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OVERSIGHT OF THE FEDERAL BUREAU OF PRISONS AND THE U.S. MARSHALS SERVICE

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

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C O N T E N T S

DECEMBER 2, 2020

QUESTIONS FOR THE RECORD

OVERSIGHT OF THE FEDERAL BUREAU OF PRISONS AND THE U.S. MARSHALS SERVICE

Wednesday, December 2, 2020

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 9:12 a.m., in Room 2141, Rayburn House Office Building, Hon. Karen Bass [chair of the subcommittee] presiding.

Present: Representatives Bass, Jackson Lee, McBath, Deutch, Jeffries, Cicilline, Dean, Mucarsel-Powell, Jordan, Chabot, Gohmert, Lesko, and Cline.

Staff Present: Madeline Strasser, Chief Clerk; Joe Graupensperger, Chief Counsel, Subcommittee on Crime; Milagros Cisneros, Detailee, Subcommittee on Crime; Veronica Eligan, Professional Staff Member, Subcommittee on Crime; Chris Hixon, Minority Staff Director; Jason Cervenak, Minority Chief Counsel, Subcommittee on Crime; Ken David, Minority Counsel; and Kiley Bidelman, Minority Clerk.

Ms. BASS. Good morning. The Subcommittee on Crime, Terrorism, and Homeland Security will come to order.

Without objection, the chair is authorized to declare recesses of the Subcommittee at any time.

I welcome everyone to today's hearing on oversight of the Federal Bureau of Prisons and the U.S. Marshals Service.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating 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 ask all Members, both those in person and those appearing remotely, to mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself anytime you seek recognition.

I will now recognize myself for an opening statement.

We welcome everyone to this morning's hearing, entitled "Oversight of the Federal Bureau of Prisons and the U.S. Marshals Service." Welcome, also, to those who are joining us virtually for this extremely important hearing.

The last time this Subcommittee held a hearing bringing together the Bureau of Prisons and the U.S. Marshals Service was in the spring of 2017, and, in October of last year, Dr. Kathleen Hawk Sawyer discussed the implementation of the FIRST STEP Act. This included Antoinette Bacon from the Department of Justice regarding the roll-out of the risk and needs assessment tool known as PATTERN.

Today, with the onset of COVID–19, we must address bigger challenges. COVID–19 is a worldwide pandemic that is escalating in the United States, and of course this includes our prisons and jails, which have become hotbeds for the virus. As of this past weekend, the BOP reported that over 23,000 prisoners have tested positive for the virus. That is out of 125,000 inmates in BOP. By our count, at least 161 people have died from COVID while in custody.

Many of these infections and these deaths might have been preventable. Early in the pandemic, anticipating the severity of what was to come, Chairman Nadler and I wrote several letters to the Attorney General and also to you, Director Carvajal, asking you to take aggressive measures to protect the many thousands of individuals in your custody.

We knew that men and women in tightly confined spaces were uniquely vulnerable to this virus, and we are instituting measures for nursing homes across the country. Correctional facilities were not properly providing for social distancing—and how can they?—testing, quarantining, or even providing those in custody with masks.

In late March, Congress passed the CARES Act, giving the Attorney General and the BOP expansive authority to decarcerate those most vulnerable to COVID–19, but this authority has been underutilized.

The BOP website may very well say that it has placed over 18,000 people on home confinement during these 9 months of the pandemic—we do wonder whether they were tested before they were released, however—but how many of those people would have been released to home confinement under normal circumstances? In other words, were extra people released because of COVID, which is what the authority was suggesting. How many people has BOP released under the direct authority of the CARES Act is the point?

We have asked these questions, others have asked these questions, but we have not been given any satisfactory answers.

Less than a month after BOP received the authority to release individuals to home confinement and the first of our letters were sent to you, I visited Terminal Island in San Pedro, California. I met with the warden, correction officers, and those serving their sentences. I received messages from constituents, family Members, advocates, and the prisoners themselves that they were all concerned about the risk of exposure to COVID–19 in the facility.

I do want to commend the warden and the staff for their openness, but, frankly, I am concerned that they don't have the support they need. Now, they didn't raise this concern to me, however, but I am raising the concern. My concern is for the staff. It was clear

that the inmates are tested but the staff, who come and go every day, were not tested.

At other institutions, we have heard stories of prisoners alleging that individuals were being grouped together to develop herd immunity. Another was concerned that he was being bunked with someone who had clear symptoms of COVID–19. Yet another was concerned he was not receiving adequate medical care. BOP officers themselves did not have access to adequate on-site testing. The incarcerated men from this particular institute did not have the right PPE and other needed resources.

We continue to hear from our constituents, distraught family Members, those on the inside, and their lawyers. They tell tales about what is going on, tales of rolling lockdowns, of sick calls that get ignored, of prisoners who haven't seen or spoken with their loved ones in months. As facility after facility experiences outbreaks, it gives further credence to their concerns.

Particularly troubling is a report from the Council on Criminal Justice, which found that incarceration facilities represented 19 out of the 20 clusters of confirmed cases of COVID–19 in the U.S. as of August. The council highlighted that this is of particular concern because the U.S., of course, has the largest incarcerated population in the world, with approximately 2 million people behind bars. More than 1.3 million individuals are in State or Federal prisons, and the remainder are in county jails.

So, today, people in custody are five times more likely to contract COVID–19 than the general population. Even with insufficient testing, there are reports that 252,000 people have contracted COVID–19 while in Federal, State, and local custody. Over 1,400 of them have died.

You may have heard about the preventable death of Andrea Circle Bear. Ms. Circle Bear, a pregnant mother of five, contracted COVID while in BOP's care. She gave birth unconscious and on a ventilator. Ms. Circle Bear didn't survive and never met her child.

This tragedy occurred in April. Less than 4 months later, nearly half of the 1,300 prisoners at the same facility in Texas would test positive for COVID–19. This facility would become the largest outbreak of COVID–19 in a Federal facility in the country.

Director Carvajal, these prisoners and their families rightfully feel abandoned, and they are scared. You are here today hopefully to provide us with answers on how you plan to address these and many other concerns and also what resources you are lacking. What assistance can we provide to you?

As for the U.S. Marshals Service, Director Washington, we continue to hear similar testimonials. The vast majority of the individuals under Marshals' care and custody are pretrial detainees, who are innocent until proven guilty. I understand that you don't have direct control over the facilities with which you have contracts, but I would like to understand what oversight you are conducting over these facilities and, frankly, for many, question whether you should consider renewing the contracts, depending on how things are being handled.

We understand from news reports that well over 6,500 detainees in the U.S. Marshal custody have tested positive for the coronavirus and that the latest death toll among Federal pretrial

detainees is 20. I underscore that we have heard this from news reports for a reason, because, unlike the BOP, it is our understanding that the Marshals Service does not publicly report any of this information.

When Chairman Nadler and I wrote to you in May, we requested that you immediately begin to provide this information on the U.S. Marshals' website. We eventually received a response in October but with no commitment to report that information online. To this day, the information about infection rates and deaths in U.S. Marshals' custody is a virtual mystery to the public.

In addition, we have heard multiple reports that, even though the official BOP policy was to halt prisoner transfers among facilities, the Marshals Service has nevertheless continued to transfer prisoners from facility to facility. In a nationwide OSHA complaint, the union representing correction officers in the Bureau of Prisons has alleged that the U.S. Marshals do not properly test prisoners before they transport them, spreading the virus from facilities with high rates of infection to facilities with no infections.

Yesterday, I received information from a report produced by the BOP. On October 29, BOP reported 1,800 inmates and 888 staff tested positive for COVID–19. By November 30, there were 4,000 inmates and 1,400 staff who tested positive. That is a 162-percent increase in inmates and a 60-percent increase in staff in just 30 days. This is a pretty stark increase and seems to be correlated to the resumption of transfers and social visiting.

I have spoken with children who were terrified that their parent will die of COVID while in custody, husbands and wives who were seeking our assistance to gain the release of their sick spouses, mothers and fathers who were pleading on behalf of their children. As COVID–19 spikes for the general population, we know this translates to more cases in correctional facilities.

Today, I am thinking of the death of Andrea Circle Bear and that of Marie Neba. Ms. Neba was sick with stage IV cancer and pleading to be released at home. Instead, she would die from COVID–19 in custody. I really want to understand, especially with inmates who are very elderly or have terminal illnesses or multiple risk factors, why they can't be released.

So, it is now my pleasure to recognize the Ranking Member of the subcommittee, the gentleman from Ohio.

Mr. JORDAN. Thank you, Madam Chair.

Dr. Washington and Director Carvajal, welcome, and thank you both for your service to our country.

The Federal Bureau of Prisons is tasked with protecting society by confining offenders in the controlled environments of prisons and community-based facilities. BOP's duty is not merely to provide housing, food, and security for Federal inmates but also to help them become eventually law-abiding citizens. Every American has an interest in BOP's mission because the vast majority of Federal inmates, well above 90 percent, will someday, in fact, be released.

BOP's job is not an easy task and has only become more complicated due to the COVID–19 virus. In response to COVID–19, BOP undertook a number of steps to safeguard the health and safety of staff and the public. They prioritized inmates for home con-

finement who did not pose a significant risk to the public, restricted the number of visitors, and limited the movement of inmates among their detention facilities. These are reasonable measures.

My colleagues on the other side of the aisle want to go much further. They have tried to use the COVID–19 pandemic as a reason to let more criminals back on our streets. They even wrote to the Attorney General, Attorney General Barr, urging him to, quote, use every tool at his disposal to release as many prisoners as possible, regardless of whether they had completed their process and what the plan for each inmate to actually have reached what the experts would call rehabilitation.

They even passed legislation in the House that would pay States to release inmates in State prisons and local jails. Think about that. Democrats want to use your tax dollars to incentivize States to put more criminals back on the streets.

The consequence of these actions has deadly real-world results, as we have unfortunately seen. A Colorado inmate released pursuant to an executive order signed by the Governor related to COVID–19 was arrested in a fatal Denver shooting less than a month after his release. In Florida, a 26-year-old man charged with second-degree murder in connection with a fatal shooting in March, he was released from custody by the sheriff the previous month to contain the spread of COVID–19. Just a few miles from here, in Alexandria, Virginia, a man who was in custody for breaking into a woman's apartment and attacking her in 2019, due to COVID–19 concerns, this man was released by a local judge over the objection of the prosecutors in April. Three months later, he shot and killed the very woman he attacked the year before.

In the spite of these and numerous other crimes that have been committed by inmates released early, Democrats are calling for more inmates to be released, regardless of their crime or prison sentence.

To be clear, Democrats on the Committee want to open the jails. Don't forget, they also want to defund the police. They want to turn a public health crisis into a public safety crisis. These are not responsible policies, and I hope our witnesses today will explain why they are not.

Like the Bureau of Prisons, the United States Marshals Service has faced challenges stemming from the COVID–19 pandemic. As our Nation's oldest Federal law enforcement agency, the Marshals Service's duties are vast: Protecting the Federal judiciary, apprehending Federal fugitives, managing and selling seized criminal assets, housing and transporting Federal prisoners, and, of course, operating the Witness Security Program.

This past summer, we saw the husband and son of a Federal judge in New Jersey become the victims of murder after they were ambushed feet from the front door of their home. I look forward to exploring with our witnesses today ways we can help to keep our judges safe. As we discuss the BOP and the Marshals Service, we cannot forget the men and women around the country who put their lives on the line to keep us safe.

I also want to tell Director Washington and Director Carvajal to please pass on our appreciation to your officers and employees.

They have a tough job. Especially in the recent months, with all the violence around the country, they should know that they have our support.

Finally, President Trump has been a leader in criminal justice reform through the Second Chance Act and his wise use of the Presidential pardon power. President Trump also been a champion for law enforcement around the country. This hearing would not be complete without discussing and appreciating the job the President has done leading in these important areas.

Thank you, Madam Chair, and I yield back the balance of my time.

Ms. BASS. Thank you.

It is now my pleasure to introduce today's panel.

Michael Carvajal is Director of the Federal Bureau of Prisons. He began his career with the Bureau of Prisons in 1992 as a correctional officer in Texas. The Attorney General appointed him as the Bureau's 11th Director on February 25, 2020.

As Director, he oversees the operation of 122 Bureau of Prisons facilities, 6 regional officers, 2 staff training centers, 12 contract facilities, 22 residential re-entry management offices, with oversight and management of approximately 37,000 staff and 156,000 prisoners.

The Honorable Donald Washington was confirmed by the Senate and sworn in as the 11th Director of the U.S. Marshals Service on March 29, 2019. He directs a force of more than 5,000 operational and administrative employees spanning 94 districts, 218 sub-offices, and 4 foreign field offices. He is a graduate the U.S. Military Academy at West Point and South Texas College of Law in Houston, Texas.

We welcome our witnesses and thank them for participating in today's hearing.

Please note that your written statement will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that your 5 minutes have expired.

Before proceeding with testimony, I hereby remind each witness that all your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 U.S.C., which may result in the imposition of a fine or imprisonment up to 5 years or both.

Mr. Carvajal, please begin.

TESTIMONY OF MICHAEL CARVAJAL

Mr. CARVAJAL. Good morning, Chair Bass, Ranking Member Jordan, and Members of the subcommittee. It is my privilege to speak today on behalf of the Bureau of Prisons' over 37,000 corrections professionals who work day-in and day-out to support our critical law enforcement mission. I am committed to ensuring these dedicated men and women are guided by the values of respect, integrity, courage, and correctional excellence.

The Bureau receives a great deal of scrutiny with respect to our mission, and much of this is based on misinformation or misunder-

standing of what we do to keep America safe. I appreciate this opportunity to discuss what the Bureau does to maintain safety and security while providing inmates the programming they need to return to our communities and their families.

I have spent the majority of my professional life in career service to this agency. After serving in the United States Army, I joined the Bureau as a correctional officer, moving up through the ranks as a captain, warden, regional director, assistant director, and now director. I care deeply about our work and the personal sacrifices that the Bureau's law enforcement officers make.

The Bureau currently confines 154,000 inmates in our 122 Federal prisons nationwide as well as 11 private prisons and nearly 200 community-based facilities. Almost 80 percent of those inmates are serving terms for drugs, weapons, or sex offenses, with 41 percent of those being medium- and high-security offenders. The safe management of those offenders is challenging, but we continue to maintain low levels of serious assaults while ensuring that inmates engage in programs that address their re-entry needs.

The FIRST STEP Act provided further incentives for inmates to participate in re-entry opportunities, and we successfully met the very aggressive implementation deadlines that it included.

Essentially, the FIRST STEP Act required assessment of recidivism risk and programming needs for all inmates in our custody. After the Department of Justice developed and released their risk assessment tool, we immediately began scoring all inmates with the new tool. Effective January 22, all inmates in our custody were scored, to include new commitments, who were scored within 30 days of their arrival.

As the COVID–19 pandemic has harshly impacted our country, it has also had a tremendous impact on the lives of our staff and the inmates. Under normal circumstances, life in prison is challenging, and even more so coupled with COVID–19.

Our pandemic response has often been mischaracterized in public forums, which is unfortunate, since we have worked closely with the Centers for Disease Control to develop the best COVID–19 plan for correctional environments. We have welcomed external stakeholders into our facilities for audits and reviews as well as conducted unannounced inspections of the vast majority of our institutions to ensure COVID–19 procedural compliance. These internal reviews are ongoing.

Early on, we developed quarantine and isolation procedures for inmates and mandated social distancing and use of face coverings. Our procedures have proven effective, as this is evidenced by the steep decline in our inmate hospitalizations, inmates on ventilators, and deaths. As test supplies became available, we put in place test-in/test-out procedures for internal inmate movement to minimize the spread of the virus.

Since March, we have transferred more than 18,000 inmates at risk for COVID–19 to home confinement to help keep them safe. Many have asserted that the Bureau is spreading COVID–19 within our communities. However, contact tracing often revealed that the virus entered our prisons from the community.

Although delayed, our institutions generally mirror the community transmission rates. Therefore, it is vital that we all work together, the Bureau and the public, to combat this threat.

I am honored to speak on behalf of the Bureau staff nationwide who are working the front lines tirelessly to mitigate the spread of this virus as well as carrying on our very important mission. This is challenging, but it is vital to the safety and security of the public, our staff, and the inmates entrusted to our care.

Chair Bass, Ranking Member Jordan, and Members of the subcommittee, this concludes my statement.

[The statement of Mr. Carvajal follows:]

STATEMENT OF OF MICHAEL CARVAJAL

Good morning, Chairwoman Bass and Members of the Subcommittee. You have asked me to come before you today to discuss the Bureau of Prisons' (Bureau's) mission and operations. It is a privilege to speak today on behalf of the Bureau's over 37,000 staff—corrections professionals who support the agency's critical law enforcement mission. I am committed to ensuring that Bureau staff are guided by the values of respect, integrity, courage, and correctional excellence, and that we carry out our mission with the highest competencies as we serve our stakeholders: Inmates, the public, and not to be forgotten, the crime victims whose voices are often unheard.

I was honored to be selected to lead the Bureau and to work alongside the finest corrections professionals in the world. I have spent 28 years in the Bureau, starting as a Correctional Officer, moving up through the ranks of Correctional Services to become a Warden, Regional Director, Assistant Director, and now Director. I was appointed to serve as the Bureau's eleventh Director on February 25, 2020, approximately four weeks before the Bureau's first inmate COVID–19 positive case.

It is impossible to fully discuss the Bureau's current mission and operations without recognizing the impact of the COVID–19 pandemic and the diligent work of the Bureau's professionals in response. In these past months, I have seen the Bureau's professionals work tirelessly and with dedication toward their mission to protect the health and safety of inmates, fellow staff, and the public. I am keenly aware of the personal sacrifices these law enforcement officers make in fulfilling our important public safety mission. The great work they do every day goes largely unseen by the general public. Yet this inherently dangerous work helps keep our communities safe.

Our Mission—A History of Public Safety and Re-entry

The Bureau confines over 154,000 inmates in 122 federal prisons, 11 private prisons, and nearly 200 community-based facilities nationwide. Incarceration is a valuable crime-reduction strategy and an important law enforcement tool that holds individuals responsible for their actions and deters others from committing similar crimes. But equally important, it provides a means for individuals to address their criminogenic risks (such as gang involvement and substance use). As the Subcommittee recognizes, it is imperative that we effectively reintegrate individuals back into the community following release from prison to reduce the likelihood of future criminal behavior and associated victimization. To that end, the mission of the Bureau is to confine offenders in prisons and community-based facilities that are safe, humane, cost- efficient, and secure, and to assist inmates in becoming productive, law-abiding citizens when they return to our communities.

The Bureau has had great success with respect to both parts of our mission: We have low rates of inmate on staff and inmate on inmate assaults, disturbances, and escapes, and our recidivism rate is lower than that found in most studies of State prisons using comparable definitions and methodologies.[1] These results are a testa-

[1] An estimated 68% of prisoners released from 30 State prisons were arrested within 3 years. Source: BJS, Office of Justice Programs "2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005–2014)" May 2019. The BOP's 2018 Second Chance Act study (of inmates released FY 2011–13) shows that approximately 45% were re-arrested or had their supervision revoked over a three-year period; *see also* U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, 16 (Mar. 2016), *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf* (finding that 33.7% of federal offenders recidivated within three years of release (Table 2)).

ment to the hard work of our dedicated professional staff who support public safety and promote re-entry.

Our Population

During the first five decades of the Bureau's existence, the number and type of inmates we housed remained fairly stable. Beginning in the 1980s, however, federal law enforcement efforts and legislative changes led to a significant increase in the federal prison population; the Bureau's inmate population doubled in the 1980s and doubled again in the 1990s. Between 1980 and 2013, the population grew by approximately 800%, topping out at nearly 220,000. This increase was a significant challenge, and our staff responded accordingly and continued to serve the public by maintaining safety, security, and providing re-entry programming to our inmates.

Over the past few years, the inmate population has decreased significantly, such that today our crowding and staffing levels are more manageable. Particularly in the wake of COVID–19, this recent decrease has given us important latitude to respond to the pandemic.

Our Programs—Re-entry Begins on Day One

Re-entry programing is a critical component of public safety; individuals are much less likely to return to a life of crime and victimization if they leave prison with an education, job training, treatment for mental illness and/or substance use when needed, and a general understanding of what it means to be a productive, law-abiding citizen. Inmates also need an opportunity to develop employable skills. It is imperative we work in conjunction with our criminal justice partners and community stakeholders to do everything possible to ensure the nearly 44,000 inmates who are released back into our communities each year do not reoffend.

Inmate programs in federal prisons include work, occupational and vocational training, education (including literacy), substance abuse disorder treatment, psychological services and counseling, observance of faith and religion, and other programs that impart essential life skills. These programs are a critical part of the Bureau's mission to keep our communities safe by improving an inmate's mental health and/or providing employable skills and addressing critical criminogenic needs. The Residential Drug Abuse Program (RDAP), vocational and occupational training, education, and Federal Prison Industries (FPI) have been shown to reduce recidivism. In previous research studies, RDAP participants were 16 percent less likely to recidivate and 15 percent less likely to have a relapse in their substance use disorder within three years after release. Inmates who participate in vocational or occupational training were 33 percent less likely to recidivate, and inmates who participate in education programs were 16 percent less likely to recidivate

Our Goal—Effective Transition to the Community

The Bureau relies on Residential Re-entry Centers (RRCs; also known as halfway houses), and home confinement to assist inmates reintegrate into their communities prior to completing their prison terms. Typically, approximately 75% of inmates annually transfer to an RRC or home confinement prior to their release. RRCs provide inmates with a structured, supervised environment, and assistance in finding employment and housing; completing necessary programming (*e.g.*, community-based treatment services); participating in counseling; and strengthening ties to family and friends.

COVID–19 Pandemic

The COVID–19 pandemic that is impacting our entire country, and indeed the world, has had a significant impact on our operations. The Bureau's response to and management of COVID has received a great deal of Congressional, media, and stakeholder interest and scrutiny. I appreciate the opportunity to discuss in person all that the Bureau has done, and continues to do, to reduce risks and mitigate the impacts of the pandemic, and to keep our staff, inmates, and communities safe.

The Bureau has a sound pandemic plan in place and a well-established history of managing and responding to various types of communicable disease outbreaks. We used this pandemic plan as a springboard for our COVID response planning beginning in January, when our medical leadership began consulting with relevant experts, including the Centers for Disease Control and Prevention (CDC), the U.S. Public Health Service, the Office of Personnel Management (OPM), and the Office of the Vice President. We leveraged and implemented guidance from these experts

and used it to develop protocols for screening inmates and staff with potential COVID exposure risk factors. We have continued this strong collaboration throughout the pandemic and have invited the CDC and public health officials into our facilities to evaluate our work. They have praised our planning and implementation in the wake of a vexing virus. To be transparent about our plans, operations, and statistics, the Bureau has published one of the most detailed and thorough COVID pandemic resource areas in the Federal Government on our public website at *www.bop.gov/coronavirus*. As a further commitment to transparency, the Bureau updates the statistics on this site daily.

Institution Operations

On March 13, 2020, in response to an increasing number of people with COVID–19 positive infections in various communities, the Bureau implemented a decisive and comprehensive action plan to protect the health of the inmates in our custody, the staff, and the public, to the greatest extent possible, consistent with sound medical and corrections principles. This plan included significantly limiting movement in and out of our federal prisons. Almost all internal inmate—or Bureau-controlled—movement was suspended. There was some very limited inmate movement that was required, including movements for forensic studies, writs, Interstate Agreements on Detainers, necessary medical and mental health treatment, and transfer to RRCs or home confinement. Some new admissions to the Bureau from the United States Marshals Service (USMS) continued, as legally required. While we received criticism for that limited but continued movement, it is critical to note that the criminal justice system has not stopped processing criminal cases during the pandemic. Individuals in the community continue to commit crimes, arrests continue to be made, federal courts continue to adjudicate and sentence offenders, and thus detainees and sentenced inmates continue to enter our system. We are obligated to take these individuals from the courts and cannot control who the courts place into our system. Working closely with the Department of Justice (Department) and the USMS, we attempted to slow the entrance of some of these new admissions until additional testing capability was acquired.

With the March 13, 2020 guidance, we implemented social distancing procedures, to the greatest extent appropriate within the prison environment. As is widely noted, prisons are not designed for social distancing. Nonetheless, we modified our operations to the extent we could minimize co-mingling and group gatherings. We suspended social visiting, tours, and the admission of volunteers to decrease the flow of individuals from the community into the prison, particularly at the height of the pandemic. Understanding the importance of visitation to the inmate population, we significantly increased telephone minutes for the inmates from 300 to 500 minutes on March 13, 2020, and later, on April 8, 2020, in accordance with the CARES Act, we made telephone calls free for the inmate population. We also made video-visiting, also available at our female facilities, free of charge. The impact of this program has been great—telephone minutes use increased by nearly 50% the next day. This program is expected to continue over the course of the Presidentially-declared emergency.

On March 26, 2020, over eight months ago and early in the pandemic, we implemented enhanced daily monitoring, to include the cessation of movement for any inmate who screened positive for COVID–19, and established quarantine and medical isolation procedures for inmates. On March 31, 2020, enhanced modified operations were introduced to further limit movement within the institution such as eating meals in their rooms or cells, or in small groups within housing units, and limiting programmatic offerings to individualized or small group activities.

Despite movement limitations, all critical services have continued, and Chaplains and Psychologists visit inmates in their housing areas when inmates cannot leave that space. In early April, to maintain the safety of inmates leaving our facilities and the public, we instituted requirements for all inmates releasing from the Bureau or transferring to a Residential Re-entry Center (RRC) or Home Confinement to be placed on 14-day quarantine prior to their anticipated release or transfer.

The Bureau recognized early on that COVID testing for the inmate population was critical, but as was the case for the country as a whole, testing supplies were initially very limited. Working closely with the Department, the Bureau was able to obtain testing resources for all our prisons and established a national contract with outside laboratories for COVID testing. With that availability, we have instituted a test-in/test-out and 14-day quarantine protocol for any necessary inmate movement.

Further, regardless of our diligent COVID–19 planning and protocol, emergencies have and will continue to arise that require us to adapt changes to our procedures.

For example, in the midst of the diligent work Bureau staff were undertaking nationwide to counter the pandemic, on April 13, 2020, Federal Correctional Institution (FCI) Estill, South Carolina, was struck by a tornado causing extensive damage to both the medium- and minimum-security institutions. Over the ensuing four days, we were able to move 842 inmates safely and securely, relocating them to a prison in Pennsylvania that had available capacity. Subsequently, three facilities sustained significant damage from Hurricane Laura. The Bureau has plans in place to deal with situations such as these, and despite the complexities that the COVID–19 pandemic adds to the implementation of those plans, these experiences reflect just how well-trained and prepared our staff and leadership are to handle whatever the next challenge may be.

Home Confinement

As the pandemic grew more widespread, the Bureau began aggressively screening the inmate population for inmates who were appropriate for transfer to an RRC or Home Confinement for service of the remainder of their sentences. Additionally, the Bureau authorized the use of inmate furloughs to move qualified offenders out of the facilities, to reduce populations, and to increase ability for inmates to socially distance.

On March 26, 2020 and April 3, 2020, Attorney General Barr issued memoranda to the Bureau directing us to maximize the use of Home Confinement for vulnerable inmates, particularly at institutions that were markedly affected by COVID–19. The CARES Act, signed into law on March 27, 2020, further expanded our ability to place inmates on Home Confinement by lifting the statutory limitations contained in title 18 USC 3624(c)(2) during the course of the pandemic. I am pleased to report that since March 26, 2020, BOP has transferred 18,112 inmates to Home Confinement, and there are an additional 175 who are scheduled to transfer to Home Confinement in the coming weeks. These assessments remain ongoing and will continue for the duration of the pandemic.

It should go without saying that, while we are always dedicated to the protection of our inmates' health and safety, public safety must also be considered when evaluating community placements, and, as the Attorney General's guidance emphasized, it is not appropriate for inmates who present a risk to the public, because of their criminal acts or other factors, to be transferred to home confinement. Nor can we transfer inmates, who do not have safe housing for themselves or housing with appropriate safeguards, to home confinement. As home confinement is still, after all, a form of incarceration for persons convicted of crimes who are still serving a federal sentence, these public safety factors must be considered, and these decisions are made using sound correctional judgement and our many years of experience overseeing such transfers.

First Step Act

Despite the challenges COVID brings, the Bureau continues to provide robust and effective programming, and it is diligently implementing the First Step Act (FSA).

Assessment of Inmates' Risk to Recidivate

As of January 15, 2020, which is the FSA statutory deadline, all sentenced inmates had received individual risk scores and identified need areas. Also in January, the approved catalog of more than 70 Evidence-based Recidivism Reducing Programs (EBRR) and Productive Activities (PA) was published on our public website. These EBRRs and PAs are recommended to inmates, to address their specific needs. When an inmate successfully completes a recommended program in an identified need area, he or she may be able to earn FSA time credit or other incentives.

FSA Programming

The Bureau has a variety of programs, the most robust of which are Cognitive Behavioral Therapy (CBT) interventions for mental health and substance use disorders, anger management, and criminal thinking elimination. Literacy and occupational training programs are also widely available, and re-entry-focused programs, such as parenting, are offered at all sites. Because the agency has such a large menu of programs covering all need areas, the Bureau has put forth considerable effort to ensure adequate capacity in our existing programs and has been able to give access to more inmates by hiring staff into the positions authorized by Congress under FSA. We have also worked toward program fidelity, standardizing service de-

livery so that every program comports with the evidence that supports its use. We identified gaps in services for women and were able to enhance our offerings. We also recently contracted for women's college programming. Although we have many strong programs, external vendors or program developers may submit established programs for initial review by an independent research organization engaged by the Bureau; this review analyzes and determines if the program satisfies the requirements of the FSA, and that determination is later reviewed by the Bureau. We also develop programs internally. As one of the largest employers of doctoral level psychologists—as well as an employer of chaplains, teachers, and medical professionals—the agency is well- suited to identify gaps in programming and create services grounded in evidence that fit federal population parameters.

Medication Assisted Treatment (MAT)

The Bureau's MAT program was established in 2018 and expanded as a result of the FSA. By May 2019, the Bureau was screening all inmates nearing transfer to community placement for MAT, in an effort to treat addiction and reduce the risk of overdose deaths among releasing offenders. Treatment options for newly-committed inmates, who entered Bureau custody with existing MAT treatment plans, were expanded to include all three Food and Drug Administration (FDA)-approved medications for MAT, using a combination of community providers and appropriately trained Bureau providers. The Substance Abuse and Mental Health Services Administration (SAMHSA), within the U.S. Department of Health and Human Services (HHS), provides the regulation and oversight of substance use disorder treatment. The Drug Enforcement Administration (DEA) and SAMHSA work together to provide the licensing and accreditation of Opioid Treatment Programs. The Bureau currently has one opioid treatment program at MCC New York and is working with the DEA and SAMSHA to stand up three more at Federal Medical Center (FMC) Butner, North Carolina; FMC Springfield, Illinois; and FMC Carswell, Texas. These will enable the Bureau to internalize even more MAT services and expand our ability to treat all inmates in our custody who demonstrate a clinical need for MAT. The Bureau continues to work towards establishing an internal infrastructure for all MAT-related services and medications, with primary focus on consulting with external subject matter experts, training staff in all divisions, implementing clinical guidance for treatment standardization, and monitoring/tracking/reporting MAT utilization.

FSA Second Chance Act Provisions

The FSA also contains enhancements to the Second Chance Reauthorization Act of 2018, which, among other changes, reauthorized and modified a pilot program that allows the Bureau to place certain elderly and terminally ill inmates on home confinement, to serve the remainder of their sentences. The program was fully implemented in April 2019. To-date, approximately 534 inmates have been placed into home confinement pursuant to this five-year pilot program.

FSA Criminal Justice Provisions

The FSA includes a series of other criminal justice-related provisions. These provisions include a statutory prohibition on the use of restraints on pregnant inmates; a change to the way good conduct time credit is calculated (directing that inmates earn 54 days of good time credit for each year of imposed sentence, rather than for each year of time served); a requirement for the Bureau to provide a way for employees to safely store firearms on Bureau grounds; a requirement for the Bureau to try to place inmates within 500 driving miles of their primary residences; a prohibition against the use of solitary confinement for juvenile delinquents in federal custody; and an expanded requirement that the Bureau aid inmates with obtaining identification before they are released. In each of these areas, the Bureau either was already in compliance with the mandate when the FSA was enacted or has since updated its policy or procedures to come into compliance with the new provisions.

Conclusion

I am honored to speak on behalf of the Bureau, its staff in our 122 institutions, and our administrative offices nationwide. Our mission is extremely challenging, but critical to the safety and security of the public, our staff, and the inmates we house. I thank the staff who, like first responders everywhere, are working long hours to prevent or mitigate the spread of COVID–19 in our facilities. The Bureau can be proud of this hard work, but we understand there is still more to do.

Chairwoman Bass and Members of the Subcommittee, this concludes my formal statement.

Ms. BASS. Thank you.
Mr. Washington?

TESTIMONY OF THE HONORABLE DONALD W. WASHINGTON

Mr. WASHINGTON. Good morning, Chair Bass, Ranking Member Jordan, distinguished Members of the committee. Thank you for the opportunity to appear before you today to discuss the United States Marshals Service.

As my statement for the record reflects, the Marshals Service has an array of critical law enforcement missions, all of which we have continued to accomplish despite the challenges presented this year.

My complete statement is available to you all, so I just want to briefly highlight two current areas of operation that reflect our diversity and importance as a law enforcement entity.

First, not many people realize that, in addition to our core missions of apprehending fugitives, transporting, and housing prisoners, protecting the judicial process, and running the Federal Witness Security program, we are also responsible for the Strategic National Stockpile security operations program.

Enhanced after 9/11, the national stockpile fills an important need to have pharmaceuticals and other medical materials available for quick dissemination to the American people in times of national need, such as a manmade or natural disaster or a pandemic. The Marshals provide a variety of security controls for the stockpile, including storage and transportation of medical materials.

I am very pleased to report that our deputies are already working hand-in-hand with Operation Warp Speed to provide security for COVID–19 vaccines from the facilities where they are manufactured to distribution sites. We have teams of highly trained Marshals Service deputies who are executing this mission, and this demonstrates yet another way this agency provides for the safety and security of our Nation's citizens.

The second area I want to highlight relates to critically missing children. While we are recognized as the preeminent agency for locating and apprehending fugitives, we have found an equally important application for our people-finding skills.

In 2015, Members of this Subcommittee gave the Marshals Service an added statutory authority as part of the Justice for Victims of Trafficking Act. This authority enhanced our ability to use our resources to assist Federal, State, and local law enforcement entities with the recovery of missing, endangered, and abducted children.

Previously, we could only help find critically missing children when there was a connection to a fugitive or a sex offender investigation. Under this new authority, we established a Missing Child Unit in 2016, and, ever since, we have been partnering with our Federal, State, and local authorities to recover missing children, many of whom are older runaways who are at a very high risk of child sex trafficking, child exploitation, sexual abuse, and physical abuse.

Since August alone, this agency's Missing Child Unit has conducted six operations in districts around the country aimed at locating and recovering local missing children. The results speak for themselves. In these 6 operations, we recovered or located 181 children, 22 of which were known victims of sex trafficking.

Now, beneath those numbers are real people. A few weeks ago, the foster parents of a child we recovered in New Orleans sent me this email. It reads: "Dear Director Washington, thank you for saving our foster son. When 13-year-old Malik was abducted in New Orleans in mid-October, we were put in touch with your Missing Children Unit team here. Their coordinated efforts, calm energy, vigilant search tactics, and quick communication provided both relief and results. They stayed in touch with us at every turn, giving us hope when we had little. We cannot thank you enough for the great work your team down here does. If we can impress upon you anything, it is that this program should continue to be funded and provided resources. Without these efforts, we fear where our son may be today. Thank you again for the commitment you have instilled in your NOLA team. We are forever grateful. Best, Chelsea and Eric Nelson."

Committee Members, these two mission areas I have highlighted demonstrates this agency's diverse missions and commitment to public safety. I thank you for the opportunity to be here today, and I look forward to answering your questions or any questions that you might have.

Thank you.

[The statement of Mr. Washington follows:]

STATEMENT OF HONORABLE DONALD W. WASHINGTON

Good morning Chairwoman Bass, Ranking Member Sensenbrenner, and other distinguished Members of the Subcommittee. I am honored to appear before you today to discuss the missions of the United States Marshals Service (USMS).

I would like to start by thanking you for your strong support of the USMS and providing us the resources that allow us to reduce violent crime and protect, defend, and enforce the American justice system.

Overview

In 2019, the USMS celebrated its 230th anniversary. For over two centuries, the USMS has held a unique role in the American judicial system. Since 1789, when George Washington appointed the first 13 Marshals, we serve as the enforcement arm of the federal courts and are involved in virtually every federal law enforcement initiative. From the Nation's inception, through our 19th century westward expansion, our role in the iconic 20th century civil rights struggles, and into the present, USMS has proudly contributed to the Rule of law.

Even for an organization as storied as ours, 2020 has been a year with unique challenges. Like every American institution, the USMS has adjusted to the realities imposed by the COVID–19 pandemic and accompanying economic disruption, while still conducting our critical law enforcement missions. As a federal law enforcement organization, we have a keen interest in the policing issues raised by the death of George Floyd and other highly publicized cases this summer. The USMS has been affected by the violent unrest in some American cities that put the federal judiciary directly at risk. Finally, on July 19, a deranged gunman attacked the family of federal judge Esther Salas at her home, killing her 20-year-old son and severely injuring her husband. This tragic incident brings to the forefront our sacred duty to protect the federal judiciary from threats to the Rule of law and raises important issues about the availability of technology that criminals and disturbed individuals use to target protected individuals like judges.

Despite these challenges, the USMS continues to accomplish our varied and critical missions. I am proud of the way our workforce of approximately 5,500 Marshals,

Deputy Marshals, and administrative employees has risen to meet this year's adversity. Courthouse operations have been reconfigured because of COVID–19, often under short deadlines.

Enforcement operations are precisely focused on arresting the most violent criminals who need to be off the streets in order to make our communities safer, pandemic or not. We have reconfigured our prisoner operations to ensure the safety of the prisoners, our staff, and the court family. Deputies have been shifted from one part of the country to another to help defend federal property. Many of our employees are teleworking from home, juggling work, family, and their own concerns about safety. Others are out on the streets of our nation, risking themselves and their health in order to find and apprehend violent fugitives, wherever they may be. I am incredibly proud of our workforce and hope you are as well.

A recent example of our dedication is Operation Not Forgotten, where our Missing Child Unit worked with numerous other agencies to locate 26 missing and endangered children in Georgia and arrested nine criminals in the process. Using our renowned skills to locate wanted fugitives, we used relatively new authorities granted to us by Congress in 2015 to find these children, who were considered to be some of the most at-risk and challenging recovery cases in the area, based on indications of high-risk factors such as victimization of child sex trafficking, child exploitation, sexual abuse, physical abuse, and medical or mental health conditions. One child was recovered in the company of a convicted child molester, who was promptly arrested and is now incarcerated.

Without the continued support of this committee, successes like these would not be possible. As the Director of the USMS, my priorities are to ensure the safety of USMS employees and protectees; reduce violent crime; and increase the professional development of our workforce.

The Fiscal Year (FY) 2021 President's budget request supports a robust addition to our workforce, specifically 363 positions, including 280 deputies, which are all carefully justified. The number one concern I hear from deputies, from the judiciary, and from the various Marshals and leaders who report to me is that we do not have enough people to execute the missions that we have been assigned. With your support, funding of these positions will improve the USMS's capabilities to meet our mission responsibilities in the years to come. I appreciate the chance to speak with you today about the many missions of the USMS, which include protecting the federal judiciary, apprehending fugitives, housing and transporting federal prisoners, managing and selling seized assets acquired by criminals through illegal activities, operating the Witness Security Program, and ensuring that convicted sex offenders are complying with their obligations. Many of our missions are accomplished working side by side with other federal, state, and local law enforcement agencies, a force multiplier that we believe is a hallmark of effective federal law enforcement.

COVID–19

From the outset of the COVID–19 pandemic, the USMS has taken proactive measures to contain the spread of COVID–19 amongst prisoners in its custody and began monitoring its detention population for COVID–19, formulating COVID–19 related guidance, and providing COVID–19 related resources addressing the USMS's prisoner detention mission.

The USMS does not own or operate any detention facilities. While some USMS detainees are housed in Bureau of Prisons (BOP) and private detention facilities, the majority of those in USMS custody are housed in facilities operated by State or local government facilities where we have an established intergovernmental agreement to house federal prisoners. All decisions concerning infectious disease treatment, including decisions to isolate and quarantine prisoners, are made by medical and correctional staff working at each facility. Nevertheless, we have worked from the beginning of the pandemic to minimize the risk of COVID–19 to prisoners and staff, and have adjusted our processes from the beginning of the pandemic to account for our growing understanding of the disease and its transmission. For example, we have authorized COVID–19 testing at any facility where the USMS houses prisoners; and we are now testing many prisoners who are leaving our custody before they move to the BOP to serve their sentences. We also have widely distributed personal protective equipment (PPE) to our operational workforce who are arresting and interacting with prisoners, and we also provide PPE to prisoners in our custody upon their arrest.

The USMS currently houses prisoners in nearly 800 facilities located throughout the country, which reflects our legal requirements to house prisoners in proximity to their legal proceedings. Depending upon the needs of each judicial district, we might use some facilities to house just a few prisoners while others routinely house

more than 1,000. In more than two-thirds of the facilities with USMS prisoners, we house fewer than 50 prisoners, representing a fraction of their total population.

Judicial Security

Protecting federal judicial officials, which include judges, attorneys, and jurors, is a primary mission for USMS. Each year, Deputy U.S. Marshals investigate thousands of communications that are vetted into hundreds of significant threats against judges, prosecutors, and other Members of the court family. Our investigations have been complicated by the exponential growth of social media communications in recent years, and we see an increasing need to monitor public social media so that we have a better chance of detecting disturbed people who may be contemplating crimes against protected officials. Senior inspectors and deputies, as well as contract court security officers, provide security and screen visitors at more than 700 judicial facilities across the country. Because of COVID–19, we have instituted safety precautions in courthouses across the nation, including masking requirements, use of video conferencing for some judicial appearances, and increased screenings and protections for in-person prisoner appearances. In addition to providing security to judicial proceedings, Deputy

U.S. Marshals also provide protective security details for certain governmental officials when required. The USMS also oversees the security aspect of courthouse construction projects, from design to completion. These protective measures, although not always visible to the general public, are critical to ensuring the security and stability of our federal judicial system.

Fugitive Operations

The USMS is the Federal Government's primary agency for fugitive investigations and apprehensions. Deputy U.S. Marshals arrest or clear more than 30,000 federal fugitives each year, and Marshals-led fugitive task forces, made up of federal, state, and local law enforcement partner agencies, arrest or clear more than 70,000 State and local fugitives every year. Many of these fugitives are the "worst of the worst": Violent repeat offenders whose capture immediately makes local communities safer. The USMS leads 56 district fugitive task forces and operates eight regional fugitive task forces dedicated to locating and arresting wanted felons. We are the primary agency tasked with arresting foreign criminal fugitives believed to be hiding in the U.S., as well as working with law enforcement partners and governments worldwide to track, arrest, and extradite fugitives hiding in foreign countries. This year we began piloting the use of Unmanned Aerial Systems (UAS) in some of our fugitive apprehension operations, marking a carefully implemented, years-long development effort consistent with DOJ policy. We are excited about the ability of UAS to provide cost effective overwatch capabilities to our fugitive task forces that reduce risks to law enforcement personnel.

The USMS is the lead federal law enforcement agency responsible for investigating sex offender registration violations. Following passage of the Adam Walsh Act in 2006, the Marshals Service has partnered with law enforcement personnel from thousands of State and local agencies to coordinate and conduct sex offender compliance/enforcement operations throughout the country. In FY 2020, USMS conducted 2,759 non-compliant sex offender investigations and assisted with 52,738 compliance checks of known registered sex offenders.

Prisoner Operations

The USMS is responsible for the custody of more than 200,000 federal detainees each year, beginning at the time of arrest by a federal agency (or remand by a judge) until acquittal, commitment to a designated Federal BOP institution, or otherwise ordered release from our custody. The USMS ensures the safe, secure, and humane care of prisoners in its custody. We currently provide housing, medical care, and transportation for an average daily population of about 63,000 federal prisoners located throughout the United States and its territories and escort prisoners to and from their court appearances. Our prisoner operations have been significantly affected by the sudden COVID–19 pandemic this year. Many court appearances have been substantially curtailed in certain parts of the country, depending on the severity of the disease outbreak there. The USMS does not own or operate detention facilities but partners with State and local governments to house approximately 70 percent of our prisoners. Additionally, the agency houses approximately 16 percent of its prisoner population in private detention facilities under direct contract and approximately 14 percent in Federal BOP facilities. In regular times, the detention of

federal prisoners presents diverse and complex challenges, including: (1) Locating detention space near federal courthouses; (2) coordinating with federal, state, and local authorities regarding the execution of writs, court orders, and the transfer of prisoners; (3) separating multiple co-defendant prisoners from each other to ensure their safety and security and the effective operation of the judicial system; and (4) managing prisoners with contagious diseases and chronic illnesses. These factors have all been complicated by the COVID–19 pandemic. Jails and detention facilities are a particularly challenging environment for communicable diseases like COVID–19, and we have been taking appropriate and prudent measures to protect prisoners, staff, and the community while executing the lawful orders set by the federal judiciary. USMS is actively mitigating the COVID–19 threat for all new detainees. After arrest, all new intakes are screened for COVID–19 symptoms at the sally port prior to entering the courthouse facility. Prisoners are also screened when leaving the facility. Screening includes verbal COVID–19 screening questions, as well as temperature checks. Detainees are given facemasks upon arrest and must wear masks within the courthouse and during transportation. Inmate restraints are cleaned between uses. We are following guidance from the Centers for Disease Control and Prevention (CDC) on handling prisoners; this guidance has changed several times since the outbreak, and we will continue to evolve our prisoner operations as CDC guidance changes. We also have surveyed the approximately 800 State and local facilities actively housing USMS prisoners to determine if they are following CDC guidelines for managing COVID–19 in correctional and detention facilities. We observed that the vast majority are following most of CDC's guidelines.

Prisoner Transportation

The USMS Justice Prisoner and Alien Transportation System (JPATS) transports prisoners between judicial districts and correctional institutions in the U.S., including Puerto Rico and the U.S. Virgin Islands. During normal times, JPATS handles more than 1,000 movements per business day on average, or about a quarter million movements a year. Since the arrival of COVID–19, prisoner movements have been sharply reduced as a safety measure.

Between March 2020 and July 2020, there has been a 70 percent decrease in JPATS movements when compared to the same timeframe last year. JPATS uses all CDC recommended protocols including full personal protective equipment (PPE) for crews and face coverings for prisoners. JPATS has also implemented increased equipment and aircraft cleaning as well as crew/prisoner social distancing on flights.

Asset Forfeiture

The Department of Justice Asset Forfeiture Program is a key component of the Federal Government's law enforcement efforts to combat major criminal activity by disrupting and dismantling illegal enterprises, depriving criminals of the proceeds of illegal activity, deterring crime, and restoring property to victims. The USMS plays a critical role in identifying and evaluating assets that represent the proceeds of crime as well as efficiently managing and selling assets seized and forfeited by DOJ. Proceeds generated from asset sales are used to operate the program, compensate victims, and support various law enforcement and community initiatives. We manage a wide array of assets, including real estate, commercial businesses, cash, financial instruments, vehicles, jewelry, art, antiques, collectibles, vessels, and aircraft.

Witness Security

The USMS operates the federal Witness Security Program (WITSEC), which is sometimes referred to colloquially as the "Witness Protection Program." WITSEC provides for the security, safety, and health of government witnesses and their authorized family Members, whose lives are in danger as a result of their cooperation with the U.S. government. The

program has successfully protected an estimated 19,000 participants—including innocent victim-witnesses and cooperating defendants and their dependent family Members—from intimidation and retribution since it began in 1971. No participant following program guidelines has ever been harmed while under the active protection of the USMS. The program is a vital and effective tool in the U.S. government's battles against organized crime, drug trafficking, terrorism, and other major criminal enterprises. WITSEC personnel are the leading authorities and foremost experts on witness security matters, providing guidance and training to many government officials throughout the world.

Tactical Operations

The USMS performs tactical operations for sensitive missions involving homeland security, national emergencies, and domestic crises. The Special Operations Group (SOG) is a rapidly-deployable, highly-trained force of tactically-trained deputies whose Members are deployed in high-risk and sensitive law-enforcement situations, national emergencies, civil disorders, and natural disasters. SOG is comprised of 80–100 volunteer Deputy U.S. Marshals who complete rigorous training in specialties such as high-risk entry, explosive breaching, weapons employment, rural operations, evasive driving, less-than-lethal weapons, waterborne operations, and tactical medical support. SOG deploys specialized people and equipment in support of domestic operations such as 15 Most Wanted investigations, fugitive task force support, and high-threat judicial proceedings such as terrorist and drug kingpin trials.

Officer Safety

The USMS's fugitive apprehension mission is among the most dangerous in federal law enforcement, and officer safety is our top priority. Born of hard lessons learned, we developed Officer Safety Training that includes a 40-hour High Risk Fugitive Apprehension Course, which focuses on the real dangers of the fugitive mission. This course focuses on topics including: Deputy Trauma Medicine, Use of Force, Building Entries, Firearms Training, Vehicle Stops, and Leadership. We also ensure that all personnel receive officer safety training on a continuous basis, including a program to ensure every district has a highly trained Tactical Training Officer able to provide officer safety training on a continuous basis. Finally, we developed a program in recent years for the cyclical replacement of body armor, which ensures that all body armor is replaced on a 5 year cycle to take advantage of advances in protective technologies.

Conclusion

Chairwoman Bass, Ranking Member Sensenbrenner, and Members of the Subcommittee, on behalf of the men and women of the United States Marshals Service, thank you for your ongoing support of the Agency's programs. I am committed to ensuring that we are efficient stewards of the resources you have entrusted to us. I look forward to working with you to ensure we meet our obligations to the Department of Justice, the federal judiciary, and the American people.

Ms. BASS. Again, let me thank both witnesses for being here today and for your service.

I would like to ask unanimous consent to enter two documents into the record, one from The Sentencing Project and the other one from the American Federation of Government Employees.

[The information follows:]

KAREN BASS FOR THE RECORD

RESEARCH AND ADVOCACY FOR REFORM

The Honorable Karen Bass
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and
Homeland Security
Washington, DC 20515

The Honorable Jim Jordan
U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515

December 2, 2020

Re: Oversight Hearing for the Federal Bureau of Prisons and the U.S. Marshals Service

Dear Chairwoman Bass and Ranking Member Jordan:

Thank you for holding today's critical oversight hearing of the Bureau of Prisons (BOP) and Marshals Service as these two agencies confront a deadly pandemic that is expected to grow worse as COVID-19 infections increase across the nation. The Sentencing Project is deeply concerned that despite warnings from public health experts, including the Centers for Disease Control and Prevention, regarding the heightened risk that incarcerated people face from COVID-19 due to overcrowded and unsanitary conditions of confinement, officials at every level of government have not done enough to protect the lives of incarcerated people and correctional workers.

According to *The New York Times*, over 250,000 people in prisons and jails nationwide have tested positive for COVID-19 as of November 30, 2020, a rate four times higher than the general public. The federal prison system reports the second highest number of cases among correctional systems, exceeding 24,000 since March. At least 145 people incarcerated in BOP custody and two staff members have died due to the virus. A November 17 report from the *Marshall Project* also finds that the new surges in the virus are outpacing previous infection peaks; over 1,000 people in federal facilities tested positive the week of November 17 alone. Moreover, as of early November, 6,676 people in Marshals Service custody had tested positive for coronavirus and 20 people have died.

Despite the high number of cases and the strong likelihood of increased infections in carceral settings, public health guidelines are not adequately followed by agency officials. Indeed, a report from the Office of the Inspector General for the Department of Justice in November found the Bureau failed to appropriately isolate individuals who tested positive for COVID-19 from the general population and corrections staff were not always equipped with protective gear or informed about the health status of sick individuals they were charged with overseeing. In August, a *Marshall Project* expose quoted frightened correctional workers who alleged that Marshals Service transfer protocols were endangering the health of incarcerated people and BOP employees. They recounted multiple cases of Marshals arriving at BOP facilities with infected individuals who had never been tested and no one wore appropriate face coverings.

The Sentencing Project joins with experts in public health and correctional medicine in calling for a significant reduction in incarceration levels to limit the spread of infections in BOP facilities and to save lives.

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The Bureau of Prisons has been operating overcrowded prisons for decades and staffing shortages persist. Congress granted the Department of Justice authority under the CARES Act to help reduce the federal prison population by expediting transfers to home confinement. The Attorney General severely limited the effect of this new authority, however, by creating a long list of eligibility criteria, including that individuals must have a PATTERN risk score of minimum, have completed at least 50 percent of their sentence, and reside in a low- or minimum-security facility. Currently, only about 5% of the total federal prison population is serving their sentence on home confinement despite criminological evidence that if released many incarcerated people would not pose an unreasonable public safety risk.

The Sentencing Project regularly corresponds with an individual confined at the prison camp at FCI Cumberland in Maryland which is a dormitory style low security housing unit where large groups of men sleep three feet apart from one another in bunk beds. Dozens of people share a bathroom. Unfortunately, despite this individual's history of chronic asthma and approval from the warden for transfer to home confinement, the Bureau of Prisons has denied his request because he has not completed 50 percent of his sentence. The Sentencing Project urges this Committee to use its oversight authority for the Bureau of Prisons to ensure that the CARES Act's expansion of home confinement is implemented as Congress intended.

The Department of Justice's limited strategy to reduce crowding ignores research that finds older people in prison have very low rates of recidivism upon release regardless of their offense type or history of violent behavior. Known as "aging out of crime," this phenomenon has been long established and should be considered in decisions to determine whether or not an individual presents a threat to public safety and is suitable for release.

U.S. District Judge M. Casey Rodgers applied this evidence in granting a petition for compassionate release for Andre Williams, 78, who was serving a life sentence for bank robbery and weapons possession. The judge's order stated, "given Williams' age, serious health problems, the substantial amount of time he has already served and his exemplary prison record ... the court finds that the risk of him engaging in further criminal conduct is minimal." Over DOJ objections, the court ordered Williams' release on April 1. While still in custody on April 5, Williams tested positive for COVID-19. Tragically, he died April 12 still incarcerated.

It is this Committee's obligation to ensure that the Department of Justice, the Bureau of Prisons and Marshals Service do everything in their power to protect the lives of people in federal custody, which includes expediting releases and transfers of elderly and vulnerable people who do not present a credible threat to public safety during this health crisis. The potential consequence of failing to take significant action to reduce the spread of infection is staggering.

Thank you for considering the concerns of The Sentencing Project. We look forward to working with you to protect people during this crisis. Please contact Kara Gotsch, Director of Strategic Initiatives at The Sentencing Project, at kgotsch@sentencingproject.org if you need additional information.

Sincerely,

Amy Fettig
Executive Director

Council of Prison Locals 33

STATEMENT OF
SHANE FAUSEY
NATIONAL PRESIDENT
COUNCIL OF PRISON LOCALS

BEFORE THE

COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED:
"Oversight of the Federal Bureau of Prisons and the U.S. Marshals Service"

PRESENTED:
December 2, 2020

Statement of
Shane Fausey
National President
Council of Prison Locals
Committee on Judiciary
United States House of Representatives

Good morning, Chairwoman Bass, Ranking Member Sensenbrenner, and Members of the Subcommittee. I am pleased to offer the following statement related to the Council of Prison Locals, the Federal Bureau of Prisons, and the staffing crisis and handling of the COVID-19 pandemic.

I am honored to represent and speak on behalf of the nearly 30,000 bargaining unit Bureau of Prisons (BOP) employees – professionals who go to work in America's penitentiaries and prisons every day. In the face of adversity and some of the most violent 'cities' in the country, they keep us all safe from some of the world's most dangerous human beings. Throughout this pandemic, the dedicated Federal Law Enforcement personnel have continued to work to provide institutions that are safe for the inmates, staff, and most importantly the communities surrounding these Federal Prisons.

UPDATE COVID-19 IN THE FEDERAL PRISON SYSTEM

It was our concern, at the beginning of this pandemic, that the Bureau of Prisons would not be prepared and most importantly be proactive when dealing with what could happen to the inmates, the staff, and communities associated with Federal Facilities.

The Federal Bureau of Prisons has been in the midst of a staffing crisis that did not just begin with the hiring freeze of January 2017. It began with the 'mission critical' cuts in 2005, which eliminated more than 10% of all Correctional Officer posts. For almost two decades we have warned of the ominous results of underfunding and staffing reductions. The initial mission critical cuts eliminated the second officer in most housing units across the agency. This elimination directly resulted in the isolation of both Officers Jose Rivera (2008 USP Atwater, CA) and Eric Williams (2013 USP Canaan, PA) in some of America's most dangerous penitentiaries. This isolation and 'budget' cuts resulted in the murder of both Jose and Eric. The hiring freeze of January 2017 saw the elimination of more than 4,400 additional positions agency-wide, plummeting most Correctional Services compliments below 80% of the authorized positions at the time. In January 2016, authorized positions were 43,369. These arbitrary cuts eliminated whichever positions were vacant at the time. There was no thought analysis or prioritization of which positions were to be eliminated. In just three short months, the 80% became the new 100%. In essence, the new 100% is approximately 75% of the 'mission critical' levels the agency testified to be the minimum level of Officers to keep the Bureau of Prisons safe. As Correctional Officer numbers plummeted, the Office of the Inspector General

determined[1] that prison violence and homicides rapidly increased with the inmate suicide rate nearly doubling in a few short years. As of October of 2020, there are 37,096 positions filled. All of the parties, including the leadership of the Department of Justice and BOP, were well aware of the unpreparedness of the Bureau of Prisons even absent any 'major' occurrences such as the COVID-19 pandemic we are now facing.

The staffing crisis worsened the severity of this pandemic in our federal prisons and severely limited the agency's possible responses[2]. The pre-pandemic hiring efforts by the agency were outpaced by our attrition rate and then stifled by the pandemic's restrictions. The limited employees available, coupled with the critical shortage of Correctional Officers nationwide, has exacerbated the misery of COVID-19. The devastating levels of mandatory double shifts and dependence on augmentation just to function has evolved into TDY (Temporary Duty Assignments) in which a 'National Augmentation' became necessary in institutions wracked by COVID-19. Understaffed facilities sent TDY employees to rapidly deteriorating facilities to put fingers in the cracking dam.

As of this time, the Bureau of Prisons has publicly acknowledged 143 inmates are dead due to COVID-19. The Bureau of Prisons has recognized only two employees have died due to COVID-19 and continues to deny the death of another staff member as COVID-19-related. On April 14, 2020, Robin Grubbs, 39, a veteran and a Case Manager at USP Atlanta was found dead in her home. She posthumously tested positive for COVID-19. She was screened on April 10, 2020, and was determined to be asymptomatic. Ms. Grubbs had an office located in the unit being used to house sick inmates or inmates who had been exposed to COVID-19. Staff working with Ms. Grubbs at USP Atlanta are among many who have stated they were not issued personal protective equipment to stay safe while working around COVID-19 areas. Even with specific guidance from the Department of Labor clarifying the presumptive causal connection of COVID-19 and a correctional worker / first responder, the BOP still denies Ms. Grubbs' death as being COVID-19-related. I fear the loss of human life is being viewed as an acceptable cost of budget restrictions and working in a prison. Throughout this pandemic, nearly 23,000 inmates and 3,100 staff have contracted COVID-19. The alarming rate that both inmates and staff continue to contract COVID-19 far exceeds the rate of the general public.

INMATE TRANSFERS DURING A GLOBAL PANDEMIC

COVID-19 outbreaks can be particularly devastating inside federal prisons due to the large number of people living and working in very close proximity to one another. And once an outbreak occurs inside a prison it puts the surrounding community at risk as the employees of the prison return home to their families and interact with others in their community.

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[1] Top Management and Performance Challenges Facing the Department of Justice October 18, 2019 https://www.oversight.gov/sites/default/files/oig-reports/2019.pdf

[2] DOJ OIG Press Release dated July 23, 2020, https://oig.justice.gov/reports/remote-inspection-federal-correctional-complex-tucson ; https://oig.justice.gov/reports/remote-inspection-federal-correctional-complex-lompoc. It is pertinent to note this is the first of a series of investigations.

It is for this reason that we sounded the alarm early, and have done so repeatedly, since the pandemic took hold in March of this year. We urged the Director of the BOP and the Attorney General to halt the transfer of all prisoners into and between federal prisons to stem the spread of the novel coronavirus. They halted the internal movement of inmates for a brief time, however, as cases across the country were skyrocketing, BOP resumed inmate transfers. Even more troubling is the lack of testing and quarantine of inmates by the United States Marshals Service (USMS), which is responsible for the intake and transfer of federal prisoners before they are turned over to the BOP.

On August 8, 2020, the Council of Prison Locals filed a complaint with the Occupational Safety and Health Administration (OSHA) related to the BOP's handling of inmates infected with COVID-19. As the complaint states, the Federal Bureau of Prisons, under the direction of Michael Carvajal, has directed the continued and enhanced movement and acceptance of COVID-19-positive inmates throughout the Bureau of Prisons facilities across the country.

These inmates appear to originate primarily from the USMS. In May, the BOP reached an agreement with USMS to significantly decrease incoming movement of inmates and identified specific BOP sites that would house incoming inmate transfers where testing, quarantining and isolation could be done. All internal movement was suspended. However, just 42 days later, at the end of June as cases were spiking across the country, the BOP issued a new action plan stating that they would return to normalized movement to all institutions and open internal movement once again.

Upon doing so, the BOP experienced a significant spike in COVID-19-positive inmates and staff, nearly doubling the number from the period when the movement was decreased. On July 22, 2020, the BOP had the highest number of inmate cases at 4,247, more than double the 1,955 cases on May 18, 2020, just two months earlier. Staff numbers went from 286 on May 18, 2020 to 586 on August 11, 2020.

The original use of quarantine sites and a "shelter in place" theory should again be applied and all new inmates should stay in the immediate area they are accepted in until they can complete a full 14 day quarantine, consistent with CDC guidance and OSHA standards keeping the recognized hazards contained in specific locations. CDC guidelines recommend that where COVID-19 cases exist within a correctional institution, transfers of inmates should be suspended. Instead, the BOP has continued to authorize movement of infected inmates, inmates suspected of being infected, and inmates who have been in close contact or proximity to infected inmates, to areas of the country that do not have any rate of infections, or to Institutions that otherwise have not shown signs of any introduction of the virus, thus introducing the virus into an uninfected area.

By continuing to transfer inmates into and within the federal prison system without first testing and quarantining them, the BOP and USMS are putting the health and safety of tens of thousands of federal correctional workers, their families, and their communities at risk.

COVID-19 TESTING FOR STAFF

Given the frequent exposure of prison staff to infected inmates coupled with the prevalence of asymptomatic spread of the virus, BOP should offer voluntary coronavirus testing to staff at the prion facility where they work. However, the Bureau has repeatedly refused to do this. Instead, employees who believe they were exposed or might be infected with the coronavirus must get tested on their own time and in their own communities. This further puts strain on the already limited testing and healthcare resources in these communities, many of which are rural and severely under-resourced. This was the BOP's policy during the height of the pandemic in the spring and continues to this day as cases are again surging nationwide. The BOP should immediately change its policy and obtain adequate supplies and offer testing to employees on a voluntary basis at the facility where they work.

CONCLUSION

Chairwoman Bass, Ranking Member Sensenbrenner, and Members of the Subcommittee, I appreciate the opportunity to provide the Committee with our concerns.

As I have indicated, the staffing crisis in the Bureau of Prisons not only creates a clear and present danger to every employee, inmate, and the community at large, but it has made the response to the COVID-19 pandemic nearly impossible. This has been further exacerbated by the continued transfer of inmates into and within the federal prison system without proper testing and quarantining. The Bureau of Prisons' reactive response, coupled with the ineffective oversight of OSHA and the inconsistent and ambiguous guidance of the CDC, has led to an infection rate of our employees and incarcerated individuals only second to the pandemic's devastating effects on our nursing homes and elder care facilities.

The dedicated and loyal employees of the Federal Bureau of Prisons have long prided themselves on accomplishing the missions given to them. Throughout this pandemic, they have been pushed beyond the breaking point and deserve much-needed relief. They will continue to protect the American people as they always have done honorably. They only need the staffing resources, the budgetary support, and proper policies in place to safely protect the American public from the incarcerated individuals within the Federal Bureau of Prisons. I implore you to immediately intervene by expanding incentives and elevate the staffing levels across the Bureau of Prisons to a safe level. Short-term fixes to slow the attrition rate (or retention problem as acknowledged by OPM[3] in their response to 47 United States Senators) can be as simple as offering the statutorily-limited 25% retention incentive to all employees in the agency that are eligible to retire. At this moment, over 3,500 Bureau of Prison's employees are eligible to retire. Couple that with the no-additional-cost option to 'carry-over' accrued annual leave an additional year as an incentive to stay with the agency. This unprecedented loss of experience will have lasting effects into the distant future. Maximizing incentives to statutory ceilings (25%) at difficult and/or hard to fill locations should be done immediately. The focus on safety requires an immediate, focused, and unprecedented effort to hire Correctional Officers. An additional

[3] See attached document, "OPM Response to Senators re DHA_4.23.20"

long- and short-term incentive is to increase the Correctional Officer pay bands to a level more commensurate with their Federal Law Enforcement peers. The inability to compete with the elevated pay bands of other state and federal law enforcement agencies has created an additional drain on the valuable human capital within the Bureau of Prisons.

Thank you.

Ms. BASS. Thank you.

We will now proceed under the 5-minute Rule with questions, and I will begin by recognizing myself for 5 minutes.

The Justice Department's inspector general has reported that the Federal Correctional Complex in Oakdale, Louisiana, failed to isolate or quarantine prisoners who were exposed or who tested positive to COVID–19.

The report found that some inmates who had tested positive were left in their housing units for up to 6 days without being isolated. In the BOP's COVID–19 Pandemic Response Plan, the BOP requires that a person who tests positive for COVID–19 be immediately placed under medical isolation.

So, I would like to ask Mr. Carvajal, what is your response to this? Why are COVID-positive prisoners not immediately isolated from the general population in all Federal facilities?

Mr. CARVAJAL. Thank you, Chair Bass.

They are. We do have procedures. They are good procedures when they are followed.

In a nutshell, we had some leadership issues there. We sent an outside team in. Attorney General Barr actually sent a couple of his staff over. We sent a review team. Our regional director had some concerns about the procedures not being enforced or followed.

In essence, without getting into details, I removed the leadership. The warden was removed from his position.

Ms. BASS. Okay. Good. I appreciate that.

So, in your facilities, are inmates and staff provided with masks, gloves, and the ability to practice good hygiene?

Mr. CARVAJAL. Chair Bass, that is absolutely correct; they are.

We do have the same challenge that everyone else, I believe, in the country, in the world does, is that people have a personal accountability here also. We must enforce the rules, but people have to make a conscious effort to follow the rules and procedures.

They are in place for a reason, and we have been in lockstep with CDC guidance from day one. It is well-published. There are links. I have done informational messages. We have COVID review compliance teams, unannounced. Prior to me being the Director, an announced visit in a Federal correctional institution was unheard of. We have reviewed almost 100 percent of our facilities. That doesn't include outside stakeholders coming in.

So, it is a matter of enforcement, and it is a matter of people following the rules, both inmates and staff.

Ms. BASS. Okay.

I want to ask you about staff being provided access to testing. I mentioned my visit to Terminal Island, and I did appreciate they were very open. They did not raise the issue, but I am.

So, it made no sense at all to me—it was wonderful that the inmates were tested and tested regularly. The inmates are there. The staff come and go every day and the staff had no access to testing.

So, has this been remedied in not just that facility but throughout?

Mr. CARVAJAL. Yes, it has, Chair Bass.

I do recall your visit over there. I don't remember the particular date or the time. I will tell you that, early on, as with the rest of the world and the country, testing resources were unavailable.

Ms. BASS. Right.

Mr. CARVAJAL. They were hard to get—

[Audio interruption.]

Ms. BASS. —is not picking up your voice. There you go.

Mr. CARVAJAL. Yes, ma'am. It was on.

Ms. BASS. Great.

Mr. CARVAJAL. Okay. Testing resources, as they have become available, we have gained access to them. If I remember correctly, in California, we partnered with the local community public health care, we partnered with other entities. The union has helped us at times gain resources. Bow I am happy to say that we have a contract, a high-volume testing contract.

I would also like to mention, Chair Bass, that we can offer the testing, and in many places, we have offered availability to 100-percent testing, people don't want to take it. We can't make them—

Ms. BASS. "People" meaning who?

Mr. CARVAJAL. "People" as in staff. It is voluntary.

Ms. BASS. They don't want to take it?

Mr. CARVAJAL. It is voluntary. I will give you an example. At Forrest City, we—

Ms. BASS. Actually, I am going to run out of time, so thank you.

Mr. CARVAJAL. Yes, ma'am.

Let me ask Mr. Washington: We have heard accounts of people in Marshals' custody being moved across State and county lines and placed into local jails with no information on their transfer paperwork about whether they have been tested for COVID or not.

Could you respond to that?

Mr. WASHINGTON. Yeah, Chair Bass, I have not heard that particular complaint. I can say that the good men and women of the United States Marshals Service are very interested in making sure that our inmates are healthy and safe and that—

Ms. BASS. Are they tested before they are transferred, and are the people, the staff?

Mr. WASHINGTON. Yes. We are testing in—for example, all our inmates that go off to the BOP facilities are being tested, or at least a large portion of them are. We have authorized funding for all State institutions in which our prisoners are housed.

Ms. BASS. Are you aware of the breakouts that have taken place from prisoners being transferred? Now, I don't know, maybe you have rectified it, but—

Mr. WASHINGTON. Yes, ma'am. I have, of course, seen the media reports and things of that sort. We also know when there is an issue inside of a particular—

Ms. BASS. Are the media reports accurate?

Mr. WASHINGTON. Generally, so-so.

Ms. BASS. Okay.

Thank you. My time has expired.

Representative Chabot?

Mr. CHABOT. Thank you, Madam Chair. Thank you for holding this hearing today.

I want to thank Director Washington and Director Carvajal for appearing this morning. Thank you both for your service to our country and to your respective agencies.

This year has been particularly difficult for everyone, everywhere, due to the ongoing COVID–19 pandemic. We have all had to stay home, socially distance, and otherwise—

Ms. BASS. Oh. Steve, your mike.

Mr. CHABOT. Sorry. Otherwise follow CDC guidelines to help reduce the spread of this deadly virus.

Similarly, you have had three challenges. You are tasked to protect both your staff and the spreading populations that you serve and make sure that they don't contract, both your employees as well as the inmates, this deadly virus.

Now, in the Ranking Member's opening statement, Mr. Jordan mentioned that Democratic leadership in this Committee sent a letter to the Attorney General, Mr. Barr—I am sure that you were aware of this—urging you to use every tool at your disposal to release as many prisoners as possible. Now, that would be completely irresponsible, as I think most people would agree, and would put the public directly at risk.

Now, Director, how do you take into consideration the seriousness of the inmate's crime, for example, and the risk of recidivism before sending someone into home confinement, for example? What do you look at when you are making those types of determinations?

Mr. CARVAJAL. Congressman, there are several criteria. The ones in particular that would refer to what you are talking about, the seriousness of crime, is there are four criteria that were listed that we follow that we don't deviate from: The primary offense cannot be a violence, a sex offense, terrorism, or they can't have a detainer.

There are numerous other criteria—I can certainly list them if you would like—that are somewhat discretionary. We absolutely take into consideration public safety. In fact, the Attorney General's guidance to me in two separate memoranda stated that, to maximize the use of this authority but that we absolutely have a responsibility not to release and overburden the community.

So, we take into consideration public health and public safety. I assure you that anyone that is eligible under that criteria have been reviewed and, if appropriate, transferred to community custody, just as we were directed.

Mr. CHABOT. Thank you.

What tools does the Bureau use to monitor inmates after they are released into home confinement?

Mr. CARVAJAL. Congressman, under normal circumstances, I think everyone needs to understand that home confinement, in and of itself, is a transitional program. It is set up for inmates at the end of their sentence, 6 months, or 10 percent of their sentence, to transition into the community.

The CARES Act has us looking at inmates who otherwise may not even meet that criteria. So, you are talking about long-term placement in the community. We didn't have the resources; we expanded it. Ninty-four percent of the inmates on home confinement are monitored through contracts. Everybody needs to understand that those contract staff that monitor these inmates, they use GPS, electronic monitoring, things like that. These are not law enforcement personnel.

We don't have the staff to monitor them. We contract out. Ninty-four percent of them are monitored by contract staff. We do contracts, but they are not law enforcement. They simply keep track of and check on these people. The other 6 percent are monitored by the United States Probation Office and the Federal Location Monitoring.

Mr. CHABOT. Thank you.

Finally, I have about a minute left, so let me touch on something else.

I have been a longtime supporter and advocate for prison industries. When we have these folks confined for a period of time, the vast majority of them are going to get out at some point. We would prefer the lowest recidivism as possible. We don't want them to go out and commit more crimes. We know many will, unfortunately, but those that have been involved in getting a skill or something they can put to work in the private sector at some point probably have a better chance of not going out and committing more crime.

So how has COVID and the restrictions impacted the prison industries program?

Mr. CARVAJAL. Congressman, it absolutely has impacted prison industries.

We know that 24 percent less likely to recidivate if they worked in prison industries, 14 percent more likely to have a job when they get out if they worked in Federal prison industries. It is actually our number-one evidence-based recidivism-reducing program.

It has been impacted, like all other organizations. We are down about 2,000 workers. We generally employ about 10,000 inmates in Federal prison industries. There is always a waiting list. We are done to about 8,000.

UNICOR was projected to have $27 million earnings last year, because our factories were doing well under the FIRST STEP Act. We closed the year with a $3 million deficit. So, we have to get that back on track so that we continue to give people the opportunity to get those jobs out there.

Ms. BASS. Thank you.

Mr. CHABOT. Thank you.

Ms. BASS. Thank you very much.

Representative Jackson Lee?

Ms. JACKSON LEE. Thank you for yielding. Good morning. Thank you to the Director for your service to the country, and to the head of the U.S. Marshals as well.

My time is very short. I will try to shorten my questions.

I will go directly to you, U.S. Marshals. The chairwoman asked a question that I would like to follow up, and that is that those that you are able to secure—and let me also acknowledge your work with finding children and congratulate your men and women in that service—come from many different facilities. There has never been a question of—or a source of information about the COVID–19 protocols or the status of these individuals coming from facilities that do not follow the Bureau of Prisons protocol in testing.

Do you have the data of all the people you have in custody and whether or not they have been tested whether or not their facilities

are following COVID–19 facility protocols, and also whether or not you have had any to die from COVID–19 in your custody?

If you could just quickly answer those questions, I need to move to the Director, please.

Mr. WASHINGTON. Thank you, Congresswoman Jackson Lee.

Yes, we have some data. The difficulty we have, of course, is that we have some 800 facilities, because, as Chair Bass indicated, of the 2 million prisoners in the United States, we have 63,000 spread out over 800 facilities. So, it has been somewhat of a difficult exercise to make sure that we have consistent, accurate data. The data that we have been able to accumulate is not uniformly reported, and it is not reported at the same time.

We do have some data, in terms of the numbers that have tested positive and deaths and those that are on ventilators and in hospitals and things of that sort.

Ms. JACKSON LEE. So, let me make this request. I think it has been made by Members of Congress before, House and Senate. My official request is that you find the capacity for collecting that data and submitting it to this committee, particularly—as much as you can garner—particularly those hospitalized and any that have died.

Whatever authority you have to the facilities—because we pay those facilities—to send notice to them that you want them to provide testing protocols or others, to those that you have—that are under your Federal custody, meaning that you are getting from them. I would like to hopefully have you look into that, please, Mr. Washington, and see how much data you can provide us with.

Mr. WASHINGTON. I will look into it, Representative.

Ms. JACKSON LEE. Those individuals may go back into society—family Members, *et cetera*. That is what we are trying to stop, is that extensive community spread.

Thank you very much for your service.

Mr. WASHINGTON. Thank you.

Ms. JACKSON LEE. Let me ask—Director, thank you again. As you well know, the ACLU filed a lawsuit on October 27 regarding the handling of COVID–19 at the Federal facility at Butner, North Carolina. The complaint alleges that BOP has not reconfigured housing units to allow for social distancing.

During a hearing, Director, in the Senate Judiciary Committee, you committed to new efforts by the Bureau to create alternate living. Let me ask you, what progress you have made in dealing with social distancing? Let me also ask you, whether or not you have continued the waiver of the copayment for incarcerated persons that makes it very difficult for them?

Then my other question is to raise the question of why we are allowing the mindset for individuals who are on the front lines to deny or reject testing. That means—I know there are unions inside. I want to respect—and I am not sure whether they are representing individuals. I would like to question them. I am a strong supporter of their work ethic. I don't think you can come here and say to us that they don't want to get tested. I am going to be asking people to get vaccinated, and I know that is going to be a challenge. They don't want to get tested?

I think you need to come up with—I would like to hear your response of how you can more effectively deal with making sure that

all your staff are effectively tested, which I think is extremely important. If you would share, in the short amount of time, your best answers.

Thank you.

Mr. CARVAJAL. Thank you, Congresswoman.

Yes, we are still waiving the copay for COVID-related illness.

We have expanded the use—because our population is lower, two things we have done in those areas that were challenging: The prisons aren't made for social distancing, as you are well aware. They are completely the opposite, so we did have challenges. With the reduction in our population, we have been able to spread people out. We actually put target population levels on our most vulnerable facilities so they are at about 50-percent capacity.

We also used some of the COVID funding to purchase tents and things of that nature. We have temporary housing—we borrowed tents from the military at one point until we were able to get some—to distance people out and provide alternative living areas. We have made use of every available space we can to convert for housing so that we can get that in place. Again, prisons aren't necessarily built for that.

The last portion of your question, about staff testing, I can't mandate somebody to take a test, Congresswoman. If I could, I would be doing it already.

Ms. JACKSON LEE. Well, my time is up, but let me indicate that your individuals who are on the front line, maybe we need to help you with that. I understand civil liberties, civil rights, the Constitution. You are talking about individuals coming in contact with incarcerated persons, who can't walk away, can't get out. That means they are endangering themselves, their families at home.

Can you just answer the question of the numbers of your men and women who may have lost their life to COVID–19? Do you have a number on that?

Mr. CARVAJAL. When you say my men and women, are you referring to inmates or staff?

Ms. JACKSON LEE. Staff.

Mr. CARVAJAL. One-hundred-and-forty-five inmates and three staff—two staff that were confirmed, one that was listed posthumously as being COVID-positive but the cause of death was not listed as that.

Ms. BASS. Thank you.

Ms. JACKSON LEE. Thank you.

I yield back. Thank you.

Ms. BASS. Representative Gohmert?

Mr. GOHMERT. Thank you, Chair.

Thank you both, to our witnesses, for being here.

Mr. Carvajal, I know this is a difficult time, but I am—back when I was a judge and when I was paying attention to felony facilities, Federal and State, we had a problem called AIDS. I am glad to see the majority's interest now. I was shocked how little regard people had in Congress with regard to AIDS spreading through Federal prisons. So, it looks like there is more of an appropriate interest now, even though that was much more of a deadly disease.

Do you have any idea what the percentage, the mortality rate, is of those who are positive with COVID–19 within the prison system?

Mr. CARVAJAL. Congressman, that is somewhat of a difficult question to ask, because we have so many moving pieces, releases, and everything. Even my medical experts are challenged with that.

Here is what I will tell you. The way we look at this is that we have a lot of positive cases, as does everyone. The majority of those cases early on were asymptomatic. That is why the testing is so important and the mass testing, is we have been able to identify presymptomatic or asymptomatic cases and use that to help us mitigate the spread of this virus.

So, we have been able to flatten that curve, as everyone likes to say. Although our deaths were a higher rate early on, we haven't had as many on ventilators, which is a key. It averages about six to eight here lately, even with the last spike. More importantly, at one point, we had over 145, 150 inmates in a hospital at one time. That stays at about 18 to 20, depending on these spikes.

Less people are dying now from this disease. Even though our numbers show high positive rates, at least 50 percent, at this point right now, are asymptomatic, and they aren't actively sick. I know they are sick with the virus. That is why we want to isolate them and quarantine them. We are able to do that better with testing.

Mr. GOHMERT. I would encourage your physicians, when you talk about people being put on ventilators—Dr. Bartlett from Midland has done some great research in the use of steroid nebulizers to protect the alveoli from becoming mush. Because once that happens, even when you put them on ventilators, it doesn't seem to be helpful.

Do you know approximately what percentage of the prison population are in the United States illegally?

Mr. CARVAJAL. Congressman, off my head, I remember the number is about 15 percent non-U.S. citizens. I don't know the exact number that were illegal entry, but I do know that we have approximately 15 percent non-U.S. citizens.

Mr. GOHMERT. Wasn't it higher than that at one time?

Mr. CARVAJAL. I believe so, Congressman.

Mr. GOHMERT. I understood that that percentage have been reduced because of the COVID crackdown on the border. Have you seen that yourself?

Mr. CARVAJAL. Congressman, I don't want to misspeak. I would have to ask somebody for that data. I don't have—

Mr. GOHMERT. Would you mind getting that and—

Mr. CARVAJAL. Yes, I will.

Mr. GOHMERT. Thank you.

Now, from my experience during the days as a judge, it seemed that 70-plus percent of those incarcerated had either an alcohol or drug problem, alcoholics, or drug addicts. Do you have any idea what percentage you are looking at in our Federal prison system?

Mr. CARVAJAL. Again, Congressman, I don't know the exact percentages. I will tell you that we do have lots of programming tailored towards alcohol and drug problems and offenses, treatment programs. A lot of our programs are geared towards that. I don't know the exact percentage.

Mr. GOHMERT. Have those programs been impacted by COVID, their ability to have the regular meetings?

Mr. CARVAJAL. Absolutely. We have been impacted by COVID just like everyone else.

We did—early on, obviously, we suspended programming at some point. We have since resumed. We are probably at—it varies, depending on the infection at the facility, but I would like to say we are at 50, 60, 70 percent programming back to normal. We have found creative ways, just as the school systems have, to resume programming.

Mr. GOHMERT. All right.

We have military inmates confined in Federal facilities using a program called Federal Transfer. Has that been impacted by COVID?

Ms. BASS. A quick answer because you are out of time.

Mr. GOHMERT. Yeah.

Mr. CARVAJAL. Congressman, I don't know particularly about the military, again, our entire system has been impacted.

Mr. GOHMERT. All right.

Ms. BASS. Thank you.

Mr. GOHMERT. Thank you, Madam Chair.

Ms. BASS. Representative McBath?

Mrs. MCBATH. Thank you, Madam Chair.

Thank you gentlemen for shedding some light on these very important issues this morning.

As we continue to grapple with COVID–19, case after case has shown us just how difficult it is to contain this virus. Everyone must do their part to protect one another. We have seen that a single unsafe environment or event has ripple effects through our communities. Employers especially have a responsibility to be provide safety measures for their workers, because if they don't, lives are definitely on the line.

No one knows this more than the family of Robin Grubbs. Robin was an Army veteran and a caseworker at a BOP facility in Atlanta. I represent Georgia. In March, she was promoted to a new role, where she would be helping those who had completed their sentences to return to their families and to their communities, and she would be helping them get a brand-new start.

Despite her promotion, Robin never got to start her new job or move to a new office in another building. Instead, she was kept for an additional month in her old role, in her old office, located in an area that BOP started using to house those who were infected or exposed to COVID–19.

According to coworkers, Robin tried to buy her own masks while she still waited for her office move and for BOP to provide her sufficient PPE. Robin's parents knew that she was at risk. They themselves had recently dropped off a care package with cough suppressants, medicine, and hand sanitizer to her.

Sadly, Robin was found dead in her home. She posthumously tested positive for COVID–19, and her father says that he was told the toxicology report did not reveal any alternative causes of her death other than COVID–19.

According to a news report in April, and I quote, a BOP spokesperson said that her official cause of death has not yet been deter-

mined, as her autopsy is not yet complete, end quote. Since then, according to later reporting, a spokesperson for the Georgia Bureau of Investigation said an autopsy was not performed on Robin because she tested positive for COVID–19, which was listed as the probable cause of death.

As of today, BOP does not list any COVID–19 staff deaths at the facility where Robin worked. In short, BOP has not acknowledged that Robin Grubbs likely died of COVID–19.

Director Carvajal, does BOP disagree with the determination that COVID–19 was Robin's possible cause of death? If so, what evidence does it rely on to make that decision?

Mr. CARVAJAL. Congresswoman, what happened to Robin Grubbs, as with anyone who dies, for that matter, is sad.

I don't know that we have ever disagreed with anything. I don't know where you are getting your information. I am not a medical expert, nor do I write the autopsy reports, and we are simply saying what we are given. That last piece of information you said, from the Georgia bureau, I don't have that information. We have never disputed or debated; we just simply call it like we see it.

The paperwork we were given did not determine a cause of death. We are not disputing it. I would not do that. Robin Grubbs was one of our staff.

Mrs. MCBATH. Okay. Well, thank for that answer. Also, too, the Bureau of Prisons' website—we have just had a chance to look at—doesn't actually show her death. It shows the death of two staff Members.

So, are you planning on updating the website to identify the fact that Robin did actually die and so there was a prison—there was an inmate death?

Mr. CARVAJAL. You are correct, Congresswoman; our website lists two. Again, I don't know all the specifics or the legalities or whatever region that is, but I will tell you that no one in the Bureau of Prisons is disputing whatever the doctor says that that young lady passed away from.

Our website—we get criticized regardless of if we put it out there. I will have you know that staff criticized us for acknowledging her death at all early on. We were actually scrutinized because we wanted to tell people about this. There has been nobody trying to hide anything here.

Regardless of what we put on that website; somebody is not going to like the information. We are not disputing—it is a sad situation, and it bothers me that I am even talking about this. Robin Grubbs was one of my staff.

Mrs. MCBATH. Sir, thank you so much.

So, despite what anyone thinks, would you be willing to update the website to make sure that you are identifying that an inmate actually died within the care of the Bureau of Prisons?

Mr. CARVAJAL. Congresswoman, again, I will speak to whatever reason that that website is not updated. I follow the advice of people. There are reasons we do that. I will get back with you, I assure you, and I will address that issue of our staff member passing away.

Mrs. MCBATH. Okay. Thank you very much, and I appreciate any updates that you can provide the Committee going forward.

I would like to give the balance of my time to Chair Bass.

Ms. BASS. I think you are out of time.

Let me say quickly that no one on either side of the aisle is calling for the indiscriminate release of prisoners. Who we are concerned about are prisoners that might be medically compromised, including prisoners with terminal illnesses—why would they be confined now? Prisoners who are elderly; illnesses that put them at risk for COVID, respiratory or heart conditions; and people who are in pretrial detention who are not a risk to the public safety.

The other issue is that the majority of the inmates come from communities that are already disproportionately impacted. So, we want to make sure that they are tested and medically cleared before they are released. This protects the inmates, the prison staff, and the general public.

Representative Cline?

Mr. CLINE. Thank you, Madam Chair.

Thank our witnesses for being here today.

This has certainly been a challenging year for our Nation, and the impacts of the COVID–19 pandemic have been felt by every American and institution. Much like everything else in today's world, our criminal justice system has had to adapt to ensure justice is served no matter the circumstances we are facing.

As Members of this committee, we must continue to seek improvements to our justice system and guarantee that victims of crime and their families are never robbed of justice. At the same time, we must ensure that there is fairness and transparency throughout our criminal justice system.

I have appreciated hearing from our witnesses today and getting their insight on how the pandemic has affected their agencies and what must be done to ensure that our justice system continues to operate safely and in the best interest of the American public.

Director Washington, I want to first commend the U.S. Marshals Service for their tremendous work in rescuing 33 children during an operation last month in Virginia that included parts of my district. Protecting our Nation's children from predators has been a top priority for me.

Can you expand on your earlier remarks about how the pandemic has impacted Marshals' work in pursuing predators and rescuing children who are being exploited and trafficked?

Mr. WASHINGTON. Yes. Thank you for that question, Congressman Cline.

First, let me thank you for House Resolution 5706 and the Danger Pay for U.S. Marshals Act. That is very meaningful for my agency. It is something that we need.

The pandemic has taken its toll all over the country, as you well know. Inside of our agency, we have had to adjust, like anyone else has done. In terms of the number of fugitives, as an example, in any given year, the United States Marshals Service will arrest 100,000 of the Nation's worst criminals in any given year. That number is going to be about 80,000 this year, as an example.

So, we will see the impact in terms of workload and things of that sort, but it has also impacted just the way we look and feel about each other. For example, we took note, of course, as everyone in the country did, of the death of George Floyd and what hap-

pened there. We have had the opportunity to have discussions about racial inequality and use of force and things of that sort. That is the good side of it.

On the other side of it, workload has been tremendously impacted. Although we have people who are at home, we have deputies that must go to court every day, and that has caused a tremendous strain on those deputies and their families.

In terms of courts, you know, we continue to ensure that the Rule of law functions as it should in this country. I will be honest with you; we need staff. I think you probably have heard that before. We have asked for 280 additional deputy United States marshal positions in the fiscal year 2021 budget. That is not something that we take lightly, when we make those kinds of requests.

It is vital for us to do whatever we can to increase those kinds of resources so we can get back to do even more fugitive operations and even more child rescues.

Mr. CLINE. Let me follow up on that. Regarding recruiting, the U.S. Marshals carry out operations not only here in the U.S. but overseas in dangerous locations. However, unlike your DOJ counterparts at the FBI and DEA, the U.S. Marshals Service is not eligible for danger pay, as you mentioned. This is a serious problem, and I appreciate your recognition of the legislation that has been introduced on a bipartisan basis by Members of this committee.

Can you talk about the impact on recruitment? If these men and women are serving overseas in dangerous conditions, putting themselves in harm's way, shouldn't they also be able to receive danger pay? How does that lack of danger pay impact your ability to recruit the best and brightest?

Mr. WASHINGTON. Yes. The pandemic has shone a light on that issue. Let me back up just a little bit.

So, as you indicated, the FBI and the DEA have those authorities to pay danger pay to their agents. We do not to our deputy U.S. marshals, who do exceedingly, extraordinarily dangerous work—in countries like Mexico, where we are going after a drug trafficker and trying to bring them back to the United States, where we are actually working with authorities inside the country at levels that I don't think the other agencies do. In fact, we have relationships in those countries that give us a little bit of a leg up.

We have not only agents, but deputy U.S. marshals and their families as well. So, this year, as an example, we had to, of course, remove people from those four foreign field offices because of the pandemic, and then we had to send them back. So, we are sending them back into harm's way. They can look across the table in Mexico City, as an example, and sit there next to a DEA agent or an FBI agent and recognize that, even though they may be the same grade level, they are not getting the same kind of compensation for work that is equally as dangerous, if not more dangerous, than what those other agents are doing.

So, it is just something that we need to kind of level out and make sure that our officers are fairly treated.

Ms. BASS. Thank you.

Mr. CLINE. Thank you.

Ms. BASS. Representative Deutch?

Mr. DEUTCH. Thanks very much, Madam Chair.

Director Carvajal, Director Washington, thank you for your service to our country.

Prisoners confined in BOP facilities have two options to seek additional protection from the pandemic. We have talked about this; we have talked about seeking a remainder of their sentence in home confinement or compassionate release.

Home confinement is a determination made solely by the BOP. Director Carvajal, you have talked about the consideration of public safety, something that all of us acknowledge needs to be the primary driver here. Then we get to the criteria that are used to determine whether a person is eligible to serve their remainder in their home confinement.

The question I have for you, just for some context: On May 13, the former chair of President Trump's campaign, Paul Manafort, was transferred to home confinement due to COVID–19 fears. He had served far less than half of his 7-year sentence. On May 20, President Trump's former lawyer, Michael Cohen, qualified for home confinement. He was released from BOP custody.

Both Paul Manafort and Michael Cohen were released due to concerns of the pandemic in prisons. These are valid concerns. Since May of this year, only about 1.8 percent of prisoners in the BOP have been moved to complete their sentence in home confinement. Most have been denied a transfer.

So, my question, Director Carvajal, for you is: How many prisoners have been approved by the Bureau of Prisons for transfer to home confinement? Do you have that number?

Mr. CARVAJAL. Congressman, I believe, if I am understanding your question correctly, it is 18,000—over 18,000 that we have placed in home confinement since the passage of the CARES Act.

Mr. DEUTCH. How did—if you know, how did Paul Manafort and Michael Cohen qualify to be transferred to home confinement? Do you know the analysis that was used in those cases?

Mr. CARVAJAL. Congressman, what I can tell you is, anyone that has been placed on home confinement, regardless of who they are, have met the criteria outlined by the CARES Act and, specifically, the criteria written by the Attorney General. He issued two separate memorandums to me with guidance on there.

I don't personally review these. There is a reason I don't get involved. They are done at the local level. When there is anything discretionary to be reviewed outside of the criteria, it rises to a Committee at the headquarters level that is higher-level subject-matter experts. Everything is either—they either meet the criteria or they don't.

There is some discretion on some of that criteria—

Mr. DEUTCH. Well, let me just follow up for a second. I appreciate that. I am not sure that I understand what the higher-level analysis or the expertise is required, but let me just talk about two other cases, not Paul Manafort or Michael Cohen.

In a letter requesting compassionate release from Marie Neba, who was confined at the Federal Medical Center Carswell, there was a description to the judge that she had not received medication for treating her breast cancer since March 5 of this year. She described how the lockdown at the facility due to the COVID–19 pandemic had caused medical care at the facility to deteriorate. Her

condition worsened. She was concerned about the spread of COVID–19. She was not released and ultimately passed away from COVID.

In a letter requesting compassionate release, W. Young Bird, who was confined at the Medical Center for Federal Prisoners in Springfield, Missouri, described to the judge how there were 30 cases of COVID in 3 different facilities. The facility was on lockdown, and Mr. Young Bird was housed in a 24-hour medical care unit. Actively sought help from the warden and the judge to protect himself from the spreading virus. Ultimately, in that case, unfortunately, he passed as well.

Do you know, Director Carvajal, how many prisoners over the age of 65 and medically vulnerable have been transferred to home confinement? Is that all the 18,000 that you referenced?

Mr. CARVAJAL. Congressman, I don't have those exact numbers. I will have to follow up with you.

I will tell you, there is a difference between the compassionate release process—you are talking about releasing someone, essentially undoing, or reducing a sentence imposed by a criminal court.

Mr. DEUTCH. No, I understand.

Mr. CARVAJAL. The home confinement process is different.

Mr. DEUTCH. Director Carvajal, I understand. I do understand the difference well. What I don't understand is the seeming disparity in treatment that permitted two individuals who may have had underlying conditions but were released to home confinement with two individuals who clearly had underlying challenges and wound up dying of COVID–19.

A Federal judge ordered the Bureau of Prisons to review medically vulnerable prisoners at Elkton in Ohio, asked for a list of prisoners age 65 and those who were medically vulnerable, and the Bureau responded to a judge that there were 837, but only 5 would be transferred to home confinement.

All I ask, Director Carvajal, is that we go back and analyze fully the steps that we can take to provide the same protections for these inmates, who are not violent, as the protections that were provided to these two individuals who happened, coincidentally, to have close relationships with the President of the United States.

I yield back.

Ms. BASS. Thank you.

Representative Lesko?

Mrs. LESKO. Thank you, Madam Chair.

First of all, I want to say thank you to both of you for your service to our country, and also to your employees. They have a difficult job, very dangerous job. I appreciate them, and I believe the majority of Americans appreciate their hard work.

I am going to read a letter dated March 30, 2020, and it was a letter from Chairman Nadler and Chair Bass to Attorney General Barr. It is on page 4, and I am going to go into page 5. It reads, "Your memorandum," meaning Attorney General Barr's memorandum, "specifies that priority should be given to inmates in low- and minimum-security facilities and that serious offenses should weigh more heavily against consideration for home detention."

I think that is reasonable.

"These limitations unfortunately beg the question of what you do with individuals who are at high risk for contracting COVID–19 who are not in low- or minimum-security facilities, who have been convicted of serious offenses, or have high PATTERN risk scores. We urge you to consider that even individuals in these categories should be assessed for release because they may be elderly or particularly vulnerable.

"Pregnant prisoners in all circumstances should be released to home confinement forthwith.

"We further urge you to assess the risk of contracting COVID–19 of every individual in BOP custody regardless of the type of institution in which they are housed, the seriousness of their offense, or the potential recidivism risk they may present."

Well, I think that we can take reasonable measures, commonsense measures of people that are low risk to the society. I am concerned, I have to say, Madam Chairman and others, I am very concerned if we are just encouraging the prisons to release even people convicted of serious offenses.

Let me tell you why. This isn't a person that was in Federal prison, but this is an example. This was a rape—this man was indicted in rape of a woman last year and was released in April because of the coronavirus and is accused of then fatally shooting his accuser.

I mean, this is the picture of the man.

You know, to me, of course we must take reasonable measures to protect not only the inmates but, of course, your employees. I certainly do not think that the majority of Americans, including myself, whether they are Republican, independent, or Democrats, want dangerous criminals released into our communities.

So, I just want to tell you that. Also, with the 1 minute and 47 seconds left, do either one of you have anything that you would like to add that you haven't had the opportunity to talk about?

Mr. CARVAJAL. Thank you, Congresswoman.

I just want to say that anyone that was eligible under the criteria we were issued at the direction of the CARES Act, that met that criteria and was safe, met public safety factors, has been released from our custody. We take this very seriously. We want to keep people safe regardless.

Most people that aren't released, it is because they have committed a crime of violence or a sex offense or they have a detainer or an Act of terrorism.

I think that it goes back to what you were saying that we have a responsibility. A court processed them; a judge found them to come to our custody. We take seriously who we are going to release back.

Again, I would like to remind everyone that we are transferring people to home confinement. They are still in the custody of the Bureau of Prisons. Compassionate release is an actual reduction in sentence or release of that sentence that was imposed by a court.

Thank you.

Mrs. LESKO. Thank you.

I yield back.

Ms. BASS. Representative Jeffries?

Mrs. LESKO. Unless the Marshals had something to say?

Ms. BASS. Oh. Well, we are done. You are out of time.

Mrs. LESKO. Okay. I thank you.

Mr. JEFFRIES. Thank you, Madam Chair, for yielding and for your tremendous leadership in convening this hearing.

I thank our two witnesses for their service to the country.

Director Carvajal, COVID–19 is a serious disease; is that correct?

Mr. CARVAJAL. Yes, Congressman, it is.

Mr. JEFFRIES. A potentially fatal disease in some instances. Is that right?

Mr. CARVAJAL. Yes, sir.

Mr. JEFFRIES. I think there are about 24,000 individuals in BOP custody who have tested positive for the virus. Is that right?

Mr. CARVAJAL. Yes, sir.

Mr. JEFFRIES. Approximately 145 Federal inmates have died as a result of COVID–19. Is that true?

Mr. CARVAJAL. That is correct.

Mr. JEFFRIES. Those individuals who died were in the Bureau of Prisons' custody. Is that right?

Mr. CARVAJAL. The 145? Correct.

Mr. JEFFRIES. At a hearing before the Senate in June, you stated that, quote, "prisons, by design, are not made for social distancing. They are, on the opposite, made to contain people in one area." Is that correct, in terms of that being your testimony?

Mr. CARVAJAL. Yes, sir, it is.

Mr. JEFFRIES. I think you reiterated earlier today that prisons are not built for social distancing. Is that true?

Mr. CARVAJAL. That is correct.

Mr. JEFFRIES. The public health experts have indicated that social distancing is an important tool to be used in combating this serious and deadly COVID–19 virus. Is that right?

Mr. CARVAJAL. That is correct.

Mr. JEFFRIES. So, I think, given the circumstances that the inmates and employees of the Bureau of Prisons find themselves in, as you have testified, it seems like the presumption at the Bureau of Prisons should be to utilize the tools available to it to allow inmates relief from this potentially deadly virus. Is that fair to say?

Mr. CARVAJAL. It is, Congressman, and that is what we are doing.

Mr. JEFFRIES. So, part of my concern is that the tools that have been made available to you include both the emergency provisions and powers provided under the CARES Act as well as the compassionate release provision that was a part of the FIRST STEP Act. Is that right?

Mr. CARVAJAL. Correct.

Mr. JEFFRIES. In terms of the compassionate release provision, I guess during the COVID–19 pandemic the Federal courts have granted nearly 2,000 motions for compassionate release. Is that true?

Mr. CARVAJAL. That sounds about right.

Mr. JEFFRIES. Now, the Bureau of Prisons can also initiate a motion for compassionate release. Is that correct?

Mr. CARVAJAL. Correct.

Mr. JEFFRIES. Part of my concern is that, I guess during the first 3 months of the pandemic, the Bureau of Prisons approved approximately 0.1 percent of compassionate release requests. Is that right?

Mr. CARVAJAL. Yes, sir. Again, I don't know the exact numbers, but it was a low number.

Mr. JEFFRIES. In other words, 10,929 requests out of 10,940 requests were rejected. Does that sound right?

Mr. CARVAJAL. Again, Congressman, I don't have the exact numbers.

Mr. JEFFRIES. So, you just testified earlier that we should utilize the tools available to us, that have been made available to you on a bipartisan basis in both the CARES Act and the FIRST STEP Act, to alleviate the pain, suffering, and death connected to the COVID–19 pandemic, but the numbers don't suggest that you are actually doing that.

Can you explain why there has been such low utilization as it relates to compassionate release?

Mr. CARVAJAL. Yes, I can, Congressman.

First, as I stated earlier, you are talking about reducing a sentence or reversing a sentence imposed by a judge in a court. That is not a process that should be rushed. We take into consideration public safety. We review everyone for home confinement because it is a quicker process to get them out.

An inmate has the right and the ability to go straight to the courts. I also want to remind everyone that the Bureau of Prisons doesn't make the final determination of whether or not someone is approved for compassionate release. All we are doing is simply recommending to the judge. So, there is a 30-day window, and then the inmate can go directly to a court. That is why the courts have released more.

It is a lengthy process. There is a lot of vetting and verifying to go into that. So, it is a very thorough process.

Mr. JEFFRIES. Thank you for that.

I think the issue is that you have had at least two dozen individuals who have died in prison waiting for a compassionate release request to even be reviewed, if not signed off on, by the Bureau of Prisons. That seems, to me, inconsistent with the presumption that we should be doing all that we can to alleviate the pain and suffering and death connected to COVID–19 in the tight quarters of the Federal penitentiary.

The last observation I will make, as my time has expired, is that you have mentioned consistently this notion that we have individuals who may have engaged in serious crimes and pose public safety risks. The example that we have been talking about, Marie Neba, is someone who was in prison on a nonviolent offense of Medicare fraud. In too many of these instances, it is the same situation. That is a shame, because a prison sentence should not be a death sentence.

I yield back.

Ms. BASS. Representative Jordan?

Mr. JORDAN. Thank you, Madam Chair.

Director Washington, has violent crime increased this year in major urban areas?

Mr. WASHINGTON. The data indicates it has increased.

Mr. JORDAN. Aggravated assaults up 14 percent, homicide rates up 53 percent in major urban areas.

In that environment, should big cities be defunding their police? New York City has defunded their police a billion dollars; Los Angeles, $150 million reduction in police force and in police budget; Austin, Texas, $150 million; San Francisco, $120 million; Philadelphia, $33 million; Baltimore, $23 million; Portland, Oregon, $16 million.

Does that make sense to you, Director Washington?

Mr. WASHINGTON. Not to me, as the head of a law enforcement agency that is charged with handling violent crime. In fact, in many of those cities, of course, we have deployed deputy U.S. marshals—

Mr. JORDAN. Yep.

Mr. WASHINGTON. —to participate on various task forces to address the increase in violent crime.

Mr. JORDAN. In that overall environment, the increase in violent crime, cities defunding their police departments, should we be releasing more criminals early back into those neighborhoods?

Mr. WASHINGTON. I don't think we should, Congressman.

Mr. JORDAN. That is exactly what Democrats want to do.

It is not just—as the chairwoman said earlier, it is not just those, Director Carvajal, that you go through and make sure that they are not going to be a harm to the community. That is not what they said in their letter.

As Congresswoman Lesko just pointed out, when they sent a letter to Attorney General Barr back in March, they said, assess all prisoners for release regardless of the type of institution in which they are housed—here is the key part—regardless of the seriousness of their offense or the potential recidivism risk that they pose to the community.

So, they wanted everyone to get released, in an environment where we already have a 53-percent increase in homicide rates, a 14-percent increase in aggravated assaults, and big-city mayors and big-city city councils, all run by Democrats, are defunding the police department. That is exactly what they wanted to do.

Do you think that makes sense, Director Washington?

Mr. WASHINGTON. Well, again, Congressman, from my agency's perspective, we have been very busy addressing violent crime in the United States.

As you well know, we have initiated an Operation LeGend as a result of the death of young LeGend Taliferro in Kansas City, Missouri. A 4-year-old, in bed, gets shot and killed is not a thing that we want to happen in the United States.

So, what we have done, of course, is participate in various cities around the country. Operation LeGend continues; I just received the data yesterday on the 20th week of Operation LeGend. For example, in Chicago, we have arrested 1,000 folks who fit the categories of either homicide, sexual assault, robbery, and things of that sort.

Mr. JORDAN. Yeah.

I actually wanted to—I forgot one thing. It is worse than I just described. They not only want to release criminals back into communities where there is already an elevated State of violent crime, where the police are being defunded. They not only want to release people early, regardless of the seriousness of their offense. They

want the taxpayers to pay for it. I forgot about that. They introduced legislation that said, we want to pay States to do what I just described. Such a deal for the taxpayer.

I mean, this is the part—no wonder they are—think about the small-business owner in Portland, for example. You have a small-business owner in Portland who has paid all their local taxes, only to have their business in downtown Portland be destroyed this summer when the mob took over the streets. Now Democrats are saying, oh, now we want to use your Federal tax dollars to put more criminals on the streets.

Does that make any sense to you at all, Director Washington?

Mr. WASHINGTON. Well, Your Honor—"Your Honor"—Congressman, I am not, of course, a politician. I just run a Federal law enforcement agency. From a law enforcement perspective, that doesn't make sense.

Mr. JORDAN. Doesn't make sense.

Oh, there is one other step I—it gets better. There is one other thing. We just learned that 15 percent of the inmates in our Bureau of Prisons are illegal immigrants.

Is that right, Director Carvajal?

Mr. CARVAJAL. Non-U.S. citizens.

Mr. JORDAN. Non-U.S. citizens. The Democrats want them released as well. Regardless of the seriousness of their offense, they want taxpayer money to be used to pay the States to release illegal immigrants, regardless of their offense, back into communities where we have seen a 53-percent increase in violent crime and where those same cities are defunding their police. That might be the craziest thing I have ever heard, but that is exactly their policy.

Frankly, Madam Chair, I would ask for unanimous consent to enter the letter you sent, along with Chairman Nadler, to the Attorney General which spells out what I just described.

[The information follows:]

MR. JORDAN FOR THE RECORD

JERROLD NADLER, New York
CHAIRMAN

JIM JORDAN, Ohio
RANKING MINORITY MEMBER

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Sixteenth Congress

March 30, 2020

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

Dear Attorney General Barr:

On the evening of March 28, 2020, we sadly learned of the first death of a prisoner in the custody of the federal Bureau of Prisons (BOP) due to COVID-19.[1] The decedent was a 49-year-old African-American man who, according to the BOP's press release announcing his death, had "long-term, pre-existing medical conditions which the CDC (Centers for Disease Control and Prevention) lists as risk factors for developing more severe COVID-19 disease."[2] He was housed in a *low-security* facility in Oakdale, Louisiana.[3] Reports now indicate that one guard at the same facility is in intensive care due to COVID-19 and there have been positive test results for another 30 prisoners and staff.[4] This death and the explosion of cases in the Oakdale prison underscore the urgency of taking action to prevent more avoidable deaths of individuals in federal custody.

The Department of Justice (DOJ) and BOP presently have the authority to request, under 18 U.S.C. § 3582(c)(1)(A)(i), that courts modify the sentences of prisoners who present "extraordinary and compelling reasons."[5] We call on you, in the most urgent of terms, to do the

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[1] *See* BOP Press Release, Mar. 28, 2020.
[2] *Id.*
[3] *Id.*
[4] Kimberly Kindy, *An Explosion of Coronavirus Cases Cripples a Federal Prison in Louisiana*, Wash. Post, March 29, 2020.
[5] *See* 18 U.S.C. § 3582(c)(1)(A) ("The court may not modify a term of imprisonment once it has been imposed except that---in any case—the court, upon motion of the Director of the Bureau of Prisons,…may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if it finds that…extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."). The relevant policy statement of the U.S. Sentencing Commission provides that "extraordinary and compelling reasons" are ones which involve (A) the medical condition of the defendant, (B) the age of the defendant, (C) his or her family circumstances, and (D) any "other" extraordinary and compelling reason not described in (A) through (C) that the Director of the Bureau of Prisons determines to be, in combination with (A) through (C) or on its own, an extraordinary and compelling reason. *See* U.S.S.G. § 1B1.13, Policy Statement n.1 (2018).

right thing and exercise this authority and immediately move to release medically-compromised, elderly, and pregnant prisoners in the custody of the BOP.

In addition, we urge that you use every tool at your disposal to release as many prisoners as possible, to protect them from COVID-19. Along those lines, and as you move forward with planning for and executing the release of what we hope will be an appropriately sizable number of BOP prisoners, we urge you to consider the issues raised below.

Home Confinement Release Authority Under the CARES Act

On March 27, 2020, the House passed, and President Trump signed into law, the Coronavirus Aid, Relief, and Economic Security Act," or the "CARES Act."[6] Among other things, the CARES Act broadens the authority of the Attorney General and the Director of the BOP, during the COVID-19 crisis, to release prisoners to home confinement.[7] We ask that both you and the Director of the BOP interpret and exercise this new authority as broadly as possible, given that thousands of lives are at stake.

As you know, before BOP can exercise its authority under the CARES Act, the Attorney General must make a finding that "emergency conditions will materially affect the functioning of the Bureau [of Prisons]."[8] On March 26, 2020, you issued a memorandum directing the BOP to prioritize home confinement as an appropriate response to the COVID-19 pandemic.[9] Your memorandum certainly implies that the COVID-19 pandemic is "materially affect[ing] the functioning" of BOP.[10] Your memorandum further urges the Director of the BOP to "prioritize the use of [his] various statutory authorities for inmates seeking transfer in connection with the ongoing COVID-19 pandemic."[11] In order for the Director of the BOP to exercise his statutory authority under the CARES Act, the Attorney General must first find that COVID-19 is materially affecting the functioning of the BOP. We urge you to make this finding immediately.

Memorandum of March 26, 2020

Although we were encouraged to see that you have already issued a directive to the Director of the BOP prioritizing home confinement as appropriate in response to the COVID-19 pandemic, your memorandum raises a number of concerns:

(1) **Public Health.** We are troubled by your statement that "[m]any inmates will be safer in BOP facilities where the population is controlled and there is ready access to

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[6] *See* Coronavirus Aid, Relief, and Economic Security Act (CARES Act), H.R. 748, 116th Cong. (2020).
[7] *See* H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2).
[8] *Id.*
[9] *See* Attorney General William P. Barr, Memorandum for Director of Bureau of Prisons ("Barr Memorandum"), Mar. 26, 2020.
[10] *See generally id.*
[11] *Id.* at unnumbered page 1.

doctors and medical care."[12] While that may well be the case for some inmates, we hope this statement does not indicate that you believe that prison is a safe place for anyone to be during a pandemic. Quite the contrary, as already demonstrated by the death of a medically-compromised BOP prisoner and the growing numbers of infected persons in BOP facilities across the country.[13] For instance, we are not aware that BOP facilities, as a whole, have "ready access to doctors"; a 2019 report by DOJ's Office of the Inspector General found that "staffing prisoners with qualified healthcare workers is a challenge for the BOP."[14] This is likely even more true at the present time, with large numbers of healthcare workers being deployed to battle COVID-19 outside the prison walls. In addition, the CDC have encouraged "social distancing" and increased hygiene to prevent COVID-19.[15] Unfortunately, many BOP facilities utilize close quarter housing,[16] which makes it impossible to accomplish adequate distancing between prisoners. And, it is no secret that hygienic conditions are lacking in BOP facilities,[17] as they are in prisons across the country. For all these reasons, the best way to ensure that our prisons do not become epicenters of this incredibly virulent, contagious, and deadly disease is to release as many people as possible.

(2) **Criteria for Home Confinement Assessment.** The criteria you set forth for BOP to utilize in prioritizing who should be placed in home confinement during the COVID-19 pandemic, although discretionary, will likely preclude the expeditious release of many prisoners who should be released. The following criteria are especially problematic and raise some questions:

(a) ***Use of PATTERN.***[18] Although BOP has begun to use PATTERN, the tool developed pursuant to the First Step Act to assess inmates with regards to their

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[12] *Id.*

[13] As of March 29, 2020, BOP had confirmed 14 inmates and 13 staff had tested positive for the COVID-19, but, according to union officials, there is a "lag" between the cases reported by the union and the cases reported by prison officials. Kindy, *supra* note 4. One alarming example of what could go wrong in federal prisons, as cases grow in other parts of the country, is Rikers Island, where the rate of infection for COVID-19 is seven times higher than in New York City and 87 times higher than in the rest of the United States. *See* CBS New York, *Coronavirus Update: Rikers Island Rate of Infection 7 Times Higher Than Citywide, Legal Aid Says*, Mar. 26, 2020, https://newyork.cbslocal.com/2020/03/26/coronavirus-rikers-island/ (citing findings by the Legal Aid Society of New York City).

[14] U.S. Dep't Just., Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice-2019*, Oct. 18, 2019, at 3. "Nationwide provider shortages, the BOP's inability to provide competitive compensation to providers, and the BOP's rural facility locations each contribute to . . .difficulties [in staffing healthcare provider positions]. In addition to the problems of recruiting and retaining qualified healthcare professionals, providing adequate healthcare to inmates remains a challenge for the BOP." *Id.* at 4.

[15] Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How to Prepare—How to Protect Yourself*, https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html.

[16] Letter from Kevin A. Ring, President, FAMM to AG Barr and BOP Director Michael Carvajal, Mar. 26, 2020, at 2.

[17] *See* Nathalie Baptiste, *The Coronavirus is Spreading and Reportedly There's No Soap at this Federal Jail in Brooklyn*, Mother Jones, Mar. 9, 2020, https://www.motherjones.com/politics/2020/03/the-coronavirus-is-spreading-and-reportedly-theres-no-soap-at-this-federal-jail-in-brooklyn/.

[18] Barr Memorandum, at 2.

recidivism risk, it is still an incomplete tool; it has yet to be independently validated, as required by the First Step Act.[19] Indeed, many questions remain about PATTERN's validity because of possible racial/ethnic and gender bias and because of the tool's overemphasis on static factors such as criminal history. Moreover, as you know, PATTERN was created for an entirely different purpose than for assessing whether prisoners should be released during a pandemic. For these reasons, we urge BOP *not* to use a prisoner's PATTERN score as a consideration for whether they should be released to home confinement during the COVID-19 pandemic.

(b) ***Re-Entry Plan.*** One of the criteria you set forth is that the inmate have a "demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety."[20] How will you measure whether a plan prevents recidivism and maximizes public safety? Will you be providing guidance on how the BOP Director is to make this assessment? If so, what are the parameters? How will you ensure that meeting this criterion is not unduly burdensome for inmates, especially those who are elderly or medically-compromised? We also note that this criterion (i.e., having a proper reentry plan) appears to apply to individuals who are already in the "pipeline" for release. We note this to urge that you do not restrict the home confinement prioritization only to individuals who are already "seeking" transfer. There will certainly be individuals who would be newly eligible after the CARES Act, but who may not be aware they are eligible and, for that reason, are not yet seeking transfer to home confinement. Due to the enactment of the CARES Act, we urge you to proactively direct the BOP to identify *all* individuals who would be eligible for release to home confinement under the newly expanded statutory authority, notify them that they are eligible, and assess them for release. Please advise whether you intend to do this.

(c) ***Prioritization of Low and Minimum Security Facilities and Discouragement of Release for Inmates with Serious Offenses.*** Your memorandum specifies that priority should be given to inmates in low- and minimum-security facilities and that "serious" offenses should weigh more heavily *against* consideration for home detention.[21] These limitations, unfortunately, beg the question of what you do with individuals who are at a high risk for contracting COVID-19 who are not in low- or minimum-security facilities, who have been convicted of serious offenses, or who have high PATTERN risk scores. We urge you to consider that even individuals in these categories should be assessed for release because they may be elderly or particularly vulnerable.[22] Pregnant prisoners, in all circumstances, should be released to home confinement forthwith. We further urge you to assess

[19] First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, 5215, § 107 (2018),
[20] *Id.*
[21] *Id.*
[22] The man who died on March 28, 2020 was convicted of a serious offense, but he presented *known* risk factors and was housed in a low-security facility.

the risk of contracting COVID-19 of *every* individual in BOP custody, regardless of the type of institution in which they are housed, the seriousness of their offense, or the potential recidivism risk they may present. If BOP decides to keep these individuals detained, what specific provisions are being made for those among them who are at high risk for contracting COVID-19? What plans are being made to communicate information to these individuals, their attorneys, and their loved ones, about the plan for their care behind bars during the COVID-19 pandemic?

(3) **Location Monitoring.** Your memorandum states that any individuals released because of the COVID-19 pandemic will be released with location monitoring.[23] If this is the case, we ask that you ensure that there are enough resources to provide monitoring equipment free of charge to those individuals released and that you ensure that there is enough equipment available, so that no one is kept behind bars because of a lack of availability of equipment. Please confirm whether it is your intent to ensure this and, if not, why not.

Full Utilization of Second Chance Act Elderly Home Confinement Program

You should also exercise your authority to release as many people as possible into home confinement, under the elderly home confinement pilot program established under the Second Chance Act.[24] The elderly home confinement program authorizes you to waive the requirements of section 3624 of title 18, "as necessary to provide for the release of some or all eligible elderly offenders and eligible terminally ill offenders from Bureau of Prisons facilities to home detention."[25] In other words, the statute authorizes, and indeed it *encourages,* you to place *all* eligible elderly offenders in the pilot program—without regard for any of the time constraints set forth in section 3624. Current conditions underscore the need to exercise this authority fully. Please advise us whether you will seek to do so.

Residential Reentry Centers

We want to highlight an issue that has been brought to our attention regarding persons who are currently finishing out their BOP sentences in residential reentry centers. Under the CARES Act, you have been granted authority, if you choose to exercise it, to release to home confinement every person who is currently finishing out his or her sentence in a residential reentry center. In particular, if they have been released to a residential reentry center and have been there without incident, you should, at a minimum, consider these individuals to have a "lower risk level." We have been dismayed to hear, in the last few days, several stories of elderly

[23] *Id.*
[24] *See* Second Chance Act, Pub. L. No. 110-199 122 Stat. 657, 687 (2008), at § 231 (codified at 34 U.S.C. § 60541).
[25] 34 U.S.C. § 60541(g)(1)(C).

and vulnerable inmates who are residing in close-quarters in residential reentry centers and are fearful of getting sick. If they otherwise qualify, these individuals should be allowed to be placed on home confinement under the CARES Act. We urge you to pay particular attention to this issue, and to inform us whether these individuals have been released or whether they will be considered for release pursuant to the new authority granted under the CARES Act and, if not, why not.

Movement of Prisoners from Facility to Facility

We are familiar with BOP's directive suspending internal movement during the COVID-19 pandemic, with limited exceptions—among these are, transportation for forensic testing and treatment and movements to ameliorate overcrowding in certain facilities. Unfortunately, I have heard multiple reports that BOP is transporting prisoners *outside* of the limited exceptions BOP has enumerated. Please confirm whether all BOP facilities are complying with the directive to suspend internal movements during the COVID-19 pandemic. We are also deeply troubled by the fact that those being moved are merely being given exit "screenings." As you know, carriers of COVID-19 can be completely asymptomatic. If BOP is going to continue moving prisoners from facility to facility it *must* test—not merely screen—prisoners prior to moving them, else there is a high risk of transmission among facilities. We understand that BOP's Emergency Operations Center is tracking and monitoring prisoner movement during this time. Please provide us with the information you are collecting about prisoner movements, explaining what factors necessitated the movement.

Data-Gathering and Reporting

We also ask that you collect and maintain comprehensive data about the release of inmates into home confinement in response to the COVID-19 pandemic for the purpose of reporting the information to Congress. Specifically, we ask that you gather data pertaining to every inmate in BOP and whether they were considered for release and if not, why not. With regards to those who were considered for release, but were ultimately not released, please provide an explanation for why they were not released. Please ensure that this data is collected and organized in a way that it can be searched in relation to demographic factors, such as age, race and ethnicity, and gender.

Finally, it goes without saying that we are deeply concerned about what is going on in BOP facilities around the country during this pandemic, especially now that a federal prisoner has died from COVID-19 and reports of increasing numbers of infected prisoners and correctional officers. In the coming weeks, we hope you will institute aggressive measures to release medically-compromised, elderly and pregnant prisoners, as well as universal testing in BOP facilities--to protect everyone. As we have told you before, we are ready to work with you

to address the needs of prisoners during this difficult time. We appreciated your response to our earlier letters on the topic of COVID-19. We look forward to receiving your response to this letter in the same prompt manner. Urgent action is required because lives depend on it.

Sincerely,

Jerrold Nadler
Chairman

Karen Bass
Chair, Subcommittee on Crime,
Terrorism, and Homeland Security

cc: Jim Jordan, Ranking Member
John Ratcliffe, Ranking Member
Subcommittee on Crime, Terrorism,
and Homeland Security

Mr. JORDAN. With that, I will yield back.

Ms. BASS. Representative Dean?

For the record, the letter says "assessed," not "released," I don't know of anyone on either side of the aisle who calls for defunding the police, and I love the way the Ranking Member talks about my city.

Representative Dean?

Mr. JORDAN. Well, Madam Chair, the—

Ms. DEAN. Madam Chair—

Mr. JORDAN. —again, "regardless of the type of institution in which they are housed, the seriousness of their offense, or the potential recidivism risk that they may present." I didn't write that. You did. I didn't—that is not a Republican language. That is you and Chair Nadler.

So, if you are now saying "the seriousness of their offense" is not in the letter, that you want to strike that out, that is one thing, but that is not what you wrote on March 30, 2020.

Ms. BASS. We can debate the letter, but I would pose—

Mr. JORDAN. No, that is not debating the letter. That is what is in the letter.

Ms. BASS. I would pose that you are mischaracterizing it, and I will call on Representative Dean.

Mr. JORDAN. I am reading your words.

Ms. BASS. Representative Dean.

Ms. DEAN. I thank you, Madam Chair.

I do want to say, I thought this was a serious body here to talk about governing and protecting public health and protecting public safety, and not a campaign commercial. I thought the campaign was over. Sadly, we are seeing mischaracterization of other Members' works very, very grotesquely.

So, number one, I thank you both for the work that you do. I thank you for the teams that you have assembled and the extraordinary staff who puts their own lives and health at risk.

What I would like to know more about is, during COVID, for example, compliance with mask-wearing among staff and among inmates. You able to get full compliance for simple mask-wearing? Because you are challenged with confinement and close spaces.

Mr. CARVAJAL. Thank you, Congresswoman.

It is a tough—just like with anything, it is enforcement and accountability and expectations. We expect people to wear it, we expect from the leadership that it be enforced, and we expect from everyone that they have personal accountability to follow the rules.

We incorporated unannounced inspections. We welcome outside inspections. If there is any doubt, just this week, I sent someone to verify, because I had people complaining—I heard these complaints. They were concerning. We sent an unannounced team to an institution just for that reason.

Ms. DEAN. That is great, because you are in the business of supervising and overseeing. So, I would think you would have the tools in place to deal with, sadly, this pandemic and the need for these important measures.

I, too, want to ask about the use of compassionate release. I want to make clear that, when you testified that some 18,112 inmates were returned to home confinement, that is not compassionate re-

lease. From the records that we have seen, that I read about, only 11 people of nearly 11,000 folks in the first 3 months who had applied for compassionate release had received that.

So, I want to be really clear. When we talk about 18,000 people going to home confinement, they were going there anyway under the protocols as things were happening; they weren't as a result of COVID release. Am I correct?

Mr. CARVAJAL. Congresswoman, passage of the CARES Act and COVID caused us to place a high number of people who would not ordinarily have been considered, at least at this point in time, for home confinement.

You are correct; the compassionate release numbers are lower. As I explained earlier, that is a lengthy process. Under our policy and by the guidelines of the statute, an inmate has to be showing extraordinary and compelling circumstances. That is not something we do in a day or two.

Ms. DEAN. I heard that answer. I appreciate that and the balancing of the urgency of COVID against the assessment of whether a person is appropriate for compassionate release. Some of those criteria were met in the cases that had been identified, and yet those folks were not released.

Of the 18,000 who went to home confinement, can you break down that number for us? How many were headed to home confinement anyway? How many are because of your reassessment from COVID?

Mr. CARVAJAL. I don't have the exact numbers in front of me. They change—

Ms. DEAN. Would you be able to provide that?

Mr. CARVAJAL. I will tell you, as of right now—there is approximately 8,000 on home confinement currently, right now. About 50 or 60 percent of those are CARES Act, specific to the CARES Act, that would not have ordinarily been in home confinement at this point. I am not saying they weren't ever going to be eligible.

Ms. DEAN. I am worried about my time. Sorry to try to keep it tight.

What I would like to ask you is if you would provide the chairwoman and the Ranking Member detailed data about those who have been released for compassionate care—I am hoping there is well more than 11 that we have learned about; that seems incredibly sad—and also the breakdown of the 18,000 and now 8,000 who are in home confinement.

I appreciate all of that. I am going to have no time. Darn it. I apologize.

Ms. BASS. You can continue.

Ms. DEAN. I thank you.

What I would like to ask about and shift to is something I have been very concerned about, which is the use of shackling of pregnant women while in confinement. Can both of you speak to the use of shackles on pregnant women in your agencies?

Mr. CARVAJAL. Thank you, Director.

We don't do it. We have procedures in place. We amended our policy.

It has happened one time since the passage of the FIRST STEP Act. It was documented. It was a mistake, for all practical pur-

poses. The female was identified as being pregnant in the same day; the person didn't have time to enter it. We have good procedures in place to identify, respecting their rights. It was for less than 5 minutes.

Aside from that, if it gets done, it gets reported all the way up to our medical director, our women, and special programs administrator; there is a review conducted. We use alternative means. We do not restrain pregnant or postpartum females in our agency.

Ms. DEAN. Thank you.

Mr. WASHINGTON. I believe that is the same answer for the United States Marshals Service. Because we have the pretrial folks, folks under prosecution. We also have the statute that required that to be stopped. So we use alternative means.

Ms. DEAN. Well, I would quote others who have said that that is barbaric, and I appreciate that that has been banned. Thank you very much.

Thank you for your consideration.

Ms. BASS. Sure.

Before I move to our last speaker, Mr. Washington, if you could confirm that in data, especially during transportation, okay? If you could confirm it. You said you believed it wasn't the case, so I just wanted to know if you could confirm it, especially during transportation.

Mr. WASHINGTON. Yes, Madam Chair.

Ms. BASS. Thank you.

Our final member is Representative Mucarsel-Powell.

Let me just say, Representative Cline had to leave to go back to his office, but he wanted to express to you, as do I, our joy in working with you over the last couple of years and the leadership that you have displayed here in Congress. We just want you to know how much you will be missed, and we hope we see you again in the future.

Ms. MUCARSEL-POWELL. Thank you so much, Chair Bass.

To all my colleagues in the committee, it has been the greatest honor to serve with all of you, even in the most contentious times, and I truly will carry these experiences with me. I hope that we will all meet soon again, after I am done with serving here in the House of Representatives.

Thank you so much, Chair.

Thank you to the witnesses for appearing this morning. It is such an important public health issue. I wanted to just start at setting the record straight and responding to some of the points that the Ranking Member has made.

He continues to accuse Democrats of failing to keep our communities safe. That is the farthest thing from the truth. It is actually Republicans and Members like him who are trampling on the Rule of law and trying to overturn the will of the people.

Just yesterday, one of the President's attorneys called for Chris Krebs to be taken out and shot—Chris Krebs, the security official who Trump fired because he wouldn't go along with the lies from the Administration, because he said that there was absolutely no evidence of fraud.

It is the Democrats who are fighting to save lives during this pandemic. It is the Democrats who are constantly trying to keep

our communities safe and to save the lives of those who are incarcerated, because we realize that there is respect and dignity to every human life.

Now, Director Carvajal, I sent you a letter with Representative Demings back in April. In my district, we have one of the prison bureaus, FCI Miami. It is a low-security facility that holds about 900 inmates and employs several hundred staff. A hundred-and-thirty-nine inmates at FCI Miami have tested positive for COVID–19, and, unfortunately, we have lost 1 life there at that facility.

So, I would just urge you that you would make voluntary testing available to staff immediately. It is very difficult for them to travel long distances to get those tests. It is not just for the safety of the inmates and the staff; it is also for the safety of our community here in Miami.

Now, I wanted to turn quickly to another issue, and that is the deployment of the BOP teams to respond to the protests over the murder of George Floyd.

In June, we received reports that showed that tactical BOP teams were sent to Washington, DC, and Miami. The riot team sent to Miami sat in a hotel for a few days and left after the protests in Miami because they were nothing but peaceful. There were no Federal buildings at risk. We didn't see any sort of violence.

Director Carvajal, why were tactical BOP teams sent to Miami? If you can shortly, quickly answer that question.

Mr. CARVAJAL. Congresswoman, they were there only a few hours. We actually redirected them back to DC. Yes, they were deployed.

Ms. MUCARSEL-POWELL. Who made that decision, and what was the rationale for that?

Mr. CARVAJAL. As you know, Congresswoman, we are a component of the Department of Justice. The Attorney General and the Department of Justice requested assistance in the law enforcement mission. They called us. I made the decision after consulting with my leadership team to make sure that we could send the number of personnel, and we did.

Ms. MUCARSEL-POWELL. Are these teams trained in civilian crowd control?

Mr. CARVAJAL. Congresswoman, they are trained in crowd control. It is actually what we do.

Ms. MUCARSEL-POWELL. Okay. So, I am assuming that the special operations response teams received training on appropriate non-inmate crowd control since June?

Mr. CARVAJAL. We have a contingency plan and training in place to train for civil disturbances. That is non-prison-type disturbances. We train our personnel and our tactical teams in just that.

Ms. MUCARSEL-POWELL. Okay. Thank you.

Director Washington, since June 2020, how many times have BOP agents or employees been deputized as U.S. marshals?

Mr. WASHINGTON. Since June of 2020? I don't recall any BOP agents being deputized as U.S. marshals.

Ms. MUCARSEL-POWELL. Okay.

Mr. WASHINGTON. Is that the case?

Ms. MUCARSEL-POWELL. Go ahead, Director Carvajal.

Mr. CARVAJAL. If I may assist there, our personnel who were deployed are deputized by United States Marshals. It was done on site before they ever took to the patrolling.

That was done because, by statute, our arrest authority is limited in the BOP, and anytime we are deployed—we often deploy; it just doesn't get media attention. We respond to most every major national disaster out there. Our staff are always deputized before they go out on patrol.

Ms. MUCARSEL-POWELL. Let me ask you something that I saw. Some of the BOP personnel were concealing their identities by removing their nametags and other identifying badges. Who directed them to do this, and what was the purpose of that?

Mr. CARVAJAL. Congresswoman, I would like to correct the record. I appreciate you asking me that question.

No one was instructed to remove anything. I got asked that question during a virtual press conference, and I answered it very bluntly. I failed to properly mark our people because we deployed in such a quick manner—we don't usually worry about that. Having an institution marker on you doesn't mean nothing in a major city if you don't know where that prison is located.

We did correct that immediately. Within 2 days, we appropriately marked all our staff. There is a standardized marking for them now.

Ms. MUCARSEL-POWELL. Well, I thank you for that, Director Carvajal, because we actually did see that Federal agents were unidentified, and it poses a risk to the safety, to the overall safety, of our community. So, I do hope that you hold those that did that and did not follow the appropriate procedures accountable.

Thank you, Madam Chair. I yield back.

Ms. BASS. Thank you very much.

Before we adjourn, I just want to say, one, I want to thank you again, both of our witnesses, for coming today. Let me thank you for taking the time to come and let me also thank you for your work. In addition to raising concerns we want to know how we can best help you.

We would have liked to have done a second panel. If we had done a second panel, I would have invited Donte Westmoreland, who was sentenced to 7 years in Kansas. It was a first-time marijuana charge. Ironically, if he had been from California, what he had done would not have even been a crime. In fact, he could have opened his own business.

I want to say that public safety is safety from violence but also safety from COVID in terms of the general community. My concern is both for the inmates but also the staff. The staff are dying as well, not just the inmates.

So, reducing the prison population safely protects the health and safety of inmates and the general community. That we will continue to call—as it says in the memo, "We further urge you to assess the risk of contracting COVID–19 of every individual in BOP custody."

With that, this concludes today's hearing, and we adjourn.

[Whereupon, at 10:49 a.m., the Subcommittee was adjourned.]

APPENDIX

STATEMENT OF DONTE WESTMORELAND

Dear Chairwomen Bass, Ranking member Jordan, and Members of the House Judiciary Subcommittee on Crime,

My name is Donte Westmoreland. Six weeks ago, I was sitting in a cell at the Lansing Correctional Facility in Kansas, serving nearly an 8 year sentence for allegedly selling (1 pound) of marijuana. I received this very lengthy sentence even though I had a no criminal history score. Fortunately, after serving nearly 4 years of my sentence, it came to light that prosecutors had concealed exculpatory evidence and my conviction was overturned.

I grew up in Stockton, California where I was raised by my grandmother. My mother had many challenges of her own which put me in position to be the sole supporter for our family. It was difficult maintaining a household financially I had my two younger brothers and my grandmother was receiving public assistance at the time. I focused mostly on being a caregiver for my grandmother, I was an athlete in high school and graduated in 2013. My dream was to keep moving forward with my education, but I knew that was unlikely given the circumstances of my situation. My grandmother encouraged me to visit colleges she would say, "There is more to life than just taking care of me, experience life you only have one." I knew deep down that was not possible, but it encouraged me to visit universities across the states, including Kansas.

This was interrupted by my arrest on March 8, 2016. I chose to take this case to jury trial because I felt I was not guilty of the crime in addition I was forced to go to trial with sick unprepared counsel. Right before my trial, my grandmother, the woman that raised me, suffered extreme distress. She ended up passing away during the trial and my 10 and 11 year old brothers were placed in the foster care system, where they remain today. On May 22,2017 I was sentenced to serve nearly an 8 year prison term which was ironically my youngest brothers birthday.

There have been a few moments that really brought everything home for me. One came while I was watching TV in prison and saw a news story saying that Missouri, the State right next to me, had legalized medical cannabis and was issuing licenses for cultivators and retailers and talked about billions of dollars of wealth that was going to be generated by the legal industry. But there I was sitting in prison for allegedly doing the same thing. What was criminal in Kansas was considered entrepreneurial in the bordering State of Missouri.

Another moment I can never forget came when I learned that COVID had infected other prisoners and guards in the prison I was incarcerated in. I did all I possibly could to protect myself, but that's difficult when you have no control over the people who are housed with you, and you have no control over the air you breath and limited access to personal protective gear. It's really terrifying, just waiting and hoping you don't get it. In the end, despite my best efforts I became infected with the virus. At the moment I felt as if I was sentenced to death, behind a first time marijuana offense. I recovered, but five prisoners and two guards that were in the same facility died from Covid.

I knew some of them personally—here today, gone tomorrow. I honestly did not know what my future held at that point.

My charges are still pending. It is still possible that I could be returned to prison to serve out my nearly 8 year sentence, if prosecutors in Kansas choose to put me on trial again, but I've been encouraged lately. I've been encouraged that the citizens of all five states that had cannabis reform initiatives on the ballot decided to approve those measures, including in conservative states like North Dakota and Mississippi. I have also been encouraged by the Biden Administration announcement that they intend to make federal cannabis reform a priority. I'm really encouraged to have been invited to submit this written testimony to the House Judiciary sub-committee on crime.

My story is not unique. Today 40,000 people are serving prison sentences for nonviolent cannabis convictions, even though cannabis has been completely legalized in ten states and made legal for medical purposes in a large majority of states. These prisoners are disproportionately people of color, who are four times more likely to be arrested on cannabis charges than are White people. Sometimes they were traveling from a State where their possession of cannabis would have been legal or just a minor offense but had the bad luck of being pulled over in one of the states that still has not passed reform legislation, as was the case with my arrest.

Today, I am trying to rebuild my life and avoid being sent back to prison in Kansas. I cannot get time back, but I can make the most of the time I have now. I very much hope that this sub-committee and congress will take whatever steps are nec-

essary to make sure that in the future nobody else has the kind of experience that I had.

Thank you for the opportunity to share my story. I appreciate it very much.

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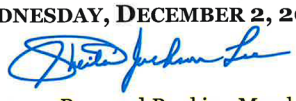
CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OVERSIGHT HEARING ON:
"FEDERAL BUREAU OF PRISONS AN U.S. MARSHALS SERVICE"

2141 RAYBURN
9:00 A.M.
WEDNESDAY, DECEMBER 2, 2020



- Thank you, Chairwoman Bass and Ranking Member Sensenbrenner, for convening this important oversight hearing on the Federal Bureau of Prisons and the U.S. Marshals Service of the United States Department of Justice.

- Let me thank our witnesses for their testimony and attendance:

1. **Michael Carvajal,** Director of Bureau of Prisons; and
2. **Donald W. Washington,** Director of U.S. Marshal Service.

- Director Washington, welcome back to the Judiciary Committee; the first time we discussed criminal justice issues and racial inequalities was back in 2006 when you were the U.S. Attorney for the Western District of Louisiana and the location of the notorious and infamous 'noose hanging from tree' incident in the town of Jena, Louisiana.

- Madam Chair, this hearing is particularly timely given the stress the COVID-19 pandemic has placed on our economy, our public heath infrastructure, our election apparatus, and our criminal justice system, not to mention the 13.7 million Americans who were infected or the loss of life, so many unnecessary, of more than 269,000 of our fellow Americans.

COVID-19 RESPONSE

- In early 2020, a new, highly contagious and deadly virus, was coursing its way through Wuhan, China and in but a few short weeks later, had spread to the United States, landing initially on the West Coast and later wreaking havoc on New York City.

- On March 13, 2020, the President declared the virus, COVID-19, a pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, tribes, territories and the District of Columbia pursuant to section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

- Just a few days later, on March 21, 2020, the Metropolitan Detention Center (MDC) in Brooklyn reported the first COVID-19 case involving a prisoner in BOP custody.

- In response to the crisis, Congress sprang into action to respond to the pandemic and the House and Senate negotiated the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was signed into law by President Trump on March 27, 2020.

- Among other things, the CARES Act included a provision giving the Attorney General and the BOP authority to expand the use of home confinement during the covered emergency period. The day after the CARES Act was signed into law, 49-year-old Patrick Jones became the first BOP prisoner to die from COVID-19 and since then many have followed, including the well-publicized case of 30-year-old Andrea High

Bear, who died from COVID-19 at FMC Carswell, shortly after giving birth on a ventilator.

- The Bureau of Prisons operates 122 facilities and has contracts with 12 private facilities and, additionally, prisoners still technically in BOP custody but who are transitioning into the community are held in approximately 165 residential reentry centers (RRCs) around the country.

- As of November 27, 2020, 126 facilities and 59 RRCs had confirmed COVID-19 cases.

- BOP has tested at least 80,199 prisoners and at least 23,323 have tested positive, with 3,187 still pending test results as of November 27, 2020, for a **positivity rate of 29.08%.**

- The number of COVID-19 infections in BOP facilities continues to rise, with no end in sight, leading one expert to note that a positivity rate of almost 30%, if extrapolated to the entire federal correctional population, indicates a rate of infection four to five times higher than what BOP reports.

- Indeed, COVID-19 is ripping through BOP, as it is in other prison systems, infecting incarcerated individuals at a rate at least 4.77 times that of the general population, and causing deaths at nearly twice the national rate.

- Press releases put out by the BOP reveal that the majority of those who have died in custody from COVID-19 were at a higher risk of complications from the virus, and BOP knew that they were.

- A tragically common refrain found in these press releases reads: "Mr. [X], who had long-term, pre-existing medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease, was pronounced dead..."

- In addition, nearly a third of those who have died in BOP's care were 65 years of age or older; obviously, their age—and vulnerability as a result of it—was also a fact known to the BOP.

- Public health experts agree that prison populations must drop to create space.

- The National Academy of Sciences, Engineering, and Medicine (NAS) recently concluded that lowering prison populations is essential to saving lives and controlling the spread of COVID-19.

- Even BOP Director Michael Carvajal has acknowledged as much, stating during a Senate hearing in June, 2020, that "[p]risons by design are not made for social distancing.

- But, to date, it is quite evident that there is no commitment or desire on the part of the Attorney General or the BOP to take the aggressive action to release prisoners to home confinement that has been repeatedly requested by numerous members of this Committee and of Congress.

- As of November 27, 2020, the BOP website reported that 145 prisoners and two staff members had died from COVID-19, including several deaths at RRCs. In a separate link, BOP also reported 12 additional deaths in private prisons under contract with BOP.

- The four deaths of prisoners on home confinement that are also reported are *in addition* to these, for a total of 161 BOP prisoners dead from COVID-19, as of November 27, 2020.

- Also reported on the BOP website, were the 4,523 prisoners and 1,381 staff with confirmed positive test results and 19,775 prisoners and 1,843 staff who had "recovered."

- But the data on the BOP website does not tell the whole story.

- There is, however, no available explanation for how BOP determines that a prisoner has recovered.

- At least four individuals—Adrian Solarzano, Gerald Porter, Robert Hague-Rogers, and Marie Neba—died from COVID-19 after either testing negative or after BOP erroneously pronounced them "recovered."

- In addition, despite the fact that people of color get sick and die of COVID-19 at rates higher than whites and higher than their share of the

population, BOP has made no effort to report demographic data to help the public better understand whether certain demographic groups are experiencing greater impact from the virus while in custody.

- Many stakeholders have reported serious problems in BOP's management of COVID-19, including the inadequacy of personal protective equipment, both in relation to the quantity and the quality of supplies provided; continued transfers of people between facilities; inadequate testing of both incarcerated people and staff; forcing staff to work even while displaying symptoms of the virus; ignored medical requests; confusing information about policies related to home confinement, early and compassionate release; and negligence regarding the housing and cleanliness conditions required to protect against the virus.

- BOP has instituted a policy that requires individuals approved for release to home confinement be placed in quarantine for 14 days before they can be released from the facility.

- But individuals placed in quarantine are not tested for COVID-19 and they quarantine in a group.

- If a prisoner shows COVID-19-related symptoms during the 14-day period, the clock is reset and that individual and all the other people in the same quarantine group must quarantine for another 14 days.

- This results in a potentially indefinite delay in release—even after release is approved.

- Across the country, courts have recognized that BOP undertreats or ignores COVID-related symptoms, despite findings by the Centers for Disease Control and Prevention (CDC) that COVID-19 can "result in prolonged illness even among persons with milder...illness."

- During the pandemic, medical care for chronic conditions has been delayed and, in many cases, withheld entirely.

- An OIG inspection of the Metropolitan Detention Center (MDC) in Brooklyn, found that sick call requests dating to early July 2020 had not been scheduled or seen as of late September 2020.

- At the Federal Correctional Complex (FCC) in Oakdale, Louisiana, the Inspector General found that the facility failed to isolate or quarantine prisoners who were exposed to COVID-19 or who tested positive for the virus, despite the fact that BOP's own Pandemic Response Plan requires that a person who tests positive for COVID-19 must be immediately placed under medical isolation.

CARES ACT COMPLIANCE

- The CARES Act included a provision giving the Attorney General and the BOP authority to expand the use of home confinement during the covered emergency period and permits the BOP Director to extend the maximum amount of time for which a prisoner may be placed on home confinement, when the Attorney General "finds that emergency conditions will materially affect the functioning" of BOP.

- The Attorney General made this finding on April 3, 2020, but unfortunately, the Attorney General and the BOP have severely underutilized the authority given to them by Congress to release prisoners to home confinement, even in cases where the prisoners are medically compromised.

- Additionally, the CARES Act implementation process has been mired in problems.

- For example, in two high-profile cases involving associates of President Trump who were serving time in BOP, his former lawyer, Michael Cohen, and his former campaign manager, Paul Manafort, were released early to home confinement.

- Around the time of these releases, BOP stated that it was prioritizing for release to home confinement those prisoners who had served at least 50 percent of their sentences, or who had 18 months or less left and had served 25 percent of their sentences.

- In fact, the time-served criterion had not been mentioned in the Attorney General's previously-issued guidance memos but under the new criteria, Cohen's release was at least arguably proper, especially because there were several COVID-19 cases in the facility where he was housed.

- Manafort's release was and is inexplicable, as there were no COVID-19 cases where he was located and, unlike Cohen, he had not served the minimum amount of time required under the policy.

- More generally, the criteria devised by the Attorney General for release to home confinement under the CARES Act are still too narrow, arbitrary, and do not focus on releasing the most vulnerable.

COMPASSIONATE RELEASE

- Under Title 18, United States Code, section 3582(c)(1)(A), a sentencing court may reduce the term of imprisonment of a prisoner for "extraordinary and compelling reasons," an action known as "compassionate release."

- The First Step Act of 2018 expanded compassionate release so that individuals may now file a motion directly with the court 30 days after they first make a request with the Warden of the facility where they are housed.

- Unfortunately, the 30-day delay, coupled with DOJ's routine opposition to release, prevents vulnerable defendants from obtaining critical release.

- During the first three months of the pandemic, for instance, BOP approved only 11 of the 10,940 requests it received, a meager 0.1% of the requests.

- Madam Chair, Waylon Young Bird wrote 17 letters pleading to be freed from Springfield Medical Center.

- He tested positive one day after writing his final letter and died a week later.

- Andre Williams—who was 78 years-old and had undergone a quadruple coronary bypass in BOP custody—sought compassionate release before the COVID-19 pandemic, which on April 1, 2020, the court granted.

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- Finally, and as disturbing as everything else that has been uncovered, we now know that in response to the largely peaceful protests that sprung up organically across the nation following the killing of George Floyd, the Department of Justice (DOJ), along with other federal agencies, deployed federal officers and agents in and around Washington, D.C.

- The Attorney General assumed a leadership role in authorizing and coordinating the deployment of federal agents, who came from the United States Secret Service, the U.S. Marshals Service, the Drug Enforcement Administration, the BOP and the United States Park Police, among others.

- Starting on June 3, 2020, a number of heavily armed officers, wearing no identifying uniforms, nametapes, or badges, positioned themselves in the area surrounding the White House complex.

- When questioned by the media, these individuals refused to disclose their affiliation or names.

- Only after investigative reporters discerned the symbols on a number of the officers' shirts did the DOJ and BOP confirm that these officers were members of the Special Operations Response Team (SORT) deployed from BOP Crisis Management Teams (CMT).

- Madam Chair, this is just a partial litany of the actions for which the leadership of the Bureau of Prisons and U.S. Marshals Service needs to account to this Committee.

- Madam Chair, thank you again for convening this most important hearing.

- I yield back my time.

How Biden helped create the student debt problem he now promises to fix

theguardian.com/us-news/2019/dec/02/joe-biden-student-loan-debt-2005-act-2020

Ed Pilkington December 2, 2019

In 10 weeks' time Joe Biden will lay "Joe's vision for America" at the feet of Iowa's caucus-goers in the hope that the first voters in the Democratic presidential race will put him on the road to the White House.

Among his promises is that he will fix the student loan crisis saddling 45 million Americans with crippling debt now totalling a staggering $1.5tn. One idea is to allow people struggling to repay private student loans owed to banks and credit card companies to discharge them in bankruptcy.

The pledge is one of the most striking policies on offer from Democratic candidates in the 2020 race, given how the problem Biden now proposes to resolve came about in the first place. Private student loans were largely stripped of bankruptcy protections in 2005 in a congressional move that had the devastating impact of tripling such debt over a decade and locking in millions of Americans to years of grueling repayments.

The Republican-led bill tightened the bankruptcy code, unleashing a huge giveaway to lenders at the expense of indebted student borrowers. At the time it faced vociferous opposition from 25 Democrats in the US Senate.

But it passed anyway, with 18 Democratic senators breaking ranks and casting their vote in favor of the bill. Of those 18, one politician stood out as an especially enthusiastic champion of the credit companies who, as it happens, had given him hundreds of thousands of dollars in campaign contributions – Joe Biden.

Roots of the student loan crisis

Student debt has become a hot-button issue on the Democratic campaign trail. Candidates are vying to position themselves as having the most radical solution to the crisis, which now holds more than one in three young adults in its grip as well as 3 million Americans beyond the age of 60 still laboring to honor college loans they took out decades ago.

More than 1 million people default on their student loans every year. By 2023 the proportion of borrowers falling behind with repayments is expected to reach 40% – puncturing a massive hole in the system.

$123bn private student loans debt

But very little discussion has been devoted to how this monumental disaster came about. How was it, for instance, that the sum of outstanding educational loans borrowed from private financial entities shot up from $56bn in 2005 to $150bn in just 10 years – contributing to an overall student debt burden second in the US only to home mortgages.

Until 2005, private student loans were eligible for bankruptcy protections just like other forms of private credit. But in that year Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act, a law that made it vastly more difficult for struggling former students to rebuild their lives by discharging the debts and starting over.

Earlier this year, Biden tried to justify his backing of the 2005 act. His campaign spokesman told Politico that "knowing that the bill was likely to make it through the Republican-led Congress, he worked to moderate the bankruptcy bill and protect middle class families. He believed that if you have income and consumer debts you can pay, you should agree to a repayment plan that you can afford."

Dig into the record, and you find a more complicated story that puts Biden in a less flattering posture. His offer to the caucus-goers of Iowa when they gather on 3 February is in effect that he will reverse a damaging provision that in 2005 he himself voted through.

Despite his protestations, it is indisputable that Biden was an avid supporter of the 2005 bill as a whole and of its overall thrust of tightening up the bankruptcy code largely to the benefit of lenders at the expense of distressed families who would find it harder to file for bankruptcy.

"Biden was one of the most powerful people who could have said no, who could have changed this. Instead he used his leadership role to limit the ability of other Democrats who had concerns and who wanted the bill softened," said Melissa Jacoby, a law professor at the University of North Carolina at Chapel Hill specialising in bankruptcy.

Other leading Democrats and consumer advocates did say no. In the Senate debate on the 2005 bill, Ted Kennedy was scathing about its implications.

"This legislation breaks the bond that unites America, it sacrifices Americans to the rampant greed of the credit card industry," he said. Kennedy warned that even before the new provision kicked in young people were dropping out of college "because of the costs of student loans – they can't pay them".

Warren warned of bill's impact on women

When an earlier version of the bill was in front of Congress, a respected law professor at Harvard law school was so incensed by its terms that in 2002 she wrote an entire paper decrying Biden's forceful support of it. The author – Elizabeth Warren – said the changes would be to the detriment of one group above all others: women.

"Senator Biden supports legislation that will fall hardest on women," she wrote. "Why? The answer will have to come from him ... He is a zealous advocate on behalf of one of his biggest contributors – the financial services industry."

Warren, whose decision to enter politics was inspired in no small part by her experiences of fighting Congress over bankruptcy laws, goes on to note in her essay that Biden's "energetic work on behalf of the credit card companies has earned him the affection of the banking industry and protected him from any well-funded challengers for his Senate seat".

Warren's suspicion that Biden's enthusiasm for toughening bankruptcy laws came from his close ties to the credit card companies persists to this day. Professor Jacoby said: "I don't know how else to explain his stance on bankruptcy policy for financially distressed families other than his relationship with the consumer credit industry. There really isn't another plausible explanation."

As a US senator from Delaware, a state that hosts many of the largest financial corporations in the country, that relationship came naturally. So friendly were his links with the Delaware-incorporated MBNA, a major credit card company since taken over by Bank of America, that back in 1999 he felt it necessary to declare: "I'm not the senator from MBNA."

Campaign finance watchdogs underline the point. In the 2003-2008 senatorial election cycle, Biden received more than $500,000 in help from credit card companies, financial services and banks, the Open Secrets database shows.

In the lead up to the 2005 bankruptcy act, Biden tried to justify his support for the legislation by pointing to abuse of the bankruptcy system by people who should at least pay back some of their debts. By requiring better-off borrowers to repay what they could afford, private lenders would be able to reduce their interest rates to the benefit of all consumers.

Neither claim was born out by events. Later reviews found that the level of abuse in the student loan system was relatively insignificant; nor did the removal of bankruptcy protections from private student loans lower interest rates.

"The evidence is not there – making bankruptcy laws more protective of lenders did not lead to more access and cheaper credit," Jacoby said.

What the 2005 act did do was to herald an explosion in private student loans. Lenders, confident in the knowledge that it would be much more difficult in future for debts to be discharged, opened their arms wide to new borrowers.

Today, the total of outstanding private student loans stands at $123bn. That is only about 8% of the overall $1.5tn debt mountain, but it is responsible for much of the human suffering with the average private student loan debt amounting to almost $14,000 a person.

Higher interest rates

Most outstanding student loans are owed to the federal government. Discharging federal student loans in bankruptcy is similarly tightly proscribed, but the pain of those restrictions is heavily tranquilised by schemes that help borrowers who fall into trouble including loan forgiveness.

Private student loans by contrast have no such cushion. The only hope for a borrower falling behind in repayments is if they can prove "undue hardship" – a standard that is almost impossible to meet and that often involves litigation costing thousands of dollars they do not have.

"Private student loans tend to have higher interest rates than federal loans, are far less flexible when borrowers are struggling, and are not eligible for programs like income-driven repayment or loan forgiveness," said Adam Minsky, a bankruptcy attorney who takes on student loans cases.

In Joe's Vision, Biden points to an attempt in 2015 by the Obama administration, in which he was the vice-president, to allow at least some private student loans to be discharged in bankruptcy. He promises that a Biden presidency would enact that legislation – effectively reversing his earlier 2005 vote.

But other than that he has remained largely silent on the subject and has not offered a retraction of his earlier voting record. The Guardian asked the Biden campaign to respond to the accusation that his support of the 2005 act, encouraged by his close ties to Delaware corporations, has made it harder for millions of Americans struggling with private student loans. There was no immediate reply.

So far on the Democratic presidential trail the subject of Biden's role in the 2005 reforms has attracted remarkably little attention. The former vice-president has had to atone for his treatment of Anita Hill when she accused the US supreme court justice nominee Clarence Thomas of sexual harassment in 1991 and for his support of the 1994 crime bill that heralded mass incarceration, but on student loans he has largely avoided scrutiny.

Warren – no longer a law professor, a political rival now – made a passing reference to his record on bankruptcy on the day Biden launched his presidential bid in April. "At a time when the biggest financial institutions in this country were trying to put the squeeze on millions of hard-working families, Joe Biden was on the side of the credit card companies," she said.

How Joe Biden helped inflame the student loan crisis: Geoffrey Peterson

cleveland.com/opinion/2019/09/how-joe-biden-helped-inflame-the-student-loan-crisis-geoffrey-peterson.html

September 6, 2019

Posted Sep 06, 2019

AP

By Guest Column, cleveland.com

SHAKER HEIGHTS, Ohio -- "Get in, get out, and get on with your life. Navient, here for you." This is the optimistic, yet odd, on-hold message which student-loan-servicing giant Navient greets you with while waiting for a representative. I am one of its more than 12 million customers and owe over $102,000. Navient Corp. is based in the bank-friendly state of Delaware, along with about 50 percent of the U.S. credit card market.

Student loan debt has ballooned to its current conservative estimate of $1.62 trillion. However, the actual figure may be closer to $1.65 trillion. This amount includes both federal and private loans, along with accrued interest on the debt (a minor discrepancy of roughly $30 billion.)

The student loan debt crisis has been widely reported on by the media. However, there are some significant aspects that have received little attention.

The roots of the crisis originated from changes made to the U.S. Bankruptcy Code in 1978, and resulted nearly three decades later with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The extensive overhaul of the bankruptcy code makes it nearly impossible to discharge student loan debt unless the borrower can prove that it would cause "undue hardship," a legal designation rarely upheld by the courts in the majority of cases, and typically only granted to individuals who are permanently disabled.

Though the law was a huge triumph for Wall Street, it was disastrous for consumers, making it extremely difficult to file for bankruptcy.

Among Democrats, then-Sen. Barack Obama voted against it, along with the late Sen. Edward Kennedy, who declared that the bill "sacrifices the hopes and dreams of average Americans to the rampant greed of the credit card industry" and "turns the United States Senate into a collection agency for the credit card companies, reaching the long arm of the law into the pocketbooks of average Americans who have reached the end of their economic rope."

Notably, current senator and Democratic presidential candidate Elizabeth Warren, at the time a respected law professor specializing in bankruptcy law at Harvard Law School, was so outraged by the law's passage that she ultimately decided to leave her tenured position to run for political office.

One of the 2005 bankruptcy bill's most ardent Democratic supporters was Joe Biden, then a Delaware senator, now a presidential candidate.

In Elizabeth Warren's words, from a 2002 Harvard Women's Law Journal article, "Without his sponsorship, it is widely believed a hard-to-explain bill that favors big banks over families in terrible financial trouble would be dead."

Former Sen. Russ Feingold referred to the bankruptcy bill in 2001 as "a poster child for the need for campaign finance reform."

As mentioned before, Delaware is a haven for the financial industry. Major credit card companies such as Chase, Citigroup, Discover and MBNA (acquired by Bank of America in 2006) have or previously had headquarters there. Biden's close association with MBNA was well-known by Washington insiders at the time. In fact, so chummy was his relationship with the Wilmington-based company that some called him the "Senator from MBNA" because it had been one of his biggest campaign contributors since 1989.

Throughout his political career, Biden has consistently been a lapdog for the financial industry. The evidence of his allegiance to Wall Street over the American people is overwhelming.

The 2005 bankruptcy bill Biden supported proposed a major change, to make student loans nondischargeable in bankruptcy. The stated intention was to protect banks from potential fraud by debtors who might abuse bankruptcy to not pay back their loans. Additionally, it was argued by some proponents of the bill that giving further protection to banks would enable them to offer private student loans at lower interest rates. However, as stated in a 2015 report by the

U.S. Department of Education recommending that private loans be dischargeable in bankruptcy, "There has been no evidence that the 2005 changes to bankruptcy caused interest rates on student loans to decline or access to credit to increase significantly."

One of the more troubling consequences of the 2005 bankruptcy law was the securitization of student loans into student loan asset-backed securities. Known as SLABS, they are strikingly similar to the subprime mortgages that triggered the 2008 financial crisis. Taylor Mann, founder of the Texas-based financial management firm Pine Capital, and an expert on SLABS, discovered fundamental risks in Navient's business model of repackaging student loans like mortgage-backed securities and selling them. Like investor Michael Burry shorting subprime mortgages, depicted in the film "The Big Short," Mann successfully shorted Navient's stock.

When I consolidated my loans in September 2004, it was slightly above $76,000. In 15 years, capitalized interest has increased that by more than $26,000 or 35 percent. Sadly, my situation is typical, but I consider myself fortunate. I was very privileged to receive an excellent education at some of the best colleges in the country. I have not defaulted (yet) on my loans, had my credit score destroyed, had my tax refunds withheld and applied to my debt, had my wages or a portion of my Social Security benefit garnished, or sued, charged court costs, and collection and legal fees.

All things considered, I am in relatively good shape, right?

Geoffrey Peterson is a composer and musician and lives in Shaker Heights.

Joe Biden's Role in Creating the Student Debt Crisis Stretches Back to the 1970s

theintercept.com/2020/01/07/joe-biden-student-loans/

Aída Chávez, Aída Chávez

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A graduate is silhouetted during the Boston College commencement at Alumni Stadium in Boston on May 21, 2018. Photo: David L. Ryan/The Boston Globe via Getty ImagesA graduate is silhouetted during the Boston College commencement at Alumni Stadium in Boston on May 21, 2018. Photo: David L. Ryan/The Boston Globe via Getty Images

Joe Biden played a central role in the creation of the student debt crisis that he and other candidates are now promising to fix, according to a close look at the legislative history around the spiraling phenomenon.

Today, more than 44 million Americans collectively owe nearly $1.6 trillion in student loan debt, a figure that has surpassed similar numbers for nearly every other form of debt, including credit cards and auto loans. The issue of student loan debt has even radicalized a high-ranking Trump administration student loan official, A. Wayne Johnson, who resigned from Betsy DeVos's Education Department last October to launch a Senate campaign in Georgia centered on mass student debt forgiveness.

Early in his senatorial career, Biden played a role in making it easier for students and parents to take out burdensome loans, spanning across several decades. Later, his landmark bankruptcy reform legislation made it nearly impossible to discharge student loans, birthing a predatory industry and sinking millions into unsustainable levels of debt.

The former vice president has enjoyed a relatively leisurely stroll through the Democratic primary over the past year, as his opponents waited for the three-time presidential candidate to fade harmlessly away. After watching Julián Castro wilt in the wake of his attack on Biden in an early debate, none wanted to be seen as the one holding the knife when the lights came on.

Yet Biden has refused to go quietly, stubbornly remaining atop the field. And so the knives are coming out. Former South Bend Mayor Pete Buttigieg has recently attacked his judgment for supporting the Iraq War and allowing his son to profit from a natural gas company in Ukraine while Biden was leading anti-corruption efforts there. Vermont Sen. Bernie Sanders unloaded on him Monday night on CNN, hitting everything from his vote for the war and damaging trade deals to his push for a major bankruptcy reform bill, "which has caused enormous financial problems for working families."

On Tuesday morning, Massachusetts Sen. Elizabeth Warren pointedly released a plan to repeal the "harmful provisions" in the bankruptcy bill, reviving a bitter fight she had with the then-Delaware senator more than a decade ago. A surrogate, Adam Green of the Progressive Change Campaign Committee, linked the bankruptcy plan to the line of attack against Biden that progressives see as the most potent: He is unelectable. "When thinking about electability, it would be complete malpractice to nominate someone who conspired in backrooms for years with credit card lobbyists and voted for every corporate bankruptcy bill, Wall Street deregulation, and trade deal that voters hate," Green said.

"So if we're going to beat Trump, we need turnout," Sanders said Monday night. "And to get turnout, you need energy and excitement. And I don't think that that kind of record is going to bring forth the energy we need to defeat Trump."

In 1978, Biden supported the Middle Income Student Assistance Act, which eliminated income restrictions on federal loans to expand eligibility to all students. Biden helped write a separate bill that year blocking students from seeking bankruptcy protections on those loans after graduation. (The income restrictions on federal loans were reinstated in 1981.) Then he went on to vote to create the Parent Loan for Undergraduate Students, or PLUS, program in 1980 and the Auxiliary Loans to Assist Students, or ALAS, program in 1981, which extended loan eligibility to students with no parental financial support.

"Within a few years, the crackdown [on student debtors filing for bankruptcy] that began in 1978 would extend beyond just government loans. In 1984, as Biden was gaining seniority on the Judiciary Committee, the Delaware lawmaker reprised his role as one of his party's top negotiators on a new legislative proposal," the International Business-Times reported in 2015.

"Under that bill — which was signed into law by President Ronald Reagan — bankruptcy exemptions were extended to non-higher-education loans like those for vocational schools, according to the U.S. Department of Education."

> Early in his senatorial career, Biden played a role in making it easier for students and parents to take out burdensome loans.

Though Biden ultimately missed the vote for the Higher Education Amendments of 1986, he co-sponsored the legislation and said he would have voted for it if he were able to. (According to the Congressional Record, he had to be in Delaware for a family matter.) One of the most significant changes in the Higher Education reauthorization was a provision that prevented students in default under the Guaranteed Student Loan program from receiving new federal assistance. It also imposed new regulations that "helped fuel the development of lending-industry giants like Sallie Mae by creating barriers to entry to smaller, newer companies wanting to enter the field," the think tank Education Sector wrote in a 2007 report.

"Loosened loan eligibility requirements, together with two new federal loan programs, increased student borrowing from $1.8 billion in 1977 to $12 billion in 1989," the report said, referring to the Middle Income Student Assistance Act, and the PLUS and ALAS programs.

Years later, as a senator from Delaware, Biden was one of the most enthusiastic supporters of the disastrous 2005 bankruptcy bill that made it nearly impossible for borrowers to reduce their student loan debt. The Bankruptcy Abuse Prevention and Consumer Protection Act raised the bar for families to pursue Chapter 7 bankruptcy protections. It overwhelmingly passed in the Senate at the end of the Clinton administration, over the objections of Warren, then a bankruptcy expert who had tangled for years with Biden over the issue. She lobbied first lady Hillary Clinton, who herself persuaded Bill Clinton to veto it.

Biden came back to the legislation under the Bush administration; it passed the Senate in 2005 on a 74-25 vote, with most Democratic lawmakers, including then-Sen. Barack Obama, voting against it. (Clinton, by then a senator from New York, voted for it.) George W. Bush signed it into law, and private student loan debt skyrocketed in the wake of its passage. The total amount of private

student loan debt more than doubled between 2005 and 2011, growing from $55.9 billion to $140.2 billion, according to the Consumer Financial Protection Bureau.

A 2011 study from the Federal Reserve Bank of New York found that the 2005 bankruptcy bill led to a surge of foreclosures that may not have happened otherwise, translating to an additional 29,000 foreclosures every three months. To defend his support of the bill, Biden's campaign told Politico that "knowing that the bill was likely to make it through the Republican-led Congress, he worked to moderate the bankruptcy bill and protect middle class families. He believed that if you have income and consumer debts you can pay, you should agree to a repayment plan that you can afford."

In 2002, during an earlier version of the legislation, Warren, who was a Harvard bankruptcy law professor at the time, singled out Biden for his push to make it harder for struggling people to file for bankruptcy — arguing the change would be particularly harmful to women.

"The point is simply that family economics should not be left to giant corporations and paid lobbyists, and senators like Joe Biden should not be allowed to sell out women in the morning and be heralded as their friend in the evening," she wrote in her 2003 book, "The Two-Income Trap." "Middle-class women need help, and right now no one is putting their economic interests first."

Out of the current primary field, only Sanders and Warren are proposing to eliminate student loan debt. Sanders goes the furthest on the issue, with a universal plan that would cancel every last dollar of student debt. Warren's means-tested plan would offer no debt forgiveness for those making more than $250,000 a year and would cap the amount that can be forgiven at $50,000, regardless of income. But her new bankruptcy reform plan also addresses the issue: It would end "the absurd special treatment of student loans in bankruptcy," making them dischargeable like other consumer debts.

Young people, particularly students, flocked to the Vermont senator's first long-shot bid for the Democratic nomination in large part because of his promise to make college free. According to a September Hill-HarrisX poll, a majority of voters support the elimination of all student debt and making

higher education free. Seventy-two percent of Democratic voters said they are in favor of the two policies, compared with 40 percent of Republicans and 58 percent of independents.

Biden, who has said he's still paying off $298,000 in student debt for his three children, opposes free college and student debt forgiveness, calling it unrealistic. (The former vice president has a net worth of more than $15 million, according to the tax returns his campaign released last July. Oddly enough, the campaign video in which he mentions his children's debt with the system is captioned "We Need a President Who Will Forgive Student Debt.") The Biden Plan for Education Beyond High School, which was released in October, aims to "expand" the accessibility of community college and "simplify" income-based loan repayment programs.

During the Democratic primary, he has characterized loan forgiveness as something that would help wealthy students.

"I don't think you should be paying for my son [Hunter] going to Yale Law School. I don't think you should be paying for my daughter [Ashley] to go to the University of Pennsylvania," he said at a campaign stop in New Hampshire, according to a Washington Post reporter. "I do think we should make it more affordable to attend school." The reporter clarified in a follow-up tweet that Biden was specifically referring to loan forgiveness and not the related debate about tuition-free college.

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WHAT IS A WOMEN'S ISSUE?

BANKRUPTCY, COMMERCIAL LAW, AND OTHER GENDER-NEUTRAL TOPICS

ELIZABETH WARREN

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WHAT IS A WOMEN'S ISSUE? BANKRUPTCY, COMMERCIAL LAW, AND OTHER GENDER-NEUTRAL TOPICS

ELIZABETH WARREN*

The 2001 Annual Report of the NOW Legal Defense and Education Fund celebrates the achievements of this premier women's organization and charts the organization's agenda for the year to come.[1] Topics in the report range from the announcement of a lectureship to honor Justice Ruth Bader Ginsburg to a discussion of legislative initiatives supported by the organization. The twenty-four-page brochure mentions only one politician by name: Senator Joseph Biden, a Democrat from Delaware. He not only is singled out in the text of the report, but he is also featured in a photograph standing shoulder to shoulder with a dozen women cele-

* Leo Gottlieb Professor of Law, Harvard Law School. J.D., Rutgers University, 1976; B.S., Houston University, 1970. I express my appreciation to the Fellowship Program at the Radcliffe Institute for Advanced Study. The Institute made completion of this manuscript possible by providing the time to write—a gift of immeasurable significance. I also thank Elizabeth Schneider, Amelia Warren Tyagi, Jay Lawrence Westbrook, and Brady Williamson, each of whom offered many thoughtful comments on earlier drafts of this Essay, and Teresa Sullivan and Deborah Thorne, who generously offered help on the data calculations.

Some of the data cited in this Essay are from the Consumer Bankruptcy Project III, 2001, an empirical study of 1250 families filing for bankruptcy during 2001 in five judicial districts around the country. The Consumer Bankruptcy Project III was funded through grants from the Ford Foundation, the Harvard Law School, and New York University Law School. The enthusiastic support and assistance of many bankruptcy judges, bankruptcy clerks, Chapter 7 and Chapter 13 trustees, and attorneys also contributed significantly to this work. The principal investigators express our gratitude to the organizations that provided financial support and to each of the judges, clerks, trustees, and lawyers who made this research possible. None of the sponsors is responsible for the content of this Essay.

No project of this kind could be put together without the contribution of a number of people. Consumer Bankruptcy Project I in 1981 and Consumer Bankruptcy Project II in 1991 were the work of Professors Teresa A. Sullivan, Jay Lawrence Westbrook, and myself. All three of us have continued our work into Consumer Bankruptcy Project III. In addition, Professors David Himmelstein, Bruce Markell, Michael Schill, Susan Wachter, and Steffie Woolhandler have shared in the design and development of the 2001 study. John Pottow, Katherine Porter, and Deborah Thorne served as Project Director at different times, participating in the design of the study and managing much of the data collection. Cathy Ellis and Ann de Ville provided extraordinary administrative support, and Alexander Warren designed and managed all the coding databases. I am grateful for the contributions of each of these people in creating a database that permits analysis from so many different perspectives.

More details about the project are available in Elizabeth Warren, *Bankrupt Children*, Appendix I, 86 MINN. L. REV. (forthcoming 2002) (information about the project can be found in Appendix I).

[1] NOW LEGAL DEFENSE AND EDUCATION FUND, 2001 ANNUAL REPORT (2001).

brating the renewal of the Violence Against Women Act. With his presidential aspirations growing,[2] Senator Biden must be delighted with his starring role in the Annual Report and with the halo effect that suggests that he is one public official politically active women can trust.

Of course, not all of Senator Biden's legislative agenda is reflected in the Annual Report. Missing, for example, is a picture of Senator Biden standing shoulder to shoulder with the CEOs of the credit industry, cosponsoring legislation to increase restrictions on consumer and small business bankruptcy.[3] His energetic work on behalf of the credit card companies has earned him the affection of the banking industry and protected him from any well-funded challengers for his Senate seat.[4] This important part of Senator Biden's legislative work also appears to be missing from his Web site and publicity releases.[5]

Like his support for the Violence Against Women Act, Senator Biden's efforts on behalf of the credit industry to increase restrictions on bankruptcy bear particular relevance to NOW Legal Defense and Education Fund's annual report. The annual report focuses on economic and social issues that will affect women and establishes the organization's legislative agenda. The group that will be most affected by the changes in the bankruptcy legislation Senator Biden so forcefully supports will be women, particularly women heads of household who are supporting chil-

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[2] *See, e.g.*, Howard Fineman, *Wanted: A Senate 'Solomon,'* NEWSWEEK, June 18, 2001, at 26 ("among other possible [presidential candidates]: Joe Biden, Evan Bayh, Joe Lieberman, Hillary Rodham Clinton, Chris Dodd and Dick Durbin").

[3] Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001). A very similar bill was introduced in the House. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001). Both bills have passed their respective chambers and are now in conference between the House and the Senate while legislators try to iron out the differences between the bills.

[4] *See, e.g.*, Rob Blackwell, Michele Heller & Nicole Duran, *Biden Challenger?*, AM. BANKER, July 16, 2001, at 3. ("Sen. Biden is particularly popular with the financial services industry these days because he is an active proponent of legislation to overhaul the nation's bankruptcy laws and, more important, because he is expected to be named to a conference committee to reconcile the differing bankruptcy bills the House and Senate passed in March. His presence would tilt the committee in favor of the industry-backed measure.").

[5] *See* Official Senate Site of Joseph R. Biden *at* http://www.senate.gov/~biden. This absence is particularly notable because of his extensive work on the bankruptcy issue and his insistence on being named to the House-Senate conference on bankruptcy even after he left the Judiciary Committee (which has jurisdiction over the bankruptcy bill) for the Foreign Relations Committee (which has no special interest in the bill). For a discussion of the process of appointing Senator Biden to the conference committee to resolve the differences between the House and Senate versions of the bankruptcy bill, see Pamela Barnett, *Despite Possible Advantage, GOP Balks at Bankruptcy Conference*, CONGRESS DAILY, May 1, 2001, LEXIS, News Library, Cngdly File; *Daschle Ready to Appoint Bankruptcy Overhaul Conferees*, BULL.'S FRONTRUNNER, June 20, 2001 *available at* LEXIS, News Library, Frntrn File; *All Things Considered: Stalled Bankruptcy Bill* (National Public Radio broadcast, June 21, 2001); *Biden to Be Named Conferee on Bankruptcy Reform Bill*, CONGRESS DAILY, July 9, 2001, LEXIS, News Library, Cngdly File.

dren. Indeed, women are now the largest demographic group in bankruptcy, outnumbering men by about 150,000 per year.[6]

Based on projected figures, more than a million women will find their way to the bankruptcy courts next year[7]—more women than will graduate from four-year colleges,[8] receive a diagnosis of cancer,[9] or file for divorce.[10] Women who file for bankruptcy and women whose ex-husbands file for bankruptcy will be affected by any change in the bankruptcy laws. The impact of the bill will be felt both by women as debtors and women as creditors. Twenty-nine women's groups—a diverse collection that includes the Y.W.C.A., Hadassah, American Association of University Women, Church Women United, and the Feminist Majority—have publicly opposed the pending bankruptcy legislation.[11] Notably, one of the groups most actively opposing the legislation, precisely because of its effects on women and children, has been the NOW Legal Defense and Education Fund.

Senator Biden's starring role in the NOW Legal Defense and Education Fund's annual report and his work on the pending bankruptcy legislation comes into even sharper focus in light of his aggressive response to the concerns women have raised about the bankruptcy bill. When confronted with data showing the disproportionate impact of the proposed bankruptcy legislation on women, Senator Biden has gone on the offensive, stating flatly that "this bill actually improves the situation of women and children."[12] How does the Senator explain the opposition of women's groups? He dismisses their concerns as "based on the vague and unarticulated fears that women will be unfairly disadvantaged."[13] Not a single women's group that has spoken publicly about the bankruptcy bill agrees with him, but his public position as a champion of women seems untarnished.

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[6] *See* Table 3: Households Filings for Bankruptcy, 2001, *infra* note 40.

[7] *See id.*

[8] U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, at 152 tbl.241 (2000) [hereinafter 2000 STATISTICAL ABSTRACT].

[9] *See* 2000 STATISTICAL ABSTRACT, *supra* note 8, at 143 tbl.228.

[10] *See* 2000 STATISTICAL ABSTRACT, *supra* note 8, at 104 tbl.150.

[11] *See* Letter from National Women's Law Center; National Partnership for Women & Families; ACES, Association for Children for Enforcement of Support, Inc.; American Association of University Women; American Medical Women's Association; Business and Professional Women/USA; Center for Law and Social Policy; Center for the Advancement of Public Policy; Center for the Child Care Workforce; Church Women United; Coalition of Labor Union Women (CLUN); Equal Rights Advocates; Feminist Majority; Hadassah; National Association of Commissions for Women (NACW); National Black Women's Health Project; National Center for Youth Law; National Council of Jewish Women; National Council of Negro Women; National Organization for Women; National Women's Conference; Northwest Women's Law Center; NOW Legal Defense and Education Fund; Wider Opportunities for Women; The Woman Activist Fund; Women Employed; Women Work!; Women's Institute for Freedom of the Press; YWCA of the U.S.A. (Sept. 17, 1999) (on file with author).

[12] 147 CONG. REC. S2417 (daily ed. Mar. 15, 2001) (statement of Sen. Biden).

[13] 146 CONG. REC. S11462 (daily ed. Nov. 1, 2000) (statement of Sen. Biden).

Of course, Senator Biden cannot guarantee passage of the bankruptcy bill by himself. He has received substantial help from both parties in the Senate and in the House of Representatives. The primary sponsors of the bankruptcy legislation are Senator Charles Grassley (R-Iowa) and Congressman George Gekas (R-Pa.). The bill passed both houses of Congress by huge margins with virtually unanimous support from the Republicans and substantial support among the Democrats. Even Senator Biden's women colleagues have quietly voted for the bill.[14] At this moment, the bill is in conference as a committee from the Senate and the House attempt to reconcile the differences between the two versions so that the bill can be presented to the President for his signature. But Senator Biden's role, as the credit industry has noted, has been crucial.[15] The Senator is variously described as "the linchpin" to passage,[16] "a staunch supporter,"[17] "pivotal,"[18] "a strong proponent,"[19] "the only Democratic true believer,"[20] "possibly the bankruptcy bill's staunchest defender,"[21] and "the most ardent Democratic supporter of bankruptcy legislation."[22] The American Bankers Association describes itself as "lucky to have Biden on the conference."[23] Without his sponsorship, it is widely believed a hard-to-explain bill that favors big banks over families in terrible financial trouble would be dead.[24] More importantly, because Senator Biden has expressly rejected concerns raised about the bill's ef-

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[14] S. 420, 107th Cong. (2001), *available at* http://www.senate.gov/legislative/vote1071/vote_00036.html. The only woman in the Senate to vote against the bill was Senator Kay Bailey Hutchison (R-Tex.) who objected to the provision that would hurt Texas and Florida millionaires by capping the amount of equity in a home they could keep if they filed for bankruptcy. Senator Hutchison has made this defense quite visible to her home-state constituency. *See, e.g.*, Christopher Lee, *Homestead Exemptions Seems Safe; New Bankruptcy Laws May One Day Abolish Texas Provision*, DALLAS MORNING NEWS, Nov. 18, 2001, at 8A; Pamela Yip, *Bills Would Drain Protections in Some Personal Bankruptcy Cases*, DALLAS MORNING NEWS, Aug. 6, 2001, at 1D; *Bankruptcy Bills Lurch Forward*, NAT'L ASSOC. ATTYS GEN. BANKR. BULL., July 2001, at 1.

[15] Barnett, *supra* note 5 ("Biden's presence on the conference committee is considered crucial by bill supporters.").

[16] Carl Weiser, *Congress to Finalize Bankruptcy Reform*, GANNETT NEWS SERV., Aug. 28, 2001 (quoting a lobbyist source).

[17] Barnett, *supra* note 5.

[18] Pamela Barnett, *Sources Say Addition of Biden Increased Its Size*, CONG. DAILY, July 23, 2001, *available at* LEXIS, News Library, Cngdly File (citing unnamed sources).

[19] *Legislative Update*, AM. BANKER, July 12, 2001, at 7.

[20] Lisa Freeman, *Bankruptcy Reform Bill Faces Multiple Delays in Senate*, CREDIT UNION J., June 25, 2001, at 16 (quoting the Credit Union National Association's Gary Kohn).

[21] Pamela Barnett, *Bankruptcy Conference Faces Filibuster*, CONG. DAILY, June 19, 2001, LEXIS, News Library, Cngdly File.

[22] *Bankruptcy Overhaul Unlikely to be Enacted This Year*, BULL.'S FRONTRUNNER, Oct. 10, 2001, *available at* LEXIS, News Library, Frntrn File.

[23] Weiser, *supra* note 16 (quoting a representative of the Delaware Bankers Association).

[24] *See, e.g.*, *Daschle Ready to Appoint Bankruptcy Overhaul Conferees*, *supra* note 5 ("a Senate Republican aide 'said that excluding Biden from the conference would likely doom the bill'").

fect on women, he has shielded his colleagues on both sides of the aisle from being branded as anti-women for their support of this legislation. He is simply the most visible example of legislators who daily weigh the effect of proposed legislation on women and on other interest groups, deciding when to stand up for women and when to take a pass.

Senator Biden's support of legislation that helps women and his even more vigorous support of legislation that hurts women poses a serious question: what constitutes a women's issue? Some issues tied to physical differences between the sexes—abortion, birth control, sexual assault, breast cancer—are clearly labeled women's issues. Other issues close to the hearts of many women—child abuse, child care, elder care, child custody, women in poverty—also make it to the top of the list. Economic issues focusing on equality—equal pay for equal work, equal employment opportunity, equal educational opportunity—all find their champions as well. But business and economic topics are often overlooked. Even when women's groups become involved, these issues never seem to become a priority. Moreover, when business topics are on the agenda there is often a well-funded business group pressing for its own interests, drowning out the voices of women.[25]

It is fitting that on the twenty-fifth anniversary of a journal dedicated to promoting discussion of issues affecting women that we ask what constitutes a women's issue. A survey of the *Harvard Women's Law Journal*'s article topics for the last twenty-five years reveals what kind of topics are traditionally considered "women's issues." The topics that receive the most attention include domestic violence, sexual harassment, and reproductive rights, rather than facially neutral issues such as bankruptcy.[26] Is Senator Biden right? Is bankruptcy simply not a women's issue? On financial topics, are women, as his words seem to suggest, unable to understand what helps them and what hurts them? If, as this Essay suggests, bankruptcy is an issue of great economic importance to women, then why has it not become a popular women's issue? Why isn't Senator Biden in trouble with grassroots women's groups all over the country and with the millions of women whose lives will be directly affected by the legislation he sponsors?

The answers to these questions raise a troubling specter of women exercising powerful political influence within a limited scope, such as rape laws or equal educational opportunity statutes, but wielding little

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[25] *See* discussion *infra* notes 84–91 and accompanying text.

[26] *See, e.g.*, G. Kristian Miccio, *A Reasonable Battered Mother?: Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89 (1999); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35 (1990); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987). *But see, e.g.*, Barbara A. Mikulski & Ellyn L. Brown, *Case Studies in the Treatment of Women Under Social Security Law: The Need for Reform*, 6 HARV. WOMEN'S L.J. 29 (1983).

influence in business or other supposedly gender-neutral areas that profoundly affect many women.[27] This Essay discusses why business issues have not become rallying points as women's issues or even attracted much attention among politically active women. A number of factors, stretching from the disproportionate power of a narrowly focused business lobby to the continued perception of commercial law as an area dominated by men, have acted to place business issues outside the scope of women's issues. Moreover, as a group that has some highly visible issues, women face the problem of politicians who flaunt their support of one or two issues that prominently bear the label "women's issue," believing they have assured themselves of women's support regardless of what they do on a range of dull, economic issues.[28] As women set their agenda for the next twenty-five years, the question of how to define a women's issue should be a matter of first concern.

I. BANKRUPTCY IS A WOMEN'S ISSUE

Two years ago, I was paging through some computer runs to verify that a multi-state sample of households in bankruptcy that my co-authors and I had drawn was statistically representative.[29] All the data points were matching up nicely when I noticed that nearly 40% of those filing for bankruptcy were divorced or single women. My 1981 study with Dr. Teresa Sullivan and Professor Jay Westbrook had laid the foundation for a demographic analysis of who filed for bankruptcy, providing data about how many women had filed for bankruptcy years earlier. I knew something had to be wrong. Some quick calculations showed that if the number in the 1999 sample was accurate, then bankruptcy filings by women had grown by nearly 800% in less than two decades. This seemed unimaginable, and all I could do was curse. Something had to be wrong with my sample selection to create this apparent distortion.

This discovery triggered a search that ranged far outside the bankruptcy statistics for information that would explain the financial circum-

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[27] The implications of economic vulnerability are beyond the scope of this essay, but I note one powerful connection between economic vulnerability and violence against women. For victims of domestic violence, economic dependence on their batterers often provides a significant hurdle to leaving an abusive relationship. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 77 (2000) (noting that "[m]any women who are battered have little money, no child care, no employment; they may be financially and emotionally dependent on the men who batter them").

[28] Judith Resnik argues that women's issues are not separable from a host of general legal issues. Judith Resnik, *Visible on "Women's Issues,"* 77 IOWA L. REV. 41 (1991). This Essay should offer yet another piece of support for her central premise.

[29] That study was the 1999 Consumer Bankruptcy Project, a survey of 1496 debtors in eight judicial districts around the country. For a more detailed description of the research methods of that study, see Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 413–18 (2001).

stances of today's women. I finally understood that something was wrong, but it was not the data. Instead, the real problem is that women, particularly divorced and separated women with children, are facing a rapidly growing risk of economic collapse. The data from the bankruptcy courts document a shocking decline in the financial health of a growing group of women.

The finding is all the more surprising given these women's circumstances. The women in the bankruptcy sample, single and married, are not those mired for years in poverty. Instead, the women in bankruptcy, like the men who file for bankruptcy, are a fairly representative cross-section of the American middle class.[30] Their education levels are slightly higher than the population generally, with women in bankruptcy more likely to have attended college than their counterparts.[31] Most are

[30] For a more detailed analysis based on 2001 data, showing these women's position in the middle class, see Elizabeth Warren, *What Went Wrong? U.S. Families in Bankruptcy*, 1991–2001, 48 OSGOODE HALL L.J. (forthcoming 2002). A more detailed discussion of bankruptcy as a middle-class phenomenon is available in TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 26–74 (2000) [hereinafter FRAGILE MIDDLE CLASS].

[31] In the population generally, 50.3% of all women have no education beyond high school. In the bankruptcy sample, only 43.5% of the women filing alone had no education beyond high school. In other words, a larger proportion of the women who file for bankruptcy have made it to college than women in the population generally. As Table 1 below illustrates, the educational distribution among the women who filed for bankruptcy alone is close to that of adult women in the population generally, with more women making it to college but fewer actually getting their bachelor's degrees or going on for advanced work.

Table 1: Educational Attainment of Women and Women Filing Alone for Bankruptcy

	Proportion of Women in Population Generally	Proportion of Women Who Filed Alone for Bankruptcy
No high school diploma	16.6%	16.1%
High school diploma	33.7%	27.4%
Some college	27.9%	41.4%
College diploma only	15.3%	10.4%
Advanced degree	6.5%	4.2%

* Columns do not add up perfectly because of rounding error.

These calculations are based on data from the U.S. Census Bureau and the Consumer Bankruptcy Project III. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2000 3 tbl.11 (2000); Consumer Bankruptcy Project III, 2001 (unpublished) (on file with author) [hereinafter Consumer Bankruptcy Project III]. For more information about the project, see Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. (forthcoming 2002) (information about the project can be found in Appendix I). In the table above, the "some college" numbers were obtained by adding the "some college, no degree" and "associate degree" figures from the census data. The "college diploma only" number is based on the "bachelor's degree only" category divided by the total educational attainment of all of the categories; "associate degree" is not included in this category.

employed when they file.[32] They work in a representative cross-section of industries and occupations.[33] About half are homeowners.[34] By the most overt criteria, the women who file for bankruptcy are, as a group, solidly middle-class.

The women in bankruptcy are distinguished from their counterparts in the population generally by their terrible financial circumstances. The majority have had a serious interruption in income—a job loss, layoff, firing, downsizing, outsourcing, or some other work-related euphemism that has sharply cut their income.[35] Nearly half have had to deal with a serious medical problem—either their own or that of a child or parent for whom they provide care.[36] These setbacks have left them trying to cope with mortgages and car payments and, as a result, have increased their reliance on credit cards to make ends meet. By the time they file for bankruptcy, they owe, on average, more than their gross annual income in short-term high-interest debt.[37] On average, the people filing for bankruptcy would have to give every fifth paycheck to their creditors just to

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[32] At the time they file for bankruptcy, 80.1% of the women filing alone are working. While many have suffered a significant period of unemployment preceding their bankruptcy, most have been employed and are back at work by the time they file. They scramble to get by, but once they are back at work they report making a more realistic assessment of their circumstances, deciding that bankruptcy is the only way they will ever become financially stable. For a more detailed discussion of the work histories of people in bankruptcy, see FRAGILE MIDDLE CLASS, *supra* note 30, at 75–107.

[33] Occupational prestige scores are developed by sociologists to rank the relative prestige of different jobs. They range from a low of 9 (bootblack) to a high of 82 (physician). The data from the Consumer Bankruptcy Project III (2001), *supra* note 31, are not yet complete, but the 1991 data showed that the people who filed for bankruptcy had a median occupational prestige score of 39 for primary filers, compared with a median occupational prestige score in the nation generally of 40. FRAGILE MIDDLE CLASS, *supra* note 30 at 56–59.

[34] Home ownership status varied by marital status in the study as it does in the population generally. Among married women filing bankruptcy with their spouses, 70% owned their own homes. Among those filing alone, the rate was 38%. Consumer Bankruptcy Project III, *supra* note 31; Warren, *supra* note 30. This compares with a national home ownership rate in 1999 of 66.8% for all households. *See* 2000 STATISTICAL ABSTRACT, *supra* note 8, at 722 tbl.1213.

[35] More than half of the women filing alone for bankruptcy in 2001 indicated they had been unemployed or otherwise had an interruption in their incomes or cut back in their working hours within the two years preceding their bankruptcy filings. Consumer Bankruptcy Project III, 2001, *supra* note 31.

[36] Among women filing alone in 2001, 37.2% identified substantial medical bills or a medical problem as a reason for filing. Among the women filing jointly with their husbands, the proportion was even higher at 47.7%. *Id.* For a more detailed discussion of the relationship between medical debts and bankruptcy based on 1999 data, see generally Jacoby, Sullivan & Warren, *supra* note 29.

[37] The 2001 bankruptcy court record data from Consumer Bankruptcy Project III, which includes information on debts and incomes, are not yet coded and analyzed, but Ed Flynn and Gordon Bermant have provided a good estimate of the debt to income ratio for debtors in Chapter 7. In a study of 1,931 Chapter 7 no asset cases closed in 2000, they show average secured debts of $48,416 and average unsecured debt of $46,120; the average gross income per household is $30,108. Ed Flynn and Gordon Bermant, *Filers Most Likely in 25–44 Age Range*, ABI J., Dec.–Jan. 2002, at 28.

pay the interest on their outstanding loans. If they could not afford to dedicate one in five paychecks to interest payments, they would discover the effect of compounded interest: they would simply owe more money even if they never bought anything else on credit.

The data developed in the 2001 Consumer Bankruptcy Project show that women are now the largest group in bankruptcy.[38] In 1981, women filing alone for bankruptcy had been the smallest group, just 22.1% of all those filing.[39] Twenty years later, they are the largest group, constituting 39.1% of those filing.[40] While bankruptcy filings for all groups—married

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[38] In 1981, the number of Chapter 7 non-business filings was 230,404, the number of Chapter 13 non-business filings was 81,913, and the number of business Chapter 13s was 4865. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 552–55 (1981) [hereinafter ADMINISTRATIVE OFFICE REPORT]. Because all Chapter 13 cases, even business Chapter 13s, are limited to individual (not corporate) debtors, this combination gives the most accurate estimate of the number of households filing for bankruptcy in 1981. These groups total 317,182 households. The number of joint petitions in these three categories totaled 141,822, or 44.7% of the 317,182 households filing for bankruptcy. *Id.* at 557–60. The Administrative Office does not collect data about the family status or the sex of the filing party. Data collected from Consumer Bankruptcy Project I in the same year shows that single filers were 60% men and 40% women. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: CONSUMER CREDIT AND BANKRUPTCY IN AMERICA 149 (1989) (summarizing data from Consumer Bankruptcy Project I) [hereinafter AS WE FORGIVE]. Because 44.7% of filers were joint petitioners, the 60%/40% split of the 55.3% who were single petitioners means that approximately 33.2% of petitioners were men filing alone and 22.1% were women filing alone. Those calculations yield the following:

Table 2: Households Filing for Bankruptcy, 1981

	Percentage	Number
Joint Petitions, Husband and Wife	44.7%	141,822
Men Filing Alone	33.2%	105,304
Women Filing Alone	22.1%	70,097
Total*	100.0%	317,182

* Columns do not add up perfectly because of rounding error in estimates for each subset of debtors.

These calculations are based on data from Consumer Bankruptcy Project I and the Administrative Office of the U.S. Courts. *See id.* at 149; *see also* ADMINISTRATIVE OFFICE REPORT, *supra*, at 552–60. The sample in 1981 included 17% women single filers, but the overall sample in 1981 over-represented the number of married couples, thus under-representing the number of single filing men and women. After readjusting the sample number to reflect the national average on the number of joint petitioners in 1981, the estimated proportion of women filing alone climbs to 22.1% and the estimated number of men filing alone climbs to 33.2%.

[39] *See* Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38.

[40] For the twelve-month period ending December 31, 2001, the number of households in bankruptcy (all Chapter 7 and Chapter 13 non-business filings plus all Chapter 13 business filings) was 1,456,785. The distribution among joint filers, men alone and women alone was as follows:

couples, men filing alone and women filing alone—have increased significantly, women filing alone are the fastest growing group in bankruptcy. In twenty years, the number of women filing alone for bankruptcy has increased by nearly 800%, compared with an increase of about 300% and 400% respectively for married couples and men filing alone.[41] The data are captured in Figure 1.

Table 3: Households Filing for Bankruptcy, 2001

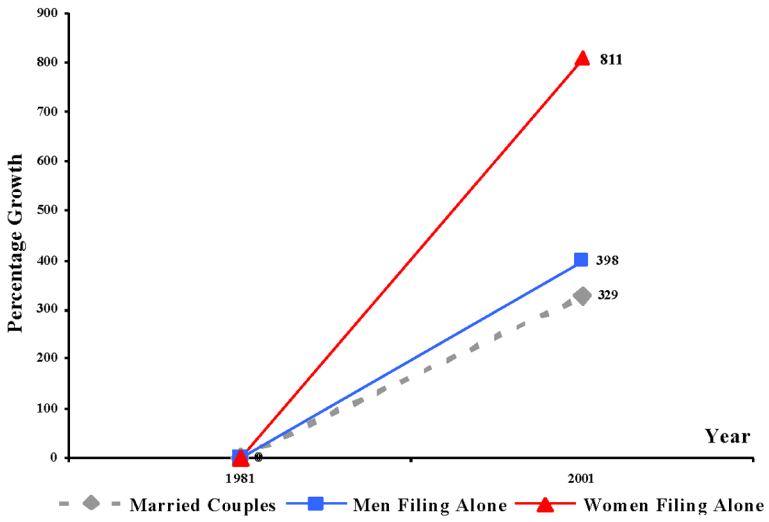
	Percentage	Number
Joint Petitions, Husband and Wife	32.0%	466,275
Men Filing Alone	28.8%	419,554
Women Filing Alone	39.0%	568,146
Total*	100.0%	1,456,785

*Columns do not add up perfectly because of rounding error in estimates for each subset of debtors.

These calculations are based on data from Consumer Bankruptcy Project III and the Administrative Office of the U.S. Courts. *See* Consumer Bankruptcy Project III, *supra*, note 31; News Release, Administrative Office of the U.S. Courts, Record Breaking Bankruptcy Filings Reported in Calendar Year 2001, tbl.F-2 (Feb. 19, 2002) (reporting data from business and nonbusiness bankruptcy cases during twelve-month period ending December 31, 2001) *at* http://www.uscourts.gov/Press_Releases/index.html.

[41] *Compare* Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38 *with* Table 3: Households Filing for Bankruptcy, 2001, *supra* note 40.

FIGURE 1: PERCENTAGE GROWTH IN BANKRUPTCY FILINGS BY GROUP, 1981–2001



These calculations are based on data from the Administrative Office of the United States Courts; Consumer Bankruptcy Project I, 1981; and Consumer Bankruptcy Project III, 2001. *See* ADMINISTRATIVE OFFICE REPORT, *supra* note 38; Consumer Bankruptcy Project III, *supra* note 31.

Including women who file for bankruptcy alone and those who file jointly with their husbands, an estimated one million women filed for bankruptcy in 2001.[42] The sharp rise in the use of bankruptcy by women in financial trouble thrusts the bankruptcy system into a critical role as a safety net for the financial health of American women.

These women use the bankruptcy process to stabilize themselves financially. By declaring bankruptcy, they can discharge certain debts, principally their credit card obligations, so that they can pay the mortgage or rent, utility bills, tuition, and car payments, and buy food and clothing for themselves and their children. For homeowners, bankruptcy provides a chance to stop a foreclosure temporarily, to catch up on back payments, and to get back on track with monthly payments—giving the homeowner a chance to remain a homeowner. For those with cars, bank-

[42] *See* Table 3: Households Filing for Bankruptcy, 2001, *supra* note 40. From 1981 to 2001, the rise in the number of married women has not been as rapid as the rise in the number of single-filing women, but the increase for all women combined—jointly filing with their husbands and filing alone—is nearly 500%. *Compare id. with* Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38.

ruptcy offers the opportunity to give back the car and eliminate the remaining debt or to make payments equal to the actual value of the car.

Bankruptcy, however, is hardly a complete economic renewal. A woman who owns a home will have to make all the payments, in full, plus penalties and interest, or lose the house.[43] She will also have to continue making car payments if she hopes to keep her car.[44] Taxes and student loans must be paid in full.[45] Nonetheless, the ability to discharge high interest credit card debt, outstanding hospital and doctor's bills, and finance company loans is a godsend to someone so far in debt that she faces a downward spiral of missed payments, foreclosures, repossessions, penalties and compound interest from which she could never recover.

The pending bankruptcy bill is 456 pages long, containing more than a hundred proposals, all gender-neutral on their faces, applicable to men and women alike, who file for personal bankruptcy.[46] While some of these proposals are limited to those who earn more than the median family income in the United States,[47] the overwhelming majority apply to every person—regardless of economic circumstances. So, for example, requirements deliberately designed to drive up the cost of bankruptcy—such as increased paperwork and expanded attorney liability provi-sions[48]—apply to every single case. Provisions increasing payback requirements and reducing the scope of the discharge apply across the board in consumer cases, regardless of how little money the debtor makes or the reason for the bankruptcy filing.[49] This is not the place for an extended

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[43] 11 U.S.C. §1322(b)(2) (2001); 11 U.S.C. §524(a) (2001).

[44] 11 U.S.C. §1322(b)(2) (2001); 11 U.S.C. §524(a) (2001); 11 U.S.C. §506 (2001).

[45] 11 U.S.C. §523 (a)(8), (a)(14) (2001); 11 U.S.C. § 1328(a) (2001).

[46] Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001). *See supra* note 3.

[47] *See, e.g.*, H.R. 333, 107th Cong. §102(h) (2001).

[48] *See, e.g.*, S. 420, 107th Cong. §102(a) (2001) (increasing paperwork for *all* debtors, regardless of income level and increasing liabilities for debtors' attorneys).

[49] Here is a very short summary of bankruptcy law for those who are completely unfamiliar with the subject. Families in financial trouble can file a petition in bankruptcy, pay a filing fee, disclose all their assets and liabilities, and have most of their debts discharged. If they own a home or a car, they are likely to continue paying on those obligations because, even if they are no longer personally liable, they will lose the home or the car (the collateral) if they do not make their payments. Certain debts—child support, taxes and student loans are the most notable—are not dischargeable and must be repaid notwithstanding the bankruptcy.

About 70% of all debtors choose a Chapter 7, or liquidation bankruptcy, which concludes with a discharge in about six weeks. The remaining 30% file in Chapter 13, agreeing to make payments over a three- to five-year period, usually on the house, the car, and, in some cases, the credit card debt. Chapter 13 has become attractive to some debtors because it offers the debtors several incentives, such as an expanded discharge, an opportunity to strip down a lien against a car or other personal property, and a chance to catch up on mortgage payments by paying an arrearage.

Before the laws were changed in 1978, a creditor could continue to try to collect after a bankruptcy filing, but a debtor could defend himself or herself in a legal action by pleading a defense of discharge based on the bankruptcy filing. A debtor improvident enough to promise to repay after the bankruptcy would see the debt automatically revived. In 1978, greater restrictions on creditors' post-bankruptcy collection efforts were imposed,

analysis of hundreds of pages of pending legislation. For the reader who wants more detail, Professor Charles Tabb summarizes a prevalent academic view in his new article *The Death of Consumer Bankruptcy in the United States?*.[50]

Notwithstanding their facial neutrality, these changes will fall most harshly on women. As the largest and fastest growing group in bankruptcy, they will suffer the consequences of a meaner bankruptcy system. Some women will be forced out of the system, unable to right themselves financially, living in a permanent state of past due notices, evictions and repossessions. Other women will make their way through a deliberately more complex maze of bankruptcy rules and regulations, paying more in legal fees and forced into more negotiations with their creditors. Those who complete a Chapter 7 will find that less of their debt will be discharged, which means that their post-bankruptcy position will not be as stable as it would have been under current law. Many of those who attempt to save a house in Chapter 13 will find that they are unable to confirm a plan of reorganization, which makes them ineligible for relief,[51] while others will learn that they will be bound to longer repayments of larger proportions of their modest incomes. The laws are gender-neutral, and the restrictions will apply to men as well as women, but the direct effects on more than a million women a year will be especially severe.

If bankruptcy legislation passes, it is women who disproportionately will bear the brunt of higher costs, more restrictions and less protection from creditor abuses. Credit card companies that have pushed relentlessly for this legislation will collect more from women, particularly from women who are heads of their own households, trying to provide for themselves and their children. For a million women who will go to the bankruptcy courts each year, there is no more important pending federal legislation than the bankruptcy bill. The economic survival of their families may well hang in the balance.

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along with various provisions to make consumer bankruptcy operate more efficiently to discharge personal liability on most debt.

The pending bankruptcy legislation has literally hundreds of small changes to both Chapter 7 and Chapter 13, applicable to every single person who files. *See, e.g.*, text accompanying notes 59–66, *infra*, (discussing the increased nondischargeability of debt and ineligibility of debtors under Chapter 13).

[50] Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1 (2001). Ninety-one law professors signed a letters to Congress urging them not to pass this legislation and expressing their grave concerns about the effects of the pending legislation on women and children. 147 CONG. REC. S2334–35 (daily ed. Mar. 15, 2001) (reproducing letter signed by ninety-one law professors) [hereinafter Letter from Law Professors to Congress].

[51] *See infra* note 65 (discussing the report of the National Association of Chapter 13 Trustees on the effect of the pending legislation to make approximately 20% of all debtors ineligible for Chapter 13).

II. DIVORCE, ALIMONY, AND BANKRUPTCY

There is a second group of women that will be profoundly affected by the bankruptcy system even though they may avoid filing for bankruptcy themselves. They are the ex-wives of men who declare bankruptcy. The provisions of the pending bankruptcy legislation will affect their ability to collect alimony and child support.

Bankruptcy laws have been remarkably progressive. Since 1903, federal bankruptcy law has provided that no one may discharge an alimony or child support obligation.[52] Women trying to collect support obligations need not worry that what is owed to them will be discharged in their ex-husbands' bankruptcies.[53] The law is, of course, facially neutral on the point too; ex-wives may not discharge support or alimony obligations owed to their ex-husbands. The law also covers orders issued for child support even if the parents were never married. But among those who owe child support, the overwhelming proportion of people in bankruptcy—like the overwhelming proportion in the population generally—are ex-husbands.[54] Bankruptcy reflects an even stronger gender imbalance. In 2001, bankrupt men obligated to pay child support outnumbered women with similar obligations by 13 to 1,[55] compared with a ratio of about 8 to 1 of men to women obligated to pay child support in the population generally.[56] Men remain the focus of any discussion of support payments, even with the occasional reminder that the parent with the obligation could be a woman.

Men file for bankruptcy for much the same reason women file—to deal with a terrible mismatch between debts and incomes. Like their female counterparts, they discharge what debt they can, pay their taxes and students loans, and make the decision either to continue payments on the car and the house or to surrender them. But men often face an additional obligation, ongoing alimony and child support obligations. As they try to

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[52] Bankruptcy Act of 1898 §17(a)(2), *amended by* Bankruptcy Act of 1903, Pub. L. No. 57-62, 32 Stat. 797 (1903). The Supreme Court held in *Dunbar v. Dunbar*, 190 U.S. 340, 353 (1903), that Congress's passing an explicit exception to make support obligations nondischargeable did not mean that such obligation had been dischargeable before 1903. According to the Court, Congress was merely clarifying the law as it already existed. *Id.* at 352–53.

[53] 11 U.S.C. §523(a)(5) (2001).

[54] *See* 2000 STATISTICAL ABSTRACT, *supra* note 8 at 394 tbl.631 (reporting 7,123,000 mothers with child support awards in 1995 and 844,000 fathers with similar awards). Child support is so disproportionately received by women that some government publications simply collect data on women entitled to receive support. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRENDS IN THE WELL-BEING OF AMERICA'S CHILDREN AND YOUTH 75 (1997). Not all men paying child support are ex-husbands. Support obligations are sometimes imposed on men who were never married to their children's mothers. *Id.*

[55] Consumer Bankruptcy Project III, *supra* note 31.

[56] 2000 STATISTICAL ABSTRACT, *supra* note 8, at 394 tbl.631.

stabilize themselves financially, they confront a recurrent, monthly obligation to help support their ex-wives and their children.

Because an ex-wife need not worry that an ex-husband will discharge the support obligations she enforces on behalf of herself and her children, bankruptcy takes on a very different cast for her. An ex-husband who files for bankruptcy can discharge most of the other debts that compete for his income, righting himself financially and permitting him to concentrate his future income on supporting himself and making his legally mandated support payments.

For men who owe support, a Chapter 7 liquidation makes paying those obligations easier. A man who can discharge most credit card debt, for example, is in a better position to pay his ex-wife because his disposable income increases. Bankruptcy may not make him any more eager to pay, but it makes him more able to pay. Bankruptcy has the added benefit for the ex-wife of making it easier to collect from the non-paying ex-husband. He is already in the legal system when he declares bankruptcy, which gives her a better chance of finding him and, if necessary, forcing that payment. Moreover, bankruptcy changes the post-bankruptcy incentive structure. An ex-husband owing support has no one else, except perhaps a student loan agency or the tax collector, pressing him for payment. In effect, bankruptcy gives the ex-wife a better chance to collect a share of whatever her ex-husband earns.

Chapter 13 also can help facilitate collection of support obligations. Instead of discharging most of the debt immediately in a Chapter 7, a person who files for Chapter 13 makes payments to a trustee over three to five years, receiving a discharge only at the completion of payments. Chapter 13, like Chapter 7, makes support obligations nondischargeable, so the same benefits that accrue to the ex-wife when the ex-husband gets back on his feet in Chapter 7 also apply in Chapter 13. In Chapter 13, however, an ex-wife gets additional benefits.

The law requires that a trustee supervise each case throughout the three to five year repayment period. Trustees collect payments from the debtor and disburse them to the creditors. This means that the trustee communicates regularly with the ex-spouse, follows him if he moves, and tracks his monthly payments—including his support payments. The trustee knows the debtor's source of income, how much he earns, and where he lives. If the trustee has any difficulties in collecting payments, then the trustee can easily get a court order to garnish the debtor's wages. In effect, a Chapter 13 trustee often acts as a collection agent for an ex-spouse, either by collecting the money and distributing it to the ex-wife or by supervising the ex-husband's direct payments to the ex-wife.

So long as a spouse stays in a payment plan, the trustee will see to it that he either pays his support or faces dismissal of his bankruptcy case. This supervision gives a reluctant ex-husband in Chapter 13 an additional incentive to remain current on child support payments: if he does not, he

will be dismissed from bankruptcy and receive no discharge from *any* of his outstanding debts. In Chapter 13, an ex-wife has the double benefit of seeing her ex-husband's finances straightened out while a trustee collects support payments on her behalf.

Whether an ex-husband files for Chapter 7 or Chapter 13, a functioning bankruptcy system protects women who are trying to collect court-ordered support. It helps them by giving their ex-husbands a chance to stabilize themselves financially and by reducing the competition women face for the ex-husband's post-bankruptcy incomes. In a world in which only 39% of women collect all the child support owed to them,[57] women need every available tool to help them collect and to help men get in a position where they can pay.

The law is not perfect by any means, but it provides a way for women collecting child support to increase their ability to collect from an ex-husband who is in financial trouble. The proposed bankruptcy legislation, pressed by the consumer credit industry, would directly undermine the legal protection now afforded ex-spouses. When their ex-husbands are denied access to the bankruptcy system, these women will find themselves trying to collect child support from men who are also trying to pay Visa and MasterCard. A single provision in the new bill illustrates a pervasive problem.

Under current law, alimony and child support, taxes and federally guaranteed educational loans all survive a bankruptcy filing without being discharged. These exceptions to discharge represent a national value judgment that certain debts stand above others, that they must be paid no matter how desperate the circumstances of the person.[58] They represent our collective values as a country, a concern that everyone contribute to the public fisc and that everyone meet support obligations to children and ex-spouses. They reflect our collective concern that taxing authorities, federal student loan agencies and ex-spouses are not in the business of lending—especially for the same profit motives that animate other lenders—and that they are unable to screen their debtors based on a cold calculation of creditworthiness. Taxing authorities and ex-spouses are classified legally as "creditors," but they are fundamentally different from lenders who solicit the debtor's business; as a result, they receive the most aggressive protection under the law. The credit card companies would like more of their debt treated the same way as alimony and taxes, and the proposed legislation they support takes a major step in that direction. The result, of course, would be that the special treatment af-

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[57] *Id.* (reporting that 39.0% of child support award recipient received full payments; another 29.4% received partial payments).

[58] Even student loans, which are generally nondischargeable, can be discharged if the debtor is in truly desperate circumstances. 11 U.S.C. § 523(a) (2001) (creating an exception for student loans that "will impose an undue hardship on the debtor and the debtor's dependents").

forded taxing authorities and ex-wives would become the standard treatment given to an ever-growing group of creditors.

Currently credit card debt survives bankruptcy only if it was incurred by fraud or for the purchase of luxury goods worth more than $1,000 within sixty days of a bankruptcy filing.[59] The proposed legislation would significantly expand the scope of such nondischargeable debt. Under the pending House bill, if, any time in the ninety days before filing, a debtor charged any goods or services totaling more than $250, the debt would be presumptively nondischargeable.[60] If the debtor took cash advances totaling more than $750 within seventy days of filing, those debts would not be discharged.[61]

The dollar amounts—$250 and $750—are modest, but they are merely minimum amounts that trigger nondischargeability for much larger amounts. If a debtor charges more or takes more in cash advances, the whole amount becomes nondischargeable. For example, a person who charged $2,000 more than two months before bankruptcy would find the whole amount nondischargeable—even if he made the charges in good faith and continued to make payments on his outstanding credit card bill. Similarly, once the cash advances hit a total of $750—even if the customer had also made regular payments—the entire amount would become nondischargeable. A family in financial trouble could easily end up with $2,500 or more in nondischargeable credit card debt.

While $2,500 might be manageable for many families, it constitutes more than 10% of a debtor's median annual income for those in bankruptcy, many of whom have been hard hit by unemployment.[62] For the debtors who do not have enough to pay $2,500 immediately—nearly every one of them—the nondischarged creditor is entitled to collect interest and late payment fees. If the debtor had already missed a payment or two, the debtor could be facing so-called "default rates of interest," which may run from 22% to 35% or higher, with late fees and penalties on top of that.[63] Of course, if the debtor had charged more than $2,500,

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[59] 11 U.S.C. §523(a)(2)(C) (2001).

[60] H.R. 333, 107th Cong. §310 (2001). The proposed law exempts "goods or services reasonably necessary for the support of the debtor" from the provision of nondischargeability. *Id.* This language offers little practical protection. Because the exception is a defense, the burden appears to be on the debtor to hire a lawyer, raise the issue, and persuade the court. Until the debtor does so, the creditor seems to be free to continue to collect. Because most consumers are less familiar than most credit card companies with the provisions of 11 U.S.C. §523, the defense is likely to have little practical effect. Even for those who used their credit cards to feed their families, most debtors cannot afford an attorney to litigate whether a purchase was "reasonably necessary." Ironically, it will be the most financially strapped debtors who will be forced to pay regardless of the facts because they cannot afford to litigate whether their purchases were reasonably necessary for support.

[61] *Id.*

[62] Ed Flynn & Gordon Bermant, *The Class of 2000*, ABI J., Oct. 2001, at 20 tbl.1. Median net income was $20,796 for 2000, while mean income, inflated by a few higher income debtors, was $23,340. *Id.*

[63] In a recent mailing, Fleet promoted a "Titanium Visa card" and its interest-free in-

the payments and interest would simply be higher. Other provisions in the bill give creditors additional opportunities to survive a discharge.[64]

For the debtors who try to repay their creditors over three to five years in Chapter 13, the bill would impose even more hurdles. One restriction alone—a change in how secured debt is calculated—is estimated to make one in every five debtors who would otherwise repay debts in Chapter 13 ineligible to file.[65] If this bill becomes law, this provision alone would mean that 20% of the women who would have counted on a trustee to help them collect child support would find that their ex-husbands had no access to Chapter 13. Other provisions in the bill compound the problems, further reducing the number of ex-husbands who can qualify for Chapter 13[66]—even though the proponents of the bill say they want more people to undertake Chapter 13 repayment plans. More of the men forced out of Chapter 13 will end up either in Chapter 7—where other provisions in the pending legislation would impose stiffer eligibility requirements and shrink available protection—or be forced out of the bankruptcy system altogether.

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troductory APR, but notes on the back of the offer that if the customer is late with a payment, exceeds the credit limit, sends a check that is returned for insufficient funds, or defaults on any other obligation to Fleet such as a mortgage or car loan, Fleet will bump the interest rate on this card to 21.99%. Fleet promotional mailing (on file with author). A credit card targeted to African Americans and promoted by hip-hop star Queen Latifah imposes an interest charge of 35% on credit lines of $300 to $10,000 for those with a weak credit history. *Hard Charging*, CONSUMER REP., Dec. 2001, at 59.

[64] For example, a debtor who wishes to file for Chapter 7 must pass a complex means test. *See* H.R. 333, 107th Cong. §102 (2001). Debtors who are unable to produce the paperwork or whose incomes or expenses exceed the guidelines in the statute are denied any protection under Chapter 7. *See id.* If they have large enough incomes to qualify for a repayment plan under the new proposals, they can file in Chapter 13. *See, e.g., id.* Those who cannot qualify for Chapter 13 lose all bankruptcy protection, however, making all their debts effectively nondischargeable.

[65] Current law requires that the secured portion of the loan be repaid in full, but the unsecured portion can be repaid pro rata with other unsecured debt out of the debtor's disposable income—if the debtor has any disposable income. 11 U.S.C. §506 (2001); 11 U.S.C. §1325(a)(5) (2001). The proposed bill would require that a Chapter 13 plan include payment in full on both the secured and unsecured portions of a car loan. *See* S. 420, 107th Cong. §306 (2001). If the debtor does not have enough income to make the payment in full—secured and unsecured portions, plus penalties and interest—the debtor simply cannot confirm a payment plan. *See id.* This change would increase required plan payments substantially. In a study of families currently attempting repayment plans in Chapter 13, one in five would have been ineligible to file under this provision alone. NATIONAL ASS'N OF CHAPTER 13 TRUSTEES, RESULTS OF INFORMAL SURVEY ON IMPACT OF SECTION 306(B) OF S. 625 (May 25, 1999) (on file with author).

[66] The proposed legislation would require that every debtor who purchased any item subject to a security interest within a year before bankruptcy must repay the debt in full plus interest plus penalties in order to confirm a plan of reorganization. *See* S. 420, 107th Cong. §306 (2001). While the implications of the provision might not be immediately clear, anyone who shops at Sears or uses a GE Capital credit card should understand them. Both Sears and GE Capital claim a security interest in every item a customer buys, from pantyhose to paint. Any debtor who did not make enough money to repay Sears and GE in full under the new provisions would be barred access to Chapter 13. *See id.*

The cumulative effect of these changes in the bankruptcy laws on women will be harsh. In place of the carefully protected access to her ex-husband's post-bankruptcy income she now has, under the proposed legislation a woman trying to collect child support or alimony will find herself more often competing with MasterCard and Visa. She has some legal advantages: she can garnish a larger portion of his wages than MasterCard or Visa,[67] if her ex-husband works for a salary so that his wages can be garnished.[68] MasterCard and Visa have their advantages too: they have sophisticated collection departments, specialists to work with delinquents, and an expensive legal team. They also wield the ultimate weapon: they can charge interest, penalties, late fees and collection costs. Whatever the relative advantages of credit card companies and ex-wives, however, the market speaks for itself: credit card issuers collect more than 95% of everything that is owed to them on the first try.[69] The remaining 5% they squeeze out through late notices, dunning calls, and collection agencies. By contrast, only about 39% of all women owed child support *ever* collect 100% of what they are owed.[70] If the pending bankruptcy legislation becomes law, women and credit card companies will go head to head more often.

The number of men who file for bankruptcy owing child support obligations is substantial. Based on data collected for Consumer Bankruptcy Project III, an estimated 180,000 men who owed child support filed for bankruptcy during 2001.[71] If there were no changes in the bankruptcy system, during the next six years, more than a million child support orders would be processed through the bankruptcy system. Men would file for bankruptcy, discharge most of their other debts, make payments through a Chapter 13 trustee or be subject to post–Chapter 7 collection by their ex-wives. Under current law, credit card companies, along with finance companies, doctors, hospitals, mortgage companies and car lenders collecting deficiencies would have to step aside. If the proposed legislation were passed, in a single year, a million women—and well over a million children—would encounter a substantially altered

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[67] For a discussion of the use of garnishment actions to collect child support, see ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 86–91 (4th ed. 2001).

[68] The practical obstacles of garnishing wages of men who are self-employed, men who work for different people (such as construction workers), men who move from job to job, men who work in largely cash businesses, and men who move out of state are often insurmountable for a woman whose ex-husband does not voluntarily pay support.

[69] About 95.45% of all credit card bills are paid on time, without any dispute. 2000 STATISTICAL ABSTRACT, *supra* note 8, at 513 tbl.803.

[70] 2000 STATISTICAL ABSTRACT, *supra* note 8, at 394 tbl.631.

[71] Out of *all* petitioners filing for bankruptcy, 12.1% reported that they owed child support obligations. That includes 25.7% of all men filing alone and 11.7% of all married men filing with their wives. Consumer Bankruptcy Project III, *supra* note 31.

bankruptcy system with a significantly different outcome for them. If that happens, it will not be by accident, but by the decisions of those who support the pending bankruptcy legislation.

III. How Commercial Interests Respond When a Business Issue Becomes a Women's Issue

Women who file for bankruptcy and women whose ex-husbands file for bankruptcy will be affected by any change in the bankruptcy laws. Both groups—women as debtors and women as creditors—have received some attention. More than two dozen women's groups have sent letters to Congress to oppose the bankruptcy legislation specifically because it will fall hardest on women. The high proportion of women in bankruptcy has been mentioned in the media, including a front page story in USA Today.[72] The impact of the bill on both women as debtors and women as creditors has been cited by a handful of Senators in their opposition to the bankruptcy bill.[73]

Yet, it is fair to say, neither issue has become part of a national debate. Both have received little sustained attention in the news media and had minimal public visibility. Even among those engaged on the bill, however, the two groups of women have been treated differently: women filers, on the one hand, and the ex-wives of men filers.

The growing number of women who will be debtors—women who are trying to support themselves and their children, stay in their homes, survive a period of unemployment, deal with an uninsured medical bill, and put their lives back in order—are simply ignored. The proponents of the bill have issued news releases and discussed consumer bankruptcy at length in the extensive floor debates on the topic, but not one of the bill's supporters, including Senator Biden, has mentioned the million women who will be filing for bankruptcy this year. Instead, these women are swept in with the men in financial trouble to create a genderless group of debtors. The fact that the number of women filing for bankruptcy is increasing at an alarming rate and that the distribution of those in bankruptcy is shifting, from decidedly male in the 1980s to decidedly female in the 2000s, is a matter on which they have no comment. Similarly, the reasons for this increase in filings among women—or the larger social implications of growing economic failure among middle-class women—has never been an issue meriting the attention of those who push for increased restrictions on access to bankruptcy.

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[72] Christine Dugas, *Critics Say Bankruptcy Bills Threaten Child Support*, USA Today, Apr. 30, 1998, at A1.

[73] *See, e.g.*, 146 Cong. Rec. S11684 (daily ed. Dec. 7, 2000) (statement of Sen. Wellstone).

The ex-spouse issue has been treated differently, although with much the same practical result. When divorce and child support are on the table, it seems that a switch is triggered and the supporters of the bankruptcy bill at least feel a need to respond. After initially denying that the bill would have any effect on women, the bill's supporters amended the proposed legislation to "solve" the women's problem. They added a provision to change the order of payment in a Chapter 7 case.

This political move requires a bit of background to understand. When a debtor files for Chapter 7, secured creditors either seize their collateral or work out a payment plan with the debtor. The remaining property is dealt with in the bankruptcy. State laws permit debtors to exempt some items, a protection traditionally recognized in bankruptcy.[74] Any property that is not exempt is turned over to a bankruptcy trustee for sale, and the proceeds are distributed among the creditors. The law establishes a priority for payment, with all creditors of one kind paid in full ahead of the next class of creditors. Once all priority creditors are paid in full, the remaining creditors—general unsecured creditors—receive a pro rata distribution of whatever is left. Of course, if there is no creditor in a certain class because the debtor does not owe money to anyone who fits that description, then the money simply goes to the next class.

Today, the law provides that any money in a Chapter 7 estate will be paid out to creditors in this order:[75]

1. Administrative expenses for running the bankruptcy, including trustee's costs of sale and percentage fees
2. Post-petition business obligations in involuntary cases
3. Employees' wage claims against their employers
4. Employees' benefit claims against their employers
5. Grain producers and American fishermen with claims against grain storage facilities and fisheries
6. Security deposits held by businesses that sell or rent property
7. Alimony and child support
8. Taxes
9. Capital commitments to the FDIC on behalf of a depositary institution

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[74] All state law exemptions are recognized in bankruptcy. 11 U.S.C. § 522(b), (d) (2001). In addition, bankruptcy law provides for federal exemptions that a debtor might choose in lieu of the state exemptions, but the federal law also permits states to deny debtors this option. *Id.* It is the patchwork of exemptions that permits debtors in Florida or Texas to exempt all of the equity in a multi-million dollar home, while a debtor in New York is limited to a home with only $10,000 in equity. For a summary of the homestead exemption laws in all fifty states, ranging from unlimited homestead exemptions to no homestead exemptions at all, see 14 COLLIER ON BANKRUPTCY (Lawrence P. King ed., 15th ed. rev. 2001) (discussion of exemptions divided by state).

[75] 11 U.S.C. § 507(a)(1)–(9) (2001).

10. Pro rata payment to all the general creditors: credit cards, retail stores, medical bills, finance companies, unsecured portions of car loans and mortgages, student loans.

Obviously, the list is written generically for both business and consumer bankruptcies. Priorities two through six apply exclusively to businesses. They deal with a bankrupt company's obligation to its employees, to grain producers or fisherman who store their wares with the bankrupt company, and to customers who gave the business security deposits. While the provisions apply to all debtors as a matter of law, only businesses are likely to owe creditors who fit in categories two through six. Businesses are not ex-husbands of women trying to collect child support.

As this list shows, whether a child support obligation is listed behind priorities two through six or in front of them is irrelevant in a consumer bankruptcy case because there is no one with priorities two through six claiming any money in such cases. To move the support priority ahead of priorities two through six is mere window dressing, pretending to create a benefit that will not yield a single dollar for a single woman.

Priority one, however, covers administrative expenses for all cases. Under the current priority one, the trustee who assembles and liquidates property receives reimbursement for expenses and a portion of what is collected before anyone else is paid. The more assets the trustee finds and liquidates, the more money the trustee collects, but also the more money made available for the creditors. Without that priority, of course, no one would be willing to serve as a trustee or to incur expenses and work on behalf of a bankrupt estate.

To solve the "women's problem," the bill's proponents added a provision that would move the repayment of alimony and child support from seventh priority to first. While this is irrelevant in the practical application of priorities two through six, it has one powerful effect: under the proposed new priority scheme, women collecting child support would come ahead of the trustees who are charged with liquidating property to help pay that support. The trustees, now in priority one, would be demoted to priority two, and the women who receive distributions from the trustees would come first. The difficulty, of course, is that priority one now assures that trustees have an incentive to gather assets and liquidate them. If support recipients received the entire distribution, trustees would have no incentive to work in cases in which an ex-wife claimed support. In other words, the practical effects of the proposed change in "priority" for women trying to collect child support would be either nonexistent or detrimental.

But that is not what Senator Biden says about the provision. He describes the proposed changes in the bankruptcy laws as an "historic im-

provement in the treatment for family support payments, child support, and alimony."[76] Senator John Kerry (D. Mass.) had a rather different assessment: "[T]he claim of the bill's sponsors that it 'puts child support first' is an example of the worst kind of Washington cynicism."[77] Kathy Rodgers, President of NOW Legal Defense and Education Fund, characterized the newly improved bill as "a shameless raid on child support."[78]

Not only does the change in priority not help women, its application in bankruptcy cases would be extraordinarily limited. The priority provisions apply *only* when the Chapter 7 estate has some money to distribute and *only* for the very brief time that a Chapter 7 proceeding is pending. The estate will have money only when the debtor owns some property that was not already fully encumbered by a mortgage or security interest and that exceeded state law exemptions. Yet, 96.4% of all Chapter 7 cases are no-asset cases, which means there are no assets to liquidate, no money in the estate, and nothing to distribute.[79]

Most debtors own very little unencumbered property. The debtors have so little that nothing is liquidated and nothing is distributed to any of the creditors—first priority, seventh priority, or general unsecured creditors. To give women a "first priority" here is to offer them a ticket to stand first in line to collect nothing. The real impact of the Chapter 7 bankruptcy law comes after bankruptcy—who can reach the debtor's post-bankruptcy income? The credit card companies want access to a larger piece of that future income by increasing the amount of their debt that is nondischargeable, even if it means competing with women and children in the collection rush.[80]

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[76] 146 CONG. REC. S11462 (daily ed. Nov. 1, 2000) (statement of Sen. Biden).

[77] 146 CONG. REC. S11727 (daily ed. Dec. 7, 2000) (statement of Sen. Kerry). A bankruptcy journal noted that "the improvements Biden and others point to are window dressing on a vacant house." *Will Bankruptcy Reform Help Women and Children?*, CONSUMER BANKR. NEWS, June 2001 at 1.

[78] Tish Durkin, *Where Are the Sisters When Sex Isn't the Issue?*, NAT'L J., Mar. 24, 2001, at 848.

[79] The Department of Justice estimated that only 3.6% of all Chapter 7 cases generated a single dollar for distribution to creditors. U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, PRELIMINARY REPORT ON CHAPTER 7 ASSET CASES 1994 TO 2000 9 (2001). Because businesses also file in Chapter 7, it is possible that most of the no-asset cases are consumer filings. If so, the proportion of Chapter 7 cases generating any money for support payments may be considerably below 3.6%

[80] There is another twist in the new provisions as well. State agencies are given equal footing with women in collecting past-due child support in Chapter 13. *See, e.g.*, H.R. 333, 107th Cong. § 211 (2001). The practical significance of this can create another ironic disadvantage for women trying to support their children. When a woman is unable to collect child support but does receive state assistance, she is required to assign her child support for that time period to the state. If the ex-husband is eventually located, both the wife and the state can make him begin repaying: the ex-spouse for current support, the state for past due support. Once again, the competition is obvious. Current law forces the state to defer to the ex-wife who is collecting current support, but the pending bankruptcy bill would change that—creating yet another obstacle for the ex-wife trying to support herself and her children. *See id.* Some state officials, following the lead of MasterCard and Visa, applauded the proposed change in the law, arguing that this helped enforce child support

The decision of the sponsors of the bill to rearrange the priority of repayment in Chapter 7 was a stunningly effective public relations move. Each time someone pointed out that the bill would fall hardest on women, one of the proponents would reply that the bill *improved* women's lot by moving them from seventh priority to first priority in the collection order. Moreover, with this amendment in hand, Senator Biden went on the offensive. In his vigorous support of the bankruptcy bill, he placed a separate statement in the Congressional Record entitled "THE BANKRUPTCY BILL WILL NOT DISADVANTAGE WOMEN AND CHILDREN."[81] He claimed that through the bankruptcy bill, he was once again championing the cause of women. The other proponents of the bill were relieved of having to defend themselves from charges that they supported a bill harmful to women, simply standing instead in the long shadow cast by Senator Biden's support for the bill. And for every elected official who took advantage of campaign contributions from the financial services industry, Senator Biden effectively made the case that they did not need to worry, the pending bill would not harm groups they regularly supported.

Of course, in every political battle there are charges and counter-charges. Those who claim injury are often confronted by those who say that, to the contrary, whatever is proposed is *good* for the intended targets. What makes this debate different is that the claim that something will "help" in most debates fools no one. Those who support access to abortion, for example, never let someone get away with claiming that a waiting period or notice period somehow increases a woman's choice. But when bankruptcy is the issue, long time supporters of women can fall silent, nodding quietly in relief that the women's problem has been solved. Whether they do not take the time to understand because the matter is complex or whether they understand but do not care because they have adequate political cover is unclear. Either way, the result is the same.

IV. WHY BANKRUPTCY IS NOT ON THE LIST OF WOMEN'S ISSUES

Several women's organizations, including most notably the National Partnership for Women and Families, the National Women's Law Center and NOW Legal Defense and Education Fund, have worked hard to op-

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orders. Of course, they didn't explain that the increased enforcement meant more money for the state coffers, but nothing more in women's pockets. *See, e.g.*, Letter from Laura Kadwell, President of the National Child Support Enforcement Association, representing over 60,000 child support professionals across America, read into the Congressional Record at 146 CONG. REC. S11695 (daily ed. Dec. 7, 2000).

[81] 147 CONG. REC. S2416 (daily ed. Mar. 15, 2001) (statement of Sen. Biden) (capitalization in original).

pose the bankruptcy bill.[82] Law professors who specialize in commercial law and bankruptcy have tried to call attention to the impact of the bill on women.[83] A number of Senators—Paul Wellstone, Patrick Leahy, Edward Kennedy, Russell Feingold, Richard Durbin, John Kerry, and Thomas Harkin—have been outspoken critics of the bill, focusing particularly on the effects of the bill on women. Despite the fact that over a million women had to work their way through the bankruptcy system in 2001, however, bankruptcy law has not been a rallying point for even the most politically involved advocates of women's issues.

Why not? Several reasons come to mind about why bankruptcy is an unlikely candidate as a critical women's issue, despite the staggering number of women who will be affected by changes in the system. While each reason speaks specifically to the narrow issue of bankruptcy, each also offers some insight into the larger question of how women's issues are framed and the limitations on the power of women to reshape the political landscape to protect themselves.

A. The Sound Bite Problem

Bankruptcy presents devilishly complex policy issues. The law itself is counter-intuitive, a statute under which legally enforceable contracts cannot be enforced, transactions completed weeks before bankruptcy can be unwound, and tiny interest groups such as airplane engine financiers and wheat farmers can carve out special legal protection. The statute itself is loaded with cross-references and interconnections among hundreds of subsections, with highly technical provisions ungirded by broad, amorphous concepts. There are now 269 volumes of published opinions interpreting the statutory ambiguities, and the number jumps by about one volume each month. The bill pending before Congress would add yet another layer of complexity. The proposal runs more than 400 pages; the most significant effects on consumers are not contained in a single section but are an amalgamation of dozens of small, technical changes. As a result, it is hard to distill a few pithy sentences to explain exactly how women will be affected by changes in the bankruptcy laws. Moreover, the complexity means that any proponent of the bill can throw up enough verbal sand to leave a casual listener uncertain about the bill's effects.

Of course, complexity is not the unique province of bankruptcy. Education policy, welfare reform, and Title IX funding are laden with intricate details as well, but the basic ideas and terms in those areas are far more congenial to most listeners. The core factual circumstances—

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[82] *See supra* note 11 and accompanying text (describing letter organized by the National Partnership for Women and Children and the National Women's Law Center, sent to all members of the Senate).

[83] Letter from Law Professors to Congress, *supra* note 50.

how our children are educated, how the poorest families get help to pay the rent or put food on the table, and how academic and sports programs are funded in our schools—are familiar to lawyers and non-lawyers alike. Bankruptcy with its partial debt forgiveness and partial debt ratification is a difficult concept to grasp, even in its most basic form. Complexity offers an opportunity for well-funded public relations campaigns and aggressive politicians to throw up confusing or even misleading allegations to fool the casual listener. When the core ideas are complex, the details at issue in a fight over statutory revision often become a quagmire, and quagmires do not make good rallying points for public policy issues.

B. The Power of Single-Issue Focus

Bankruptcy is statutory, and statutory rights can be expanded or contracted overnight by the legislature. This means the policies are subject to the influences of campaign money and political organizations. While the consumer credit industry and women's groups both have professional advocates, there is a powerful difference between the two. The credit industry focuses on just a few items, giving it the freedom to make a big push on bankruptcy.[84] Women's groups, by comparison, often have dozens of issues ranging from literacy to the availability of low cost breast cancer screening tests on which they must press. There is a second difference: the consumer credit lobbying effort is backed by the biggest banks, finance companies, retailers, car lenders, and home mortgage companies in the country. Women's lobbying efforts are largely supported by the contributions of individual women and a handful of foundations and corporate sponsors.

Concentrating more money on fewer issues has an effect. In 2000, for example, the credit industry was the single largest campaign contributor in Washington. During 2000 alone, the credit industry collectively spread around $37.7 million to both Democrats and Republicans in Congress.[85] The campaign contributions outstripped the spending of

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[84] Princeton political scientists Stephen Nunez and Howard Rosenthal conducted a detailed analysis of voting patterns on the proposed bankruptcy legislation. In explaining the pattern of lobbying and political contributions to members of Congress, they began with the observation that "Financial services companies may have many fish to fry other than defaulting consumer debtors. Consequently, their contributions are poor measures of contributions directed at bankruptcy legislation. On the other hand, [a coalition of credit card issuers] placed substantial, if not total, emphasis on achieving bankruptcy 'reform.'" Stephen Nunez & Howard Rosenthal, Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process 13 (Jan. 18, 2002) (unpublished manuscript, on file with author).

[85] Bruce Shapiro, *Let the Hogfest Begin* (Mar. 12, 2001), *at* http://www.salon.com/politics/feature/2001/03/12/bankruptcy/index.html (reporting on Federal Elections Commission figures analyzed by Public Campaign, the campaign-finance reform lobby). The group reports that this amount constitutes a 75% increase from 1998. The split was 61%

every other special interest group.[86] MBNA, headquartered in Delaware and now the country's biggest credit card lender, through its executives and PACs and "soft money" pledges, made more contributions to George Bush's presidential campaign than any other company.[87] Senator Russell Feingold has called the bankruptcy bill "a poster child for the need for campaign finance reform,"[88] a telling assessment from a man who observes the abuses of money and influence in Washington on a daily basis. His point is a valid one: it is otherwise difficult to explain how a democratically elected legislature could favor a bill that would squeeze millions of working families in order to improve the bottom line of a small group of high profit credit providers.

Flush with money, the credit industry can hire the lobbyists to pay calls on every Senate and House staff member, prepare "information" packages for Congress and the media, make calls to reporters, organize news conferences, buy advertisements in national newspapers, hire expensive law firms to draft legislative proposals, and pay for celebrity endorsements.[89] Women's groups, even if they had no other issues to occupy their time and resources, cannot match this outlay. And with dozens of other urgent issues competing for their limited resources, it is nothing short of heroic for them to become as involved as effectively as they have in the bankruptcy bill.

The difference in money makes a difference in outcome. In 2000, Congress passed a bankruptcy bill that was vetoed at the eleventh hour as one of the final acts of President Bill Clinton. Two Princeton professors of political science, Stephen Nunez and Howard Rosenthal, analyzed voting records on the 2000 bankruptcy bill. "We find that money was not only statistically significant but that it made a large impact."[90] They were

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for Republicans, 39% for Democrats.

[86] In 2000, the financial services industry was the biggest contributor to both political parties. *See* CENTER FOR RESPONSIVE POLITICS, ELECTION OVERVIEW 2000 CYCLE, *at* http://www.opensecrets.org/overview/sectors.asp?cycle=2000 (last visited Mar. 4, 2002).

[87] *See, e.g.*, Robert Zausner & Josh Goldstein, *Bush's Largest Funding Source: Employees of Credit-Card Firm*, PHILA. INQUIRER, July 28, 2000, at 1 ("By orchestrating mass contributions from its employees, the Wilmington-based company has become Bush's single largest source of campaign money. MBNA employees and their families have given more than $250,000 to the Republican's presidential bid, an Inquirer analysis found."); Christopher Schmitt, *Tougher Bankruptcy Laws—Compliments of MBNA?*, BUS. WK., Feb. 26, 2001, at 43 ("[MBNA] was the candidate's single biggest source of cash .... On the soft-money side, MBNA chipped in nearly $600,000 .... On top of that, MBNA Chairman and CEO Alfred Lerner and his wife, Norma, each kicked in $250,000 to the Republicans. Charles M. Cawley, CEO of MBNA's bank unit and a friend of Bush Sr., organized fund-raisers and gave $18,660 to Bush and the GOP.").

[88] 147 CONG. REC. S2293 (daily ed. Mar. 14, 2001) (statement of Sen. Feingold).

[89] For example, the credit industry hired former Secretary of the Treasury and former U.S. Senator Lloyd Bentsen, who wrote a stirring op-ed about the need for bankruptcy reform without disclosing that he was a paid lobbyist on behalf of the credit industry. Lloyd Bentsen, *Get Tough on Bankruptcy Law*, WASH. TIMES, Sept. 19, 1997, at A19. Paul Wiseman, *Lenders Lobby for Reform of Bankruptcy*, USA TODAY, Oct. 21, 1997, at 6A.

[90] Nunez & Rosenthal, *supra* note 84 (manuscript at 9).

impressed by the strength of the data they uncovered, concluding that "it is rare to find such clear evidence of the effects of money."[91]

Focus also affects the strength of opposition. When women's groups face diffused, generic opposition, they may marshal a winning force. The Violence Against Women Act provides one example. While the law certainly had its critics, there was no multi-billion dollar industry willing to commit millions of dollars to a campaign to enlarge the rights of those who abuse women. But when women's groups face a powerful, well-organized industry that is willing to spend a great deal of money to accomplish a highly focused legislative outcome, they are badly outmatched.

C. Bankruptcy Stigma

The credit industry claims that bankruptcy no longer carries a stigma, that the courts are overflowing with people who deliberately shrug off their debts as easily as they shrug off an old overcoat. Bankruptcy, by this account, smacks of moral degeneracy.

News stories about the rise in consumer debt often feature a silly woman ruefully explaining that she bought too many frills. The cover story in a recent issue of Newsweek about debt and bankruptcy began with a story illustrating a decline in financial responsibility across three generations—from grandparent, to parent, to adult child in a single family. But a more subtle point permeated the piece. The responsible older person quoted is male, while the increasingly irresponsible interviewees just happened to be female.[92] The second vignette in the story is of a woman who "admits that she's maxed out two of her credit cards (balance: $9,000) but still uses the third for restaurants and weekends away. 'I've spoiled myself and I can't change my habits,' she says, ticking off unused shoes, a flat screen computer and a $500 telescope she's bought recently."[93] The key visual for the story, under the blaring headline "MAXED OUT!," is an attractive young woman in a saucy pose, surrounded by cutouts of thousands of high-heeled shoes—presumably the purchases that got her in trouble. A systematic study of the image of financial irresponsibility must await another day, but attractive, single, "spoiled" women seem to receive a large share of the attention when the subject of financial trouble is on the table.

With fiscal irresponsibility as the widely promoted "cause" of bankruptcy, it is not difficult to understand a certain reluctance to embrace bankruptcy protection as a women's issue. After all, millions of women

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[91] *Id.* at 33.
[92] Daniel McGinn, *Maxed Out!*, NEWSWEEK, Aug. 27, 2001, at 34.
[93] *Id.* at 36.

are struggling to make ends meet. Why spend valuable political and public capital to support the profligate?

The financial industry's vision of bankruptcy centers on the question of fault. The charge is just below the surface: women file for bankruptcy because they run up bills they cannot pay, buying things they do not need and enriching themselves at the expense of their bill paying sisters who must pay higher prices to set off these losses.[94] Newsweek claims the problem is too much "Tommy, Ralph, Gucci and Prada."[95] Is the stereotype accurate? Or, like so many stereotypes, is it a product of fable and political convenience fed by an industry that can increase its bottom line if Congress will change the laws to squeeze debtors harder?

The data my co-authors and I have collected give an overview of a cross-section of the debtors filing for bankruptcy. The data show that the bankruptcy courts are serving hardworking women who are struggling to make it on modest incomes in an increasingly risky and difficult world. These women file for bankruptcy after they have been laid off from work, after they—or their children—have had serious medical problems, or after their ex-husbands have quit paying child support.[96] Personal interviews confirm the picture that emerges from the quantitative analysis.[97] Women speak of trying to keep their families together, of holding down two jobs to try to save their homes, or of losing their jobs because of the time they lost staying home to care for a seriously ill child.[98] They talk about health insurance they cannot afford and forgoing trips to the dentist. Is each woman who files for bankruptcy financially responsible in every possible way? Has each one been hit by setbacks beyond her control? No. Bankruptcy is no different from any other institution that serves more than 1.4 million households a year. Some of those who use the bankruptcy system are irresponsible, morally slack, perhaps contempt-ible. But the data strongly suggest that the overwhelming majority of women who file for bankruptcy are doing the best they can under extraordinarily difficult circumstances.

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[94] A typical full-page advertisement in the *Washington Post* carried the headline: "What Does Bankruptcy Cost American Families? A Month's Worth of Groceries" above a full grocery cart. WASH. POST, June 4, 1998 (on file with author). The text followed: "Today's record number of personal bankruptcies costs every American family $400 a year," then exhorted people to endorse the pending bankruptcy legislation. *Id.* For a fuller discussion of the credit industry's proclamation that bankruptcy costs American families $400 a year, see Elizabeth Warren, *A Market for Data*, 2002 WIS. L. REV. 1 (2002).

[95] McGinn, *supra* note 92, at 37.

[96] Consumer Bankruptcy Project III, *supra* note 31.

[97] *Id.* Consumer Bankruptcy Project III includes telephone interviews of approximately 900 families who filed for bankruptcy during 2001 in five major cities around the country. As I write this draft, the interview portion of the study is nearly concluded, with about 840 completed and coded interviews now in our database. Those interviews will be the source of several future reports on the families in bankruptcy.

[98] *Id.*

So long as bankruptcy is surrounded by the slight stink of moral culpability, the women who need it are not only likely to be stigmatized by society, they are also abandoned by other women who do not acknowledge their needs, who are not even aware of those needs. The women who are struggling the hardest to maintain some semblance of middle-class lives for themselves and their children are not always on the agenda of their most politically active sisters.

D. Invisible Women

The federal government reports data on bankruptcy *cases*—not the *people* who file. The Administrative Office of the United States Courts records how many bankruptcy cases are filed in the country each year, where they are filed, what chapter they are filed in, whether they are denominated business or non-business cases, and whether they are filed jointly (married couples) or singly.[99] Nowhere in these reports is there any information about how many men and how many women filed for bankruptcy, this year or any year. This means that bankruptcy is about "debtors" generically, not about "women" and "men." With no information reported about the sex of the filers, there are no data to track the changes in the risks that men and women will file for bankruptcy.

Because there is no information about marital status other than the fact of marriage for the joint filers, there is no report on how many divorced women fled to the bankruptcy courts or how many widows sought refuge in bankruptcy. Because there is no information about the families of those in bankruptcy, there is no report on how many children were in households that declared bankruptcy or how many elderly parents were supported by daughters who ended up in bankruptcy. Because there is no information about job history, there is no report on how many women were laid off before they filed for bankruptcy. Because there is no information about support enforcement, there is no report on how many women were forced into bankruptcy when their ex-husbands ducked out on the child support payments. Because there is no information about age, there is no report about the growing risks that older women will file for bankruptcy. Because there is no information about medical histories, there is no report on how many women filed for bankruptcy when an illness struck after they had lost insurance or when they had to care for an ailing parent or a handicapped child.

Ironically, much of this information is currently reported by debtors who file for bankruptcy. Bankruptcy forms, collected from each debtor, demand considerable information under penalty of perjury and a threat of dismissal of the bankruptcy case. These data, however, are not assembled

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[99] *See, e.g., supra* notes 38, 40.

and publicly reported, which means that this information is not part of our nation's discourse about bankruptcy—or our discourse about women.

Every year, scholars and journalists discuss the economic health of women—how much women are earning, how many women are in the professions, how many women started medical school or took graduate degrees in the sciences, and how much money women have put away for retirement.[100] Researchers watch closely whether the number of women in poverty rises or falls, how many women are rearing children without a spouse, and how many women and their children have no health insurance.[101] The routine collection and reporting of income and educational data make possible a national dialogue on dozens of different issues important to women. Bankruptcy offers another way to measure financial distress, to track the implications of job layoffs, to document the impact of inadequate child support enforcement, and to observe the consequences of living without health insurance. But it cannot serve that function if no data are available.[102]

A handful of scholars, including my co-authors and myself, have collected data on all these topics.[103] The data reported in our collective work have helped form the basis of objections raised by women's groups

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[100] *See, e.g.*, DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA (1999); LIMRA INT'L, 1999 LIFE BUYER STUDY U.S. (2001); Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84 (2001).

[101] *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 54; HEIDI HARTMANN ET AL., EQUAL PAY FOR WORKING FAMILIES: A JOINT RESEARCH PROJECT OF THE AFL-CIO AND THE INSTITUTE FOR WOMEN'S POLICY RESEARCH (1999).

[102] Judith Resnik forcefully points out that what we do not ask, we cannot know. Judith Resnik, *Asking About Gender in Court*, 21 SIGNS 952 (1996). Her work with the federal courts to raise the issue of gender bias in a number of different settings is nothing short of extraordinary. She expands her inquiries in Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

[103] *See, e.g.*, FRAGILE MIDDLE CLASS, *supra* note 30, at 35, 37 (reporting on the number of women filing for bankruptcy in 1981); AS WE FORGIVE, *supra* note 38, at 147–65 (reporting on the number of women filing for bankruptcy in 1991); Oliver B. Pollak, *Gender and Bankruptcy: An Empirical Analysis of Evolving Trends in Chapter 7 and Chapter 13 Bankruptcy Filings 1996–1997*, 102 COM. L.J. 333 (1998) (reporting on data collected about the number of women in bankruptcy every ten years from 1967 through 1997); Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Demographics of Chapter 7 Debtors*, ABI J., Sept. 1999, at 24 (collecting data on the number of women in bankruptcy in 1997); Teresa Sullivan & Elizabeth Warren, *The Changing Demographics of Bankruptcy*, NORTON BANKR. L. ADVISER 1 (Oct. 1999), (using Marianne B. Culhane & Michaela M. White's unpublished data on the proportion of women filing for bankruptcy in 1995; protocols for this study were reported in Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27 (1999)); letter from Thomas Neubig to Samuel J. Gerdano (July 19, 1999), *quoted in* Teresa A. Sullivan & Elizabeth Warren, *More Women in Bankruptcy*, AM. BANKR. INST. J., July 30, 1999 (unpublished data on the proportion of women filing for bankruptcy in 1997). For a longer view of the role of women in the bankruptcy system, see Karen Gross, Marie Stefanini Newman & Denise Campbell, *Ladies in Red: Learning from America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1 (Jan. 1996) (reporting on the first women debtors in the United States).

about the pending bankruptcy legislation. But a few academic researchers, working episodically and without a steady source of funding, developing relatively modest samples of data are unlikely ever to penetrate the mainstream of conversation.

There is, of course, one well-funded source of data about the bankruptcy system: the credit industry. The industry has paid for its own studies, which it vigorously promotes, purporting to show that many of those who file for bankruptcy could pay their debts but are taking the easy way out with bankruptcy.[104] Those studies, not surprisingly, do not focus on women.[105]

Without a steady, independent source of information about the women who file for bankruptcy, the topic will remain an issue for specialists and those with a direct business stake in the shape of the laws. Bankruptcy will be about "debtors," about technical terms such as "cramdown," "lien-stripping," and "subordinated creditors"—not about jobs, health care financing, child support enforcement, or women.

E. Men, Money, and Image

When bankruptcy cases are covered in the media, they are almost always big business cases—Chapter 11 reorganizations such as Enron rather than a run-of-the-mill consumer case. In those big cases, the lawyers, nearly all of the CEOs, the judges, the turnaround specialists, the economic analysts—in effect, all the decision makers who understand and run the system—are men.[106] When individuals file for bankruptcy,

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[104] Credit industry studies include: Ernst & Young, Chapter 7 Bankruptcy Petitioners' Ability to Repay: Additional Evidence from Bankruptcy Petition Files (Feb. 1998) (unpublished manuscript, on file with author); WEFA Group, The Financial Costs of Personal Bankruptcy (Feb. 1998) (unpublished manuscript, on file with author); *Repayment Capacity of Consumers in Bankruptcy: Testimony Before the National Bankruptcy Review Commission* (1997) (testimony of Michael Staten) (on file with author); *Repayment Capacity of Consumers Who Seek Bankruptcy Relief: Hearings before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee*, 105th Cong. (1997) (statement of Michael Staten, Director, Credit Research Center, Purdue University); *A Profile of Debt, Income and Expenses of Consumers in Bankruptcy: Testimony Before the National Bankruptcy Review Commission* (1996) (testimony of Michael Staten). The studies have been sharply criticized as unreliable both by the government and academics. *See* Warren, *supra* note 94.

[105] The credit industry made one foray into discussing women in bankruptcy, a letter to the Web site of the American Bankruptcy Institute by one of the co-authors of the credit industry study, Mr. Thomas Neubig. Letter from Thomas Neubig, Ernst & Young LLP, to Samuel J. Gerdano (July 19, 1999) *cited in* Sullivan & Warren, *supra* note 103, at 3 n.6. When a closer analysis of the data confirmed the sharp rise in the proportion of women filers, the credit industry representatives had no more to say on the subject.

[106] A systematic review of all the news stories on all the Chapter 11 bankruptcies will have to await another researcher, but a quick search produced two medium sized newspaper articles written by women that provided brief updates on two of the biggest pending bankruptcy cases. *See, e.g.*, Brenda Sapino Jeffreys, *Plaintiffs Want Constructive Trust To Freeze Enron Trading Proceeds*, TEX. LAW. (Dec. 17, 2001) at 41 (identifying twenty people associated with Enron and its pending bankruptcy and ancillary law suits, eighteen

the stories that make the news are famous people: former Texas Governor and Treasury Secretary John Connally, actor Burt Reynolds, convicted financier Paul Bilzerian, real estate magnate Abe Gosman, convicted participant in the savings and loan collapse Marvin Warner, former star of *Diff'rent Strokes* Gary Coleman, Arizona Governor Fife Symington, Dallas Cowboys Quarterback Danny White, former baseball commissioner Bowie Kuhn, and country singer Willie Nelson.[107] Ordinary consumer bankruptcy receives relatively little media attention, so that much of what is written about bankruptcy reinforces the image of bankruptcy as a man's world. With the exception of the dithering females who cannot seem to figure out a budget,[108] the public image of bankruptcy remains largely male.

Consumer bankruptcies do involve a substantial number of men. In 2001, more than 1.2 million women came to the bankruptcy courts either to file their own bankruptcies or to file as creditors of their bankrupt exhusbands. But along with those million-plus women were nearly 900,000 men.[109] Any changes in the laws will affect them as well. Men, like women, file for a variety of reasons. They lose their jobs, they cannot afford health insurance, they get sick, their businesses fail, they get divorced and cannot meet all their expenses, they fear that they will lose their homes and their cars. The presence of so many men in bankruptcy muddies the perception of whether bankruptcy is a women's issue.

There was a time when bankruptcy was the almost-exclusive province of men. In one of the only studies of the relative proportion of men and women predating adoption of the 1978 Bankruptcy Code, historian Oliver Pollak documented that nearly nine out of ten bankruptcy filers in 1967 and 1977 were men.[110] In 1978, the bankruptcy laws were amended to make bankruptcy more accessible to those in financial trouble, and men continued to dominate the bankruptcy system,[111] although the per-

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of whom were men); Jennifer Scott Cimperman, *LTV Corp. Names New Chairman; Former General Counsel Moran Assumes Leadership*, PLAIN DEALER, Dec. 14, 2001, at C1 (identifying twelve people associated with LTV Steel and its pending bankruptcy and ancillary business problems, eleven of whom were men).

[107] *See, e.g.*, Mary Deibel, *Florida Refuge for Well-Off Debtors,* PATRIOT LEDGER, Oct. 25, 1997, at 26; Marc Peyser with Alison Samuels, *Gary Coleman Goes to the Poorhouse*, NEWSWEEK, Aug. 30, 1999, at 51; Jonathan Foreman, *The Freedom to Fail*, AUDACITY, Winter 1994, at 28; Beth Healy, *Abe Gosman Files for Personal Bankrutpcy*, BOSTON GLOBE, Mar. 7, 2001 at D3; *Bankruptcy Loophole for Rich Outrageous*, WISC. ST. J., July 9, 2001, at A6.

[108] *See, e.g.*, McGinn, *supra* note 92.

[109] There were an estimated 466,275 men filing for bankruptcies jointly with their wives and another 419,554 men filing alone. *See* Table 3: Households Filing for Bankruptcy, 2001, *supra* note 40.

[110] Oliver B. Pollak, *supra* note 103, at 338. Professor Pollak identified the sex for all the petitioners in a single district (Nebraska) in 1967, 1977, 1987, and 1996-97. *Id.* at 337.

[111] The adoption of the 1978 Code permitted a married couple to file jointly by paying only a single filing fee and filing only one set of papers. It is widely believed that before 1978 when married couples got into financial trouble the man, as the wage earner, filed for

centage fell back to about 80% by 1981.[112] Women are now the largest group in bankruptcy, with more than a million women affected by any changes that narrow the scope of the bankruptcy discharge or make Chapter 13 more inaccessible.

The sheer number of middle-class women who are in such economically desperate circumstances that they must file for bankruptcy should make bankruptcy a women's issue—indeed a preeminent women's issue. Moreover, the shift in the balance between men and women declaring bankruptcy should push bankruptcy near the top of the agenda for every politically and socially active woman. But both the perception of bankruptcy as a man's field combined with a significant number of men in the bankruptcy system make it an unlikely candidate for coverage as a pressing women's issue on *Oprah*, the *CBS Evening News*, *Time*, or the *Wall Street Journal*.

Business laws are gender-neutral. In other areas, the women's movement has fought a hard and largely successful campaign to eradicate legal barriers that are facially neutral but have a disproportionate impact on women—attacking, for example, "neutral" physical standards that bar women from police and firefighter jobs or pension rules that reduce payments to women. No serious scholar of women's rights is unfamiliar with the extensive litigation and debate of disparate impact. But with the image of bankruptcy dominated by men, and with no overt tie making it clear why women would be disproportionately at risk for bankruptcy, it is harder to make a convincing case that bankruptcy is a women's issue.

F. Left-Right Politics

Labels and stereotypes, however inaccurate or unfair, still matter in politics and in the way the news media cover politics. To people unfamiliar with the intricacies of the bankruptcy law, it is easy to see bankruptcy as part of a constellation of government support programs that provide a safety net for the less fortunate: welfare, medicaid, subsidized housing, food stamps. As such, its status as a political issue is not based on a realistic calculation of the economic effects on women, but rather on the larger debate about the role of the government. While this may in-

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bankruptcy and the wife, with no assets or income of her own, did not and the creditors did not bother with her. The pre-1978 records do not indicate which men were married or enough about their circumstances to determine whether a joint petition might be appropriate, so it is impossible to estimate how widespread this practice was. The high proportion of men in the system even after 1978 suggests, however, that the inability to bring wives into the system through a joint petition was not the only reason that the bankruptcy system was largely populated by men.

[112] *See* Table 2: Households Filing for Bankruptcy, 1981, *supra* note 38. After 1978 when joint petitions were readily available for couples, men began to file with their wives. In 1981, 44.7% of the filings were husband and wife and another 33.2% were men filing alone.

crease the interest of some in bankruptcy issues, it makes the issue less appealing for conservatives. Women whose blood may run hot over issues of equal educational and job opportunities, violence against women, or divorce laws, but who are fiscal conservatives critical of an expanding economic role for the government, may see bankruptcy as just another government program in which benefits should be minimized.

The perception of bankruptcy as a "government program" is flatly wrong. Bankruptcy is about commercial debt and the allocation of losses among parties who enter into contracts voluntarily. Credit card issuers, mortgage lenders and car finance companies charge interest rates commensurate with the risks that their borrowers cannot repay. Thus far, the credit card issuers—those who stand to gain the most if the new bankruptcy law should pass—have done fairly well. Their net profits, after accounting for the cost of funds, advertising, bad debt write-offs *and* bankruptcy, have been more than twice as high as any other commercial lender.[113] In the past year, as the Federal Reserve has reduced interest rates so that the cost of funds for the companies has dropped, credit card rates charged to customers have not dropped nearly so quickly. The stickiness of the interest rates that credit card customers pay has created a $10 billion windfall for the card issuers—without any change in their need to advertise for new customers or take on new risks.[114]

But the same credit card lenders raking in huge profits have continued to lead the charge in Congress to demand that the bankruptcy courts take a more active role in debt collection, providing the financial screening that the card issuers themselves refuse to supply. The proposed bankruptcy legislation would include a means test, requiring courts and trustees to make a highly detailed examination of each debtor's expenses and sources of income before granting the debtor access to bankruptcy relief.[115] The inquiry imposed on trustees and judges is far more exten-

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[113] Credit card lending has remained about twice as profitable as other forms of lending, even as consumer bankruptcies have climbed. The Federal Reserve Board documented the high profitability of credit card lending, noting, for example, that in the 2000 credit card banks showed a 3.14% return on assets, compared to a 1.81% return on assets reported by all commercial banks. FED. RESERVE BD., THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 2 (2001), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/. The longer-term trends for greater profitability for credit card issuers was identified in Lawrence Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249 (1997).

[114] Cecily Fraser, *A $10 Billion Windfall: Credit Card Lenders Don't Pass On Full Interest-Rate Cuts*, *at* http://www.cbs.marketwatch.com (Oct. 3, 2001) ("about twenty-five percent of cards offering variable interest rates have a minimum, or so-called floors, to ensure rates don't dip below a certain price"). It seems that the fine print in many credit card agreements calls for customers to pay more as interest rates climb, but not fall below certain pre-set levels when interest rates fall. The last nine interest rate cuts by the Federal Reserve have not affected most fixed rate cards and have had only modest effects on variable rate cards. As the low Federal Reserve rates persist, the windfall for credit card issuers will grow.

[115] *See* S. 420, 107th Cong. §102 (2001); H.R. 333, 107th Cong. §102 (2001).

sive than any credit card company currently conducts when it issues pre-approved credit cards and increases credit limits. The costs of this additional scrutiny will not be borne by the highly profitable credit card companies that will reap the rewards; instead, the tax payers are expected to shoulder this burden.[116] Ironically, economists predict that if the bankruptcy laws are changed, *more* families will get into trouble with debt because consumer lenders will have even fewer incentives to weed out the riskiest customers because the lenders will know that even the weakest borrowers will have less access to bankruptcy.[117] In addition, the current bankruptcy bill is designed to change the bankruptcy rules for tens of millions of loans already outstanding—loans that bear interest rates set to reflect current bankruptcy laws.[118] The staunchest fiscal conservatives should be appalled by the way the pending bankruptcy legislation plans to shift costs from private companies to the taxpayer.

To be sure, there are connections between government programs and bankruptcy. If the government provided health insurance for children, for example, hundreds of thousands of families would never file for bankruptcy. If states offered more generous unemployment benefits, bankruptcy filings would fall off sharply. If the Federal Reserve adopted more aggressive regulations over predatory mortgage financing, tens of thousands of families that file for bankruptcy to try to save their homes from unscrupulous lenders would be spared. Because so many families file for bankruptcy after they have encountered unemployment, crushing medical bills, and deceptive home mortgages, bankruptcy can be thought of as part of America's social safety net. When other government programs and regulations fail, bankruptcy often serves as the last resort for families in trouble, a last chance to save a home or to stabilize themselves financially.

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[116] Currently, the bankruptcy system covers approximately half its costs from user fees, but the remaining expense must be met from general tax revenues. Memorandum from Jarilyn Dupont, Executive Director/General Counsel of the National Bankruptcy Review Commission, to National Bankruptcy Review Commission Members, Financing the Bankruptcy System, Feb. 7, 1996, at 3 (on file with author) [hereinafter Commission Memorandum]. Any new costs imposed by the pending legislation, particularly the complex means test, would presumably all come from tax revenue. The GAO scored just one portion of the bill for estimated costs. It concluded that, unlike the current system, implementation of the means test would impose $333 million over 2000–2004, while it would decrease the government's fee receipts by $4 million. CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE, H.R. 833 BANKRUPTCY REFORM ACT OF 1999 (May 5, 1999), *available at* http://www.cbo.gov/showdoc.cfm?index=1246&sequence=0&from=6. The shortfall would be left to the taxpayer.

[117] *See, e.g.*, Ausubel, *supra* note 113, at 251; David Moss and Gibbs Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311 (1999). Ausubel, Moss and Johnson argue that laws that give creditors greater leverage to collect debts reduce the lenders' incentives to screen customers carefully for repayment ability before they extend credit.

[118] The proposed changes would be applicable to all cases filed after the date of implementation, regardless of when the loans were actually incurred. S. 440, 107th Cong. § 1501 (2001).

But bankruptcy is the privately funded part of the social safety net. No debtor gets a handout or a government guaranteed loan from the bankruptcy court. Indeed, a large portion of the services of the bankruptcy court system today are currently paid for by user fees, minimizing the system's financial impact on the taxpayer.[119] The Bankruptcy Code requires that taxes and government supported student loans be repaid in full,[120] along with child support,[121] so that a family's losses in bankruptcy should fall primarily and proportionately on their voluntary creditors who had the chance to assess their financial stability before lending. The bankruptcy system helps discipline both borrowers and lenders. Bankruptcy denies lenders the opportunity to squeeze families until some give up their jobs and live on welfare or flee to the underground economy where their creditors cannot find them, but neither can the taxing authorities or those trying to collect child support. In short, bankruptcy makes sure that the effects of lending decisions are borne by the lenders themselves, not by the rest of us.

Tangling bankruptcy with left-right politics undercuts some of the political support that bankruptcy should receive, but it also illustrates a larger problem for identifying women's issues. Are all women's issues exclusively issues of the political left? Does "feminist" mean both social liberal and fiscal liberal? The political left has been quickest to embrace a host of issues important to women, but they have not had an exclusive franchise on such women's issues as education reform and safety. Bankruptcy is just one of a series of business-oriented issues that should be analyzed as women's issues but get mired instead in stylized left-right political paradigms that offer much heat but little light.

CONCLUSION

Senator Biden supports legislation that will fall hardest on women, particularly on women trying to rear children on their own. Why? The answer will have to come from him, if any reporter or constituent presses on this question. There is an unavoidable suspicion, however, that he supports the financial industry's legislation because there is no political disadvantage to supporting it. Bankruptcy is sufficiently arcane, sufficiently obscure that it is possible for an otherwise respected legislator to support legislation that, over the next decade, will make it more difficult for millions of women to keep their homes, feed their children, and deal with bill collectors. Senator Biden can publicly support one very visible piece of legislation on behalf of women, satisfying his duty and assuring

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[119] Commission Memorandum, *supra* note 116, at 3. The bankruptcy courts are far more self-sustaining than other courts in the federal system; 85.3% of all the revenues collected by the federal courts come from various bankruptcy filing fees. *Id.* at 3.

[120] 11 U.S.C. §523(a)(8) (2001).

[121] 11 U.S.C. §523(a)(5) (2001).

the loyal support of millions of women. He is then free to be a zealous advocate on behalf of one of his biggest contributors, the financial services industry, and still position himself as a champion for women.

This Essay notes one way in which a dull financial topic is relevant to women and how the failure to attend to its relevance will put millions of women at risk over the next decade. I have not exhausted the list. The scope of Article 9 security interests can affect recoveries by tort victims. Collective bargaining agreements can be rewritten in Chapter 11. Environmental clean-up obligations can be avoided by the careful use of asset securitization. Retirement funds can be depleted by aggressive manipulation of generally accepted accounting principles.

Women who win judgments against large corporations need to understand how to structure their payments and protect their clients from discharge in bankruptcy. Women who plan business transactions need to know how to protect employees and retirees. Women who monitor environmental compliance need to recognize how financial structuring can affect legal liability. In short, business law is not just for business, or just for men.

In my bankruptcy and commercial law classes, I have many students interested in business. Most expect to go to large law firms and practice law on behalf of large corporations; others plan to become deal makers or turnaround specialists. But the classes rarely attract more than a handful of students who are more interested in social policy questions and a career outside a corporate law firm or consulting company. Students often speak of a business/public interest dichotomy in the scholarly and career choices they make.

The dichotomy is false. It is not possible to remain ignorant of business and commercial law and become an effective advocate for social issues. Anyone attempting significant social change without a thorough grounding in business and commercial law is handicapped. To accomplish real change in many areas, advocates will need to understand the causation, implementation, and collection issues that deeply implicate business practices and commercial laws. If few students interested in women's issues train themselves in commercial areas, the effects of the commercial laws will not be diminished, but there will be few effective advocates around to influence those policy outcomes. If women are to achieve true economic equality, a far more inclusive definition of a women's issue must emerge among women's advocates.

With this issue, the *Harvard Women's Law Journal* marks twenty-five years of encouraging debates on women's issues, expanding the range of subjects discussed and acting as a catalyst for change. It is appropriate to celebrate what the editors and authors have accomplished, but it is no less important to identify the work that remains to be done—and to set about doing it.

QUESTIONS FOR THE RECORD

QUESTIONS FOR THE RECORD FOR DIRECTOR MICHAEL CARVAJAL SUBMITTED BY THE HONORABLE KAREN BASS, CHAIR OF THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

(1) Vaccinations

On November 23rd, the Associated Press reported that the BOP has instructed wardens and other Bureau of Prisons staff Members to prepare to receive a COVID–19 vaccine within a number of weeks. Though the American Medical Association recently passed a resolution stating that both prison staff and incarcerated people ought to be among the first to receive the vaccine, reports indicate that the BOP only intends to use their initial supply for vaccinating staff.

Questions

(a) How much of the vaccine does the BOP need to provide coverage to all those in your custody and for all personnel working in your facilities?
(b) Do you have reason to believe that you will not be receiving a sufficient amount of the vaccine? If you received an adequate amount of the vaccine how would you prioritize who initially receives the vaccine?
(c) Is it true that BOP intends to only vaccinate staff, in the first instance? If so, what is the reasoning behind this? What is BOP's timeline for providing the vaccine for those in custody?
(d) Is there a BOP policy on distribution of the COVID–19 vaccine? If so, please provide a copy.
(e) Who has been consulted in developing this policy?
(f) When will the BOP share this policy publicly and post the information on its website?

(2) Prisoner Transport

As we understand it, the Bureau of Prisons has a limited moratorium on prisoner transport. It has been reported that, from the outset of the pandemic, BOP has continued to accept inmates from local and private facilities, via the U.S. Marshals Service, without first requiring a negative COVID–19 test. The BOP's own internal guidance was not mandated on outside entities, to include the U.S. Marshals, whose continued transfer of COVID–19-positive inmates, and in some instances, visibly and seriously ill inmates, arguably resulted in the proliferation of COVID–19. Indeed, over the months of the pandemic, the virus has "spiked" at different BOP facilities and several facilities have become hot spots for COVID–19 (*e.g.*, Terminal Island, Oakdale, Elkton, Butner, Fort Dix, etc.).

Yet, as of November 23, 2020, BOP has apparently lifted even the limited prisoner transport moratorium it had in place. Social visits, as we understand, have also resumed.

Questions

(a) Our country is in the midst of the worst spike in cases since the beginning of the pandemic. People are dying from COVID–19 at extraordinary rates. We know that COVID–19 can spread into and in correctional institutions when prisoners are transferred from one location to another. Why, at this time, has BOP lifted the moratorium on prisoner transfers?
(b) Regarding social visits, why have these resumed? Is BOP conducting any kind of contact tracing in relation to social visits?
(c) How do you justify the policy of simply accepting whatever persons the Marshals bring to BOP, without regard for whether they are infected and would, therefore, spread the virus into a BOP facility?

(3) BOP COVID–19 Protocols

The Justice Department's inspector general has reported that the Federal Correctional Complex in Oakdale, Louisiana, failed to isolate or quarantine prisoners who were exposed to or who tested positive for COVID–19. The report found that "some inmates who had tested positive were left in their housing units for up to 6 days without being isolated." In the BOP's COVID–19 Pandemic Response Plan, released on September 8, 2020, the BOP requires that a person who tests positive for COVID–19 be immediately placed under medical isolation.

Questions

(a) At the BOP/USMS hearing on December 2, 2020, you stated that prisoners who test positive for COVID–19 are isolated, but we keep hearing that they are not—and COVID–19 keeps spiking in BOP facilities across the country. What specific steps were taken and are still being taken, in every BOP institution, to address the Inspector General's findings?

(b) More generally, what resources are being provided to individual facilities to ensure that incarcerated people are able to practice good hygiene?

(c) Is the BOP taking steps to ensure compliance with mask and social distancing requirements in its facilities? What steps are those?

(d) At this point in time, what is the status of the supply of personal protective equipment for

staff and prisoners? Could Congress be doing more to ensure you have what you need?

(4) Testing

It has been reported that as of November 3, the Bureau of Prisons had tested roughly 56% of its population and, in addition, that the BOP only tests those who show symptoms of COVID–19. In early October, Senator Elizabeth Warren, Senator Cory Booker, and Representative Nanette Barragán introduced legislation to improve the BOP's response to COVID–19. This legislation calls for weekly surveillance testing, expanded contact tracing in prisons, and expanded data collection. This type of legislation is necessary because there is cause for concern that the BOP is not taking adequate steps to locate individuals who are positive for COVID–19, or to conduct appropriate contact tracing to limit further spread.

Questions

(a) Is this the type of intervention from Congress that would be helpful to you?

(b) What is the BOP's testing strategy? How many prisoners have been tested as of this date

(c) Has this testing strategy been made public?

(d) Were public health officials consulted in the development of this strategy? Who was consulted?

(e) Does the BOP have procedures in place for contact tracing in the event an incarcerated person or staff member begins showing symptoms of COVID–19 or tests positive for COVID–19? If not, why not? If so, what are these procedures? Where are these procedures made public? Were public health officials consulted in the development of this strategy?

(f) Can you guarantee that every prisoner released from a BOP facility has been tested before being released or transferred from the facility? What is the procedure if a prisoner tests positive before being released or transferred?

At the BOP/USMS hearing on December 2nd, you stated that BOP corrections officers were, in some instances, reluctant or refusing to be tested for COVID–19.

(g) How pervasive is this reluctance to be tested?

(h) What can Congress do to assist BOP in obtaining both availability of testing for staff, as well as compliance with testing by staff?

(5) Compassionate Release

The Department of Justice has instructed federal prosecutors responding to a motion for compassionate release to take the position that being at risk of death or serious illness from COVID–19, due to Centers for Disease Control-identified risk factors, is "an extraordinary and compelling reason" within the meaning of the statute. BOP could also take this position and either request the release of prisoners with serious risk factors or approve their requests for release. During the BOP/USMS hearing on December 2nd you made clear that the compassionate release process is more complicated than merely home confinement because it essentially results in the actual reduction of a person's sentence. We understand that; although we also understand that it is ultimately the court that decides whether or not to reduce the sentence.

During the hearing, you acknowledged that federal courts have granted approximately 2,000 motions for compassionate release. The vast majority of these have been to protect prisoners vulnerable to COVID–19. By contrast, federal courts granted 166 reduction in sentence motions between January 2019, when the First Step Act was enacted, and the end of February 2020.

Based on information obtained through the Freedom of Information Act, the Marshall Project has reported that, during the first three months of the pandemic, BOP approved 11 of the 10,940 compassionate release requests it received. That represents 0.1 percent of requests received.

The data did not indicate whether any of those approvals were based on a heightened vulnerability to severe illness from a COVID–19 infection.

Questions

(a) Beyond the first three months of the pandemic, has the rate of approval continued to be 0.1%? In other words, is the BOP Office of General Counsel still approving only approximately 0.1% of compassionate release requests?

(b) Has BOP approved any compassionate release requests based on a heightened vulnerability to severe illness from a COVID–19 infection?

(c) How many requests for sentence reduction motions have wardens or BOP denied during the COVID–19 emergency period? Out of how many requests?

(d) How many motions for sentence reduction has the Bureau of Prisons filed on behalf of prisoners in its custody since the beginning of the COVID–19 emergency period?

(e) Why hasn't BOP filed more reduction in sentence motions for prisoners?

(f) Does BOP have any plans to increase the use of compassionate release? If so, what are these plans, and, if not, why not?

(g) Has the Bureau informed all prisoners it deems possible candidates for compassionate release of their right to request relief?

(6) Home Confinement

On March 27, 2020, Congress came together to unanimously pass the CARES Act, which authorized the Attorney General to expand dramatically the use of home confinement to protect vulnerable individuals from COVID–19. Attorney General William Barr made the finding that triggered this expansion on April 3, ordering BOP to expedite its use of home confinement. But, later, a judge found, after hearing the testimony of the Warden of FMC Devens, that BOP has adopted a policy that is "utterly inconsistent" with the Attorney General's directive to maximize home confinement. The Department of Justice's Inspector General, too, has found that BOP has failed to fully use its early-release authorities to transfer vulnerable individuals to safety at hard-hit facilities like Lompoc Federal Correctional Complex (FCC) and Oakdale FCC.

When you appeared before the Senate Judiciary Committee in June, you testified that BOP was "prioritizing" home confinement over compassionate release. Congress is interested in understanding what you mean by this. Yet BOP has not answered calls by Members of Congress—including several on this Committee—to produce detailed data about releases to home confinement. During the BOP/USMS hearing on December 2nd, you stated that 18,000 prisoners have been released to home confinement since the start of the pandemic, but could not give specific numbers on the ones that have been released specifically under the authority of the CARES Act.

Question

(a) When will BOP produce data about the exact number of transfers into home confinement pursuant to CARES Act authority, rather than other authorities that existed prior to the CARES Act? (This question was asked by at least three Members of Congress at the hearing.)

(7) BOP Pandemic Response at Carswell Prison for Women

FMC Carswell, the hospital prison for women in Fort Worth Texas, has reported over 500 cases of COVID and six deaths. Half of those in the medical facility and 38 percent of those in the compound have tested positive. During the first three months of the pandemic, 349 women, about a quarter of the prison's inmates, asked for compassionate release. The warden denied or failed to respond to 346 of them, including a request from Marie Neba, a woman with stage 4 cancer serving a 75-year term for Medicare fraud. The government opposed her subsequent motion for compassionate release. Even when she was on her deathbed after contracting COVID–19, the warden refused to grant her compassionate release so she could die without being in handcuffs. At the BOP/USMS hearing on December 2, 2020, you stated that "most people" who are not released "aren't released . . . because they have committed a crime of violence or sex offense or they have a detainer or an Act of terrorism."

Questions

(a) With regards to the Carswell prison, please provide specific data to show that most of those who have not been released have not been released because they have committed a crime of violence, a sex offense, an Act of terrorism, or have a detainer.
(b) What justification is there for denying virtually every woman in a hospital prison compassionate release? What was the justification for denying Marie Neba?

(8) Employee Issues

In recent weeks, the Inspector General of the Department of Justice has issued multiple negative reports about the Bureau of Prisons' handling of the COVID–19 crisis, revealing substantial mishandling of the crisis coupled with national grievances from the National Prison Council.

Questions

(a) What steps have you taken to improve collaboration with the national union to address the continued threat of COVID–19 in our federal prisons and their surrounding communities?
(b) Is there anything Congress can do to assist you with issues involving BOP employees?
(c) Specifically, what additional resources do you need to address their concerns? What are your main issues when addressing the national union?

(9) Use of Restraints on Pregnant Women

At the BOP/USMS hearing on December 2nd, you testified that only one pregnant woman in BOP custody has been restrained since passage of the First Step Act, and only for a short period of time.

Question

(a) Can you confirm that restraints were not used on Andrea Circle Bear at any point while she was in BOP custody?

(10) Social Distancing

On October 27, the ACLU filed a lawsuit against the Bureau of Prisons over its handling of COVID–19 at the federal facility in Butner, NC. Among other things, the complaint alleges that the BOP has not reconfigured housing units to allow for social distancing. During a Senate Judiciary Committee hearing in early June, Director Carvajal committed to new efforts by the Bureau to create "alternate living [spaces]" in recognition that the current layout of correctional settings is "not made for social distancing."

Questions

(a) Please identify what percentage of BOP facilities have been subject to such adjustments, especially in light of COVID–19's current and expected acceleration this winter?
(b) How is the BOP ensuring and enforcing social distancing if housing has not been adjusted?
(c) How is the Bureau ensuring continued access to religious worship and services for prisoners that complies with CDC safety guidelines?

(11) Transparency in Demographic Information

As of November 25, there were 4,159 identified COVID–19 cases in Bureau of Prisons custody, 19,563 recoveries, and 145 deaths among incarcerated persons, and 1,339 current cases, 1,824 recovered, and 2 deaths among staff Members that have been reported. Alarmingly, even this limited data reveals a large number of coronavirus cases among incarcerated people and correctional staff, yet the data does not indicate the demographic information—such as age, sex, gender, race, disability, or sexual orientation—of staff or incarcerated people under BOP custody. According to data from the COVID Tracking Project, Black people nationwide are dying at over two times the rate of White people (113 deaths per 100,000 compared to 55 deaths per 100,000). To date, Black people account for 19% of COVID–19

deaths where race is known. In light of these types of concerns, many Members of Congress have requested that BOP collect and report demographic data.

Questions

(a) Is BOP recording any demographic information for positive/negative cases, recoveries, hospitalizations, and deaths? If so, what demographic data is being recorded?

(b) Given that demographic data is necessary to learn whether any demographic groups are experiencing greater impact from the virus (and whether there are any disparities in terms of treatment or outcomes), can the data BOP has been collecting pertaining to COVID–19 be disaggregated to permit reporting about demographic information?

(c) Going forward, will BOP commit to collecting and reporting demographic data?

(12) Quarantine and Solitary Confinement

Across federal facilities, rolling lockdowns and quarantines have restricted movement and increased solitary confinement. Reportedly, these have had the unintended consequence of deterring prisoners from reporting symptoms for fear of being placed in isolation or locked down. Public health officials have recommended de-densification efforts, as well as the use of medical isolation as uniquely distinct from punitive solitary confinement. Yet, reportedly, punitive isolation continues to be used in BOP in response to the pandemic. A June 2020 report found a 500% increase in solitary confinement in federal and State jails in response to the outbreak of the COVID–19 pandemic.

Questions

(a) Please provide the BOP's policy for quarantine during the COVID–19 pandemic. Have individuals who tested positive while in the process of being released been allowed to self-quarantine at home?

(b) Will you pledge to immediately stop the practice of using solitary confinement as a substitute for medical isolation? If so, how does BOP plan to institute the use of medical isolation in place of punitive solitary confinement?

(13) First Step Act Implementation

As you know, the First Step Act, mandated the development and implementation of robust recidivism reduction programming in the Bureau of Prisons. Our communities—not to mention correctional staff—cannot afford an entire 2021 where the majority of federal prisoners go without constructive programming. According to the Council of State Governments, over 20 states already use electronically secure tablets to provide educational and rehabilitative programming for prisoners.

Questions

(a) How are rehabilitative programming and productive activities taking place during this period of modified operations in BOP?

(b) What is the Bureau's strategy for continued recidivism-reducing programs in the likely event of a "third wave" of COVID–19 this winter or future acute outbreak?

(c) Is BOP able to use electronically secure tablets for programming, as over 20 states around the country already do?

During this pandemic, it is critical for federal prisoners to continue to receive support and accountability from family Members, loved ones, and faith leaders. A March 2020 BJS report using 2018 data found that 15 out of 122 federal facilities had "video conferencing available to prisoners to communicate with individuals outside of the criminal-justice process."

(d) Today, in December, 2020, how many facilities now have that capacity?

One key goal of the bipartisan First Step Act was to facilitate greater BOP partnerships with outside third-party institutions able and willing to provide evidence-based programming and productive activities.

(e) Has the BOP made efforts to communicate or advertise the opportunity for third party program providers to apply?

(f) If so, how many program applications from external program providers are submitted, approved, or rejected at this time?

In its explanatory statement for FY21 Commerce-Justice-Science appropriations, the Senate Appropriations Committee expressed the concern that the BOP's request

for First Step Act implementation "covers existing programming, including educational and counseling programming, which existed at BOP long before the FSA."

(g) Is this an accurate description of the Bureau of Prison's budget request?

(h) How will BOP clearly distinguish between investments and programming that preceded and followed the First Step Act so that the public and lawmakers can clearly track the Bureau's progress?

(14) Deployment of BOP and USMS Personnel During Protests

A June 2020 report by the Office of the Inspector General called into question Special Operations Response Team (SORT) training and specifically identified a number of dangerous elements of regular SORT training. As you indicated during the BOP/USMS hearing on December 2, 2020, BOP agents or employees can be—and were this past summer—deputized as U.S. Marshals.

Questions

(a) Since June 2020, how many times have BOP agents or employees been deputized as U.S. Marshals? When and for what purpose?

(b) Regarding the June 2020 deputization of BOP personnel as U.S. Marshals, how many complaints has the BOP received concerning use of force or behavior contrary to regulations? What is the status of those investigations?

(15) Issues Raised in Recent OIG Reports

The Office of the Inspector General identified that the BOP, among other DOJ agencies, has implemented procedures to comply with the Death in Custody Reporting Act's requirements to document and report deaths of individuals in custody.

Questions

(a) What specific procedures has the USMS implemented to comply with the Death in Custody Reporting Act?

The Office of the Inspector General found that the BOP lacked procedures in place to ensure that vendors provided food that meets USDA and FDA standards.

(b) What specific steps, if any, has the BOP taken to ensure it serves safe, edible food?

(16) Questions Pertaining to Pandemic Response at Ft. Dix FCI

(a) Recently a moratorium on inmate transfers to Ft. Dix FCI was lifted, despite a continued rise in positive COVID–19 cases at the facility. Since the moratorium was lifted on November 24, 2020 multiple buses have arrived at the facility carrying inmates that tested positive for COVID–19 upon arrival. What is the BOP's rationale behind continuing to move COVID–19 positive inmates to a facility with an outbreak of the virus?

(b) Recently the publicly available number of active COVID–19 cases on the BOP's COVID–19 dashboard dropped by nearly 200 overnight for Ft. Dix FCI. Can you please explain the reasoning behind the decision to confirm that these inmates are no longer carriers of the virus and do not pose a threat to spread COVID–19 to other inmates and correctional officers? Were all of these inmates tested to ensure they were negative for COVID–19?

(c) Multiple reports in the media have indicated a severe lack of quality medical care for COVID–19 positive inmates at FCI Ft. Dix. What is the BOP's procedure for caring for symptomatic COVID–19 patients? What is the procedure for BOP medical staff if an inmate's condition rapidly deteriorates?

(17) Questions Submitted on Behalf of Congressman Eric Swalwell, Member of the House Judiciary Committee

These questions pertain to Michael Cohen, who, until May of 2020, was imprisoned at FCI Otisville.

(a) Which BOP officials reviewed Mr. Cohen's conditions of release? Who ultimately approved the conditions of release, to include prohibitions on his ability to write or publish materials?

(b) Did BOP officials receive any communications from the Department of Justice or White House concerning Mr. Cohen's conditions of release? If so, please produce those documents and communications in their entirety.

(c) Which BOP or U.S. Marshals monitored Mr. Cohen while he was released from federal correctional custody? Who in the Department of Justice reviewed the reports of Mr. Cohen's compliance? To whom were reports of his compliance forwarded?

(d) Upon his release, what, if any, communications did the Department of Justice or the White House have with BOP officials concerning Mr. Cohen's behavior or compliance with the conditions of his release?

(e) Did BOP officials receive any communications from the President's personal counsel concerning Mr. Cohen's conditions or terms of release. If so, please produce those documents and communications in their entirety.

(f) Which BOP officials reviewed and who ultimately approved the transfer of Mr. Cohen from furlough and home confinement to jail?

QUESTIONS FOR THE RECORD FOR DIRECTOR MICHAEL CARVAJAL SUBMITTED BY THE HONORABLE VAL DEMINGS, VICE-CHAIR OF THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

1. On August 26th, I met with representatives from FCC Coleman and Bureau of Regional Director Jeff Keller. During that meeting we discussed the deployment of BOP created "strike teams" to inspect and audit certain BOP facilities regarding their use and compliance with BOP COVID–19 protocols and provide recommendations to rectify issues identified

a. With regards to the work of the "strike teams," which facilities were inspected?
b. What specifically were the teams directed to audit and inspect?
c. What were the results of these audits and inspections?
d. Did any policy recommendations result from the audits and inspections?
e. Will you commit to providing this Committee with the results of the audits and inspections, including any policy infractions, resulting discipline, and recommendations?

2. With the critical budgetary concerns and shortages, what was the rationale for purchasing UV body scanners for some of its facilities, in lieu of more effective COVID-mitigation measures?

3. What steps has BOP taken to mitigate staffing shortages and issues that are COVID-related? Is BOP still widely using "augmentation" to respond to staffing issues?

QUESTIONS FOR THE RECORD FOR THE HONORABLE DONALD W. WASHINGTON SUBMITTED BY THE HONORABLE KAREN BASS, CHAIR OF THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

(1) Transparency and COVID–19 Protocols

The U.S. Marshals Service has custody of over 61,000 individuals awaiting trial, sentencing, or transfer into the Bureau of Prisons, about 70% of whom were held in over 850 different state, local, or tribal facilities under the terms of intergovernmental agreements. Despite repeated requests from this Committee and other Congresspeople, and in contrast to the BOP, there is no public source that reports the number of COVID–19 cases among those in USMS custody, nor have you published a COVID–19 response protocol. Basically, the only information the public has about what is happening in USMS custody in relation to COVID–19 is contained in occasional statements given to the press. Most recently, your agency reported that 6,676 individuals in its custody had tested positive for COVID–19 and that 20 had died. During the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee you indicated that this information is sometimes difficult for the USMS to obtain, but, during the hearing, you were requested to provide it nonetheless.

Questions

(a) What is the current data regarding the number of infections, hospitalizations, and deaths, for both detainees and staff?

(b) Will you commit to begin immediately publishing on the USMS website basic COVID–19 data (as the Bureau of Prisons does) and as has been repeatedly requested by Members of this Committee and others in Congress?

(c) Does the USMS have a COVID–19 protocol that it requires contract facilities to follow? How are you auditing compliance with that protocol? If no protocol exists, what audit procedures has the USMS adopted to ensure safe and humane conditions during this crisis? Will you commit to publishing those audits immediately?

(2) Movement of Prisoners and Transfers

Over the past months, there have been numerous reports that the U.S. Marshal Service's failures to adequately test or screen individuals for COVID–19 have led to the spread of the disease across the country. In August, the Office of the Inspector General reported that "USMS's decentralized system . . . creates potential safety issues as detainees are transferred between facilities and to and from federal courthouses and U.S. Attorney's offices."

Questions

(a) What steps, if any, is the USMS taking now to remedy these failures and in response to the OIG's report?

(b) Will you commit to publishing data about transfers and testing protocols?

We have heard accounts of people in Marshals custody being moved across State and county lines and placed into local jails with no information on their transfer paperwork about whether they have been tested for or have COVID–19. In light of this information, there is a legitimate concern that individuals in your agency's custody are contributing to community spread of the coronavirus, when placed in contract facilities around the country. Some local courts and jail administrators have worked hard to protect people in jails and the community from the pandemic by decreasing the jail population, providing adequate PPE, and other measures.

Question

(c) Can you guarantee that Marshals policy and practice during the pandemic has not been at cross-purposes with these local efforts or led to community spread of the coronavirus?

(3) Access to Counsel

The pandemic has sharply curtailed pretrial access to counsel, given that in many instances attorneys cannot meet with their clients in person and given that many facilities are in virtual lockdown. Attorneys with clients in USMS custody are no exception. There are ample examples of the challenges experienced by pretrial detainees from the lack of access to counsel, including being able to get needed medical attention during this pandemic.

Questions

(a) Has the USMS issued directives to its contracting facilities about how they must facilitate access to counsel during the COVID–19 pandemic?

(b) Has the USMS undertaken any national efforts to support the expansion of video conferencing for legal visits in local (public or private), state, and tribal facilities? If so, will you commit to publish those communications, or to produce them to this Committee?

(4) Demographic Data Collection

According to data from the COVID Tracking Project, Black people nationwide are dying at over two times the rate of White people (113 deaths per 100,000 compared to 55 deaths per 100,000). To date, Black people account for 19% of COVID–19 deaths where race is known. The U.S. Marshals Service does not make racial demographic data—pertaining to cases, recoveries, and deaths—available to the public.

Questions

(a) Is the USMS recording any demographic information for positive/negative cases, recoveries, hospitalizations, and deaths? If so, what demographic data is recorded? If data is being recorded, why has that data not been made publicly available?

(b) Can you promise to make any demographic data you have been collecting publicly available as soon as possible?

(5) Use of Restraints on Pregnant Women

In 2008, the Bureau of Prisons ended the practice of routinely shackling pregnant women and the First Step Act of 2018 outlawed the practice except in very limited circumstances. Both the American Correctional Association and the National Commission on Correctional Healthcare have adopted standards opposing the use of shackles; however, these standards are only guidelines and are voluntary. At the end of the December 2, 2020 BOP/USMS hearing, your staff indicated that you would be reporting to the Committee the number of times restraints were used on pregnant women in USMS custody. I have reviewed your December 28, 2020 annual report to Congress pertaining to USMS compliance with section 301 of the First Step Act of 2018.

Questions

(a) Please provide information about the number of times restraints have been used on pregnant women in USMS custody, for as far back as you have been collecting such data. Please provide details pertaining to each instance that restraints were used and the rationale for their use.

(b) Your December 28 report provides USMS data pertaining to the use of restraints on pregnant women, from October 1, 2019 through September 20, 2020. Please provide the same data since September 21, 2020.

(c) The case of Andrea Circle Bear (a.k.a., Andrea High Bear) was mentioned during the December 2 hearing. Ms. Circle Bear was eight months pregnant, gave birth while on a ventilator, in BOP custody, and ultimately died from COVID–19. Can you confirm that restraints were affirmatively not used on Ms. Circle Bear when the U.S. Marshals transported her from South Dakota to FMC–Carswell, in Texas?

(d) More generally, what is the USMS's policy regarding the use of restraints on pregnant women? What is your specific policy pertaining to the use of restraints while transporting pregnant women?

(6) Issue Raised in Recent OIG Reports

The Office of the Inspector General identified that the BOP, among other DOJ agencies, has implemented procedures to comply with the Death in Custody Reporting Act's requirements to document and report deaths of individuals in custody.

Question

(a) What specific procedures has the USMS implemented to comply with the Death in Custody Reporting Act?