deputy Secretary of Homeland Security Ken Cuccinelli suggested that prosecutions for unauthorized entry are suspended in New Mexico and Arizona, and prosecutions for unauthorized reentry are suspended in New Mexico (These individuals will continue to be subject to civil immigration proceedings), available at <https://twitter.com/HomelandKen/status/1238589443247878145?s=20>.

approach, which it could do formally by reinstating certain guidance, including that previously issued around fines and fees.⁸ Finally, DOJ and BOP should immediately respond to congressional oversight inquiries to ensure agency transparency in the response to coronavirus.

Thank you in advance for your consideration. If you have any questions, please contact the ACLU's Justice Division Deputy Director, Cynthia Roseberry, at croseberry@aclu.org or Senior Legislative Counsel, Kanya Bennett, at kbennett@aclu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Udi Ofer", with a long horizontal flourish extending to the right.

Udi Ofer
Director, Justice Division
American Civil Liberties Union

⁸ DOJ, CRT, ATJ, *Dear Colleague on Fines and Fees*, Mar. 14, 2016, available at <https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf>. Consistent with this Dear Colleague, DOJ could ask states and localities to release people for failure to pay fines and fees and failure to appear in fines and fees cases, as well as advise states and localities to impose a moratorium on enforcement, including warrants and court hearings, for failure to pay and failure to reappear.