

BRENNAN CENTER --- FOR JUSTICE

June 8, 2020

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**RE: Written Testimony from the Brennan Center for Justice to the President's
Commission on Law Enforcement and the Administration of Justice**

Dear Attorney General Barr, Director Keith, and Principal Deputy AAG Sullivan:

Thank you for the opportunity to submit written testimony before President Trump's Commission on Law Enforcement and the Administration of Justice.

The Brennan Center is a non-partisan law and policy institute that focuses on improving America's systems of democracy and justice.¹ The Brennan Center's Justice Program seeks to ensure a rational, efficient, effective, and fair criminal justice system. As part of that mission, we seek to end mass incarceration in the United States and reduce racial and economic disparities within the justice system.

We write to you offering testimony on: racial injustice across our justice system, law enforcement accountability, public health concerns in correctional facilities related to

COVID-19, concern over the Commission's examination of State and local prosecutors who refuse to prosecute certain crimes, and concerns about transparency of this Commission.

The Presidential Commission on Law Enforcement and the Administration of Justice ("Commission") is operating at a critical moment in our nation's history. While COVID-19 continues to threaten the lives of so many Americans, across the nation we are mourning yet another death of an unarmed Black man at the hands of those who were sworn to protect our communities.

It is imperative that the Commission take prompt, but considered, steps to hold our law enforcement agencies accountable, acknowledge and address racism in our justice system, and recommend bold solutions to end the nation's addiction to incarceration that has plagued our country's health and safety for generations.

I. The Commission Must Acknowledge Racial Disparities in our Justice System and the Disproportionate Black and Brown Killings by Police

It is clear that the communities most disadvantaged by COVID-19 are the same ones most affected by structural racism, police violence, and the devastating consequences of mass incarceration. Thousands of people each year -- the vast majority of whom are Black and Latinx -- are funneled into the criminal justice system because of the deep-seated structural racism that we continue to witness today in America.² As Cornell William Brooks, former President and CEO of the National Association for the Advancement of Colored People, wrote, "Communities of color are over policed, over-prosecuted, over-incarcerated and yet underemployed."³

The Commission must consider recommendations that not only acknowledge but also address the vast racial disparities that exist not only in our criminal justice system but also within our broader democracy. The racial disparities in our justice system are vast. For example, one in three Black men are incarcerated in their lifetimes compared to one in 17 white men.⁴ Our country's racism is evident in the number of Black men and women who are killed without justification by law enforcement officers. The murder of Mr. George Floyd demonstrates once again that law enforcement's dehumanization of Black Americans can have deadly results.

A mapping of police violence illustrates that Black Americans are three times more likely to be killed by police officers than white Americans, while nearly twice as likely to be killed as a Latinx person.⁵ Black Americans are also about 1.3 times more likely to be unarmed in fatal interactions with police than white Americans.⁶ Despite these horrifying statistics, between 2013-2019, 99 percent of officer involved killings did not result in officers being charged of a crime.⁷

In 2019, nearly 1,100 Americans were killed by police. Not a single week went by last year without families grieving the loss of their loved ones.⁸ Black people represented 24 percent of those killed despite making up only 13 percent of the American population.⁹ It is time to end the violence that Black people and communities of color endure and fear by our nation's law enforcement officers.

Any work to reform law enforcement operates within that reality. We ask this Commission to acknowledge that racial disparities exist across our justice system resulting in too many people of color filling our nations jails and prisons. We also request the Commission to articulate in its final report that Black Americans are disproportionately hurt and killed by police.

II. Ensure Federal Police Oversight and Accountability

Congress reacted to the 1991 beating of Rodney King at the hands of the Los Angeles Police Department officers by giving the federal government oversight of local police departments. Congress did this by passing the Violent Crime Control and Law Enforcement Act in 1994, authorizing the Justice Department (“DOJ”) to step in when police engage in “a pattern or practice of conduct” that deprives people of their constitutional rights.¹⁰ These pattern or practice cases allow the Justice Department to enforce rights defined and protected by the Constitution in addition to other federal laws.

Since 1994, DOJ launched 70 investigations into state and local law enforcement agencies and has negotiated 40 reform agreements, half of which are court-enforced consent decrees.¹¹

The current administration has pared back federal oversight of police. The Obama Administration oversaw more than 20 investigations into potential abuses of police power, culminating in some cases in consent decrees.¹² However, Attorney General Sessions made it difficult for the Justice Department to open new pattern or practice investigations. In fact, on the very day the Attorney General resigned, he signed a memo detailing the narrow circumstances under which DOJ can enter into a consent decree.¹³ Since President Trump took office, the Justice Department has publicly announced only one pattern or practice investigation into a police department.¹⁴

Additionally, the Justice Department has another tool for working with police departments to implement large-scale reforms. For many years, its Office of Community Oriented Policing Services (“COPS Office”) Collaborative Reform Initiative spearheaded police reform by “undertaking assessments of a law enforcement agency’s operations, providing recommendations for reform, and assisting the agency in implementing those reforms.”¹⁵ Through the COPS Office’s Collaborative Reform Initiative, the Justice Department avoided complex and lengthy litigation by working with cities to reform policing practices, and had widespread support from police chiefs across the country. The COPS’s Office worked with cities including: Las Vegas, Philadelphia, Fayetteville,

Milwaukee, and San Francisco.¹⁶ In 2017, however, Attorney General Sessions announced that the COPS Office would abandon this practice and discontinue the significant work that began under the Obama administration. At that time, 16 police departments across the country had signed up for Collaborative Reform.¹⁷

Federal oversight often produces significant systemic changes in police departments and forces law enforcement to address racial bias, reform use of force policies, and improve police department's relationships with their communities. We recommend the Commission urge the current Justice Department to avail itself of its robust statutory authority to investigate police departments and bring about widespread systemic change. This Commission should recommend that the Justice Department immediately and swiftly open new federal civil rights pattern or practice investigations and work with these police departments to ensure real oversight of our nation's police forces. We also urge the Commission to recommend that the administration authorize the COPS Office to resume this program that police chiefs across the nation asked for so they could receive guidance and technical assistance to reform structural practices within their departments.

III. Ensuring the Release of Vulnerable People from Prison During the COVID-19 Public Health Crisis

Today, approximately 2.2 million people are locked inside America's vast infrastructure of jails and prisons. Prisons and jails frequently suffer from overcrowding. Even in the best of times they are, by definition, facilities where people are placed in close contact with each other on a near-constant basis. These correctional institutions present unique health dangers and are especially vulnerable to the spread of infectious disease, problems that the outbreak of COVID-19 throw into sharp relief.¹⁸

Correctional facilities have faced significant public health challenges before and in recent years dealt with seasonal flu strains, norovirus, and the 2009 H1N1 flu outbreak. Yet our current public health crisis presents more daunting circumstances given how quickly COVID-19 has spread across the United States. As of the date we submitted this testimony, there are at least 107,000 reported deaths from COVID-19 in America, alone.¹⁹ But with an infectious disease like the coronavirus spreading rapidly, the nation's reliance on mass incarceration could be disproportionately deadly for many incarcerated people — especially those 65 and older or those with pre-existing conditions. At least 40,566 people in prisons across the nation have tested positive for COVID-19, a conservative number that only accounts for those who have been tested and one that does not reflect the growing number of cases in county jails.²⁰ More than 496 incarcerated people have died in state facilities.²¹ Currently 1,981 federal prisoners and 181 Bureau of Prisons (BOP) staff are confirmed positive for COVID-19, and 77 federal prisoners have died because of the virus.²² Absent additional interventions, COVID-19 will continue to spread through incarcerated populations, and our nation's correctional officers and staff, at an alarming rate.

Seven out of ten of the largest COVID-19 outbreaks in the United States to date originated in a jail or prison. Moreover, the rate of spread in prisons is an estimated 150 percent higher than in the general population, infecting correctional officers and incarcerated people alike. But most prisons do not have hospital infrastructure, and most “prison hospitals” are more accurately described as infirmaries or clinics.

We urge this Commission to recommend that both state and federal correctional administrators identify and release from their facilities the most vulnerable people and those who do not pose public safety threats to communities. We also recommend that the Bureau of Prisons use its authority under the CARES Act to its maximum effect. Under ordinary circumstances, the BOP can transfer people to home confinement for “10 percent of the term of imprisonment,” or six months — whichever is shorter.²³ The CARES Act provides for a significant expansion of this authority if the Attorney General concludes that “emergency conditions will materially affect the functioning of” the prison system — considerable authority that the DOJ appears to have largely declined to use.²⁴

IV. Concerns of Alienating Prosecutors of Different Perspectives and Opinion

We also write with our concerns about the President’s Executive Order signed on Friday, November 1, 2019 stating that the Commission shall review relevant research and expertise and make recommendations regarding a number of issues, including, “refusals by State and local prosecutors to enforce laws or prosecute categories of crimes.”²⁵

In multiple speeches made by Attorney General Barr, he has targeted reform-minded, elected prosecutors who are relying on decades of evidence that overincarceration does not create healthier and safer communities as “anti-law enforcement.” In one speech to the Fraternal Order of Police in New Orleans, LA, Barr criticized “‘social justice’ reformers, who spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law...Once in office, they have been announcing their refusal to enforce broad swathes of the criminal law.”²⁶

The Attorney General’s speech relied on excessively punitive rhetoric from the ’80s and ’90s that we now know did not make us safer, tore apart communities, and led to us locking up more people than any country on the planet. The language is also out of step with the reality that in recent years, many lawmakers, advocates, and researchers have begun to see the role of prosecutors more broadly, and as forces for change.

Many of these so-called “social justice reformers” have pursued important policy changes that other offices should consider emulating.²⁷ For example, these prosecutors have declined to prosecute minor offenses in order to prioritize more serious crime and alleviate unnecessary incarceration.²⁸ They have cleared existing bench warrants for minor offenses to ensure that longstanding arrest warrants for petty crimes such as drinking in public and traffic incidents do not pull people back into jail and prison. They have played a role in reducing economic inequities by issuing directives to their offices to

stop requesting bail for lower-level offenses except in exceptional circumstances.²⁹ This new wave of prosecutors has also prioritized diversion to ensure that people are truly kept out of the criminal justice system, encouraged the use of treatment and not incarceration for those who suffer mental health issues, and have created conviction review units to examine old cases to determine whether outcomes were tainted by unjust practices, faulty evidence, or bias.³⁰

In the President's Executive Order, and in any of the press releases announcing the formation of this Commission, there is no mention about studying the need to replicate and expand the use of these practices and policies that seek to rebuild communities and move away from relying on past and often misguided incarceration-driven practices.

The Commission must include a recommendation in its final report highlighting the need for more local prosecutors to use their discretion to improve administration of justice in this country through the principles highlighted in 21 Principles for the 21st Century Prosecutor and moving away from past incarceration-driven practices that we know did not make us safer.³¹

V. The Commission Must Increase Transparency About Its Work

We are concerned about the lack of transparency associated with this Commission. Although occasional press releases from the Department of Justice are published, the details of any motions or action items are absent from public-facing materials.³² The commission is charged with conducting a system-wide, comprehensive review of the criminal justice system, identifying gaps, needs and opportunities, and developing a strategic plan that will guide federal, state, and local efforts in the long term. If this goal is to be achieved, more transparency and timely notification is needed to update criminal justice stakeholders and the public by providing agendas and public notices in an easily identifiable way.

The Federal Advisory Committee Act (FACA), requires meetings to be open in addition to public notice of meetings advertised in The Federal Register.³³ A long list of the weekly testimonies received without any additional publications of short-term reports and findings cloaks the commission with a veil of secrecy at a time when stakeholders across the country need to collaborate on how to improve the administration of justice in this country. Since late April of 2020, the Commission's Hearings webpage stopped including comprehensive summaries detailing the multiple day hearings.³⁴ As the Leadership Conference noted in its testimony, "The lack of notice and transparency surrounding the Commission's process for conducting its study of law enforcement impedes meaningful public participation."³⁵

We recommend the Commission hold public hearings, include summaries of meetings on its website, and operate with greater transparency about its work.

This Commission's convenings come at a critical juncture: Americans are calling for change and law enforcement cannot be at odds with the people they serve to protect. We urge the Commission to exercise its oversight powers accordingly and take this opportunity to consider our recommendations to review the overarching criminal justice systems comprehensively and in depth. We also hope the Commission addresses the racial and economic disparities and advises policy and practice changes that will create a more fair and just system across the country.

Respectfully submitted,



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¹ This letter does not purport to represent the views, if any, that the New York University School of Law may have.

² The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Washington, D.C.: The Sentencing Project, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

³ Cornell William Brooks, foreword to *How Many Americans Are Unnecessarily Incarcerated?*, by James Austin et al. (New York, NY: Brennan Center for Justice, 2016), 1, https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf.

⁴ *Racial Disparities*, 1.

⁵ "Mapping Police Violence," Mapping Police Violence, last modified March 7, 2020, <https://mappingpoliceviolence.org/>.

⁶ "Mapping Political Violence."

⁷ "Mapping Political Violence."

⁸ "Mapping Political Violence."

⁹ "Mapping Political Violence."

¹⁰ Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C ch. 121 (1994).

¹¹ Brandon E. Patterson, "Rodney King and the LA Riots Changed Policing. Now Jeff Sessions Wants to Turn Back the Clock," *Mother Jones*, April 27, 2017, <https://www.motherjones.com/politics/2017/04/rodney-king-jeff-sessions-consent-decrees-policing/2/>.

¹² Sari Horwitz, Mark Berman, and Wesley Lowery, "Sessions Orders Justice Department to Review All Police Reform Agreements," *Washington Post*, April 3, 2017, https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08_story.html.

¹³ Office of the Attorney General, *Principles and Procedures for Civil Consent Decrees and Settlement*

Agreements with State and Local Governmental Entities, by Attorney General Jeff Sessions, Washington, D.C.: Department of Justice, 2018, <https://www.justice.gov/opa/press-release/file/1109681/download>.

¹⁴ Katie Benner and Emily Badger, “A Justice Dept. Skeptical of Police Abuse Cases Vows to Investigate Floyd Death,” *The New York Times*, May 29, 2020,

<https://www.nytimes.com/2020/05/29/us/politics/justice-department-civil-rights-george-floyd.html>

¹⁵ U.S. Department of Justice, Civil Rights Division, *The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present* (Washington, D.C.: DOJ, 2017), 50, <https://www.justice.gov/crt/file/922421/download>.

¹⁶ Department of Justice, *Police Reform Work*, 50.

¹⁷ “Justice Department Ends Popular Police Reform Program.” Equal Justice Initiative, September 25, 2017, <https://eji.org/news/justice-department-ends-popular-police-reform-program/>.

¹⁸ Daniel A. Gross, “‘It Spreads Like Wildfire’: The Coronavirus Comes to New York’s Prisons,” *New Yorker*, March 24, 2020, <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

¹⁹ Hannah Miller, Jasmine Kim, and Alex Harring, “Coronavirus live updates,” *CNBC*, June 4, 2020, <https://www.cnbc.com/2020/06/04/coronavirus-live-updates.html>.

²⁰ “A State-by-State Look at Coronavirus in Prisons,” *Marshall Project*, last modified June 6, 2020, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

²¹ *Ibid.*

²² “COVID-19 Coronavirus.” Federal Bureau of Prisons, last modified June 5, 2020, <https://www.bop.gov/coronavirus/>.

²³ 18 U.S.C. § 3624(c)(2) (2018).

²⁴ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(a)(2), (b)(2), 134 Stat. 281, 515-16 (2020).

²⁵ Exec. Order. No. 13896, 72 Fed. Reg. 58595 (October 28, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-11-01/pdf/2019-24040.pdf>.

²⁶ “Attorney General William P. Barr Delivers Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference,” Department of Justice, August 12, 2019, <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th>.

²⁷ Lauren-Brooke Eisen and Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators* (New York: Brennan Center for Justice, 2018), 26, https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal%20Justice%20Agenda.pdf.

²⁸ Eisen and Chettiar, *Criminal Justice*, 26.

²⁹ Eisen and Chettiar, *Criminal Justice*, 27.

³⁰ Brennan Center for Justice, Fair and Just Prosecution, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (San Francisco: Fair and Just Prosecution, 2018), 7-8, <https://www.brennancenter.org/our-work/policy-solutions/21principles-21st-century-prosecutor>.

³¹ Brennan Center for Justice, Fair and Just Prosecution, and The Justice Collaborative, *21 Principles*.

³² “President’s Commission on Law Enforcement and the Administration of Justice Holds Teleconferences on Crime Reduction,” Department of Justice, April 10, 2020, <https://www.justice.gov/opa/pr/president-s-commission-law-enforcement-and-administration-justice-holds-teleconferences-crime>.

³³ Federal Advisory Committee Act of 1972, Pub. L. 92-463, §2, 86 Stat. 770 (1972).

³⁴ Presidential Commission on Law Enforcement and the Administration of Justice, “Hearings,” Department of Justice, last modified June 4, 2020, <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

³⁵ Vanita Gupta, “Comments on the Work of the Presidential Commission on Law Enforcement and the Administration of Justice,” *The Leadership Conference on Civil & Human Rights*, April 30, 2020, <https://civilrights.org/resource/comments-on-the-work-of-the-presidential-commission-on-law-enforcement-and-the-administration-of-justice/>.