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Federal Prisoners and COVID-19: Background and Authorities to Grant Release

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SUMMARY

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Federal Prisoners and COVID-19: Background and Authorities to Grant Release

There is concern that coronavirus disease 2019 (COVID-19) could quickly spread among federal prisoners and prison staff because of the nature of the prison environment. Prisons are places where hundreds of prisoners and staff are living and working in close proximity to each other and where they are forced to have regular contact. Prisons are generally not conducive to social distancing. Also, prison infirmaries typically do not have the resources available to most hospitals, such as isolation beds, that would help prevent the spread of the disease. There are also concerns that if prison staff were hard hit by COVID-19, a significant number of staff would require quarantine; they would be unavailable to perform their duties, including providing care to sick prisoners; and the disease could spread.

On March 13, 2020, the Bureau of Prisons (BOP) released a COVID-19 action plan. The action plan largely focuses on restricting access to federal prisons and limiting the movement of prisoners between prisons.

On March 18, 2020, the American Civil Liberties Union (ACLU) sent a letter to the Department of Justice (DOJ) and its BOP seeking the release of prisoners in the custody of BOP and the U.S. Marshals Service (USMS) who might be at risk for serious illness because of COVID-19, and a reduction in the intake of new prisoners to avoid overcrowding. In addition, multiple Members of Congress have also urged DOJ and BOP to take steps "to reduce the incarcerated population and guard against potential exposure to coronavirus," and legislation has been introduced that would require the release of some federal prisoners during a national emergency relating to a communicable disease.

BOP updated its action plan on March 19, 2020, to clarify that while prisoner movement is limited under the plan, BOP will still move prisoners as needed to properly manage the prison population and to outline new conditions that must be met if a prisoner is transferred.

On March 31, 2020, BOP announced that effective April 1, 2020, all prisoners will be placed on a 14-day lockdown in their assigned cells as a measure to prevent the spread of COVID-19. Prisoners will be allowed to leave their cells during this period for certain reasons, such as attending programming or to shower and use the phone.

On April 14, 2020, BOP announced that its action plan, which was initially set to expire on April 12, 2020, would be extended until May 18, 2020.

Regarding the release of federal criminal defendants in detention pending trial, 18 U.S.C. Section 3142 allows for federal courts to reopen pretrial detention hearings based on new information or permit temporary release of pretrial detainees for "compelling" reasons. With respect to the release of federal prisoners who are currently serving their court-imposed sentences, 18 U.S.C. Section 3582(c)(1)(A) permits a federal court to reduce a prisoner's sentence and impose a term of probation or supervised release if the court finds that "extraordinary and compelling reasons warrant such a reduction," or the prisoner is at least 70 years of age, the prisoner has served at least 30 years of his or her sentence, and BOP has determined that the prisoner is not a danger to the safety of any other person or the community. Under 34 U.S.C. Section 60541(g), BOP is authorized to conduct a program whereby elderly and terminally ill prisoners who meet certain statutory requirements can be placed on home confinement. Under 18 U.S.C. Section 3624(c), BOP is authorized to place prisoners in a Residential Reentry Center (i.e., a halfway house) and/or on home confinement at the end of their sentences. The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act; P.L. 116-136) permits the BOP Director to extend the maximum amount of time for which a prisoner may be placed on home confinement under Section 3624(c)(2) under certain circumstances. Under Article II, Section 2 of the U.S. Constitution, the President has broad authority to grant clemency for federal offenses, which can include commuting a prisoner's sentence to time served.

The Attorney General has issued three memoranda outlining how DOJ will utilize the legal authorities available to it to respond to the COVID-19 pandemic. Two of the memoranda are to the BOP Director, and they direct BOP to increase the number of prisoners placed on home confinement and outline factors for BOP to consider when making decisions about which prisoners should be released from federal prison. The other memorandum is for all components of DOJ, including all United States Attorneys, and it provides a directive on how prosecutors should make decisions about the use of pretrial detention for federal defendants in light of possible exposure to COVID-19.

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Introduction

On March 18, 2020, the American Civil Liberties Union (ACLU) sent a letter to Attorney General William Barr and Bureau of Prisons (BOP) Director Michael Carvajal asking them to release federal prisoners who might be at risk of serious illness due to coronavirus disease 2019 (COVID-19) infection and to reduce the intake of new prisoners to reduce overcrowding.[1] The ACLU called on BOP to utilize authorities granted to it, such as compassionate release and home confinement for elderly offenders, to reduce the number of at-risk prisoners in the federal prison system. The ACLU also asked the Department of Justice (DOJ) to direct the U.S. Marshals Service (USMS) to release from custody any individuals who are at risk of serious illness related to COVID-19, such as those who are elderly and/or have chronic health conditions. Multiple Members of Congress have additionally urged DOJ and its BOP to take steps "to reduce the incarcerated population and guard against potential exposure to coronavirus,"[2] and legislation has been introduced that would require the release of some prisoners during a national emergency relating to a communicable disease.[3]

Use of the Term *Prisoner*

Traditionally, *prisoner* refers to someone who has been convicted of a crime, sentenced to a period of incarceration, and is incarcerated in a prison. However, USMS refers to people in their custody as *prisoners* even though these individuals have not been convicted of an offense.[4] Throughout this report, *prisoner* refers to anyone who is incarcerated under the authority of DOJ, both those who are in the custody of USMS pending the resolution of their cases and individuals who are serving a period of incarceration in a BOP facility.

BOP data indicate that COVID-19 has become widespread in the federal prison system. As of April 22, 2020, BOP reported that 566 federal prisoners and 342 BOP staff members in 47 prisons and 16 Residential Reentry Centers had tested positive for COVID-19 and 24 prisoners have died from the disease (no BOP staff have died).[5] Prior to these positive tests, BOP released a COVID-19 action plan.[6] The action plan, discussed below, largely focuses on restricting access to federal prisons and limiting the movement of prisoners. In addition, the Attorney General has issued three

[1] Letter from American Civil Liberties Union to Attorney General William Barr and BOP Director Michael Carvajal, March 18, 2020, https://www.aclu.org/letter/aclu-letter-doj-and-bop-coronavirus-and-criminal-justice-system.

[2] Letter from Sen. Kamala D. Harris to BOP Director Michael Carvajal, March 19, 2020, https://www.harris.senate.gov/imo/media/doc/Harris%20Letter%20to%20Carvajal%20(3.19).pdf; *see also* Letter from Sens. Richard J. Durbin & Charles E. Grassley, et al., to Attorney General William Barr & BOP Director Michael Carvajal, March 23, 2020, https://www.durbin.senate.gov/imo/media/doc/Letter.%20to%20DOJ%20and%20BOP%20on%20COVID-19%20and%20FSA%20provisions%20-%20final%20bipartisan%20text%20with%20signature%20blocks.pdf (urging BOP and DOJ "to take necessary steps to protect" federal prisoners under existing authorities); Letter from Reps. Jerrold Nadler & Karen Bass to Attorney General William Barr, March 19, 2020, https://judiciary.house.gov/uploadedfiles/2020-03-19_letter_to_ag_barr_re_covid19.pdf ("[W]e urge you to put in place measures to ensure that both the flow of prisoners into federal facilities is slowed significantly and that prisoners who can and should be released are released forthwith."). The Coronavirus Aid, Relief, and Economic Security Act (CARES Act, P.L. 116-136) authorizes BOP to place a prisoner on home confinement for a longer period of time when the Attorney General determines that emergency conditions will materially affect the functioning of BOP.

[3] S. 3579 and H.R. 6400, 116th Cong. (2020).

[4] See, for example, U.S. Department of Justice, U.S. Marshals Service, Prisoner Operations 2020, Fact Sheet, https://www.usmarshals.gov/duties/factsheets/prisoner_ops.pdf (hereinafter, "USMS prisoner operations fact sheet").

[5] U.S. Department of Justice, Bureau of Prisons, COVID-19 Resources, https://www.bop.gov/coronavirus/. BOP regularly updates this webpage with information on the number of prisoners and staff that have tested positive for COVID-19.

[6] U.S. Department of Justice, Bureau of Prisons, Federal Bureau of Prisons COVID-19 Action Plan, https://www.bop.gov/resources/news/20200313_covid-19.jsp.

memoranda outlining how DOJ will use the legal authorities available to address the COVID-19 pandemic. Two of the memoranda direct BOP to use available authorities to place more prisoners on home confinement and the other memorandum provides directives for prosecutors when deciding whether to seek pretrial detention for federal defendants.

This report provides information on DOJ's response to the threat of COVID-19 as it pertains to federal prisons and the authorities that may permit the release of some federal prisoners because of the pandemic. The report starts with a brief overview of why the prison environment is conducive to the spread of COVID-19 and the federal prisoners who might be at risk of serious complications if they contract the virus. Next, the report provides an overview of BOP's COVID-19 action plan. The report then turns to a discussion of current authorities that could allow for some federal prisoners to be released and directives from the Attorney General on how DOJ is to use those authorities to respond to the COVID-19 pandemic. The report concludes with a review of legislation introduced in the House and the Senate that would alter the operation of some of those authorities.

Background on People Confined in the Federal Criminal Justice System

USMS is responsible for initially confining people who have been arrested and charged for a federal offense and are not granted pre-trial release. USMS does not operate any of its own jails. Rather, prisoners in USMS custody are housed in a combination of BOP-operated facilities, as well as state, local, and private facilities. While most facilities operated by BOP are prisons that hold people who have been convicted of federal offenses and sentenced to a period of incarceration, BOP operates a series of facilities that largely function in a manner similar to local jails (i.e., they hold people who have not been convicted and are awaiting the resolution of their case or people who have been convicted but are awaiting transfer to a prison where they will serve their sentence).[7] These facilities—referred to as Metropolitan Detention Centers, Metropolitan Correctional Centers, or Federal Detention Centers—are generally located in metropolitan areas and can hold prisoners of any security designation (i.e., high, medium, low, or minimum). The majority of prisoners in USMS custody are housed in state and local facilities; data from USMS indicate that in FY2019, approximately 16% of USMS prisoners were housed in BOP-operated facilities.[8]

USMS says it "relies on state and local jails as well as Bureau of Prisons detention facilities to provide medical care inside the facilities."[9] Therefore, defendants in the custody of USMS would be subject to any plan that the facility they are housed in implements to prevent the spread of COVID-19. For example, a USMS prisoner held in BOP-operated facility would be subject to BOP's COVID-19 action plan, outlined below, while a prisoner held in a local jail would be subject to any steps that facility takes to prevent the spread of COVID-19 in its facility.

If a defendant is convicted of or pleads guilty to a federal offense, USMS is to turn the prisoner over to the custody of BOP, which is responsible for confining the prisoner until completion of

[7] Local jails can sometimes hold people who have been convicted of an offense, typically misdemeanors, and have been sentenced to less than a year of incarceration.

[8] USMS prisoner operations fact sheet.

[9] U.S. Department of Justice, U.S. Marshals Service, "Defendants in Custody and Prisoner Management," https://www.usmarshals.gov/prisoner/index.html.

his or her sentence. BOP is to assign prisoners to one of its facilities based on a series of factors, including the level of security and supervision the prisoner requires, the level of security and staff supervision the facility is able to provide, and the prisoner's program needs (i.e., sex offender, substance abuse treatment, educational/vocational training, individual counseling, group counseling, or medical/mental health treatment).[10]

COVID-19 and the Prison Environment

According to the Vera Institute of Justice,[11] "it is not a matter of if, but when, coronavirus shows up in courts, jails, detention centers, prisons, and other places where the work of the criminal and immigration systems occur."[12] While prisons may appear to be closed environments, because prisoners cannot leave and return to the facility on their own volition, there are opportunities for the disease to be introduced into any prison.[13] COVID-19 could be introduced by the prison's staff, who could be exposed when they are not at the prison and subsequently introduce it to the facility when they come to work.[14] COVID-19 could also be transmitted to a prisoner though face-to-face visits with family, friends, or attorneys. Also, while prisoners cannot freely leave the facility, they do travel outside it for things such as court appearances or medical appointments.[15]

The introduction of COVID-19 into a prison raises the concern that the nature of the prison environment can facilitate its spread. Prisons typically hold hundreds of prisoners who live in close proximity to one another. In some facilities, prisoners might live in dormitory-style housing where many share the same space.[16] Even if prisoners are housed in individual cells, they typically share the same ventilation system with prisoners in other cells. There are also concerns about hygiene. Prisoners might not have regular access to soap and water to wash their hands, and hand sanitizer can be considered contraband because it contains alcohol.[17] These concerns are especially acute for prison systems that are operating over capacity.[18]

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[10] U.S. Department of Justice, Bureau of Prisons, *Inmate Security Designation and Custody Classification*, Program Statement 5100.08, p. 1, http://www.bop.gov/policy/progstat/5100_008.pdf.

[11] The Vera Institute of Justice is a national research and policy organization in the United States that describes its mission as "to tackle the most pressing injustices of our day – from the causes and consequences of mass incarceration, racial disparities, and the loss of public trust in law enforcement, to the unmet needs of the vulnerable, the marginalized, and those harmed by crime and violence." Vera Institute of Justice, "About Us," https://www.vera.org/about.

[12] Vera Institute of Justice, "Guidance for Preventive and Responsive Measures to Coronavirus for Jails, Prisons, Immigration Detention and Youth Facilities," March 18, 2020, p. 1, https://www.vera.org/downloads/publications/coronavirus-guidance-jails-prisons-immigration-youth.pdf.

[13] Maria Morris, "Are Our Prisons and Jails Ready for COVID-19?", American Civil Liberties Union, March 6, 2020, https://www.aclu.org/news/prisoners-rights/are-our-prisons-and-jails-ready-for-covid-19/ (hereinafter, "ACLU, 'Are Our Prisons and Jails Ready for COVID-19?'").

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Chris Francescani and Luke Barr, "Fearing Outbreaks and Riots, Nation's Prison and Jail Wardens Scramble to Respond to Coronavirus Threat," *ABC News*, March 19, 2020, https://abcnews.go.com/Health/fearing-outbreaks-riots-nations-prison-jail-wardens-scramble/story?id=69676840 (hereinafter, "Francescani and Barr, 'Fearing Outbreaks and Riots, Nation's Prison and Jail Wardens Scramble to Respond to Coronavirus Threat'").

[18] According to the most recent data available from the Bureau of Justice Statistics, 13 states and BOP were operating over their highest capacity at the end of 2017; Jennifer Bronson and E. Ann Carson, *Prisoners in 2017*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 252156, Washington, DC, April 2019, pp. 25-26, https://www.bjs.gov/content/pub/pdf/p17.pdf.

There are also concerns about whether prisoners will have access to adequate medical care if a prison's staff is hit hard by the disease. If COVID-19 were to spread among prison staff resulting in wide spread quarantines, there could be fewer medical staff to deliver care or fewer correctional staff available to transport critically ill prisoners to outside medical facilities.[19] Also, prison infirmaries tend to have fewer medical resources, such as isolation beds, compared to hospitals.[20] However, one expert at the National Commission on Correctional Health Care[21] believes that the prisons are prepared to handle potential COVID-19 infections because prisons have experience with preventing the spread of communicable diseases.[22]

As of April 16, 2020, BOP has approximately 172,300 prisoners under its jurisdiction, who are held in a combination of BOP-operated facilities (122 in total), privately operated prisons, Residential Reentry Centers (RRCs; i.e., halfway houses), and state prisons.[23] While the federal prison population decreased by approximately 42,000 prisoners (19%) from FY2013 to FY2019, the federal prison system operated at 12% over its rated capacity in FY2019.[24] According to USMS, in FY2019 they received approximately 248,900 prisoners and their average daily detention population was approximately 61,500 prisoners.[25]

While BOP does not publish data on the number of prisoners that have health conditions that might make them more susceptible to serious complications if they were to contract COVID-19, as of April 18, 2020, approximately 10,200 prisoners (6% of all prisoners) under BOP's jurisdiction were age 61 or older.[26] BOP also notes, "the average age of offenders in BOP-managed facilities is 41 years and average length of sentence is 128 months. The average age of offenders in BOP facilities has increased by 8 percent over the past decade. Approximately 45 percent of offenders have multiple chronic conditions that, despite management with medications and other therapeutic interventions, will progress and may result in serious complications."[27] USMS does not publish data on the age or health issues of prisoners in their custody.

BOP's COVID-19 Action Plan

BOP's COVID-19 action plan was announced on March 13, 2020.[28] BOP has modified its action plan as the situation in the federal prison system has dictated. On March 19, 2020, BOP clarified

[19] ACLU, "Are Our Prisons and Jails Ready for COVID-19?"

[20] Ibid.

[21] The NCCHC, supported by the major national organizations representing the fields of health, mental health, law, and corrections, seeks to improve the quality of health care in jails, prisons, and juvenile confinement facilities. National Commission on Correctional Health Care, "About Us," https://www.ncchc.org/about.

[22] Francescani and Barr, "Fearing Outbreaks and Riots, Nation's Prison and Jail Wardens Scramble to Respond to Coronavirus Threat."

[23] U.S. Department of Justice, Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (accessed April 21, 2020).

[24] The FY2013 federal prison population was taken from U.S. Department of Justice, Bureau of Prisons, Statistics: Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp. The FY2019 federal prison population and percentage crowding figure were taken from U.S. Department of Justice, Bureau of Prisons, *Federal Prison System, FY2021 Performance Budget, Congressional Submission*, p. 7, https://www.justice.gov/doj/page/file/1246231/download (hereinafter, "BOP FY2021 congressional budget request").

[25] USMS prisoner operations fact sheet.

[26] U.S. Department of Justice, Bureau of Prisons, Inmate Statistics: Inmate Age, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (accessed April 21, 2020).

[27] BOP FY2021 congressional budget request, p. 27.

[28] U.S. Department of Justice, Bureau of Prisons, Federal Bureau of Prisons COVID-19 Action Plan,

that while there are restrictions on the movement of prisoners between facilities, BOP will transfer prisoners if necessary to properly manage the prison population, subject to certain conditions. On March 31, 2020, BOP announced that effective April 1, 2020, all prisoners would be placed on lockdown, meaning that they may not leave their assigned cell unless it is to attend programs or services offered as a part of normal operating procedures, such as educational programs or mental health treatment.[29] On April 14, 2020, BOP announced that its action plan, which was initially set to expire on April 12, 2020, would be extended until May 18, 2020.[30]

BOP's action plan includes the following measures:

- **Suspending social visits**. BOP has suspended social visits for prisoners. To allow prisoners to maintain social ties while social visits are suspended, BOP is allowing prisoners to have 500 minutes per month (compared to the usual 300 minutes) of telephone time.
- **Suspending attorney**. Like social visits, BOP is suspending visits from attorneys, though BOP is to allow visits from attorneys on a case-by-case basis. Prisoners are to still be allowed to have confidential phone calls with their attorneys, which do not count against the 500 minutes per month limit.[31]
- **Limiting movement of prisoners**. BOP is suspending transferring prisoners between facilities, with the exception of transfers for forensic studies, writs, Interstate Agreements on Detainers, medical or mental health treatment, and transfers to pre-release custody. BOP will continue to accept new prisoners, though BOP is working with USMS to limit the number of prisoners transferred from jail facilities to BOP's custody. Prisoners who are moved from one facility to another must have been in BOP's custody for at least 14 days. Prisoners are also to be screened for COVID-19 symptoms (e.g., fever, cough, shortness of breath) before being transferred, and those who present symptoms or have a temperature greater than 100.4 degrees are not to be transferred and instead are to be placed in isolation.
- **Limiting official travel**. BOP is suspending official staff travel, with the exception of relocation.
- **Suspending tours**. BOP is suspending prison tours, though it can grant exceptions on a case-by-case basis.
- **Reducing staff training**. BOP is suspending all staff training, with the exception of basic staff training for new employees at the Federal Law Enforcement Training Center.
- **Limiting contractor access to prisons**. BOP is only allowing access for contractors who are providing essential services or those who provide maintenance on essential systems. Essential services include medical or mental health care, religious services, and critical infrastructure repairs.

https://www.bop.gov/resources/news/20200313_covid-19.jsp.

[29] BOP allows prisoners access to the commissary, laundry, showers, telephones, and prisoner email to the extent practicable during the lockdown. U.S. Department of Justice, Bureau of Prisons, "COVID-19 Action Plan: Phase Five," https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

[30] U.S. Department of Justice, Bureau of Prisons, "Bureau of Prisons COVID-19 Action Plan: Phase Six," press release, April 14, 2020, https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf.

[31] BOP notes that under normal circumstances, "the 300-minute per calendar month limitation does not apply to unmonitored legal telephone calls." U.S. Department of Justice, Bureau of Prisons, *Legal Resource Guide to the Federal Bureau of Prisons*, 2019, p. 37, https://www.bop.gov/resources/pdfs/legal_guide_march_2019.pdf.

- **Limiting volunteer access to prisons**. BOP is suspending visits to prisons from volunteers, though it can grant some exceptions on a case-by-case basis. Alternative means of communication (e.g., telephone calls) will be provided to prisoners who want to speak privately with a religious volunteer. It is not clear if telephone calls with volunteers count against a prisoner's 500 minutes per month limit.
- **Screening employees**. BOP is instituting advanced health screenings of employees at prisons in areas with "sustained community transmission" as determined by the Centers for Disease Control and Prevention (CDC). Advanced health screening involves self-reporting of possible exposure to COVID-19 and temperature checks. Volunteers, contractors, attorneys, and tour participants who are granted access to a prison are subject to the same screening procedures.
- **Screening prisoners**. BOP maintains an infectious disease management program as a matter of course, but in response to the COVID-19 pandemic BOP has instituted practices specific to mitigating the spread of the disease in its facilities. All new arrivals to the prison are to be screened for COVID-19 exposure risk factors and symptoms, asymptomatic prisoners with noted exposure risk factors are quarantined, and symptomatic prisoners with noted exposure risk factors are to be isolated and tested for COVID-19.
- **Modifications to operations**. BOP is making modifications to its operations, if the facility's population and physical layout make modifications feasible, to allow for social distancing and to limit group gatherings. For example, prisons might stagger meal and recreation times.

USMS has not released a COVID-19 prevention plan, but as discussed above, USMS does not operate its own jail system and prisoners are subject to any plans developed and implemented by the facility in which they are housed. However, if a prisoner develops complications from COVID-19 that could not be adequately treated in the facility in which he or she is housed, USMS would assume the cost of transporting the prisoner to a local medical facility and covering the cost of the medical care provided.[32]

Existing Authorities to Grant Release to Prisoners

DOJ lacks the authority to grant early release to prisoners for the specific purpose of mitigating the transmission of a communicable disease. However, there are authorities that may provide avenues for some federal prisoners to be released in response to the COVID-19 pandemic. These authorities include statutory provisions allowing (1) federal courts to reopen pretrial detention hearings or permit temporary release of prisoners under certain circumstances, (2) for federal prisoners to be released before completing their sentences, and (3) for federal prisoners to be placed in the community to serve the final portion of their sentences. Additionally, the President retains constitutional authority to grant clemency for federal offenses, which can include commuting a prisoner's sentence to time served.

[32] U.S. Department of Justice, U.S. Marshals Service, "Defendants in Custody and Prisoner Management," https://www.usmarshals.gov/prisoner/index.html.

Pretrial Detention and Release

A person arrested for a federal offense must be brought before a judge "without unnecessary delay,"[33] and the judge "shall order that such person be released or detained, pending judicial proceedings."[34] 18 U.S.C. Section 3142 governs the circumstances under which a person charged with a federal offense may be ordered released or incarcerated pending trial.[35] The statute reflects a preference for release on personal recognizance[36] or unsecured appearance bond,[37] subject to limited conditions, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[38] However, if after a hearing[39] the judge finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the defendant's appearance and the safety of others, the judge must order the detention of the person before trial.[40] Though the statute purports to establish an order of preference favoring release for federal criminal defendants, it appears that the majority of defendants accused of federal crimes and presented to a judge are, in fact, incarcerated.[41]

Two provisions of Section 3142 provide means to seek court-ordered release from pretrial detention after a detention determination has been made. First, under Section 3142(f)(2) a detention hearing may be "reopened" at any time prior to trial if the judge "finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue" of whether any conditions of release would reasonably assure the defendant's appearance and the safety of others.[42] Second, under Section 3142(i) a judge who has entered a detention order may issue a subsequent order permitting the "temporary release" of the accused where "necessary for preparation of the person's defense or for another compelling reason."[43] Thus, release under either provision is necessarily dependent on judge-made determinations that may be highly case- and fact-specific.[44]

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[33] FED. R. CRIM. PROC. 5(a)(1).

[34] 18 U.S.C. § 3141(a).

[35] 18 U.S.C. § 3142. Separate provisions also permit detention or release of defendants pending sentencing or appeal. *Id.* § 3143.

[36] Personal recognizance means that, in lieu of posting money or having a surety sign a bond to obtain release, the court "takes the defendant's word that he or she will appear for a scheduled matter or when told to appear." *Recognizance: personal recognizance*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[37] This type of bond "holds a defendant liable for a breach of the bond's conditions (such as failure to appear in court)," but it "is not secured by a deposit of or lien on property." *Id.*, *Bond: unsecured bail bond*.

[38] 18 U.S.C. § 3142(b).

[39] The government may move for a hearing in cases involving certain kinds of offenses (such as crimes of violence) or where certain circumstances exist (such as the involvement of a minor victim), and either the government or the judge may move for a hearing in cases involving "serious risk" that the accused will flee or obstruct justice. *Id.* § 3142(f).

[40] *Id.* § 3142(e)-(f). If the judge finds probable cause to believe that the accused has committed one of several serious crimes listed in the statute, the accused is subject to a rebuttable presumption that no combination of conditions will reasonably assure the defendant's appearance and the safety of the community. *Id.* § 3142(e)(3). The same presumption applies if the accused previously was convicted of one of the offenses (or a similar state or local offense) while on release pending trial and the conviction or the accused's release from imprisonment was within the last five years. *Id.* § 3142(e)(2).

[41] *See id.* at 1 (noting that slightly less than 65% of persons arrested by federal agencies are "detained at some point in the judicial process").

[42] 18 U.S.C. § 3142(f)(2).

[43] *Id.* § 3142(i).

[44] *See, e.g.*, United States v. Martin, No. 19-CR-140, 2020 WL 1274857, at *3 (D. Md. Mar. 17, 2020) (noting that

Multiple federal courts have addressed requests for release under these provisions of Section 3142 in light of COVID-19 concerns, considering factors including "(1) the original grounds for the defendant's pretrial detention, (2) the specificity of the defendant's stated COVID-19 concerns, (3) the extent to which [a] proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to the defendant, and (4) the likelihood that the defendant's proposed release would increase COVID-19 risks to others."[45] The courts' responses to the requests have been mixed. In one case, the U.S. District Court for the Southern District of New York ruled that both provisions of Section 3142 supported a defendant's release subject to conditions of home incarceration and electronic location monitoring.[46] At the outset, the court viewed the "unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic," in conjunction with new information that had come to light about the defendant's dangerousness, as sufficiently changed circumstances bearing on risk to the community to necessitate reconsideration of the defendant's detention.[47] And in light of those changed circumstances, the court determined that the weight of the evidence now clearly and convincingly tipped in favor of concluding that the defendant did not pose a danger to the community and should be conditionally released.[48] The court also ruled that the impact of the COVID-19 outbreak on the defendant's ability to prepare his defense constituted a "compelling reason" justifying temporary release under Section 3142(i), noting that BOP's suspension of visits except on a case-by-case basis limited the defendant's access to his attorney.[49]

By contrast, other federal courts have rejected arguments that the COVID-19 pandemic justifies release under Section 3142. In one case, where the defendant argued that his "advanced age" and medical conditions (which included a history of stroke and heart attack) warranted temporary release under Section 3142(i) in response to the ongoing outbreak, the court recognized that that provision has been used only "sparingly" and noted that (1) the defendant's medical conditions appeared to be "well managed," (2) there were no reported incidents of COVID-19 within the defendant's detention center, and (3) BOP was taking "system-wide precautions to mitigate the possibility of infection within its facilities."[50] Accordingly, the court concluded that the possibility of an outbreak in the facility was not a "compelling" reason under Section 3142(i). Likewise, a district court in Maryland, while acknowledging that the health risk from COVID-19 can constitute new information with a material bearing on release under Section 3142(f)(2) and may even implicate constitutional concerns under the Due Process Clauses if conditions of confinement expose a defendant to serious illness, ruled that a defendant charged with a serious crime and who has an extensive criminal history should be detained despite health conditions like high blood pressure and diabetes.[51] The court in that case viewed defendant's health conditions as insufficient on their own to rebut the government's proffer that precautionary measures were being implemented at the defendant's detention center to protect detainees from exposure to COVID-19.[52]

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review of detention order requires an "individualized assessment" of the factors in Section 3142).

[45] United States v. Ryan, No. 19-CR-756, 2020 WL 1861662, at *2 (C.D. Cal. Apr. 14, 2020); United States v. Boatwright, No. 19-CR-301, 2020 WL 1639855, at *5 (D. Nev. Apr. 2, 2020).

[46] United States v. Stephens, No. 15-CR-0095, 2020 WL 1295155, at *1 (S.D.N.Y. Mar. 19, 2020).

[47] *Id.* at *2.

[48] *Id.*

[49] *Id.* at *3.

[50] United States v. Hamilton, No. 19-CR-054, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020).

[51] United States v. Martin, No. 19-CR-140, 2020 WL 1274857, at *2–*3 (D. Md. Mar. 17, 2020).

[52] *Id.* at *3.

In short, although a significant number of federal defendants have sought release under Section 3142 in light of the COVID-19 outbreak,[53] the highly individualized and fact-specific nature of the inquiry makes Section 3142 a somewhat limited avenue for the release of federal prisoners in response to COVID-19.[54]

Compassionate Release

Once a person has been convicted of a federal offense and sentenced to a term of imprisonment, a federal court can reduce the sentence under 18 U.S.C. Section 3582(c)(1)(A) and impose a term of probation or supervised release, with or without conditions, equal to the amount of time remaining on the prisoner's sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction," or, for certain offenders, if the prisoner is at least 70 years of age, the prisoner has served at least 30 years of his or her sentence, and a determination has been made by BOP that the prisoner is not a danger to the safety of any other person or the community. A petition for compassionate release can be filed by BOP itself. In the alternative, a prisoner can file such a petition if he or she has fully exhausted all administrative rights to appeal BOP's refusal to bring a motion on the prisoner's behalf or upon a lapse of 30 days from the receipt of such a request by the warden of the prisoner's facility, whichever is earlier.

Sentence reductions under Section 3582(c)(1)(A) must be consistent with any applicable policy statements issued by the U.S. Sentencing Commission. Under the current sentencing guidelines, "extraordinary and compelling reasons" for a sentence reduction include the following:

- The prisoner is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required.
- The prisoner is suffering from a serious physical or medical condition, suffering from a serious functional or cognitive impairment, or experiencing deteriorating physical or mental health because of the aging process that substantially diminishes the ability of the prisoner to care for himself or herself while incarcerated and the prisoner is not expected to recover from the condition.
- The prisoner is at least 65 years old, is experiencing a serious deterioration in physical or mental health because of the aging process, and has served at least 10 years or 75% of his or her term of imprisonment, whichever is less.
- The caregiver of the prisoner's minor child or minor children dies or is incapacitated.

[53] A Westlaw search conducted April 20, 2020, yields over 300 decisions citing Section 3142 and referencing "COVID-19" or "coronavirus."

[54] As noted previously, a separate statutory provision, 18 U.S.C. § 3143, governs release or detention pending sentencing or appeal by the defendant. The provisions of Section 3142 permitting a court to reopen a detention hearing or order temporary release for "compelling" reasons do not appear to apply to most detention determinations made following conviction. *See* 18 U.S.C. § 3142(f)(2) (stating that detention hearing may be reopened "at any time before trial"). Additionally, once a person has been convicted of a federal offense for which a sentence of imprisonment is recommended, the "presumption [is] in favor of detention," and the defendant bears the burden of establishing that he or she meets statutory criteria for release. *E.g.*, United States v. Scali, 738 F. App'x 32, 33 (2d Cir. 2018). As such, avenues for seeking release of prisoners pending sentencing or their appeals in light of COVID-19 appear to be limited, although at least one court has authorized release of a prisoner prior to sentencing (subject to stringent conditions) in response to COVID-19 pursuant to a narrow exception to mandatory detention for certain offenders in exceptional circumstances. *See* United States v. Harris, No. 19-CR-356, 2020 WL 1482342, at *1 (D.D.C. Mar. 26, 2020).

- The prisoner's spouse or registered partner is incapacitated, and the prisoner is the only available caregiver.
- BOP determines that there is an extraordinary and compelling reason other than, or in combination with, the reasons described above.[55]

There are limits on whether a prisoner can be released from BOP's custody using compassionate release. First, BOP cannot unilaterally release elderly or terminally ill offenders under this authority; a petition for compassionate release has to be approved by a federal court, based on consideration of multiple case-specific factors.[56] Also, only certain prisoners 70 years of age or older can be released without a finding that there is a compelling and extraordinary circumstance for their release.[57] While the compassionate release statute allows for prisoners who are under the age of 70 to be released from prison before completing their sentence, in cases where the prisoner would potentially be released for reasons related to the prisoner's health, the prisoner must be seriously ill.[58]

A prisoner's ability to seek release from a federal court is also limited by the requirement contained in Section 3582 that the prisoner exhaust all administrative rights of review or wait 30 days. Courts have split on whether that requirement may be waived in the context of the COVID-19 pandemic. The U.S. Court of Appeals for the Third Circuit has viewed the exhaustion requirement as unwaivable, characterizing a prisoner's failure to comply with the requirement as "a glaring roadblock foreclosing compassionate release" and observing that "strict compliance" with the statutory obligation is of "critical ... importance" even during the ongoing pandemic.[59] However, other lower federal courts have concluded that they have the discretion to waive the exhaustion requirement, indicating (among other things) that Congress could not "have intended the 30-day waiting period of 3582(c)(1)(A) to rigidly apply in the highly unusual" circumstances of the COVID-19 pandemic.[60]

Assuming the exhaustion requirement is not an impediment to judicial relief, a court still might not consider people with underlying medical conditions such as hypertension, heart disease, lung disease, or diabetes, which might make them more likely to suffer from serious complications if they were to contract COVID-19 to meet any of the "extraordinary and compelling reasons" specified in the U.S. Sentencing Guidelines. Multiple federal courts have rejected requests for release under Section 3582 in light of COVID-19 transmission risk.[61] For instance, a prisoner in

[55] United States Sentencing Commission, *Guidelines Manual*, §1B1.13 (effective November 1, 2018).

[56] *See* 18 U.S.C. § 3582(c)(1)(A) (requiring court to consider factors in 18 U.S.C. § 3553(a) to the extent they are applicable, including "the nature and circumstances of the offense and the history and characteristics of the defendant").

[57] *Id.* (providing that defendants aged 70 or older must have served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) and BOP has determined they are not a danger to the safety of any other person or the community).

[58] *See* United States Sentencing Commission, *Guidelines Manual*, §1B1.13 (effective November 1, 2018) (specifying that extraordinary health reasons include terminal illness or "serious" health concerns).

[59] United States v. Raia, No. 20-1033, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020). Some federal district courts have agreed with this position. *E.g.*, United States v. Reid, No. 17-CR-175, 2020 WL 1904598, at *4 (N.D. Cal. Apr. 18, 2020); United States v. Roberts, No. 18-CR-528, 2020 WL 1700032, at *2 (S.D.N.Y. Apr. 8, 2020).

[60] United States v. Haney, No. 19-CR-541, 2020 WL 1821988, at *3 (S.D.N.Y. Apr. 13, 2020); *see also, e.g.*, United States v. Ben-Yhwh, No. 15-830, 2020 WL 1874125, at *3 (D. Haw. Apr. 13, 2020) (concluding requirement may be waived if exhaustion would be futile, if the administrative process would be incapable of granting adequate relief, or if undue prejudice would result).

[61] *See, e.g.*, United States v. Rodriguez, No. 16-CR-167, 2020 WL 1866040, at *4 (S.D.N.Y. Apr. 14, 2020); United States v. Gileno, No. 19-CR-161, 2020 WL 1307108, at *4 (D. Conn. Mar. 19, 2020).

one case argued that he should be released to home confinement in part because the conditions of his confinement in a federal prison facility created "the ideal environment for the transmission" of COVID-19 and he was "at a heightened risk" in light of health conditions such as high blood pressure, high cholesterol, asthma, and allergies.[62] The government opposed the prisoner's request, pointing to BOP's "extensive action plan" to address the pandemic, and the court sided with the government.[63] Specifically, the court determined that the prisoner's motion did not meet the requirements for modifying a sentence for extraordinary and compelling reasons because, among other things, the prisoner had "not shown that the plan proposed by the Bureau of Prisons is inadequate to manage the pandemic within [the prisoner's] correctional facility, or that the facility is specifically unable to adequately treat" him.[64] As such, though the court noted that "public health recommendations are rapidly changing," it concluded that at least as of the ruling date, it could not assume that BOP would "be unable to manage the outbreak or adequately treat [the prisoner] should it emerge at his correctional facility while he is still incarcerated."[65] Nevertheless, some other courts have authorized compassionate release because of the COVID-19 pandemic. One federal court, for example, concluded that a prisoner with a compromised immune system had shown an extraordinary and compelling reason justifying release to home incarceration under Section 3582 in light of "the COVID-19 public health crisis," though the government in that case did not oppose the request.[66]

Aside from the question of whether COVID-19 transmission risk would be considered an "extraordinary and compelling reason[]" to grant release, which could vary depending on the circumstances before the court considering the request, if a prisoner is granted compassionate release it does not mean that the prisoner is no longer involved in the criminal justice system. The court can impose a term of probation or supervised release for the prisoner, and there might be a question about whether U.S. Probation and Pretrial Services Offices has the necessary resources to handle an unexpected influx of probationers.[67]

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[62] *Gileno*, 2020 WL 1307108, at *3. The prisoner additionally argued that the COVID-19 pandemic had exacerbated an underlying anxiety condition and imposed financial burdens on his family because his wife had to stay home from work to care for their children. *Id.*

[63] *Id.*

[64] *Id.* at *4.

[65] *Id.* The court also rejected other health-related arguments raised by the prisoner and recognized that he had failed to satisfy the procedural requirement under Section 3582 that he first request that BOP file a motion on his behalf and wait 30 days. *Id.* at *3–*4.

[66] United States v. Campagna, No. 16-CR-078, 2020 WL 1489829, at *3 (S.D.N.Y Mar. 27, 2020); *see also* United States v. Ben-Yhwh, No. 15-830, 2020 WL 1874125, at *5 (D. Haw. Apr. 13, 2020) (collecting cases and concluding, despite government opposition, that prisoner's advanced age and serious medical conditions, "taken in concert with the COVID-19 public health crisis," constituted extraordinary and compelling reason to reduce sentence).

[67] That said, given that criminal behavior tends to decrease as people age, many granted compassionate release could be part of a fairly low-risk population that would not require as intensive supervision as some other offenders. In a paper presented at a conference for the Society for Computer Simulation International, three experts noted "the relationship between age and crime is one of the most solid within the field of criminology. It is understood that crime increases throughout adolescence and then peaks at age 17 (slightly earlier for property crime than for violent crime) and then begins to decrease over the life course moving forward. This trend has, over the years, withstood stringent testing and examination across time periods and maintains consistent results regardless of race/ethnicity, education level, or income []." Caitlin V.M. Cornelius, Christopher J. Lynch, and Ross Gore, "Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling," *ADS '17: Proceedings of the Agent-Directed Simulation Symposium,* April 2017, pp. 1-12, http://scs.org/wp-content/uploads/2017/06/6_Final_Manuscript.pdf.

Early Release Pilot Program

Under 34 U.S.C. Section 60541(g), BOP is authorized to conduct a program that places eligible elderly and terminally ill prisoners on home confinement. The Attorney General is authorized to designate the prisons at which the program will be conducted. Elderly prisoners who are eligible for home confinement under the program are those who

- are at least 60 years old;
- have never been convicted of a violent, sex-related, espionage, or terrorism offense;
- are sentenced to less than life;
- have served two-thirds of their sentence;
- have not been determined by BOP to have a history of violence, or of engaging in conduct constituting a sex, espionage, or terrorism offense;
- have not escaped or attempted to escape;
- received a determination that release to home detention would result in a substantial reduction in cost to the federal government; and
- received a determination that he or she is not a substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.

Terminally ill prisoners who are eligible for early release under the program generally have to meet the same criteria as eligible elderly prisoners, except they can be of any age and have served any portion of their sentences, even life sentences.[68]

The ability of BOP to release prisoners under this authority has some limitations similar to those associated with compassionate release, except under this authority BOP can place prisoners on home confinement without the approval of a federal court.[69]

Community Confinement

Under 18 U.S.C. Section 3624(c), BOP is authorized to place a prisoner in a Residential Reentry Center for up to 12 months at the end of his or her sentence. BOP is also ordinarily authorized to place a prisoner on home confinement for a period of time equal to 10% of his or her sentence or six months, whichever is shorter.[70] Though BOP must make individualized determinations as to whether placement in an RRC or home confinement is appropriate, the statute "grants considerable discretion to the BOP" in making such determinations.[71]

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[68] 34 U.S.C. § 60541(g)(5)(D).

[69] *E.g.*, Marshall v. Hudson, No. 19-3236, 2020 WL 1131228, at *4 (10th Cir. Mar. 9, 2020) ("Congress has vested the executive branch, not the judicial branch, with the final say on whether to include certain prisoners in the pilot program."); United States v. Gajewski, No. 14-CR-084, 2020 WL 1066300, at *2 (E.D. Tex. Mar. 4, 2020) ("the [statute] grants discretion to release a prisoner to home confinement solely to the Attorney General.").

[70] As described *infra*, the CARES Act, which was signed into law on March 27, 2020, permits the BOP Director in certain circumstances to "lengthen the maximum amount of time" for which home confinement is authorized. CARES Act, P.L. 116-136, § 12003(b)(2) (2020).

[71] *E.g.*, Bernard v. Roal, 716 F. Supp. 2d 354, 359 (S.D.N.Y. 2010); Krueger v. Martinez, 665 F. Supp. 2d 477, 483 (M.D. Pa. 2009).

The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act; P.L. 116-136), permits the BOP Director to lengthen the maximum amount of time for which a prisoner may be placed on home confinement under Section 3624(c)(2) "as the Director determines appropriate" when the Attorney General "finds that emergency conditions will materially affect the functioning" of BOP.[72] The authority is limited, however, to "the covered emergency period," which is defined as the period spanning from the President's declaration of a national emergency with respect to COVID-19 to the date that is 30 days after the date on which the declaration terminates.[73] As discussed below, the Attorney General issued a memorandum to the BOP Director making the requisite finding under the CARES Act and thereby authorizing the director to make expanded use of home confinement.

Executive Clemency

Under Article II, Section 2 of the U.S. Constitution, the President has broad authority to grant relief from punishment for federal criminal offenses. One form of executive clemency is commutation of a sentence, whereby the sentence imposed by a federal court is replaced by a less severe punishment, such as reducing a prisoner's sentence to time served.[74]

While it is not required by the Constitution, there is a process for prisoners who want to have their sentences commuted to submit a petition for executive clemency through DOJ's Office of the Pardon Attorney.[75] Regulations state that prisoners should not submit petitions for commutations if other forms of judicial or administrative relief are available, unless there is a showing of "exceptional circumstances" for submitting the petition.[76] When a petition is received, the Pardon Attorney conducts an investigation to determine the merit of the petition, which can include collecting reports from or using the services of federal agencies, such as the Federal Bureau of Investigation.[77] After the investigation is concluded, the Pardon Attorney submits a recommendation about the merits of the petition to the Attorney General through the Deputy Attorney General.[78] The Attorney General makes a final recommendation to the President about whether the petition for clemency should be granted.[79]

Guidance issued by DOJ notes that commuting a sentence is an "extraordinary remedy" and that grounds for considering commutation include "disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner" (such as aiding the government in an investigation) and/or "other equitable factors," such as demonstrating rehabilitation or "exigent circumstances unforeseen by the court at the time of sentencing."[80]

The process for applying for executive clemency established by DOJ regulations and guidance does not "restrict the authority granted to the President under Article II, Section 2 of the

[72] CARES Act, P.L. 116-136, § 12003(b)(2) (2020).

[73] *Id.* § 12003(a)(2).

[74] For more information on executive clemency, see CRS Report R46179, *Presidential Pardons: Overview and Selected Legal Issues*.

[75] 28 C.F.R. Part 1.

[76] 28 C.F.R. § 1.3.

[77] 28 C.F.R. § 1.6(a).

[78] 28 C.F.R. § 0.36.

[79] 28 C.F.R. § 1.6(c).

[80] U.S. Department of Justice, *Justice Manual*, § 9.140-113.

Constitution."[81] Therefore, the President could grant commutations to federal prisoners who do not submit a petition to DOJ or to those who do not meet the standards outlined by DOJ. Some advocates and commentators have called for the President to exercise this authority to commute federal prison sentences for populations vulnerable to COVID-19.[82]

The Attorney General's Directives Regarding DOJ's Response to COVID-19

As of April 6, 2020, Attorney General William Barr has issued three memoranda that provide direction on DOJ's response to the COVID-19 pandemic. Two of the memoranda were to BOP, and they outlined how BOP should use its home confinement authorities to reduce the spread of COVID-19 in federal prisons. The other memorandum was to all components of DOJ, including all U.S. Attorney's Offices, and it provides guidance regarding when prosecutors should seek pretrial detention for federal defendants in light of the risks some people might face if they were jailed pending adjudication of their cases.

Memoranda Regarding Home Confinement

On March 26, 2020, Attorney General William Barr issued a memorandum to BOP Director Michael Carvajal directing him to "prioritize the use of [BOP's] various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic."[83] In the memorandum, the Attorney General notes that there are some at-risk prisoners who are incarcerated for nonviolent crimes, pose a minimal risk of recidivism, and might be safer serving their sentences on home confinement rather than in a BOP facility. However, the Attorney General also states that many prisoners will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care.

The memorandum requires BOP when making a decision about which prisoners to place on home confinement to consider the "totality of the circumstances" for each prisoner, statutory requirements for home confinement, and the following discretionary factors:

- the age and vulnerability of the prisoner to COVID-19, in accordance with CDC guidelines;
- the security level of the facility where the prisoner is held, with priority given to prisoners held in low- and minimum-security facilities;
- the prisoner's conduct in prison, with those who have engaged in violent or gang-related activities while incarcerated or who have been found to have violated institutional rules not receiving priority consideration for home confinement;

[81] 28 C.F.R. § 1.11.

[82] *See, e.g.*, *Bipartisan Coalition Calls on President Trump to Commute Federal Prison Sentences for Populations Most Vulnerable to COVID-19*, THE SENTENCING PROJECT (Mar. 24, 2020), https://www.sentencingproject.org/publications/bipartisan-coalition-calls-on-president-trump-to-commute-federal-prison-sentences-for-populations-most-vulnerable-to-covid-19/.

[83] Memorandum from Attorney General William Barr to BOP Director Michael Carvajal, March 26, 2020, https://www.justice.gov/file/1262731/download.

- the prisoner's risk assessment score under BOP's risk and needs assessment system, with prisoners who have more than a minimum score not receiving priority consideration for home confinement;[84]
- whether the prisoner has a re-entry plan, which includes verification that the conditions under which the prisoner would be confined after release would present a lower risk of contracting COVID-19 than if the prisoner remained incarcerated in a BOP facility;
- the prisoner's crime of conviction and an assessment of the risk to public safety posed by him or her (the memorandum notes that some offenses, such as sex offenses, will make a prisoner ineligible for home confinement, while convictions for other "serious" offenses should weigh more heavily against placing the prisoner on home confinement).

In addition to these factors, prisoners considered for home confinement must be assessed, based on CDC guidance, for risk factors for "severe COVID-19 illness," risks of COVID-19 illness at the prisoner's current facility, and risk of COVID-19 illness at the location where the prisoner would be placed on home confinement. BOP is not to place prisoners on home confinement if it would increase their risk of contracting COVID-19 or increase the risk of spreading COVID-19 in the community. The memorandum also directs BOP to place prisoners in a 14-day quarantine before they are transferred to home confinement.

In a subsequent memorandum issued on April 3, 2020, the Attorney General invokes the authority granted under the CARES Act and directs BOP to review all prisoners with risk factors for serious complications related to COVID-19 for possible placement on home confinement.[85] The memorandum directs BOP to focus on prisoners incarcerated at Federal Correctional Institution (FCI) Oakdale, FCI Danbury, and FCI Elkton, and any other "similarly situated facilities where [BOP] determine[s] that COVID-19 is materially affecting operations."

BOP is directed to immediately process all prisoners who are deemed to be suitable candidates for home confinement. Prisoners are to be placed on home confinement after a 14-day in-prison quarantine. BOP is also authorized on a case-by-case basis to place prisoners on home confinement without first quarantining them in prison. In these cases, a prisoner would be required to quarantine at home for a 14-day period. The Attorney General warns against potentially spreading COVID-19 by releasing prisoners to home confinement. Thus, BOP is directed to follow the criteria outlined in the March 26 memorandum when making decisions about which prisoners should be released, with the understanding that prisoners "with a suitable confinement plan will generally be approved candidates for home confinement rather than continued detention at institutions in which COVID-19 is materially affecting their operations."

In the memorandum, the Attorney General acknowledges that BOP has limited resources to monitor all prisoners on home confinement and the U.S. Probation Office is unable to monitor large numbers of prisoners in the community. Despite these limitations, the Attorney General authorizes BOP to place prisoners on home confinement even if electronic monitoring is not

[84] DOJ developed a risk and needs assessment system for use in the federal prison system as required by the First Step Act of 2018 (P.L. 115-391). BOP named the risk and needs assessment instrument the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN). Using the instrument, prisoners can be assessed as having a high, medium, low, or minimum risk of recidivating. For more information on PATTERN, see U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System*, July 19, 2019, https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system.pdf.

[85] Memorandum from Attorney General William Barr to BOP Director Michael Carvajal, April 3, 2020, https://www.justice.gov/file/1266661/download.

available, "so long as BOP determines in every such instance that doing so is appropriate and consistent with [DOJ's] obligation to protect public safety." Regarding public safety, the Attorney General notes that while DOJ has an obligation to protect federal prisoners, DOJ also has an obligation to protect public safety and cannot "simply release prison populations en masse onto the streets." The Attorney General notes that while he is directing BOP to expand the use of home confinement for prisoners at affected prisons, "it is essential that [BOP] continue making careful, individualized determinations BOP makes in the typical case. Each inmate is unique and each requires the same individualized determinations [that] have always been made in this context."

Memorandum Regarding Pretrial Detention

On April 6, 2020, the Attorney General issued a memorandum to the U.S. Attorney's Offices and the heads of components of DOJ that provides guidance on when DOJ should seek pretrial detention for defendants.[86] The Attorney General notes that under the Bail Reform Act (BRA), defendants must be detained pending trial where "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community"[87] and that for certain crimes it is assumed that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community."[88] The Attorney General encourages prosecutors to continue to seek pretrial detention for defendants that pose a risk to public safety or a flight risk as outlined in the BRA.

The Attorney General also notes that a defendant's physical and mental condition can be considered when making determinations about pretrial detention under the BRA and prosecutors should consider the "medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic." The Attorney General directs prosecutors to consider not seeking pretrial detention to the extent that they would under normal circumstances, especially for defendants who have "not committed serious crimes and who pose little risk of flight (but no threat to the public) and who are clearly vulnerable to COVID-19 under CDC Guidelines." The memorandum directs prosecutors to conduct the same analysis when litigating motions filed by defendants who want the court to reconsider its decision to order pretrial detention in light of the pandemic. When considering motions filed by defendants, prosecutors are also directed to consider the risk a defendant poses of spreading COVID-19 in the community if he or she were released.

Current Legislation

As described previously, Congress has passed legislation in response to the COVID-19 pandemic that modifies one of the authorities addressed in this report—release to home confinement under 18 U.S.C. Section 3624(c)(2). However, at least one bill has been introduced that would appear to further facilitate the release of some federal prisoners in the context of a national emergency related to a communicable disease.

Introduced legislation would appear to further supplement some of the authorities discussed above.[89] S. 3579 and H.R. 6400 would require that certain federal prisoners in the custody of BOP

[86] Memorandum from Attorney General William Barr to All Heads of Department Components and All United States Attorneys, April 6, 2020, https://www.justice.gov/file/1266901/download.

[87] 18 U.S.C. § 3142(e)(1).

[88] 18 U.S.C. § 3142(e)(3).

[89] S. 3579 and H.R. 6400 , 116th Cong. (2020).

or USMS—those who are pregnant, age 50 or older, have certain underlying medical conditions, or have 12 months or less to serve—immediately be placed in community supervision when a "national emergency relating to a communicable disease" has been declared and for 60 days after it has expired.[90] In making such placements, the directors of BOP and USMS would be obligated to "take into account and prioritize" placements enabling "adequate social distancing," with home confinement given as one example.[91] Individuals falling into qualifying categories would be excepted from placement in community supervision under the bills, however, if the Director of BOP or Director of USMS determines by clear and convincing evidence that they are "likely to pose a specific and substantial risk of causing bodily injury or using violent force against the person of another."[92]

It thus appears that S. 3579 and H.R. 6400 would enhance current authorities that permit the release of federal prisoners in response to COVID-19. Specifically, under both bills some federal criminal defendants in pretrial detention would be eligible for immediate release to community supervision (assuming they meet the health or other criteria) without the need to file individual petitions seeking the reopening of their detention hearing based on new information or asserting a "compelling reason" for temporary release. And those detained solely because they were previously determined to be a flight risk would appear to qualify for relief under both bills, as the bills' only exception for those eligible for relief are detainees that are determined to pose a risk of causing bodily injury or using violent force against another.[93] Additionally, for those currently serving federal sentences in BOP facilities, S. 3579 and H.R. 6400 would appear to establish another alternative for release to community confinement in the context of the COVID-19 pandemic beyond 18 U.S.C. Section 3624(c) and 34 U.S.C. Section 60541(g), as BOP would be required to release a prisoner over 50 years old, with a covered health condition, or who is within 12 months of release from incarceration unless the exception applied.

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[90] *Id.* § 4. A "national emergency relating to a communicable disease" is defined as either an emergency determined by the President to exist under 42 U.S.C. § 5191(b) or declared by the President under 50 U.S.C. § 1601–1651 (the National Emergencies Act) with respect to a communicable disease. *Id.* § 3. It appears that such an emergency has already been declared under the National Emergencies Act with respect to COVID-19. *See* Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

[91] S. 3579 and H.R. 6400 , 116th Cong. § 4 (2020).

[92] *Id.* The respective directors would be required to document any such determination and report to Congress within 180 days of the expiration of a national emergency. *Id.*

[93] A separate provision of the bill would restrict *new* pretrial detentions by prohibiting the government from seeking, or a judicial officer from ordering, the detainment of any individual unless the government shows by clear and convincing evidence that the individual is likely to pose a flight risk or a "specific and substantial risk of causing bodily injury or using violent force" against another. *Id.* § 5.

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