

April 1, 2021

The Honorable Merrick B. Garland  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Cc: The Honorable Joseph R. Biden  
President of the United States  
The White House  
Washington, D.C. 20500

Dear Attorney General Garland:

The undersigned organizations urge you to rescind a legal memo issued by the Justice Department's Office of Legal Counsel (OLC) that would lead to the return of people serving their sentences on home confinement to federal prison. This memo, issued in the final days of the previous administration, would force the Bureau of Prisons (BOP) to send back to prison thousands of people currently safely completing their sentences at home. The memo is incorrect as a matter of law and would impose devastating human costs, as well as a negative impact on public safety.

At the onset of the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), to provide emergency assistance to states and individuals. To combat the virus's rapid spread through federal prisons, the law included a provision permitting the Attorney General to expand the amount of time a person can spend on home confinement, upon making a finding that COVID-19 materially affects the functioning of the BOP. Attorney General Barr made the finding on April 3, 2020. He directed the BOP to prioritize the use of home confinement and identify and transfer all individuals "deemed suitable candidates" to serve the remainder of their sentence at home under BOP supervision.<sup>1</sup> The BOP published criteria designed to identify only those individuals who could safely be returned to the community and began the process of selecting and transferring them.<sup>2</sup>

Typically, the BOP is authorized to transfer incarcerated individuals to home confinement only at the very end of their sentence.<sup>3</sup> Since last March, the BOP has safely transferred over 23,000 people to home confinement, with more than 7,500 currently on home confinement.<sup>4</sup> The decision to expand eligibility almost certainly saved lives and helped mitigate the spread of COVID-19 in federal prisons, while allowing individuals who pose low public safety risks to live law-abiding lives outside of prison.

On January 15, 2021, the OLC issued a memo opining that the BOP must re-incarcerate everyone on CARES Act home confinement at the end of the covered emergency period if they

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<sup>1</sup> Attorney General William P. Barr, Memorandum for Director of Bureau of Prisons (April 3, 2020).

<sup>2</sup> Hugh Hurwitz et al., Memorandum for Chief Executive Officers (April 22, 2020).

<sup>3</sup> See 18 U.S.C. § 3624 (c)(2).

<sup>4</sup> Dir. Carvajal estimated in Dec. 2020 that about 50-60% of those on home confinement at that time had been transferred pursuant to the CARES Act and would not otherwise have been transferred to home confinement. *Federal Bureau of Prisons and U.S. Marshals Service Oversight Hearing: House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security*, 116th Con. (2020) (Testimony of Michael Carvajal). <https://www.c-span.org/video/?506909-1/federal-bureau-prisons-us-marshals-service-oversight-hearing>

do not otherwise qualify for home confinement.<sup>5</sup> For those on home confinement, this memo came as a shock. No one had been told that they would have to return to prison, unless they violated the conditions of their confinement.

Those sent to home confinement as a result of the CARES Act were transferred only after meeting strict criteria, and they remain under significant supervision. Many of those transferred were selected due to their advanced age or medical vulnerabilities. Almost all have been reunited with children, spouses, and loved ones. Some have been home for nearly a year.

Following the OLC memo would exact an enormous human cost. Allowing the OLC memo to stand would be devastating for thousands of individuals who have re-established themselves in their communities and begun planning for the next steps of their lives. Children who have been told that their families were made whole again would see their parents forced back to prison. Moreover, the mere prospect of re-incarceration is profoundly destabilizing. It is interrupting the ability of returned citizens to plan their future, bond with their children, secure long-term employment, or do the many emotional and practical tasks necessary to ensuring their safe return to community life.

In addition to the mental devastation for families, following the memo would have a negative impact on public safety. At a recent hearing, BOP Director Carvajal said that only 21 people have violated the terms of their home confinement and just one has committed a new crime – out of over 23,000 transferred. Establishing community ties and deepening family connections are known to be significant positive factors for reducing recidivism. Disrupting that process would mean disrupting safe re-integration into society and damaging networks that are vital to improving public safety.

The memo is also unwarranted and unsupported by the law. The CARES Act neither requires nor permits the BOP to return individuals transferred to home confinement to prison absent a violation of their home confinement conditions. The CARES Act gives the BOP authority, during the emergency period, to lengthen the maximum amount of home confinement time. It limits when the BOP director can lengthen home confinement, but does not limit it by how much. The CARES Act does not speak to the program's duration. After the completion of the emergency period, the CARES Act returns transfer eligibility to its previous limitations, but it does not require those transferred to home confinement during the emergency period to return to prison. The Justice Department has the authority to rescind this memo, and should utilize it.

You have rightly acknowledged the toll of over-incarceration and the need to reduce the size of the federal prison population. Re-incarcerating thousands of individuals who are safely completing their sentences under home confinement while they reunite with their children, establish employment, and build ties to their community would undermine public safety and justice.

We urge you to direct the OLC to rescind the January 15 memo and allow those on home confinement to remain on home confinement.

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<sup>5</sup> Jennifer Mascott, Memorandum Opinion for General Counsel, Federal Bureau of Prisons, Home Confinement of Federal Prisoners After the COVID-19 Emergency (Jan. 15, 2021).

Sincerely,

FAMM

Justice Action Network

American Civil Liberties Union

Brennan Center for Justice at NYU School of Law

The Center for Community Transitions

Center for Disability Rights

Church of Scientology National Affairs Office

College and Community Fellowship

CURE (Citizens United for Rehabilitation of Errants)

DC Democratic Caucus for Returning Citizens

Doing The Most for You

Drug Policy Alliance

Due Process Institute

Federal Public and Community Defenders

Jewish Council for Public Affairs

The Leadership Conference on Civil and Human Rights

#LetMyPeopleGoNow! Campaign

National Association of Criminal Defense Lawyers

National Council of Churches of Christ in the USA (NCC)

Prison Families Anonymous

Prison Fellowship

Rebuilding Independence My Style

Release Aging People in Prison/RAPP

The Sentencing Project

StoptheDrugWar.org

The Taifa Group

Tzedek Association

Union for Reform Judaism

WCJA