



WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

March 30, 2021

Hon. Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Routine Usage Exception to Allow for Implementation of Universal Enfranchisement and Abolition of Prison Gerrymandering

Dear Attorney General Garland,

We write to urge you to adopt a new routine use exception under the Privacy Act that would enable the Federal Bureau of Prisons (BOP) to share the data necessary to allow states and localities to implement two pro-democracy reforms: enacting universal enfranchisement and abolishing prison gerrymandering. These crucial efforts seek to safeguard the fundamental rights of people incarcerated within the BOP by providing them with representation and the right to vote.

The Department of Justice (DOJ) should act swiftly to enable the BOP to share this data with state, local, tribal, and territorial governments and community groups before the 2021 redistricting cycle. Currently, the BOP has interpreted the Privacy Act to bar it from sharing population data with jurisdictions seeking to abolish prison gerrymandering or adopt universal enfranchisement, including for those serving prison sentences within the BOP. This has seriously hindered jurisdictions' efforts to implement these crucial reforms. As this letter explains, there is a simple, low-cost fix that would remedy this problem: DOJ can adopt a new routine use exception under the Privacy Act to allow the BOP to share this data.

DOJ must act quickly to enable the BOP to facilitate, rather than impede, these state and local reforms for the 2021 redistricting cycle. As organizations deeply committed to democracy reform—and particularly equity in democracy access for historically disenfranchised justice-involved populations—we urge you to take action now.

I. Background

Jurisdictions that have embraced universal enfranchisement or abolished prison gerrymandering require data on the BOP's incarcerated population in order to fully implement their reforms. For example, Washington D.C.'s universal enfranchisement law requires its Board

of Elections to send ballots automatically to all D.C. voters housed in the BOP;¹ because the BOP has denied D.C. access to population data showing who within the BOP is a D.C. resident and where those residents are located within the BOP, D.C. cannot execute any targeted outreach, voter registration, or voting assistance efforts to voters in the BOP facilities. The same is true for Maine and Vermont, both states that do not disenfranchise citizens for felony convictions.

Jurisdictions that have abolished prison gerrymandering also require data from the BOP in order to fully carry out their laws. The nine states and more than 200 jurisdictions that seek to count incarcerated people at their pre-incarceration residences for the purposes of redistricting need population data about the BOP prisoners if they are to include these individuals in their adjusted apportionment data. However, the BOP has historically refused to provide this data—despite repeated efforts from Maryland, one of the first states to end the practice of prison gerrymandering.²

The information these jurisdictions need to fully implement universal enfranchisement and end prison gerrymandering is currently stored in the Inmate Central Records System, JUSTICE/BOP—005, 84 Fed. Reg. 19808, and can only be shared pursuant to a “routine use” exception noticed in the Federal Register. 5 U.S.C. § 552a (b)(3). The BOP has indicated that it does not believe any of the existing routine usage exceptions apply here. 84 Fed. Reg. 19808.

II. DOJ Can Address this Problem by Creating a New Election Administration Routine Use for the BOP’s Inmate Central Records System.

DOJ can address this problem by creating a new routine use exception to allow state, local, tribal, and territorial officials and community groups to access the information stored in the BOP’s Inmate Central Records System for the purpose of facilitating voting, registering voters, administering elections, or otherwise implementing election laws.

Under the Privacy Act, “‘routine use’ means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.” 5 U.S.C. § 552a(7). The purpose of the BOP’s Inmate Central Records System is to “assist[] the Attorney General and the Bureau of Prisons in meeting statutory responsibilities for the safekeeping, care, and custody of incarcerated persons” and to “serve[] as the primary record system on these individuals[.]” 84 Fed. Reg. 19808. Those statutory responsibilities include “provid[ing] for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise,” 18 U.S.C. § 4042(a)(2), and

¹ 67 D.C. Reg. 13867 (requiring a process to mail all necessary election materials to DC residents in Bureau of Prison facilities).

² Prison Policy Initiative, *Prison Gerrymandering Project: Progress Towards Ending Prison Gerrymandering* (2021), <https://www.prisonersofthecensus.org> (tracking the number of jurisdictions that have ended the practice of prison gerrymandering); Erika Wood, *Implementing Reform: How Maryland and New York Ended Prison Gerrymandering*, Demos (2014), <https://www.demos.org/policy-briefs/implementing-reform-how-maryland-new-york-ended-prison-gerrymandering> (noting that, although Maryland requested population data from the BOP, “BOP would not release the information, citing the Privacy Act of 1974” even after two appeals by the state).

“provid[ing] technical assistance to State, tribal, and local governments in the improvement of their correctional systems,” *id.* § 4042(a)(4).³

The BOP has interpreted this purpose broadly to encompass numerous routine use exceptions for providing data to state and local authorities in order to benefit confined individuals, including to determine “eligibility of these [individuals] for unemployment compensation” and “eligibility of an individual for a license, permit, or similar authorization.” 84 Fed. Reg. 19810.

A routine use exception that enables states and localities to collaborate with the BOP and DOJ to enfranchise and protect the democratic rights of the BOP prisoners is compatible with the purpose of the BOP’s Inmate Central Records System. Specifically, allowing for such collaboration will assist the BOP and the Attorney General in “provid[ing] for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise.” 18 U.S.C. § 4042(a)(2). When the State deprives a person of their liberty, it creates a “special relationship” that imposes a duty of care on the State.⁴ As part of that obligation, the government is obliged to safeguard those who are incarcerated from “deprivations of liberty which are not among those generally authorized by his confinement,” including deprivations of fundamental rights.⁵ Thus, enabling access to the right to vote—a fundamental constitutional right—is certainly consistent with the BOP and Attorney General’s obligation to provide for the care of the BOP’s population. Likewise, ensuring the right to representation for the BOP’s population by enabling representation at their home addresses also fits well within the BOP’s mandate.

Additionally, sharing data with states and localities is in line with the Attorney General and the BOP’s statutory duty to “provide technical assistance to State, tribal, and local governments in the improvement of their correctional systems.” 18 U.S.C. § 4042(a)(4). States and localities that have decided to end prison gerrymandering for correctional systems in their jurisdiction require the BOP’s assistance to count incarcerated individuals at their home addresses. Likewise, jurisdictions that have embraced universal enfranchisement require the BOP’s assistance to determine who within the BOP is a resident of the jurisdiction and where those residents are located within the BOP, in order to implement voter assistance programs. Thus, creating a routine use exception that enables the BOP and DOJ to assist states and localities in implementing these pro-democracy reforms related to correctional systems in their jurisdictions is in line with the purpose of BOP’s Inmate Central Records System.

Further, allowing data sharing with states, localities, and community groups will assist the Attorney General and the BOP in living up to their new mandates—imposed by Executive Order 14019—to ensure eligible incarcerated voters within the BOP and leaving the BOP are able to register to vote and cast ballots. Exec. Order No.14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021).

³ See 84 Fed. Reg. 19809 (citing 18 U.S.C. § 4042, *inter alia*, as the legal source of authority for maintenance of the system).

⁴ *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989); see also *id.* at 199-200 (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility [for his care].”).

⁵ *Id.* at 200 n.8; Dana Paikowsky, *Jails As Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 869 (2019) (describing the substantive due process obligations that require the state to provide ballot access to incarcerated voters).

Finally, the Attorney General and the BOP have a statutory mandate to provide education and community resources as reentry support. 18 U.S.C. § 4042(a)(7). Studies show that disenfranchisement *undermines* rehabilitation and hinders re-entry,⁶ while restoring the right to vote *improves* individuals' connection to and engagement with their communities while incarcerated, as well as their transition back into society post-release.⁷

This routine usage exception would also be similar in-kind to many that are already listed in the Federal Register, as noted above. Existing routing usage exceptions allow the BOP to share information from the Inmate Central Records System with, for example:

(d) . . . [To] federal, state, and local licensing agencies or associations which require information concerning the suitability or eligibility of an individual for a license, permit, or similar authorization; . . .

(g) To state agencies and authorities, [] to review eligibility of these inmates for unemployment compensation; . . .

(h) To the Social Security Administration (SSA), [] for the purpose of matching the data against SSA records to enable the SSA to determine the eligibility of Bureau inmates to receive benefits under the Social Security Act . . .

(i) To the United States Department of Veterans Affairs (VA), for the purpose of matching the records against VA records to determine the eligibility or potential eligibility of Bureau inmates to receive veterans' benefits and/or services; . . .

(j) To the Federal Aviation Administration (FAA), [] for the purpose of matching the data against FAA records to determine the eligibility of Bureau inmates to hold and obtain airmen certification and qualification; . . .

(t) To federal, state or community health care agencies and professionals, including physicians, psychiatrists, psychologists, and state and federal medical facility personnel, who are providing treatment for a pre-existing condition to former federal inmates, and to federal, state, or local health care agencies and professionals for the purpose of securing medical or mental health after-care for current federal inmates; . . .

(x) To the Department of Treasury for the purpose of matching federal records on behalf of federal agencies, to determine the eligibility of or validate the entitlement of Bureau inmates to receive federal benefits pursuant to applicable federal law.

⁶ See, e.g., Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407 (2012); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205 (2004).

⁷ See, e.g., Civic Nebraska, *Recidivism & Voting Rights, Case Study: Florida* (Jan. 30, 2019), <https://www.civicnebraska.org/wp-content/uploads/2019/02/2019-Florida-recidivism-case-study.pdf>; Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government* (Oct. 25, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272694.

84 Fed. Reg. 19808. An election administration routine use exception would similarly allow the BOP to enlist the help of state and local allies to deliver crucial services to incarcerated people and ensure they are included in our democracy.

Establishing an election administration routine use would also be straightforward. In order to create a routine use for information stored in a given system of records, the relevant agency must publish notice of “each routine use of the records contained in the system, including the categories of users and the purpose of such use.” 5 U.S.C. § 552a(e)(4)(D). Agencies may modify routine uses by, “at least 30 days prior to publication . . . publish[ing] in the Federal Register notice of any new use or intended use of the information in the system, and provid[ing] an opportunity for interested persons to submit written data, views, or arguments to the agency.” 5 U.S.C. § 552a(11).

Given the increasing public support for repealing or reforming felony disenfranchisement laws⁸ and ending prison gerrymandering,⁹ we believe a reform that would allow the federal government to cooperate with states enacting these measures would receive significant popular support.

III. DOJ Should Act on this Opportunity Now, Before the 2021 Redistricting Cycle.

The time to make this change is now. In 2021, many states and the federal government will enact structural changes that will directly impact the democratic rights of people incarcerated in the BOP for years to come. At least nine states and more than 200 jurisdictions will move forward with their redistricting processes without being able to count federally incarcerated citizens as residents of their home communities, locking in these malapportioned districts for at least a decade. Washington D.C.’s universal enfranchisement measure, which grants the right to vote to 3,200 District of Columbia citizens incarcerated in the BOP, will take permanent legal effect for the first

⁸ See Will Wilder, *Progress on Restoring Voting Rights*, Brennan Center for Justice (Feb. 25, 2021) (discussing the “growing national momentum on voting rights restoration”) <https://www.brennancenter.org/our-work/analysis-opinion/progress-restoring-voting-rights>. Also, in a 2018 poll conducted by HuffPost/YouGov, for example, 63% of adults reported that they support restoring the vote to individuals with felony convictions who have completed their sentences, while only 20% were opposed. Restoration of Voting Rights, HuffPost & YouGov (Mar. 16-18, 2018), <http://big.assets.huffingtonpost.com/tabsHPRestorationofvotingrights20180316.pdf>.

⁹ See Prison Policy Initiative, *Prison Gerrymandering Project: Progress Towards Ending Prison Gerrymandering* (2021), <https://www.prisonersofthecensus.org>. Since 2010, Maryland, California, Colorado, Delaware, Nevada, New Jersey, New York, Virginia, and Washington State have adopted laws that eliminate prison gerrymandering. *Id.* Other states, such as Michigan and Tennessee, now prohibit or discourage local governments from engaging in prison gerrymandering. *Id.* And hundreds of county and municipal governments across the country have also rejected prison gerrymandering. *Local Governments that Avoid Prison-Based Gerrymandering*, Prison Policy Initiative (Jan. 7, 2019), <https://www.prisonersofthecensus.org/local/>. Recently, over 99% of the comments from the public on the 2020 Census (77,863 out of 77,887) also supported counting prisoners at their last known residence. Final 2020 Census Residence Criteria and Residence Situations, 85 Fed. Reg. 5,526 (Feb. 8, 2018), <https://www.federalregister.gov/documents/2018/02/08/2018-02370/final-2020-census-residence-criteria-and-residence-situations>.

time. And, finally, in the next 200 days, the BOP will begin to assess the ways in which it can better promote voter registration, voter education, and voting access for incarcerated citizens and those being released, and establish policies and procedures that will govern how voting and elections are facilitated in the BOP moving forward. Exec. Order No.14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021).

Allowing BOP to share its population data with election officials and others will, thus, not only ensure that state and local jurisdictions will be able to fully implement their own pro-democracy reforms; it will also equip the BOP with the information it needs to guide its own internal reform efforts. By working with jurisdictions that are already engaging in their own independent voter outreach efforts, the BOP may learn it can work with states and localities to expand enfranchisement as Executive Order 14019 directs—perhaps by improving the BOP’s database, collecting new information, or storing its data in a more accessible way. But, without the possibility of data sharing, this kind of productive collaboration will remain out of reach.

We appreciate your consideration of this important issue and look forward to continuing to work with DOJ and the administration to continue to push for the inclusion of justice-involved citizens in our democracy. If you have any questions or concerns, please do not hesitate to reach out to Dana Paikowsky at dpaikowsky@campaignlegalcenter.org or 480-648-7705 for more information.

Sincerely,

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