



August 12, 2020

The Honorable James E. Clyburn
Whip, United States House of Representatives
Chairman, House Select Committee on the Coronavirus Crisis
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Clyburn:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 220 national organizations to promote and protect civil and human rights in the United States and the Justice Roundtable, a broad-based coalition of more than 100 organizations working to reform federal criminal justice laws and policies, we urge the House Select Committee on the Coronavirus Crisis to give critical consideration to policies that would protect the health and safety of incarcerated individuals and corrections staff particularly vulnerable to COVID-19. We ask that you include the necessary provisions to respond to the crisis in our nation's jails and prisons in the next COVID-19 response package just as you did in the House-passed Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act.

We also ask that the select committee use its oversight to ensure that COVID-19 response policies and funding in fact address the needs of people in carceral settings nationwide. Thus far, less than one penny of each COVID-19 response dollar has been allocated to respond to the urgent needs of incarcerated people, despite the fact that tens of billions of dollars are spent annually on the criminal legal system. This disparity is stark and must be highlighted and remedied moving forward.

While the Coronavirus Aid, Relief, and Economic Security (CARES) Act expanded the Federal Bureau of Prison's (BOP) authority to transfer individuals to home confinement, BOP and the Department of Justice (DOJ) have failed to properly exercise this authority. BOP and DOJ have been negligent in meeting Congress' charge to quickly and safely reduce the prison population and minimize the spread and harm of COVID-19 for incarcerated persons and correctional staff. These failures by BOP and DOJ have been revealed in a Congressional Black Caucus town hall¹ and a Senate Judiciary oversight hearing.² Therefore, more is urgently required to address the alarmingly high infection rates occurring in correctional facilities across the nation.

¹ Cong. Black Caucus, Speak Up & Speak Out: Incarceration and COVID-19 (Apr. 24, 2020).

<https://bass.house.gov/media-center/press-releases/rep-bass-cbc-members-host-covid-19-incarceration-town-hall>

² Senate Judiciary, Examining Best Practices for Incarceration and Detention During COVID-19 (June 2, 2020).

<https://www.judiciary.senate.gov/meetings/examining-best-practices-for-incarceration-and-detention-during-covid-19>

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As Congress works to provide additional relief for individuals impacted by the pandemic, it has a moral obligation to extend that relief to all of our most vulnerable — the elderly, the sick, those without medical care, and those unable to protect themselves from the virus — including those who are incarcerated. We urge you to prioritize the health and wellbeing of incarcerated people and their families by incorporating the recommendations outlined below in the next stimulus package.

All of us are at risk of contracting COVID-19 and the more than 2.2 million individuals currently incarcerated nationwide remain uniquely vulnerable. The unsanitary and overcrowded conditions in correctional facilities make it nearly impossible to appropriately disinfect surfaces or socially distance,³ and access to quality medical care in many of these facilities has historically been lacking.⁴ Further, high rates of underlying health issues among incarcerated populations place many individuals in custody in high-risk categories that make them more susceptible to complications if they do contract the virus.⁵ One study found that incarcerated individuals are three times more likely to die and more than five times more likely to become infected than the general population.⁶

As coronavirus cases continue to surge across the country, prisons and jails have emerged as hotspots for outbreaks. Currently, the twelve largest known virus clusters are connected not to hard-hit nursing homes or meatpacking plants, but to correctional institutions.⁷ Between mid-May and mid-June, the number of infections in prisons doubled and prison deaths increased by 73 percent.⁸ More than 100,000 individuals in incarceration facilities have now contracted the virus, and at least 800 incarcerated individuals and correctional staff have died as a result.⁹

While California state prisons and jails — which make up five of the twelve hotspots¹⁰ — recorded more than 7,700 coronavirus cases at the close of July, some states with significantly

³ See, e.g., Morse, D. and Jouvenal, J. (Apr. 10, 2020). *Inmates sharing sinks, showers and cells say social distancing isn't possible in Maryland prisons*. THE WASHINGTON POST.

https://www.washingtonpost.com/local/public-safety/inmates-sharing-sinks-showers-and-cells-say-social-distancing-isnt-possible-in-maryland-prisons/2020/04/10/5b1d5cf8-7913-11ea-9bee-c5bf9d2e3288_story.html

⁴ See, e.g., Honderich, H. and Popat, S. (July 27, 2020). *Coronavirus: Can this California prison save itself from Covid-19?* BBC NEWS. <https://www.bbc.com/news/world-us-canada-53476208>; Novak, K. (July 9, 2020). *Inmates Say Poor Conditions, Medical Care Continue at San Quentin*. KCBS RADIO.

<https://kcsradio.radio.com/articles/inmates-say-poor-conditions-continue-at-san-quentin>

⁵ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (Oct. 4, 2016). Special Report: Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12.

<https://www.bjs.gov/content/pub/pdf/mpsfpj1112.pdf>

⁶ Carissimo, J. (July 11, 2020). *Inmates are 5 times more likely to get coronavirus than the general population, study says*. CBS NEWS. <https://www.cbsnews.com/news/coronavirus-prison-inmates-more-likely-to-get-infected-study-says/>

⁷ Coronavirus in the U.S.: Latest Map and Case Count. (July 30, 2020). THE NEW YORK TIMES.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>

⁸ Williams, T., Seline, L., and Griesbach, R. (June 30, 2020). *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*. THE NEW YORK TIMES. <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>

⁹ Coronavirus in the U.S.: Latest Map and Case Count. (July 30, 2020). THE NEW YORK TIMES.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>

¹⁰ Coronavirus in the U.S.: Latest Map and Case Count. (July 30, 2020). THE NEW YORK TIMES.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>

smaller incarcerated populations actually have similarly high infection rates.¹¹ For example, Kentucky's rate of 716 cases per 10,000 prisoners is actually slightly higher than California's rate of 702.¹² In South Carolina, the Department of Corrections (SCDC) reported the 11th death of an incarcerated person due to complications from COVID-19 on August 6th. SCDC also reports that 1,056 of 16,340 incarcerated persons have contracted COVID-19 system wide and 305 cases among correctional staff.¹³ Last month, BOP recorded the death of the 100th federal prisoner,¹⁴ and more are certainly to come in the weeks ahead.

While these numbers are staggering, they almost certainly do not represent the actual number of infected individuals given the low number of tests conducted. At the federal level, BOP reports that it has completed testing for just 39,927 individuals as of August 10, despite overseeing a total of over 142,315 individuals in both BOP-managed and community-based facilities.¹⁵ Similarly low rates of testing have occurred in state facilities, where Centers for Disease Control and Prevention (CDC) guidelines recommend testing only for symptomatic people and their close contacts in most cases, despite widespread knowledge of asymptomatic spread.¹⁶ For example, as of mid-June, state prison systems in Illinois, Mississippi, and Alabama had tested less than 2.5 percent of incarcerated individuals, and testing of approximately 3 percent of individuals incarcerated in New York revealed that more than 40 percent were infected.¹⁷ Failing to ensure the safety of individuals in our prisons and jails is not only an abdication of our societal responsibility to protect our most vulnerable, but a danger to our ability to effectively control the spread of COVID-19 and limit the damage this pandemic will cause.

Congress must take immediate action to provide for the protection, release, and safe reentry of incarcerated people. The actions taken in the last enacted stimulus package — the CARES Act on March 27, 2020, were a welcome step, but are far from enough. Despite the additional authority granted to it through the stimulus legislation, BOP has not meaningfully reduced its prison population in response to the pandemic. It has instead adopted exceedingly narrow criteria

¹¹ The Marshall Project. (July 30, 2020). *A State-by-State Look at Coronavirus in Prisons*.

<https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>

¹² *Ibid*.

¹³ Greg Hadley (Aug. 6, 2020). *11th SCDC inmate dies from coronavirus complications*. THE NEWS & OBSERVER.

<https://www.newsobserver.com/news/state/south-carolina/article244779202.html>

¹⁴ Hymes, C. (July 28, 2020). *Federal prisons reach grim milestone: 100 inmate deaths from coronavirus*. CBS

NEWS. <https://www.cbsnews.com/news/coronavirus-100-federal-prison-inmates-covid-deaths/>

¹⁵ U.S. Department of Justice, Federal Bureau of Prisons. *COVID-19 Coronavirus*.

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

¹⁶ Williams, T., Seline, L., and Griesbach, R. (June 30, 2020). *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*. THE NEW YORK TIMES. <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>; Centers for Disease Control and Prevention. (July 17, 2020). *Testing Overview*.

https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhcp%2Fclinical-criteria.html

¹⁷ Williams, T., Seline, L., and Griesbach, R. (June 30, 2020). *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*. THE NEW YORK TIMES. <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>

for determining individuals eligible for release,¹⁸ rendering the directive to “immediately process” suitable candidates under the DOJ’s April 3 memorandum ineffective.¹⁹

In the three weeks following that memo, BOP granted just 1,027 people home confinement, and reduced its prison population by just 3,400 individuals in the month of April — a number that falls below the pre-pandemic monthly average of 3,700 individuals despite including regularly occurring releases.²⁰ Fewer than 1,400 people were released from BOP-affiliated halfway houses between April 2 and April 25,²¹ and fewer than 150 elderly or medically vulnerable prisoners were granted compassionate release prior to April 2.²² Now, more than four months after the Attorney General’s initial March 26 memo to prioritize the use of “statutory authorities to grant home confinement” to individuals at high-risk for COVID-19,²³ BOP has continued to slow-walk or fail to exercise its authority. It has released just 7,405 people to home confinement – a number that appears to include regularly scheduled transfers in addition to those taken pursuant to CARES Act authorities,²⁴ and at least 25 individuals have died while their requests for sentence reductions were pending with the Bureau.²⁵ Moreover, the Bureau has continued to actively work against decarceration for individuals, opposing or not responding to 48 of the 50 compassionate release cases decided in early July, and agreeing to release before court intervention in just two cases.²⁶

It is therefore absolutely critical that Congress act swiftly to address the issues facing incarcerated individuals in the next COVID-19 relief package. Again, many of these necessary decarceration and reentry policies were included in the House-passed (HEROES) Act). Therefore, at a minimum, the relief package should include:

1. **Provisions that will dramatically reduce pretrial and prison populations.** Congress should take action to ensure that additional individuals are being released, not detained, during a public health crisis. This means final COVID-19 relief legislation should include

¹⁸ Barr, L. and Mallin, A. (Apr. 24, 2020). *DOJ clarifies federal inmate release guidance after confusion process*. ABC NEWS. <https://abcnews.go.com/US/doj-clarifies-federal-inmate-release-guidance-confusion-plagues/story?id=70318981>

¹⁹ Memorandum from the Attorney General, U.S. Department of Justice, to Director, Bureau of Prisons, U.S. Department of Justice. (Apr. 3, 2020).

https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf

²⁰ Neff, J. and Blakinger, K. (Apr. 25, 2020). *Few Federal Prisoners Released Under COVID-10 Emergency Policies*. THE MARSHALL PROJECT. <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>

²¹ [Ibid.](#)

²² [Ibid.](#)

²³ Memorandum from the Attorney General, U.S. Department of Justice, to Director, Bureau of Prisons, U.S. Department of Justice. (Mar. 26, 2020). https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf

²⁴ U.S. Department of Justice, Federal Bureau of Prisons. *COVID-19 Coronavirus*. <https://www.bop.gov/coronavirus/>

²⁵ Moyer, J.W., and Satija, N. (Aug. 3, 2020). *Frail inmates could be sent home to prevent the spread of covid-19. Instead, some are dying in federal prisons*. THE WASHINGTON POST. https://www.washingtonpost.com/local/public-safety/frail-inmates-could-be-sent-home-to-prevent-the-spread-of-covid-19-instead-some-are-dying-in-federal-prisons/2020/08/02/992fd484-b636-11ea-9b0f-c797548c1154_story.html?hpid=hp_hp-top-table-main_virusdeadinmates-12pm%3Ahomepage%2Fstory-ans

²⁶ [Ibid.](#)

the Emergency Community Supervision Act (§191102 of the House-passed Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act), which would mandate release or transfer to community supervision of individuals in federal prison or pretrial detention who are most at risk to contracting the virus and experiencing severe illness or death. The populations most at risk are those who are age 50 and older, have underlying health conditions, or are pregnant.

Inclusion of the Emergency Community Supervision Act in the next relief bill would prevent deaths like that of Andrea High Bear, a mother who died shortly after being transferred from a jail in South Dakota to Carswell Federal Medical Center (FMC) in Texas, just 28 days after giving birth via C-section while on a ventilator. The 30-year-old member of the Cheyenne River Sioux Tribe in South Dakota was the first federally incarcerated woman to die from COVID-19. Rather than learn from that tragedy, BOP has permitted COVID-19 to rage at FMC Carswell: the facility now reports the second-highest rate of infection in the BOP.

The Emergency Community Supervision Act would also modify probation and supervised release policies to be safer and less punitive and mandate the release of low-level pretrial defendants on their own recognizance.

2. **An expansion of court authority to release individuals in BOP Custody.** Congress should build upon the actions taken in the CARES Act by expanding the authority of courts to order compassionate release and reduce sentences for individuals incarcerated in the federal prison system. It should include in any relief package the COVID-19 Safer Detention Act (S. 4034), which would clarify the authority of courts to order compassionate release based on COVID-19 vulnerability, ensure that individuals sentenced before 1987 may seek compassionate release, and reduce the amount of time courts must wait before considering compassionate release motions during the coronavirus crisis.

Additionally, any negotiated legislation should include §191103(a)(1)-(3) of the HEROES Act, which would require courts to reduce the sentences of individuals most vulnerable to COVID-19 who do not pose a danger to society. The term “covered health condition” in that provision should be amended to cross-reference the CDC’s list of individuals who might be at heightened risk of severe complications from COVID-19, in addition to existing enumerated health conditions, to allow flexibility in the law as medical understandings of COVID-19 continue to evolve.

3. **Increases in the availability of home detention for elderly people.** Our detention of elderly and other high-risk individuals who pose no danger was already inhumane and unhealthy but has become even more so amid the coronavirus pandemic. Over a quarter of the people who have died from COVID-19 while in BOP’s care were seventy years or older.²⁷ Legislation should include provisions of the COVID-19 Safer Detention Act that

²⁷ Sentencing Resource Counsel for the Federal Public and Community Defenders. (July 30, 2020). *The Worsening COVID-19 Crisis in Federal Detention*.

improve and expand eligibility criteria for the First Step Act's Elderly Home Detention Pilot program, which permits the transfer of certain elderly and terminally ill prisoners from prison to home detention after serving a portion of their sentence.

- 4. Additional support at the federal, state, and local level to prevent, prepare for, and respond to coronavirus.** In the CARES Act, Congress provided \$100 million in emergency funding to the federal prison system to respond to COVID-19. In forthcoming legislation, Congress should provide an additional \$200 million to expand testing and other medical services, the provision of personal protective equipment and hygiene supplies, and sanitation services that are vital to maintaining the safety of the individuals who remain incarcerated as well as correctional staff. Congress should adopt language from and provide \$1 billion for the COVID-19 Correctional Facility Emergency Response Act (H.R. 6414/S. 3720), which would establish a grant program within DOJ to support and encourage correctional facility releases by states and localities and to facilitate safe reentry planning for those releases. Congress also should include \$100 million for prevention and mitigation of COVID-19 risks for justice-involved youth, as well as funding to support free access to COVID-19 testing, medical care, and sanitation for incarcerated and reentering individuals.

Additionally, Congress should include provisions that facilitate essential communication with counsel. Given the restrictions on in-person activities put in place to address the coronavirus pandemic, it is imperative that Congress include provisions in any legislation to ensure that individuals in custody retain the ability to speak with their attorneys confidentially and as necessary. The Effective Assistance of Counsel in the Digital Era Act (H.R. 5546) should be included in relief legislation to direct the Attorney General to put in place an electronic communication system for persons in federal custody that ensures confidential communication between attorneys and clients.

- 5.** Finally, Congress should ensure safe reentry during the pandemic for individuals who are released from carceral settings. Inclusion of H.R. 1329, *The Medicaid Reentry Act*, would permit Medicaid coverage for eligible incarcerated individuals 30 days prior to release which would enhance access to medical and behavioral health care immediately prior to and during reentry. Additionally, access to safe housing, food support through SNAP, workforce development programming, and income support through TANF, stimulus payments, and other COVID-19 financial relief is critical and must not exclude people with criminal records during the pandemic. Congress also should not exclude people with criminal records from other COVID-19 relief, such as loans/grants from the Paycheck Protection Program. Finally, \$250 million in DOJ Second Chance Act funding is needed for community-based organizations struggling to keep up with the requests for support and services for people transitioning back to the community at this time.

Congress must take action to protect the health and safety of every individual in our communities — including those who are incarcerated and reentering — in order to successfully slow the spread of COVID-19 and put the United States on the road to recovery. We urge Congress to

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ensure that the most vulnerable among us are not forgotten in the next coronavirus response package by including the critical provisions outlined above to protect, release, and provide safe reentry for incarcerated people.

If you have questions or concerns, please contact Kara Gotsch, Director of Strategic Initiatives, The Sentencing Project, at kgotsch@sentencingproject.org; Sakira Cook, Director, Justice Reform Program, The Leadership Conference on Civil and Human Rights, at cook@civilrights.org; Kanya Bennett, Senior Legislative Counsel, American Civil Liberties Union, at kbennett@aclu.org; or Patricia Richman, National Sentencing Resource Counsel, Federal Public and Community Defenders, at Patricia_Richman@fd.org.

Sincerely,

Aleph Institute
American Civil Liberties Union
Campaign for the Fair Sentencing of Youth
Center for Disability Rights
Center for Law and Social Policy (CLASP)
Church of Scientology National Affairs Office
CURE
The Daniel Initiative (TDI)
Dream Corps #cut50
Drug Policy Alliance
FAMM
Federal Public and Community Defenders
FREE! Families Rally for Emancipation and Empowerment
Friends Committee on National Legislation
Friends of Guest House
From Prison Cells to PhD
Innocence Project
Interfaith Action for Human Rights
Justice Roundtable
The Leadership Conference on Civil and Human Rights
Legal Action Center
NAACP
National Action Network (NAN)
National Association of Criminal Defense Lawyers
National Association of Social Workers (NASW)
National Immigrant Justice Center
New Hour for Women and Children- LI
Project On Government Oversight
Reproductive Justice Inside
Safer Foundation
School Social Work Association of America
The Sentencing Project

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StoptheDrugWar.org

Treatment Communities of America

Tzedek Association

V-Day