



June 16, 2021

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

Director Donald W. Washington, U.S. Marshals Service
U.S. Marshals Headquarters
1215 S Clark Street
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Dear Attorney General Garland and Director Washington:

On March 7, 2021, President Biden issued an Executive Order on Promoting Access to Voting, directing federal agencies, by September 23, 2021, to provide plans regarding how they will promote and facilitate the right to vote. Exec. Order No. 14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021) (“EO 14019”). As we reach the halfway point toward that deadline, the Campaign Legal Center (“CLC”) writes to assist the Department of Justice and the U.S. Marshals Service in fulfilling that mandate.

CLC is a non-partisan, non-profit organization dedicated to supporting and advancing American democracy through the practice of law. CLC has developed a particular expertise in identifying and removing barriers to the ballot for justice-involved voters, including by working directly with jurisdictions across the country to make democracy accessible to eligible incarcerated voters. Our Restore Your Vote also program helps restore voting rights to people with past convictions by providing direct rights restoration services and empowering community leaders to understand and monitor implementation of rights restoration laws.

The aim of EO 14019 is to ensure that federal agencies leverage their power, direct their programming, and adopt positions to promote and support civic engagement. EO 14019 (1). Within this broad mandate, there are two provisions that directly impact the Marshals Service. First, EO 14019 requires that the Attorney General create policies and procedures to ensure the Marshals Service “includes language in intergovernmental agreements and jail contracts to require the jails to provide educational materials related to voter registration and voting, and to facilitate voting

by mail, to the extent practicable and appropriate.” *Id.* (9)(b). Second, section 3 of the Executive Order requires all federal agencies—including the Marshals Service—to engage in a self-evaluation to better understand how they can expand voter registration and voting opportunities, *id.* (3)(a), and, within 200 days, publish a strategic plan outlining how they will actually do so, *id.* (3)(b).

EO 14019, along with the Justice Department initiative announced by the Attorney General, creates an important opportunity for the Marshals Service to provide national leadership on a long-overlooked democracy issue: jail-based disenfranchisement. To that end, this letter first will offer general background on the problem of jail-based disenfranchisement to help your agency understand the barriers to the ballot box that incarcerated and justice-involved voters face. Then, the letter will outline an analytical framework to assist you in identifying best practices for facilitating voting and elections in correctional settings. Finally, the letter will offer specific suggestions for the Marshals Service to consider as it moves forward implementing the mandates of EO 14019.

In particular, we believe the Marshals Service should consider:

- Requiring that local jails address the 6 factors discussed below for facilitating elections and voting in correctional settings, in their jail policies, and in jail contracts;
- Promulgating guidance and best practices to assist jails in facilitating voting and elections for incarcerated voters; and
- Collaborating with partners and advocates to drive innovation and further efforts to support the enfranchisement of incarcerated eligible voters.

The U.S. Marshals Service in particular is uniquely positioned to prompt large-scale reform in this space. Most jails are decentralized rather than run by a state or federal agency, which means advocates often must go jail-to-jail, working for incremental progress one local institution at a time. Because the U.S. Marshals Service contracts with jails all across the country, though, it can leverage its position to prompt national reform and innovation in this space.

We appreciate your time and attention to this important issue, and we hope you find this letter helpful. Please do not hesitate to reach out to us if you have any questions or if could be of any further help as you move forward implementing EO 14019.

I. Jail-Based Disenfranchisement

The majority of the nearly 700,000 people incarcerated in jails in the United States are eligible to vote. This is because jail populations are largely comprised of people being held pretrial—which never impacts voter eligibility—or for low-level misdemeanor convictions—which only impacts voter eligibility in a small handful of states. In 1974, the Supreme Court affirmed this right in *O’Brien v. Skinner*, when it found that the state could not deprive otherwise eligible voters of their right to vote simply because they are incarcerated. 414 U.S. 524, 531 (1974).

Although many incarcerated voters are eligible to vote, few can exercise that right because the realities of incarceration make doing so difficult or, in some circumstances, impossible. This is known as jail-based disenfranchisement¹; the reasons for it are many and important to understand in order to address the problem.

First, many jailed voters do not know that they retain their right to vote. While many justice-involved voters know that contact with the criminal justice system can impact voter eligibility, they do not know exactly how felony disenfranchisement laws do (or do not) apply to them.² Ascertaining eligibility can also be more complicated for incarcerated people with previous convictions, who may be unable to obtain information about their criminal record or the additional paperwork required to understand the law and register to vote. Voters can also feel at high risk in this circumstance. Because voting while ineligible is illegal, incarcerated voters who must navigate this maze behind jail walls may risk criminal consequences if they make mistakes.

Second, election and corrections officials often do not realize that incarcerated individuals retain their voting rights.³ Jailed voters must rely on these individuals to provide them with the information, resources, and assistance they need in order to cast their ballots. If these institutional actors are misinformed, they can make mistakes or, worse, refuse to assist an incarcerated voter, leading to that voter's disenfranchisement.⁴

Finally, even if incarcerated voters and institutional actors know incarcerated voters can vote, casting a ballot while incarcerated is enormously difficult. Jail walls are built to restrict access to information and visitation, to deprive individuals of their autonomy, and to separate people from the outside community. Election infrastructure is not designed to overcome these barriers. For a person in jail, accessing even the most basic things one might need in order to request a ballot—a pen, an envelope, the request form, information about where and how to submit that form—can be time-consuming and costly. Delay prone jail-mail systems make it challenging to timely submit voter registrations, ballot request forms, and absentee ballots, and few states provide any means of voting to people who are incarcerated after the state's absentee deadline passes. Officials can deny requests and spread misinformation, and strict ID laws as well as restrictions on third-party voter assistance can complicate the task even further.

¹ 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 (2019).

² Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 Mo. L. Rev. 1037, 1040 (2019).

³ Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, ACLU and Brennan Center for Justice (2008); Julia Rentsch, *Advocates Push to Enfranchise Jailed Colorado Voters*, Reporter-Herald (Aug. 25, 2018), http://www.reporterherald.com/news/election/ci_32095057/advocates-push-enfranchise-jailed-colorado-voters,

⁴ *Lewis v. San Mateo County*, No. C 96-4168 FMS, 1996 WL 708594, at *1 (N.D. Cal. Dec. 5, 1996) (describing the case of a man who was disenfranchised because a jail official failed to provide him with election materials).

In most jurisdictions, incarcerated voters have no support and no safety net. Unsurprisingly, the participation rate in most jails is close to 0%.⁵ Because people of color and low-income people are disproportionately jailed, they are also disproportionately impacted by jail-based disenfranchisement. In many states, too, voters can be prevented from voting only because they cannot pay cash bail. The assessed bail thus functions as poll tax.

Jail-based disenfranchisement is not only widespread, but predictable. States and localities do not stop arresting, arraigning, and incarcerating people in the lead up to elections. Thus, every Election Day, eligible voters *will be incarcerated* in pretrial detention and for misdemeanor convictions. Even though states and localities can and should be prepared to serve this population of voters, they almost uniformly fail to make election infrastructure accessible to the eligible voters they incarcerate. It is time for the government to step up and begin addressing this solvable problem.

II. Addressing the Problem: Best Practices for Jail Policy

After working with jurisdictions across the country to address the problem of jail-based disenfranchisement, we have seen firsthand that there is no one-size-fits-all solution. Every state (and even locality) may have different election laws, policies, and procedures governing voter registration and voting. Every jail, too, will have its own individualized needs and challenges. While erecting a polling place inside a jail might make sense for a large urban jail, for example, this reform may be unnecessary and wasteful for a smaller, more rural jail environment.

No matter what approach a jurisdiction takes to solving these problems, however, these complicated challenges require nothing less than comprehensive solutions. To that end, at a minimum, every jurisdiction should have a jail voting policy and infrastructure that provides for six things:

- i. Voter education: This requires jails consider how to make information about voting and elections accessible to incarcerated people. Jurisdictions may use more than one kind of outreach, including engaging in individualized outreach (which is a best practice), providing materials at intake and/or upon release, hanging posters, making announcements, canvassing the jail, sending out notices, and hosting civic engagement classes or events.
- ii. Voter registration: This requires jails consider how to provide jailed voters with meaningful opportunities to register to vote. Similar to above, these efforts could require different kinds of outreach and support. While some of these efforts can be more passive (*i.e.*, distributing registration forms), jails

⁵ *Unlock the Vote Arizona: Procedures for Jail-based Voting by County, July 2020*, The Arizona Coalition to End Jail-based Disenfranchisement (July 2020) <https://www.votefromjail.org/wp-content/uploads/2020/07/July-JBV-Report.pdf>; *Ballots for All: Ensuring Eligible Wisconsin Voters in Jail Have Equal Access to Voting*, ACLU of Wisconsin and All Voting is Local (July 2020) https://allvotingislocal.org/wp-content/uploads/2020/07/ACLU-AVL-2020_Jail-Voting-Access-Report-FINAL-07012020.pdf.

- can provide more affirmative assistance, including identifying those who are eligible to register, informing them about their eligibility, and working with them to submit registration paperwork.
- iii. Absentee voting: This requires jails consider how to provide jailed voters with meaningful opportunities to vote absentee. In addition to requiring much of the same outreach as described above, jails should also consider means of securing the privacy of the ballot, ensuring that the jail's mail policies (and jail bureaucracy) do not unduly delay voting, and making available the necessary instrumentalities of voting (pens, pencils, stamps, IDs, etc.).
 - iv. Election Day voting and/or voting for late-jailed voters: While the majority of individuals who vote from jail do so by absentee ballot, some voters will be incarcerated after the absentee ballot request deadline has passed. Jails should work with local election officials to ensure these late-jailed voters have access to an alternative means of casting their ballots. This could mean making the jail a vote center or polling place, or providing access using emergency voting or voting via agent.
 - v. Collaboration: The most successful jail voting programs rely on collaboration. Jails should be in communication with local election officials and community groups to coordinate their civic engagement activities. Election officials and community groups can also aid jails in doing this work, for example by coming into the jail to run programming, assist in the facilitation of voting, provide the jail with training, and create voter education materials for dissemination by the jail.
 - vi. Accountability: In order to ensure that a jail's policies and practices actually do provide jailed voters with access to the franchise, jails must commit to transparency and accountability on these issues. Specifically, jails should publish their jail voting policies and practices both internally and externally (*i.e.*, in jail handbooks and on jail websites) and track and publish data on civic participation in the jail. Jails also should designate at least one a staff person who will be accountable for coordinating this programing and who can act as a liaison between the jail, voters, election officials, and the community.

Facilitating elections in jails can and should be a routine part of jail management. Because this has not been the norm in America thus far, our challenge is to find effective ways to merge elections and corrections infrastructure. This project will take time, creativity, and innovation. By addressing each of these six criteria in their jail voting policies, though, jails can begin this work with a strong foundation that will safeguard the rights of incarcerated voters.

Encouraging and facilitating civic participation in this setting can have long term benefits. Formerly incarcerated individuals who vote are less likely to recidivate.⁶ On the other hand, however, even short terms of incarceration have been shown to lead

⁶ 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).

to decreased future civic participation.⁷ Jails already incarcerate the people who are most often left out of our democracy, specifically people of color, low-income individuals, people with disabilities—all populations that have long been targeted by vote suppression. In America, the two of the factors that correlate most with regular civic participation are education and income.⁸ In a word, individuals who are most likely to be incarcerated in jails across the country are the same ones who are most likely to feel (and be) excluded from the democratic process.

By supporting civic engagement and civic learning inside their jails, corrections officials can begin to disrupt this damaging cycle of disempowerment. They can think about how to encourage and support community engagement not only for those who are currently incarcerated, but also for those who are being released. They can develop programming to assist individuals who need IDs (not only to vote, but to access benefits and community support), to inform people about rights restoration upon their release or after convictions, and to build knowledge about the voting process. In this way, supporting incarcerated individuals in exercising their constitutional rights can contribute to our much longer-term project of building a more robust and inclusive democracy.

III. Recommendations

While the barriers to the ballot box that incarcerated voter face are great, they can be overcome, especially if correctional officials take an active role in providing incarcerated voters with the support and resources they need to register to vote and vote.

After the passage of EO 14019, the U.S. Marshals Office has a clear mandate to prompt these powerful officials to do just that. Pursuant to that mandate, we recommend the U.S. Marshals Office take the following three actions:

1. Require in new contracts that jails create jail voting policies and procedures that include each of the six factors outlined above;
2. Create and disseminate guidance and best practices to assist jails in facilitating voting and elections for incarcerated voters; and
3. Collaborate with partners and advocates to drive innovation and further efforts to support the enfranchisement of incarcerated eligible voters.

As a federal law enforcement agency, the U.S. Marshals Office will serve as an example to state and local agencies in how it addresses this often-overlooked civil rights issue. Because correctional officials exercise direct control over the activities, movements, and information available to incarcerated voters, they have an outsized

⁷ Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. (2019), <https://www.cambridge.org/core/journals/american-political-science-review/article/misdemeanor-disenfranchisement-the-demobilizing-effects-of-brief-jail-spells-on-potential-voters/2FEDEE197EA55768312586DA2FEFB8F9>.

⁸ *Voter Turnout*, MIT Election + Data Science Lab, Massachusetts Institute of Technology, <https://electionlab.mit.edu/research/voter-turnout>.

ability to make a real difference in this space. Your involvement and leadership, then, will be instrumental to this nascent effort to removing the barriers to the ballot box that prevent incarcerated people from exercising their right to vote.

IV. Conclusion

Our democracy works best when all eligible voters can participate. By impeding access to the ballot box for incarcerated eligible voters, jail-based disenfranchisement represents a profound democratic failure. EO 14019, however, has created an important opportunity for the U.S. Marshals—and other federal law enforcement agencies—to serve as leaders in remedying this longstanding problem.

As an organization that is deeply involved in efforts to address jail-based disenfranchisement across the country, we have worked hard to understand the challenges that come with facilitating democracy in correctional settings, and we would welcome the opportunity to work with you to implement the terms of EO 14019 or in any future work your agency does on this topic. If you have any questions, please do not hesitate to reach out to Dana Paikowsky by email at dpaikowsky@campaignlegalcenter.org or by phone 480-648-7705 or Blair Bowie at bbowie@campaignlegalcenter.org. Thank you for your time and consideration of this matter.

Sincerely,

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