THE FIRST STEP ACT, THE PANDEMIC, AND COMPASSIONATE RELEASE: WHAT ARE THE NEXT STEPS FOR THE FEDERAL BUREAU OF PRISONS?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

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THE FIRST STEP ACT, THE PANDEMIC, AND COMPASSIONATE RELEASE: WHAT ARE THE NEXT STEPS FOR THE FEDERAL BUREAU OF PRISONS?

Friday, January 21, 2022

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 10:00 a.m., via Zoom, Hon. Sheila Jackson Lee [Chair of the Subcommittee] presiding.

Members present: Representatives Nadler, Jackson Lee, Demings, Bass, McBath, Dean, Scanlon, Bush, Cicilline, Escobar, Cohen, Jordan, Biggs, Chabot, Gohmert, Steube, Massie, Fitzgerald, and Owens.

Staff present: John Doty, Senior Advisor and Deputy Staff Director; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian and Senior Counsel; Merrick Nelson, Digital Director; Joe Graupensperger, Chief Counsel for Crime; Mauri Gray, Deputy Chief Counsel for Crime; Natalie Knight, Counsel for Crime; Nicole Banister, Counsel for Crime; Veronica Eligan, Professional Staff Member/Legislative Aide for Crime; Jason Cervenak, Minority Chief Counsel for Crime; Ken David, Minority Counsel; Andrea Woodard, Minority Professional Staff Member; Kiley Bidelman, Minority Clerk; and Carter Robertson, Minority USSS Detailee.

Ms. JACKSON LEE. The Subcommittee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Good morning and welcome to today's hearing on The First Step Act, The Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons?

I would like to remind Members that we have established an email address and distribution list to circulate exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices and we will circulate the materials to Members and staff as quickly as we can.

I would also like to ask all Members to please mute your microphones when you are not speaking. This will help prevent feedback

and other technical issues. You may unmute yourself any time to seek recognition.

I now will recognize myself for an opening statement, but before I do that, one of our colleagues on the Full Committee, Mr. McClintock, has suffered a terrible loss over the holidays, the loss of his wife, and I want to offer my deepest sympathy to him and his family and to all of you who work with him, all of us who work with him every day.

We are here today to discuss several topics. We are here to focus on the great concern including the Bureau of Prisons' implementation of The First Step Act as so many Members on this Committee worked very hard, including Hakeem Jeffries, Chair of the Democratic Caucus, working across the aisle as we did on that very important initiative, its use of compassionate release, or the lack thereof, and its response to the COVID–19 pandemic.

In 2018, we passed a landmark piece of legislation, The First Step Act and aimed at transformational sentencing and prison reform at the federal level. It is an exceptional piece of legislation, and we must maximize its potential. Because we are here primarily to talk about the next steps for the Bureau of Prisons, I will focus on The First Step Act's legislation and its commitment to prison reform, which among other mandates, required BOP to create and use a risk and needs assessment tool to categorize federal prisoners as minimum, low, medium, or high risk to recidivate.

Based on the resulting assessment, federal prisoners can earn time credits to reduce their sentences which can mean early release to a halfway house, home confinement, or early release to supervised release, all based upon the ability to rehabilitate and contribute to society.

Although this Subcommittee has previously held two hearings that discuss the risk and needs assessment tools, now known as PATTERN, questions remain regarding the efficacy, validation, and implementation of the tools.

First, we previously learned that PATTERN relies on dynamic and static factors, on factors which can never change such as criminal history and the community where a prisoner lived, before they were arrested. Knowing that communities of color are over policed, reliance on static factors could result in biases against people of color being baked into the application tool, as BOP adjusted the weight these factors are given in the assessment or otherwise accounted for the presence of this bias.

I would venture to say that many of us on this Committee this morning may have known someone who, as we were growing up, we might have said they are in trouble all the time, but yet, we know them now as a contributing family man or woman, as a contributing citizen of the United States and as a loving person of their community. We know that rehabilitation can work.

Second, as I understand that PATTERN may produce racially-disparate results in that the tool tends to over predict recidivism in people of color and under predict recidivism in others, as BOP adjusted the tool to account for over prediction and under prediction.

Third, based on DOJ's 2021 review and revitalization of The First Step Act, risk assessment to Version 1.3 of PATTERN, which

has not been approved yet by DOJ, addresses errors in the version that is currently being used by BOP. What does this mean for prisoners whose risk is being determined now for what is arguably a flawed tool of assessment?

Last, it does not appear that BOP has made a good-faith effort to develop a needs assessment tool. BOP officials continue to use the same tools they have used for years such as a pre-sentence investigation report, a document that is prepared solely by U.S. probation and pre-trial service's officers for sentencing purposes.

The Independent Review Committee pursuant to The First Step Act persists in the development of the risk and assessment needs tool, identified problems of BOP's approach to needs assessment in their report two years ago as BOP addressed the concern raised by the IRC. Does BOP plan to develop a needs assessment tool that goes further than the status quo?

If The First Step Act is to be successful, we have a duty to make sure that the risk and needs assessment tool will produce reliable and unbiased results. We want to work with BOP, as Members of Congress, this Committee, the Full Committee, to ensure what is best for the safety and security of America and, of course, those who are incarcerated within the walls of BOP.

I hope our panel can help us better understand the issues that remain in validating and developing the tool and offer suggestions to how we can make sure it works. In issuing a Rule last week concerning The First Step Act's earned time credit system, I was very pleased to see that DOJ heard the outcry of advocates, prisons, family Members, and several of the Subcommittee's Members, including Mr. Jeffries, in closing and choosing to do away with the proposed restrictive definition of a day of participation in calculating how prisoners would earn time credit.

As a result of that simple clarification, thousands of prisoners should be released in the coming days and weeks which will reduce the number of prisoners in custody and reduce the risk of further spreading COVID–19 in the BOP facilities which at this time is raging and ravaging both those who are working there, as well as those who are incarcerated.

Let me be very clear. This clarification does not pretend to release those who would be unsafe in the community. You still have to go through the normal processes, but it will give greater response to those who are working hard to rehabilitate inside the prison.

To respond to the crisis of the impact of the pandemic on federal prisons, we included in The CARES Act an additional mechanism to allow BOP to release prisoners to home confinement, reduce the prison population, and reduce the number of COVID infections among prisons and staff. Although using overly restrictive criteria, BOP released thousands of prisoners under The CARES Act who reconnected with family, found employment, and have not re-offended. I am grateful for DOJ for reversing the past Administration's merciless opinion in deciding that most of those released will not have to return to custody when the pandemic ends. Yet, BOP still continues to stumble over those who are legitimately able to take advantage of the compassionate release and still are holding individuals, taxing their family, those who have committed non-

violence crimes, and who are sick. Many of those who are sick in the face of the COVID–19 breakout are still facing the lack of review and assessment of their eligibility for compassionate release.

While BOP's ability to release prisoners was expanded under The CARES Act, BOP has long possessed the statutory authority through a request to provide early release of prisoners through compassionate release. Even in the early stages, they were counting those who were already being released to bolster up their numbers of those being released under COVID. Yet, even during the pandemic as thousands of prisoners testified positive for COVID–19, and others died, BOP failed to effectively utilize its authority. What seems to be divine foresight, we included a provision in The First Step Act that authorizes prisoners to request compassionate release themselves after meeting certain criteria. That seems to be receiving limited response.

According to the Sentencing Commission, the first year of the pandemic, 96 percent of motions decided through December 31, 2020, that were granted compassionate release were filed by the prisoner. Even as the pandemic worsened, that percentage remains the same. The Sentencing Commission released a more detailed report on compassionate release in September of last year that showed that just nine percent of motions granted were filed by the BOP Director.

COVID–19 continues to run rampant throughout BOP facilities. On January 13th, there were 6,043 Federal prisoners and 939 BOP staff who tested positive for COVID–19. On January 18th, there were 9,194 prisoners and 1,150 staff who tested positive for COVID–19 and 98 facilities at Level 3 of the modified operational level. From the time the pandemic began until now, BOP reports that 279 prisoners have died due to COVID, and 7 staff Members have died.

I am certain that our Witnesses will let us know whether these numbers are correct. I hope they will also provide solutions for how they think we can reduce infection and protect prisoners and staff within BOP. BOP has operated under staff shortages for many years and the pandemic has only exacerbated staffing problems. That is something that I want this Committee going forward to focus on in assisting BOP and assisting of their staffing capabilities to be staffed up.

The death of Jeffrey Epstein was in BOP custody almost 2½ years ago, attributed in part to staffing shortages. I look forward to the pending report from the Inspector General on the circumstances surrounding his death. I expect that the report will include recommendations to make all efforts to staff up throughout the Bureau.

It is my hope that this hearing that we will take additional steps to ensure BOP carries out its mission to confine offenders in prison and community-based facilities that are safe, humane, cost efficient, and appropriately secure and that provide work and other self-improvement opportunity to assist offenders in becoming law-abiding citizens.

It is now my pleasure to recognize the distinguished gentleman from Arizona, the Ranking Member of this Committee for his opening statement.

Mr. Biggs, you are now recognized.

Mr. BIGGS. Thank you, Madam Chair, and I particularly thank you for calling attention and reminding us of the grieving of our colleague and friend, Mr. McClintock of California, whose tragic loss of his wife came unexpectedly over the holidays and appreciate your thoughtfulness.

This hearing today, we are focused largely on post-conviction sentencing and confinement. I welcome that discussion and there will be discussions about compassionate release, all for post-convicted individuals.

There is also a concern regarding pre-trial detention and conditions in which defendants are held. Our constitutional rights, are they being protected? Is everyone receiving the due process regardless for the charge that they are pending trial, they are waiting conclusion, or the outcome of that case?

On January 4th, I sent Chair Nadler a letter requesting a hearing on the treatment of the January 6th defendants while in custody at the D.C. Jail. I have yet to receive a response from the Chair.

It is my position that the Judiciary Committee must investigate the horrific treatment of the January 6th defendants. Individuals being held at the D.C. Jail are being punished for exercising constitutional rights while in custody. For instance, them being held in solitary confinement for meeting with their attorneys. They are being forced to spend up to 23 hours a day in solitary confinement. This has received, actually, a bipartisan rebuke. Senator Elizabeth Warren told The Washington Examiner, and I quote "I do not believe in solitary confinement for extended periods of time for anyone."

The ACLU has objected to the treatment of the January 6th defendants. Tammie Gregg, Deputy Director of the ACLU National Prison Project, told The Washington Examiner "Prolonged solitary confinement is torture and certainly should not be used as a punitive tool to intimidate or extract cooperation."

However, it does not start or stop with solitary confinement. I appreciate the Chair's comments about healthcare in the prison system and what we have seen is that individuals that need healthcare in the D.C. prison have been defined that healthcare and I will mention that a little bit more in a minute.

What is interesting about this pre-trial detention is that most of the individuals that are in this situation have had no contact with the criminal justice system previously. They don't pose a flight risk. They meet all Federal guidelines for pre-trial release but have been denied that release. They have been forced into rooms with human feces on the walls. One defendant was subjected to a strip search after meeting with his lawyer. When he asked for "literature that authorized the strip search," the officers refused to answer. The officers then handcuffed that individual and put him a dark room with a chair and maced him.

There are reports of defendants being denied medical care including one defendant who was denied treatment for non-Hodgkin's lymphoma. The treatment is so horrific that a Federal judge asked the Department of Justice to investigate the D.C. Jail for civil

rights abuses saying "It is clear to me the civil rights of the defendant were violated by the D.C. Department of Corrections."

The conditions in the jail were so horrendous that U.S. Marshals removed inmates from the jail, and they were quoted as stating that the facility did "not meet the minimum standards of confinement as prescribed in the federal performance-based detention standards."

This is all being done to people who are innocent in the eyes of the law. They have yet to be convicted of a crime, but they are being treated as if they had been convicted of a crime. In fact, they are being treated worse than anybody who has been convicted of a crime should be treated.

In America, we still adhere to the principle that you are innocent until proven guilty. Unfortunately, there have been people who have not allowed these injustices to go unreported and we have one of those individuals with us here today. Julie Kelly has brought to light the horrific treatment of the January 6th defendants by the D.C. Jail.

I just highlight something else that the Chair said, and I appreciate her comments about compassionate release. Her comments focusing on compassionate release were directed to folks who have been convicted of a crime. When you meet the Federal guidelines for pretrial release, it is not compassionate. It is not due process. It is not fair or equitable to be confined in a prison, in a jail with the conditions that many of these January 6th defendants await the outcomes of their cases.

I am glad that we have our Witnesses here today. I am glad we have an opportunity to put these issues on the table. Madam Chair, I thank you for the time, and I yield back to you.

Ms. JACKSON LEE. Mr. Ranking Member, I thank you for putting these important issues on the table. Thank you.

Now, it is my privilege, the Chair now recognizes the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Thank you, Madam Chair, for holding this important hearing to discuss implementation of The First Step Act, and on-going efforts by the Bureau of Prisons to respond to the COVID–19 pandemic including its use of compassionate release.

Let me join in an expression of condolences to our colleague, Mr. McClintock.

Three years ago, we passed the ground-breaking piece of bipartisan legislation, The First Step Act of 2018, which truly was a step forward in our efforts to reform our criminal justice system. That law reforms in modest, but important ways, Federal criminal sentencing and various aspects of the Federal court system.

These critical provisions are intended to improve Federal prison conditions, reduce the Federal prison population, and reduce recidivism among offenders released from BOP custody through evidence-based practices.

Now, although COVID–19 certainly contributed to the delays, we should recognize that BOP was slow to implement this legislation long before the first inmate tested positive for COVID. I am pleased, however, that BOP and DOJ have now taken significant steps through the implementation of PATTERN, the risk and needs

assessment tool used to determine inmates' eligibility to participate in recidivism-reducing programming which can help inmates earn credits toward early release.

It has also completed an assessment of BOP inmates under this tool and a determination of how these credits will be calculated. The Biden Administration has also made important improvements to the implementation of The First Step Act in the past year. For example, just a few days ago, the Administration significantly revised how it will calculate the invaluable earned time credits using a much more reasonable and less restrictive formula than originally proposed. This new policy has the potential to lead through the release of thousands of inmates who are unlikely to re-offend.

While I am heartened by this decision, many questions remain about whether the PATTERN tool, which shows so much power to determine an inmate's eligibility to receive earned time credits, has been sufficiently validated by independent experts. I look forward to hearing from our Witnesses on this important question.

I also look forward to examining the BOP's troubling response to the COVID–19 pandemic and its inability to protect inmates and staff adequately. Since the pandemic began, more than 50,000 BOP inmates have been infected with COVID–19. This month, in just a five-day span, more than 3,000 more inmates in our Federal prison system tested positive and two more inmates died from complications due to COVID bringing the total number of inmate deaths from the virus to 279. The number of staff Members to die of COVID–19 remains at seven, although that seven is seven too many. These numbers are quite frightening, and we must do more to protect individuals in custody, individuals who are placed in our, particularly those of high risk to several COVID–19 complications, even if that means releasing them. Nobody deserves to die from this disease, and we have a duty to ensure basic protections for those in our custody.

Unfortunately, in the years since the pandemic began, BOP has failed to make sufficient use of the authority granted to it under the CARES Act to place certain prisoners in home confinement earlier than previously permitted by statute, leaving many inmates unnecessarily at risk of illness or death.

After the Trump Administration ordered that people released under the CARES Act will have to return to custody when the spread of COVID–19 has abated, I was pleased to see that Attorney General Garland wisely reversed this policy. Most of these individuals will now be allowed to remain out of custody and continue with the work of rebuilding their lives. This is a significant and appropriate change and I commend the Biden Administration for making this important move.

Long before the pandemic, the CARES Act under The First Step Act, BOP already had the power to petition for the release of any Federal inmate if extraordinary and compelling reasons warrant or if an inmate met several criteria. Despite this broad authority called compassionate release, BOP has routinely chosen not to seek compassionate release of inmates. This is a wasted opportunity to deliver justice to people of low risk of recidivism and to the families and communities who would benefit from their return home.

In light of the low recidivism rates among individuals released under the CARES Act and during the pandemic, I hope that BOP will begin to utilize compassionate release more often. I also hope that BOP will commit to improving the conditions at its facilities across the country. I am aware particularly of unacceptable conditions at the Metropolitan Detention Center in Brooklyn, conditions that long predate COVID–19. For example, a frigid cold spell in early 2019, detainees there had no heat or electricity, and BOP officials had no plan in place to assure inmate safety in case of a power outage and had no sense of urgency whatsoever to address the problem.

I, along with other Members, including Mr. Jeffries and Ms. Velazquez, toured the facility to see firsthand the terrible conditions. At the onset of the pandemic, we continue to get reports about inadequate treatment of those detained at the MDC. We must do better. That is why I am pleased that Dr. Venters and Dr. Goodwin are here today to discuss their observations while conducting on-site inspections of BOP facilities. I expect that you both will have helpful recommendations for what we can do moving forward to improve the conditions at BOP facilities. To help inmates pass to treatment and programming and to protect the most vulnerable in custody.

We are also fortunate to have other distinguished guests here to speak with us about some of the critical issues I have discussed, and I look forward to hearing from each of you.

Madam Chair, before I yield back, I would like to take a brief moment of personal privilege to recognize Joe Graupensperger for his long and valued service at the House Judiciary Committee. Joe came to the Committee in 2009 to work on crime policy for then Chair John Conyers, Jr. He is today the Chief Counsel of our Subcommittee on Crime, Terrorism, and Homeland Security. In that span of service, Joe has drafted dozens of laws, run hundreds of hearings like this one, and without question, helped to improve the lives of millions of Americans.

In particular, we should observe that Joe has played a role in every major criminal justice reform effort that has been signed into law in the past decade and a half including the Fair Sentencing Act and The First Step Act, as well as laws to address the rape-kit backlog, reform surveillance practice, and establish rights for survivors of sexual assault, among many others. In fact, under Joe's leadership, despite a divided Congress and a Republican President, more than a dozen bills under the Crime Subcommittee jurisdiction was signed into law last Congress alone. Several others have been signed into law this Congress as well.

Today is Joe's last hearing as Chief Counsel. I want to congratulate him on his recent engagement and wish him well in his upcoming move to Texas. We will miss his leadership, his friendship, and his steadfast dedication to justice for all. Simply put, our country is better off because of Joe's work as a public servant.

Thank you, Joe, for your service to the Committee and best of luck with this exciting next chapter. With that, I yield back.

Ms. JACKSON LEE. Mr. Chair, thank you so very much for your statement, but also for your kind words. Of course, I would be remiss if I also did not acknowledge the very invaluable and long

standing, knowledgeable service of Chief Counsel Joe Graupensperger. He has given to the Judiciary Committee and, of course, to this Subcommittee years of experience having come from the Department of Justice.

If I might say his calm demeanor was a guiding pulse in making sure that the Crime Subcommittee and his service to then Chair and Ranking Member John Conyers, Jr., and of course, to you, Mr. Chair, was steady and constructive and helpful.

You are right. He has been at the cornerstone of so much legislation that has helped millions and millions of Americans. I can think of legislation reducing gun violence, protecting the health and safety of those who are incarcerated, ensuring the need for access to counsel, and dealing with reducing domestic terrorism as well. This has been really a focus of this Committee and he has been at the center point of dealing with homeland security and reform of outdated drug laws. He has a passion for the law and a passion for service to the country and to this Committee and this Congress.

I, too, would like to restrain him, but that I will not do because he is leaving because of a joyful moment in his life and that is an engagement to his wonderful now fiancé and of course, the great opportunities for both of them.

I want him to know that we are excited about his legacy and what he has done for this country through this Committee, but we are even more excited about his future. I want to congratulate you. I am glad we were able to have a Committee hearing that you had such a handprint on so that we could say congratulations to you. We will miss you, but we bid you adieu, my friend, and wish you the very best.

I want to acknowledge the Ranking Member, Mr. Jordan. I thank him very much for his presence here today.

It is now my pleasure to introduce today's Witnesses and again to thank them for their presence here and again to acknowledge the importance of their testimony.

Gwen Levi was born and raised in Baltimore. As a mother of six, Levi lived a double life, serving as a PTA President and Model Cities representative, while also distributing cocaine and heroin. She is a cancer survivor, who in the 17th year of her 33-year prison sentence, was released to home confinement under the CARES Act, then returned to custody 13 months later due to a missed call from a halfway house. In July 2021, she was granted compassionate release under The First Step Act which resulted in a time served sentence.

Dr. Homer Venters is a court-appointed prison and jail monitor and Adjunct Professor of New York University College of Global Public Health. He is a physician and epidemiologist, working at the intersection of incarceration, health, and human rights, specializing in prison health. He served on the Biden-Harris COVID–19 Health Equity Task Force and is a former Chief Medical Officer of Correctional Health Services at New York City Health and Hospital Corporation and author of Life and Death in Rikers Island. Dr. Venters received his medical doctorate from the University of Illinois–Urbana.

Alison Guernsey is a Clinical Professor at the University of Iowa College of Law where she oversees the Federal Criminal Defense Clinic. She has also done extensive work on compassionate release, BOP's handling of COVID–19 and tracked deaths in BOP custody attributable to COVID–19. Ms. Guernsey is formerly an Assistant Federal Defender who served the United States District Court for the Eastern Districts of Washington and Idaho. She received her law degree from the University of Iowa College of Law where she was the Editor-in-Chief of the Iowa Law Review.

Gretta Goodwin, Ph.D., is a Director of the Homeland Security and Justice Team at the U.S. Government Accountability Office where she leads GAO's work on justice and law enforcement issues. Her portfolio includes the Federal prison system, Federal law enforcement oversight and training, civil liberties and civil rights, vulnerable populations, and the Federal judiciary. During her 20-plus years at GAO, she also worked on issues related to Social Security reform, disability, worker protection, K–12, and higher education. Dr. Goodwin received her Ph.D. and Master's degree in Economics from the University of Nebraska at Lincoln and a Bachelor degree in Economics from the University of Houston.

Julie Kelly is a political commentator and senior contributor at American Greatness. Ms. Kelly covers political and policy issues. She is an author and former political consultant for office holders and candidates in suburban Chicago. Her past work can be found at the Federalist and National Review, as well as guest editorials in the Wall Street Journal, Roll Call, and The Hill. Ms. Kelly is a 1990 graduate of Eastern Illinois University. She lives in Orland Park, Illinois with her husband and her two daughters.

Melissa Hamilton, Ph.D., is a Senior Lecturer of Law in Criminal Justice at the University of Surrey, School of Law in the United Kingdom, who previously served as Visiting Criminal Law Fellow and Visiting Assistant Professor of Law at the University of Houston Law Center. Dr. Hamilton is a former police officer, former corrections officer, and former judicial clerk who is a member of the Task Force on Women and Community Corrections with the International Corrections and Prison Association. She previously served on the Risk Assessment Task Force with the National Association of Criminal Defense Lawyers. She received her Ph.D. in Criminology from the University of Texas at Austin and her J.D. from the University of Texas School of Law.

I welcome all of you, welcome all our distinguished Witnesses. We are very grateful to them for their participation. It does not go unnoticed two Witnesses' connection to Texas and the University of Houston. It brings a great smile and of course, that means I have a smile for all the Witnesses.

I will begin by swearing in our Witnesses. I ask our Witnesses to turn on their audio and make sure that I can see your faces and your raised hands while I administer the oath. Raised hands, raised right hands. Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief so help you God? Witnesses need to show your affirmative.

Thank you so very much. Please note that your Witnesses statements will be entered into the record in their entirety. Accordingly,

I ask that you summarize your testimony in five minutes. To help you stay within that time frame, there is a time light on your screen. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it signals that your five minutes have expired.

It is now a pleasure to recognize Ms. Levi for five minutes. Ms. Levi, you are recognized. Please unmute and begin your testimony. Thank you very much.

STATEMENT OF GWEN LEVI

Ms. LEVI. Good morning, Chair Jackson Lee, Ranking Member Biggs, and the Members of the Subcommittee. My name is Gwen Levi and I live in Baltimore, Maryland.

In March 2020, when the first wave of the COVID–19 pandemic hit, I was 16 years into my sentence for a nonviolent drug offense. I was 74 years old and had just survived a bout with lung cancer. Like so many other people in prison at the time, I was worried about the deadly virus spreading throughout the prison. There was no vaccine yet and being in prison made physical distancing and proper hygiene almost impossible.

Fortunately, Congress did pass the CARES Act in March. The law included a provision that allowed the Federal Bureau of Prisons to send people to home confinement for long periods of time to save lives and to limit the spread of COVID–19. Attorney General Barr established a strict criterion for home confinement limiting it to people who served more than half their sentence, had a clean disciplinary record for the past year, had no history of violence, and had a minimum score on the PATTERN risk assessment, and were among those considered high risk for suffering complications from COVID–19.

I met all those criteria, and I was approved for home confinement the day before my 75th birthday. It was a blessing to be able to return home to my family and my 94-year-old surviving mother which my incarceration was especially difficult for her.

When I left prison, I was sitting with an ankle monitor that tracked my every move. I could not leave my house to go anywhere, even the grocery store without permission from my case manager at the halfway house. Doing a home confinement is much better than prison, but it is still worlds away from being free.

When I got home, I began advocating for criminal justice reform, especially women, people of color, the elderly, and those without a lot of money, people just like me. I wanted to make a positive contribution to my community. I signed up for a full session computer class administered by the Maryland Justice Project which was being held in a building owned by the Baltimore Police Department. I didn't know the building was designed to prevent GPS monitoring as a security measure so the ankle monitor I was wearing lost its signal.

While I was in the second class on June 12th, my phone was turned off. Apparently, the halfway house tried calling me for the radio pinged my ankle bracelet. I didn't hear either device. That afternoon, I was told I had committed an escape which the Bureau defined as being out of touch for four hours. I was told to pack a bag and return to the halfway house. While at the halfway house,

I was questioned and told to sign a statement so that I could go home. My attorney asked to be present at that hearing when I was being questioned, but they refused her request. The day after I signed the statement, I wasn't sent home. Instead, the United States Marshals came to the halfway house and arrested me. They put me in the D.C. Jail on June 16th telling my attorney that they would expedite my return to a Federal corrections facility to complete my sentence.

As awful as that was, I was luckier than most. My family, though devastated, they sprang into action, so did the organizations I had been working with. The media picked up the story and it struck a nerve with the public. Organizations like the National Council of Formerly Incarcerated Women and Girls, FAM, organizations like Maryland Justice Project, these organizations would lobby to get me home. People across the country were outraged that during a pandemic, the BOP sent me, a 75-year-old cancer survivor to jail because I attended a computer class in the hope of finding a paying job.

At that point, my request for a sentence reduction through compassionate release had been sitting in the court for more than a year. The Justice Department opposed my motion, just as they did nearly every motion for compassionate release that was filed. I was lucky this time. Thanks to the overwhelming support I received, my judge granted me compassionate release on July 6, 2021, reducing my sentence to time served. My long ordeal was almost finally over.

My work to help others, however, goes on. I would like to share with the Subcommittee that there are things the Administration and Congress can do right now to help those in my position, people who are trying their best to make amends.

First, President Biden could commute the sentences of everyone under CARES Act confinement to home confinement so that they can move forward with their lives.

Second, as the latest COVID–19 variant makes its way through the prisons, the BOP and the Justice Department should use their authority to bring compassionate release motions on behalf of at-risk people.

Ms. JACKSON LEE. Ms. Levi, your time is expired. If you could wrap up, I will let you finish. If you could wrap up. Thank you.

Ms. LEVI. Finally, we would like Congress to pass legislation establishing an Oversight Committee so that these things that we are addressing today at this Subcommittee hearing can be addressed.

I thank you for allowing me to testify this morning and I look forward to answering your questions.

[The statement of Ms. Levi follows:]

Statement of Gwendolyn Levi
Hearing on "The First Step Act, The Pandemic, and Compassionate Release:
What are the Next Steps for the Federal Bureau of Prisons"
U.S. House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
January 21, 2022

Good morning, Chair Jackson Lee, Ranking Member Biggs, and members of the subcommittee. My name is Gwen Levi and I live in Baltimore, Maryland.

In March 2020, when the first wave of the Covid-19 pandemic hit, I was 16 years into a 24-year prison sentence for a nonviolent drug offense. I was 74 years old and had just survived a bout with lung cancer. Like so many other people in prison at the time, I was worried about the deadly virus spreading through the prisons. There was no vaccine yet and being in prison made physical distancing and proper hygiene impossible.

Fortunately, Congress passed the CARES Act in March. The law included a provision that allowed the Bureau of Prisons (BOP) to send people to home confinement for longer periods of time to save lives and limit the spread of Covid-19. Attorney General Barr established strict criteria for home confinement, limiting it to people who (1) served more than half their sentence, (2) had a clean disciplinary record for the past year, (3) had no history of violence, (4) had a "minimum" score on the PATTERN risk assessment, and (5) were among those considered high risk for suffering complications from COVID-19.

I met those criteria, and I was approved for home confinement the day before my 75th birthday. It was a blessing to be able to return home to my 94-year-old mother. My incarceration was especially difficult for her.

When I left prison, I was fitted with an ankle monitor that tracked my every move. I could not leave my house to go anywhere – even the grocery store – without permission from my case manager at the halfway house. Being on home confinement is much better than prison, but it is still worlds away from being free.

When I got home, I began advocating for criminal justice reform, especially for women, people of color, the elderly, and those without a lot of money — people like me. I wanted to make a positive contribution to my community.

I signed up for a four-session computer class administered by the Maryland Justice Project, which was being held in a building owned by the Baltimore City Police Department. I didn't know the building was designed to prevent GPS and other signals as a security measure, so the ankle monitor I was required to wear lost its signal. While I was in the second class on June 12th, my phone was turned off. Apparently, the halfway house tried calling me, then later pinged my ankle bracelet. I didn't hear either device.

That afternoon, I was told I had committed an "escape," which the BOP defines as being out of touch for four hours. I was told to pack a bag and return to the halfway house. While at the halfway house, I was questioned and told to sign a statement so that I could go home. My attorney asked to be present while I was questioned, but they refused her request.

The day after I signed the statement, I wasn't sent home. Instead, the U.S. Marshals came to the halfway house and arrested me. They put me in the D.C. jail on June 16th, telling my lawyer they would expedite my return to a federal correctional facility to complete my sentence.

As awful as that was, I was luckier than most. My family, though devastated, sprang into action. So did the organizations I had been working with. The media picked up the story, and it struck a nerve with the public. People across the country were outraged that during a pandemic, the BOP sent me – a 75-year-old lung cancer survivor – to jail because I attended a computer class in the hope of finding paid work.

By that point, my request for a sentence reduction—through compassionate release—had been sitting in the court for more than a year. The Justice Department opposed my motion, just as they did nearly every motion for compassionate release that was filed. But I was lucky. Thanks to the overwhelming support I received, my judge granted me compassionate release on July 6, 2021, reducing my sentence to time served. My long ordeal was finally over.

My work to help others, however, goes on. And I'd like to share with this subcommittee that there are three things the administration and Congress can do right now to help those in my position – people who are trying their best to make amends.

First, President Biden should commute the sentences of everyone on CARES Act home confinement so that they can move forward with their lives. We received good news last month when the Attorney General announced that he was revising the Office of Legal Counsel memo that would have required people to return to prison at the end of the pandemic. But many of these people already have been confined at home, with severe restrictions and with an ankle monitor tracking their every move, for nearly two years. And I continue to hear about these people being re-incarcerated for technical violations (like turning a phone off during class). President Biden should stop the Ferris wheel of reincarceration and commute their sentences. Congress can help by supporting H.R. 6234, the FIX CLEMENCY Act, which aims to remedy the commutation process. Until then, Attorney General Garland should make clear that the Justice Department will not return to prison anyone on home confinement who is following the rules.

Second, as the latest COVID-19 variant makes its way through the prisons, the BOP and Justice Department should use their authority to bring compassionate release motions on behalf of at-risk people – or, at the very least, to rely on the CARES Act to move them to home confinement. Between January 2020 and January 2021, 20,000 people sought compassionate release. Of those motions, less than 1% -- 32 in total—were filed by the BOP, even though that agency has struggled mightily to keep people safe. The situation is dire. Over the past two weeks, three women at the prison camp in Alderson, West Virginia, died from COVID-19. None was serving a

life sentence. In other facilities, people who test positive are not being separated from those who test negative.

Finally, Congress must pass legislation establishing independent oversight of federal prisons. Long before COVID-19, our federal prisons were in crisis. For the most part, what I witnessed – physical and mental abuse, inadequate medical care, and lack of programming – has been hidden from the public because there is no meaningful oversight. The situation poses a continuing danger to the safety and well-being of inmates and correctional officers alike.

The Justice Department's Office of Inspector General (OIG) inspected some BOP facilities during the pandemic, though these inspections were limited in number and relied primarily on BOP staff reports. But even the limited information gathered showed significant failures, including inadequate staffing and supply shortages. The BOP needs transparency and accountability—things that can only come from independent oversight.

Thank you for allowing me to testify this morning, and I look forward to answering your questions.

Ms. JACKSON LEE. Thank you so very much.
Dr. Venters, you are now recognized for five minutes.

STATEMENT OF HOMER VENTERS

Dr. VENTERS. Good morning, Chair Jackson Lee, Chair Nadler, Ranking Members Biggs and Jordan, and the Members of the Committee. Thank you for the opportunity to present this testimony.

My name is Homer Venters. I am a physician and epidemiologist who has spent the past two years performing over 40 inspections of jails, prisons, and immigration detention facilities across the country to assess the adequacy of COVID–19 responses including Bureau of Prisons facilities.

The BOP is at a crucial juncture regarding healthcare for detained people and I fear that many critical lessons from the COVID–19 pandemic may be ignored or left unaddressed. My greatest area of concern is that pre-existing deficiencies in the health services provided to people in BOP custody which contributed to the spread and lethality of COVID–19 remain unaddressed. We must replicate the strengths and address the deficiencies in how the agency has responded.

My investigations have revealed a disturbing lack of access to care when a new medical problem is encountered. In the first BOP facility I inspected, the Metropolitan Detention Center in Brooklyn, New York, it quickly became apparent that not only were reports of COVID–19 symptoms being ignored, but that the sick call requests people filled out were being destroyed, leaving no trace of their original reports. Systemic issues like this meant that when COVID–19 arrived, incarcerated people relied on a broken system of sick call to seek care.

Chronic care and behavioral health are two more areas where preexisting weaknesses in the BOP health services worsened the morbidity and mortality of COVID–19. One example is the take it or leave it approach to COVID–19 vaccination in BOP's large scale vaccination events. This approach may suffice for some, but for patients on multiple medications, with complicated health histories, and many questions, it simply does not suffice.

The BOP needs to improve these areas of care, but the principles laid out in then Attorney General Barr's memo from early in the pandemic stand today. There is a compelling and unrealized rationale for release of high-risk patients who pose minimal public safety risks. This approach is even more important now to consider during the omicron outbreaks because of the tremendous lack of staffing inside facilities.

There is one critical task that remains unaddressed regarding the BOP and COVID–19. We must have an independent assessment of all COVID–19 deaths including those that occurred in private facilities. In my work, I have encountered significant strengths and deficiencies in the BOP COVID–19 responses. There is no doubt that many of these strengths saved lives and conversely, that many of these deficiencies led to preventable illness and death.

To date, there has not been any systemic and independent review of deaths from COVID–19 in BOP custody, although a recent call for exactly this type of analysis was sent to the Inspector General of the DOJ. I strongly support this proposal, but it highlights a

more fundamental problem for the BOP, the lack of independent assessment in how deaths are reviewed and more broadly, the lack of meaningful oversight by a health organization.

Every other sector of healthcare in the United States has independent and professional health organizations reviewing the quality of care, but in the BOP and other carceral spaces, we leave those crucial assessments to law enforcement to review its own provision of health care. For the BOP to improve its overall health services and prepare for the next infectious disease outbreak, we must have an independent assessment of COVID–19 related deaths among people in BOP and Marshals custody. We also must create an independent health authority to oversee and report on all aspects of healthcare inside BOP facilities.

The BOP faces an important choice in how they respond to COVID–19 and work to improve their health services. In community health settings, we do not allow a hospital or a clinic to be the arbiter of how well they were doing. Instead, we rely on external agencies and authorities with health expertise for this critical work.

Currently, the BOP is left to make its own assessments about the quality and scope of its healthcare and only sporadic investigations by the Inspector General of the Department of Justice provide alternative viewpoints. This is wholly insufficient and leaves incarcerated people at a systemic disadvantage because the organizations and structures that measure and promote health for the rest of the nation—for the rest of us—are excluded from the care people receive in the BOP.

The BOP has an opportunity to start addressing this unequal system of care and it must start with an honest assessment of COVID–19 deaths and partnership with the CDC and other true health organizations.

Thank you for the opportunity to provide this testimony. I am happy to take any questions.

[The statement of Dr. Venters follows:]

Statement of Dr. Homer Venters

Adjunct Faculty, NYU College of Global Public Health

United States House of Representatives Subcommittee on Crime, Terrorism, and

Homeland Security, Judiciary Committee

January 21, 2022

Good morning, Chairwoman Jackson Lee, Chairman Nadler, Ranking members Biggs and Jordan and Members of the Committee, thank you for the opportunity to submit this testimony. My name is Homer Venters. I'm a physician and epidemiologist who has spent the past two years performing inspections of jails, prisons and immigration detention facilities across the county to assess the adequacy of COVID-19 responses. I have been appointed by Federal Courts and individual States to monitor COVID-19 responses in carceral settings and have conducted multiple inspections of Bureau of Prisons (BOP) facilities (Appendix 1). I previously served as the Medical Director and Chief Medical Officer of the NYC Correctional Health Services, one of the few jail or prison health services in the United States that is an independent health authority and not part of the correctional department.

At the core of this work are two principles that I believe should apply to the BOP; 1) that incarcerated people have a right to ethical, evidence-based care and 2) that a correctional health must be subject to transparent oversight and accountability, just as with community health systems.

The BOP is at a crucial juncture regarding health care for detained people, and I fear that many critical lessons from the COVID-19 pandemic may be ignored or left unaddressed. My greatest area of concern is that pre-existing deficiencies in the health services provided to people in BOP custody, which contributed to the spread and lethality of COVID-19, remain unaddressed. Approximately 10,000 detained people and staff within the BOP currently have COVID-19 and

approximately 300 people in these two groups have died with COVID-19 infection. We must replicate the strengths and address the deficiencies in how the agency has responded.[1]

My investigations have revealed a disturbing lack of access to care when a new medical problem is encountered. This process, called 'sick call' in most carceral settings, relies on the ability of incarcerated people to submit a written or electronic concern and then be seen in a face-to-face encounter with a day or two. In the first BOP facility I inspected, the Metropolitan Detention Center in Brooklyn NY, it quickly became apparent that not only were many people reporting that their sick call requests (including COVID-19 symptoms) were being ignored, but that the facility was actually destroying their original requests, which violates basic correctional standards.[2] With such a system, a facility could claim that most people they scheduled for a sick call appointment ultimately received one, and there would be no record of people who were never scheduled for care and no record of what symptoms were being reported. This theme, of undocumented or ignored sick call requests, including COVID-19 symptoms, was common throughout my COVID-19 inspections and represented a significant source of mistrust and acrimony between BOP health staff and their patients. At the root of this problem was often a lack of appreciation for the critical role of sick call, as well as chronic understaffing for the number of sick call requests.[3] As a result, when COVID-19 arrived, incarcerated people relied on broken systems of sick call to seek care. Many of the public statements I encountered about nobody having COVID-19 symptoms in a facility reflected a lack of looking, not a lack of illness. While some facilities implemented proactive screening for COVID-19, these approaches

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[1] https://www.bop.gov/coronavirus/ accessed 1/19/22.
[2] https://theintercept.com/2020/05/01/mdc-brooklyn-jail-coronavirus-medical-records/ and https://www.clearinghouse.net/chDocs/public/PC-NY-0082-0026.pdf pp 3,4.
[3] https://bloximages.chicago2.vip.townnews.com/lompocrecord.com/content/tncms/assets/v3/editorial/d/f3/df325d91-1e1d-5fc6-b1e4-c6b9c16fd1ed/5f748b8696819.pdf.pdf and https://oig.justice.gov/sites/default/files/reports/20-086_0.pdf.

often failed to ask people about their symptoms, simply relying on temperature checks, which can be unreliable especially with the Omicron variant.

Chronic care and behavioral health are two more areas where pre-existing weakness in the BOP health services worsened the morbidity and mortality of COVID-19. In speaking with patients and reviewing their medical records, I am concerned that many people do not have the severity of their illness correctly identified, so that people the BOP considers as 'well controlled' for diabetes or hypertension or depression may be people who have gone long periods in between care and who struggle to access sick call to report worsening symptoms. Patients with conditions that the CDC has identified as placing them at higher risk of death from COVID-19 should be receiving a higher level of care and prevention, but too often they are not.

One example is the 'take it or leave it' approach to COVID-19 vaccination in BOP's large scale vaccination events. This approach may suffice for some, but for patients on multiple medications, with complicated health histories and many questions, it simply does not suffice. Every high-risk patient who becomes vaccinated represents a potential life saved. I have similar concerns about how high-risk patients are being monitored during exposure quarantine and medical isolation settings. The BOP needs to improve these areas of care, but the principles laid out in Attorney General Barr's memo from early in the pandemic stand today; there is a compelling and unrealized rationale for release of high-risk patients who pose minimal public safety risks. This approach is even more important to consider during the Omicron outbreaks, because of the tremendous lack of staffing inside facilities.

There is one critical task that remains unaddressed regarding the BOP and COVID-19; we must have an independent assessment of all COVID-19 deaths, including those that occurred in private facilities. In my work, I have encountered a great many strengths in the overall and local

COVID-19 responses-like effective staff screening, addressing specialty referral backlogs and creating new inpatient treatment capacity.[4] But I have also encountered significant deficiencies in how or whether basic CDC guidelines and BOP policies were being implemented. There is no doubt that many of these strengths saved lives and conversely, that many of these deficiencies led to preventable illness and death. One cannot be true without the other. In fact, when I have reviewed the cases of people who died from COVID-19, I have found that both the internal review, and the external review that BOP has paid a consultant for, come to the same conclusion- that there were no deficiencies in care, despite clear and systemic issues being apparent.

To date, there has not been any systemic and independent review of deaths from COVID-19 in BOP custody, although a recent call for exactly this type of analysis was sent to the Inspector General of the DOJ.[5] I strongly support this proposal, but it highlights a more fundamental problem for the BOP; the lack of independent assessment in how deaths are reviewed and more broadly, the lack of meaningful oversight by a health organization. Every other sector of health care in the United States has independent and professional health organizations reviewing the quality of care, but in the BOP and in other carceral spaces, we leave these crucial assessments to law enforcement to review its own provision of health care.

In order for the BOP to improve its overall health services, and prepare for the next infectious disease outbreak, I believe the following recommendations are essential.

[4] https://www.lisa-legalinfo.com/wp-content/uploads/2021/07/VentersReportDkt239-20cv4450-1.pdf.
[5] https://www.cnn.com/world/live-news/coronavirus-pandemic-vaccine-updates-03-18-21/h_da9af577035e29c42d4024c22840c8dc.

1. An independent assessment of COVID-19 related deaths among people in BOP and Marshalls custody should occur, with focus on;

a. whether each person received the standard of care and

b. whether delays/denials of care or other environmental issues contributed to their death.

2. Design of an independent authority to oversee and report on all aspects of health care inside BOP facilities, including the performance of BOP in the following areas;

a. Identification and treatment of chronic disease morbidity mortality and level of control.

b. Creation an injury surveillance and prevention program, including traumatic brain injury, that both tracks the rates of various injuries and also works to implement injury reduction programs and their effectiveness

c. Implementation of a plan for suicide prevention and substance use treatment that is based on evidence from the CDC and SAMHSA and includes regular reporting on the resources required to fully implement access to methadone and suboxone and minimize the use of isolation.

d. Identification of racial, gender and other disparities in how care is provided or accessed

The BOP faces an important choice in how they respond to COVID-19 and work to improve their health services. In community health settings, we do not allow a hospital or clinic to be the arbiter of how well they are doing. Instead, we rely on external agencies and authorities with health expertise for this critical work, whether through the state or federal oversight. Currently,

the BOP is left to make its own assessments about the quality and scope of its health care, and only sporadic investigations by the Inspector General of the Department of Justice provide any alternative viewpoints. This is wholly insufficient and leaves incarcerated people at a systematic disadvantage because the organizations and structures that measure and promote health for the rest of the nation are excluded from the care they receive. The BOP has an opportunity to start addressing this unequal system of care, and it must start with an honest assessment of COVID-19 deaths and partnership with the CDC and other true health organizations. Thank you for the opportunity to provide this testimony.

Homer Venters, MD MS

1/21/22

Appendix 1. COVID-19 inspections

- MDC Brooklyn (BOP), NY
- MCC Manhattan (BOP), NY
- FCI Danbury (BOP), CT
- Cook County Jail, IL
- Broome County Jail, NY
- Sullivan County Jail, NY
- Shelby County Jail, TN
- Farmville Detention Center (ICE), VA
- Lompoc Prison (BOP), CA
- Southern Mississippi Correctional Facility, MS
- Central Mississippi Correctional Facility, MS
- FDC Philadelphia (BOP), PA
- Osborn Correctional Institution, CT
- Robinson Correctional Institution, CT
- Hartford Correctional Center, CT
- Dallas County Jail, TX
- Cheshire Correctional Institution, CT
- Calhoun County Jail, MI
- York Correctional Institution, CT
- Chesapeake Detention Facility Re-inspection, MD
- Pender Correctional Institution, NC
- Craven Correctional Institution, NC
- Central Prison, NC
- North Carolina Correctional Institution for Women, NC
- Chesapeake Detention Facility Re-inspection, MD
- Broward County Jail, FL
- Lompoc Prison Re-inspection (BOP), CA
- Maricopa County Jail, AZ
- Northeast Florida State Hospital, FL
- Florida State Hospital, FL
- Western Regional Jail, WV
- Northern Regional Jail, WV
- Tygart Regional Jail, WV
- Women's Community Correctional Center, HI
- Halawa Correctional Facility, HI
- Oahu Community Correctional Center, HI
- Maui Community Correctional Center, HI
- Kauai Community Correctional Center, HI
- Clayton County Jail, GA
- Cummings Unit Prison, AK
- Varner Unit Prison, AK
- Ouachita Unit Prison, AK
- East Arkansas Regional Unit, AKkkk

Ms. JACKSON LEE. Dr. Venters, thank you so very much for your testimony.

Now I would like to recognize Ms. Guernsey for five minutes. Thank you.

STATEMENT OF ALISON GUERNSEY

Ms. GUERNSEY. Chair, Subcommittee Chair and Ranking Members, thank you for inviting me to testify here today for the more than 153,000 people currently incarcerated in federal facilities. The topics that the Committee is going to address today are literally a matter of life and death.

My name is Alison Guernsey, and I am a Clinical Associate Professor at the University of Iowa College of Law where I direct the Federal Criminal Defense Clinic. My students and I represent indigent people who have been charged with Federal crimes or who are seeking sentencing reductions in various Federal Districts and Circuit Courts across the country. This includes motions for compassionate release and advocacy under the CARES Act.

In addition to our direct representation, however, we spent the past 22 months attempting to monitor and track the COVID–19 related deaths and infections in the Bureau of Prisons with an eye towards identifying the impact of the BOP's actions on the availability and use of compassionate release. Because of the people currently living in our prisons have been the driver behind our work, I want to start today by highlighting their real human toll COVID–19 has exacted.

I want to tell you about Jaime Benevides. Mr. Benevides was a 49-year-old father and brother from Texas who died of COVID–19 while being housed at a medical facility in Springfield, Missouri. In March 2022, Mr. Benevides was sentenced for marijuana trafficking to 30 months. He had long-term pre-existing medical conditions that the CDC had listed as increasing his risk of severe COVID and even death. Not surprisingly, in December 2020, Mr. Benevides caught COVID. He started to get better until he didn't. In March of 2021, he was transported to the hospital and just days later he died.

At the time of his death, Mr. Benevides had served 20 months of his 30-month sentence. From the information we know, Mr. Benevides was a strong candidate for CARES Act home confinement. From what we know, he could have even had a shot at compassionate release. Although it is impossible tell from the Bureau of Prison's publicly-available data whether he applied for either, we know that he certainly did not get them.

Mr. Benevides is one of thousands of people across the country in federal facilities who have caught COVID, some of them more than once. The deaths are close to 300 that have occurred since March 2020. As I highlight in detail my written remarks, having spent the past 22 months monitoring the BOP data and talking to advocates both inside and out of Federal prison, there is serious questions about the veracity of the BOP's infection and death data. Not only do these questions cast doubt on the BOP's handling of the pandemic, but they have real-world impact on the adjudication of compassionate release motions.

First, the death rate. According to the currently available public data from the Bureau of Prisons, as of today, there are 279 people who have died from COVID who were housed in Federal facilities. But this number is suspect for several reasons: First, delayed reporting; second, it doesn't include anyone who has died in a privately managed facility with a Federal contract; and third, it excludes people who are granted compassionate release just in time to die free.

Second, the infection rate. The Bureau of Prisons has admitted that its cumulative infection rate doesn't include anyone who caught COVID and was then released from prison. Moreover, infection rate data is only as good as its testing. The BOP reports only one testing variable for incarcerated people, the number of people it tests. By recording the number of people it tests, as opposed to the number of tests administered, the BOP is able to hide whether a low-infection rate is due to low COVID prevalence or simply inadequate testing. As advocates and people who are incarcerated have reported day after day, their suspicion is the latter.

The accuracy of the BOP's data matters. Federal courts rely on it routinely in granting compassionate release and if a judge misjudges the COVID risk based on inaccurate data, people that we know are medically vulnerable will be left in prison to die. We know the Bureau of Prisons is not bridging that gap. It has approved only 43 requests in 2020 and in the first part of 2021 only 9.

So, reduction is simple. What must we do? We should the BOP to report accurate and verifiable data. We should require them to do this for deaths and for infections. We should require the BOP to comply with the mandates already articulated in The First Step Act, that requiring them to report to this Committee in Congress what they are doing with respect to compassionate release procedures.

I appreciate you taking the time to focus on some of the people who are the most vulnerable during the pandemic and I welcome your questions.

[The statement of Ms. Guernsey follows:]

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?

Written Testimony Submitted By:

Alison K. Guernsey, *Clinical Associate Professor, University of Iowa College of Law*

January 21, 2022

Chairman Nadler, Subcommittee Chair Jackson-Lee, and members of the Subcommittee, thank you for inviting me to testify on the BOP's response to the pandemic and compassionate release. For the more than 157,000 people currently locked away in federal custody,[1] the topics the Committee will address today are, quite literally, a matter of life or death.

My name is Alison K. Guernsey, and I am a former Assistant Federal Public Defender and, now, a Clinical Associate Professor at the University of Iowa College of Law where I direct the Federal Criminal Defense Clinic. Since August 2019—before the pandemic—more than 30 law students and I have worked together to represent people across the country seeking release from federal prison under 18 U.S.C. § 3582(c), the compassionate-release statute.

Our compassionate-release work changed when COVID-19 hit. In addition to direct litigation, we have spent the past 22 months listening to the stories our clients and non-clients, alike, have conveyed about the horrific pandemic-related conditions of confinement in federal prisons, privately managed facilities with federal contracts, and U.S. Marshal custody. We have spent the past 22 months receiving the angry and desperate pleas of the family members and friends of those people we have locked away as they described their loved ones' experiences or tried to make sense of how and why a family member or friend died. And we have spent the past 22 months tracking and attempting to verify the BOP's infection and death data to ensure that what is happening behind bars is not easily misrepresented or erased.

Simply and pointedly stated, in March 2020 our prisons became death traps. And given the BOP's inability or reticence to control the spread of COVID-19 behind bars by engaging in aggressive evidence-based public-health measures, including decarceration, they remain dangerous today.

In my remarks, I will start by highlighting my concerns over the BOP's lack of transparency about the number of deaths of people in federal custody from COVID-19, as well as concerns about the real infection rate in its facilities. I will then highlight the difficulties that inaccurate, incomplete, and delayed data poses for people who are incarcerated, advocates, and the federal-court system that has been tasked under 18 U.S.C. § 3582(c) with deciding whether to allow someone to return home through compassionate release. I will conclude by highlighting several modest things that the BOP can do, today, to help preserve human life.

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[1] Fed. Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Jan. 18, 2022)

1. BOP Death Rates Are Inaccurate and Unverifiable

First, the death rates. According to the current publicly available data from the BOP's website, as of January 19, 2022, 277 people have died from COVID-19 while housed in federal facilities.[2] This number includes people who died in prisons, halfway houses, or while on home confinement. This number is suspect for several reasons.

Principally, the BOP is often slow to report deaths of people living in its institutions. This means that on any given day, advocates, lawyers, and people living behind bars can identify people that they know have died but who are not reflected in the publicly reported data. Two recent examples include Bree Eberbaugh and Rebecca Marie Adams, two women who were incarcerated at FPC Alderson when they died. Ms. Adams[3] died on January 12, 2022, while Ms. Eberbaugh[4] died just two days later, on January 14, 2022.

At the time of their deaths (and currently), FPC Alderson was undergoing a COVID-19 outbreak. On December 1, 2021, there was only one reported infection at the institution.[5] But by December 15, 2021, there were 56.[6] And by December 26, 2021, there were 124.[7] As of January 19, 2022, the number remains at 71.[8] Although the BOP reports that approximately 184 people have "recovered,"[9]—assuming this data is accurate[10]—for a prison with a population of 677,[11] these current numbers suggest that approximately 38% of the population has been or is currently infected with COVID-19.

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[2] Fed. Bureau of Prisons, *COVID-19 Cases*, https://www.bop.gov/coronavirus/ (last visited Jan. 18, 2022).
[3] Fed. Bureau of Prisons, Find an Inmate, Rebecca Marie Adams, Register Number 35136-057 (reported deceased 1/12/2022).
[4] Fed. Bureau of Prisons, Find an Inmate, Bree Eberbaugh, Register Number 15134-088 (reported deceased 1/14/2022).
[5] University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, https://law.uiowa.edu/compassionate-release-work (last updated Jan. 20, 2022).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Fed. Bureau of Prisons, *COVID-19 Cases*, https://www.bop.gov/coronavirus/ (last visited Jan. 19, 2022).
[10] *See infra* Part 2.
[11] Fed. Bureau of Prisons, FPC Alderson, https://www.bop.gov/locations/institutions/ald/ (last visited Jan. 19, 2022).

Even though Ms. Eberbaugh's and Ms. Adams's deaths took place during this COVID outbreak, and even though there is no question they died from COVID—Ms. Adams had "tested positive" and been on a ventilator[12] and Ms. Eberbaugh suffered from several conditions that the CDC listed as rendering a person more vulnerable to serious illness or death[13]—as of January 19, 2022, the BOP has yet to count their deaths in its tally:

Facility	Inmates Positive	Staff Positive	Inmate Deaths	Staff Deaths	Inmates Recovered	Staff Recovered	City
Alderson FPC	71	4	0	0	184	39	Alderson

It is only because of the work of incarcerated people and their advocates that people, like me, who attempt to track and monitor this data can identify, in real time, what is happening in our prisons.[14]

I do not mean to imply that the BOP will never count Ms. Eberbaugh, Ms. Adams, or others in its tally or that it is delaying intentionally. It is likely, with time, it will rightly include the deaths that occur at FPC Alderson and other institutions in its total. It has done so belatedly in other cases. To provide just one example, Gregory Ziglar died of COVID-19 in BOP custody on January 29, 2021. But the BOP did not report his death publicly until January 3, 2022, almost a year later[15]:

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[12] *United States v. Adams*, 1:19-cr-00546-NCT, Doc. 71 (Gov't Response to Mox for Compassionate Release) (MDNC Jan. 11, 2022).
[13] *United States v. Eberbaugh*, 2:18-cr-00222, Doc. 130 (Mox for Compassionate Release) (SD W. Va. July 30, 2020).
[14] As an example, Ms. Dianthe D. Martinez-Brooks, a woman who was formerly incarcerated at FCI Danbury, *see Martinez-Brooks et al v. Easter et al*, 3:20-cv-00569-MPS (D. Conn) and who maintains close communication with women still inside is the one who notified me of the two deaths at FPC Alderson on the day they occurred.
[15] Fed. Bureau of Prisons, Press Release, *Inmate Death at USP Lewisburg* (Jan. 3, 2022), https://tinyurl.com/2ddxsvba.

U. S. Department of Justice
Federal Bureau of Prisons

FOR IMMEDIATE RELEASE
January 3, 2022

Contact: Office of Public Affairs
202-514-6551

Inmate Death at USP Lewisburg

WASHINGTON, D.C.: On Friday, January 29, 2021, inmate Gregory Ziglar was found unresponsive at the United States Penitentiary (USP) Lewisburg in Lewisburg, Pennsylvania. Responding staff immediately initiated life-saving measures. Staff requested emergency medical services (EMS) and life-saving efforts continued. Mr. Ziglar was transported by EMS to a local hospital. Subsequently on the same day, Mr. Ziglar, who had long-term, pre-existing medical conditions which the Centers for Disease Control and Prevention (CDC) lists as risk factors for developing more severe COVID-19 disease, was pronounced deceased by hospital staff. Mr. Ziglar tested positive for COVID-19 post-mortem. Following an autopsy, it was determined Mr. Ziglar's death was likely related to COVID-19.

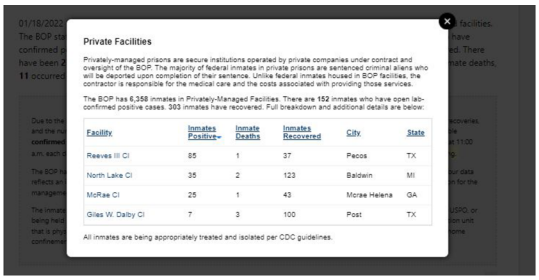
This delay occurred even though non-publicly available data showed clearly that the BOP knew that Mr. Ziglar had died of COVID well before January of this year. In fact, Mr. Ziglar's name appears on a list of people who died from COVID that the BOP provided in its response to a Freedom of Information Act ("FOIA") request on June 16, 2021:

93241-083	ZIGLAR, Gregory	1/29/2021	LEW	Pulmonary	U07.1	COVID-19, virus identified

The fact that the information the BOP reports on its website could end up being accurate over time, however, does not alleviate the concern. The delay obfuscates the reality of COVID-19's current impact on people in prison and undermines the reliability of the BOP's reporting. And that, as I will discuss below, has grave legal and public-health implications.

A second concern about the reliability of the BOP's death number is that it does not include the people who have died in privately managed prisons with federal contracts. Nor does the BOP even accurately report that data when it attempts to do so separately. For example, apart from the 277 deaths previously mentioned, as of January 19, 2022, the BOP website reports seven deaths in "private facilities":[16]

[16] Fed. Bureau of Prisons, *COVID-19 Cases*, https://www.bop.gov/coronavirus/ (last visited Jan. 18, 2022).



Private Facilities

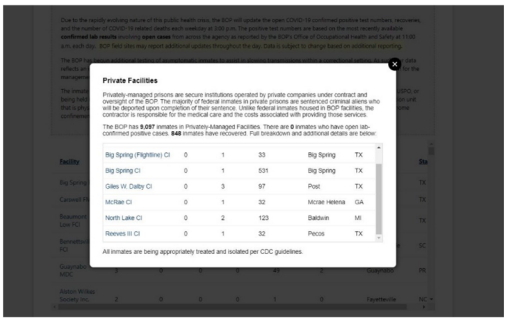
Privately-managed prisons are secure institutions operated by private companies under contract and oversight of the BOP. The majority of federal inmates in private prisons are sentenced criminal aliens who will be deported upon completion of their sentence. Unlike federal inmates housed in BOP facilities, the contractor is responsible for the medical care and the costs associated with providing those services.

The BOP has 6,358 inmates in Privately-Managed Facilities. There are 152 inmates who have open lab-confirmed positive cases. 303 inmates have recovered. Full breakdown and additional details are below:

Facility	Inmates Positive	Inmate Deaths	Inmates Recovered	City	State
Reeves III CI	85	1	37	Pecos	TX
North Lake CI	35	2	123	Baldwin	MI
McRae CI	25	1	43	Mcrae Helena	GA
Giles W. Dalby CI	7	3	100	Post	TX

All inmates are being appropriately treated and isolated per CDC guidelines.

But six months ago, on June 2, 2021, it was reporting nine deaths in "private facilities":



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The BOP has 9,057 inmates in Privately-Managed Facilities. There are 0 inmates who have open lab-confirmed positive cases. 848 inmates have recovered. Full breakdown and additional details are below:

Big Spring (Flightline) CI	0	1	33	Big Spring	TX
Big Spring CI	0	1	531	Big Spring	TX
Giles W. Dalby CI	0	3	97	Post	TX
McRae CI	0	1	32	Mcrae Helena	GA
North Lake CI	0	2	123	Baldwin	MI
Reeves III CI	0	1	32	Pecos	TX

All inmates are being appropriately treated and isolated per CDC guidelines.

And a FOIA returned just 8 days later, on June 10, 2021, listed eighteen deaths.[17]

When this discrepancy was brought to the BOP's attention, Scott Taylor, from the BOP's Office of Public Affairs explained that the deaths had been removed from the site because people with federal holds no longer reside at the private facilities.[18] In other words, the federal contracts had expired. But the simple fact that privately managed facilities no longer incarcerate people with federal, criminal holds does not resurrect the people who contracted COVID-19 and died there when the facilities did.

For those seeking accurate data about the BOP's death rate, a FOIA appears to

[17] University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: People Who Have Died in Federal Custody*, https://law.uiowa.edu/compassionate-release-work (last updated Jan. 20, 2022).

[18] Email from Scott Taylor, BOP Office of Public Affairs, to Keri Blakinger, The Marshall Project (Apr. 8, 2021), https://tinyurl.com/2sdurwst.

be the best option. But, again, the data is confusing. In a FOIA returned on September 9, 2021, the BOP reported 252 deaths from COVID-19 between March 2020 and June 16, 2021, including deaths in privately managed facilities.[19] But for this same period across the same types of institutions, the BOP's website reported 257 deaths.

Who are the five people the BOP website listed as being deceased but who were not included on the FOIA? It is impossible to tell because the BOP does not provide press releases for all of the deaths that occur in its facilities.[20] And yet it is the press releases that provide valuable and necessary information about who has died, when they died, why they died, and where they died. Without these details, cross checking the number of deaths reported on the BOP's website with the information available through the FOIA process is impossible, and the real death toll remains unclear.

A third concern about the BOP's death statistics are that they are inaccurate because they do not include the people who caught COVID-19 in the BOP, became severely and gravely ill while incarcerated, and who were then granted compassionate release on their death beds. In other words, the people who, upon release, did nothing more than die free. One recent example also comes from FPC Alderson: Juanita Haynes. Ms. Haynes was granted compassionate release on January 3, 2022.[21] At the time, she had "been sedated on a ventilator since December 26, 2021, unable to maintain oxygen levels above fifty percent."[22] Because Ms. Haynes died out of BOP custody[23] she will never be included in the BOP's data. And it's only because of the work of advocates in and out of prison that we know her name.[24]

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[19] I have filed two follow-up FOIA requests since receiving this information in September 2021. Both remain outstanding.

[20] As of January 18, 2022, the BOP has published 257 press releases for deaths in its facilities. Fed. Bureau of Prisons, News Stories https://www.bop.gov/resources/news_stories.jsp#. Excluding the people who died in privately managed facilities with federal contracts, there are currently at least 20 missing press releases. That means that there are at least 20 people whom we cannot name or track.

[21] *United States v. Haynes*, 2:18-cr-00261, Doc. 119 (Order Granting Compassionate Release) (Jan. 3, 2022).

[22] *Id.* at 7.

[23] Legacy, Juanita Carrie Haynes, Obituary, https://tinyurl.com/2p9bbzys (last visited Jan. 20, 2022).

[24] For example, Wendy Hechtman, a person who was formerly incarcerated at FCI Danbury and who does advocacy work on behalf of people in the criminal-legal system, alerted me to Ms. Haynes's case and subsequent death.

In short, the BOP's claim that 277 people have died from COVID in federal facilities is inaccurate. That number is missing at least 18 people who have died in privately managed prisons and an unknown number of other people the BOP has not timely counted or will never count because they were released just in time to die.

2. The BOP Infection Rates Are Inaccurate and Unreliable

Second, the infection rates. The concerns with the BOP's recordkeeping do not stop with deaths, but they also extend to its daily and cumulative infection numbers. With respect to cumulative infection numbers over time, there is no dispute that they are inaccurate. In fact, a BOP spokesperson confirmed to The Marshall Project in April 2021 that the cumulative COVID-19 infection data the BOP reports does not include anyone who caught COVID-19 in prison but who was then released.[25]

The admission that the data was inaccurate was not surprising, however. The University of Iowa College of Law's Federal Criminal Defense Clinic has been tracking the reported cumulative infection rate for each BOP facility on a daily basis since August 2020.[26] Given the BOP's data supposedly includes both positive and recovered people,[27] the total number of people infected should never drop. It should either remain constant—if there are no new infections—or increase as the virus spreads. But that is not what the BOP is reporting.

Instead, the cumulative totals signal a certain number of infected and recovered people one day, only to have that number decrease the next.[28] The BOP has been undercounting the infection rate by thousands.[29] The impact of the undercounting is stark when merely glancing at less than one month of reporting for just a few federal facilities. All the red boxes are red flags. They signal dates when the infection rate

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[25] The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, https://tinyurl.com/2vbhh2mf (last visited Apr. 12, 2021); *see also* Joshua Manson & Liz DeWolf, *The Federal Bureau of Prisons Is Even Less Transparent than We'd Thought* (Apr. 2, 2021), https://uclacovidbehindbars.org/blog/bopdata.

[26] University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, https://law.uiowa.edu/compassionate-release-work (last updated Jan. 20, 2022).

[27] Fed. Bureau of Prisons, *COVID-19 Cases*, https://www.bop.gov/coronavirus/ (last visited Apr. 12, 2021) (noting data includes "confirmed positive test numbers" and "recoveries").

[28] University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, https://law.uiowa.edu/compassionate-release-work (last updated Jan. 20, 2022).

[29] Joshua Manson & Liz DeWolf, *The Federal Bureau of Prisons Is Even Less Transparent than We'd Thought* (Apr. 2, 2021), https://uclacovidbehindbars.org/blog/bopdata.

dropped. Dates when we cannot trust the data[30]:

	7-Dec	8-Dec	9-Dec	10-Dec	13-Dec	14-Dec	15-Dec	16-Dec	17-Dec	20-Dec	21-Dec	22-Dec	23-Dec	28-Dec	29-Dec	30-Dec
ACS Corrections (RRC)	7	7	7	7	7	7	7	7	7	6	6	6	6	5	5	5
Fort Dix FCI	1725	1723	1722	1722	1721	1721	1717	1711	1711	1713	1713	1711	1711	1706	1706	1706
Seagoville FCI	1098	1098	1098	1098	1097	1096	1096	1094	1093	1092	1092	1090	1089	1090	1090	1088
Tuscon USP	991	990	989	989	987	986	986	985	985	985	985	985	985	986	986	987
Beaumont Low FCI	1008	998	995	994	994	991	988	988	985	985	983	984	983	984	985	983
Elkton FCI	831	830	829	829	829	828	825	825	824	825	825	820	820	818	818	819
Carswell FMC	613	612	609	609	608	611	610	606	605	609	607	608	612	638	649	673
Lexington FMC	663	663	665	664	664	664	664	663	663	663	662	660	658	686	689	688
Texarkana FCI	769	767	764	764	763	762	762	761	761	762	761	760	760	761	760	758
Pekin FCI	747	747	748	748	748	748	748	747	747	748	749	750	750	751	751	751
Florence FCI	662	661	661	661	661	661	660	659	658	658	658	657	655	652	648	649
Fort Worth FMC	688	688	687	687	688	687	686	686	686	684	688	688	687	695	694	696
Loretto FCI	690	690	690	688	688	684	684	684	684	684	683	685	682	678	679	684
Marion USP	706	706	705	706	705	704	704	700	700	700	700	697	695	696	695	717
Terre Haute USP	735	734	734	735	734	735	735	733	733	733	733	731	731	731	731	731
Greenville FCI	696	696	696	697	696	696	696	696	694	695	696	696	696	694	694	694
Big Spring FCI	701	701	702	702	701	700	702	698	698	698	698	698	696	693	694	694
Leavenworth USP	709	707	707	706	706	704	705	704	702	703	703	699	699	698	699	699
Manchester FCI	695	695	694	692	692	694	693	693	693	694	695	694	695	697	698	697
Brooklyn MDC	438	439	440	440	440	441	441	441	441	441	446	464	465	474	545	582
Oxford FCI	645	643	643	643	644	647	647	645	643	645	645	645	644	643	643	643
Pollock USP	642	642	642	642	642	641	642	643	643	643	643	643	643	644	645	647
Forrest City Low FCI	665	665	663	664	664	664	663	660	661	661	661	659	658	657	657	657
Thomson USP	610	610	610	611	610	610	611	611	611	610	609	608	609	611	611	610
Lee USP	640	640	641	641	640	640	641	641	641	641	641	640	640	639	639	639
Springfield MCFP	625	624	622	622	622	621	621	620	620	621	621	620	619	620	621	621
Victorville Medium I FCI	597	597	597	597	595	596	596	596	595	594	594	594	593	594	597	597
Pollock FCI	569	567	568	568	593	596	596	596	596	597	601	601	601	604	605	609
Sandstone FCI	629	628	627	627	627	627	626	627	627	627	627	627	624	624	621	620
Oklahoma City FTC	520	520	520	518	519	519	517	516	516	518	517	515	515	514	515	515
Englewood FCI	609	608	608	607	607	607	607	607	608	607	606	605	604	605	605	605
Terminal Island FCI	511	512	511	512	513	513	511	511	511	511	508	509	508	507	508	509

It is no surprise that UCLA Law School's COVID-19 Behind Bars Data Project has given the BOP's data-reporting an "F."[31]

In addition to problems with the accuracy of the cumulative infection totals for each facility over time, the daily infection numbers that the BOP is reporting are also concerning. The infection-rate data is only as good as the BOP's testing.[32] If the BOP does not test, then the infection rates will not increase, even though people are sick. Unfortunately, the BOP's publicly available data on testing sheds very little light on what is happening in its facilities. As Hope Johnson, a data fellow at UCLA Law School's COVID-19 Behind Bars Project has noted, the BOP reports only one testing variable for incarcerated people: the "number of incarcerated people tested."[33] This

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[30] The full spreadsheet can be found at: University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, https://law.uiowa.edu/compassionate-release-work (last updated Jan. 20, 2022).

[31] Joshua Manson & Liz DeWolf, *The Federal Bureau of Prisons Is Even Less Transparent than We'd Thought*, UCLA Law COVID Behind Bars Data Project (Apr. 2, 2021), https://uclacovidbehindbars.org/blog/bopdata.

[32] *Cf.* Erika Tyagi, Neal Marquez, and Joshua Manson, *A Crisis of Undertesting: How Inadequate COVID-19 Detection Skews the Data and Costs Lives*, UCLA Law COVID Behind Bars Data Project (Oct. 2021), https://uclacovidbehindbars.org/assets/cfr_report_final.pdf.

[33] Fed. Bureau of Prisons, *COVID-19 Inmate Test Information*, https://www.bop.gov/coronavirus/ (last visited Jan. 19, 2022). Most jurisdictions report the "number of tests administered."

means that even if the same person has been tested many times throughout the course of the pandemic, they are counted only once by the BOP. Conveying only this variable provides no indication of how often and when—between March 2020 and today—the BOP has administered tests.[34] But this is key data needed to understand "whether a low positivity rate reflects actually low COVID-19 prevalence, confirmed by mass testing, or just the tip of a much larger and undetected outbreak, concealed by insufficient testing."[35]

Moreover, setting aside the infection and testing numbers the BOP has reported, people residing in federal facilities and their advocates have consistently complained about chronic undertesting. Incarcerated people with whom I've spoken in various facilities across the country have reported that some facilities refuse to test people who have already contracted COVID-19 or who previously tested negative.[36] Other facilities decline to test asymptomatic people, even though they necessarily reside in close proximity with people who have tested positive.[37]

In short, without being able to determine whether the BOP has been appropriately testing throughout the life of the pandemic, both in terms of timing and volume, it is impossible to verify whether the reported daily infection rates are accurate at any given time. Instead, they are an undercount and an unreliable measure of the extent of carceral spread.

3. Inaccurate Death and Infection Rate Data Matters for Compassionate Release and Public Health

So, why does the BOP's data matter? It matters because accurate, timely reporting about deaths and infections in federal prison facilities is critical from both a legal and public-health perspective.

First, the legal. Federal courts routinely rely on the BOP's COVID-19 death and infection-rate data in evaluating the danger a person may face in prison and then

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[34] Fed. Bureau of Prisons, *COVID-19 Inmate Test Information*, https://www.bop.gov/coronavirus/ (last visited Jan. 19, 2022).
[35] Written Joint Statement of Aaron Littman, Lauren Brinkley-Rubinstein, Michele Deitch Before the Senate Judiciary Committee, *Oversight Hearing to Examine the Federal Bureau of Prisons* (Apr. 15, 2021), https://tinyurl.com/43xd8xd8.
[36] *Robinson v. Pullen*, 3:22-cv-00094-SRU, Doc. 1 at 1, 6 (Jan. 18, 2022) (petition under 28 U.S.C. § 2241).
[37] *Id.* at 7.

deciding whether to grant motions for compassionate release.[38] To qualify for compassionate release, the incarcerated person must demonstrate that an "extraordinary and compelling" reason justifies a reduced sentence.[39] Although many courts have used their discretion to conclude "extraordinary and compelling" reasons for release include the dangers that COVID-19 poses in BOP custody, fear over a "generalized" or "speculative" risk of contracting COVID-19 is insufficient to meet the standard.[40] For this reason, over the course of this pandemic, prosecutors routinely claim in their oppositions to motions for compassionate release that the BOP is taking appropriate action to prevent the spread of COVID-19 and that the BOP data about infections and deaths bear this out[41]:

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BOP's efforts have been fruitful. There is no way to stop this virus short of widespread vaccination. Some inmates inevitably will be infected and some of that cohort may succumb, just as in the population at large. However, the rate of deaths in federal prisons as a whole has been lower than that in the general U.S. population, a notable achievement given the known risks of viral spread in a congregate prison setting.

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[38] *United States v. Doe*, 833 F. App'x 366, 367 n.3 (3d Cir. 2020) ("We note that, despite Doe's unsupported argument that FCI Cumberland staff took inadequate precautions in July 2020, the Bureau of Prisons currently is reporting no active cases of COVID-19 among FCI Cumberland inmates or staff."); *United States v. Freed*, 845 F. App'x 198, 200 (3d Cir. 2021) ("The Court held that Freed had not established 'extraordinary and compelling circumstances,' in part because he could not demonstrate 'an actual, non-speculative, and non-generalized risk of exposure to COVID-19' at FCI Fort Dix, where he is serving his sentence. At that time, there were no COVID cases at Fort Dix."); *United States v. Zirkelbach*, No. 13-CR-1001-CJW-MAR, 2021 WL 3609299, at *5 (N.D. Iowa Aug. 11, 2021 (noting "the concerns about a disproportionate risk of contracting the virus are unfounded. . . . [T]here is now only one active case of COVID-19 among the inmates at Forrest City Medium FCI").

[39] 18 U.S.C. § 3582(c)(1).

[40] *Doe*, 833 F. App'x at 367; *see also United States v. Petty*, No. 2:18-CR-53(4), 2020 WL 7047300, at *2 (S.D. Ohio Dec. 1, 2020); *United States v. Koons*, 2020 WL 1940570, at *5 (W.D. La. Apr. 21, 2020) ("General concerns about the spread of COVID-19 or the mere fear of contracting an illness in prison are insufficient grounds to establish the extraordinary and compelling reasons necessary to reduce a sentence.")

[41] *United States v. Hopkins*, 1:06-cr-00227-RBW, Doc. 484 at 15 (D.C.D.C. Dec. 21, 2021)

But, as outlined above, the figures on which prosecutors and the courts have been relying are inaccurate. And if courts are misjudging the risk of COVID-19 in federal prison based on flawed data, then we are unjustifiably incarcerating people who are at medical risk in contravention of the First Step Act's desired expansion of 18 U.S.C. § 3582(c).[42]

Turning quickly to compassionate release generally, the fact that most of the releases from federal custody during the pandemic have come through defendant-initiated motions with the federal courts, as opposed to the BOP, speaks volumes about the BOP's unwillingness to use the decarceration tools at its disposal to protect human life. In calendar year 2020, the BOP approved only 43 requests for sentence reductions.[43] And, according to the most recent data publicly available, in the first quarter of calendar year 2021, the BOP approved 9 requests for sentence reductions.[44] This is compared to the over 3,000 motions for compassionate release granted by the federal courts between January 1, 2020, and June 30, 2021.[45]

A review of the number of people who died in BOP custody after seeking compassionate release gives us just a taste of how a more robust use of compassionate release at the BOP level could have saved additional lives.

As of January 18, 2021, seventy-two of the approximately 274 people we can identify by name[46] as having died in federal custody passed away after seeking compassionate release.[47] To say that only seventy-two of the people who died had filed for compassionate release, however, is certainly an undercount. This number includes only those people who eventually filed their request with a federal district court upon getting nowhere with the BOP. The number of people who asked for compassionate release from the BOP before dying and who never filed with a federal district court is unknown—that data does not appear publicly—but it is undoubtedly

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[42] *See infra* n. 67

[43] U.S. Dep't of Justice, Federal Prison System, *FY 2022 Performance Budget Congressional Submission* 28 (2021), https://www.justice.gov/jmd/page/file/1398306/download

[44] *Id.*

[45] U.S. Sentencing Comm'n, Compassionate Release Data Report, Calendar Years 2020 to 2021 (Sept. 2021), https://tinyurl.com/2eztkaj7.

[46] This number includes the 256 people for whom the BOP has issued a press release plus the 18 individuals on the BOP's private prison FOIA. (Although there are 257 press releases, *see supra* n. 20, one of those press releases merely identifies the person as John Doe making it impossible to track his case).

[47] *See* University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: People Who Have Died in Federal Custody*, https://law.uiowa.edu/compassionate-release-work-federal-courts (last updated Jan. 20, 2022).

much higher.

But even assuming only seventy-two of those who died requested compassionate release from the BOP, in not even one of those cases did the BOP move for release on the person's behalf. This is even though in almost every single press release it issued announcing a new death, the BOP touted the person's pre-existing medical conditions as a purported explanation.[48]

As Assistant Federal Defender, Anita Aboagye-Agyeman, and I highlighted in our previous written testimony to the U.S. Senate Committee on the Judiciary in April 2021, an awful example of the BOP's under assessment of risk while a person remains alive is John Rodrigues. Mr. Rodrigues, a 65-year-old man from Hawaii, died on December 15, 2020.[49] Mr. Rodrigues suffered from obesity, diabetes, and kidney disease[50]—conditions the CDC recognizes to be serious risk factors for COVID-19.[51] Despite these conditions, DOJ prosecutors argued against his release on the grounds that the BOP had his care under control and the COVID-19 infection rates at his prison were too low to warrant release.[52] Even when Mr. Rodrigues was hospitalized and struggling to breathe, DOJ prosecutors continued to argue for him to remain in prison because it was safer for him.[53] In its press release announcing Mr. Rodrigues's death, the BOP finally acknowledged what Mr. Rodrigues had been arguing all along: he "had long-term, preexisting medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease."[54]

Or, Jaime Benavides, a 49-year-old man from Texas, who died from COVID-

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[48] Fed. Bureau of Prisons, News Stories, COVID-related Inmate Deaths, https://www.bop.gov/resources/news_stories.jsp (last visited Jan. 18, 2022).
[49] Fed. Bureau of Prisons, Press Release, Inmate Death at USP Tucson (Dec. 16, 2020), https://tinyurl.com/jt6rjh98
[50] *United States v. Rodrigues*, 1:08-cr-00668-JAO, Doc. 177 at 1-2 (D. Hawaii Oct. 8, 2020) (Motion for a Reduced Sentence).
[51] Ctrs. for Disease Control and Prevention, *People with Certain Medical Conditions* (Mar. 29, 2021), https://tinyurl.com/5zvudb3e
[52] *United States v. Rodrigues*, 1:08-cr-00668-JAO, Doc. 183 at 12-14 (D. Hawaii Oct. 26, 2020) (Government Response in Opposition to Motion for a Reduced Sentence).
[53] *United States v. Rodrigues*, 1:08-cr-00668-JAO, Doc. 197 at 4 (D. Hawaii Dec. 11, 2020) (Government Supplemental Response in Opposition to a Reduced Sentence).
[54] Fed. Bureau of Prisons, Press Release, Inmate Death at USP Tucson (Dec. 16, 2020), https://tinyurl.com/jt6rjh98

19 while being housed at MCFP Springfield.[55] Mr. Benavides was serving a 30-month sentence for a marijuana-trafficking offense,[56] and at the time of his death, he had served 20 of those months.[57] As though his death were not tragic enough, the last months of Mr. Benavides's life in the BOP must have been horrible. He was first diagnosed with COVID-19 on December 18, 2020.[58] The BOP considered him "recovered" on December 28, 2020, but he was hospitalized on March 25, 2021, as his "condition worsened."[59] Just days later, on April 4, he died.[60] In the press release, the BOP notes he "had long-term, preexisting medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease."[61]

More recently is the case of Lee Cormier, who passed away in BOP custody on December 28, 2021.[62] Prior to his death, Mr. Cormier was incarcerated at FCI Beaumont.[63] He tested positive for COVID-19 on November 6, 2020, and according to the BOP "was converted to the status of recovered."[64] As outlined in his emergency motion for compassionate release, however, Mr. Cormier's battle with COVID-19 had left him "ravaged."[65] Confined to a wheelchair, reliant on other incarcerated people to push him around, and having visited the hospital six times over three weeks, he pleaded with the district court to let him go home to no avail.[66] On December 21, 2021, Mr. Cormier was transferred to a hospital for "shortness of breath" and later died.[67] In the press release announcing Mr. Cormier's death, the BOP again made sure to highlight that he had "pre-existing medical conditions which

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[55] Fed. Bureau of Prisons, Press Release, Inmate Death at MCFP Springfield (Apr. 7, 2021), https://tinyurl.com/bxx3p9u3
[56] *United States v. Benavides*, 5:19-cr-01324, Doc. 36 at 2 (S.D. Tex. Mar. 4, 2020) (Judgment).
[57] *United States v. Benavides*, 5:19-cr-01324, Doc. 4 (S.D. Tex. Aug. 13, 2019) (noting that Mr. Rodrigues was kept in custody at his initial appearance where he remained).
[58] Fed. Bureau of Prisons, Press Release, Inmate Death at MCFP Springfield (Apr. 7, 2021), https://tinyurl.com/bxx3p9u3
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Fed. Bureau of Prisons, Press Release, Inmate Death at FCI Beaumont Low (Jan. 5, 2022), https://tinyurl.com/2p8ufcy2
[63] *Id.*
[64] *Id.*
[65] *United States v. Cormier*, 2:02-cr-20100-JDC-KK, Doc. 175 at 2 (W.D.La. Dec. 21, 2021).
[66] *Id.*
[67] *Id.*

the CDC lists as risk factors for developing more severe COVID-19 disease."[68]

Not only is Mr. Cormier one of the latest people to die from COVID-19 while in BOP custody despite the BOP's recognition that he was medically at risk, but he is also the 37th person to die after having been considered recovered by the BOP.[69]

With the passage of the First Step Act of 2018, Congress made clear that it intended the BOP to more broadly use its compassionate-release authority.[70] The BOP had a chance to do so in each of the instances in which people in its custody died. The BOP even publicly recognized, post-mortem, that the people who had died were at risk for more severe illness and death. But these individuals' stories—and the stories of many others like them—show that the BOP has failed to realize Congress's intent.

Second, the BOP's inaccurate reporting has serious public-health implications. Accurate record keeping is a public-health necessity. In February 2021, Senators Elizabeth Warren and Cory Booker, along with Congresswomen Ayanna Pressley and Sylvia Garcia urged Congressional leaders to pass the Corrections Data Transparency Act, a bill that would require, in part, the BOP and U.S. Marshals service to collect and publicly report detailed data about COVID-19 cases, hospitalizations, deaths, and vaccinations in federal, state, and local correctional facilities.[71] That bill currently sits in this Subcommittee.

Public health professionals like Dr. Brie Williams, Professor of Medicine at the University of San Francisco, and Director of AMEND, a training and leadership development program aimed at giving correctional leaders, correctional workers, and policy makers the tools needed to provide better healthcare in prisons, have endorsed

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[68] Fed. Bureau of Prisons, Press Release, Inmate Death at FCI Beaumont Low (Jan. 5, 2022), https://tinyurl.com/2p8ufcy2

[69] *See* University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: People Who Have Died in Federal Custody*, https://law.uiowa.edu/compassionate-release-work-federal-courts (last updated Jan. 20, 2022).

[70] *See* 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications."); *see also United States v. Brown*, 457 F. Supp. 3d 691, 700 (S.D. Iowa 2020) (noting the First Step Act listed its changes under the title of "Increasing the Use and Transparency of Compassionate Release" (citing First Step Act of 2018, § 603(b), 132 Stat. at 5239)).

[71] H.R. 1072 – COVID-19 in Corrections Data Transparency Act, 117th Congress (2021-2022).

the bill. Dr. Williams notes that "without accurate, timely and comprehensive data about the impact of COVID-19 in prisons, we are at an extraordinary disadvantage in the fight to keep people who live or work in prisons and their surrounding communities safe from the pandemic" and a failure to access and analyze this data today leaves us less prepared to address future infectious disease outbreaks.[72]

4. Modest Proposals for Reform

The question that remains is this: what must we do now? As my fellow defender, Anita Aboagye-Agyeman, and I have been arguing for over a year,[73] Congress can take modest steps to remedy some of these issues. The steps below are narrow and focused on the issues that I've raised in my remarks, and they are in no way intended to be comprehensive.

First, with respect to deaths in custody, Congress should require the BOP to release complete and accurate information about everyone who has died while in federally run facilities, private prisons with federal contracts, and federally controlled halfway houses in a timely manner without the need for a FOIA request. Even if the agency cannot disclose the names of those individuals who have died in the press releases, it should issue "John/Jane Doe" press releases that include the gender, age, race, and information about whether the person suffered from an underlying condition that made them more susceptible to COVID-19. The BOP should also disclose how it trackd deaths in each facility, thereby helping to explain otherwise suspect fluctuations.

Second, with respect to infection rates, the BOP should not be reporting "cumulative" infection rate data that fails to fully account for everyone who has been infected with COVID-19 in its facilities. Removing people who have been released from custody from the total number of infections distorts the real rate of infection overtime. More precise data is needed. Moreover, each facility should be required to identify when it administers tests in each facility and how many people receive those tests at any one time. Without this data it is impossible to determine whether the BOP is undertesting.

Third, with respect to compassionate release, Congress should demand the BOP comply with the directive of the First Step Ac of 2018 that already requires it to

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[72] UCSF Geriatrics, Department of Medicine, *Brie Williams and AMEND at UCSF Endorse COVID-19 in Corrections Data Transparency Act*, https://tinyurl.com/5n8mjm5a.
[73] Written Testimony Before the U.S. Senate Committee on the Judiciary, Hearing on Oversight of the Federal Bureau of Prisons (Apr. 15, 2021).

track and release statistics about the number of internal compassionate-release requests it has received, the substance of those requests, and the timeline for their disposition.[74]

Many more reforms are required to ensure complete transparency and accountability in the BOP as we continue to grapple with its handling of the pandemic. But as Assistant Federal Defender, Anita Aboagye-Agyeman, and I highlighted last April, we have watched our clients and our colleagues' clients become gravely ill and even die when they were eligible for compassionate release. Their deaths are based, in part, on the failure of the BOP to be transparent about what is happening in its facilities. We believe that increased transparency in reporting and institutional consistency are modest and good places to start in dealing with the pandemic.

[74] First Step Act of 2018, § 603(b), 132 Stat. at 5240-41.

Ms. JACKSON LEE. Thank you very much, Ms. Guernsey, for your statement.

Now, Ms. Goodwin, it is my pleasure to recognize you for five minutes.

STATEMENT OF GRETTA L. GOODWIN

Ms. GOODWIN. Chair Jackson Lee, Ranking Member Biggs, Chair Nadler, and Ranking Member Jordan and the Members of this Subcommittee, I am pleased to be here today to discuss the recommendations we made to enhance BOP's COVID–19 response and BOP's efforts to address them and our on-going work on DOJ and BOP's implementation of certain provisions in The First Step Act.

BOP is responsible not only for the supervision and custody of more than 157,000 Federal inmates, but also for their healthcare, safety, and rehabilitation. The COVID–19 pandemic has strained congregate living facilities such as prisons which are more vulnerable to infectious disease outbreaks. As of yesterday, BOP attributed 279 inmate deaths and 7 staff member deaths to COVID–19.

Our report examining BOP's COVID–19 response found that while BOP developed an updated guidance with input from the CDC, BOP staff reported confusion about how to implement the guidance. We recommended that BOP routinely evaluate how it communicates its guidance to facility staff and modify its approach to ensure protocols are clearly communicated. BOP has taken some actions such as surveying its staff on COVID–19 guidance. We will continue to monitor BOP's efforts to review and assess staff feedback and to modify its COVID–19 guidance as needed.

We also examined the process that BOP uses to identify and share best practices and lessons learned. To do this, BOP holds teleconferences among officials and inspects facilities. However, we found that the agency does not capture or share bureau-wide the lessons and best practices learned from these efforts. We recommended that BOP develop and implement an approach to capture and share best practices and lessons learned, as well as ensure that its facilities are applying this information to COVID–19 and future public health emergency response efforts.

BOP continues to work on its approach to implementing these recommendations and we will continue to monitor its progress. Even as BOP has put COVID–19 protocols in place, it still has obligations to provide inmates with programs to advance their education and development. The First Step Act contains a number of requirements for BOP and DOJ related to assessing inmates' recidivism risk and the need for programs that target certain risk factors.

DOJ has developed a risk assessment tool known as PATTERN which is designed to predict the likelihood of recidivism for all BOP inmates. BOP has begun to formalize and enhance its needs assessment system.

BOP uses PATTERN risk scores, and inmates' needs assessments to determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each Federal inmate. Eligible inmates who successfully participate in this programming or other productive activities may earn time credits that

will allow them to be placed in pre-release custody or supervised release earlier than previously allowed.

The First Step Act requires GAO to review the actions BOP and DOJ have taken to implement the risk and needs assessment system. Our ongoing work will analyze BOP data to determine if it is conducting risk and needs assessments with the frequency required by law. We will also examine inmates' participation in evidence-based recidivism reduction programming and productive activities, and we will examine BOP's process for applying time credits to reduce inmate sentences, and we will monitor BOP's new Rule implementing the Federal time credit program.

Our prior work illustrates the importance of BOP effectively communicating its COVID–19 guidance to staff and ensuring that lessons learned from the pandemic are captured, shared, and applied. Our ongoing work on The First Step Act requirements is both timely and relevant in light of COVID–19.

Chair Jackson Lee, Ranking Member Biggs, Chair Nadler, Ranking Member Jordan, and the Members of this Subcommittee, this concludes my remarks. I am happy to answer any questions you have.

[The statement of Ms. Goodwin follows:]

United States Government Accountability Office

Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives

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FEDERAL PRISONS

Monitoring Efforts to Implement COVID-19 Recommendations and Examining First Step Act Implementation

Statement of Gretta L. Goodwin, Director,
Homeland Security and Justice

GAO-22-105691

GAO Highlights

Highlights of GAO-22-105691, a testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

BOP is responsible not only for the supervision and custody of more than 157,000 federal inmates, but also for their health care, safety, and rehabilitation. The COVID-19 pandemic has strained BOP's institutions, yet BOP's obligation to provide inmates with programs to advance their education and development remains. Further, BOP has ongoing challenges with leadership instability and staff shortages. In response, GAO raised federal prison management as an emerging issue on its High-Risk List.

This statement discusses (1) three recommendations GAO made in July 2021 to enhance BOP's COVID-19 response and efforts to date to address them, and (2) GAO's ongoing review of DOJ's and BOP's implementation of FSA requirements related to inmate assessments and programming.

GAO updated information on BOP's activities in response to GAO recommendations, reviewed FSA requirements, and conducted preliminary research to design its audit work

What GAO Recommends

In July 2021, GAO recommended that BOP evaluate communication of COVID-19 guidance, develop an approach to capture and share best practices and lessons learned, and ensure that facilities apply these practices as appropriate. BOP concurred with these recommendations and is planning or taking actions to implement them.

View GAO-22-105691. For more information, contact Gretta L. Goodwin at (202) 512-8777 or goodwing@gao.gov.

January 21, 2022

FEDERAL PRISONS

Monitoring Efforts to Implement COVID-19 Recommendations and Examining First Step Act Implementation

What GAO Found

GAO's July 2021 report on the Bureau of Prison's (BOP) response to the COVID-19 pandemic found that, while BOP developed and updated COVID-19 guidance with input from the Centers for Disease Control and Prevention (CDC), BOP staff reported confusion about how to implement the guidance. In response, GAO recommended that BOP routinely evaluate how it communicates its COVID-19 guidance to facility staff and modify its approach, as needed, to ensure more clear communication about BOP protocols. Since GAO issued the report, BOP has developed two questions on its annual feedback survey to BOP staff about its COVID-19 guidance and deployed the survey in December 2021. This is a promising step; however, the recommendation remains only partially addressed, as BOP still needs to review and assess staff feedback to determine whether modifications to its guidance are needed. GAO will continue to monitor BOP's efforts.

In addition, BOP has processes, such as teleconferences among BOP officials and facility inspections, to identify best practices and lessons learned related to BOP's COVID-19 response. However, BOP does not capture or share, bureau-wide, the lessons and practices discussed at its teleconferences, or have an approach for ensuring that facilities apply them, as appropriate. In response, GAO recommended that BOP develop and implement an approach to (1) capture and share best practices and lessons learned for responding to COVID-19 and future public health emergencies; and (2) ensure its facilities are applying, as appropriate, these best practices and lessons learned. At the time of GAO's report issuance, BOP indicated that it planned to conduct an after-action assessment of its pandemic response to help ensure preparedness for any future public health emergencies. BOP has yet to implement these two recommendations, and GAO will continue to coordinate with BOP for updates on BOP's progress.

The First Step Act (FSA) requires the Attorney General, in consultation with an Independent Review Committee, to develop and release publicly on the Department of Justice (DOJ) website a risk and needs assessment system. This system is to be used to determine the recidivism risk of each federal inmate as part of the intake process. It is also to be used to help determine and assign the type and amount of evidence-based recidivism reduction (EBRR) programming—activities designed to help inmates succeed upon release from prison—appropriate for each inmate. Generally, eligible inmates who successfully complete EBRR programming may earn time credits that will allow them to be placed in prerelease custody or supervised release earlier than they were previously allowed.

GAO is currently reviewing DOJ's and BOP's implementation of certain FSA requirements related to the risk and needs assessment and has a number of audit steps planned. These include examining BOP data and documentation on progress, and conducting interviews with DOJ and BOP officials, as well as selected stakeholders knowledgeable in the area of recidivism. GAO expects to publish the findings of its work, and any related recommendations that may stem from its findings, later in 2022.

January 21, 2022

Chair Jackson Lee, Ranking Member Biggs, and Members of the Subcommittee:

I am pleased to be here today to talk about the recommendations we made to improve the Bureau of Prisons' (BOP) pandemic response,[1]—as well as provide an update on our ongoing review of BOP's implementation of specific provisions in the First Step Act (FSA).[2]

BOP is responsible not only for the supervision and custody of more than 157,000 federal inmates, but also for their health care, safety, and rehabilitation. The Coronavirus Disease 2019 (COVID-19) pandemic has placed great strain on institutions providing congregate care. Because inmates and the staff working in prison facilities function in confined spaces and in close proximity to each other, the prison population has been particularly vulnerable during infectious disease outbreaks.

As of January 13, 2022, BOP reports 6,043 inmates and 939 staff were currently positive for COVID-19; 42,678 inmates and 9,027 staff have recovered, and 277 inmate deaths and seven staff member deaths were attributed to COVID-19. While BOP has put COVID-19 protocols in place to protect inmates and staff, BOP is still obligated to provide inmates with programs to advance their education and development. Our ongoing work to address FSA requirements that BOP conduct inmate risk and needs assessments—and address those risks and needs through programming—is both timely and relevant in light of COVID-19's impact.

In addition, in March 2021, we issued our biennial High-Risk List, which raised the management of the federal prison system as a challenge

[1]GAO. *Bureau of Prisons: BOP Could Further Enhance its COVID-19 Response by Capturing and Incorporating Lessons Learned,* GAO-21-502, (Washington, D.C.: July 29, 2021).

[2]Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018). In general, the First Step Act requires the development and implementation of a risk and needs assessment system to determine the recidivism risk of inmates and the type and amount of programming that is appropriate for inmates; prohibits the use of certain restraints on inmates in the custody of BOP and the United States Marshals Service during the period of pregnancy, labor, and postpartum recovery with certain exceptions; and reauthorizes, expands, and amends certain federal grant programs related to inmate reentry; among other things.

facing our nation that merits continuing close attention.[3] In particular, our published and ongoing work has shown that BOP's deficiencies can generally be categorized into three themes: (1) inadequate management of staff and resources, (2) inadequate planning for new programs or initiatives that help inmates prepare for a successful return to the community, including drug treatment programs; and (3) insufficient monitoring and evaluation of these inmate programs, which has led to imprudent spending. Furthermore, BOP has experienced significant leadership instability, with five different acting or permanent directors from 2016 through 2020—as well as the January 2022 announcement of the current BOP Director's upcoming retirement.

Among our ongoing and planned studies reviewing BOP's management and operations, our work to assess BOP's implementation of the FSA will be critical to determining BOP's progress in enhancing inmate programs and reducing recidivism. As the primary agency responsible for the safety, care, and rehabilitation of individuals sentenced for committing federal crimes, BOP must demonstrate leadership commitment, capacity, and action planning. We will determine whether strengthening management of the federal prison system should be added to the High-Risk List based on BOP's implementation of certain FSA provisions and once our relevant assessments are complete.

My statement today discusses (1) the three recommendations we made to enhance BOP's COVID-19 response and BOP's efforts to date to address them, and (2) the approach we plan to take to assess BOP's implementation of the FSA requirements related to inmate assessments and programming—and the extent to which DOJ has fulfilled its related FSA obligations.

To conduct our work on BOP's COVID-19 response, we reviewed BOP policies, data, and other documentation related to the impact of COVID-19 and how BOP addressed this impact. We also conducted nongeneralizable interviews of officials from five BOP facilities and one private facility operating under contract with BOP, selected based on inmate infection rates and other factors. More detailed information about our scope and methodology can be found in our issued report. To design

[3]GAO's High-Risk Series identifies government operations with vulnerabilities to fraud, waste, abuse, and mismanagement, or in need of transformation to address economy, efficiency, or effectiveness challenges. See GAO, *High Risk Series: Dedicated Leadership Needed to Address Limited Progress in Most High-Risk Areas*, GAO-21-119SP, (Washington, D.C.: March 2, 2021).

our work on FSA implementation, we reviewed the FSA requirements, developed an audit plan to assess BOP's and DOJ's satisfaction of these requirements, and identified stakeholder groups knowledgeable in the area of recidivism who could provide perspectives to inform our work.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

BOP Has Taken Some Early Steps to Enhance Its COVID-19 Response

In our July 2021 report that examined BOP's COVID-19 response, we assessed, among other things, BOP's efforts to develop and update its COVID-19 guidance. We found that, while BOP developed and updated guidance with input from the Centers for Disease Control and Prevention (CDC), BOP staff reported confusion about how to implement the guidance. For example, the DOJ Office of Inspector General (OIG) sent a survey to all BOP employees in April 2020, in part to gather anonymous staff perspectives on the adequacy of the guidance they received from BOP about exposure to COVID-19. Of the 28 percent of employees who responded, 59 percent of respondents thought the guidance was not clear and 53 percent thought the guidance was not timely.[4] We also interviewed BOP union officials during our review about BOP's guidance and they noted areas of confusion about BOP's guidance, such as the use of personal protective equipment (PPE).

In response, we recommended that BOP routinely evaluate how it communicates its COVID-19 guidance to facility staff and to modify its approach, as needed, based on the results to ensure that BOP protocols are clearly communicated to staff. BOP concurred with our recommendation, and, in its formal comment letter, noted that the continuous evaluation of its efforts to communicate COVID-19 guidance is necessary to help ensure that BOP institutions are provided the most recent guidance in the most effective manner. The agency noted that it

[4]Specifically, the OIG invited 38,651 total employees to take the survey and received 10,735 responses, a 28 percent response rate. The scope and methodology of each inspection, including a description of the survey, is located in each of the OIG's individual Pandemic Response Reports for remote inspections conducted with selected BOP facilities (https://oig.justice.gov/reports/pandemic).Given the low response rate, the results of this survey are not generalizable to the entire BOP staff population.

had established an email box for staff to submit questions on its COVID-19 guidance. Since then, BOP has taken further action to implement our recommendation. For example, it developed two questions on its annual feedback survey to BOP staff that asked whether staff knew where to find BOP's COVID-19 guidance and whether staff knew where to get further information on the guidance if they have any questions. BOP deployed the survey in December 2021. These are promising steps and partially address our recommendation. To fully implement our recommendation, BOP still needs to review and assess the feedback it receives and make a determination on whether any modifications to its COVID-19 guidance are needed. We will continue to monitor BOP's efforts.

In addition to assessing BOP's COVID-19 guidance, we also examined the extent to which BOP incorporated lessons learned into its COVID-19 response. We found that BOP has processes, such as teleconferences among BOP officials and facilities' inspections, to identify best practices and lessons learned related to its COVID-19 response. However, BOP does not capture or share, bureau-wide, the lessons and practices discussed at its teleconferences, or have an approach for ensuring that facilities apply them, as appropriate.

In response, we made two recommendations to BOP that it should develop and implement an approach to (1) capture and share best practices and lessons learned for responding to COVID-19 and future public health emergencies; and (2) ensure that its facilities are applying, as appropriate, best practices and lessons learned related to COVID-19 and future public health emergency response efforts. BOP concurred with both of our recommendations. In commenting on our report, BOP noted that capturing and sharing best practices is vital to ensure continuous improvement in the current, and any future, pandemic. The agency also noted that it will continue to identify lessons learned though its facilities inspections and through teleconferences among BOP officials, and that it also plans to conduct an after-action assessment of its pandemic response to help ensure preparedness for any future public health emergencies. BOP has yet to implement these two recommendations, and GAO will continue to coordinate with BOP for updates on BOP's progress. We will continue to coordinate with BOP for updates on its efforts and progress as it works to implement our recommendations.

Our Work to Address FSA Implementation

We are currently reviewing BOP's implementation of certain FSA requirements related to the risk and needs assessment. The FSA requires the Attorney General, in consultation with an Independent

Review Committee,[5] to develop and release publicly on the DOJ website a risk and needs assessment system, among other things.[6] BOP is to use this system to determine the recidivism risk of each federal inmate as part of the intake process and determine and assign the type and amount of evidence-based recidivism reduction (EBRR) programming that is appropriate for each federal inmate.[7] Generally, eligible inmates who successfully complete EBRR programming or productive activities may earn FSA time credits that will allow them to be placed in prerelease custody (i.e., home confinement or a Residential Reentry Center) or supervised release earlier than they were previously allowed.[8]

Section 103 of the FSA requires GAO to review various actions taken by BOP and DOJ to implement the risk and needs assessment system and continually review and report on it. We are reviewing the extent to which (1) BOP is fulfilling its requirements as described in section 103 of the FSA and (2) DOJ is fulfilling the requirements of 18 U.S.C. § 3631(b) as added by section 101(a) of the FSA. To carry out this work, we will:

- analyze BOP data to determine BOP's frequency of risk and needs assessments, BOP's application of FSA time credits, and inmates' participation in EBRR programs and productive activities, among other things;

[5]Section 107 of the First Step Act, Pub. L. No. 115-391, § 107, 132 Stat. 5194, 5215-16, requires DOJ's National Institute of Justice (NIJ) to select a nonpartisan and nonprofit organization with expertise in the study and development of risk and needs assessment tools to host the Independent Review Committee. The organization that NIJ selects shall appoint not fewer than six members to the Independent Review Committee whose members shall all have expertise in risk and needs assessment systems.

[6]Pub. L. No. 115-391, § 101, 132 Stat. 5194, 5195-5208. See 18 U.S.C. § 3632.

[7]Pub. L. No. 115-391, § 101, 132 Stat. 5194, 5195-5208. See 18 U.S.C. § 3632(a)(1), (3). Pursuant to 18 U.S.C. § 3635(3), "[t]he term 'evidence-based recidivism reduction program' means either a group or individual activity that—(A) has been shown by empirical evidence to reduce recidivism or is based on research indicating that it is likely to be effective in reducing recidivism; (B) is designed to help prisoners succeed in their communities upon release from prison; and (C) may include—(i) social learning and communication, interpersonal, anti-bullying, rejection response, and other life skills; (ii) family relationship building, structured parent-child interaction, and parenting skills; (iii) classes on morals or ethics; (iv) academic classes; (v) cognitive behavioral treatment; (vi) mentoring; (vii) substance abuse treatment; (viii) vocational training; (ix) faith-based classes or services; (x) civic engagement and reintegrative community services; (xi) a prison job, including through a prison work program; (xii) victim impact classes or other restorative justice programs; and (xiii) trauma counseling and trauma-informed support programs."

[8]18 U.S.C. § 3632(d)(4).

- analyze DOJ and BOP documentation on agencies' efforts;
- interview DOJ, BOP, and BOP union officials about DOJ's and BOP's actions to address the FSA requirements in regard to the risk and needs assessment system;
- interview BOP officials from four BOP facilities, selected based on the facility security level, region, population (male/female), and institution type; and
- interview stakeholders knowledgeable in the area of recidivism and members of the Independent Review Committee to obtain their perspectives on BOP's EBRR programs.

We expect to publish the findings of our work, and any related recommendations that may stem from our findings, later in 2022.

In closing, our prior work illustrates the importance of BOP effectively communicating its COVID-19 guidance to staff and ensuring that lessons learned from the pandemic are captured, shared, and applied, as appropriate. Our ongoing work will also highlight the progress that BOP and DOJ have made in implementing FSA provisions and potentially provide recommendations, should we note any areas that can be strengthened.

Chair Jackson Lee, Ranking Member Biggs, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Gretta L. Goodwin, Director, Homeland Security and Justice, at (202) 512-8777 or GoodwinG@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Joy A. Booth (Assistant Director), Tracey Cross (Assistant Director), Billy Commons, Benjamin Crossley, Elizabeth Dretsch, Wendy Dye, Emily Flores, Julia Vieweg, and Kellen Wartnow.

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Ms. JACKSON LEE. Thank you very much, Ms. Goodwin, and thank you for your work.

Ms. Kelly, I am very pleased to recognize you for five minutes.

STATEMENT OF JULIE KELLY

Ms. KELLY. Thank you, Chair Jackson Lee and Ranking Member Biggs, Chair Nadler, and Ranking Member Jordan. My name is Julie Kelly. I am a Senior Contributor for American Greatness. For nearly a year, I have reported on the inhumane conditions at the D.C. Correctional Treatment Facility which has been set aside to detain Americans charged in the Justice Department's Capitol breach probe. The Justice Department has sought pre-trial detention for at least 100 January 6th protesters and right now more than 70 men are incarcerated at prisons across the country awaiting trial. At least 37 of those men are detained at the D.C. Correctional Treatment Facility.

It is important to underscore to the Committee and those watching that these defendants have not been convicted of any crime. Most have no criminal record, and some do not even face violent charges related to their conduct on January 6th. Many detainees don't even have a court date yet. They have been denied bail because prosecutors insist they are a threat to society based on their participation in the Capitol protest and Federal judges on the D.C. District Court have consented to the Justice Department's demands to keep them behind bars while at the same time repeatedly delaying their trials until the middle and end of this year.

The original rationale for keeping the January 6th protesters separated from the general population incarcerated at the D.C. Department of Corrections was to protect them from more violent criminals. It appears, however, that the D.C. Jail for January 6th protesters is more of a political prison for Americans who protested Joe Biden's election.

Detainees at the D.C. Jail have reported numerous human rights and constitutional violations. A detainee I spoke with this week, an Army Reservist charged with no violence crimes, who nonetheless has been in prison since his arrest one year ago, confirmed the January 6th jail is under 22-hour lockdown due to COVID. It is nearly impossible for detainees to meet with their attorneys or access the discovery evidence against them. Defense lawyers have complained that it takes months for their clients to finally receive digital discovery materials because jail officials are withholding the evidence.

The viewing of video evidence, especially any clip produced from the roughly 14,000 hours of surveillance video captured by Capitol security cameras on January 6th at the Justice Department designated highly sensitive government material is under strict rules. It is nearly impossible for detainees to watch any relevant video concealed under protective orders.

The situation is so egregious that the D.C. District Court banned the committee-to-committee to attempt to resolve the problem between defense attorneys and detainees accessing their evidence. Judge Randolph Moss blasted the D.C. Jail for withholding evidence from an accused defendant. "I can't allow some to stay in prison for this long without access for material," Moss said back in July, calling the delays utterly unacceptable and not consistent

with due process. Six months later, the situation does not appear to be improving.

Living conditions are also utterly unacceptable. Detainees do not have access to religious service, a law library, or even personal hygiene services. They have not seen their family in nearly a year. Detainees have reported instances of racially and politically motivated verbal abuse. I am told the only newspaper distributed within the D.C. Jail for January 6th defendants is a paper published by the Nation of Islam.

Just this week, Marvin Bickham, a Federal Detention Monitor for the U.S. Marshals Service detailed several issues at the D.C. Jail for January 6th detainees such as the presence of mold and maintenance of CPAP machines. They have been reported that detainees who refuse to get the COVID shot are denied shaving gear and haircuts. Detainees who refuse the vaccine cannot have personal visits. Regardless of vaccine status, January 6th detainees are only allowed out two hours a day for recreation time which means now they are spending 22 hours alone in a freezing, what I am told freezing, eight by ten cell.

Again, these men have been convicted of no crime. They [inaudible] from detainees' lawyers and judges about lack of access to discovery material. Bickham wrote in his report, they are only allowed access to computers to review electronic discovery for only 14 days and there are not enough computers to go around. This is a clear violation of the 6th Amendment, yet Bickham still concluded that the conditions in the D.C. Jail for January 6th detainees are appropriate and consistent with Federal prisoner standards.

I see my time is up. Thank you so much for inviting me here today. I look forward to answering any questions.

[The statement of Ms. Kelly follows:]

My name is Julie Kelly and I am a senior contributor for American Greatness online journal.

For nearly a year, I have reported on the inhumane conditions at the D.C. Correctional Treatment Facility, which has been set aside to detain Americans charged in the Justice Department's Capitol breach probe. The Justice Department has sought pretrial detention for at least 100 January 6 protesters; right now, more than 70 men are incarcerated at prisons across the country awaiting trial. According to one count, and this is based on work of an independent researcher because jail officials are so opaque, 37 men are detained at the D.C. Correctional Treatment Facility.

It's important to underscore to those watching that these defendants have not been convicted of any crime. Most have no criminal record and some do not face violent charges related to their conduct on January 6. Many detainees don't even have a court date yet. They have been denied bail because prosecutors insist they are a threat to society based on their participation in the Capitol protest and federal judges on the D.C. District Court—judges appointed by every president from Ronald Reagan to Donald Trump—have consented to the Justice Department's demand to keep them behind bars while at the same repeatedly delaying trials into the middle of this year.

The original rationale for keeping the January 6 protesters separated from the general population incarcerated in the D.C. Department of Corrections was to protect them from more violent criminals. It appears, however, that the D.C. jail for January 6 protesters is more of a political prison for Americans who protested Joe Biden's election.

Detainees at the D.C. jail have reported numerous human rights and Constitutional violations. A detainee I spoke with this week—an Army reservist charged with no violent crime who nonetheless has been in prison since his arrest one year ago—confirmed the January 6 jail is under a 22-hour lockdown due to COVID.

It's nearly impossible for detainees to meet with their attorneys or access the discovery evidence against them. Defense lawyers have complained that it takes months for their clients to finally receive digital discovery materials because jail officials are withholding the evidence. The viewing of video evidence—especially any clip produced from the roughly 14,000 hours of surveillance video captured by Capitol security cameras on January 6 that the Justice Department designated "highly sensitive" government material—is under strict rules. It's nearly impossible for detainees to watch any relevant video concealed under protective orders.

The situation is so egregious that the D.C. District Court formed a committee to attempt to resolve the problem. In July, Judge Randolph Moss blasted the D.C. jail for withholding evidence from an accused defendant. "I can't allow someone to sit in prison for this long without access to material," Moss said, calling the delays "utterly unacceptable" and "not consistent with due process."

But six months later, the situation does not appear to be improving.

Living conditions are also utterly unacceptable. Detainees do not have access to religious services, a law library, or even personal hygiene services. Some have not seen their families in nearly a year. Detainees have reported instances of racially and politically-motivated verbal abuse. I am told the only newspaper distributed within the D.C. jail for January 6 defendants is the paper published by the Nation of Islam.

One was moved from the D.C. jail after he was physically assaulted by jail guards. Another detainee was moved after a judge concluded jail officials were withholding treatment for his non-Hodgkin's lymphoma and for a broken hand. And another detainee, a former Army ranger with three tours of duty in Afghanistan, was moved to a facility in another state after a judge heard of an explicit strip search by jail officials following an in-person meeting with his attorney.

Just this week, Marvin Bickman, a federal detention monitor for the U.S. Marshals Service detailed several issues at the D.C. jail for January 6 detainees such as the presence of mold and maintenance of CPAP machines. Bickman reported that detainees who refuse to get the COVID shot are denied shaving gear and haircuts. Detainees who refuse the vaccine cannot have personal visits. Regardless of vaccination status, January 6 detainees are only allowed two hours of recreation time per day, which means they spend 22 hours alone in a freezing 8 x 10 cell.

Again, these men have not been convicted of any crime.

Bickman also again confirmed what I have heard from detainees, lawyers, and judges about lack of access to discovery material.

Detainees, Bickman wrote in his report, "are allowed access to computers to review electronic discovery for only 14 days and that there are not enough computers to go around."

This is a clear violation of the Sixth Amendment. Yet Bickman still concluded that the conditions in the D.C. jail for January 6 detainees are "appropriate and consistent" with federal prisoner standards.

Despite being held in inhumane and in some instances abusive conditions as they await trials that have been repeatedly delayed, January 6 detainees still sing the National Anthem each night at 9 p.m., a tradition the earliest detainees began last February.

I would like to thank the committee for allowing me to speak this morning and I will be happy to answer any questions.

Ms. JACKSON LEE. Ms. Kelly, we thank you. Ms. Hamilton, I now recognize you for five minutes. You are recognized.

STATEMENT OF MELISSA HAMILTON

Ms. HAMILTON. Thank you, esteemed Committee, for the opportunity to provide information about the current State of PATTERN which is the name of the risk-assessment tool developed under the auspices of The First Step Act.

I will make six points. Transparency regarding PATTERN has waxed and waned. Notably, the most recent NIJ review and revalidation report of December 2021 provides a healthy amount of information. I refer to it here as the NIJ Report.

The second point is that the version of PATTERN being used now for purposes of The First Step Act implementation is fundamentally flawed. The NIJ report reveals, for example, that two thirds of the risk factors were incorrectly weighted. Most factors were incorrectly defined and there were additional scoring errors. According to the NIJ report, due to these problems overall 11 percent of BOP population is placed in the wrong risk level.

Third, the NIJ report offers a new version of PATTERN which corrects these errors and makes significant modifications otherwise. Nonetheless, this updated version will not be used in practice unless and until it is formally approved by the Attorney General himself. A time frame is not offered for that process.

Consequently, there are over 14,000 prisoners in BOP custody with admittedly incorrect classifications. This impacts upon many of these individuals' ability to draw on the incentives that The First Step Act was meant to offer. The DOJ position is that nothing can be done until a new version is approved, the individuals reassessed, and then assigned new risk levels.

Fourth, the NIJ report informs that PATTERN does not perform equally based on race and ethnicity.

I do applaud the new NIJ consultants for helpfully providing multiple metrics on this.

In sum, the tool over predicts which means unnecessarily classifying as a high risk the likelihood of any re-arrests specifically for African Americans, Asian Americans, and Hispanic Americans.

Moreover, a recent DOJ publication revealed that a high-risk classification applies to over 50 percent of African Americans compared to 28 percent of race. Further, more work should be done toward ameliorating potential disparities.

Fifth, sadly, NIJ report reveals that PATTERN operates with significant rates of error and that it disproportionately prefers false positives over false negatives. A false positive is the incorrect prediction of high risk when the individual remains crime free whereas false negative is the incorrect prediction of low risk. This means that a choice has been made to design the tool to perform far less accurately when designating persons of high risk which means placing too many individuals into the high-risk groupings than is necessary.

This is a curious choice. As The First Step Act was designed, there is little danger to the public of incorrect predictions, and this does not lead to immediate release. Instead, the predictions relate

to who is given more robust incentives to engage with rehabilitative programming. Thus, a policy directive could be to recalibrate patterns to reduce false positives which in turn would increase the number of individuals who are eligible to work toward earned time credit.

Sixth, so far there has been no validation of the needs aspect of the broader system. The BOP is working to identify appropriate programs, but at this time, a significant divide exists between program availability and demand in many BOP facilities, resulting in sort of a lottery system whereby the luck of the draw in facility placement in some individuals will have greater access than others to earning time credit.

In conclusion, I remain hopeful that there is a path for congressional intent to be realized with The First Step Act. On a risk guide, this will require continued effort to correct the current inaccurate rating and the brainstorm on ways to reduce racial disparities in the next version of PATTERN that must be offered to the Attorney General for approval.

On the needs side of it, this means supplementing program availability and then conducting a validation of the needs component. Thank you.

[The statement of Ms. Hamilton follows:]

Written Testimony of

Melissa Hamilton, JD, Ph.D
Professor of Law & Criminal Justice
University of Surrey School of Law
England

Before the

United States House of Representatives
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Regarding

"The First Step Act, The Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons?"

January 21, 2022

Esteemed members: Thank you for your invitation to appear before you today.

I address herein the Prisoner Assessment Tool Targeting Risk and Needs (PATTERN), the risk and needs system that was created under the auspices of the First Step Act of 2018. The development and implementation of a risk tool with a large, national population is a tremendously difficult endeavor. In such a process, there are inevitably errors, disagreements, controversies, and trade-offs to be made.

As an academic, I do not advocate for or against the use of risk assessment tools in criminal justice settings. That choice is for policymakers with the difficult responsibility of making those decisions. Instead, the purpose is to highlight some pressing issues that PATTERN presents to inform policymakers, other stakeholders, and the public. It is noted first that transparency regarding PATTERN has waxed and waned. This could be due to issues of tight time deadlines and the pandemic. Notably, the most recent NIJ Review and Revalidation report of December 2021[1] provides a healthy amount of information. I will refer to it here as the NIJ Report. Many concerns, though, remain to be highlighted and resolved.

The Evolution of PATTERN

PATTERN evaluates males and females separately.[2] For each gender, there is a general recidivism scale (i.e., any rearrest) and a violent recidivism scale (i.e., any violent rearrest). Fifteen risk factors have been identified, though not all of them are used in each of the four scales (i.e., the four are male general, male violent, female general, and female violent). For each of the general and violent recidivism scales, scores are combined into four ordinal risk categories of minimum, low, medium, and high risk. The greater of the risk categories becomes the individual's final risk category. For instance, if an individual is classified as medium risk in the general scale and low risk in the violence scale, the individual is assigned a final category of medium risk.

PATTERN has undergone various iterations. Using the numbering system employed in the NIJ Report, four versions have existed:

- The initial draft of PATTERN was publicly released in July 2019.[3]
- PATTERN 1.2 was a revision following receipt and consideration of comments from listening sessions with stakeholders and solicitations of public feedback. PATTERN 1.2 was approved for use by the Attorney General and has been used to score individuals in Bureau of Prisons (BOP) custody from January 2020 onward.
- PATTERN 1.2-R corrected for "typos" identified in the BOP scoring sheets so that the tool in practice was the version approved for use.[4] The risk level categories currently assigned to prisoners in the BOP are based on PATTERN 1.2-R.

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[1] National Institute of Justice, 2021 Review and Revalidation of the First Step Act Risk Assessment Tool (December 2021), https://nij.ojp.gov/library/publications/2021-review-and-revalidation-first-step-act-risk-assessment-tool [hereinafter NIJ Report 2021].

[2] There are substantive, legitimate reasons (scientifically and legally) to differentiate by gender as studies consistently indicate that the risk profiles and likelihood of recidivism vary significantly for males versus females.

[3] Department of Justice, The First Step Act of 2018: Risk and Needs Assessment System (2019), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf.

[4] NIJ Report 2021, at 7.

- PATTERN 1.3 is a version offered in the December 2021 NIJ Report that (i) corrects for additional errors the newly installed consultants discovered existing within PATTERN 1.2 (and 1.2-R) and (i) rehauls certain of the risk factors, weights, scoring sheets, definitions, and sources of data from which to draw. PATTERN 1.3 is not in use as the NIJ reported that details about it were issued to begin discussions with the Independent Review Committee and others, with the potential of later being proposed to the Attorney General for approval.[5] Only at that time will the BOP implement an update in lieu of PATTERN 1.2-R.

Errors in PATTERN

At present, the BOP assigns prisoners the risk category levels produced by PATTERN 1.2-R. As indicated above, the reason given is that it represents the version approved to date by the Attorney General. Yet, the NIJ Report makes clear that this version (1.2-R) contains many errors and that, as a result, 10.9% of males and 9.8% of females have been given incorrect overall PATTERN risk categories as a result.[6] In other terms, as of late 2020, a total of 14,170 prisoners have been assigned erroneous final risk categories.[7] The BOP has no plans to correct these errors until a new version of PATTERN (such as the proposed version 1.3) is formally approved by the Attorney General.[8]

A summary of these errors from NIJ publications include these:

- Four errors in scoring or cut-point: (1) point values for the infraction-free (serious and violent) item for the violent male scale, (2) point values for the infraction-free (serious and violent) item for the general recidivism female scale, (3) point values for the criminal history score for the violent recidivism female scale, (4) the cut-points for the general recidivism male scale.[9]

- The initial version of the tool was developed based on a statistical model that scored a vast majority of the risk factors *at the time of one's release from custody* rather than what was specified in the formal publications which designed these factors to be scored *at the time of the individual's last assessment* (which typically would occur some period of time before release). As a simple example of why this may matter, consider a risk factor regarding the individual's age. One's age at the time of release will be older than at the time of an in-custody assessment, and this difference may have changed the scoring on this age-related risk factor. An earlier (published in 2020) NIJ publication admits the broader issue: "Because the empirical models were estimated using different versions of these variables, it may have influenced the coefficients obtained and the item weights assigned."[10] In other words, this definitional discrepancy across risk factors called into question the efficacy of the entire scoring system.

- There were irregularities in the tool's intended function and what occurred in practice in scoring the number of prison disciplinary infractions the individual had (impacting four risk factors). The

[5] NIJ Report 2021, at 47.
[6] NIJ Report 2021, at 7.
[7] National Institute of Justice, 2020 Review and Revalidation of the First Step Act Risk Assessment Tool 7-8 tbls. 1-2 (January 2021), https://www.ojp.gov/pdffiles1/nij/256084.pdf [hereinafter NIJ Review 2020].
[8] A group of 1,745 individuals whose scores were impacted by the scoring "typos" corrected in PATTERN 1.2-R were rescored and their risk levels updated. NIJ Review 2020, at 10 n. 39.
[9] NIJ Review 2020, at 5.
[10] NIJ Review 2020, at 6.

difference was whether to count infractions no matter how old or only those occurring within the last 10 years. Then BOP personnel also counted infractions when individuals were in pretrial and holdover stages, whereas PATTERN 1.2 would exclude infractions during those types of custody. The NIJ sums up the problem: "This means that as BOP is implementing PATTERN 1.2, they are currently scoring these infraction variables differently than were modeled in the reported PATTERN 1.2, which may have an impact on the utility of these two measures."[11]

- The developmental study improperly defined several risk factors: (i) the number of programs completed was inadvertently counted as the number of programs in which the person participated (regardless of completion), (i) counted participation in UNICOR as a multiplier of the number of days in UNICOR rather than treating participation in UNICOR as one program regardless of number of days, and (iii) counted participation in drug treatment while imprisoned as having completed only a nonresidential drug treatment program for individuals who had completed both residential and nonresidential programs. As per an NIJ publication the potential impact is this: "Given that the empirical models were estimated using different constructs of the variables, the factor selection and weighting may have resulted in a scoring and risk assessment scheme that would be different if the correct versions of these variables were included."[12]

As a consequence of such errors, officials called off the initial revalidation of PATTERN.[13] A revalidation was eventually conducted, with findings published in the (December 2021) NIJ Report. The results indicated that the various errors meant that 37 out of the possible 60 items (almost two-thirds of them) had been incorrectly weighted.[14] Due to these errors, according to the NIJ Report, overall, 11% of the BOP population was placed in the wrong risk category. This proportion may be on the low end. The NIJ Report also indicates a significant problem with reliability in that BOP personnel incorrectly scored and classified more than 20% of the BOP population.[15] An automated system has been developed to improve reliability. However, it is unclear when/if the misclassifications from manual scoring will be remedied.

In sum, as the flawed PATTERN 1.2-R continues to be used, erroneous risk level classifications appear to be continuing to this day.

An Issue with Revalidation

The (December 2021) NIJ Report labels itself a "Revalidation of the First Step Act Risk Assessment Tool." This terminology is curious considering the differences between the versions of PATTERN: the one that has been and is currently used in practice to score individual risk levels (version 1.2-R) and the modified version proposed for adoption (version 1.3). While such Report provides some information on the empirical performance of PATTERN 1.2-R, the vast majority of the statistical measures provided are for

[11] NIJ Review 2020, at 6.
[12] NIJ Review 2020, at 6.
[13] NIJ Review 2020, at 6. Other problems plagued the developmental study. For example, the initial publication indicated that individuals who had died after release and before the end of the follow-up period were excluded, but in fact they were not. NIJ Review 2020, at 3 n.9.
[14] There are 15 possible risk factors and four scales (male general, male violence, female general, female violence) and thus up to 60 (15 x 4) items.
[15] NIJ Report 2021, at 8.

PATTERN 1.3. Hence, this NIJ Report in reality seems more of a validation of the new PATTERN version 1.3.

Preference for False Positives

PATTERN operates with significant rates of error and disproportionately prefers false positives over false negatives. A false positive is the incorrect prediction of higher risk (i.e., a person classified as high risk is not rearrested), whereas a false negative is the incorrect prediction of lower risk (i.e., a person classified as low risk was rearrested). This means that a choice has been made to design the tool to perform far less accurately when predicting those who are at higher risk—which means placing too many individuals into the higher risk groupings than necessary.

The preference for a high proportion of false positives is not a necessary one dictated by any scientific principles. As the First Step Act was designed, there is little danger to the public of incorrect predictions as the risk assessment outcomes are not meant to lead to immediate release. Indeed, even with earned time credits, the individual's sentence is not shortened. Instead, the predictions relate to who is given more robust incentives to engage with rehabilitative programming and who might earn a change in the type of prerelease custody. Thus, a policy directive could be given to recalibrate PATTERN to reduce the numbers of false positives, which in turn would increase the number of individuals who are eligible to work toward earned time credits.

Racial and Ethnic Differences

The NIJ Report informs that PATTERN does not perform equally based on race and ethnicity. The new NIJ consultants deserve praise for helpfully providing multiple metrics and for showing results across various groupings. Still, using the conclusions of the Report itself, the tool overpredicts the general risk for African Americans, Hispanic Americans, and Asian Americans, while it underpredicts for Native Americans. An explanation given for the underprediction of Native Americans is the lack of information to score this group on criminal history and on recidivism considering tribal reservations generally have not been required to provide arrest information to the National Law Enforcement Telecommunications System.[16]

There are also differences in the rates at which PATTERN assigns individuals to risk classifications based on race, as indicated in Table 1, and by ethnicity in Table 2 (utilizing abbreviated race/ethnic labels assigned by the DOJ in the publication from which these statistics are derived).[17] Note that Table 1 includes within each racial category those who are also identified as Hispanic (or not) (e.g., white Hispanic, black Hispanic).

[16] NIJ Report 2021, at 43 n. 55.

[17] Statistics obtained from Department of Justice, Federal Prisoner Statistics Collected under the First Step Act, 2021, at 16 tbl. 10 (November 2021, NCJ 301582), https://bjs.ojp.gov/content/pub/pdf/fpscfsa21.pdf. The Asian category also includes Native Hawaiian and other Pacific Islander. The American Indian category also includes Alaska Native.

Table 1

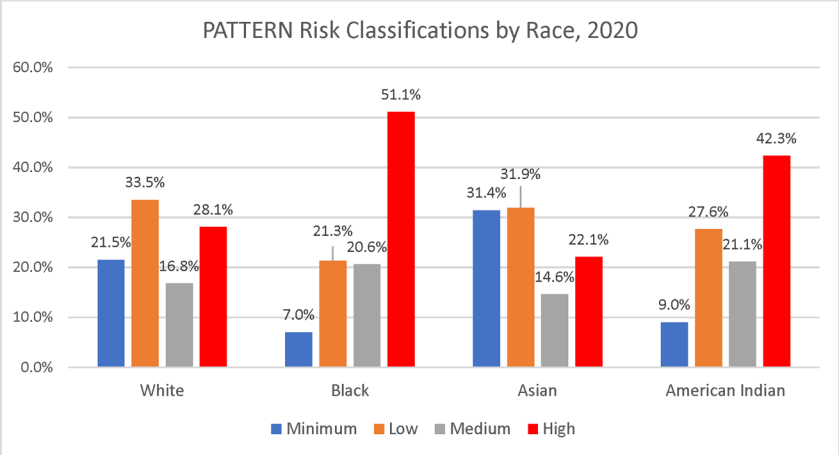
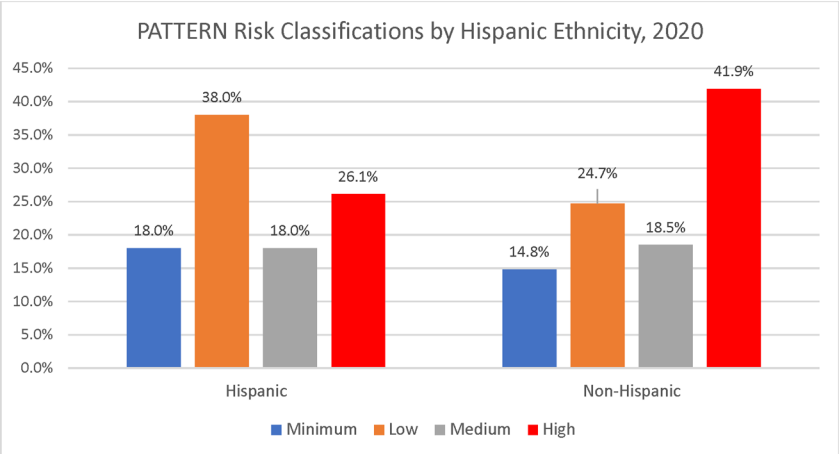


Table 1 shows that PATTERN classifies African Americans as high risk at a disproportionate rate (51%) compared to other groups, such as 28% of Whites and 22% of Asians.

Table 2



Concerning potential racial/ethnic differences overall, I concur with these comments in the NIJ Report: "multiple definitions of racial fairness exist, and that in real-world applications, these notions of fairness

conflict" and "a tool cannot satisfy all definitions of fairness."[18] When recidivism rates vary across groups, one or more of the standards for racial fairness are likely to be violated. Nonetheless, further work can be done toward ameliorating these potential disparities, which the NIJ Report suggests.

PATTERN Risk Levels and Compassionate Release

The deployment of PATTERN as an informational point in determining who to release for compassionate reasons and/or COVID represents an off-label use. The tool was not designed or validated for such a purpose.

Needs System

PATTERN is not itself a needs system.[19] Instead, the BOP is relying, and purportedly improving, upon its preexisting policies and practices of identifying individual needs.[20] This means that to date there has been no (publicly known) validation of the needs aspect of the broader system. The BOP states that it is working to identify appropriate programs. At this time, though, a significant divide exists between program availability and individual demand in many BOP facilities.[21] The result is a sort of lottery system whereby the luck of the draw in facility placement means some individuals will have a greater access to achieving earned time credits than others.

Release of Datasets for Independent Evaluation

The NIJ Report is helpful in providing a host of various statistics to provide outsiders a better understanding of PATTERN. However, this is not a fully acceptable alternative to making publicly available an anonymized version of the dataset(s) for independent researchers. I have discovered various statistical and textual errors in the NIJ Report itself. As with the revelation of problems in the initial PATTERN development by new consultants, verification of the work of these consultants might well be better confirmed by others.

Final Thoughts

In conclusion, I remain hopeful that there is a path for Congressional intent to be realized with the First Step Act. This will require continued efforts to correct the current inaccurate ratings, brainstorm on ways to reduce disparities, supplement the availability of programs, and to validate the needs component.

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[18] NIJ Report 2021, at 44.

[19] Department of Justice, The Attorney General's First Step Act Section 3634 Annual Report (December 2020), https://www.bop.gov/inmates/fsa/docs/20201221_fsa_section_3634_report.pdf.

[20] Department of Justice, The Attorney General's First Step Act Section 3634 Annual Report, at Section II (December 2020), https://www.bop.gov/inmates/fsa/docs/20201221_fsa_section_3634_report.pdf.

[21] Department of Justice, The Attorney General's First Step Act Section 3634 Annual Report 17-18 tb. 11 (December 2020), https://www.bop.gov/inmates/fsa/docs/20201221_fsa_section_3634_report.pdf.

Ms. JACKSON LEE. Thank you very much for your testimony. I thank all of you for your opening statements. We will now proceed under the five-minute Rule with questions, and I will begin by recognizing myself for five minutes.

Again, thanking all of you. Looking forward to the testimony of the Witnesses.

Let me just briefly indicate that under compassionate release—the facts that have come to my attention—21,150 motions were filed, 3,608 motions were granted, and so 6,957 motions were denied.

Ninty-six percent of the motions filed for compassionate relief were done by the prisons. That means the BOP was assessing no one, barely, and barely responding to the crisis of COVID–19.

I'd like to explore that, first, with Ms. Guernsey and ask with the framework whether or not the legislation or the opportunity and the compassionate release was taken seriously during the height of COVID–19, which continues today.

In your extensive work tracking compassionate relief and COVID–19 deaths in custody, have you noticed a trend where BOP has attributed an inmate's death to the very illness on which the inmate relied to request compassionate relief?

If so, could you elaborate and tell us how frequently you've seen this happen and can you talk about whether or not there's been an active review of those with COVID–19 or maybe vulnerable to COVID–19 and the BOP assessing them and providing them with compassionate release?

Ms. Guernsey?

Ms. GUERNSEY. Thank you. I think that one of the things to make very clear at the outset is that, oftentimes—in fact, in almost every case—where an individual has died while seeking compassionate release, if you pull up the motions that they filed with federal court you will see that the prosecutors oftentimes argue—in almost all cases, in fact—that the conditions that the person suffers from aren't the type of conditions that would arise to the level of an extraordinary and compelling reason for a sentence reduction.

Oftentimes, they rely on the medical records that the Bureau of Prisons has provided, and they oftentimes argued in front of the district courts that the Bureau of Prisons was providing adequate medical care.

What is so striking about that position from the Department of Justice is that as soon as somebody ended up dying while they were seeking compassionate release or dying from COVID, generally, in prison, the Bureau of Prisons would immediately or sometimes, in a delayed sense, issue a press release and those press releases would always say as a justification for the death that the person suffered from conditions—chronic conditions—that the CDC had listed as making them more likely to be vulnerable to severe illness or death.

So, the doublespeak coming out of the Department of Justice is quite striking. You have prosecutors arguing in court that the Bureau of Prisons is just fine, and you have the Bureau of Prisons stating in press releases after the death happens nothing to see here—in fact, this person was already ill.

Ms. JACKSON LEE. Thank you. Thank you so very much.

Ms. Goodwin, would you explain what GAO found regarding staffing issues in the BOP facilities and how these issues are related to BOP's response to COVID–19 and its ability to provide services and programming and care to inmates?

My time is running short. If you can give me a quick answer, I would greatly appreciate it.

Ms. GOODWIN. Okay. Thank you, Congresswoman. So, when we did the report looking at BOP staffing we found that BOP faced a number of challenges and they were very constrained with their staffing and one of the effects of that is the delivery of services.

Like, some of the folks who were in prison weren't able to participate in various services or programming because the staff weren't available.

Some of the other issues or concerns there would be, was having the appropriate number of staff to actually provide whatever kind of service that the inmates would need.

So, as you move forward from that BOP staffing report and you look at, now, in this COVID–19 environment you have fewer staff to assist with the inmates and the fewer staff, maybe because of staffing issues or maybe because the staff have become infected with the virus themselves, you just have so fewer people to manage and address any of the challenges or services that the inmates need.

So, it's kind of like a round—a loop.

Ms. JACKSON LEE. Thank you. Thank you so very much.

Dr. Hamilton, I'm disturbed by the disparities of risk assessment. Would you provide just a brief response on how that impacts justice when there's a bias of where inmates may have come from, bias on race, gender, and otherwise?

Ms. HAMILTON. So, bias infects the system. So, often people assume that an algorithm cannot be biased. If it's based on biased data, then the algorithm becomes biased and then it produces biased results such as an over prediction and in turn then that encourages, unfortunately, people to believe that these are dangerous individuals when it may simply be based on bias.

Then, real briefly, there something can be done and the NIJ consultants are aware of the discussions in the broader community about how to reduce biases in these types of algorithms.

Ms. JACKSON LEE. Thank you very much. My time has expired.

I recognize Mr. Biggs for his questioning.

Mr. BIGGS. Thank you, Madam Chair, and I thank all the Witnesses for their testimony. I feel like we have received important information already today and I appreciate your testimony and, hopefully, I think we'll get an opportunity to comment on that later.

I hope, Madam Chair, as we do a follow-up—no doubt do a follow-up hearing on what we learned today that we'd bring in Bureau of Prison personnel and so that we might be able to question them as well. I think that would be important.

Ms. Kelly, thank you for being here today.

Ms. JACKSON LEE. Mr. Biggs, I don't want to interrupt you, but you are absolutely right, and we will be having the very next hearing in a few next days on that very point.

Thank you so very much. I just wanted to answer you immediately.

Mr. BIGGS. Thank you. Thank you, Madam Chair.

Ms. JACKSON LEE. I yield back.

Mr. BIGGS. Thank you.

Ms. Kelly, as I mentioned during my opening statement, some of the January 6th defendants have been held in solitary confinement for extended periods of time.

What have you heard from detainees and their families or lawyers about how these men are coping with incarceration conditions that, simply, are not permissible in the United States?

Ms. KELLY. Thank you, Ranking Member Biggs, for that question and for inviting me.

It's, as you can imagine, extremely difficult. They were in solitary confinement conditions for the first several months of their incarceration, based on the pandemic, and then those conditions were loosened up a little bit.

Now they are back to 22 hours in their cell with only two hours out. That only gives them time to—that's all the time that they have to try to communicate with their family, their lawyers, to see the discovery evidence against them.

As I said, some of these men are not charged with any violent crime, and at the same time that COVID is impacting what's happening at the D.C. Jail for January 6th defendants, their trial dates now are getting pushed further out.

For instance, I covered a hearing this week for Robert Gieswein. He has been incarcerated for over a year, not convicted of any crime, of course. He he will be in COVID isolation for 30 days based on the testing that's going on there.

Even if someone tests positive in his unit—he was in 14 days isolation, came out, someone else tested positive. He's now in another 14 days. His trial was set to begin the end of February. Judge Sullivan just moved it to the end of April, now. So, he will be in jail almost 18 months before he even has a chance to defend himself in a court of law.

Mr. BIGGS. So, Ms. Kelly, you mentioned Mr. Bickman going and investigating and coming up and determining that this kind of isolated treatment is appropriate for the January 6th detainees.

My question for you is, is this treatment that they're receiving consistent of all Federal prisoners who are in pretrial detention?

Ms. KELLY. That I don't know. That would be a great question. Maybe some of the other Witnesses have an answer for that.

The idea that now they've been returned to what now is confirmed—I heard this from family Members and detainees over the past week or so—but now that it's been confirmed by U.S. Marshals, I don't know if that's the situation for all 130 some odd Federal detainees, not including the ones who are just there under pretrial detention.

I just don't have an answer for that. My assumption is that no, this is not the situation for other pretrial detainees in the Federal system right now.

Mr. BIGGS. In October, Judge Royce Lamberth found the director of the D.C. Department of Corrections and the D.C. Jail warden in contempt of court for repeatedly refusing to turn over the medical

records related to the care of Christopher Worrell, a former January 6th detainee who suffers from non-Hodgkins lymphoma. What happened in that case and what's the status now?

Ms. KELLY. So, Judge Lamberth repeatedly asked for the medical records related to Christopher Worrell, who does suffer from non-Hodgkins lymphoma. His case worsened while he was in the D.C. Jail.

He was denied medical care. He also broke his hand and was not getting attention for that. So, his medical condition worsened. Finally, a doctor decided that he needed weekly chemotherapy—intensive chemo and radiation every week, and Judge Lamberth had enough, finally.

Now, Judge Lamberth has signed-off on many of these pretrial detention orders, but because he was not getting the documents that he requested in October, he cited both of them for Contempt of Court.

He also referred this case to DOJ for civil rights violations. I have no update on that. Then Mr. Worrell was finally moved out of the D.C. Jail so he could get the care that he needed. I still don't think he has a trial date yet either.

Mr. BIGGS. Who's Kathleen Landerkin?

Ms. KELLY. She was the Deputy Warden for the D.C. Jail. I believe she is still there. As you know, Representative Biggs, there were several Republican House Members who signed a letter demanding her resignation after social media posts showed extreme political bias against former President Trump and Trump supporters.

It was racially biased. It was politically biased, religiously biased. As soon as her posts were exposed to the public, she deleted her Twitter account that showed exactly who she was and her views of the people under her care.

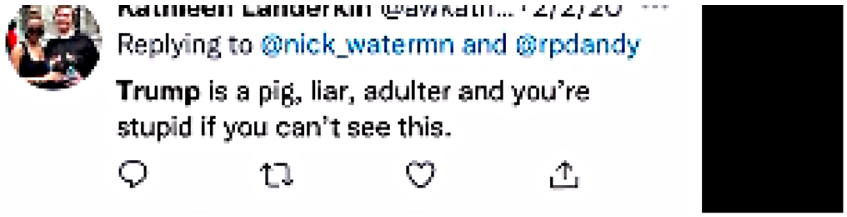
Mr. BIGGS. Thank you. Thank you. My time has expired.

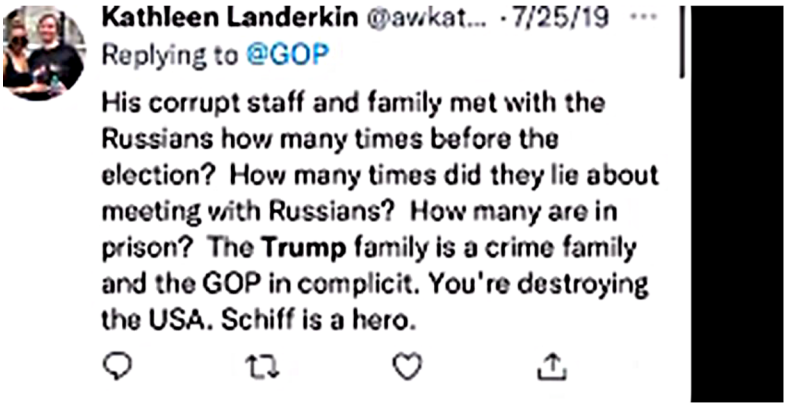
Madam Chair, I would like to submit screen shots of Ms. Landerkin's social media depicting what Ms. Kelly has just stated.

Ms. JACKSON LEE. Without objection, so ordered.

[The information follows:]

MR. BIGGS FOR THE RECORD


Replying to @nick_watermn and @rpdandy
Trump is a pig, liar, adulter and you're stupid if you can't see this.


Kathleen Landerkin @awkat... · 7/25/19
Replying to @GOP
His corrupt staff and family met with the Russians how many times before the election? How many times did they lie about meeting with Russians? How many are in prison? The Trump family is a crime family and the GOP in complicit. You're destroying the USA. Schiff is a hero.


Kathleen Landerkin @awkat... · 9/11/20
Replying to @AmyMcGrathKY
Trump is doing more damage to this county then foreign terrorists ever have.

Mr. BIGGS. Thank you.

Ms. JACKSON LEE. Thank you.

Mr. BIGGS. I yield to you. Thank you.

Ms. JACKSON LEE. Thank you to the Ranking Member.

It's now my privilege to recognize the gentleman from New York, the distinguished Chair of the Full Committee, Mr. Nadler.

Chair NADLER. Well, thank you, Madam Chair.

Dr. Venters, you bring deep experience in evaluating not just individual provisions of medical care in correctional facilities but also managing and evaluating systemic issues from your role at Rikers Island.

I know you visited the Brooklyn MDC during the first large COVID outbreak in 2020, spoke directly to a number of incarcerated people and also evaluated the adequacy of medical care there. Was there anything about MDC's medical response to COVID that stood out to you as more concerning than what you saw at the BOP nationwide?

Mr. VENTERS. I think two of the things I was especially concerned about were the approach of just letting the virus run rampant—locking people in small spaces and letting the virus run through housing areas with little or even no care, and the other was that when people were reporting problems through sick call slips, until we started looking into this the practice in the facility was to throw those slips out.

If a person never got seen, there was no actual record of what they had experienced and that was especially shocking to me. I really hadn't encountered that previously in my work in correctional health.

Chair NADLER. I gather this is totally contrary to be BOP policy?

Mr. VENTERS. Yes. I, certainly, have looked at how sick call is approached during the COVID pandemics because there's only a few ways people can get care when they get sick with COVID. So, it's a special area of scrutiny for me everywhere I go.

Chair NADLER. Do you have a sense of how MDC Brooklyn is dealing with medical care today as it faces among the highest positivity rates for COVID–19 among detainees of any BOP facility in the country, and did they seem to learn anything from the initial outbreak?

Mr. VENTERS. Well, I haven't been back in the facility, I should say. I think my concern now is that, like a lot of facilities, there's a huge number of cases happening very quickly but that there is still not a system to find and keep a special eye on high-risk people—people with special-risk factors—because while we all think of Omicron as being potentially less deadly, overall, we know who are the people that are most likely to die.

It's really important, as staff gets sick themselves and there's less work that can be done, to keep a special eye on high-risk people, both to check on them every day for symptoms but also to aggressively push for potential release when they meet the public safety criteria.

Chair NADLER. Thank you.

Professor Guernsey, can you explain the discrepancy between your reported number of deaths and BOP's reported number of deaths?

Ms. GUERNSEY. I'll attempt to do so with the information that's publicly available, but it's really quite difficult.

The Bureau of Prisons is reporting 279 deaths. We know for a fact that this number doesn't include the 18 people whose names we learned through a Freedom of Information Act request who were incarcerated in private facilities that had a Federal contract.

The other problem is that the Bureau of Prisons is, frankly, removing numbers from its website, particularly the numbers with respect to these privately managed facilities.

The other issue that we're having is that the reporting of deaths appears to be quite substantially delayed. Of the people who I can track, which is very few—it's only 276 out of the potential 297—several of them—more than a dozen died and the Bureau of Prisons did not report their deaths within six months.

Frankly, there were two that it took a year for the Bureau of Prisons to report.

The other issue is that the Bureau of Prisons and, frankly, Federal courts are granting compassionate release when people are on their death beds and so they will, literally, be released so that they don't die in chains, and those numbers are never attributed to the total death count at the Bureau of Prisons.

Chair NADLER. So, BOP's policy seems to be downright dishonest is what you're really saying?

Ms. GUERNSEY. I can't speak for the motivation behind the Bureau of Prisons. I can tell you that the data indicates that there are substantially more deaths than they are reporting, and that's just limited data. I still have two Freedom of Information Act requests outstanding so it's difficult to do a comparison.

Chair NADLER. Thank you. My last question is how has BOP-reported information to family Members of individuals who died in custody differed from the information you received from BOP through Freedom of Information Act requests, and do you believe the BOP is withholding information from families of individuals who die in custody?

Ms. GUERNSEY. So, I've attempted to reach out to a lot of family Members, and I've been quite surprised at how many say, I had no idea that my family member, in fact, died from COVID. I can think of two families off the top of my head that were given information that their loved one died from a pre-existing condition when, in fact, the FOIA that I received indicated the death was the result of COVID–19.

Chair NADLER. Thank you. I yield back.

Ms. JACKSON LEE. I thank the Chair very much for his questioning.

Now, I'd like to recognize—pleased to recognize the gentlelady from California, Ms. Bass, for five minutes.

[No response.]

Ms. JACKSON LEE. We'll come back to her. We'll come back to her. At this time, it's pleasing as well to recognize the gentlelady from Florida and that is Ms. Demings for five minutes.

Ms. DEMINGS. Thank you so much, Madam Chair, and for holding this very important hearing, and thank you to all our Witnesses for joining us today.

There is no doubt the testimony we have heard about the operation of the Federal Bureau of Prisons is troubling. I did my internship—yeah, it was a lot of years ago, but I did my internship in a Federal correctional institution.

There were challenges then and it is apparent today, based on our Witnesses' testimony, that we still have a lot of work to do.

We have heard testimony that describes the poor conditions. My colleague, Mr. Biggs, talked about the filth that is just unimaginable. We have heard about inadequate medical care and attention, a failure to properly administer authorities granted by Congress.

Yes, we can hold people accountable, but we know that we can also treat them with dignity. I'm glad we're having this hearing to confront these important issues and I hope we're able to have someone—we have already heard it but, let me just say it again—I hope that we're able to have someone from the Bureau of Prisons before us soon to continue the conversation.

Chair Jackson Lee, thank you for your commitment there.

Ms. Goodwin, you testified that the GAO's work has shown that BOP's deficiencies can, generally, be categorized into three themes, one of which is inadequate management of staff and resources.

Ms. Goodwin, could you just please expand a bit on that and show how BOP's deficiencies in their management style, if you will, contribute to other issues identified by your office?

Ms. GOODWIN. Thank you for that question, Congresswoman.

GAO, every two years, does what we call the high-risk list where we note the agencies that we think are at risk for issues around fraud, waste, abuse, or mismanagement of resources.

So, this past high-risk list GAO listed the management of the Federal prison system as an emerging issue because we were concerned about those three themes, particularly, the first one being management of resources and the number of times the leadership has changed over.

When that happens, that affects everything else in the agency. It affects the staffing. When we did the report looking at BOP staffing, and to circle back to the question I got from the Chair earlier, if you don't have the appropriate staff, you can't get the appropriate programs to the inmates.

Then if you're short staffed, here comes COVID, and if staff are going out because of COVID that's fewer and fewer staff that you have to just provide services to the people who are incarcerated.

Another reason we have listed BOP as an issue—as an emerging issue on the high-risk list is just the management of resources. When we did the staffing report, just getting information about how BOP was conducting augmentation or information about how they were providing overtime and how that was being done across the number of staff that they had it was problematic.

The agency has faced some fairly severe staffing challenges before COVID, and then once COVID hit, those challenges were only exacerbated.

So, we will continue to review everything that's happening at the agency, and we'll see if they're an emerging issue now, and we will make decisions about whether they become placed on the high-risk list later on.

One of the things we're looking at is how they're going to be implementing the First Step Act. Those requirements, particularly the needs and risk assessment, that's ongoing work we have right now. So, that will help feed into our determination as to whether they end up on the high-risk list.

Ms. DEMINGS. Ms. Goodwin, you also talked about inadequate planning for new programs and initiatives that help inmates prepare for a successful return back into our community. Can you also expand a little bit on that and what needs to be done there in your recommendation to improve the planning for future success?

Ms. GOODWIN. Yes.

The couple things that we looked at there, when BOP would pilot new programs, just paying attention and keeping the data on the effectiveness of those programs to see if it's something that they could put up on a larger scale and provide throughout the agency.

Just lessons learned from all that we found that the agency wasn't adequately capturing that. So, at times, they might be duplicating efforts, or they might just not be getting the cost—paying attention to the cost benefits or cost effectiveness of the efforts that they had ongoing.

So, you do something one year and then maybe 10–15 years later you might try something again. Did you learn from what didn't work the first time?

Ms. DEMINGS. Thank you. Yeah, thank you. I'm out of time. I just want to say very quickly, Madam Chair, Ms. Levi, thank you so much. I didn't get to my question to you but thank you so much for sharing your story. It is most helpful for this Committee.

Madam Chair, I do yield back.

Ms. JACKSON LEE. The gentlelady yields. Thank you so very much.

Mr. Chabot, let me yield to you for five minutes and thank you for accepting my apology.

Thank you.

Mr. CHABOT. No problem.

Madam Chair, the conditions of inmates at prisons are important. No question about that. Before there was an incarceration, a crime was committed.

Back in the summer of 2020 following the horrific death of George Floyd, many protesters and elected officials, mostly Democrats, across the country proclaimed that because Mr. Floyd had died at the hands of a police officer it was time to defund the police.

In cities across America we did, indeed, see that defunding, and we have seen the Federal prosecutor, again, overwhelmingly Democratic—liberal prosecutors—deciding that they no longer prosecute so-called low-level offenses, like shoplifting which, for example, resulted in mobs with sledgehammers rampaging through department stores.

We have also seen the left's relentless campaign to eliminate cash bail. Criminals commit crimes, they're quickly released on low or no bail, and they go out and commit more crimes.

It's even gotten too much for, of all people, Governor Newsom in California. Apparently, thieves have been raiding cargo containers on trains near downtown L.A. for months. For months.

Thousands of empty cardboard boxes were strewn [inaudible] after they'd been plundered. Newsom said it looked like a third world country. No wonder we have a supply-chain problem.

Unfortunately, this is just the tip of the iceberg when it comes to the level of crime in America, particularly in cities.

Madam Chair, I urge the majority to invite the Attorney General and the FBI to testify—the Director of the FBI to testify before this Committee to discuss their strategy for combating the current spike of violence and crime in this nation.

Now, I'd like to direct a question to Ms. Kelly. As a result of the Antifa and BLM-led marches, which, in many cases, led to riots and violence, there was an effort by the left, including some Democrats in Congress, to defund the police.

Because most major cities across the country are controlled overwhelmingly by Democrats, many police departments were, indeed, defunded.

For example, Portland, Oregon, $16 million cut; Baltimore, $23 million; Philadelphia, $33 million; San Francisco, $120 million; Austin, Texas, and L.A., $150 million; and New York City cut its police department by a billion dollars.

My question is, do you believe that this defunding of police has contributed to the increased crime rates that we're seeing currently?

Ms. KELLY. This question is to me?

Mr. CHABOT. Yes. Ms. Kelly.

Ms. KELLY. Oh, yes. Well, I assume so. I'm not an expert specifically on that.

I will say that people who I hear from, based on my work, the disparity in the treatment between Capitol protesters and those who rioted and did far more destruction to the country, responsible for $2 billion worth of damages, thousands—hundreds or thousands of police officers attacked and assaulted, and nearly two dozen deaths related to what happened in the summer of 2020, what I hear mostly from Americans is outrage over this disparity between the treatment of those rioters, activists, whatever you want to call them, and what happened for four hours at the Capitol, the DOJ and FBI rounding up people every single week, mostly on misdemeanors, but nonetheless, treating them as domestic terrorists while we have so many of the offenders from 2020 who have not been charged anywhere close to what these people have been.

Mr. CHABOT. Thank you. Just to follow up, I would also note that during the course of those riots that I mentioned earlier there were approximately 2,000 police officers who were injured, some severely, and, unfortunately, some died.

I'd also note that one of the things that my Democratic colleagues in Congress wanted to do was to take away their qualified immunity, which would, basically, allow people to sue police officers in their personal capacity, in which case their pension funds, their home, their college funds for their kids, could all be at risk of greedy trial lawyers.

What sane person is going to want to go into policing if you're actually going against their personal assets?

It's no wonder that we've seen morale decline to a considerable degree, less proactive policing in some communities across the country, and the resulting rise in crime rates.

Whereas this is a very important topic, Madam Chair, that we're discussing today, we ought to be discussing that crime and the dramatic impact it's having on the quality of life in this Nation across the country.

I yield back.

Ms. JACKSON LEE. Mr. Chabot, let me thank you. I would be remiss if I did not remind our Committee that we know that through the January 6th investigation there are several Members in this Congress that they are concerned about.

They are contributing to the incidents that occurred, and I think as we look at the video, we saw many people that were not those that you refer to, Mr. Chabot, who were beating police officers, to my horror and outrage.

We need to look at these issues globally and recognize that the facts are important when we're in this Committee as well.

Let me indicate that we think Ms. Bass has come online and I'm pleased to yield to her five minutes at this time.

Ms. BASS. Thank you, Madam Chair. I apologize for having technical difficulties on my end, but I appreciate your leadership for holding this hearing today.

I wanted to ask the Witnesses, many communities around the country have been experiencing an uptick in crime and some people are concerned that maybe that uptick is due to early release programs because of the pandemic, and I wanted to know if there is any data about what is happening to the people who were released.

Have they gone out and engaged in new crimes and have they been reincarcerated, as opposed to what the Witness described earlier, which was technical, because of the problem with her ankle bracelet?

I wanted to know about people who have been released because of the pandemic and if there is evidence, documentation, that they have gotten out and been involved in crimes—also, people who were released not just because of the pandemic but because of compassionate release.

Dr. Goodwin, if you could respond.

Ms. GOODWIN. Thank you for that question, Congresswoman.

GAO hasn't looked at that issue, yet. It's something that we can, certainly, work with your office if it's something you want GAO to investigate. We don't have a lot of information on that right now.

Ms. BASS. Can any of the other Witnesses speak to that?

Ms. GUERNSEY. If I may.

Ms. BASS. Yes.

Ms. GUERNSEY. I know that in the December 21, 2021, an Attorney General memorandum that reversed the decision that individuals on home confinement had to be sent back to prison, the Attorney General cites a very specific number of people who have been on CARES Act home confinement who were returned to prison, and that number is 289.

Thinking about the fact that there were 36,000 people placed on home confinement, 289 is a very small number to have returned.

It's my understanding that the Bureau of Prisons, in fact, has the data that breaks that down even further into people who were returned for technical violations and people who were returned for new crimes, and it's my understanding that the people who were returned for new crimes is relatively small. I mean, we're talking less than 10 people.

In terms of the compassionate release data, I do not have that.

Ms. BASS. So, 289—you cannot distinguish whether those were new crimes or just technical?

Ms. GUERNSEY. There is no public data that indicates whether they were new crimes or technical. I do know that there was something published in April of 2021. A gentleman named Ames Grawert from the Brennan Center of Justice indicated that there were three who had been returned as of April 2021 for new crimes.

Again, the Bureau of Prisons has that data. It cited that data in a memo that it submitted to the Attorney General's office and I would urge this Committee to ask for that data from the Bureau of Prisons.

Ms. BASS. Thank you. I appreciate that.

Dr. Venters?

Mr. VENTERS. I don't have any information on that question. I apologize.

Ms. BASS. Okay. All right. I appreciate that.

The Witness that described being violated because of the technical problem with the ankle bracelet, I wanted to know if you could elaborate a little more.

When it was discovered that it was a technical problem, was there any consideration given to that at all?

Ms. LEVI. What happened is that my attorney brought in evidence to show that I had been attending a class that I had previously attended, and it was acknowledged that I had attended that class before. My case manager at the halfway house did not follow through, I believe, and it was—

Ms. BASS. Didn't you say that—didn't you say that it wasn't just a matter of you attending class but that your ankle bracelet didn't work?

Ms. LEVI. Yes, and several times my ankle bracelet didn't work and that's happening to the thousands of people who are out. Your ankle bracelet will ping when you're in different places. Your ankle bracelet will ping when you're home. Sometimes when you're being called there are people who will speak a foreign language that you can hardly understand who will call you.

Ms. BASS. What is your situation today?

Ms. LEVI. My situation today is that I am on—been released on compassionate release by my judge as a result of the fine that was given out by me being reincarcerated.

Again, I say the people who are on compassionate release are out right now attempting to do just what I did, try to gather their self-back together, try to reunite themselves with their families.

They're taking classes. They're buying homes. They're going back to school. They're doing all these things, and that threat, thankfully, was just removed from over their heads by Judge Garland.

We really appreciate that. There's so much that can be done towards giving these people compassionate release because not just

technicalities—most people are not committing new crimes, as the lady said before. The level of new crimes being committed by people on compassionate release is almost minute, 10—less than 20 people, probably, out of thousands of people.

Ms. BASS. Well, I do wish you success in the future. Thank you. I yield back, Madam Chair.

Ms. JACKSON LEE. The gentlelady's time has expired. Thank you for your questioning.

Now, I'm pleased to yield five minutes to Mr. Steube. You are recognized.

Mr. STEUBE. Thank you, Madam Chair.

We've heard a lot today from Witnesses about the Bureau of Prisons. I do hope that—unfortunately, we don't have a Witness from them today. I do hope the Chair is committed to bringing somebody in so we can ask some of these questions on both sides. I think we both have questions that we want answered.

We have heard a lot today about Democrats wanting to let folks out of prison in the middle of the biggest crime wave in decades. They also don't want to let out people who have been charged with misdemeanors who are languishing in prison for January 6th.

I want to read and quote from the District judge his exact quote, and I quote, "For the reasons stated in open court, it is adjudged that the warden of the D.C. Jail, Wanda Patten, and director of the D.C. Department of Corrections, Quincy Booth, are in civil contempt of court," U.S. District Judge Royce Lamberth of Washington ruled.

> "The clerk of the court is ordered to transmit a copy of this order to the Attorney General of the United States for appropriate inquiry into potential civil rights violations of January 6th defendants as exemplified in this case."

Now, we haven't heard from DOJ as to whether they're actually doing that or not. I would love for another opportunity to question AG Garland in the Full Committee about that.

He goes on, "I find that the civil rights of the defendant have been abused," Lamberth said at a hearing:

> "I don't know if it's because he's a January 6th defendant or not, but I find this matter should be referred to the Attorney General of the United States for a civil rights investigation into whether the D.C. Department of Corrections is violating the civil rights of January 6th defendants in this and maybe other cases."

I ask unanimous consent, Chair, to enter into the record Fox News article, "Federal Judge Finds D.C. Jail Warden in Contempt."

Ms. JACKSON LEE. Without objection, so ordered.

[The information follows:]

MR. STEUBE FOR THE RECORD

CAPITOL PROTESTS · **Published** October 13

Federal judge finds DC jail warden in contempt, demands DOJ civil rights probe of Jan. 6 detainees

'I find that the civil rights of the defendant have been abused,' the judge said

By **Andrew Mark Miller | Fox News**

President Biden delivers remarks on efforts to address supply chain bottlenecks

A federal judge has found the warden of a D.C. jail and the director of the D.C. Department of Corrections in contempt of court Wednesday and called for an investigation by the Department of Justice to determine whether the jail has violated the civil rights of Jan. 6 defendants.

"For the reasons stated in open court, it is adjudged that the Warden of the D.C. jail Wanda Patten and Director of the D.C. Department of Corrections Quincy Booth are in civil contempt of court," U.S. District Judge Royce C. Lamberth of Washington ruled Wednesday. "The Clerk of the Court is ordered to transmit a copy of this order to the Attorney General of the United States for appropriate inquiry into potential civil rights violations of Jan. 6 defendants, as exemplified in this case."

TUCKER: WHAT REALLY HAPPENED ON JAN 6

"I find that the civil rights of the defendant have been abused," Lamberth, a Reagan appointee, said at the hearing. "I don't know if it's because he's a January 6th defendant or not, but I find this matter should be referred to the attorney general of the United States for a civil rights investigation into whether the D.C. Department of Corrections is violating the civil rights of January 6th defendants ... in this and maybe other cases."

Christopher Worrell, the defendant in the specific case who is being charged with several felonies related to the January 6th riot, is being treated for non-Hodgkin's lymphoma and has contracted the coronavirus while in jail. Worrell broke his hand in jail in May and was recommended to have surgery in June but in August his lawyers say jail officials have not addressed the injury and have only provided Tylenol and other anti-inflammatories.

The judge's ruling in Worrell's case comes after he found there was more than an "inexcusable" delay of jail officials turning over medical documents.

ALLEGED THEFT OF NANCY PELOSI'S LAPTOP RESULTS IN CHARGES FOR PENNSYLVANIA WOMAN

After the judge learned last week that the surgery still hadn't happened, he ordered the jail system to turn over notes to the U.S. Marshals Service — because Worrell is a federal inmate housed in the local jail — so the Marshals Service could move forward and approve the medical procedure. But on Tuesday, the jail still hadn't sent the records and the judge ordered the city jail officials to appear in court for a contempt hearing.

A lawyer for the jail had argued that they had been working to get the records together to comply with the court's order before the contempt hearing was set.

"He's needed an operation. He hasn't gotten it," the judge said.

The judge had separately chastised city officials for cutting down the number of rooms in the jail for virtual court visits and for sending an inmate to his court a few weeks ago when they did not have the results of a coronavirus test, saying the "incompetence of jail officials" led to the prisoner being sent back and forth from court without appearing before the judge.

Supporters of those jailed in Washington held a rally on Sept. 18, where they sought to highlight what they said were the disturbing treatment of suspects behind bars there.

A federal law known as the Civil Rights of Institutionalized Persons Act -- commonly called CRIPA -- allows prosecutors to review conditions of jails, prisons, and other government-run facilities to identify if there is a systemic pattern of abuse or civil rights violations.

A Department of Justice spokeswoman confirmed to Fox News they received the referral but did not have any further comment.

Associated Press contributed to this report

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Mr. STEUBE. Thank you.

Ms. Kelly, my questions are for you. Even January 6th suspects who were accused of minor crimes, ones simply charged with trespassing or parading, are the targets of hyperbolic statements and smears by Merrick Garland's propaganda press team.

Can you speak to some examples of this? Just recently, in Florida I read of an individual who simply walked into the Capitol, was not violent, didn't commit any other crimes than walking in, gets a year of probation, has to deal with house arrest and all these other things, which, if it was reversed, like the Department of Interior, we have heard nothing of those who raided the Department of Interior, questions I asked AG Garland the last time he was before the Committee.

Could you expand on that?

Ms. KELLY. Yes. Thank you so much, Representative. It's important to note that the most often used charge for Capitol protesters is a Class B misdemeanor called parading or picketing in the Capitol building, and that is what most of the defendants—not necessarily the ones in the D.C. Jail, but most of the defendants have been charged with.

Again, it's important to remember these people, almost all of them, have no criminal record. That doesn't stop prosecutors in Joe Biden and Merrick Garland's Justice Department from suggesting that they are domestic terrorists, even if they were let into the building by Capitol police, as we now have surveillance video that proves that this is the case—went in, thought that they were allowed in, took selfies. Some were in for 5–10 minutes and left peacefully. They were not arrested. They were not told they weren't allowed there, and then woke up to FBI raids at their homes.

The Justice Department is asking for harsh penalties—sometimes three years' probation, and sometimes home detention. What's even more egregious are D.C. District judges who even go above and beyond what the Justice Department is asking and imprisoning these paraders for 30, 60, 90 days in jail, condemning them as potential terrorists attempting to overthrow democracy that day.

All the hyperbole you see in the press you also hear in the courtroom. So, that is what they're doing to trespassers who thought they were doing nothing wrong on January 6th.

Mr. STEUBE. Some of that video shows that there was officers that were standing there while people entered and were doing nothing about it. The treatment of January 6th suspects has been far different than BLM rioters and others accused of liberal goals through violence, including the Department of Interior that I asked AG Garland about, and he seemed to not even know that happened blocks from his office.

January 6th suspects have been interrogated by the FBI about their political beliefs such as whether they thought the 2020 election was fair. Can you discuss the role political motivations have played in the treatment of January 6th suspects, both in prison and in terms of prosecution?

Ms. KELLY. So not only are they asked about their political views by investigators, but they've also been asked what kind of news

that they watch, yes, whether they believe that the 2020 election was stolen, their views on immigration.

I've seen in sentencing memos, especially for one man who was sentenced for parading in the Capitol—they retrieved social media posts from his deleted Facebook account that were negative against Joe Biden, Nancy Pelosi, the Democrats, and that was used as evidence to try to convince a judge, successfully, that this particular man should go to jail for three months for parading in the Capitol.

Mr. STEUBE. My time has expired. Thank you. Thank you for being here.

Ms. JACKSON LEE. The gentleman's time has expired.

I'm very pleased to yield five minutes to the gentlelady from Georgia, Ms. McBath. I thank her for her service to this Committee.

Ms. McBath?

Ms. MCBATH. Thank you, Madam Chair, and good morning to our Witnesses. I'm really pleased that you have been able to join us today as we continue to discuss this critically important piece of criminal justice legislation, the First Step Act, and to examine how the Board of Prisons has responded to the COVID–19 pandemic.

I remember specifically the day that the Judiciary Committee—we had a hearing and we also had discussions on the compassionate release of nonviolent offenders under COVID–19 conditions.

Today, I am glad that we are revisiting what appears to be the Board of Prison's stalled implementation and also their neglect of just the basic health policies and practices for those that are incarcerated.

We know that the First Step Act was a major stride forward in criminal justice reform designed to address the systemic issues in our Federal prison system, and this bipartisan piece of legislation was crafted to reform sentencing and improve prison conditions.

It measures—it includes adding anti-recidivism programs, amending sentences based on good time credits, and expanding the rights of female inmates, particularly, female inmates who are mothers.

The First Step Act, for example, requires feminine hygiene products to be free and, largely, prohibits the use of restraints on pregnant women and those that are in postpartum recovery.

Despite these positive reforms, since the bill was signed into law on December 21, 2018, many of these provisions have not been implemented, and it is our responsibility here as policymakers to ensure that transformative wins of this bill are fully being carried out.

My questions are for Ms. Goodwin today, and thank you so much, Ms. Goodwin, for visiting us again today. I really appreciate you being here.

In your 2021 report on pregnant women in Federal custody, you found that out of the Board of Prison policies that address the treatment and care of pregnant women that only eight of these policies were fully aligned with the national guidance for the health and safety of pregnant women and following this report that the Board of Prisons improved their policies to align with national standards.

Can you attest to that?

Ms. GOODWIN. Yes. Thank you, Congresswoman. So, that's correct. When we did the work looking at the care and treatment of pregnant women in DOJ custody, we found that with those national standards BOP wasn't fully aligning or had not fully aligned with quite a number of them, and those national standards speak to issues around providing nutrition, providing prenatal care, providing mental health services, and we also looked at whether or not they were restraining pregnant women.

We made our recommendation to the BOP. They agreed with the recommendation, and they are in the process of fully aligning the ones that—we have a table where we note what was fully aligned and what was partially aligned. They are in the process of fully aligning the ones that we found to be deficient.

However, we are leaving that recommendation open until all those categories that we noted are fully aligned. We will be circling back to BOP to find out where things are.

Then another recommendation that we had was to the U.S. Marshals about the restraining of pregnant women.

Ms. MCBATH. Well, thank you, and I think this Committee would be more than interested to have access to that information and that data once you have access to it as well.

I'd also like to know, since the COVID–19 pandemic has the Board of Prisons implemented additional policies to protect pregnant women from the increased risks of the disease itself?

Ms. GOODWIN. My understanding is that they have. What is interesting about the pregnant women's report that we did our last site visit in January 2020, right as everyone was beginning to understand how dangerous the COVID virus was, and then in the process of pulling the report together, we did circle back to BOP to ask about what they were doing in terms of protecting pregnant women.

They talked about providing special housing, putting women—pregnant women in additional special locations to keep them away from the general population.

That's something we didn't go into a lot of detail in. It is something—as we do future work on how BOP treats pregnant women it's something that we will definitely look into.

Ms. MCBATH. Well, thank you so much. We really appreciate that.

There, again, Ms. Levi, I am so sorry for all that you've appeared to suffer through, and it's just kind of disturbing to hear that there may be others as well that are incarcerated that are going through some of the same kinds of conflicts and problems.

With that, I yield back.

Ms. JACKSON LEE. The gentlelady yields back.

I would now like to recognize Mr. Tiffany for five minutes.

Mr. TIFFANY. Thank you very much, Madam Chair. Thank you for the hearing today and thank you to all our Witnesses that are here today. It's good to have you all here.

I just would share a comment regarding Mr. Venters' testimony where he was talking about an independent assessment of COVID. I would say we should not just do it with the Bureau of Prisons,

we should do that for all government, including the Centers for Disease Control.

There should be a full, thorough, independent review of all the actions regarding COVID over the last couple months.

I would hark back to March 30, 2020, when the Chair of the Judiciary Committee urged Attorney General Barr to assess all prisoners for release regardless of the type of institution in which they are housed, the seriousness of their offense, or the potential recidivism risk they may present.

So, here we are today. We're talking about a significant issue. This Committee is whistling past the graveyard of what is the most important thing on the minds of Americans at this point and that is crime. Well, maybe inflation. Maybe the border might be more important for some.

I got to tell you, for a lot of people, especially in big cities—and I'm hearing it from them—is crime, and they're deeply concerned about it. You see smash-and-grab going on across the country, Wild West train robberies. You got carjackings that are up all over the country, especially the big cities and, of course, the murder rate is at its all-time high in what was it, 15 cities across America where we have been weak on crime, and we're not dealing with that. We're not dealing with that here today.

On November 21, 2021, Darrell Brooks drove his car through a Christmas parade, injuring over 60 individuals and killing six, one of whom was an eight-year-old.

In response, after seeing these horrific scenes in Waukesha, we learned that Darrell Brooks intentionally drove his SUV through these parade goers. In 2006, he pled guilty to statutory sexual seduction.

In 2016, a warrant was issued for his arrest for jumping bail. In 2020, he was charged with recklessly endangering safety being a felon in possession of a firearm and later released on bail. On November 21st, he, again, was criminally charged for allegedly running over the mother of his child with a car.

Despite that long history, the Milwaukee DA set bail at $1,000. Here's what that district attorney said back in 2007—John Chisholm:

> "Is there going to be an individual I divert or I put into treatment program who's going to go out and kill somebody? You bet. Guaranteed. It's guaranteed to happen. It does not invalidate the overall approach."

This is what's happening across the United States with these weak district attorneys. They're worse than weak. They are fostering crime.

Today, I call on the Governor of Wisconsin, who has the authority—he can rectify this problem with this district attorney in Milwaukee County to relieve that district attorney of his duties, because he has done this before in the case of Cassandra Lutz, who was given a fatal dose of heroin by Jeremiah Schroeder, who got out on a low bail.

So, we're seeing this all over the country. Speaking of Milwaukee, we have the Milwaukee aldermen calling to prosecute South Korean automakers because they're encouraging car theft in the United States.

Think about it. Elected officials blaming a car company for the car thefts that go on in their city. It is crazy. Think about the Minnesota Freedom Fund, which Vice-President Kamala Harris in 2020 said, "we got to get money to these people who are rioting in Minneapolis," and they nearly burned the city down.

Well, she got plenty of bail money into the Minnesota Freedom Fund and $1,500 went to a guy that has now committed a murder.

That, ladies and gentlemen, is what is going on in America at this point. I'm going to go back and reread what the District Attorney for Milwaukee County, Wisconsin, said in 2007:

> "Is there going to be an individual I divert or I put into a treatment program who is going to go out and kill somebody? You bet. Guaranteed. It's guaranteed to happen. It does not invalidate the overall approach."

They don't care about the criminals—or they care about the criminals. They don't care about the victims, and it's time for us to begin looking out for victims.

I want to ask one last question before my time is up.

Ms. Guernsey, do the January 6th defendants have a legitimate claim?

Ms. GUERNSEY. I'm not quite sure what you mean in terms of a legitimate claim. I do want to highlight that I think that the things that are happening to some of the January 6th defendants are truly appalling. I don't think that they're isolated to the January 6th defendants. I think that—

Mr. TIFFANY. Thank you very much. I agree with your answer there.

Ms. JACKSON LEE. Thank you. The gentleman's time has expired. Thank you.

I'm now pleased to recognize the gentlelady from Pennsylvania and thank her for her service. Ms. Dean is recognized.

Ms. DEAN. Thank you, Madam Chair, and I thank you. As we continue to grapple with this pandemic, I thank you and this Committee for continuing to shine a light on this important issue.

I'd like to start with you, Ms. Levi, and I thank you so much for sharing your story, your experience, with us. I have two brief questions:

(1) How are you doing today? How are you and your mother and your family doing today?

(2) Do you think compassionate release is adequately and equitably being used?

Ms. LEVI. First, I'm doing great. Good health. My mother's in good health. My mother is just awesome. I can't say too much about her. We live in a three-story house, and she walks those steps every day. I mean, she's in good health and she's just concerned, like I am, about the people who got left behind.

She hears me talking to ladies who call me on the phone, now that I can receive phone calls, and she hears from them and she knows that, no, compassionate release has not been applied as it should be.

Most wardens refuse to even put it in for most people who are there, and when they do it comes back—mine came back denied before. I got denied compassionate release. I got denied—

Ms. DEAN. Even with your history? Even with your history of lung cancer and (simultaneous speaking)—

Ms. LEVI. Yes, even with my history of lung cancer, even with my history of initiating programs for the elderly, going to school, and doing the things that I was doing positive inside. Even with all that, I got denied initially for compassionate release. Yes.

Ms. DEAN. Thank you.

Ms. LEVI. That thousands of people—I mean, no, it is not being applied. The Bureau of Prisons should really take the initiative and start a program where it will be almost mandatory that people who qualify, who meet those needs assessments, and who really fit the criteria, it should be mandatory that they apply for compassionate release for these people. Especially the elderly, they warehouse people.

Ms. DEAN. Thank you so much. I appreciate those updates and your commonsense response.

Professor Guernsey, with your troubling expertise and what you know about the inaccuracy of the reporting in terms of COVID infection and COVID death, Congress made clear that we intended for the Bureau of Prisons to more broadly use compassionate release authority, and this was even more important during the COVID pandemic.

I introduced this Congress legislation, the emergency GRACE Act, that allows people to petition the Federal court directly in a public health emergency rather than waiting for BOP to Act within 30 days.

Do you think this type of legislation would help, would be more effective in terms of the use of compassionate release? Maybe, if you can add to that also, what can we do about transparency of these numbers in the areas that you show a real delinquency?

Ms. GUERNSEY. Certainly. I think that we have been much more successful in getting individuals out on compassionate release in front of the Federal district courts—3,000 at the very least, compared to the 43 in the Bureau of Prisons.

That said, I would like to caution that even petitioning the Federal courts is not a perfect solution because most judges have compassion fatigue. We have all been living through this pandemic, and you start to become numb to the reality of what's happening in prisons, which I think is why it's really important that we have the independent oversight and people in there reporting what's really happening in the Bureau of Prisons. I do think the GRACE Act is a wonderful step forward.

In terms of the Bureau of Prisons and its lack of transparency, what I think is quite troubling is that a lot of the information that this Committee may seek has already been ordered to be provided.

The First Step Act provides that the Bureau of Prisons shall provide the data as to how many people apply for compassionate release—how long did it take, the justifications for the denials, did someone die while their denial was pending—and the Bureau of Prisons is, simply, not reporting that data.

Ms. DEAN. Thank you. Thank you very much.

Mr. Venters, I have just a little bit of time left, but your disturbing testimony as to sick calls being thrown away, destroyed, ignored—what can we do? What should we do?

Mr. VENTERS. Well, we won't get a better outcome unless we establish real oversight—independent oversight—of health care in

the BOP. Otherwise, if law enforcement is overseeing the care that they provide themselves, we're going to get the same results over and over.

The CDC, independent organizations, need to be involved in overseeing this care.

Ms. DEAN. Thank you very much.

Madam Chair, my time has expired. I yield back.

Ms. JACKSON LEE. The gentlelady's time has expired. Thank you very much.

It's my privilege now to yield to Mr. Massie for five minutes. You're recognized.

Mr. MASSIE. Thank you, Madam Chair, and thank you for holding this hearing. I hope we do get some correctional officers as Witnesses.

Mr. BIGGS. Madam Chair?

Ms. JACKSON LEE. You want to raise your volume? Thank you.

Mr. MASSIE. Can you hear me now?

Ms. JACKSON LEE. No.

Mr. MASSIE. Okay. I'll work on that. Can you come back to me?

Ms. JACKSON LEE. All right. Is Ms. Spartz able to be recognized? Ms. Spartz?

[No response.]

Mr. BIGGS. I don't believe she's on, Madam Chair.

Ms. JACKSON LEE. All right. Is there another person besides—I see Mr. Jordan on but I'm not sure if he's ready now?

Mr. BIGGS. Yeah, we'd defer—

Ms. JACKSON LEE. Mr. Massie?

Mr. BIGGS. Madam Chair, it's interesting to me that one of the most sophisticated technical geniuses on this Committee is Thomas Massie and he can't get his microphone to work. That's interesting.

Ms. JACKSON LEE. He's a scientist. If you don't mind, Mr. Ranking Member, I will go to a—let me see if he is ready now.

Mr. Massie?

[No response.]

Ms. JACKSON LEE. Okay. Mr. Massie?

Mr. BIGGS. Still having troubles hearing you, Thomas.

Madam Chair let's go to a Democrat and then we'll come back to Mr. Massie.

Ms. JACKSON LEE. We'll work on Mr. Massie. He's probably got a new scientific approach. Thank you.

Again, thank you, and it's my privilege and pleased to yield to the gentlelady from Pennsylvania, Ms. Scanlon, for five minutes.

Ms. SCANLON. Thank you, Madam Chair, for calling this hearing today.

I will just say one of the issues that built bipartisan support for passage of the First Step Act was mass incarceration throughout the United States. We incarcerate exponentially more people per capita than any other country in the world, a staggering 698 out of every 100,000 people, for a total of over 2 million people in jail in the U.S.

As we try to move our prison system to a more rehabilitative and a more productive model, we know that there are longstanding problems with that prison system and particularly its treatment of Black and Brown inmates, and that must be addressed.

For example, in 2015 the Washington Lawyers' Committee for Civil Rights released a report condemning conditions in the D.C. Jails, and those conditions and findings have been largely ignored until a more diverse population recently was incarcerated there. We know there is plenty of work to do.

Dr. Goodwin, I am interested in the GAO's findings that the Bureau of Prisons has been deficient in planning for new programs and initiatives to help inmates prepare for a successful return to the community. Can you elaborate on your concerns in this regard and share any suggestions for congressional action to move this process along?

Ms. GOODWIN. Well, thank you for that question, Congresswoman. I will hearken back to report that we did on BOP staffing and the concerns that we raised there and talk about like the challenges that that presents for individuals preparing for re-entry. If you don't have the appropriate staffing levels, you don't have the folks to provide the drug treatment, education programs, or any of the other programs or activities that an inmate would need to help earn them time credits.

We've got the new proposed legislation out there, but we at GAO, we're also mindful that if the staffing numbers or the numbers aren't there, then the programs won't be there, and the inmates aren't able to earn those time credits. So, that affects what their re-entry looks like.

We've also done work looking at the Federal prison industries because that is also another way that to provide additional job skills to folks who are incarcerated, but if those programs aren't in place, time credits aren't getting earned and then when people are coming out of prison, they're coming out with fewer job skills. So, that's a concern that we have, absolutely.

Ms. SCANLON. Thank you.

Ms. Guernsey, did you have anything to add?

Ms. GUERNSEY. I don't.

Ms. SCANLON. Okay. How about you, Mr. Venters?

Dr. VENTERS. No.

Ms. SCANLON. Okay. I mean I do think it is really, really important that we are setting people up for success upon release, otherwise we end up in this endless cycle of incarceration, and that doesn't help any of us. I would like to keep looking at that, and thank you, Madam Chair. I yield back.

Mr. BIGGS. Madam Chair, if I may—

Ms. JACKSON LEE. The gentlelady yields back.

Yes?

Mr. BIGGS. I think Mr. Massie is still working on his technical difficulties and I think Mr. Jordan is ready to go if that is okay.

Ms. JACKSON LEE. All right. Thank you so very much, Mr. Biggs.

I am very pleased to yield to the Ranking Member of the Full Committee, Mr. Jordan, for five minutes.

Mr. JORDAN. Thank you, Madam Chair. Appreciate the Witnesses, appreciate you putting this hearing together.

Ms. Kelly, let me see if I have the facts straight: First, the Deputy Warden at the D.C. Jail, Ms. Landerkin, the person in charge of day-to-day operations at the jail, had a number of social media posts in the previous couple years expressing her dislike for the

former President and anyone who may or may have not supported, or may have supported the President. One of those tweets, she said if you're behind Trump, you are trash. I think the Ranking Member of the Committee put those up earlier.

Second, Ms. Kelly, have talked to individuals in the D.C. Jail personally and they have expressed the conditions under which they were being held that seemed to reflect the attitude that Ms. Landerkin conveyed in that tweet.

Third, on October 13, 2021, Judge Lamberth held the D.C. Warden in contempt and asked the Department of Justice to investigate a possible civil right violation in the way they were being held in this facility.

Fourth, the U.S. Marshall Services has moved inmates out of the D.C. Jail because of the poor conditions of that facility.

Are those four facts accurate?

Ms. KELLY. Yes, that is correct.

Mr. JORDAN. All right. Well, Madam Chair, one of the things I think we need to know, what is the status of the Department of Justice investigation? You had a Federal judge ask them to investigate. That would be something—I mean, ask them to investigate a situation where the U.S. Marshall Services felt it was warranted to move people out of the very facility that he asked the Department of Justice to look into.

I think it would be important for our Committee, certainly this Subcommittee and the Full Committee to understand what is going on there because I agree with what Professor Guernsey said earlier: "We need to be concerned about the conditions of anyone in Federal prison to make sure the Constitution and due process are being followed."

There was a reason we all came together. We all came together on the First Step Act in the last Congress. That was an important first step. We are concerned about the compassion and the due process and the Constitution that need to be involved with this type of situation, and frankly the rehabilitation concern. We are concerned about all those.

It is important I think we get the answers from the Department of Justice on that.

Also, I think it is important for this Committee to balance everything because the biggest concern I hear from our constituents right now, the constituents I get the privilege of representing, is the dramatic increase in violent crime. There is a distinction we need to make. Violent criminals need to be incarcerated; others we need to look at how we can in a compassionate way help them get on with their lives and be productive citizens. So, that is what I hope we will do.

I guess I would maybe let Ms. Kelly respond a little bit and then I would love to hear as well from Professor Guernsey on some of the things I just outlined.

Ms. Kelly, if you could go first?

Ms. KELLY. Well, thank you so much. Thank you, Member Jordan, and thank you for your attention to this matter.

I'd like to thank Professor Guernsey for acknowledging the mistreatment of January 6 defendants.

What we really have is political prison in the United States. We have defendants, Americans who protested the election of Joe Biden who are not being treated the same as other political protestors, including those with similar, if not far more dangerous offenses than what happened on January 6. So, I appreciate the attention to this.

I think it's also important to note given all that we're hearing about the pandemic, that this Justice Department prosecutors continue to seek pretrial detention for January 6 defendants and extending their pretrial detention orders signed off by Federal judges. There is no compassion or consideration, at least in this legal and judicial system, and it sounds like that extends throughout the country, certainly when it comes to the situation with Ms. Levi.

I once again just appreciate the Committee's attention to this.

Mr. JORDAN. Thank you.

Professor?

Ms. GUERNSEY. I think that the defendants from the January 6 had the ability and the privilege that a lot of individuals who are currently incarcerated in Federal custody didn't have. They had people who were able to give them voice and to help them amplify their voices outside of the prison context. So, I want to be careful because when we talk about the treatment that they're undergoing, it's quite similar for most of my clients who've been held in pretrial detention, not identical given the conditions of the jail, but this is something that Black and Brown individuals and non-January defendants face across the country.

The other thing that I want to address, too, is that I think that addressing the fact that there has been an increase in violent crime is concerning. Of course, we're all concerned about that, but mass incarceration is not a way out of that. So, I want to be really careful when we think about potential solutions that we really are thinking about—

Mr. JORDAN. I know my time is up, let me just ask: So, what we have seen from certain prosecutors and their unwillingness to prosecute certain crimes now in large urban areas around the country, that have been elected to the prosecutor's position, is that contributing to the increase in violent crime we are seeing? Because I certainly think it is. We want to make sure bad guys are off the street, but we also want to treat people with the due process and constitutional principles that our great country, our great system has. So, that to me is where the focus has to be, particularly for this Subcommittee.

Ms. JACKSON LEE. The gentleman's time has expired.

You want to finish your last sentence?

Ms. GUERNSEY. I was going to say I think that the causes of crime are really complex, and they hinge on various social and economic factors, particularly given the pandemic that we've been living through for these past two years. So, I just urge that incarceration is not the answer.

Ms. JACKSON LEE. I thank the Witnesses. Ranking Member, I thank you for your questioning.

I now yield five minutes to the gentlelady, thank her for her service, Ms. Bush from Missouri.

You are recognized.

Ms. BUSH. Yes, thank you. St. Louis and I appreciate you, Chair, for convening this important hearing. I am so glad to hear all this advocacy for those who are incarcerated. I just wish I would have heard it be this loud and this big push for it when we were talking about mostly Black and Brown people, but I'll move on.

As the Congresswoman from Missouri's first district I have heard from my constituents behind the wall, many of whom have shared their horrifying experiences of unsafe, unsanitary, and inhumane conditions while incarcerated before and during COVID. From traumatic lock-downs to being denied visitation for months on end, this pandemic has laid bare the extreme violence inherent in our prison system.

For three years this pandemic has deprived thousands of people in our Federal prisons and jails of their health and well-being. More than one in five federally-incarcerated people have been affected with COVID–19 and at least 279 people have died. Our prisons are a petri dish for infectious disease outbreaks and the Bureau's policy to release thousands into home confinement under the CARES Act has reunited families and it has saved lives.

Ms. Levi, thank you for your powerful advocacy for home confinement. Can you talk to us about your experience since being home under supervision and about the psychological impact of being sent back to jail in June of last year while you were attending computer class during your home confinement?

Ms. LEVI. I really think this might have been the first time that I've even addressed the psychological impact. You come home, you have expectations. You're reuniting with your family, getting yourself back together, doing things that just show your self-worth, show your community, show your family that you're a changed person, that you're not the same person who went into prison 16 years beforehand. That's your dream. That's your hope. That's your prayer, that they can see who you are now.

So, that's what I began to do. I began to advocate. I began working with organizations that had helped me while I was inside, I connected with those organizations. I tried to make sure if there was anything I could do to speak out and let them know what my prison experience was like and what I thought was needed.

One of the things you are talking about today is the lack of re-entry. I took that computer class because coming home at the—at the halfway house I was refused—there were 100 computers in that halfway house. I was refused to go back there to use any one of them. Those are the kinds of things that are happening to people who are on home confinement. Those are the kind of things that are lacking in the re-entry process with us coming out, using the phone, those kinds of things.

The psychological effect of being sent back, I weigh 169 pounds. I now weigh 138 pounds. Just those 21 days back inside, it's devastating. It's devastating, especially when you know that you were doing all the rights things. Like I said, I'm not just talking about me. There are thousands of people who that threat—

Ms. BUSH. That is right. That is right. That is what we're talking about.

Ms. LEVI. —there are thousands of people who that's still over their heads, that home confinement—

Ms. BUSH. Right.

Ms. LEVI. —that monitor is on their ankle and it doesn't work right all the time.

Ms. BUSH. Well, let me add—

Ms. LEVI. —whatever you all can do, whatever you all can do towards making compassionate release more effective, more efficient.

Ms. BUSH. Right. Well, that is our duty as lawmakers. That is our duty to represent, and it is imperative that we prioritize the public health and safety of all people, not just those that agree with us politically. In society with more than 140,000 people in Federal custody, this is the only way to do it, we have to be decarcerate, we have to grant clemency and move people out of prisons and jails and back home to be with their families and in their communities.

I ask for unanimous consent to enter into the record a letter that Congresswoman Watson Coleman and I led today seeking clarification from BOP on the implementation of the new OLC guidance for those on home confinement pursuant to the CARES Act.

Ms. JACKSON LEE. Without objection, so ordered.

[The information follows:]

MS. BUSH FOR THE RECORD

Congress of the United States
Washington, DC 20515

January 21, 2022

The Honorable Michael Carvajal
Director of the Federal Bureau of Prisons
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Director Carvajal:

We write to you today to commend the Department of Justice ("Department") for issuing the Office of Legal Counsel (OLC) Memo that states that the Federal Bureau of Prisons (BOP) is not required to recall individuals placed on home confinement through the CARES Act to prison after the federal health emergency ends. As members of Congress with many constituents who will be impacted by this decision, we also write seeking further clarification on how this policy will be implemented.

On December 21, 2021, the Department determined that the BOP is not required to reimprison thousands of individuals who were placed on home confinement to limit the spread of COVID-19, even after the federal health emergency is declared over. In a statement, Attorney General Garland mentioned reasons to allow these individuals to stay on home confinement for the duration of their sentences, "Thousands of people on home confinement have reconnected with their families, have found gainful employment, and have followed the rules." He continues that this new decision "ensure[s] that the Department lives up to the letter and spirit of the CARES Act," which never mentioned the need for these individuals to be forced behind bars once again after the federal health emergency expired. We are ecstatic and pleased that the Attorney General came to this decision, especially since it keeps with the Administration's pledge to reduce our country's overall prison population.

As the BOP works to enforce the newly issued memo, we write to express our hopes that the Bureau will keep in line with the spirit of the memo and the law and ensure that none of the affected individuals will be required to go back to federal prison. With that, we have a few additional questions we are requesting responses to:

1. How does the Bureau plan to implement the new OLC memo that was issued on December 21, 2021? Specifically, does the Bureau intend to allow all affected individuals to serve the remainder of their sentences on home confinement? If not, on what basis would the Bureau require individuals to return to prison?

2. Can the Bureau provide data on the factors it will consider when granting an extension of those on home confinement? We request transparency in knowing the data on those eligible/allowed to stay on home confinement for the duration of their sentences.
3. Has the Bureau notified all the individuals impacted by this new OLC memo? What information has the Bureau provided to those impacted by the new policy?
4. With the recent surge in COVID-19 cases due to the Omicron variant, will the Bureau continue to use its jurisdiction under the CARES Act to allow other individuals to go on home confinement to reduce the spread of the virus?
5. Can the Bureau provide a briefing to both Members of Congress and their staffs on how they plan to implement and move forward with the new OLC memo?

We respectfully request that you provide answers to these questions no later than February 7th, 2022. Thank you for your time and work on this important matter.

Sincerely,

BONNIE WATSON COLEMAN
Member of Congress

CORI BUSH
Member of Congress

JERROLD NADLER
Member of Congress

KAREN BASS
Member of Congress

DAVID TRONE
Member of Congress

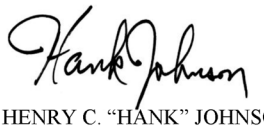
JAN SCHAKOWSKY
Member of Congress

JUDY CHU
Member of Congress

ELEANOR HOLMES NORTON
Member of Congress

TONY CÁRDENAS
Member of Congress

MONDAIRE JONES
Member of Congress

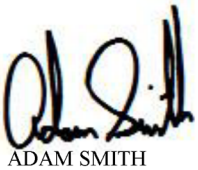


HENRY C. "HANK" JOHNSON, JR.
Member of Congress

RASHIDA TLAIB
Member of Congress

FREDERICA S. WILSON
Member of Congress

PRAMILA JAYAPAL
Member of Congress



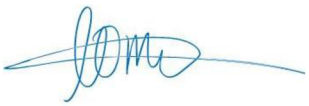
ADAM SMITH
Member of Congress

KELLY ARMSTRONG
Member of Congress

GRACE MENG
Member of Congress

DANNY K. DAVIS
Member of Congress

MARK POCAN
Member of Congress



ILHAN OMAR
Member of Congress

HAKEEM JEFFRIES
Member of Congress

BARBARA LEE
Member of Congress

/s/
ANDRÉ CARSON
Member of Congress

DAVID N. CICILLINE
Member of Congress

JAMAAL BOWMAN, ED.D
Member of Congress

SHEILA JACKSON LEE
Member of Congress

AYANNA PRESSLEY
Member of Congress

Ms. BUSH. Thank you, Chair. I also ask for unanimous consent to enter into the record testimony from Wendy Heckman and Deantha D. Brooks on the challenges of home confinement conditions in Federal facilities and earned time credit.

Ms. JACKSON LEE. Without objection, so ordered.

[The information follows:]

MS. BUSH FOR THE RECORD

Submission to House Judiciary Committee for January 21, 2022 Hearing regarding The First Step Act, The Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons?

My name is Wendy Hechtman and I am currently serving my term of incarceration on home confinement in West Haven, Connecticut under the CARES act. Since I have been placed in the community, I have received countless calls for help from fellow community confinees and their families with questions regarding navigating bureaucracy and the rules and regulations regarding our status. In addition, I have also dealt with numerous questions and concerns from friends, family members, and loved ones of individuals still incarcerated in Federal Bureau of Prisons facilities. I am writing today to recount those stories and situations to you. I am not including their names in this report in an effort to protect their privacy, but I have names available for any legislator who would like to verify these issues I am going to detail today. Recently, there have been many concerns raised about the people incarcerated with regard to January 6th, 2021 activities. Many of the concerns they raise are completely legitimate. The sole error in their complaints is the misconception that this treatment is targeted. It is not. That is standard, typical BOP policy and procedure. All incarcerated people are treated that abysmally, and all of their facilities, to one degree or another, are utter hovels.

First, I will tell you about the structural situation inside BOP facilities. I myself was incarcerated in the camp at Danbury, Connecticut. I have the added perspective of being someone who worked not only as head orderly during the pandemic but also on the construction and general maintenance detail during my incarceration, so I had the opportunity to witness much more than the average incarcerated individual. The camp building is an absolute dump unfit for human habitation. There is no more reserved way to phrase the abominable condition that building is in, despite the best efforts of maintenance officers with extremely limited budgets, tools, and human resources. Windows and doors do not seal properly, leaving the building prone to excessive drafts and cold. It is a common occurrence for snow to not only blow inside through the unsealed doors, but accumulate inside the door due to the excessive chill, mere inches from a bunk, during the winter months. Like many BOP facilities, Danbury is in a rural setting with the accompanying wildlife, flora and fauna. Due to the windows not sealing properly, bugs and vermin are a regular occurrence in the building. As an example, a raccoon, Canada goose, and turtle all wandered into the building and had to be removed at various points. There is a never-ending mud wasp infestation that is occasionally mitigated with copious amounts of insect repellant, but they always return. Birds such as crows, robins, and starlings were trapped in the building on at least a weekly basis.

The summer months are not any more pleasant than winter inside the building. The building is not air conditioned, which is not too surprising for a facility in the rolling hills of New England. But it is also not built for adequate ventilation or cooling. This leads to interior temperatures regularly 10-20 degrees higher than outdoors. This leads to leaving doors and windows, which rarely have screens at all let alone properly fitted ones, open for the aforementioned vermin and bugs to enter. The alternative is heat so oppressive it causes breathing difficulty and lightheadedness. There are room fans– but they are on the floor and due to the arrangement of the dorms the air does not flow through the cubes in an efficient manner. Individual 12 inch fans used to be sold on commissary that could be plugged in. Now the fans being sold are roughly the size of a hand, and require large, expensive batteries that run out after roughly 24-36 hours of use. We were told this is because the other fans, which were much more efficient, were using too much electricity.

For several years, until the fall of 2020 when they started replacing them, there were no fire alarms in the camp whatsoever. There were pull boxes on the walls, but they were purely decorative and had served no functional purpose for at least five years. The sprinkler system was completely non-functional. The repair of the fire prevention and detection measures is still incomplete. This is particularly appalling considering Danbury is

where five inmates died in a 1977 fire and 70 people were hospitalized with injuries. Even that didn't manage to provoke a permanent change. As with most issues, lessons are never learned in the BOP.

Perhaps one of the most disturbing examples of what horrific condition the building is in is the regular occurrence of the sewer backing up. Several times yearly, the sewers will back up into the building, spilling raw sewage all over the floor. As if that wasn't disgusting enough, this backup emits from a drain in the kitchen. This is not a small spill, either. It usually covers most of the room, several inches deep, often above the ankle line where the boots end. Usually, the inmates are responsible for cleaning this. It takes several hours to clean with the limited supplies allowed by the BOP regulations, and the place smells like God's death for days after.

The interior heating is neither consistent nor efficient. Some parts of the building will feel sticky and humid to the point of discomfort, while other parts of the building will require a winter coat to keep warm. If the heat is turned up enough that people in the cold zone don't need their coats, the people in the warm zone are getting sick from the heat. This also is an issue for the water supply. The water heating system is so old that parts to repair it are no longer made, so they take quite some time to be sourced when repairs are needed, which happens on a quite frequent basis. It is a standard and common state of affairs for there to be inconsistent hot water at best for showering and cleaning in the facility. During one period of six months in the latter half of 2020, we had only lukewarm water at the most high settings. The hot water still is regularly dysfunctional to this day, despite numerous repairs. When we have inquired as to the feasibility of a new boiler, budgetary concerns are cited for the denial. It should also be noted that these showers are filled with impossible to remove black mold, the walls are stripped to the interior components exposing wiring and plumbing, and the floor is so cracked and destroyed that the subfloor and actual earth is visible through cracks.

In December 2020, a gas leak happened in the camp at Danbury. The smell was so strong as to cause headaches and be detectable by anyone with a nose. Prior to that, for years, there had been the odor of gas in one of the recreation rooms. Instructors refused to hold classes there because the odor made them nauseated. Inspections were had, a small fix would occur, and the smell would return within a few weeks. It would take months of complaints to have the issue looked into and temporarily fixed again. When the December 2020 leak happened, it took nothing short of media complaints, families frantically calling their legislative representatives, and legal intervention to get the administration at Danbury to allow the local fire department in for an inspection. After the inspection, the building was ordered evacuated. Women were moved from the minimum security camp to the low security facility across the street. They were told it was only overnight and not permitted to bring hygiene items such as sanitary napkins, toothbrushes and toothpaste, nor their medications or a change of clothing.

After two days, the leak was sufficiently repaired to allow re-entry. Some women returned to the camp after days of sleeping on makeshift cots in classrooms with inadequate bedding and in the same clothing. Approximately a dozen women were left behind as they had all now just tested positive for covid and needed to quarantine. They were kept for two weeks without clothing, medications, or adequate bedding being supplied for the first several days. This only was resolved after major outcry from family members and the public. There were a handful of decent human beings working as officers who went and searched the inmates' personal items to bring them their necessities– but they were not required to do this. It was only because of their personal decency that this happened at all. No one should have to rely on an already overworked, underpaid, and underappreciated staff member to be a decent enough human to go out of their way for them in order to have medication and hygiene supplies.

This behavior could be written off as desperation of the learning curve of covid, and a stretched to the brink staff untrained to deal with a totally unprecedented crisis. However, a year later the same thing happened

again, thankfully without a gas leak this time. Absolutely no lessons were learned, and no changes were made with regard to how covid infection was dealt with. When the omicron variant hit the camp in December 2021, the same haphazard pseudo-quarantine procedures happened. Women with negative covid status were housed in the aforementioned gas scented recreation area, and to avoid intermingling with the covid infected inmates they were taken to the visitation center next door to use portable showers. This entailed walking back and forth in the freezing cold with wet hair and often inadequate clothing, which led to colds and illness. But even having these women quarantined was a difficulty. When the first handful of women tested positive (after having to beg for testing) in mid December, they were then taken to quarantine elsewhere in the facility. A handful of other women joined them a few days later, after which the medical staff told the women, inexplicably, that there would be no more testing. There was more outcry, and another round of universal testing, after which over half the camp was found to be positive and so a town hall was held where the women were told the others would be brought back from quarantine because “we’re gonna do this just like chicken pox.” This is contrary to any CDC guidelines, let alone the BOP’s.

After much more outcry from family, advocates, and the women themselves, the remaining 13 women who were still testing negative were finally sequestered in separate quarters. Unsurprisingly, they too eventually tested positive. While in quarantine, they were not allowed access to their lockers to get personal items or clothing, nor to use the telephones because they might get covid from them, despite that we now know at this stage of the pandemic that this is absolutely not how covid is spread. Essentially, the women are punished for not having covid, for demanding precautions, and for insisting on at least baseline medical care. Inadequate, low nutritional value, and carelessly transported food is delivered at room temperature in styrofoam containers from the other facilities on the campus, since the women are all locked down and hence cannot prepare their meals nor do any general housekeeping.

Perhaps the most alarming thing about the recent outbreak at Danbury is that it happened at all, considering there is at least an 85% full vaccination rate among the incarcerated. With an abysmal compliance rate among officers and staff, estimated to be in the 60% range according to the government’s own statistics from October, it is not surprising this happened. A close-quartered congregate setting such as the dormitories in a camp, which are arranged nearly identically to a layout of office cubes, does not provide opportunity for social distancing. The close and cramped setting provides an environment for repeated exposure, which would obviously lead to greater outbreak. Bleach and rubbing alcohol are forbidden in prisons, and the masks provided are cloth and therefore useless. Surgical masks provided are ill-fitting and re-used so repeatedly as to be more of a sanitation hazard than covid protection.

Requiring the women to stay locked down in their dorms all day long for weeks in the guise of covid mitigation, even after everyone tested positive and they were all allowed to be back in their regular rooms due to this, is just a display of the use of inefficient procedure in order to appear to be taking some sort of action, no matter how nonsensical, dysfunctional, and even counterproductive it may be in reality. For two weeks after the new year began, the women were unable to make phone calls, use email, or have video visits to communicate with their families and loved ones. The strain and worry on their families was cruel, and even worse it was completely unnecessary. It looked like nothing short of retaliation for demanding proper care, since the women were now all housed back together– so who exactly were these lockdown measures supposed to be protecting? When regional and central officials recently walked through Danbury, the administration allowed one woman to ask the warden a question as a representative for the inmates. The woman asked the warden why they would mix positive and negative inmates. The response was "I don’t know." The next day, a Danbury administrator admonished the woman for embarrassing Danbury, informed her “everyone” was mad at her, and told her to watch her step. The fact she was even allowed to ask this question is a minor miracle; usually we

are warned we will face disciplinary measures should we attempt to talk to outside officials when they come through.

It is fortunate that none of the women at Danbury were more desperately ill during this outbreak. While some were indeed very miserable and would have appreciated some of the care medicine offers, at least no one died. This cannot be said of the women at Alderson. Reading of the Alderson struggles with the death of at least three women in one week, hearing the pain in the voices of their family members, powerless to do anything to help, was heart-wrenching. Family and friends are left wondering if their loved one had been taken to a hospital in a more timely manner, when they first begged to go to the hospital, would they possibly have lived? We will never know. But it is unquestionable that they absolutely could have been taken sooner.

One of the most frightening things about incarceration is being completely out of control of your own medical care. When one is in the civilian world, we get to choose whether or not we wish to seek medical care. We get to choose if we go to a hospital or clinic. We get to choose if we see a nurse at a clinic, or a licensed physician at a private practice. We get to discuss our care with our chosen practitioners, and choose a course of action we feel comfortable with and they recommend in their professional opinion.

Every one of those rights is completely removed from incarcerated people. Officers decide if they will call a medical staff member when we request one. It seems logical that one could trust trained officers and staff entrusted with the care and custody of fellow human beings to be appropriately attentive to a request for medical assistance, but this is not always the case. There is an underlying presumption that forms the basis of every interaction between officers, staff, and incarcerated people in every incarceration setting, and that is the presumption that the inmate is lying for either attention, to create trouble, or to avoid trouble. Because of this, when incarcerated people request medical assistance, the first reaction is invariably skepticism. It is presumed the inmate is exaggerating or outright lying. It is assumed they want attention, or a “field trip” to get to leave the facility. In any setting, when an inmate dies from a health related issue, there is always a point where officers and staff are asked for assistance and that assistance is denied. The request is dismissed. “You’re fine” they say. Sometimes they are right. But when they are wrong, the results are grave, even deadly.

There is a pervasive myth held by the general public and even some of our legislators that the BOP provides top quality medical care. I am here now to absolve you of this delusion. Occasionally yes, the BOP will take an inmate to an outside facility, such as the Mayo Clinic, or Duke University’s medical center, which are both in proximity to Federal Medical Center prisons, in order to receive treatment. This sounds very excellent indeed. However, this does not happen until the inmate has been neglected into a state of decay in order to get that treatment. Treatment at these facilities is absolutely never a step of first resort. An inmate must suffer through the BOP keeping them at a barely functional level by the skin of their teeth before the bureau will finally, eventually acquiesce, and seek outside treatment when it is undeniable their own efforts have all but completely failed and will result in death otherwise.

I have supported the family of a man from Alabama recently who is paraplegic and has a host of other medical issues. His bedsores became seriously infected to the point he needed surgical intervention. He was in the hospital for months when the BOP finally transferred him from a typical prison to Butner, where he was then taken to Duke for surgery and other medical care. His doctors prescribed an air mattress to help alleviate these bed sores and recommended a course of care for the bone infection he had developed due to the improperly treated bedsores. Upon return to Butner, the care plan for the bone infection was never commenced. After a few weeks, the air mattress was summarily removed because the staff said since he would not be allowed an air mattress in a regular prison, they needed to get him used to it for when he transferred from the medical

prison back to general population. This is despite there being no plan to transfer him, and no real hope of doing so since his daily living and medical needs cannot possibly be met in a typical facility.

These stories are not unusual outliers. These are typical, standard stories about the grossly inadequate to the point of straight up negligent medical care offered in our federal facilities. There are people who have been waiting six months for chemotherapy and told they cannot go to their chemo appointments because of covid restrictions. Not the medical clinic's restrictions. The BOP's. Pregnant women have gone entire pregnancies seeing only the staff doctor, receiving late rhogam shots, never having an ultrasound, and being transferred last minute to actual facilities that can provide pregnancy care. Pregnant women are supposed to receive extra food at meal times and snacks in the evening, but getting this to actually happen takes serious persistence. The women who request this are regarded as troublemakers and it is quite clear from staff attitude that this extra effort requested on their part is deeply resented.

All of this medical neglect is troubling, but what is even more troubling is there is at least a partial solution to this problem which congress has already given to the BOP, and which they have steadfastly refused to implement to the full extent practicable. Despite the First Step Act being passed four years ago and CARES nearly two years ago, neither have been used in any means close to their full potential. Despite tens of thousands of requests to the BOP for compassionate release under the First Step Act, only 36 cases were brought forth by the Bureau. It is an incredulous proposition to suggest that only 36 of those were reasonable requests, especially considering how many of them went on to be granted compassionate release by their judges anyway. It is clear the BOP is reluctant to interpret a legal directive in any manner that benefits an incarcerated person. When given a directive, it is clear the response from the BOP has been not to say "how can we get this person back into the community safely?" but "how can we keep this person in for the maximum time allowed?"

I currently have a FOIA request in to the BOP to ask exactly how many incarcerated people are CARES eligible still languishing in our federal prisons while they are experiencing the worst outbreak since the pandemic began. Considering how many family members and loved ones I hear from who ask me "How do I get my loved one out on CARES? She has completed almost 75% of her sentence, never had a disciplinary infraction, is a first time offender, and was convicted of a white collar offense" I have reason to conclude there are at least as many still inside as there are currently left on CARES home confinement outside. These family and loved ones report that the staff and wardens at various prisons all say some form of "well, we can handle a covid outbreak right here, so we don't need to be releasing anyone." Another was told when she asked her husband's case manager why he couldn't get out on CARES despite there only being 2 years left on his 12 year non-violent sentence "this is a medical prison so we don't need to use CARES here since we can provide any medical care they need at the facility." Yet another was told "you're a drug offender and there's no way I'm letting you out" and summarily sent back to general population, even though she had been in pre-release quarantine and was approved to go home on community custody. Her family's devastation cannot be overstated.

The BOP clearly determined that CARES was optional, and subject to their own interpretation. I myself am only out due to a class action lawsuit against Danbury for not implementing it correctly according to either congress' legislation or then Attorney General Bill Barr's directives. Instead of concern about medical vulnerability, the BOP has prioritized the amount of time an incarcerated person has served, as if that has anything to do with how one is affected by covid or their risk factors for severe effects.

The delay of implementation of the First Step Act and award of credits has kept countless people incarcerated far longer than need be. On Thursday morning January 13th, my fellow advocates and I woke one another up

at the earliest hours of the morning, in shock to see dates had been changed for many inmates on the BOP's inmate locator website. We saw people's outdates change to reading as early as January 2021, all from the First Step Act credits finally being awarded. As I woke up countless people telling them to call their halfway house case managers to see when they could get their ankle monitors removed, many were shocked to realize they should have been released to their term of supervised release months ago.

While I reveled in their joy at finally being released from the oppressive and overzealous halfway house enforcement, I wondered how many people were still inside who should be out? I was heartened to hear of many releases from various low and minimum risk facilities throughout the country over the next week. But as I looked at many of the deaths from covid, I couldn't help but notice that according to their outdates and time served, many would have been out in their communities had their credits been calculated in a timely manner. I couldn't help but observe that at least some of the deceased appear to have been CARES eligible. I couldn't help but wonder how much less severe the covid outbreaks might have been, might currently be, if only these programs were used as congress intended.

I appreciate the thoughtful legislation congress has passed through CARES and the First Step Act. These acts allow for meaningful reform and rehabilitation while keeping our communities safe. There are countless families, communities, and businesses reaping these benefits now as rehabilitated citizens are returning to their communities leading productive, law-abiding lives; yours truly included. But unfortunately your Bureau of Prisons seems to have regarded these acts as optional. There is no reason it should have taken this long to award First Step Act credits other than a lack of prioritization on returning citizens to their communities. There is no reason, during a worldwide pandemic, with the infection rate at the highest of all time, that there should be so many still inside our prisons who can be placed in community supervision on CARES. Our numbers have shown that the people screened for CARES are a good risk to take. We are being held to a much higher accountability standard than we ever were in a facility through electronic monitoring, regular drug and alcohol testing, and employment requirements. We are displaying an astronomical success rate. This is how it is supposed to work. Literally everyone is benefiting from this.

Congress, I ask you today to save lives, protect mental and physical health, and ease the strain on family and loved ones by directing your Bureau of Prisons to maximize the CARES program, by placing anyone who meets the requirements to be placed on CARES home confinement in that community custody as soon as humanly possible. I ask you to please direct them to be less stingy in their approval of compassionate release requests. In addition to saving lives, this will ease a large burden on our courts. Finally, I ask that you recognize the necessity of independent oversight of the Bureau of Prisons, without which there will never be consistent, long term reform and accountability regarding decrepit facilities and medical neglect. I thank you for your time and attention, and I reiterate I am always available for any needed clarification or verification of anything I have shared with you today. Thank you again.

Sincerely and Respectfully,
Wendy Hechtman

Dianthe D. Brooks

[redacted]

January 21, 2022

Committee on the Judiciary
U.S. House of Representatives
2141 Rayburn House Office Building
Washington, DC 20515
Attn: Hon. Jerrold Nadler, Chairperson

Re: January 21, 2022, Hearing on the Implementation of the First Step Act

To Chairperson Nadler and the Esteemed Members of the Judiciary Committee:

While I could speak to so many challenges around the First Step Act, the pandemic, and challenges to the implementation of policy and practices that need to be addressed moving forward I am going to limit my remarks to home confinement challenges and earned time credit. I started serving my time I Danbury FCI in January 2019. In March 2020, as Covid 19 begin sweeping across the world and rumors of sick people and correctional officers at Danbury were occurring I started asking the administrators and medical staff at Danbury questions knowing I was immunocompromised to no avail. They acted like it was no big deal. Everyday became a new fear for those of us inside as more information became available via the news. When the Cares Act legislation was passed, we all thought relief was coming, nope we were wrong. Then when Attorney General Barr finally issued his first memo regarding the implementation of Cares Act that specifically named Danbury, we expected that things would change only once again it didn't. As they lied to everyone on the outside about the protocols being implemented throughout the facility we feared for our lives. Then came another memo specifically telling BOP to use the Cares Act to demarcate and named Danbury once again because of the conditions and high Covid infection we waited again. Finally, the first individuals were called to go into quarantine however we soon realized that parameters set up by BOP had nothing to with immunocompromised as science at Barr's memo had outlined but merely whether you have served half your time incarcerated.

After watching and waiting in fear realizing they weren't going to do right by us I started reaching to my family and attorney for help. Those requests led to the lawsuit Martinez Brooks. Vs. Easter but even with the lawsuit the Judge had to specifically order myself and others out of the facility because Danbury only cared about the length of time you had served to date. In June 2020, I finally left Danbury under Judge Shea's order. While I was grateful to leave the facility the challenges of home confinement immediately created another set of challenges. Starting with the requirement of home phones when utility companies weren't coming out to perform installations, when struggling families had to bear the cost of said phone lines and monthly payments. In addition, we came home with absolutely zero reentry services provided to us this made for more fear and anxiety. As time moved forward and restrictions started lifting around the world. I sought to address my medical concerns and immediately started having problems with getting passes for doctor appointments approved. I was told I could only have two passes a week that included medical, essential shopping and any other items that needed to be addressed. Once again, I sought legal relief. My judge had the US Department of Probation liaison instruct Kintock that they had to allow my appointments for medical care. Despite this instruction often when I went to leave for appointments passes had not been approved and entered, my case manager would be unavailable leading to a rocky

road with Kintock and myself. There were many days I could have been violated for leaving the house for medical appointments without an approved pass despite having followed the required protocol.

My problems led me to advocating and researching the various terms and conditions. I soon realized that there were no universal protocols and that every hallway house operated independently and differently. Why aren't there universal policies that ensure each facility is uniformed with their policies and procedures verses each entity having so much individual discretion?

In January 2021, while researching I came across the OLC memorandum and sprung into action contacting legislators and FAMM to advocate because the interpretation was incorrect. While attempting to advocate for myself I found hurdle after hurdle that limit your ability to advocate for yourself. Why are you formerly incarcerated restricted while under BOP custody and probation from communicating with other felons? This makes no sense! The understanding and shared experience of incarceration makes for friendships and bonds even for people you have never met because you understand the emotional and physical toll one has experienced. Furthermore, how can you organize without being able to contact individuals? After months of working with Bonnie Watson Coleman's office and FAMM the issues associated with the OLC memo started to become a public conversation. As I was advocating, I sought permission to speak at an event via zoom that might have press in attendance. The BOP's response was form including BP-A0232 that required you to identify what press might would be present and have said press representative sign form BP-A0232 submit said form to BOP for their approval before the request will even be considered for approval. These steps do not guarantee approval of said request. Furthermore, getting permission to attend events that may be organized around advocating for yourself are denied. There needs to be clear direction around freedom of speech for individuals under BOP custody.

Furthermore, when situations arise and an individual request to move to another location, getting the Probation Department to inspect the house you are relocating too is difficult. There needs to better coordination of services.

On another note, while BOP is finally implementing Earned Time Credit it means many of us who have been released served more time than our new release date. I was released on January 13, 2022, yet my release date changed to 6/25/21, how does this body ensure that individuals are credited their time towards supervised release? The guidance released by AG Garland states that at BOP's discretion that time may be credited towards supervise release. Given my experience with BOP as it stands now many of us served additional time with no recourse unless we attempt to file motions in our individual courts. There needs to be specific guidelines that mandate that individuals time be credited to their supervised release.

I hope that this committee will look at the issues that I and others have highlighted and that will not only be legislative fixes but consequences for DOJ and BOP not abiding by the policies and practices set forth. In addition, I hope to one day in the future be able to address this committee on the numerous issues related to incarceration, reentry and a system that is more punitive than restorative.

Sincerely,

Dianthe Martinez Brooks

Ms. BUSH. Thank you, Chair. We must not close our eyes to the tragic circumstances behind prison walls and we must not turn our backs on those who have been released to home confinement who are still living with uncertainty about whether they will be able to stay home. Thank you so much and I yield back.

Ms. JACKSON LEE. Thank you. The gentlelady's time has expired.

I am pleased now to represent and to recognize the gentleman, Mr. Massie, for five minutes.

You are recognized.

Mr. MASSIE. Can you hear my microphone now, Madam Chair?

Ms. JACKSON LEE. We can hear you better. Thank you so very much.

Mr. MASSIE. Okay. Thank you. I would rather have a cold mic than a hot mic any day, but glad that we have this working.

Ms. Goodwin, Congress appropriated I believe $300 million for the Bureau of Prisons to deal with COVID. Can you tell us how this money has been spent?

Ms. GOODWIN. We actually have been in the process of trying to examine all of that. We've submitted some requests to BOP to kind of ask for a layout, a detailed listing of what those monies have gone to. What I will do, Congressman, I will circle back to you.

Mr. MASSIE. Okay.

Ms. GOODWIN. I'll get back to you. I'll connect with your staff, and I'll get back to you on that.

Mr. MASSIE. Appreciate that. When you look into it, see if they bought some walk-through FDA-approved COVID killers and if those are working, because I think some of that money have been spent on things that didn't work out. One concern that I also had is an understaffed jail is a dangerous jail. Same for a prison. Congress funds a certain number of correctional officers every year. Can you tell us whether they have recruited and retained the number of correctional officers that Congress has funded?

Ms. GOODWIN. So, first, in terms of the funding that they have and things that they purchase, I want to go back. I mean, we know that they purchased masks and other supplies.

Mr. MASSIE. Yes.

Ms. GOODWIN. The other stuff I will certainly circle back to you because we have a request out for that information.

Second, in terms of recruiting, hiring, and retaining, that came up when we were doing the BOP staffing report. They have started to recruit—they have started to recruit additional officers. What we don't know because that report was about a year or two ago is how successful they've been and particularly if they've been successful in this era of COVID. What I can do, Congressman, I can circle back to you on that as well. I can reach out to BOP to see what information we can get for you.

Mr. MASSIE. Okay. Thank you very much. Also, I would like you to look into reports that I received from officers, correctional officers that when they identify COVID-positive inmates they walk them through the compound, thereby possibly exposing everybody else and then sending them to isolation units. They may not be getting—that may not be the best idea to walk a bunch of sick men together and to walk them through the facility and around the fa-

cility in the process of doing that. Could you look into that and see if that has been the policy at some of these correctional facilities?

Ms. GOODWIN. We could certainly look into that. I will tell you that when we were doing the BOP COVID work, and we spoke with union officials and others representing the officers and that was one of the concerns. I will certainly see what we can find out for you.

Mr. MASSIE. Thank you very much.

I want to take a little bit of time and point out that the officers that work in these correctional facilities have a vaccine mandate, yet the inmates do not. The irony here is that the inmates have more rights than the officers themselves. There are correctional officers and staff in a facility in my congressional district who applied and were just categorically denied medical exemptions. Nobody has been granted a medical exemption. They were able to receive, 52 of them, religious exemptions, and 4,495 staff at the BOP have received religious exemptions, but I think it is a shame that we have to apply for religious exemptions when what they want is a medical exemption.

We have failed to recognize natural immunity and I am going to submit to the record something that just came out from the CDC. It is dated January 19, "COVID Cases and Hospitalizations by COVID–19 Vaccination Status and Previous COVID–19 Diagnosis." What it shows is that prior COVID infection was more protective than vaccination during the delta surge, yet the guards aren't having their prior infection immunity recognized. So, I think that is a problem.

I would like to submit to the record, Madam Chair, the MMR—MMWR Report from CDC showing that natural immunity was better than the vaccine. Then, also, a Reuters article that highlights that.

Ms. JACKSON LEE. Without objection, so ordered.

[The information follows:]

MR. MASSIE FOR THE RECORD

Centers for Disease Control and Prevention
MMWR
Morbidity and Mortality Weekly Report
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COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis — California and New York, May–November 2021

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By November 30, 2021, approximately 130,781 COVID-19–associated deaths, one in six of all U.S. deaths from COVID-19, had occurred in California and New York.* COVID-19 vaccination protects against infection with SARS-CoV-2 (the virus that causes COVID-19), associated severe illness, and death (*1*,*2*); among those who survive, previous SARS-CoV-2 infection also confers protection against severe outcomes in the event of reinfection (*3*,*4*). The relative magnitude and duration of infection- and vaccine-derived protection, alone and together, can guide public health planning and epidemic forecasting. To examine the impact of primary COVID-19 vaccination and previous SARS-CoV-2 infection on COVID-19 incidence and hospitalization rates, statewide testing, surveillance, and COVID-19 immunization data from California and New York (which account for 18% of the U.S. population) were analyzed. Four cohorts of adults aged ≥18 years were considered: persons who were 1) unvaccinated with no previous laboratory-confirmed COVID-19 diagnosis, 2) vaccinated (14 days after completion of a primary COVID-19 vaccination series) with no previous COVID-19 diagnosis, 3) unvaccinated with a previous COVID-19 diagnosis, and 4) vaccinated with a previous COVID-19 diagnosis. Age-adjusted hazard rates of incident laboratory-confirmed COVID-19 cases in both states were compared among cohorts, and in California, hospitalizations during May 30–November 20, 2021, were also compared. During the study period, COVID-19 incidence in both states was highest among unvaccinated persons without a previous COVID-19 diagnosis compared with that among the other three groups. During the week beginning May 30, 2021, compared with COVID-19 case rates among unvaccinated persons without a previous COVID-19 diagnosis, COVID-19 case rates were 19.9-fold (California) and 18.4-fold (New York) lower among vaccinated persons without a previous diagnosis; 7.2-fold (California) and 9.9-fold lower (New York) among unvaccinated persons with a previous COVID-19 diagnosis; and 9.6-fold (California) and 8.5-fold lower (New York) among vaccinated persons with a previous COVID-19 diagnosis. During the same period, compared with hospitalization rates among unvaccinated persons without a previous COVID-19 diagnosis, hospitalization rates in California followed a similar pattern. These relationships changed after the SARS-CoV-2 Delta variant became predominant (i.e., accounted for >50% of sequenced isolates) in late June and July. By the week beginning October 3, compared with COVID-19 cases rates among unvaccinated persons without a previous COVID-19 diagnosis, case rates among vaccinated persons without a previous COVID-19 diagnosis were 6.2-fold (California) and 4.5-fold (New York) lower; rates were substantially lower among both groups with previous COVID-19 diagnoses, including 29.0-fold (California) and 14.7-fold lower (New York) among unvaccinated persons with a previous diagnosis, and 32.5-fold (California) and 19.8-fold lower (New York) among vaccinated persons with a previous diagnosis of COVID-19. During the same period, compared with hospitalization rates among unvaccinated persons without a previous COVID-19 diagnosis, hospitalization rates in California followed a similar pattern. These results demonstrate that vaccination protects against COVID-19 and related hospitalization, and that surviving a previous infection protects against a reinfection and related hospitalization. Importantly, infection-derived protection was higher after the Delta variant became predominant, a time when vaccine-induced immunity for many persons declined because of immune evasion and

* https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100klast7days

U.S. Department of Health and Human Services
Centers for Disease Control and Prevention

immunologic waning (*2*,*5*,*6*). Similar cohort data accounting for booster doses needs to be assessed, as new variants, including Omicron, circulate. Although the epidemiology of COVID-19 might change with the emergence of new variants, vaccination remains the safest strategy to prevent SARS-CoV-2 infections and associated complications; all eligible persons should be up to date with COVID-19 vaccination. Additional recommendations for vaccine doses might be warranted in the future as the virus and immunity levels change.

Four cohorts of persons aged ≥18 years were assembled via linkages of records from electronic laboratory reporting databases and state-specific immunization information systems.[†] Persons were classified based on whether they had had a laboratory-confirmed SARS-CoV-2 infection by March 1, 2021 (i.e., previous COVID-19 diagnosis)[§]; had received at least the primary COVID-19 vaccination series[¶] by May 16, 2021; had a previous COVID-19 diagnosis and were fully vaccinated[**]; or had neither received a previous COVID-19 diagnosis by March 1 nor received a first COVID-19 vaccine dose by the end of the analysis period. The size of the unvaccinated group without a previous diagnosis was derived by subtracting the observed groups from U.S. Census estimates.[††] To maintain each defined cohort, persons who received a COVID-19 diagnosis during March 1–May 30, 2021, or who died before May 30, 2021, were excluded (to maintain eligibility for incident cases for all cohorts on May 30, 2021),[§§] as were persons who received a first vaccine dose during May 30–November 20, 2021. During May 30–November 20, 2021, incident cases were defined using a positive nucleic acid amplification test (NAAT) result from the California COVID-19 Reporting System (CCRS) or a positive NAAT or antigen test result from the New York Electronic Clinical Laboratory Reporting System. In California, person-level hospitalization data from CCRS and supplementary hospitalization reports were used to identify COVID-19–associated hospitalizations. A lifetable method was used to calculate hazard rates (average daily cases during a 7-day interval or hospitalizations over a 14-day interval), hazard ratios, and 95% CIs for each cohort. Rates were age-adjusted to 2000 U.S. Census data using direct standardization.[¶¶] Supplementary analyses stratified case rates by timing of previous diagnoses and primary series vaccine product. SAS (version 9.4; SAS Institute) and R (version 4.0.4; The R Foundation) were used to conduct all analyses. Institutional review boards (IRBs) in both states determined this surveillance activity to be necessary for public health work, and therefore, it did not require IRB review.

Approximately three quarters of adults from California (71.2%) and New York (72.2%) included in this analysis were vaccinated and did not have a previous COVID-19 diagnosis; however, 18.0% of California residents and 18.4% of New York residents were unvaccinated with no previous COVID-19 diagnosis (Table 1). In both states, 4.5% of persons were vaccinated and had a previous COVID-19 diagnosis; 6.3% in California and 4.9% in New York were unvaccinated with a previous diagnosis. Among 1,108,600 incident COVID-19 cases in these cohorts (752,781 in California and 355,819 in New York), the median intervals from vaccination or previous COVID-19 diagnosis to incident diagnosis were slightly shorter in California (138–150 days) than in New York (162–171 days).

Before the Delta variant became predominant in each state's U.S. Department of Health and Human Services region (June 26 in Region 9 [California] and July 3 in Region 2 [New York]),[***] the highest incidence was among unvaccinated persons without a previous COVID-19 diagnosis; during this time, case rates were relatively low among the three groups

[†] Statewide immunization databases in California are the California Immunization Registry, Regional Immunization Data Exchange, and San Diego Immunization Registry; the laboratory system is the California COVID Reporting System (CCRS). In New York, immunization information systems include Citywide Immunization Registry and the New York State Immunization Information System; the laboratory system is the Electronic Clinical Laboratory Reporting System (ECLRS). California data were matched between the immunization and case registries using a probabilistic algorithm with exact match for zip code and date of birth and fuzzy match on first name and last name. New York data were matched to the ECLRS with the use of a deterministic algorithm based on first name, last name, and date of birth. In California, person-level hospitalization data from CCRS and supplementary hospitalization reports were used to identify COVID-19–associated hospitalizations.

[§] For both classification into cohorts of persons with previous COVID-19 diagnoses and for measuring incident cases, laboratory-confirmed infection was defined as the receipt of a new positive SARS-CoV-2 nucleic acid amplification test (NAAT) or antigen test (both for New York and NAAT only for California) result, but not within 90 days of a previous positive result.

[¶] Fully vaccinated with the primary vaccination series is defined as receipt of a second dose of an mRNA COVID-19 vaccine (Pfizer-BioNTech or Moderna) or 1 dose of the Janssen (Johnson & Johnson) vaccine ≥14 days before May 30, 2021.

[**] Because of the timing of full vaccination, the cohort definitions, and analysis timeframe, this cohort consisted nearly exclusively of persons who had previously received a laboratory-confirmed diagnosis of COVID-19 and later were fully vaccinated (California: 99.9%, New York: 99.7%), as opposed to the reverse order.

[††] Whereas vaccinated cohorts were directly observed in the immunization information system databases, unvaccinated persons without a previous COVID-19 diagnosis were defined using U.S. Census population estimates minus the number of persons partially or fully vaccinated by December 11, 2021, and unvaccinated persons with a previous laboratory-confirmed infection before May 30, 2021. In California, the California Department of Finance population estimates were used for 2020, and the 2018 CDC National Center for Health Statistics Bridged Race file for U.S. Census population estimates were used in New York, consistent with other COVID-19 surveillance reporting.

[§§] In California, a person-level match was performed to exclude deaths in each cohort before May 30, 2021. In New York, COVID-19 deaths were removed in aggregate from the starting number of unvaccinated persons with a previous COVID-19 diagnosis on May 30, 2021.

[¶¶] https://www.cdc.gov/nchs/data/statnt/statnt20.pdf

[***] https://covid.cdc.gov/covid-data-tracker/#variant-proportions

TABLE 1. Cohort sizes and cohort-specific incident laboratory-confirmed COVID-19 cases in California (N = 752,781) and New York (N = 355,819) and hospitalizations in California (N = 56,177) — May 30–November 20, 2021

State/Vaccination and diagnosis status*,†	No. of persons in each cohort (%)	Incident laboratory-confirmed COVID-19 cases			Incident COVID-19 hospitalizations**
		No. (cumulative incidence)§,¶	Median (IQR) interval from vaccination to positive test, days	Median (IQR) interval from previous diagnosis to positive test, days	No. (cumulative incidence)§,¶
California					
Vaccinated					
Previous COVID-19 diagnosis	968,167 (4.5)	3,471 (3.6)	138 (95–181)	262 (218–322)	273 (0.3)
No previous diagnosis	15,484,235 (71.2)	240,045 (15.5)	150 (112–189)	NA	10,737 (0.7)
Unvaccinated					
Previous COVID-19 diagnosis	1,370,782 (6.3)	6,805 (5.0)	NA	277 (229–356)	378 (0.3)
No previous diagnosis	3,911,146 (18.0)	502,460 (128.5)	NA	NA	44,789 (11.5)
New York					
Vaccinated					
Previous COVID-19 diagnosis	485,649 (4.5)	2,355 (4.9)	162 (118–201)	276 (227–348)	NA
No previous diagnosis	7,809,968 (72.2)	142,388 (18.2)	171 (133–203)	NA	NA
Unvaccinated					
Previous COVID-19 diagnosis	527,140 (4.9)	3,250 (6.2)	NA	295 (242–427)	NA
No previous diagnosis	1,993,709 (18.4)	207,826 (104.2)	NA	NA	NA

Abbreviations: NA = not applicable; NAAT = nucleic acid amplification test.

* Statewide immunization databases in California are the California Immunization Registry, Regional Immunization Data Exchange, and San Diego Immunization Registry, and the laboratory system is the California COVID Reporting System; in New York, Immunization Information Systems include Citywide Immunization Registry and the New York State Immunization Information System; the laboratory system is the Electronic Clinical Laboratory Reporting System. California data were matched between the immunization and case registries using a probabilistic algorithm with exact match for zip code and date of birth and fuzzy match on first name and last name. New York data were matched to the Electronic Clinical Laboratory Reporting System with the use of a deterministic algorithm based on first name, last name, and date of birth. In California, person-level hospitalization data from the California COVID Reporting System and supplemental hospitalization reports were used to identify COVID-19-associated hospitalizations.

† For both classification into cohorts of persons with previous COVID-19 diagnoses and for measuring incident cases, laboratory-confirmed infection was defined as the receipt of a new positive SARS-CoV-2 NAAT or antigen test (both for New York and NAAT only for California) result, but not within 90 days of a previous positive result. Fully vaccinated is defined as having received a second dose of an mRNA COVID-19 vaccine (Pfizer-BioNTech or Moderna) or 1 dose of the Janssen (Johnson & Johnson) vaccine ≥14 days before May 30, 2021. Whereas vaccinated cohorts were directly observed in the immunization information system databases, unvaccinated persons without a previous COVID-19 diagnosis were defined using U.S. Census population estimates minus persons partially or fully vaccinated by December 11, 2021, and unvaccinated persons with a previous laboratory-confirmed infection before May 30, 2021. In California, the California Department of Finance population estimates were used for 2020, and the 2018 CDC National Center for Health Statistics Bridged Race file for census population estimates were used in New York, consistent with other COVID-19 surveillance reporting.

§ Cumulative cases per 1,000 persons.

¶ These summaries of cumulative incidence are estimated across a period of variability in the epidemic for all cohorts.

** Hospitalization data for New York are not included in this analysis.

with either previous infection or vaccination and were lowest among vaccinated persons without a previous COVID-19 diagnosis (Supplementary Figure 1, https://stacks.cdc.gov/view/cdc/113253) (Supplementary Figure 2, https://stacks.cdc.gov/view/cdc/113253). During the week beginning May 30, 2021, compared with COVID-19 case rates among unvaccinated persons without a previous COVID-19 diagnosis, COVID-19 case rates were 19.9-fold (California) and 18.4-fold (New York) lower among vaccinated persons without a previous diagnosis; rates were 7.2-fold (California) and 9.9-fold (New York) lower among unvaccinated persons with a previous COVID-19 diagnosis and 9.6-fold (California) and 8.5-fold (New York) lower among vaccinated persons with a previous COVID-19 diagnosis (Table 2).

As the Delta variant prevalence increased to >95% (97% in Region 9 and 98% in Region 2 on August 1), rates increased more rapidly among the vaccinated group with no previous COVID-19 diagnosis than among both the vaccinated and unvaccinated groups with a previous COVID-19 diagnosis (Supplementary Figure 1, https://stacks.cdc.gov/view/cdc/113253) (Supplementary Figure 2, https://stacks.cdc.gov/view/cdc/113253). For example, during the week of October 3, compared with rates among unvaccinated persons without a previous COVID-19 diagnosis, rates among vaccinated persons without a previous diagnosis were 6.2-fold lower (95% CI = 6.0–6.4) in California and 4.5-fold lower (95% CI = 4.3–4.7) in New York (Table 2). Further, rates among unvaccinated persons with a previous COVID-19 diagnosis were 29-fold lower (95% CI = 25.0–33.1) than rates among unvaccinated persons without a previous COVID-19 diagnosis in California and 14.7-fold lower (95% CI = 12.6–16.9) in New York. Rates among vaccinated persons who had had COVID-19 were 32.5-fold lower (95% CI = 27.5–37.6) than rates among unvaccinated persons without a previous COVID-19 diagnosis in California and 19.8-fold lower (95% CI = 16.2–23.5) in New York. Rates among vaccinated persons without a previous COVID-19 diagnosis were consistently higher than rates among unvaccinated persons with

TABLE 2. Hazard ratios for incident laboratory-confirmed COVID-19 cases — New York and California and hospitalizations* — California, May 30–November 20, 2021

State and date range	Hazard ratio (95% CI)†				
	Unvaccinated, no previous COVID-19 diagnosis versus			Vaccinated, no previous COVID-19 diagnosis versus	
	Vaccinated, no previous COVID-19 diagnosis	Unvaccinated, previous COVID-19 diagnosis	Vaccinated, previous COVID-19 diagnosis	Unvaccinated, previous COVID-19 diagnosis	Vaccinated, previous COVID-19 diagnosis
Cases, California					
May 30–Jun 5	20.9 (18.9–22.9)	8.2 (6.6–9.9)	10.6 (8.1–13.2)	0.4 (0.3–0.5)	0.5 (0.4–0.6)
Jun 6–12	17.9 (16.2–19.5)	8.6 (6.8–10.4)	10.5 (7.9–13.0)	0.5 (0.4–0.6)	0.6 (0.4–0.7)
Jun 13–19	16.0 (14.7–17.4)	10.8 (8.5–13.2)	10.6 (8.2–13.1)	0.7 (0.5–0.8)	0.7 (0.5–0.8)
Jun 20–26	12.3 (11.4–13.1)	14.5 (11.2–17.8)	17.3 (12.8–21.8)	1.2 (0.9–1.5)	1.4 (1.0–1.8)
Jun 27–Jul 3	9.7 (9.2–10.2)	16.6 (13.5–19.7)	20.9 (16.0–25.8)	1.7 (1.4–2.0)	2.2 (1.6–2.7)
Jul 4–10	8.7 (8.4–9.0)	24.0 (20.1–28.0)	29.3 (23.1–35.6)	2.8 (2.3–3.2)	3.4 (2.6–4.1)
Jul 11–17	7.8 (7.5–8.0)	29.0 (25.0–32.9)	33.4 (27.3–39.4)	3.7 (3.2–4.2)	4.3 (3.5–5.1)
Jul 18–24	7.4 (7.2–7.6)	31.8 (28.1–35.6)	35.2 (29.8–40.6)	4.3 (3.8–4.8)	4.7 (4.0–5.5)
Jul 25–31	7.5 (7.4–7.7)	26.5 (24.1–29.0)	38.6 (33.3–43.9)	3.5 (3.2–3.8)	5.1 (4.4–5.8)
Aug 1–7	7.8 (7.6–7.9)	32.6 (29.5–35.6)	42.2 (36.7–47.7)	4.2 (3.8–4.6)	5.4 (4.7–6.1)
Aug 8–14	8.1 (7.9–8.2)	33.4 (30.4–36.5)	43.1 (37.6–48.6)	4.1 (3.8–4.5)	5.3 (4.7–6.0)
Aug 15–21	8.4 (8.3–8.6)	31.3 (28.5–34.1)	42.0 (36.7–47.3)	3.7 (3.4–4.0)	5.0 (4.3–5.6)
Aug 22–28	8.4 (8.3–8.6)	31.3 (28.4–34.3)	41.0 (35.5–46.5)	3.7 (3.4–4.1)	4.9 (4.2–5.5)
Aug 29–Sep 4	8.5 (8.3–8.6)	31.2 (28.1–34.3)	42.0 (36.1–48.0)	3.7 (3.3–4.1)	5.0 (4.3–5.7)
Sep 5–11	8.3 (8.1–8.5)	35.0 (31.0–39.0)	48.0 (40.2–55.9)	4.2 (3.7–4.7)	5.8 (4.8–6.7)
Sep 12–18	8.4 (8.2–8.6)	33.8 (29.9–37.8)	48.0 (39.8–56.2)	4.0 (3.6–4.5)	5.7 (4.7–6.7)
Sep 19–25	8.0 (7.8–8.2)	27.0 (23.8–30.1)	37.8 (31.5–44.1)	3.4 (3.0–3.8)	4.7 (4.0–5.5)
Sep 26–Oct 2	7.7 (7.5–7.9)	28.6 (24.9–32.2)	34.8 (28.9–40.7)	3.7 (3.2–4.2)	4.5 (3.7–5.3)
Oct 3–9	7.2 (7.0–7.4)	30.0 (26.0–34.1)	33.5 (28.5–38.6)	4.1 (3.6–4.7)	4.6 (3.9–5.3)
Oct 10–16	7.2 (7.0–7.4)	31.2 (26.8–35.7)	33.9 (27.8–40.0)	4.3 (3.7–5.0)	4.7 (3.9–5.5)
Oct 17–23	7.1 (7.0–7.3)	31.9 (27.6–36.1)	40.7 (33.3–48.1)	4.5 (3.9–5.0)	5.7 (4.7–6.7)
Oct 24–30	7.1 (6.9–7.3)	26.6 (23.3–29.9)	40.1 (32.9–47.3)	3.7 (3.3–4.2)	5.6 (4.6–6.6)
Oct 31–Nov 6	6.8 (6.6–7.0)	33.1 (28.7–37.6)	37.9 (31.0–44.7)	4.9 (4.2–5.5)	5.5 (4.5–6.6)
Nov 7–13	7.1 (6.9–7.3)	30.6 (26.3–35.0)	41.2 (33.0–49.5)	4.3 (3.7–4.9)	5.8 (4.6–7.0)
Nov 14–20	7.3 (7.0–7.5)	25.4 (21.4–29.3)	32.5 (25.5–39.5)	3.5 (2.9–4.0)	4.5 (3.5–5.5)
Cases, New York					
May 30–Jun 5	19.4 (16.9–21.8)	10.9 (7.5–14.3)	9.5 (6.7–12.4)	0.6 (0.4–0.7)	0.5 (0.3–0.7)
Jun 6–12	15.2 (13.2–17.2)	8.0 (5.5–10.6)	10.4 (6.6–14.3)	0.5 (0.4–0.7)	0.7 (0.4–0.9)
Jun 13–19	12.8 (11–14.5)	8.2 (5.3–11.2)	5.4 (3.7–7.0)	0.6 (0.4–0.9)	0.4 (0.3–0.6)
Jun 20–26	10.1 (8.8–11.4)	7.9 (5.1–10.7)	6.0 (4.0–8.0)	0.8 (0.5–1.1)	0.6 (0.4–0.8)
Jun 27–Jul 3	7.3 (6.5–8.1)	8.8 (5.8–11.8)	11.2 (6.7–15.7)	1.2 (0.8–1.6)	1.5 (0.9–2.2)
Jul 4–10	6.1 (5.6–6.7)	17.8 (10.6–25.0)	11.5 (7.5–15.6)	2.9 (1.7–4.1)	1.9 (1.2–2.6)
Jul 11–17	4.5 (4.2–4.8)	11.7 (8.5–15.0)	14.7 (9.9–19.6)	2.6 (1.9–3.3)	3.2 (2.2–4.3)
Jul 18–24	4.7 (4.5–5.0)	21.7 (15.6–27.8)	14.1 (10.5–17.7)	4.6 (3.3–5.9)	3.0 (2.2–3.8)
Jul 25–31	5.1 (4.9–5.3)	16.1 (13.1–19.2)	18.3 (14.1–22.6)	3.2 (2.6–3.8)	3.6 (2.8–4.4)
Aug 1–7	5.3 (5.2–5.5)	19.2 (15.9–22.6)	18.3 (14.7–21.9)	3.6 (3.0–4.2)	3.4 (2.7–4.1)
Aug 8–14	5.3 (5.2–5.5)	16.2 (13.8–18.6)	19.2 (15.6–22.7)	3.0 (2.6–3.5)	3.6 (2.9–4.3)
Aug 15–21	5.5 (5.3–5.7)	19.5 (16.5–22.6)	22.7 (18.4–26.9)	3.6 (3.0–4.1)	4.1 (3.4–4.9)
Aug 22–28	5.4 (5.2–5.6)	19.2 (16.4–22.1)	26.5 (21.2–31.8)	3.6 (3.0–4.1)	4.9 (3.9–5.9)
Aug 29–Sep 4	5.5 (5.3–5.6)	17.9 (15.3–20.5)	20.9 (17.2–24.6)	3.3 (2.8–3.8)	3.8 (3.1–4.5)
Sep 5–11	5.4 (5.2–5.5)	18.9 (16.1–21.6)	22.3 (18.3–26.4)	3.5 (3.0–4.0)	4.2 (3.4–4.9)
Sep 12–18	5.8 (5.6–5.9)	15.0 (13.1–16.9)	23.2 (19.1–27.4)	2.6 (2.3–2.9)	4.0 (3.3–4.8)
Sep 19–25	5.6 (5.4–5.7)	15.4 (13.3–17.5)	23.8 (19.3–28.3)	2.8 (2.4–3.1)	4.3 (3.5–5.1)
Sep 26–Oct 2	5.4 (5.2–5.5)	18.4 (15.5–21.2)	24.2 (19.3–29.1)	3.4 (2.9–4.0)	4.5 (3.6–5.4)
Oct 3–9	5.5 (5.3–5.7)	15.7 (13.6–17.9)	20.8 (17.2–24.5)	2.9 (2.5–3.3)	3.8 (3.1–4.4)
Oct 10–16	5.5 (5.3–5.6)	17.2 (14.7–19.8)	25.9 (20.6–31.1)	3.2 (2.7–3.6)	4.7 (3.8–5.7)
Oct 17–23	5.4 (5.2–5.6)	18.9 (15.7–22.1)	27.6 (21.2–34.0)	3.5 (2.9–4.1)	5.1 (3.9–6.3)
Oct 24–30	5.2 (5.0–5.4)	21.0 (17.2–24.7)	25.9 (20.2–31.6)	4.0 (3.3–4.7)	5.0 (3.9–6.1)
Oct 31–Nov 6	4.8 (4.6–4.9)	17.3 (14.7–20.0)	20.1 (16.3–23.8)	3.6 (3.1–4.2)	4.2 (3.4–5.0)
Nov 7–13	4.8 (4.7–4.9)	23.9 (20.1–27.6)	24.5 (20.1–28.9)	5.0 (4.2–5.8)	5.1 (4.2–6.1)
Nov 14–20	4.8 (4.6–4.9)	22.6 (19.4–25.7)	23.0 (19.3–26.6)	4.7 (4.1–5.4)	4.8 (4.1–5.6)
Hospitalizations, California					
May 30–Jun 12	29.8 (23.5–36.1)	3.7 (2.5–5.0)	7.2 (4.2–10.1)	0.1 (0.1–0.2)	0.2 (0.1–0.3)
Jun 13–26	28.7 (23.4–34.0)	7.0 (4.3–9.7)	8.1 (5.0–11.3)	0.2 (0.1–0.3)	0.3 (0.2–0.4)
Jun 27–10	30.1 (26.1–34.0)	16.4 (10.0–22.8)	16.0 (10.0–22.1)	0.5 (0.3–0.8)	0.5 (0.3–0.7)
Jul 11–24	25.8 (23.7–28.0)	45.0 (27.6–62.4)	41.5 (25.2–57.8)	1.7 (1.1–2.4)	1.6 (1.0–2.2)
Jul 25–Aug 7	28.8 (27.1–30.6)	41.7 (29.2–54.1)	72.9 (44.4–101.4)	1.4 (1.0–1.9)	2.5 (1.5–3.5)
Aug 8–21	29.7 (28.0–31.4)	49.0 (35.0–62.9)	64.0 (43.0–85.1)	1.6 (1.2–2.1)	2.2 (1.4–2.9)
Aug 22–Sep 4	29.1 (27.4–30.8)	62.4 (41.4–83.3)	63.9 (42.2–85.5)	2.1 (1.4–2.9)	2.2 (1.4–2.9)
Sep 5–18	26.3 (24.6–28.1)	74.4 (40.9–107.9)	96.4 (48.3–144.4)	2.8 (1.5–4.1)	3.7 (1.8–5.5)
Sep 19–Oct 2	25.0 (23.1–26.9)	61.9 (34.5–89.3)	99.4 (43.8–155.0)	2.5 (1.4–3.6)	4.0 (1.7–6.2)
Oct 3–16	20.8 (19.2–22.4)	56.3 (28.3–84.3)	58.5 (30.2–86.8)	2.7 (1.4–4.1)	2.8 (1.4–4.2)
Oct 17–30	21.5 (19.9–23.0)	56.5 (31.5–81.5)	92.1 (39.1–145.1)	2.6 (1.5–3.8)	4.3 (1.8–6.8)
Oct 31–Nov 13	22.7 (20.8–24.6)	70.7 (32.0–109.4)	86.1 (34.2–138.1)	3.1 (1.4–4.8)	3.8 (1.5–6.1)

See table footnotes on the next page.

TABLE 2. (*Continued*) Hazard ratios for incident laboratory-confirmed COVID-19 cases — New York and California and hospitalizations* — California, May 30–November 20, 2021

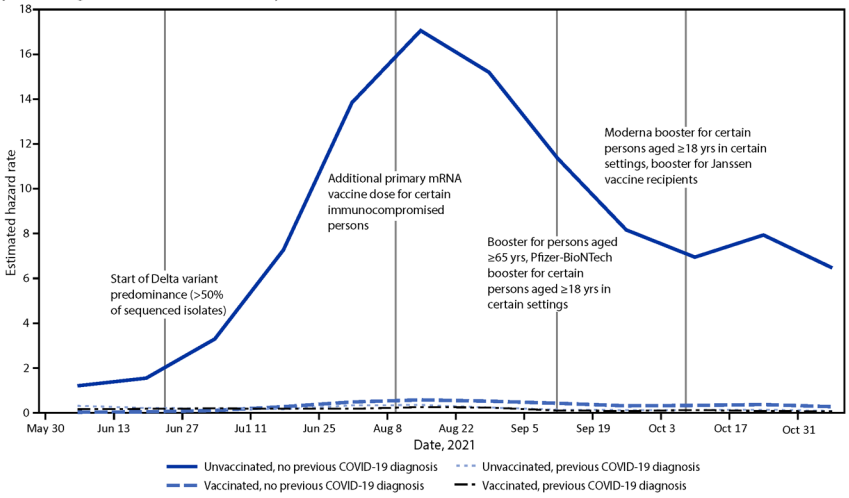
* Life tables estimated at 7-day intervals for cases and 14-day intervals for hospitalizations.
† Hazard ratios and 95% CIs reported in this table differ numerically from presentation of corresponding results in the text as "X-fold lower" rates (i.e., a hazard rate of 1.0 is zero-fold lower). For example, a hazard ratio of 20.9 (95% CI = 18.9–22.9) for those "Unvaccinated–no previous COVID-19 diagnosis" versus "Vaccinated, no previous COVID-19 diagnosis" is equivalent to a 19.9-fold lower (95% CI = 17.9–21.9) rate for those "Vaccinated, no previous COVID-19 diagnosis" relative to those "Unvaccinated, no previous COVID-19 diagnosis."

a history of COVID-19 (3.1-fold higher [95% CI = 2.6–3.7] in California and 1.9-fold higher [95% CI = 1.5–2.3] in New York) and rates among vaccinated persons with a history of COVID-19 (3.6-fold higher [95% CI = 2.9–4.3] in California and 2.8-fold higher [95% CI = 2.1–3.4] in New York).

COVID-19 hospitalization rates in California were always highest among unvaccinated persons without a previous COVID-19 diagnosis (Table 2) (Figure). In the pre-Delta period during June 13–June 26, for example, compared with hospitalization rates among unvaccinated persons without a previous COVID-19 diagnosis, hospitalization rates were 27.7-fold lower (95% CI = 22.4–33.0) among vaccinated persons without a previous COVID-19 diagnosis, 6.0-fold lower (95% CI = 3.3–8.7) among unvaccinated persons with a previous COVID-19 diagnosis, and 7.1-fold lower (95% CI = 4.0–10.3) among vaccinated persons with a previous COVID-19 diagnosis. However, this pattern also shifted as the Delta variant became predominant. During October 3–16, compared with hospitalization rates among unvaccinated persons without a previous COVID-19 diagnosis, hospitalization rates were 19.8-fold lower (95% CI = 18.2–21.4) among vaccinated persons without a previous COVID-19 diagnosis, 55.3-fold lower (95% CI = 27.3–83.3) among unvaccinated persons with a previous COVID-19 diagnosis, and 57.5-fold lower (95% CI = 29.2–85.8) among vaccinated persons with a previous COVID-19 diagnosis.

Among the two cohorts with a previous COVID-19 diagnosis, no consistent incidence gradient by time since the previous diagnosis was observed (Supplementary Figure 3, https://stacks.cdc.gov/view/cdc/113253). When the vaccinated cohorts were stratified by the vaccine product received,

FIGURE. Incident laboratory-confirmed COVID-19–associated hospitalizations among immunologic cohorts defined by vaccination and previous diagnosis histories — California, May 30–November 13, 2021*,†



* The SARS-CoV-2 Delta variant exceeded 50% of sequences in U.S. Department of Health and Human Services Region 9 (containing California) during the week of June 26. https://covid.cdc.gov/covid-data-tracker/#variant-proportions
† Estimated hazard rate is laboratory-confirmed COVID-19–associated hospitalizations per 100,000 person-days visualized at midpoint of each reporting interval.

Summary

What is already known about this topic?

Data are limited regarding the risks for SARS-CoV-2 infection and hospitalization after COVID-19 vaccination and previous infection.

What is added by this report?

During May–November 2021, case and hospitalization rates were highest among persons who were unvaccinated without a previous diagnosis. Before Delta became the predominant variant in June, case rates were higher among persons who survived a previous infection than persons who were vaccinated alone. By early October, persons who survived a previous infection had lower case rates than persons who were vaccinated alone.

What are the implications for public health practice?

Although the epidemiology of COVID-19 might change as new variants emerge, vaccination remains the safest strategy for averting future SARS-CoV-2 infections, hospitalizations, long-term sequelae, and death. Primary vaccination, additional doses, and booster doses are recommended for all eligible persons. Additional future recommendations for vaccine doses might be warranted as the virus and immunity levels change.

among vaccinated persons without a previous COVID-19 diagnosis, the highest incidences were observed among persons receiving the Janssen (Johnson & Johnson), followed by Pfizer-BioNTech, then Moderna vaccines (Supplementary Figure 4, https://stacks.cdc.gov/view/cdc/113253). No pattern by product was observed among vaccinated persons with a previous COVID-19 diagnosis.

Discussion

This analysis integrated laboratory testing, hospitalization surveillance, and immunization registry data in two large states during May–November 2021, before widespread circulation of the SARS-CoV-2 Omicron variant and before most persons had received additional or booster COVID-19 vaccine doses to protect against waning immunity. Rate estimates from the analysis describe different experiences stratified by COVID-19 vaccination status and previous COVID-19 diagnosis and during times when different SARS-CoV-2 variants predominated. Case rates were initially lowest among vaccinated persons without a previous COVID-19 diagnosis; however, after emergence of the Delta variant and over the course of time, incidence increased sharply in this group, but only slightly among both vaccinated and unvaccinated persons with previously diagnosed COVID-19 (*6*). Across the entire study period, persons with vaccine- and infection-derived immunity had much lower rates of hospitalization compared with those in unvaccinated persons. These results suggest that vaccination protects against COVID-19 and related hospitalization and that surviving a previous infection protects against a reinfection. Importantly, infection-derived protection was greater after the highly transmissible Delta variant became predominant, coinciding with early declining of vaccine-induced immunity in many persons (*5*). Similar data accounting for booster doses and as new variants, including Omicron, circulate will need to be assessed.

The understanding and epidemiology of COVID-19 has shifted substantially over time with the emergence and circulation of new SARS-CoV-2 variants, introduction of vaccines, and changing immunity as a result. Similar to the early period of this study, two previous U.S. studies found more protection from vaccination than from previous infection during periods before Delta predominance (*3*,*7*). As was observed in the present study after July, recent international studies have also demonstrated increased protection in persons with previous infection, with or without vaccination, relative to vaccination alone[†††, §§§] (*4*). This might be due to differential stimulation of the immune response by either exposure type.[¶¶¶] Whereas French and Israeli population-based studies noted waning protection from previous infection, this was not apparent in the results from this or other large U.K. and U.S. studies[****] (*4*,*8*). Further studies are needed to establish duration of protection from previous infection by variant type, severity, and symptomatology, including for the Omicron variant.

The findings in this report are subject to at least seven limitations. First, analyses were not stratified by time since vaccine receipt, but only by time since previous diagnosis, although earlier studies have examined waning of vaccine-induced immunity (Supplementary Figure 3, https://stacks.cdc.gov/view/cdc/113253) (*2*). Second, persons with undiagnosed infection are misclassified as having no previous COVID-19 diagnosis; however, this misclassification likely results in a conservative bias (i.e., the magnitude of difference in rates would be even larger if misclassified persons were not included among unvaccinated persons without a previous COVID-19 diagnosis). California seroprevalence data during this period indicate that the ratio of actual (presumptive) infections to diagnosed cases among adults was 2.6 (95% CI = 2.2–2.9).[††††] Further, California only included NAAT results, whereas New York included both NAAT and antigen test results. However, antigen testing made up a smaller percentage of overall testing volume reported in California (7% of cases) compared with New York (25% of cases) during the study period. Neither state included self-tests, which are not easily reportable to public health. State-specific hazard ratios were generally comparable, although differences in rates among unvaccinated persons with a previous COVID-19 diagnosis were noteworthy. Third,

††† https://www.medrxiv.org/content/10.1101/2021.09.12.21263461v1
§§§ https://www.medrxiv.org/content/10.1101/2021.11.29.21267006v1
¶¶¶ https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html#anchor_1635540449320
**** https://www.medrxiv.org/content/10.1101/2021.12.04.21267114v1
†††† https://www.medrxiv.org/content/10.1101/2021.12.09.21267565v1

potential exists for bias related to unmeasured confounding (e.g., behavioral or geographic differences in exposure risk) and uncertainty in the population size of the unvaccinated group without a previous COVID-19 diagnosis. Persons might be more or less likely to receive testing based on previous diagnosis or vaccination status; however, different trajectories between vaccinated persons with and without a previous COVID-19 diagnosis, and similar findings for cases and hospitalizations, suggest that these biases were minimal. Fourth, this analysis did not include information on the severity of initial infection and does not account for the full range of morbidity and mortality represented by the groups with previous infections. Fifth, this analysis did not ascertain receipt of additional or booster COVID-19 vaccine doses and was conducted before many persons were eligible or had received additional or booster vaccine doses, which have been shown to confer additional protection.[§§§§] Sixth, some estimates lacked precision because of sample size limitations. Finally, this analysis was conducted before the emergence of the Omicron variant, for which vaccine or infection-derived immunity might be diminished.[¶¶¶¶] This study offers a surveillance data framework to help evaluate both infections in vaccinated persons and reinfections as new variants continue to emerge.

Vaccination protected against COVID-19 and related hospitalization, and surviving a previous infection protected against a reinfection and related hospitalization during periods of predominantly Alpha and Delta variant transmission, before the emergence of Omicron; evidence suggests decreased protection from both vaccine- and infection-induced immunity against Omicron infections, although additional protection with widespread receipt of booster COVID-19 vaccine doses is expected. Initial infection among unvaccinated persons increases risk for serious illness, hospitalization, long-term sequelae, and death; by November 30, 2021, approximately 130,781 residents of California and New York had died from COVID-19. Thus, vaccination remains the safest and primary strategy to prevent SARS-CoV-2 infections, associated complications, and onward transmission. Primary COVID-19 vaccination, additional doses, and booster doses are recommended by CDC's Advisory Committee on Immunization Practices to ensure that all eligible persons are up to date with COVID-19 vaccination, which provides the most robust protection against initial infection, severe illness, hospitalization, long-term sequelae, and death.[*****] Additional recommendations for vaccine doses might be warranted in the future as the virus and immunity levels change.

[§§§§] https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status

[¶¶¶¶] https://www.medrxiv.org/content/10.1101/2021.12.30.21268565v1; https://www.medrxiv.org/content/10.1101/2022.01.07.22268919v1

[*****] https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html

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Prior COVID infection more protective than vaccination during Delta surge—U.S. study
Reuters.com

Jan 19 (Reuters) - People who had previously been infected with COVID-19 were better protected against the Delta variant than those who were vaccinated alone, suggesting that natural immunity was a more potent shield than vaccines against that variant, California and New York health officials reported on Wednesday.

Protection against Delta was highest, however, among people who were both vaccinated and had survived a previous COVID infection, and lowest among those who had never been infected or vaccinated, the study found.

Nevertheless, vaccination remains the safest strategy against COVID-19, according to the report published in U.S. Centers for Disease Control and Prevention (CDC) Morbidity and Mortality Weekly Report.

The results do not apply to the Omicron variant of the virus, which now accounts for 99.5% of COVID-19 cases in the United States.

"The evidence in this report does not change our vaccination recommendations," Dr. Ben Silk of the CDC and one of the study's authors told a media briefing.

"We know that vaccination is still the safest way to protect yourself against COVID-19," he said.

For the study, health officials in California and New York gathered data from May through November, which included the period when the Delta variant was dominant.

It showed that people who survived a previous infection had lower rates of COVID-19 than people who were vaccinated alone.

That represented a change from the period when the Alpha variant was dominant, Silk told the briefing.

"Before the Delta variant, COVID-19 vaccination resulted in better protection against a subsequent infection than surviving a previous infection," he said.

In the summer and fall of 2021, however, when Delta became the predominant circulating iteration of the virus in the United States, "surviving a previous infection now provided greater protection against the subsequent infection than vaccination," he said.

But acquiring immunity through natural infection carries significant risks. According to the study, by November 30, 2021, roughly 130,781 residents of California and New York had died from COVID-19.

The analysis did not include information on the severity of initial infection, nor does it account for the full range of illness caused by prior infection.

One important limitation to the study was that it ended before administration of vaccine booster doses was widespread.

Dr. Erica Pan, state epidemiologist for the California Department of Public Health, said in an email that the study "clearly shows" that vaccines provide the safest protection against COVID-19 and they offer added protection for those with prior infections.

"Outside of this study, recent data on the highly contagious Omicron variant shows that getting a booster provides significant additional protection against infection, hospitalization and death," Pan said.

Silk said the CDC is studying the impact of vaccination, boosters and prior infection during the Omicron surge and expects to issue further reports when that data becomes available.

Ms. GOODWIN. Congressman Massie—
Ms. JACKSON LEE. The gentleman's time—
Ms. GOODWIN. Oh, is his time expired?
Ms. JACKSON LEE. Yes.
Ms. GOODWIN. I did have one more thing. When we spoke to the union officials, we didn't hear anything about them walking inmates through the—sick inmates through the compounds. We did hear concerns about just having a large number of sick people in any one location.
Mr. MASSIE. Right. Okay. Thank you very much. That is what I am hearing, too.
Madam Chair, I hope that we do get correctional officers in the next hearing because we want to hear from the front line what is really happening.
Ms. JACKSON LEE. The gentleman's time is expired.
Thank you so very much, Mr. Massie.
I am pleased now to thank him for his service and to recognize Mr. Cicilline of Rhode Island for five minutes.
You are recognized.
Mr. CICILLINE. Thank you, Madam Chair, for holding this really important and very timely hearing.
I want to first say that we have heard a lot about violent crime and smash and grabs, and we of course have all condemned that. I just wish we heard the same enthusiasm about the importance of prosecuting the smash and grabs and the violence that occurred on January 6.
We are also hearing lots of concerns from our Republican colleagues about conditions for those in confinement. That is welcome news. There are many of us who have been worried about that particularly for communities of color for a very long time. It is good to have some of our Republican colleagues now so concerned about that and we welcome their newfound enthusiasm or interest in this area.
The suggestion though that this compassionate release or early home confinement is releasing criminals into the community, the Bureau of Prisons director testified in the Senate in April that 24,000 people were transferred to home confinement and only 3 were arrested for new crimes. These individuals by and large reintegrated into the community successfully.
What I want to focus on is what the purpose of this hearing is, and that is the effect of this pandemic on incarcerated individuals. We get to make decisions to mitigate the risk of COVID by vaccinating ourselves, wearing protective masks, staying six feet away from each other, getting tested. Those same practices are not available very often to those who are incarcerated.
So, while I welcome the news of Attorney General Garland to reverse the Trump era legal opinion that the Bureau of Prisons now has the option to allow inmates to remain on home confinement to avoid risk of COVID, Dr. Venters, I want to ask what should the Bureau of Prisons be doing today to reduce the spread of COVID–19 or the other strains and also in their treatment of individuals who test positive?
Dr. VENTERS. I think one of the most pressing issues is to find and protect people who are high risk. Omicron particularly moves

so quickly through facilities, the congregate settings. All these places know or have the capacity to know who is high risk, that's who either is unvaccinated or meets the CDC criteria for higher risk of illness or death. We need to protect those people and it means that we prioritize them for vaccination. We don't just offer a whole housing area a vaccination; take it or leave it. We find those high-risk people. We talk to them, engage with, because they have lots and lots of questions about the vaccine, legitimate questions. Every one of those people vaccinated is a potential life save.

Then when COVID, if and when it hits, when people are in quarantine because they've been exposed, we need to find those high-risk people every day and check on them for symptoms. The CDC has said let's do this for everybody since the outset of the pandemic. When I get into facilities, I find nobody's actually asking people about new symptoms of COVID during quarantine. Those high-risk folks, we can save their lives if we find their symptoms early.

Then finally when they get into medical isolation, if and when they have COVID themselves, we need to have a lower threshold for sending them to the hospital or just having a nurse call a doctor if it's a high-risk person. So, a pulse rate of 92 in a person with diabetes or who's 85, or both, is probably more concerning than a pulse rate of 105 in a young healthy person. We need to think about that.

Mr. CICILLINE. Thank you. I want to try to just get in one more question. Thank you for that.

Ms. Guernsey, thank you for all the work that you have done. You have concluded that 280 people have died from COVID–19 in the Federal Bureau of Prisons and your research has shown that of the 260 deaths that you were able to track just 70 had filed a motion for compassionate release with the federal courts and 3 of those motions were granted.

Based on your research is the Bureau of Prisons compassionate release process being adequately utilized for individuals suffering from COVID–19 or at risk of COVID–19? What should the BOP be doing better to address that?

Finally, I have a piece of legislation that will also allow the court to grant compassionate release directly. Would that be helpful in this context as well?

Ms. GUERNSEY. Yes, so those three people whose motions were granted, those are just the three motions that were granted of people who ultimately died. We know that Federal courts have granted around 3,000 compassionate release motions generally. Those are 3,000 people who certainly wouldn't have died in Bureau of Prisons custody because they had been released.

I do think that looking at just those three motions isn't accurate. We know at least of the 297 people that have died and—at least 297 people that have died in Bureau of Prisons custody who have petitioned for compassionate release or asked the court for relief we can't actually identify what they've done in the Bureau of Prisons because the Bureau of Prisons doesn't provide that data. It's very difficult to judge from the data that we have for the Federal courts what's truly happening in the Federal Bureau of Prisons. I think again getting that data.

Again, a piece of legislation that allows people to petition directly to the courts would be a step forward, but I also think it's imperfect just because of the discretion vested with the Federal judiciary and compassion fatigue.

Mr. CICILLINE. Thank you.

Madam Chair, before I yield back I just want to acknowledge the extraordinary testimony of Ms. Levi and thank you for sharing your story and the powerful words you gave to this Committee. I yield back.

Ms. JACKSON LEE. Thank you, Mr. Cicilline. Your time is expired.

Has anyone else come on.

Thank you, Cicilline.

Do you have any Members that have come on that we should recognize at this time?

Mr. BIGGS. Madam Chair, I do not see any additional Republicans who have come on to ask questions, so yield it back to you.

Ms. JACKSON LEE. All right. Let me know, please. Thank you so very much.

I am pleased now to represent the gentleman from California Representative Service and to recognize him for five minutes. Mr. Correa. You are recognized for five minutes.

We will come back to him.

I am pleased now to recognize, thank her for her service, the gentlelady from Texas, Ms. Escobar.

You are recognized. Ms. Escobar. Thank you, Madam Chair, for holding this very important hearing and to the recent practices of the Bureau of Prisons around addressing the needs of inmates during the COVID–19 pandemic and the Bureau of Prisons' compliance with the First Step Act.

I do want to echo my gratitude not just for all the panelists, but especially for Ms. Levi, as Mr. Cicilline just pointed out. I am so grateful that you are here sharing your story with all of America. Thank you.

Our prison system has long failed to recognize the dignity of incarcerated people, the majority of whom are Black and Brown.

This morning we heard the minority Witness and our friends on the other side of the aisle lamenting the treatment of those incarcerated for the January 6 terrorist attack against our country. Mr. Jordan mentioned that he is, quote, "concerned about compassion and due process." I am so glad to hear that. The minority Witness and my Republican colleague's concerns include a list of things: A delay in hearings, their belief that there is a lack of due process, claims of abuse, and the fact that some of the individuals they are fighting for don't have a criminal record or their charges are misdemeanors.

I want to just note here that the concerns that they have articulated are exactly the same concerns many of us have been expressing about migrants in ICE custody. Lack of due process claims of abuse, lack of a prior criminal record, and lengthy incarceration on civil charges. It is truly my hope that their concern about compassion and due process will be extended to the migrant population in our custody as well. One day, I hope.

In the summer of 2020 when a majority of Americans were working and learning from home to avoid spreading or contracting coronavirus, prisons and ICE facilities were the site of rapid unmitigated spread among staff and those incarcerated, and unfortunately instead of embracing the allowances the CARES Act made for home confinement, many Bureau of Prisons facilities attempted to contain the spread of COVID–19 with lock-downs and heavy reliance on solitary confinement, a psychological harmful tactic that prisons have historically employed as punishment. Those decisions cost lives, not just the lives of 277 incarcerated people, but the lives of 7 staff Members as well.

So, again, Madam Chair, thank you for this opportunity to discuss how Congress can Act and how we can do better in our country.

Mr. Venters, in your statement you mention that your investigations have not just included the Bureau of Prisons, but you mention that your investigations have covered ICE detention facilities as well. Do you see similar problems with ICE detention as you have within the Bureau of Prisons? Lack of oversight, the need for independent health authority, et cetera?

Dr. VENTERS. Yes, I think that in the micro sense some of the same failings about finding and protecting high-risk people are apparent, but the larger problem, the problem that will persist unless we address it is that there is no independent oversight of the quality of health care in these settings. We must have that, otherwise we're going to get the same outcomes: Preventable deaths, over and over.

Ms. ESCOBAR. You are absolutely right. I will give you just a quick example of the desperate need for that independent health care oversight not just during COVID, but preceding COVID. One example is that we had a number of ICE detainees in the El Paso facility who went on a hunger strike. Then as their health deteriorated the same doctor that was overseeing their care then ordered that they be force fed, tied down and force fed against their will. Then it was that same physician who was given the authority to check on their health even after the forced feeding and after the decline in their mental health as well. I called for an independent review, independent oversight, and that is really critical.

Can you articulate why across the board in detention we need that independence?

Dr. VENTERS. Certainly. I mean we accept this as a core requirement in every other aspect of health care in the United States if you go to a dialysis center, if you go to a clinic, a hospital. We understand that you don't let the hospital decide if they did a good job or a bad job with your surgery or with your X-ray. We need to use the skills of quality assurance, quality improvement, and independence in figuring out whether or not health care is adequate.

For some reason, for a lot of reasons we all know that are complicated for decades we've decided to carve out health care behind bars and say we're going to let sheriffs, commissioners of corrections, people who run these boxes we put people in—we'll let them decide if it's good enough and if it's the appropriate scope of services.

We get what we should expect, which is lots of jail and prison attributable deaths because we don't have independent oversight.

Ms. ESCOBAR. Thank you so much, Mr. Venters, and to all our panelists.

Thank you, Madam Chair. I yield back.

Ms. JACKSON LEE. Thank you so very much for your questioning and thank you for raising ICE. I think we know that we have seen some terrible articles recently on the conditions there and I think we will be—from the perspective of detention facilities be looking at that. Again thank you.

Let me say I am pleased now to recognize another well-serving Member, and that is Mr. Cohen of Tennessee for five minutes.

Mr. COHEN. Thank you, Madam Chair, and thank you for holding this important hearing. I am disappointed the Bureau of Prisons isn't with us. I know they will be at some time in the future.

We had a head of the Bureau of Prisons who I don't think did is job very well and it is unfortunate that one of the best things that President Trump did—he certainly was responsible greatly for getting the vaccines available with Warp Speed; and that was something to his credit, but he also got this bill passed, he with the work of Mr. Kushner, and Hakeem Jeffries, and others. It is an important bill and I wish that his Administration as head of the Bureau of Prisons would have tried to implement it, but he didn't. Hopefully the Biden Administration will.

There is an individual I have been in touch with, Michael Cohen, who was an attorney for Mr. Trump, who has been incarcerated. He still has certain limitations as he has got on parole, guess. Those could be conditions of restrictions on his liberty could be removed if they completed the Fresh Start Act and gave him the credit that he deserves for the time he has spent in prison as really a political prisoner because what he did was just facilitate Mr. Trump's work with Stormy Daniels. The individual, one has not been punished, but Michael Cohen should get his credits and hopefully the Biden Administration will see that everybody that should get their credits get them.

Ms. Levi, you brought up the fact that there is nobody in the system that is supposed to work on compassionate release except you just make your application to the Warden. Do you think there should be an individual other than the warden in the system, like an ombudsman who looks over the prison population and tries to make recommendations of those people who should qualify for compassionate release?

Ms. LEVI. I certainly do. I think some of the—not just compassionate release. The clemency process also, but compassionate release, yes. Leaving just to the warden—in my case my warden denied me. No, I'm sorry. In my case my warden took over 30 days and I was able to avail myself of that privilege since she didn't respond in 30 days, I was able to put an application in for compassionate release on my own through my attorney on the 31st days, which subsequently was denied.

Yes, there should be an ombudsman. There should be maybe a Committee or a council or whatever. I don't know what you all want to call it, but there should be somebody besides the warden in that institution or outside the institution who would oversee

those people who we already know qualify and have been vetted and everything. They qualify for the compassionate release, but it's just not being processed. It's just not.

Mr. COHEN. Thank you, Ms. Levi. I am sorry about what happened with you, but I am happy you are out, and I appreciate your testifying. I know that the Chair will look into that. I hope that if she does look into it, and I am sure she will, with the staff, that I would like to work with her on that.

I have been an advocate for compassionate release for a decade, at least, and oftentimes it was—it was not just COVID; it was people who were—had been incarcerated for a long time and were old as they could be. They didn't have the physical ability to commit a crime anymore and yet they are still being incarcerated. Those people should be released for compassionate reasons and for economic reasons because there is no reason for us to be housing those people. So, that is something we need to do.

Ms. Goodwin, what implications do these failings in the Bureau of Prisons that they haven't implemented the First Step Act have for those in Federal custody and what lessons should current Administration fund?

Ms. GOODWIN. Thank you, Congressman. The work that we are currently doing: Looking at inmates' needs and risk assessment and how the Bureau of Prisons is implementing that particular requirement under the First Step Act. That work is ongoing. As we get closer to having, preliminary findings or anything, my team, we can certainly circle back to you to share some of that information, but for us right now the work that we have is too early for me to be able to provide some substantive data or information.

Mr. COHEN. Well, thank you. Hopefully the Biden Administration will appoint a progressive-minded head of the Bureau of Prisons so that we don't have problems such as we had with this past chief who didn't do his job and let the First Step Act languish.

Ms. Guernsey, what role can the Bureau of Prisons play in criminal justice reform particularly given the authorities it has under the CARES Act and the First Step Act?

Ms. GUERNSEY. Well, I think those two things are exactly right. They have two really important tools for decarceration and we know that decarceration is good for penalogical purposes and public health purposes. So more standardized processes and procedures for compassionate release and expanded use of both compassionate release and CARES Act home confinement are incredibly important for us to move forward past an era of mass incarceration.

Mr. COHEN. I want to thank everybody on—all the Witnesses for testifying and I want to—it has been wonderful listening to my Republican colleagues, a byproduct of January 6 is we have got some new allies in trying to get prison reforms. Strange friends through strange conditions and things work in mysterious ways.

I yield back the balance of my time.

Ms. JACKSON LEE. I thank the gentleman as the gentleman's time is expired and I hear a strike for unity. Thank you all very much.

I am going to express my appreciation to Mr. Nadler, Ms. Bass, Ms. Demings, Ms. McBath, Dean, Scanlon, Bush, Mr. Cicilline, Escobar, and Cohen. Thank you so very much. Likewise express my

appreciation to Mr. Biggs, Chabot, Gohmert, Steube, Tiffany, Massie and Jordan. I think Mr. Gohmert was not on, but we thank him.

Let me also express my appreciation to Dr. Venters, Ms. Guernsey, Ms. Levi, and Dr. Hamilton, Ms. Goodwin, Dr. Goodwin, and Ms. Kelly. Let me thank you very much.

I am going to, if I might Members, yield myself a few minutes for two Witnesses.

Mr. Biggs, I didn't know if you had any matter that you wanted to address. I am going to yield to you if you have a matter that you want to address as we close. Mr. Biggs?

Mr. BIGGS. Thank you, Madam Chair. I just wanted to again thank all the Witnesses and I appreciate, and I want to just comment on some specific things that are takeaways. Appreciate, Ms. Levi, for your testimony. I think you really highlighted some of the deficiencies that we have in our system. I think that is critical that we hear firsthand the experiences that you underwent and appreciate your willingness to share those with us today, take time out.

Dr. Venter, I really appreciate your comments today and your efforts and your work. Particularly, I think it is critical that—not just within the prison system, but I think generically we understood early on who were the most vulnerable and who are at most high risk particularly in congregate settings. I think you have further identified that today as a system-wide failure to care for people who are particularly vulnerable, and I appreciate that.

Ms. Guernsey, Professor Guernsey, I thank you too because I think the idea of the COVID data within Bureau of Prisons and other data that comes out—it is missing, or it is incomplete. I think that is critical if we are going to study and see what is going on and what needs to be fixed. Thank you very much for that.

I am looking forward to getting a Bureau of Prisons representative in, Madam Chair, to testify to us. Appreciate—is it Professor Goodwin? Or Dr. Goodwin?

Ms. GOODWIN. Dr. Goodwin.

Mr. BIGGS. Dr. Goodwin? Okay. I am sorry. Appreciate your comments with regard to best policies and practices, particularly by internal communications within BOP and its failures. Sometimes the water doesn't get to the end of the row, those of us out here in the land of irrigation. Sometimes the water doesn't get to the end of the row, and I think it needs improved communication. Thank you.

Ms. Hamilton, thank you as well. A startling statistic that you laid out was that 11 percent have wrongfully assessed for risk. I think that is critical. I would like more information on that including the underlying independent variables.

Appreciate Ms. Kelly being here today and your thoughtful work on the January 6 detainees and also the testimony that indicates from some—at least from some Members that may be a widerspread problem than we knew about. That is critical as well.

Just want to make a couple quick comments as well with regard to the comment that there had not been universal condemnation of violence on January 6. That is actually inaccurate. I can't think of anybody who did not condemn the violence of January 6. Indeed, all violence should be condemned. I think sometimes the hyperbole

gets in the way and sometimes we politicize things that don't need to be politicized, but violence is violence and should be condemned.

I would ask—Madam Chair, it was raised in here that the Department of Justice was compelled by a court to investigate what was going on in the D.C. Jail, and I would ask if we could maybe follow up with a hearing on that. If not, then maybe you and I could lead a letter to the Department of Justice asking what the progress of that investigation in response to the Federal judge is. I think that is important to know and we continue to hold the DOJ accountable for what the Federal court indicated.

I am also looking forward to finding data on the crimes and compassionate release. Apparently, that is incomplete as well and that is—we really need to get to the bottom of that, too. So much came out of this hearing today. Thank you, Madam Chair. Appreciate it and I yield back.

Ms. JACKSON LEE. Thank you so very much, Ranking Member Biggs, and thank you for specifically highlighting the great insight that all our Witnesses gave.

Let me say to all our Members data is crucial. Many of you know that the head of the Prison Bureau, Federal Prison Bureau resigned, I would say hastily, about two weeks ago. But we are never far away from the will of the Members, but also our thoughts are already present in the thoughts that you have. We will have a Bureau of Prisons hearing on February 3 with those officials. Just think of the approach that we took, which is we had an expansive fact-finding group of Witnesses that have provided us enormous insight and we will rely upon their testimony.

I, too, want to take just a quick moment. Dr. Goodwin, thank you. The GAO is doing great work. We will probably engage with you further as well as Attorney Bensy. Thank you for your first-hand work that tells us that we should be concerned about courts that have not been as friendly toward compassionate release and we should look into all options and how that system could work.

Dr. Hamilton as well, and the disparity, if you want to explore that even more so that our First Step Act can work.

Dr. Venters and Ms. Levi, I am going to pose questions to you that I did not and was not able to raise.

Ms. Kelly, thank you for your research and work. You can see that you have been heard. Thank you again. I know many asked you questions.

Ms. Levi, you are my personal hero because you have not been silenced by your experience. Some would come out and be embarrassed or hesitant to speak and I am grateful that you are not. I also just want to follow up on the emotional tie, the emotional tie that you have to those who are still there because you know the conditions in the prison and then also the emotional toll that still is on you.

You got out. You know that there are others, I would assume, and I don't want to presume, but would you share that there are others that could be eligible inside the Federal Bureau of Prisons and are not being responded to? Would you comment on that, please? Thank you so very much for not being silenced about the conditions.

Ms. Levi, would you answer that, please?

Ms. LEVI. Yes, I couldn't be silent. My friends I left behind, the women and some guys that I corresponded with, you cannot just forget. What I went through I know that they're going through. They're continuing to go through.

I have friends who are at Carswell and Alderson and what they're going through right now, the letters that they write are—it's a sad tale that's being told. People talk about people being locked down for two hours where in some prisons they're not getting two hours out. They're getting a half an hour to come out and have to use the phone, have showers, and everything. It is just a sad situation that the people that were left behind. I have to talk about them. I have to—I still hear from them. They're my friends.

Ms. JACKSON LEE. If I could very quickly ask you; I know you don't make decisions, but would you comment on those who are there who have made requests for compassionate release who in your view are eligible and just being ignored or denied? Is that happening?

Ms. LEVI. Yes, it is. You have people who are sick, in wheelchairs, who can't get around. One lady just told me about that she—there's a towel around her whole face just so that she can walk through during that one hour that she gets to use the phone, that has an hour that she gets to use the phone. They reduced their phone calls to five minutes. COVID is devastating the emotional impact that it's having on people inside. I mean, to be locked down like that knowing that you're eligible, knowing that you fit the criteria, knowing that you've submitted paperwork and the warden denies you. It gets denied. Knowing that you know within your heart, your attorney has told you fit the criteria. It's frustrating for me just to see people who I know should be out still in.

I will continue to speak out. Emotionally, yes, it does have an effect on you, but I think it gives you—

Ms. JACKSON LEE. Thank you.

Ms. LEVI. —more drive because you know the emotion that it has on me, so I know what it has on the people that are still inside.

Ms. JACKSON LEE. Thank you so very much. You have done so much for us in your testimony.

Dr. Venters, you really highlighted some crucial issues regarding health care. I think we should understand that these are still human beings, but in the Bureau of Prisons there are medium and minimum facilities. There are people of all categories that are incarcerated. Of course, there's maximum. Can you comment on is there any standard criteria for which doctors or nurses or health professionals are hired in the Bureau? Is there consistency in quality or consistency in numbers? Have you been able to determine that? Are those deficiencies continuing or are those deficiencies contributing to what you say are bad health conditions and a lack of understanding of the impact of COVID and the high numbers of COVID–19? Dr. Venters?

Dr. VENTERS. Yes, I think that—thank you. I think that certainly there are problems recruiting staff all over, health staff in both the BOP facilities and other carceral settings. I think there are some very sound reasons why a lot of health staff are reluctant to take these jobs. It's not just that these are tough physical environments and it's really actually not so much, in my experience as a doctor

at Rikers, that we're afraid of your patients. It's that these are places where we're not sure we're going to be able to provide ethical care and evidence-based care.

So, until and unless we establish independent oversight so that a doctor, a nurse, a physical therapist knows that their delivery of care comes from a line of power and a line of authority that goes to a real health organization; it doesn't just go up the chain to a security person, I think it will be difficult to get the staff in that we want to fill those positions. So, that's why I sound like a broken record over and over about the need for independent oversight that comes from a health authority, not from some other law enforcement agency.

Ms. JACKSON LEE. Let me thank all of you so very much. This hearing today will be an effective fact-finding basis for our February 3 hearing and the Witnesses, each of you, have contributed in your own way.

I do want to conclude my remarks and conclude this hearing by adding to the record an article at Forbes: "As COVID Cases Spike, Federal Bureau of Prisons is Not Releasing Eligible Inmates." Then the Justice and Policy Center "Racial Equity and Criminal Risk Assessment." Then a CNN article: "This is an Unmistakable Win for Incarcerated Persons," regarding the DOJ reform dealing with the First Step Act.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

As COVID Cases Spike, Federal Bureau of Prisons is not Releasing Eligible Inmates
Forbes Article – January 11, 2022

As COVID Cases Spike, Federal Bureau of Prisons Is Not Releasing Eligible Inmates
Last week, the Director of the Federal Bureau of Prisons (BOP), Michael Carvajal, unexpectedly resigned. Right after him, the Deputy Director of the BOP, Gene Beasley, announced his retirement. The departures, while welcome in some senate chambers, are cause for alarm because the BOP is now facing another crisis as it battles the surging COVID-19 omicron variant. On December 10, 2021, there were 265 active COVID-19 infections among federal prisoners across the country ... now, just a month later, that figure is at 3,761 cases and climbing. If the past is any indication of how the BOP is reporting these numbers, it is grossly underestimated.
Many federal prisoners who are eligible for CARES Act transfer to home confinement are being told "NO". Many federal prisoners who are eligible for CARES Act transfer to home confinement are being told.

The BOP was slow to react to COVID-19, resulting in the rapid spread of the virus among both prisoners and staff. To date, there have been 275 prisoners and 7 staff members who have died as a direct result of COVID-19 while tens of thousands have been infected. Then-attorney general William Barr used a provision of the CARES Act to address the spread of the virus by reducing prison populations by allowing minimum and low security inmates, with certain underlying health conditions, to complete their sentence on home confinement. This not only put some unhealthy inmates in a safer environment, but it provided some relief to institutions so they could get achieve some level, however minimal, of social distancing. The plan has been a success from both a health perspective and that it allowed many prisoners to reunite with their family and become contributing members of society. President Joe Biden's Justice Department's Office of Legal Counsel Joe Biden recently issued an opinion that those transferred to home confinement could complete their prison terms at home. This was only possible because of the successful integration of thousands of inmates into the community to complete their sentence under strict supervision.

The BOP misled the public when it first started to transfer prisoners to home confinement under the CARES Act, choosing instead to report numbers that included prisoners who would have been on home confinement anyway ... a much larger number. The BOP has clarified their use of the total number of those placed on home confinement since March 2020 (36,809) but

does not report the number of prisoners transferred under the CARES Act ... my guess is that it is under 10,000... some of whom have completed their sentence by now.

For those prisoners who were not transferred under the CARES Act, the BOP was questioned about the measures it took to prevent the spread. Some of those methods seemed inhumane. In congressional testimony in March and April, then-Director Carvajal was questioned about the agency's use of solitary confinement, lock downs of prisons, to curtail the spread of COVID-19 rather than using the CARES Act. This action meant that inmates, some minimum security, were locked in cells for weeks at a time for up to 23-hours each day with limited access to showers and the outside world. U.S. Senate Majority Whip Dick Durbin (D-IL), Chair of the Senate Judiciary Committee, questioned Carvajal and wondered why certain prisoners who met all the criteria for CARES Act were being locked down when there was clearly an alternative. Carvajal said little but there was a brief spike in CARES Act transfers to home confinement in the months surrounding those congressional hearings. Since then, the numbers have trickled.

To be sure, those case managers responsible for sending prisoners to home confinement are being overworked. The BOP faces an agency-wide challenge of finding qualified candidates to hire for corrections officers, case managers and medical staff. The BOP's ability to meet the demands of the job is only being met by mandating additional hours to those who are already at work, meaning that overtime costs for the BOP are as high as they have been in the history of the agency. There is also indifference among the staff in a culture that was void of leadership even while Carvajal was in charge. Under his watch, MCC New York closed due to numerous staff corruption cases and a mold-infested facility, USP Atlanta is mired in corruption and the First Step Act has not been fully implemented. This comes at the peak of this new wave of the pandemic that we are now being told is going to be a part of our lives forever.

There are federal prisoners with cancer, diabetes, liver disease, pace-makers, COPD, over 70 years old, all underlying conditions for an adverse reaction to COVID-19. Thousands of them are housed in minimum security prison camps and also have been identified as having little or no likelihood of recidivism (based on the BOP's own assessment tool called PATTERN). There are also minimum security prisoners at the 7 federal medical centers that obviously have serious medical conditions. The BOP has been criticized for its skyrocketing healthcare costs and the Government Accountability Office criticized the agency for its management of prisoner

healthcare costs .... and that was in 2016 before the pandemic. One step the BOP took to help manage the increasing costs of healthcare was to impose a copayment on the prisoners. They could do more cost saving on healthcare and reduce the stress on local community hospital systems near the prisons by moving some inmates home on a program that has a track record of success.

Social visits in federal prison have mostly been cancelled or severely curtailed over the past 22 months. Currently, 97 of 98 federal facilities that list their Modified Operational Levels are at Level 3 (Intense Modification based on medical isolation rate, combined percentage of staff and inmate completed vaccinations series, and their respective county transmission rates). When you drill down to the individual institutions, one can get a feel for the chaos and fear of those being held at these institutions. The SEC Wants Companies to Disclose Climate Risk – But Retirement Savers Still Have Plenty To Worry About.

These prisoners are supposed to be evaluated and, if they have an underlying condition, are eligible to be transferred to home confinement under the CARES Act. However, many prisoners have had to result to pleading to federal prison case managers who routinely manage the lives of 100-150 prisoners in the institution. At FCC Butner, which is one of seven medical centers in the BOP, a Department of Justice Office of Inspector General report in 2021 said the the institution had not done enough to implement the CARES Act. The report concluded, "Although Butner worked to comply with the Attorney General's guidance on home confinement, the composition of the inmate population and the need to adapt to rapidly changing guidance presented challenges to reducing the complex's population in a timely manner." Over a year later, this is still a problem according to those close to the situation at Butner.

There are prisoners at Butner's minimum camp and low security facility that have conditions ranging from heart pace-makers, over 70 years old, paraplegics, who also have served enough of their sentence to be eligible for CARES. However, case work is backed up and prisoners are rarely proactively profiled for release. They are forced to go through an administrative remedy process to be considered, which can take months. One prisoner's profile I reviewed is wheelchair bound and meets all the requirements but has been bogged down in the remedy process, which goes all the way to the central office in Washington DC, for over a year. Prisoners just don't have access to information about the CARES Act in order to advocate for themselves. This at an institution, Butner, that has the highest mortality rate of any BOP facility

for COVID-19 with deaths of 34 prisoners and 2 staff. Of the seven BOP compounds with a medical center, Butner accounts for 34% of all the deaths. As of January 8, the complex listed 8 prisoner infections and 49 staff ... that is bound to swing toward many more prisoner infections in the coming days.

A prisoner at Butner provided extensive communication and documentation that he clearly is eligible for the CARES Act. He has a documented medical condition confirmed by the institution's medical staff as being eligible for CARES Act, is minimum security and has less than a year remaining on his sentence. However, he was informed by his case manager that she was doing "extra duty," and that there were other prisoners ahead of him. "I am scared to speak up because I don't want to be punished or see a delay in my eventual transfer to home confinement," the person told me.

Butner is not the only place where the CARES Act implementation has been slow. There are stories out of Edgefield, SC, McCreary, KY, Estill, SC, Lompoc, CA, ... wherever there is a BOP facility, there is a person who is not being transferred to home confinement who is eligible per the BOP's own policy. This is likely to continue without some intervention by the Executive or Legislative branch of government. The BOP is an organization that needs new leadership, is poorly managing the pandemic in its institutions, is behind in implementation of the First Step Act, has a terrible relationship with the union, experiencing staffing shortages, is short on qualified medical staff, has poor morale, has many staff calling in sick and multiple cases of staff corruption.

The true first step of reform is that the BOP must actually do what its policies say. Right now, they are falling short on serving prisoners and the staff who care for them.

Kelly Roberts Freeman, Cathy Hu, and Jesse Jannetta

March 2021

Racial and ethnic disparity is a pervasive characteristic of the American criminal justice system. This starts at the beginning of the justice process with substantial racial disparities in arrest.[1] Once arrested, people of color face disparities in pretrial bail decisions (Schlesinger 2005) through disposition and sentencing, where they are imprisoned at 5.9 times the rate of their white counterparts (Carson 2018). Disparate outcomes by race continue to emerge at decision points that are even later in the justice process, such as in determining prison release on parole (Huebner and Bynum 2008). Many of these disparities arise from discretionary decisions and sentencing policies that disadvantage people of color. Disparities are also rooted in a history of structural racism and inequities that continue today, contribute to the overrepresentation of people of color in the justice system, and require action across multiple policy domains to address (Kijakazi et al. 2019).

As a result, addressing racial and ethnic disparity in the justice system requires acknowledging these structural inequities and examining all criminal justice practices with an eye toward whether they contribute to or mitigate disparity. In this brief, "disparity" is defined as differences in justice outcomes and involvement by race or ethnicity, regardless of cause. This is distinct from disparate treatment by race or ethnicity, which is captured in this brief by the term "bias."

The Role of Risk Assessment

The centrality of risk assessment to many justice system decisions has profound implications for people's lives. Criminal justice agencies at all levels of government have increasingly adopted risk assessment tools to guide data-driven decisionmaking about who should be incarcerated as well as how to supervise, manage, and treat justice-involved populations. Many tool developers and implementers hope that risk assessment tools will reduce implicit and explicit bias among justice system decisionmakers, but it is unclear whether they mitigate, reinforce, or leave unaffected racial and ethnic bias in practice. This lack of clarity is partially because the answer likely depends on the setting. As such, the question of whether they support equity and justice for people of color—or simply reproduce existing structural inequities in the justice system—is critical to reform efforts. Justice reform advocates are increasingly posing that very question.

Recently, concerns about the potential for risk assessments to reproduce or exacerbate racial and ethnic disparities have gained widespread attention through public statements of policymakers, the media, justice reform advocates and people with justice involvement. In his 2014 address to the US Sentencing Commission, then–Attorney General Eric Holder expressed apprehension about the disparate and adverse impact of risk assessments on marginalized communities when sentencing decisions are made based on immutable characteristics associated with race.[2] A 2016 article by ProPublica about bias in a commonly used risk assessment instrument greatly elevated public attention paid to racial equity issues in the use of risk assessment.[3] In 2018, more than 100 civil rights and community-based organizations released a shared statement of civil rights concerns over the adoption of pretrial risk assessment tools as a substitute for ending money bail. They contend that both risk assessment and money bail could worsen racial disparities in the justice system (Leadership Conference on Human and Civil Rights 2018). Some justice reform advocates have gone further and oppose the use of risk assessment tools entirely (JustLeadershipUSA n.d.; PJI 2020).

Research has shown that actuarial, or statistical, methods of predicting the likelihood of future outcomes (e.g., failure to appear in court, rearrest, return to custody, successful completion of supervision) are more accurate than subjective judgment (Gottfredson and Moriarty 2006), and offer additional benefits of objectivity, transparency, and accountability among criminal justice actors. Furthermore, research has found that focusing correctional interventions based on risk levels and needs areas identified through validated assessment tools is important to improving outcomes for high-risk people and avoiding worse outcomes for low-risk people through the application of unnecessary programming and surveillance (Lloyd, Hanby, and Serin 2014; Smith, Gendreau, and Swartz 2009). Still, although the research base supports their use, they are not designed to confront the issues of disproportionate involvement and disparity.

Thus, practitioners and policymakers find themselves in a complicated position. They must determine how (or whether) to balance the use of risk assessment as a component of evidence-based practice with pursuing goals of reducing racial and ethnic disparities in the criminal justice system. This brief is intended to assist criminal justice stakeholders in thinking through these issues. It outlines the

primary concerns and potential advantages of using risk assessment tools to promote equity in the administration of justice. The brief concludes with some strategies that could be used to reduce racial and ethnic disparity in the development and use of risk assessments.

Risk Assessment and Risk Factors: An Overview

Before discussing the main concerns over the use of risk assessment, it is helpful to understand how these tools are constructed and what they are intended to do. Risk assessments are intended to predict the likelihood of future reoffending or noncompliance with justice system requirements, such as appearing in court or complying with probation conditions. They are developed on samples of people who are justice involved by modeling the relationship between risk factors and misconduct outcomes within a set time frame. Tools developed for use in sentencing or postadjudication contexts are generally designed to predict future justice system involvement over a multiyear period, whereas pretrial risk assessment tools are usually designed to predict failure to appear in court and rearrest during a period of pretrial release only. Notably, measures of misconduct are often measures of justice system contact or response, such as official arrests or warrants for failing to appear in court.

Risk factors included in assessment tools are data points associated with the type of outcome predicted (generally defined in terms of misconduct or failure). The types of risk factors included in an assessment depend on the purpose of the tool, what type of decisions it informs, and the outcomes of interest. Some risk factors, or inputs, are historical and unchangeable, such as age at arrest, prior criminal history or arrests, and current charge. These are typically considered **static factors**, which are often derived from official records or administrative data. **Dynamic risk factors** are changeable risk factors that are often the targets for programming and case planning to reduce risk. These often include a person's attitudinal, behavioral, and lifestyle factors (e.g., education, employment, family and peers, and leisure activities). Dynamic risk factors are often measured through self-reported information from an interview.

In development of a risk assessment scale, the relationship of factors to the outcome of interest are modeled statistically and used to assign scoring weights to each item included in the instrument in the interest of creating the most effectively predictive overall model. Once the tool has been found to perform optimally (often through a set of metrics commonly used to "validate" risk models), the risk level (and need, for tools that measure it) is used to inform choices such as pretrial release, supervision level, and programming (see Kim [2017] for more information on tool validation).

BOX 1

Gaps in Knowledge Regarding Assessment and Disparity

Though the discussion of racial disparities is often focused on differences between Black and white people, it is hard to explore other racial or ethnic disparities because sufficient information and sample sizes for other groups can be unavailable or difficult to obtain.[a] Some jurisdictions do not record ethnicity *or* do so inconsistently. For example, in some jurisdictions, white, Black, and Hispanic are all

categorized as discrete racial categories, but in other places, Hispanic is an ethnicity that is separate from race (e.g., white Hispanic, Black Hispanic). In many instances, there are too few members of groups such as Asian Americans and Native Americans included in tool construction and validation samples to draw strong conclusions about how use of assessment interacts with disparities in their outcomes.

[a] Sarah Eppler-Epstein, Annie Gurvis, Ryan King, John Wehmann, Vivian Hou, Alexandra Tilsley, and Daniel Matos, "The Alarming Lack of Data on Latinos in the Criminal Justice System," Urban Institute, December 2016, https://apps.urban.org/features/latino-criminal-justice-data/.

Common Areas of Concern

Tool Construction Using Biased Data

Risk assessment tool development relies heavily on data generated by the justice system, such as number of prior arrests or convictions. Much of the concern around risk assessment arises from the use of such data to construct tools when those data are partially the product of existing racial inequities in the criminal justice system. Sometimes this concern is raised relative to dynamic factors such as educational attainment and housing situation, but the strongest predictors of misconduct included in risk assessment tools are criminal history factors, which are also correlated with race (Skeem and Lowenkamp 2016). Criminal history includes factors like previous arrests, convictions, and sentences that are coproduced by the person who is justice involved and justice system actors. Thus, past criminal justice outcomes are reflective of both individual offending behavior *and* system behavior, including differential treatment of certain people in the justice system.

Though it is the risk factors included in these tools that have been most commonly criticized, there is also an argument that the outcomes being predicted are themselves partially products of structural racism. As mentioned, many risk assessment tools are validated with rearrest as an outcome. Because "pure" measures that capture actual offending behavior are not available, tool developers must rely on proxies that can be collected using administrative criminal justice data—measures such as arrest. To some extent, this captures actual criminal behavior, but it also reflects criminal justice practices and official discretion that are subject to biases and structural inequities of several kinds. For example, police often focus more attention and are more present in socially disadvantaged neighborhoods where there are more calls for service. A person living in such a neighborhood is therefore more likely to be detected and arrested for a crime such as drug possession than a person living in a neighborhood with lower levels of crime, even if both are equally likely to possess drugs. In this example, place-based policing strategies are part of what is being measured by the arrest outcome, and in some cases are more likely to raise the risk of arrest for people of color. Furthermore, people of color are more likely to be surveilled in any neighborhood, such as during targeted traffic stops (for example see Taniguchi and coauthors [2016]), and this further contributes to bias in arrest rates.

In short, part of what these tools *consider* and *predict* is past and future contact with the criminal justice system rather than simply offending behavior. To the extent that there are disparities in how

system contact occurs, risk assessment tools will reinforce inequities into their models. In other words, a race-neutral tool in an inequitable system will necessarily reproduce racial and ethnic disparities.

Disparately Punitive Outcomes of Risk-Based Decisionmaking

A key reason for concern about bias in the tools used for risk-based decisionmaking is that it can lead to disparately punitive criminal justice decisions. That is, because Black people are more likely than white people to be assessed as high risk, they will disproportionately be subject to harsher criminal justice responses. This has serious implications on individual liberty if pretrial detention, sentencing, and release decisions are based on biased measurements of risk. More restrictive criminal justice responses like placement on electronic monitoring increase surveillance and can create new rules to break, thereby increasing the risk of failure. Conversely, when less restrictive criminal justice responses—such as pretrial release and diversion programs—are reserved for people assessed to be low risk, Black people will receive the benefits of these decisions at a lower rate than their white counterparts.

In these ways, risk-based decisionmaking can create cumulative disadvantage for people of color who are justice involved. The more the system decisionmaking structure responds to people scoring at the high-risk end of the risk continuum with control responses such as incarceration rather than options to remain in the community with necessary supports for success, the more harmful this dynamic will be. Using tools that incorporate individual strengths and protective factors in addition to risk factors can help decisionmakers identify opportunities to invest in supporting individual success. Part of this is ensuring that appropriate interventions (both in type and intensity) and community resources are targeted and allocated toward those with the highest needs.

Adding to the complexity, disparately punitive decisions can occur at many stages of the justice process. Recent coverage on racial disparities arising from the use of risk assessment tools has primarily focused on disparities in front-end decisionmaking, at pretrial and sentencing, rather than in postadjudication decisions. Specifically, people have expressed concerns about the use of risk assessment to make decisions about pretrial release or detention, or decisions about sentence type and length. Decisions at early stages in the justice process often have implications for what happens at later stages. To take two examples, research indicates that pretrial detention is related to an increased likelihood of receiving a sentence to incarceration (Baumer 2013; Lowenkamp, VanNostrand, and Holsinger 2013), and people with higher risk scores are more likely to have their probation revoked when they commit violations (Jannetta et al. 2014).

Lack of Transparency in Decisionmaking

Algorithms are referred to as being a "black box" for several reasons. As described above, with proprietary tools, only the tool developer has access to the underlying data and source code that created the algorithm. Second, the tool might involve more advanced statistical modeling techniques such as machine learning, which can obscure the identification of specific inputs. Also, many of these algorithms adaptively learn from data through complex manipulations, making it difficult to interpret the meaning of those inputs individually. These statistical methods are relatively new and are not yet

widely implemented within criminal justice settings, but present additional reasons for concern for those criminal justice stakeholders interested in understanding what exactly goes into a risk assessment tool.

The lack of knowledge about which factors go into a risk assessment tool, as well as how those factors are weighted, is a valid concern that should be met with a concerted effort from the research and practitioner communities that develop and implement these tools to increase transparency. Tool developers should share which factors are included in actuarial algorithms with the criminal justice agency adopting the tool, and practitioners conducting the assessments should share these factors with the people being assessed. More broadly, agencies should decide how they will track, monitor, and communicate risk information in decisionmaking as they relate to individual outcomes.

Advantages of Risk Assessment

Given these concerns, it is important to recognize that the justice system status quo is often subjective decisionmaking by individual criminal justice actors, which is harder to standardize. For instance, it is much more difficult to determine the factors considered by a judge making pretrial release decisions than to list out the risk factors included in a statistical risk assessment algorithm. Thus, despite limitations with the current development and use of risk assessment instruments, these tools have the potential to be far more transparent and consistent than the status quo of individual subjective decisionmaking. An agency's use of a risk assessment instrument, then, should be considered relative to the practices it is intended to replace or supplement.

Greater Transparency and Accountability in Decision Inputs and Outputs

Subjective decisionmaking or professional judgment is inherently obscure and largely lacks standards for accountability and equity. Risk assessments, however, can work to enhance transparency when the *goals* and *inputs* of the tool are made explicit throughout implementation and everyday use. In addition, as previously described, a judge is unlikely to identify or even know all of the decision inputs used in a particular case, let alone for all of their cases. So, whether the same inputs used in one case will be used the same way in another, such as for a white person compared with a Black person, is unknowable, unlike with a risk instrument that standardizes these factors.

In addition, tool and decision *outputs*—such as the tool's recommendation for release and actual release decisions—can be compared to understand how often officials are relying on tool outputs and the ways in which they depart from them. Furthermore, given the imperatives to impose the least restrictive release setting possible and provide interventions relative to risk level, assessment results provide a standard for evaluating decisions. This ultimately serves to increase accountability through the tracking and review of decisionmaking across legal actors. Risk assessment tools also improve transparency to the extent that data and analysis on the tool's construction, performance, and impact on individual outcomes—such as during local validation or norming, and testing for disparate impact—is shared more widely. Thus, the more that is known regarding a tool and its use (or nonuse), the better

positioned agencies are to make adjustments to improve both the tool and local decisionmaking practices. This is typically not possible with professional judgment alone.

Consistency across Actors

Similarly, these tools can improve consistency across criminal justice actors. Unlike traditional decisionmaking that can be driven by people's backgrounds, education, politics, and careers, risk-based decisionmaking provides a level of uniformity and objectivity to the justice process while lending itself to professional judgment and individualized outcomes. Risk assessments incorporate legally relevant and research-relevant factors that judges and other actors regularly rely on and are required to consider, such as criminal history and offense severity. The difference, however, is that a risk assessment tool applies and weights these factors consistently regardless of the person making the decision.

More Successful Practice and Outcomes

The implementation of risk assessment instruments also supports evidence-based practice. Research shows that actuarial tools are better predictors of future justice system contact, misconduct, and success than clinical judgment alone (Andrews, Bonta, and Wormith 2006), and that risk has important implications for future conduct and program success. Mainly, risk assessment tools used to target resources, such as supervision and treatment, toward people who pose the greatest public safety risk see the largest returns in terms of reduced misconduct and improved reentry outcomes (Lowenkamp, Latessa, and Holsinger 2006). Providing greater guidance based on risk, then, leads to better individual outcomes as well as reduced misconduct, costs, and inefficiencies in the justice system.

Strategies to Assess and Manage Bias

Test for Fairness and Accuracy

A crucial step toward reducing racial disparity in risk assessments is to determine goals around fairness and how to achieve them without losing too much predictive accuracy. Measuring equity and fairness in criminal justice risk assessment tools is difficult because there is a lack of definitional clarity and agreement about the concept of fairness. However, any tests for equity or fairness generally involve examining the performance of an algorithm (i.e., a risk assessment instrument) across racial and ethnic groups. The question then becomes, what aspect of performance should be measured and compared?

There are several indices that can be used to measure performance. Accuracy is one of the most used (and preferred) metrics to evaluate performance because it intuitively summarizes how well the tool correctly identifies both recidivists (or those who engage in misconduct) and nonrecidivists. As summarized in table 1, there are also other metrics that can be used for group comparisons. Recall and precision can provide a more intuitive sense of performance when the outcome predicted is highly skewed (e.g., sexual recidivism). However, many definitions of fairness are not possible to maximize

simultaneously, and are also in tension with maximizing predictive accuracy (see Berk et al. [2018] for a fuller treatment of these issues).

TABLE 1
Possible Measurements of Fairness (Recidivism Prediction Tool)

Measurement	Definition	Equity example
Overall accuracy	Of all predictions, how many were correct as a recidivist and a nonrecidivist?	% correctly classified as recidivist and nonrecidivist is similar across racial/ethnic groups
Precision (predictive parity)	Of all positive predictions (i.e., recidivists), how many turned out to be a recidivist?	% predicted to recidivate that recidivated is similar across racial/ethnic groups
Recall (sensitivity)	Of all the recidivists, how many were correctly predicted as such?	% recidivists that were predicted to be a recidivist is similar across racial/ethnic groups
Specificity	Of all the nonrecidivists, how many were correctly predicted as such?	% predicted not to recidivate that did not recidivate is similar across racial/ethnic groups
Distributional equity	Equitable share of issues and benefits across subgroups	% recidivists or recidivism rates for each risk category are similar across racial/ethnic groups
Error rate balance (Type I and Type II Errors)		
Type I: false positives	Predicted positives that did not recidivate	% incorrectly classified as recidivist is similar across groups
Type II: false negatives	Predicted negatives that did recidivate	% incorrectly classified as nonrecidivist is similar across groups

Depending on the focus of attention, it is also useful to examine prediction errors—the opposite notion of accuracy. As an example, ProPublica evaluated the equity of a commonly used instrument, the COMPAS, by comparing the false positives (those people incorrectly assessed as high risk, meaning they did not reoffend) and false negatives (people incorrectly assessed as low risk, who did reoffend) that appeared across Black and white people. They found that Black people were more likely than their white counterparts to be incorrectly assessed as high risk.[4] This conclusion has been challenged on the basis that differences in recidivism rates between groups will automatically lead to these differences in prediction error rates because of the nature of the statistical construct.[5]

Furthermore, some scholars add another layer to this comparison by examining a tool's performance within risk categories (Dieterich, Mendoza, and Brennan 2016). Risk assessments usually categorize people into a three- or five-point schema of low, low-moderate, moderate, moderate-high, and high risk. Accuracy measures or error rates can be compared between racial/ethnic groups within each risk level. Similarly, the extent of misconduct (e.g., recidivism rates) can be compared between racial/ethnic groups within each risk level.

Across each of these metrics lies the potential to increase fairness, but at the expense of accuracy. It is not possible, for instance, to have no false positives and no false negatives. We can eliminate false positives if no one is predicted to reoffend, but we dramatically increase false negatives. In short, there are trade-offs involved in achieving each of these goals. In addition, eliminating or altering certain risk factors, especially criminal history, could reduce the association between race and risk classifications but is likely to also significantly reduce the predictive power of these tools. For tools that are used to allocate operational and system resources to people based on risk level, such as those used to make referrals to certain programs or treatment, these adjustments can have serious implications for a person's case plan. For example, if people at higher risk levels are no longer classified into those levels, they may no longer be prioritized for treatment programs.

Use Tools to Support Disparity-Reduction Goals

If researchers, policymakers, and practitioners are intentional in setting goals to reduce justice system involvement for people of color through the use of risk assessment instruments, there are ways that these tools and the data they build upon can be modified to achieve these goals. However, using risk assessment instruments as they are designed without carefully thinking about how to ensure equitable performance will not necessarily produce outcomes that promote equity. Therefore, it is essential that criminal justice stakeholders come together to discuss and determine whether reducing justice system involvement for people of color and mitigating racial and ethnic disparities is a priority for their jurisdiction, and if so, what approach to take to accomplish this. It is also important for everyone involved in these efforts to understand that the application of an empirical assessment tool does not divorce system decisionmaking from implicit and explicit biases for all of the reasons already discussed. More deeply investigating the root causes of system inequities remains necessary, whether a validated assessment tool is used or not.

Some ways to recognize the potential for bias and reduce it to the extent possible include improving data quality, carefully selecting the risk factors and outcome measures included, and statistically correcting for inherent system bias. It might be easier to systematically correct for bias by recognizing when and where it exists in a tool than to identify and target human bias that enters subjective decisions across each point of the justice process. Although there are no perfect measures available, one recommendation might be to use conviction data over arrest records to measure criminal history and recidivism. This is because greater legal safeguards are in place at this decision stage and, as has been suggested, convictions are "more legally accurate" (Kleiman, Ostrom, and Cheesman II 2007, 128). To the extent that racial disparities are reduced at conviction and sentencing, these measures of offending will exhibit less bias in a risk instrument compared with the use of arrests. Other more statistically involved modeling processes to identify and correct for bias can be conducted at various stages, including before data processing, during validation, or after scale development. For an example of how equity considerations can be integrated into algorithm decision rules, see Kleinberg and coauthors (2018).

Notably, although these statistical corrections for bias are possible, they are not yet being used in the construction of risk assessment tools. If criminal justice stakeholders are interested in using tools to support disparity reduction, they should partner with researchers and communities most impacted by the justice system to operationalize these goals. By engaging in these types of data and statistical corrections, risk assessment tools not only aid understanding of risk and misconduct among populations, but also serve to recognize and potentially mitigate racial and ethnic disparities at different criminal justice decision stages.

Use Tools to Support Parsimony in Application of Control

Risk assessment can also address a paradoxical issue in the justice system whereby justice involvement is heightened through new initiatives or policies aimed at reducing recidivism. Well-intentioned efforts, such as drug courts or diversion programs, can lead to net-widening when they are not targeted toward the people who benefit the most from them. In other words, these activities bring greater shares of people—often people at the lowest risk to begin with—into the justice system and in a manner that is very disruptive to their lives and social productivity. Risk assessment, as previously described, can serve to limit criminal justice interventions. Likewise, they have been employed as part of broader strategies to reduce rates of incarceration by reserving this most restrictive form of punishment for people who pose the greatest public safety risk.

Although it is possible that this kind of targeting can exacerbate disparity if it leads to greater control of people of color, risk assessment itself does not require or inevitably lead to severe sanctioning, even for people assessed at the highest risk. Rather, local criminal justice agencies can decide to use risk assessment information to determine the best use of alternatives or where to provide greater supports and resources (see Jannetta [2017] on structured decisionmaking). Moreover, judicial actors maintain some independence and discretion in using risk information.

Measure System Performance, Decisions, and Outcomes

In addition to designing tools to support disparity reduction goals and testing that they perform fairly and equitably in terms of predictive validity, it is essential that criminal justice agencies collect and analyze performance metrics on actual outcomes by racial and ethnic groups. That is, how are different racial and ethnic groups assessed to be at different risk levels, and how is this risk assessment information translated into criminal justice decisions and involvement? Even if a risk assessment tool performs at the same level of predictive validity across race, but low-risk people of color are more likely than their white counterparts to receive harsher sentences, fewer opportunities for diversion, or other stricter liberty restrictions, then the tool does not accomplish racial equity goals. This additionally allows for greater transparency when clear performance metrics can be communicated. Therefore, it is important to track actual decision outcomes in conjunction with assessed risk levels in order to measure performance across racial and ethnic groups to ensure professional discretion at various decisionmaking stages does not undermine disparity reduction efforts.

Summary

Criminal justice stakeholders must seriously consider these concerns about racial disparity, as well as the empirical evidence and policy implications surrounding the issue, to determine the future direction of risk assessment practices. The following are key takeaways from this exploration of issues and perspectives on racial disparity in risk assessment:

- Making improvements in risk assessment construction and practice first requires thinking about these issues relative to the status quo alternative. Much of the discussion of the value of risk-based justice decisionmaking has been driven by its potential to **improve upon the traditional practice of subjective decisionmaking** by individual actors.
- Using risk assessment instruments has the potential to **boost transparency, accountability, and consistency** of decision outcomes by formalizing and standardizing decisionmaking processes. Though risk assessment is not a panacea to the deeper issues inherent in the criminal justice system, it is one tool that can be part of the solution.
- We should hold risk assessments and their users to **higher standards of fairness and transparency**. With increasing awareness of the limitations and implications of this practice, criminal justice stakeholders can work together to ensure that risk assessments and the use of risk information are made fairer and more objective.
- If we understand how data used to construct and validate these tools is biased and limited, as well as how these algorithms might produce racial disparities, we can consider **data and statistical corrections**. Although the degree to which data and statistical corrections can correct for the impacts of structural racism is limited, such corrections are a critical step to mitigate bias and disparity as much as possible.

Opportunities to improve the experiences and outcomes of people involved in the criminal justice system will be missed if we immediately dismiss risk assessment because of its current limitations. Rather, practitioners, researchers, policymakers, and the public should remain open to the idea that these instruments can be improved and serve their intended purpose of increasing fairness in decisionmaking. It is also important to remember that risk assessment instruments are tools and, as with any tool, what an agency, system, or community is trying to do matters greatly in determining its value. If there is an adamant effort for processes to address and reduce disparity, risk assessment tools can help achieve that.

Ultimately, carefully constructed and properly used risk assessment instruments that account for fairness can help limit racial bias in criminal justice decisionmaking. In addition, researchers, practitioners, policymakers, and community members should engage in greater dialogue and collaboration to determine a clearer vision of the goals and standards of risk assessment. If reducing racial disparity or decreasing liberty-restrictive outcomes are explicit goals of the field, we are better positioned to create solutions in research, policy, and practice to achieve them.

Notes

[1] "Crime in the US 2015," Federal Bureau of Investigation Uniform Crime Reporting Program, accessed March 5, 2021.

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February 2, 2022

Via Electronic Delivery

The Honorable Jerrold Nadler
Chairman, House Judiciary Committee
2132 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member, House Judiciary Committee
2056 Rayburn House Office Building
Washington, DC, 20515-3504

Re: Inadequate Bureau of Prisons Releases

Dear Members of Congress:

I am writing to provide you a synopsis on what Federal Defenders have long suspected: the Bureau of Prisons systematically fails to provide constitutionally and statutorily mandated assistance to persons on their release and transfer to the community—dramatically increasing the chances of harm to both our clients and the community. Below are a few thoughts.

First, the law. By statute, Congress mandates that BOP provide three things to every person on release: the agency "***shall*** furnish the prisoner" with (1) "suitable clothing"; (2) "money," up to $500, "consistent with the needs of the offender and the public interest," (3) and "transportation" to the point of release (i.e., a halfway house). 18 U.S.C. § 3624(d) (emphasis added). That mandate reflects the government's constitutional responsibilities. The Supreme Court has long held that "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994) (citing *Hudson v. Palmer*, 468 U. S. 517, 526–27 (1984)). These requirements appear to be going often unmet, but tracking the problem is difficult—people typically do not notify the Federal Public Defenders when the Bureau of Prisons neglects proper transitions to halfway houses and home confinement, and the problem is entirely hidden from the courts' view.

Second, some examples. This problem first came to my attention with a client named Nathan Mountain Chief.[1] On May 3, 2019, a Friday, I was working in the Federal Defenders Office just past closing, around 5:30 p.m., when I received a call from an investigator who had found Mr. Mountain Chief, a Native American man with severe addiction issues, in our lobby. As we soon learned, Mr. Mountain Chief had been released that day by the Bureau of Prisons and sent by bus from western Oregon to eastern Washington—a roughly 10-hour trip, set to arrive at 4:45

[1] *See U.S. v. Mountain Chief*, No. 18-cr-178-RMP, ECF No. 82 at 3 (E.D. Wash. Nov. 5, 2019).

p.m. Mr. Mountain Chief had no money, no food, no phone, and no housing. He was wearing a t-shirt. It was 40 degrees that evening and raining. The sole item in his possession was a scrap of paper with an address on it. That address was for our federal courthouse—a courthouse that had closed for the weekend before Mr. Mountain Chief's bus even arrived at 5:15 p.m. With nowhere to go, we simply gave Mr. Mountain Chief all the money we could find and helped him to a homeless shelter for the weekend. Leaving a man with serious risks of relapse in the cold, homeless, and stressed, endangers both him and the community.

Another of my clients endured worse in November. Robert Lippert,[2] an 80-year old with documented heart problems, was released from FDC SeaTac in Seattle on November 15th. On the morning of his release, Mr. Lippert was pulled from his cell before he was able to eat breakfast. Although it was mid-November and Mr. Lippert was being sent to the Inland Northwest, he was given no coat, just a sweatshirt and sweatpants. BOP gave him shower shoes. Mr. Lippert was given neither food nor money for food. Nothing. Instead, BOP gave Mr. Lippert $3.00 for the SeaTac light rail and $2.00 for a bus ticket once he arrived in Spokane, along with a Greyhound bus ticket. Mr. Lippert walked to the light rail station, took the train to downtown Seattle, walked to the Greyhound bus station and caught his bus to Spokane. Midway through the day, still having eaten nothing, the bus stopped somewhere in central Washington. Mr. Lippert "felt weak" with low blood sugar, not having eaten since the day before, so he bought a carton of milk—spending his $2.00. When he arrived in Spokane, somewhere around 4:30 p.m., there was a windstorm, temperatures were forecast to hit the 30s that evening (they in fact hit 36 degrees that night[3]), and Mr. Lippert had no way to get to the RRC. So, Mr. Lippert did precisely what he should have done: he called the halfway house. The halfway house—BOP's contracted agent—refused to assist. At this point, Mr. Lippert faced freezing to death on the streets of Spokane. He was saved only by the kindness of the same bus-station manager, who allowed Mr. Lippert to sleep in the Greyhound terminal. In the morning, he again called the halfway house, which again refused to assist, and then informed Mr. Lippert that he had "absconded." Deciding that Mr. Lippert (who had twice called for assistance) had absconded, BOP had him rearrested and jailed. This, again, reflects a recurring problem: BOP has no emergency assistance, no one to call, when a released person runs into trouble while in transition. And transition problems are inevitable—BOP releases people with intellectual deficiencies and mental illness, the elderly, people gravely ill, lacking money, phones, family support, and facing lengthy travel across the country.

Other colleagues have had similar experiences. Another Federal Defender told me about her client, Mr. Kelley, a 61-year old who was dying of prostate cancer, suffering mental disabilities, and reliant on a walker.[4] He was granted compassionate release and the Bureau of Prisons put him on a plane to San Francisco with no money. He begged a few dollars for a bus ticket downtown where he roamed around looking for a hotel that BOP had apparently rented. Unable to find it, he spent the night in a homeless shelter and was found the following day by the Federal Defenders, who connected him with his family and Probation.

One of the recurring problems is when the Bureau of Prisons leaves a defendant in a county facility under Marshals' custody until their release and makes no provisions for their release at all. For example, another colleague in my office informed me about her client who was released from federal custody on October 14, 2021. He was in his mid-60s, with severe mental and physical health issues, and housed at the Spokane County jail while finishing his sentence. His

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[2] *U.S. v. Lippert*, No. 05-cr-118-BLW-1, ECF No. 145 (D. Id. 2022).

[3] *See* Weather Underground, *Spokane, Washington, Weather History* (Nov. 15, 2021) (available at: https://bit.ly/3yntygS).

[4] *U.S. v. Kelley*, No. 16-38 (N.D. Cal.).

attorney informed me that the man was released with no housing, food, or money. They received a voicemail from him stating he had checked into a hospital. He died a week or so later of COVID-19.

With these releases, the Bureau of Prisons appears to be repeatedly violating state endangerment laws. *See, e.g.*, Wash. Rev. Code § 9A.36.050(1) (a person is guilty of reckless endangerment when their conduct "creates a substantial risk of death or serious physical injury to another person").

There are multiple obvious concerns. First, nobody is tracking BOP releases or ensuring statutory compliance—the clients typically never report release plans to the Federal Defenders Offices. Although Congress authorized BOP to provide up to $500 to releases, consistent with their needs, the agency appears to provide nothing or amounts so meager that they cannot be fairly described as meeting the person's needs. Essentially, what we know about this problem comes solely from the random stories that Federal Defenders collect.

Second, there is virtually no method to report these problems to courts. In Mr. Lippert's case, I filed an immediate sentence-reduction motion, but it was moot by the time the briefing was ended, and the court declined to refer the issue to the Office of Inspector General (despite my request).

Third, these problems reflect the current state of our criminal system: it is, above all else, woefully inefficient and ineffective. These people have been incarcerated for years and are being released in a fashion seemingly destined to ensure addiction relapses, decompensating mental health, and ultimately, danger to themselves and others around them. More can be done to ensure safe transitions for our clients.

Sincerely,

Colin G. Prince
Chief Appellate Attorney

CNN- Article

OPINION: THIS IS AN UNMISTAKABLE WIN FOR INCARCERATED PEOPLE

Michael Cohen, E. Danya Perry and Joshua Perry write that the Federal Bureau of Prisons announced that it will finally implement a key justice reform promise made in 2018's First Step Act, but one which the prior administration had been far too slow to carry out. Michael Cohen, the former personal attorney to former President Donald J. Trump, is a podcaster and vocal advocate for prison reform. E. Danya Perry, a former federal and state prosecutor, is a Trustee of the Vera Institute of Justice and a founding partner of Perry Guha LLP. Joshua Perry was General Counsel at the New Orleans Public Defenders and Special Counsel for Civil Rights to the Connecticut Attorney General. He is Of Counsel with Perry Guha, LLP. The views expressed in this commentary are their own.

(CNN) Last week, the Federal Bureau of Prisons (BOP) announced that it will—finally—keep a key justice reform promise made in 2018's First Step Act. Thursday's release of a new rule interpreting the act opened the door to community reintegration and family reunification for up to half of all the people in federal custody, according to data from the Department of Justice.

For a long time, under Donald Trump's administration, the BOP seemed to slow-walk and even undercut the First Step Act's reforms, resulting in a patchy and unjust application. We know this personally. One of us (Danya Perry, along with the firm she co-founded, Perry Guha LLP) is a lawyer who took the BOP to court over its refusal to quickly and properly implement the First Step Act—and won. Another (Michael Cohen) was a federal inmate who took the BOP on by himself, making the same arguments that prevailed in Danya's case—and lost.

The First Step Act passed with rare bipartisan supermajorities and was signed into law by then-President Donald Trump on December 21, 2018. It enacted a suite of modest but meaningful reforms to the federal criminal legal system, where more than 157,000 people are in post-conviction custody. The Act's reforms ranged from retroactively lowering racially discriminatory sentences for certain qualifying crack cocaine convictions to expanding a "safety valve" that allows some people convicted of drug offenses to be sentenced below the mandatory minimum.

And, importantly, the act set up the "Time Credit" program, allowing people in custody who have been convicted of nonviolent offenses to earn up to 15 days of credit for every 30 days of participation in recidivism reduction programs or "productive activities" like prison jobs. 11

Time credits don't shorten your sentence, but they can make you eligible for earlier transfer to a halfway house, home confinement or supervised release. That's a big deal. BOP data shows that about half of all people in federal custody—tens of thousands of people—are eligible to earn those credits and get an early start on reintegration and family reunification. One problem was that the act never defined how much programming a person in custody must complete in order to earn a "day" of participation. And it wasn't 100% clear about when the Time Credit program actually was to begin.

The act left those things to the BOP—part of the Department of Justice—to work out. And the BOP's first draft of a rule—known in administrative law lingo as a "proposed rule"—released on November 25, 2020 in the waning days of the Trump administration, seemed to set people up to fail. The one issue that could bring Democrats and Republicans together.

The proposed rule required people in custody to complete eight full hours of programming in a day in order to earn a day's worth of credit—even though, as the act's bipartisan authors pointed out in a public letter, "BOP programs do not run for eight hours per day." And it refused to give credit for programming completed before January 15, 2022—even though untold numbers of people in custody worked countless hours in response to the act's promise.

The proposed rule wasn't law, of course. Rules are proposed before they're finalized, to give affected people a chance to comment and push back. And we did push back. In Goodman v. Ortiz, Perry Guha represented a client, who had earned enough Time Credit for immediate release, but whom the BOP refused to transfer to a halfway house or home confinement. A federal judge in the district of New Jersey granted the petition and ordered the BOP to follow the act and give the petitioner the credit that he'd earned, which resulted in his release to a halfway house. Michael, meanwhile, was held in a different jurisdiction. And when he applied for relief from a different federal court, he didn't get it—despite having qualified in the same way as Goodman. Those are the kinds of unequal, arbitrary results you get when the law isn't clear or evenly applied.

But that won't happen going forward. The Biden administration final rule, released last week, fixed both of those problems with the Trump administration's first draft. And now, as the DOJ announced, thousands of people in custody will be eligible for release—including some who will be released "immediately."

Goodman v. Ortiz helped to establish that Congress, in passing the act, intended the BOP to move quickly to give out Time Credits. And the BOP admirably, listened to the court's ruling, citing Goodman in explaining why its new rule would grant credits for programming completed from December 18, 2018, onwards.

That's only fair: When the First Step Act passed, a lot of people in custody began working hard for Time Credits. They should be given what they had been promised and what they had earned. We can't ask people to pay a debt to society while society refuses to make good on its promises to them.

The BOP also listened to the voices of directly-impacted people and to the act's bipartisan authors in allowing up to 15 days of credit for every 30 days period of program participation—no matter how many hours per day the program runs. Again, that's only fair. People in custody don't decide how many hours of programming the BOP's offers and they shouldn't be penalized for the BOP's programming decisions.

Let's be clear: There is still a lot of work to be done. There are strong indications that the BOP is not offering enough high-quality programs to help support people in prison, particularly during the pandemic.

While unquestionably impactful, the act was indeed only a "first step" towards broader changes that are desperately needed to reduce our cruel and counterproductive overreliance on incarceration. And even this welcome development does not erase the needless suffering of too many people, while the BOP pushed back against inmates seeking time credit and initially proposed a rule that cut against Congress' intent.

But, after years of frustration, this is an unmistakable win for incarcerated people and their families, for advocates and for a country that is still struggling to be rehabilitated from its chronic addiction to incarceration.

Ms. JACKSON LEE. So again, we are dealing with incarcerated persons, but we are dealing with human beings and their families. It is our responsibility and task as a Committee and to be vigilant and diligent. I want to see complete reform of our Federal prison system so that it meets society's needs of incarcerating those who have certainly violated the law inviolate, but also has a strong commitment to human dignity and response, and as well rehabilitation. I don't think they are mutually exclusive.

Thank you, Members, for contributing to today's hearing. This concludes today's hearing.

Thank you again to our distinguished Witnesses for attending.

Without objection, all Members have five legislative days to submit additional written questions for the Witnesses or additional materials for the record.

This hearing is adjourned. Have a good day. Thank you.

[Whereupon, at 12:56 p.m., the Subcommittee was adjourned.]

APPENDIX

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January 21, 2022

The Honorable Jerrold Nadler
Chairman
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2138 Rayburn House Office Building
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The Honorable Jim Jordan
Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Sheila Jackson Lee
Chairwoman
Subcommittee on Crime, Terrorism,
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House Judiciary Committee
2138 Rayburn House Office Building
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The Honorable Andy Biggs
Ranking Member
Subcommittee on Crime, Terrorism,
And Homeland Security
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler, Ranking Member Jordan, Chairwoman Jackson Lee, and Ranking Member Biggs:

Walmart appreciates the opportunity to provide the Committee with information about the Company's "fair chance" hiring practices and "second chance" hiring initiatives.

Walmart provides jobs for nearly 1.6 million people in the U.S. and more than 2.2 million worldwide, offering career opportunities, low barriers to entry, competitive wages, benefits, on-the-job coaching and training, and debt-free education.

Walmart seeks to hire the most qualified candidates and our policies require that all background checks be performed in accordance with applicable federal, state, and local laws. As a responsible, family-friendly retailer, Walmart also seeks to maintain a safe shopping and work environment for our associates, customers, and members. To that end, Walmart, like virtually all large employers, screens candidates before onboarding them by conducting job interviews and routine pre-employment background checks and drug tests in certain safety sensitive positions.

First, our hiring strategy focuses on creating access to employment, providing job stability, and building mobility for professional advancement. We maintain low barriers of entry to employment at Walmart and our "fair chance" hiring practices enable us to broaden our talent pool and provide more people with the opportunity to secure gainful employment. Notably, many candidates pass the background check, including the criminal background check, and are moved forward to scheduling orientation to begin employment (assuming they also satisfy the other conditions of employment).

Second, Walmart affords an individualized process to all candidates who have a prior criminal record. Summarizing:

- Approximately ten years ago, Walmart "banned the box" by removing from its job application any questions about a candidate's prior criminal record. Walmart also trains interviewers in procedures that help eliminate bias in the hiring process and, nationwide, defers the background check until after extending conditional job offers to candidates.

- Once the candidate accepts the conditional job offer, the candidate is asked to authorize a background check in accordance with federal and state law, including the Fair Credit Reporting Act ("FCRA"). The process is designed to be consensual and transparent.

- Only trained and designated personnel at Walmart's corporate headquarters receive and review the background reports furnished by the background report providers (known as "consumer reporting agencies"); the background reports are not available to personnel or the hiring managers in the field. They are maintained strictly in confidence.

- In evaluating candidates, Walmart also disregards certain criminal records, such as arrests and older conviction records. Furthermore, before any final hiring decision is made, Walmart provides candidates who have a criminal record (and may otherwise be ineligible for employment) with legal notices and a meaningful opportunity to submit additional information to put the record in context. This "circumstance review" process offers candidates the ability to provide Walmart with information about the facts and circumstances related to a prior conviction or charges, including, but not limited to, evidence of rehabilitation, relevant training, education, or work experience. The candidate is provided a secure link to the online circumstance review assessment portal to submit this information, including the ability to attach documents. This information is held securely in the supplier's website and is

accessible only by members of the Walmart Insider Trust and Associate Vetting support teams.

- Additionally, even if Walmart determines that a candidate is not eligible for hire at the time of the candidate's application, the candidate can re-apply for employment after 60 days. And when a candidate re-applies, the hiring process starts over anew; the prior background check does not bar employment (which is important, because Walmart considers, among other things, the time that has passed since conviction, and between job applications, a prior conviction may age out of consideration).

Third, Walmart provides educational and training opportunities for everyone in our workforce, including formerly incarcerated associates. We are taking a three-tiered approach to training and upskilling our associates through **Teaming,** the **Walmart Academies** and **Live Better U**.

- **Teaming:** The moment an associate comes to work in our stores, they join a cross-functional team. This structure, called Teaming, was built on our belief in associates. Our associates want to be challenged and engaged, not just asked to complete daily checklists of tasks. Teaming acknowledges this, giving our people ownership of their work. Every day, they have the autonomy to treat their area like its own store within a store, making decisions that move our business forward.

- **Walmart Training Academies:** In 2016, Walmart launched the Walmart Academy program to meet the changing needs of customers and to provide job training. We now have more than 200 in-house training academies around the U.S. that teach retail and management fundamentals and focus on leadership skills. To date, associates have completed more than 2 million Academy trainings.

- **Live Better U College Offering:** Walmart has built one of the largest employer-based educational benefit programs in the U.S. – Live Better U (LBU). Through LBU, associates can take advantage of our debt-free program to earn associate's and bachelor's degrees in business, supply chain management, technology, health care and more. Additionally, the education benefit includes in-demand skilled trades and career diploma programs. Walmart pays 100% of college tuition and books for eligible part- and full-time associates. From the launch of LBU in 2018 to the end of January 2021, more than 44,000 Walmart associates have enrolled in the program. More than 6,000 students have completed LBU programs, including over 320 graduates who have earned an associate's or bachelor's degree in an in-demand field. At the end of 2020, our associates had completed 290,000 college credits worth more than an estimated $123 million.

- **High School Diploma/Equivalency Education:** Walmart also offers the opportunity for associates and their family members to earn a high school diploma or equivalency education at no cost.

Fourth, Walmart recently launched three "second chance" hiring pilots to learn whether place-based partnerships with re-entry service providers can boost employment outcomes for formerly incarcerated individuals and become a new talent pipeline for Walmart. The goals for these pilots are to 1) create additional pathways to employment for second chance candidates at Walmart; 2) strengthen place-based nonprofit systems that support re-entrants; and 3) build Walmart capabilities to ensure second chance associates are supported.

Fifth, Walmart is a founding member of the Second Chance Business Coalition (SCBC), a group of employers and national organizations committed to expanding hiring and advancement practices for people with criminal records within their companies. SCBC promotes the benefits of second chance employment and provides major employers with a set of tools, relationships, and expertise to allow them to successfully hire and provide career advancement and greater economic opportunities to people with criminal records.

Sixth, as part of Walmart's larger efforts to address the drivers of systemic racism in society and accelerate change, Walmart and the Walmart Foundation committed $100 million over five years through Walmart.org's Center for Racial Equity. The center seeks to complement and extend the societal impact of Walmart business initiatives to advance racial equity within four focus areas: finance, health, education, and criminal justice. Specific to criminal justice, the center is complementing Walmart business initiatives related to second-chance hiring pilots by focusing on criminal justice prevention initiatives, with the goal of helping to address the factors contributing to Black Americans being disproportionately more likely to be incarcerated. This includes an initial investment of $3.3 million to start four national networks focused on prevention research, violence prevention through local government agencies, youth with incarcerated parents, and people's commissions on criminal justice.

In sum, we believe our "fair chance" hiring practices and "second chance" hiring initiatives provide candidates the ability to create a career path, even for those with previous criminal convictions. We will continue to assess and enhance our program to offer appropriate opportunities—while keeping the safety and security of our customers and associates the top priority.

We welcome the opportunity to discuss these practices and initiatives in further detail. Please reach out to Ryan Burns (ryan.burns@walmart.com) if you have any questions.

Walmart

Sincerely,

Bruce C. Harris
Vice President, Federal Government Affairs
Walmart

CC: Members, U.S. House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security

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