As Congress drafts and finalizes the Coronavirus Response Act, we urge members of Congress to consider the urgent public health risks and human rights violations that COVID-19 poses for individuals incarcerated in federal criminal and immigration detention. Below we have outlined federal policy proposals that Congress and administrative agencies should adopt in statutory and administrative responses to COVID-19 that would mitigate the severe harms of this pandemic on people held in federal jails, prisons and immigration detention centers.

The United States has the highest incarceration rate in the world. There are almost 2.3 million incarcerated people in U.S. prisons, jails, and immigration detention facilities. Incarcerated people are particularly vulnerable to the spread of pandemics. While locked up in overcrowded indoor environments with poor ventilation and sanitation, incarcerated people are also routinely denied access to basic healthcare, nutritious food, and critical preventive care. In most carceral institutions, hand sanitizer is considered contraband. There is no question that when COVID-19 hits prisons, jails, and immigration detention facilities, it will spread rapidly on the inside.

There is an international consensus among public health officials and medical experts that social distancing is an essential tool in our fight to stem the spread of COVID-19 and to slow the pandemic. Social distancing requires maintaining at least three feet of distance between people but ideally allows six feet of distance. State and local governments have instructed their residents to practice social distancing, with some places instituting shelter in place orders to enforce the practice. The White House has advised members of the public to avoid gathering in groups of more than 10 people. Social distancing is impossible within the confines of any prison, jail, or immigration detention facility. Therefore, a crucial component of a comprehensive and effective response to the COVID-19 pandemic is to immediately release, to the maximum extent possible, those who are incarcerated.

Health is a human right. The Universal Declaration of Human Rights affirms that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family.” The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which the United States has signed but not ratified, also requires States to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” and to take steps necessary for “the prevention, treatment and control of epidemic, endemic, occupational, and other

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diseases.” Several other international treaties recognize the right to health, including the International Convention on the Elimination of All Forms of Racial Discrimination, which the United States has ratified, and the Convention on the Rights of the Child, which the United States has signed but not ratified.

The right to health is linked to other rights of incarcerated people. The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), both of which the United States has ratified, prohibit torture and cruel, inhuman, or degrading treatment or punishment. In addition, the ICCPR mandates that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” In line with these human rights obligations, the U.S. Supreme Court has held that conditions in carceral facilities that pose an unreasonable risk of future harm, including the risk of contracting a communicable disease, violate the Eighth Amendment’s prohibition against cruel and unusual punishment. The basic human rights of incarcerated people require that the United States take immediate and comprehensive action to protect them from COVID-19.

The Allard K. Lowenstein International Human Rights Clinic is dedicated to defending the human rights of everyone, particularly the most vulnerable among us. We hope that this series of proposals will support lawmakers in their efforts to manage this public health crisis in a way that fully protects the health and human rights of incarcerated people.

**IMMIGRATION DETENTION**

The conditions of immigration detention facilities pose a grave public health risk for the spread of COVID-19. People live in close quarters. Toilets, sinks, and showers are shared, without disinfection between each use. Food preparation and service is communal with little opportunity for surface disinfection. Staff arrive and leave on a shift basis, and there is limited ability to adequately screen staff for new, asymptomatic infection. There are approximately 37,000 individuals in

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10 See ICCPR, id. at art. 10.
11 See ICCPR, id. at art. 10.
13 These facilities include those run directly by the Department of Homeland Security (DHS), as well as local jails and private prisons operating under contract with DHS.
Immigration and Customs Enforcement (ICE) detention¹⁵ and 20,000 individuals in Customs and Border Patrol (CBP) detention.¹⁶ Many of the CBP holding facilities, including the tent court facilities in Laredo and Brownsville, Texas, are operating at maximum capacity and run the risk of facilitating the rapid transmission of COVID-19.¹⁷

Legislative Measures
Congress has the power to take the following legislative measures to protect people in immigration detention from the spread of COVID-19.

1. **Congress should change the law to eliminate mandatory immigration detention.**
   The Immigration and Nationality Act (INA)¹⁸ sets out three categories of mandatory detention. First, § 1226(c) requires the detention of noncitizens who are deemed inadmissible or deportable on the basis of enumerated crimes. This detention is mandatory, even if offense is minor¹⁹ or the individual has already completed a criminal sentence.²⁰ Second, § 1225(b)(1)(B)(iii)(IV) requires the detention of asylum seekers entering the United States pending final credible fear determinations. Third, § 1225(b)(2)(A) requires the detention of noncitizens at a port of entry whom an immigration officer determines are not “clearly and beyond a doubt entitled to be admitted.”²¹ These provisions require the detention of entire categories of people without individualized determinations of dangerousness or flight risk. In a time of global pandemic, Congress should amend the INA to eliminate mandatory immigration detention.

   **In the alternative,** Congress should at least amend the INA to eliminate mandatory immigration detention for asylum seekers and noncitizens at ports of entry whom an immigration officer determines are not “clearly and beyond a doubt entitled to be admitted,” pursuant to § 122(b)(2)(A). Congress should also amend the INA to eliminate mandatory immigration detention for noncitizens deemed inadmissible or deportable on the basis of minor crimes, including all misdemeanors. Congress should use the INA amendment jointly proposed by the Immigrant Legal Resource Center, Immigration Defense Project, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association.²²

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²⁰ See Nielson v. Preap, 139 S.Ct. 954 (2019) (holding that the INA's mandatory-detention requirement, without release on bond or parole, is not limited to situations in which a noncitizen is taken into custody by immigration officials as soon as the noncitizen is released from criminal custody).
²² See ANGIE JUNCK, IMMIGRANT LEGAL RESOURCE CENTER, ET. AL., PRINCIPLES FOR IMMIGRATION REFORM THAT SUPPORT FAIRNESS FOR ALL IMMIGRANTS, at 3. (“Section 101(a)(43) (8 U.S.C. 1101(a)(43)) is amended as follows: ‘The term "aggravated felony" means a felony, for which a term of imprisonment of five years was imposed, that is –; Strike
2. Congress should change the law to mandate the release of immigrants from detention in preparation for and during an epidemic or pandemic.

   a. **Mandatory Detention**
   The INA gives the Attorney General discretion to release noncitizens from mandatory immigration detention under very narrow circumstances. Congress should amend the INA to require the release of noncitizens from mandatory detention in preparation for and during an epidemic or pandemic, as defined by the Centers for Disease Control and Prevention (CDC).

   **In the alternative,** Congress should at least amend the INA to explicitly expand the discretion of the Attorney General to release noncitizens from mandatory detention in preparation for and during an epidemic or pandemic, as defined by the CDC.

   b. **Non-Mandatory Detention**
   Under the INA, if a noncitizen is not subject to mandatory detention, the Attorney General has discretion to release the noncitizen on a bond of at least $1,500 and certain conditions, or conditional parole. Congress should amend the INA to require the release of noncitizens from discretionary detention in preparation for and during an epidemic or pandemic, as defined by the CDC.

   **In the alternative,** Congress should at least amend the INA to explicitly expand the discretion of the Attorney General to release noncitizens from discretionary detention in preparation for and during an epidemic or pandemic, as defined by the CDC.

3. **Congress should expand the grounds for humanitarian parole.**
   The INA gives the Secretary of Homeland Security discretion to grant “humanitarian parole” on a case-by-case basis for “urgent humanitarian reasons or significant public benefit,” allowing beneficiaries to be released from detention. Congress should amend the INA to explicitly expand the grounds for humanitarian parole to include reasons relating to public health, epidemics, and pandemics, as defined by the CDC. Congress should also amend the INA to allow for mass grants of humanitarian parole in preparation for or during an epidemic or pandemic, as defined by the CDC.

   **Administrative Measures**

   ‘Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.’ Effective date: This amendment shall apply to convictions entered before, on, or after the enactment of this act.”).

23 See 8 U.S.C. 1226(c)(2) (“The Attorney General may release an alien...only if the Attorney General decides...that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.”).

24 See 8 U.S.C. 1226(q).

Congress has the power to share its views with the Executive. Congress should issue recommendations to the Trump Administration urging federal agencies to take the following actions to protect people in immigration detention from the spread of COVID-19.

4. **ICE and CBP should release all individuals in their custody not subject to mandatory detention.** This is the only way to protect people in immigration detention and staff in detention facilities from the spread of COVID-19. ICE and CBP have legal authority to release these individuals. If ICE and CBP do not release all individuals not subject to mandatory detention, the agency should at least release vulnerable populations from custody, including people who are pregnant; people 60 and over; people with chronic illnesses, compromised immune systems, or disabilities; and people whose housing placements restrict their access to medical care and limit staff ability to ensure their safety.

5. **ICE and CBP should halt all transfers** from facility to facility and to out-of-state locations.

6. **ICE and CBP should immediately test the current population of individuals in its custody and all incoming detainees.** COVID-19 can be passed through asymptomatic carriers. Given the concentrated density of immigration detention facilities, and the inability of individuals to leave, everyone in or coming into immigration detention should be tested.

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22 See 8 U.S.C. § 1182(d)(5)(providing for the release of people for “urgent humanitarian reasons” or “significant public benefit”); 8 U.S.C. 1226(a)(2)(B)(providing for the release of people on “conditional parole”); 8 C.F.R. § 212.5(b)(providing for the release of people with “serious medical conditions in which continued detention would not be appropriate” and pregnant people); 8 C.F.R. § 236.1(c)(8)(providing for the release of people who do not pose a “danger to property or persons” and who is “likely to appear for any future proceedings”).


7. **ICE and CBP should provide for proper hygienic supplies at all immigration detention facilities.** The agencies should provide easy access to these supplies, including hand sanitizer with at least 60% alcohol content – in accordance with CDC guidelines – to all people in immigration detention as well as staff to help prevent the spread of COVID-19.33

8. **ICE and CBP should provide critical information about COVID-19 to people in their custody.** People in immigration detention must be informed of all measures they can take to minimize their risk of contracting or spreading the virus; potential symptoms of the virus; the risks associated with the virus; and treatment measures based on the best available science. This information must be available in multiple languages.34 All staff in immigration detention facilities must receive this information as well.35

9. **ICE and CBP should develop and share a plan with the public regarding the housing and treatment of individuals in custody exposed to COVID-19.** This plan must protect the individuals exposed, including access to quality medical treatment, while also shielding other individuals in the detention facility from infection. This means preventive care, medical testing, and prompt treatment – including any necessary transfers for hospital care – in accordance with CDC guidance – without co-pays or additional costs, regardless of patients’ insurance status.36 Housing plans should not result in lockdowns, segregation, or isolation unless medically necessary. Lockdowns disrupt people’s ability to exercise, build their legal cases, and communicate with their loved ones.37 In general, and particularly during this time of heightened stress, people in immigration detention must have access to these lifelines of nourishment and connection.

10. **ICE and CBP must ensure that people in its custody continue to have full access to their lawyers by phone or videoconference.** Efforts to prevent the spread of COVID-19 should not be used as a pretext to deny due process. Additionally, individuals in immigration detention must be able to meaningfully participate in their hearings.

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35 See id.

36 See id. See also Letter from The Legal Aid Society, Brooklyn Defender Service, and Bronx Defenders to Thomas Decker, ICE Field Director, et. al. (AILA Doc. No. No. 20030201)(March 6, 2020), available at https://www.aila.org/File/Related/20030201b.pdf.


38 See id.

Criminal Legal System Incarceration: Prisons and Jails

The Bureau of Prisons (“BOP”) incarcerates 175,483 people, many of whom have chronic health conditions that make them especially vulnerable to severe cases of COVID-19, and death associated with the illness. The rate of chronic illness is higher in state and federal jails than in the general population.

The conditions of incarceration increase opportunities for coronavirus to spread. Incarcerated people live in close quarters with others, sharing bathrooms and dining areas, and sleeping in close proximity to each other. The movements of incarcerated persons throughout the prison are strictly controlled, as corrections officers tell them when to leave their cells, when to go to recreation, if and when they may receive medical treatment, and when they are locked into their cells at night.

Given the immense risk that prisons and jails present for the spread of COVID-19, Congress should follow the lead set by other countries, as well as local governments here in the United States, and release individuals who are detained and incarcerated. In crafting a response to the COVID-19 crisis, lawmakers should aim to drastically reduce the number of people held in prisons and jails.

Legislative Measures
Congress has the power to take the following legislative measures to protect people in federal prisons from the spread of COVID-19.

1. Congress should change the law to expand legal options to release people from federal prisons and jails.

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42 Laura M. Maruschak & Marcus Berzofsky, Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-2012, DEPT. OF JUSTICE: BUREAU OF JUSTICE STATISTICS (Feb. 2015), available at https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf. People incarcerated in state and federal prisons have much higher rates of chronic illnesses than people in the general public. Many of these illness, such as hypertension (30.2% compared to 18.1% in the general population, other heart problems (9.8% compared to 2.9%), asthma (14.0% compared to 10.2% in the general population), and diabetes (9.0% compared to 6.5% in the general population), are associated with a more severe cases of COVID-19, and poorer outcomes. Id. at 3.
46 Coronavirus: Iran Temporarily Frees 34,000 prisoners to Combat Spread, BBC NEWS (Mar. 3, 2020).
a. **Compassionate Release for Vulnerable People**

Congress may expand the conditions under which courts may grant compassionate release. 18 U.S.C. Section 3582(c)(1)(A) enumerates the “extraordinary and compelling circumstances” under which courts may grant compassionate release; these conditions are limited to instances in which an incarcerated person is elderly, or has developed a serious illness or impairment.\(^48\) Congress may expand the statute to include a “national public health emergency” as a grounds for compassionate release for the thousands of individuals who are at high risk of serious complications or death from COVID-19 due to medical conditions. This change would allow BOP to proactively petition for compassionate release, as opposed to waiting for these vulnerable individuals to become critically ill.

b. **Compassionate Release for People 60 and Over**

Congress may also amend the requirements to allow courts to consider advancing age as a ground for compassionate release, and allow individuals to be released prior to turning 60.\(^49\) Elderly people are particularly vulnerable to severe COVID-19, and they are also less likely to commit new crimes.\(^50\)

c. **Reinstate Federal Parole**

Congress eliminated federal parole with the Sentencing Reform Act of 1984; individuals sentenced after November 1, 1987 are not eligible for federal parole, and must usually serve out the entire term of their incarceration. Congress could reinstate the federal parole statute and designate it to apply retroactively.

Under the statute, individuals sentenced to more than one year and less than 30 years of incarceration would be eligible after serving at least one third of their sentence. Individuals who were sentenced to more than 30 years or a life term of imprisonment would be eligible for parole after 10 years.\(^51\) Under the law, Congress should ensure that everyone who meets these conditions is immediately eligible for parole.

2. Congress should reduce DOJ enforcement and limit admissions to federal prisons and jails.

a. **Halt DOJ Enforcement of All Crimes That Are Not Mission Critical**

Congress may curtail arrests and prosecutions by limiting appropriations for certain enforcement activities, or by making emergency appropriations contingent on non-enforcement.\(^52\) These appropriations measures may be tied to

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\(^48\) Nathan James, Congressional Research Service, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS, Sentence Reduction at 14, 15.

\(^49\) Id.

\(^50\) Id.

\(^51\) Id. at 11-13.

\(^52\) See e.g., Jeff Vanderslice, Alive Again: The Two-Pronged Strategy for Federal Marijuana Policy Reform, CATO INSTITUTE BLOG (June 28, 2019), https://www.cato.org/blog/alive-again-two-pronged-strategy-federal-marijuana-policy-reform (describing how Congress limited the federal government’s ability to prosecute people who act in accordance with their state’s medical marijuana program by reducing appropriations to DOJ for anti-marijuana enforcement activity).
emergency appropriations issued during this time of crisis, and they may also be issued within the annual appropriations bill. In the annual appropriations bill, the amendment would limit DOJ funds for enforcement of crimes during times of national emergency and/or international pandemic.

b. **Amend the Bail Reform Act of 1984**\(^\text{53}\) to Suspend Considerations of Flight Risk, and to Require “Clear and Convincing” Evidence of Guilt During the Pandemic
The Bail Reform Act instructs judges to deny pretrial release if the judge determines that such release will not “reasonably assure the appearance of the person as required.”\(^\text{54}\) State and local officials continue to issue orders limiting gatherings and strongly encouraging people to stay in their homes. These conditions reduce incentives and opportunity to abscond before trials and hearings.

Currently, the Bail Reform Act does not include an explicit statement of the standard of proof for findings of Dangerousness sufficient to deny bail. Congress should amend the law to include this standard of proof.

3. **Provide compassionate**\(^\text{55}\) and evidence-based reentry services\(^\text{56}\) to individuals released from federal prisons and jails.

a. **Allocate resources to federal agencies and/or state governments to provide housing for people recently released from custody.**
The federal government should ensure that resources and funding are diverted into providing reentry and long-term housing for people released from custody without a stable home to return to. This effort could include repurposing existing facilities to house people recently released from jail or prison.\(^\text{57}\)

b. **Provide emergency social security benefits, Supplemental Nutrition Assistance Program (SNAP) benefits, and cash assistance.**
Individuals released from custody will often not have savings or immediate employment. As such, the government should commit to providing emergency social security benefits,\(^\text{58}\) SNAP benefits and cash assistance to aid individuals in their reentry efforts. As part of this effort, Congress should also reverse the 1996

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\(^\text{54}\) 18 U.S.C. § 3142.


Welfare Act requirement that allows states to deny SNAP benefits to individuals convicted of controlled substances offenses.\textsuperscript{59}

c. \textbf{Ensure that everyone released has access to respectful, quality medical care, free of cost.}

4. \textbf{Direct federal probation and supervised release programs to suspend in-person check-ins.}

a. \textbf{Replace In-Person Check-Ins with Phone, Teleconferencing, or Digital Check-Ins}
Because travel to appointments and person-to-person contact raises a particular health risk of spreading COVID-19, individuals should be given the option of checking in via phone, teleconferencing, or other digital media.

5. \textbf{Congress should appropriate funding to the BOP to provide high-quality medical treatment and ensure humane conditions for people who remain incarcerated.}

a. \textbf{Pass Legislation to Appropriate Funding for BOP for High-Quality Treatment}
All people who remain incarcerated should receive high-quality treatment, equivalent to the standard of care in the community.

b. \textbf{Pass Legislation to Make Communication Free}
Congress should pass legislation to provide access to telecommunication programs to allow incarcerated people to interact with their friends, family, and loved ones if in-person visits are suspended. These programs should not replace in-person visits once COVID-19 is contained.

\textsuperscript{59} See Chesterfield Polkey, \textit{Most states have ended SNAP ban for convicted drug felons}, National Conference of State Legislatures (Jul. 30, 2019), \url{https://www.ncsl.org/blog/2019/07/30/most-states-have-ended-snap-ban-for-convicted-drug-felons.aspx}. 