U.S. House of Representatives
Committee on the Judiciary

H.R. 1943 - Stop AIDS in Prison Act of 2007

Testimony of
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Thank you for this opportunity to provide testimony on H.R. 1943, the "Stop AIDS in Prison Act 0f 2007." In particular, I would like to thank Representative Maxine Waters for her outstanding leadership on this issue, as well as the important roles played by Congressman Conyers, Congressman Smith, Congressman Scott, Congressman Forbes, Congresswoman Lee, and Congresswoman Christensen as co-sponsors.

My name is Philip Fornaci. I am Director of the D.C. Prisoners' Project, a section of the Washington Lawyers' Committee for Civil Rights & Urban Affairs. Our organization represents D.C. prisoners held both locally in D.C. jail facilities as well as those held in the federal Bureau of Prisons (BOP), where those convicted of felonies in D.C. are sent. We advocate for appropriate medical care, protection from violence, and access to basic constitutional rights.

Although D.C. prisoners are a small percentage of the overall BOP population, more than 7,000 D.C. prisoners are spread throughout 99 separate BOP institutions, and our organization receives correspondence from individuals living in as many as 70 different facilities every year. Because we focus heavily on health care issues in the BOP, we have a great deal of experience with regard to medical care at a wide range of facilities. Additionally, because D.C. prisoners have a higher-than-average prevalence of HIV infection than other prisoners in the BOP, we have a broad perspective on issues facing people with HIV in these facilities. I appreciate the opportunity to comment on this legislation.

The most significant aspect of the Stop AIDS in Prison Act is simply that it provides official recognition of the AIDS epidemic within the federal Bureau of Prisons (BOP). Because most prisoners in the BOP will eventually leave prison, BOP policies and procedures can have a strong impact on public health efforts to limit the spread of HIV outside of prison. Effective AIDS education programs, policies that encourage and support responsible behavior, and comprehensive medical treatment for people in BOP custody are therefore extremely important for all Americans.

HIV Testing

The centerpiece of the Stop AIDS in Prison Act is its mandate for routine HIV testing in all BOP facilities in the context of pre- and post-test counseling. I commend the bill's sponsors for recognizing that "routine HIV testing" requires provisions to allow people to "opt out" of HIV testing if they choose to do so, while also giving prisoners an opportunity to receive this important information about their health.

The opt-out provision is particularly important because, consistent with the goals of the legislation, it does not simply coerce prisoners into learning their HIV status. It recognizes that prisoners need to choose to be tested for the goals of the legislation to be achieved. Effective HIV prevention requires HIV education, along with testing, so that people can change their behaviors. The prisoner must enter the process voluntarily, be willing to learn about how to protect himself and others from infection, and use that information when he is released. A more coercive approach that does not allow a prisoner to decline testing is unlikely to be effective in achieving the educational purposes behind testing. HIV testing on its own does nothing to prevent the spread of HIV. What happens after testing is crucial.

Recommendation: Written Informed Consent. To preserve the viability of the opt-out provision, and to ensure that all prisoners recognize that they have the ability to refuse testing, it is extremely important that the bill be amended to include provisions for written informed consent. Currently, there are no controls in place that will ensure that prisoners have free choice to exercise their opt-out right, and there is significant room for coercion. Remedying this need not be complicated. In order to ensure that prisoners are aware that they have the right to be tested, and the right to refuse to be tested, the BOP can design a simple form to that effect, which would remain in the prisoner's medical file. It would also ensure that, rather than simply telling prisoners that they have a free choice around testing, there are actual procedures in place documenting a prisoner's exercise of that choice.

HIV Treatment

Another important aspect of the bill is the requirement that prisoners testing positive for HIV receive comprehensive HIV treatment. Although the BOP is required to provide constitutionally-mandated levels of medical care, it is not always delivered in every BOP facility. We frequently receive reports from men and women who have been denied consistent HIV treatment while in the BOP, with frequent treatment interruptions. Some BOP facilities tend to provide only the most minimal treatment for HIV, changing

medications in favor of the least-expensive treatments, regardless of their effectiveness. (This is particularly a problem in privately-owned facilities that contract with the BOP.) Other facilities have chaotic health care delivery systems that result in prisoners missing treatments or receiving the wrong medicines.

It is important to recognize that treatment for HIV also requires that facilities provide adequate levels of general health care. People with HIV often also have hypertension, diabetes, or hepatitis. “Comprehensive medical treatment to inmates who are living with HIV/AIDS” (section 2(b)(1)) must also include treatment for non-HIV conditions for people who also have HIV.

It is my hope that, with enactment of this legislation, the BOP will take this legislative mandate seriously, effectively monitoring its facilities to ensure that every prisoner’s serious medical needs are being met. At this point, no such effective monitoring process is in place.

Confidentiality Concerns

The bill contains language aimed at protecting the confidentiality of HIV-related medical information (section 3(7)), but this language is unfortunately inadequate for the important task at hand. Although stigma and prejudice associated with HIV infection have decreased to some extent in the broader society over the last twenty years, people with HIV still suffer from job and housing discrimination as a result of their HIV status. Despite many years of public education, huge segments of the U.S. population still retain false information about HIV and about the people who live with it. Unfortunately, HIV is not treated like other diseases.

Within the walls of any BOP prison, however, the situation is far worse. HIV is not treated like diabetes or hypertension. People with HIV in jails and prisons across the U.S. are isolated and singled out for violent treatment. Outmoded beliefs about how HIV transmission occurs, as well as false stereotypes about people infected with HIV, are commonplace. It becomes fodder for homophobic attacks and physical violence. Ignorance about HIV runs rampant not only among prisoners but among correctional and even medical staff as well. In the prison setting, where violence (including sexual assault) is ever-present, persons with HIV must keep their HIV status private for their own protection. Identifying as a diabetic or even someone with mental illness does not place people at risk of violence; identifying as HIV-positive may cost a prisoner his life.

One example may be instructive. Our organization represented a man who, for reasons that remain unknown, had apparently gotten into a dispute with a correctional officer. That officer posted the man’s HIV medical records on a bulletin board in a common area in the facility. As a result, our client was threatened repeatedly through anonymous notes and, when he was moved to another facility, the threats continued and his bed was burned. Although he survived, he lived the rest of his sentence in fear of further attacks, knowing that both staff and prisoners were potential assailants.

However, unlike in our case, where we were able to bring litigation under local law, the federal Prison Litigation Reform Act (PLRA) will prevent any BOP prisoner whose confidentiality has been breached from enforcing this provision of the bill. There is no way for a prisoner to enforce the confidentiality provisions of this bill, nor is there any way to recover damages for the terror, mental anguish, and threats that would result from a confidentiality breach.

Recommendation: Strengthen the confidentiality provisions of this bill. As in the case described here, corrections staff themselves sometimes use HIV information to manipulate and harass prisoners, just as some staff commonly use information about a prisoner’s sexual orientation or alleged status as a “snitch” to enforce a code of behavior. Simply educating staff about the importance of confidentiality will do little to deter such actions. In the context of this bill, where thousands of people with HIV will be identified, it is imperative that the BOP adopt strict procedures to protect prisoners potentially stigmatized by their HIV status. Specifically, enhanced confidentiality protections should include:

- A requirement that no non-medical staff have access to confidential prisoner medical information. There is no security-based reason why a corrections office would need to know any confidential medical information, whether HIV status, a mental illness diagnosis, or cancer.
- The guarantee of swift and certain consequences, including job dismissal, for staff who allow confidential medical information (including information about HIV status) to be released to another prisoner.
- Adequate staffing patterns and transparent institutional rules protecting prisoners against violence from other prisoners, regardless of the cause of the violence.
- Include under this bill an exemption from the PLRA’s physical injury and exhaustion of administrative remedies requirements to allow prisoners to file individual lawsuits to enforce this provision when corrections staff fail to protect their confidential medical information.

HIV Testing and Parole

The requirement that prisoners be tested prior to release is a useful opportunity, and probably the most

appropriate time for HIV testing. However, individuals may have their own reasons for not wanting to be tested while incarcerated and wish to exercise their opt-out rights.

A few years ago, our organization represented a woman whose parole was denied because parole authorities found out she was HIV-positive. They discovered this because the woman revealed this fact herself, citing as proof of her educational achievements that she had completed a course in "Dealing with Your HIV Diagnosis." The parole authorities, expressing a level of ignorance not uncommon in some parts of the broader community, decided that she would be a risk to the community. We had to file a *habeas corpus* petition to secure her release on parole, which was successful largely because the case generated some media attention.

There are many other reasons why prisoners may not want to be tested prior to release, both practical and psychological. Their rights to refuse should not be taken lightly.

Recommendation: Explicitly endorse the right to opt-out of testing prior to reentry. Although the bill refers back to the opt-out provision, that provision does not address issues like release to halfway house or other pre-release issues. Section 3(9) should also add language similar to: "However, the inmate's refusal shall not be considered a violation of prison rules, result in disciplinary action, *or affect program placement, including eligibility for halfway house placement*.

Thank you for this opportunity to provide comments on this important piece of legislation. I am available to answer any questions you may have.