



December 15, 2020

The Honorable Robert Wilkie
Secretary of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Dear Mr. Secretary:

We write as two members of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. We write to express our concerns regarding a recent announcement by the Department of Veterans Affairs.¹

On December 10, the Department announced its initial plans for the distribution of a COVID-19 vaccine.² The Department indicated that it would prioritize Black, Hispanic, Native American, and Asian veterans in this distribution because these “communities have been disproportionately affected by COVID-19.”³

We recognize that COVID-19 is particularly dangerous to people who fall within certain categories, including the aged and those with existing health problems. And we further acknowledge that it is both reasonable and prudent for the Department to prioritize many of our most susceptible fellow citizens. We are concerned, however, that your decision to distribute the vaccine in part based on race might create a constitutional equal protection problem.

Under the Constitution, a court would be obliged to apply “strict scrutiny” to any law or policy that treats individuals differently based on race, no matter how well meaning.⁴ That requires proponents of the law or policy to show that it fulfills a “compelling purpose” and that it is “narrowly tailored” to achieve that purpose.

“Strict scrutiny,” as the name implies, is intended to be a very tough standard. If, for example, differing rates of susceptibility to COVID-19 among racial groups can be largely accounted for through such things as differing rates of diabetes, coronary disease, or obesity, there is a substantial likelihood that the VA’s plan to prioritize some races over others would be vulnerable to legal challenge. Similarly, if factors like age, diabetic status, or geographic areas at which outbreaks are most serious are more significant than race and yet are not given full priority over race, that, too, could make the plan vulnerable.

¹ DEP’T OF VETERANS AFF., *VA Announces Initial Plans for COVID-19 Vaccine Distribution* (Dec. 10, 2020), <https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=5580>.

² *Id.*

³ *COVID-19 Vaccines at VA*, DEP’T OF VETERANS AFF. (Dec. 10, 2020), <https://www.va.gov/health-care/covid-19-vaccine/>.

⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).



UNITED STATES COMMISSION ON CIVIL RIGHTS

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We would be happy to discuss this further with you as you develop your plans. Our interest is in making sure the VA has a plan that will be successful.

Most respectfully,

A handwritten signature in black ink, appearing to read "Gail Heriot".

Gail Heriot
Commissioner

A handwritten signature in black ink, appearing to read "Peter Kirsanow".

Peter Kirsanow
Commissioner

Cc: The Honorable Pamela J. Powers
Acting Deputy Secretary
U.S. Department of Veterans Affairs

Dr. Richard A. Stone
Executive in Charge
Veterans Health Administration
U.S. Department of Veterans Affairs

The Honorable Michael J. Missal
Inspector General
U.S. Department of Veterans Affairs

Dr. José R. Romero
Chair
Advisory Committee on Immunization Practices
Centers for Disease Control and Prevention