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VIA ELECTRONIC MAIL & U.S. MAIL

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Dear Ms. Johnsen and Ms. Monaco:

We write with respect to the Office of Legal Counsel's January 15, 2021, memorandum entitled "Home Confinement of Federal Prisoners After the Covid-19 Emergency" (Memo).[1] During the last days of the Trump administration, the Memo concluded that federal prisoners who have been granted home confinement pursuant to emergency CARES Act authority must be returned to federal prison when the emergency surrounding the Covid-19 pandemic terminates. Based on currently reported numbers, the Memo's conclusion will require that somewhere between 2,000 and 3,800 prisoners—who were sent to home confinement after the Bureau of Prisons concluded they will not be a threat to public safety—will be recalled to prison when the emergency ends.[2] Many organizations, including some of ours, have called on President Biden to use his clemency power to commute the sentences of those individuals to avoid this logistically problematic and unfair result.[3]

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[1] Jennifer L. Mascott, *Home Confinement of Federal Prisoners After the Covid-19 Emergency,* "Memorandum Opinion for the General Counsel, Federal Bureau of Prisons" (Jan. 15, 2021), *available at* https://www.justice.gov/olc/file/1355886/download.

[2] Kristine Phillips, *ACLU, NAACP among those pressing Biden to grant clemency to inmates sent home during COVID-19*, USA Today (July 19, 2021), https://www.usatoday.com/story/news/politics/2021/07/19/biden-pressed-grant-clemency-inmates-sent-home-during-covid/7980882002/; Ken Hyle, *Response from BOP re compassionate release during Covid* at 5 (Apr. 16, 2021).

[3] *See, e.g.*, ACLU, Coalition Letter to President Biden on CARES Act Clemency (July 19, 2021), *available at* https://www.aclu.org/letter/coalition-letter-president-biden-cares-act-clemency.

We write separately to call to your attention to another way to address this pressing issue. In particular, OLC may reasonably determine that the Memo does not reflect the best (or even a permissible) reading of the relevant statutory language. Specifically, the Memo read into the CARES Act a new requirement to revoke home confinement—immediately, and without discretion, at the end of the emergency—that does not exist anywhere in that statutory text. Under a plain reading of the CARES Act, the authority of the Bureau of Prisons to grant and revoke home confinement is the same as it always was under the pre-existing statutory scheme, except that BOP was authorized to "lengthen" the period of time a person may serve on home confinement. Additionally, the Memo did not consider the affected prisoners' reliance interests, potentially triggering a wave of hundreds or thousands of challenges when and if BOP attempts to implement the Memo's instructions[4] and placing BOP in legal jeopardy under recent Supreme Court precedent.[5]

We have great respect for OLC's non-partisan stance and the office's general practice of stare decisis. Consistent with OLC policy, however, we encourage you to reassess the Memo because it is incorrect and will present serious practical obstacles to BOP and the U.S. Attorneys' Offices, not to mention the thousands of affected prisoners. We provide the analysis below on why we believe that OLC should reconsider the Memo.

I. Home Confinement and the Memo

A. BOP's Longstanding Home Confinement Authority

Under section 3624(c) of title 18, the Bureau of Prisons has authority to place federal prisoners with "lower risk levels and lower needs" on home confinement for "a *portion of the final months of [their] term*."[6] The statute directs that BOP "shall, to the extent practicable," place eligible prisoners on home confinement "for the maximum amount of time permitted" and that the eligibility period under the statute is generally no longer than six months.[7] BOP's home confinement authority is expressly intended to "afford th[e] prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community."[8]

BOP's long-held position is that it retains discretion under section 3624(c) to recall prisoners once they have been placed on home confinement.[9] In our experience, BOP has historically sought to recall prisoners who BOP believes to have violated the stated terms of their

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[4] *Cheek v. Warden of Fed. Med. Ctr*., 835 F. App'x 737, 739 (5th Cir. 2020) (prisoners may seek *habeas* relief related to home confinement decisions); *Galle v. Clark*, 346 F. Supp. 2d 1052, 1053 (N.D. Cal. 2004) (granting writ of *habeas corpus* because BOP attempted to modify an early release decision).

[5] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

[6] 18 U.S.C. § 3624(c)(1)–(2) (emphasis added).

[7] *Id*. § 3624(c)(2).

[8] *Id*. § 3624(c)(1).

[9] *E.g.*, Memo at 4.

home confinement. To our knowledge, the government has never interpreted section 3624(c) to *require* BOP to recall prisoners from home confinement.

B. The CARES Act and Home Confinement During the Covid-19 Pandemic Emergency

During the Covid-19 pandemic, home confinement was expanded to reduce the infection risk in prisons. The CARES Act included a provision authorizing BOP to expand the amount of time a person can spend on home confinement following a declaration of emergency by the President and a finding by the Attorney General:

> During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may *lengthen the maximum amount of tim*e for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, *as the Director determines appropriate*.[10]

The "'covered emergency period'" starts on "the date on which the President declared a national emergency under the National Emergencies Act with respect to the Coronavirus Disease 2019 (COVID-19)" and ends "on the date that is thirty days after the date on which the national emergency declaration terminates."[11] The CARES Act did not alter BOP's home confinement authority other than to lengthen the maximum period of time that BOP can place a prisoner on home confinement.

The President declared an emergency related to Covid-19 on March 13, 2020. That emergency remains in effect today. On March 26, 2020, even before the CARES Act was enacted, Attorney General Barr issued a memorandum ordering BOP to prioritize the use of its discretion to grant home confinement to eligible prisoners.[12] The memo included a list of factors BOP should consider, including an "assessment of the danger posed by the inmate to the community" and "[w]hether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety."

On March 27, 2020, the CARES Act was signed into law. On April 3, 2020, Attorney General Barr issued a second memorandum making the requisite finding under the CARES Act that the pandemic materially affects the functioning of BOP.[13] The April 3 memo characterized the CARES Act as "authoriz[ing] me to expand the cohort of inmates who can be considered for

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[10] Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Pub. L. No. 116-136, § 12003(a)(2), (b)(2), 134 Stat. 281, 515–16 (emphasis added).

[11] *Id*. § 12003(a)(2).

[12] The Att'y Gen., *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, Mar. 26, 2020 (Mar. Barr Memo), *available at* https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

[13] The Att'y Gen., *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, Apr. 3, 2020 (Apr. Barr Memo), *available at* https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

home release." The memo ordered BOP to immediately start reviewing the prisoners with Covid risk factors at certain facilities and to immediately process for transfer all prisoners that BOP deemed suitable for home confinement.

As a BOP official testified to Congress, BOP began aggressively screening prisoners to be placed on home confinement "for service of the *remainder* of their sentences,"[14] following the criteria in the March 26 memo to determine eligibility.[15] As of July 22, 2021, BOP's website reported that it had 7,250 inmates on home confinement.[16] While the exact number of people on home confinement who still have more than six months remaining on their sentence is unknown, estimates range from approximately 2,000 to up to 3,600 prisoners.[17]

C. The Memo

A week before President Biden took office, OLC issued a Memo opining that, once the Covid-19 emergency ends, BOP must re-incarcerate all prisoners who qualify for home confinement only as a result of the CARES Act.[18]

The Memo interprets the CARES Act to mean that BOP has authority to "place prisoners on home confinement" using CARES Act authority only during the emergency period, as declared by the President, and only when the Attorney General finds that the emergency conditions materially affect BOP's functioning.[19] The Memo goes on to infer from this that, once BOP no longer has authority to *place* prisoners on home confinement, it also loses authority to allow prisoners *previously* placed on home confinement to continue their home confinement term. The Memo supports this conclusion by referencing other provisions of the CARES Act, which it states provide "temporary emergency relief," and with the assumption that the reason Congress extended BOP's authority to thirty days beyond the Covid emergency period must have been to allow BOP time to re-imprison people.[20] Finally, the Memo argues that a home

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[14] Dep't of Just., Statement of Michael D. Carvajal, Director, and Dr. Jeffrey Allen, Medical Director, Director, Federal Bureau of Prisons Before the U.S. Senate Committee on the Judiciary (Carvajal and Allen Statement) at 6 (June 2, 2020), https://www.judiciary.senate.gov/imo/media/doc/Carvajal-Allen%20Joint%20Testimony.pdf (emphasis added).

[15] *Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic*, Fed. Bureau of Prisons, https://www.bop.gov/coronavirus/faq.jsp (last visited July 30, 2021).

[16] *Id*.

[17] As of April 16, 2021, BOP reported that 3,814 people then on home confinement originally became eligible under the CARES Act. *See* Hyle, *supra* note 2. More recent news reports estimate that approximately 2,000 people are still at risk of being recalled from home confinement to federal prison. *See* Phillips, *supra* note 2.

[18] *See* Memo at 1.

[19] *Id*. at 1.

[20] *Id*. at 5–6.

confinement placement decision is not a discrete action requiring authority only at the time it is made, but an "ongoing action" requiring "continuing legal authority."[21] According to the Memo, this is because BOP and the probation system "have a continuing relationship with prisoners in prerelease custody and home confinement." The Memo does not consider any reliance interests or due process rights that those on home confinement may have but concludes that BOP is "required to recall" those individuals who have been released solely under CARES Act authority.

Generally speaking, the Memo's requirement would apply to anyone on home confinement who has more than six months remaining on their sentence when the emergency period ends. The Memo leaves no discretion for BOP to continue home confinement for these individuals—individuals whom BOP has already determined bear little risk to the community—and who are presumably in compliance with the terms of their release.

II. The Statutory Interpretation in the Memo Is Incorrect.

It is common ground that, as of thirty days after the Covid emergency ends, BOP will no longer have authority to continue granting home confinement for prisoners with more than six months remaining on their sentences.[22] But the Memo makes an unsupported leap by inferring that the anticipated expiration of authority to *grant* home confinement for longer periods of time has any effect on whether people who previously received home confinement may continue as they are.[23] This conclusion is contrary to the plain statutory text and assumes, contrary to case law, that BOP must retain authority for a past placement decision.

A. The CARES Act Authorizes BOP to Lengthen an End-of-Sentence Home-Confinement Period and Makes No Other Changes to BOP's Pre-Existing Authority.

A plain reading of section 3624(c) in combination with the CARES Act shows that home confinement was, and still is, an end-of-sentence option. Under section 3624(c), BOP has the authority to "place" prisoners on home confinement for "a portion of the final months of [their] term" of up to six months to "afford th[e] prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community."[24] The only change made by the CARES Act was, as the relevant statutory text states, to authorize BOP, during the emergency period, to "*lengthen the maximum amount of time* for which the Director is authorized to place a prisoner in home confinement" from the six-month maximum "under the first sentence of section 3624(c)(2) of title 18."[25] The CARES Act does not include any language that could be said to rescind the provision in section 3624(c) specifying that BOP's authority is to place prisoners on home confinement for "a portion of the final months of [their] term." And courts do not presume

[21] *Id*. at 7.

[22] *See* Memo at 1.

[23] *Id*. at 1–2.

[24] 18 U.S.C. § 3624 (c)(1)–(2).

[25] CARES Act § 12003(a)(2), (b)(2) (emphasis added); 18 U.S.C. § 3624 (c)(2).

that provisions of prior statutes are repealed by new statutes except to the extent that "the later statute expressly contradict[s] the original act."[26]

Crucially, Congress did not make any change to BOP's pre-existing authority other than to allow BOP to lengthen the period of home confinement. The CARES Act does not include any language creating any new requirements that BOP revoke home confinement under any particular circumstance. In fact, the CARES Act does not address revocation at all. So whatever discretion or authority BOP may have to revoke home confinement (for, say, violation of a condition of home confinement) is the same as it was under section 3624(c), before the CARES Act was passed.[27] Nothing under section 3624(c) indicates that BOP is ever *required* to revoke home confinement status, and the government itself has never taken the position that such a requirement exists under section 3624(c).[28] The requirement that BOP take immediate, non-discretionary steps to revoke home confinement once the Covid emergency ends simply does not exist in the text of either statute.

This plain-text reading is confirmed by the fact that Congress chose *not* to incorporate this expanded CARES Act authority into a separate statutory provision: 18 U.S.C. § 3622, which authorizes BOP to place prisoners on furlough under certain circumstances. That provision allows BOP to "release a prisoner from the place of his imprisonment for a limited period" to engage in certain activities.[29] Section 3622, unlike section 3624(c), expressly provides for a *temporary* release from a federal facility, with the expectation that the prisoner will return to a federal facility at the end of the furlough period. If Congress had intended for the new CARES Act authority to require BOP to recall prisoners to federal facilities, Congress would have expanded BOP's authority under the furlough provision rather than under section 3624(c). The fact that it did not do so suggests that Congress did not contemplate that people granted home confinement under the CARES Act would be returned to prison for any reason not already covered under section 3624(c).

The nature of home confinement itself further confirms that Congress intended for people granted home confinement under the CARES Act to serve the remainder of their sentences away from federal facilities. This is because home confinement is a form of physical separation from prison in which the prisoner is required to take steps to reintegrate back into society. It is a form of stepped-down custody from physical confinement that some courts have even concluded "constitutes release from custody."[30] Attorney General Barr similarly described home

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[26] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007).

[27] BOP's position is that it has broad discretion to revoke home confinement once granted. *See* Memo at 4. While we do not necessarily agree with this position, the *degree* of discretion available to BOP under section 3624(c) is not relevant to this analysis. The point is that section 3624(c) does not *require* BOP to revoke home confinement under any particular circumstance, and the CARES Act did not impose an additional revocation requirement that did not previously exist.

[28] *E.g.*, Memo at 4.

[29] 18 U.C.S. § 3622.

[30] *Cheek*, 835 F. App'x at 739 (internal quotation marks omitted).

confinement decisions as "granting an[] inmate discretionary *release*"[31] and explained that prisoners who meet certain criteria are considered "appropriate candidates for home confinement *rather than continued detention*" at BOP prisons.[32] A statute lengthening the period of time prisoners may serve on home confinement necessarily means that prisoners may begin the process of stepped-down custody and reintegration into society at an earlier time. Of course such a process will generally take place at the end of a sentence. And requiring people on home confinement to return to prison would disrupt their reintegration, affecting jobs, housing, relationships, and family responsibilities they may have acquired during their period of home confinement—in direct opposition to the stated goals of the home confinement statutory provision.

BOP itself has interpreted the CARES Act in a manner consistent with this analysis. Prior to the Memo, BOP believed that the CARES Act simply allowed BOP to lengthen the end-of-sentence period that prisoners could serve on home confinement. In testimony before Congress shortly after passage of the CARES Act, BOP officials said that the Act "*expanded* our ability to place inmates on Home Confinement by *lifting the statutory limitations* contained in Title 18 U.S.C. § 3624(c)(2)."[33] BOP went on to tell Congress that it was aggressively screening prisoners who could be placed on home confinement "for service of the *remainder* of their sentences."[34] And BOP has told courts that it was granting prisoners home confinement rather than placing them on furloughs precisely to avoid the uncertainty of "temporary, but indeterminate, release, because nobody can be sure when the pandemic will end."[35]

While no court has addressed the issue of mandatory revocation, courts that have had occasion to discuss the CARES Act have generally described it as allowing prisoners to serve a longer portion of their sentences on home confinement or expanding the pool of prisoners eligible under section 3624(c). For example, the Tenth Circuit said that Congress "amended 18 U.S.C. § 3624(c)(2) to permit *longer home confinement* in certain circumstances."[36] The Sixth Circuit described the CARES Act as "allow[ing] the Attorney General to *expand* the BOP's ability to move prisoners to home confinement."[37] Former Attorney General Barr similarly

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[31] Mar. Barr Memo, *supra* n.12, at 2.

[32] Apr. Barr Memo, *supra* n.13, at 2 (emphasis added).

[33] Carvajal and Allen Statement, *supra* n.14, at 6 (emphasis added).

[34] *Id*.

[35] Decl. of Sukenna W. Stokes, ECF No. 34-1, *United States v. Bayard*, No. 18-CR-771 (S.D.N.Y. July 23, 2020) (BOP Correctional Programs Administrator declaration).

[36] *United States v. Hammons*, 833 F. App'x 215, 216 n. 2 (10th Cir. 2021) (emphasis added); *see also United States v. Lang*, 835 F. App'x 790, 792 n.5 (5th Cir. 2021) (the CARES Act "authorizes prison authorities to *lengthen the maximum amount of time* to place a prisoner in home confinement under 18 U.S.C. § 3624(c)(2)." (emphasis added).

[37] *Wilson v. Williams*, 961 F.3d 829, 847 (6th Cir. 2020) (Cole, dissenting) (emphasis added); *see also United States v. Williams*, 829 F. App'x 138, 139 (7th Cir. 2020) (The CARES Act "*expanded* [BOP's] power to 'place a prisoner in home confinement' under § 3624(c)(2)." (emphasis added)).

described the Act as "authoriz[ing] me to *expand the cohort of inmates* who can be considered for home release" to include those who have more than six months remaining on their sentence.[38] No authority aside from the Memo has described the CARES Act as instead creating some new, temporary mid-sentence option that did not previously exist under section 3624(c).

In reaching the opposite conclusion, the Memo points to other portions of the CARES Act that, the Memo states, provide various forms of "temporary emergency relief."[39] Of course, it is axiomatic that one provision in an Act may be different from another portion of the same Act, and that different language in different portions of the same statute may have different meanings.[40] In any event, those other provisions reveal that some of the very provisions the Memo cites provide relief that does in fact last beyond the end of the emergency period.

For example, the Memo points to section 1113 of the CARES Act, noting only that it "authoriz[es] bankruptcy relief to address the emergency."[41] What section 1113 actually shows is "that Congress knew how to draft" a benefit intended to be temporary,[42] and made such temporariness clear, and that some benefits under section 1113 nonetheless last beyond the end of the emergency period. Section 1113 makes several amendments to the bankruptcy process, such as excluding payments received under the CARES Act from the monthly income calculation in bankruptcy applications,[43] and allowing debtors to amend pre-existing bankruptcy plans due to hardship created by the Covid-19 pandemic.[44] Both changes expressly "sunset" one year after enactment of the CARES Act,[45] but a debtor plan approved under the CARES Act, which can provide for payments for a seven-year period, would remain in place after the emergency period.[46]

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[38] Apr. Barr Memo, *supra* n.13, at 1 (emphasis added).

[39] Memo at 5–6.

[40] *See*, *e.g.*, *Grand Trunk W. R.R. Co. v. U.S. Dep't of Labor*, 875 F.3d 821, 825 (2017) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

[41] Memo at 5.

[42] *E.g.*, *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 337–38 (1994) ("Our interpretation is confirmed by comparing [the disputed statute] with another statutory exemption in [the same act]. . . . [T]his [other] provision shows that Congress knew how to draft a waste stream exemption . . . when it wanted to." (internal quotation marks omitted)).

[43] CARES Act § 1113(b)(1)(A).

[44] *Id.* § 1113(b)(1)(C).

[45] *Id.* § 1113(b)(2).

[46] *See id.* § 1113(b)(1)(C) (contemplating debtor plans providing for payments over a seven-year period, despite the one-year sunset of the provision allowing approval of such plans).

In another example, the Memo points to section 1109 of the CARES Act, noting only that it "provides[es] loan programs during the national emergency."[47] But this section, too, shows that benefits initially provided during the Covid-19 emergency period may last for a longer period of time. Section 1109 authorizes the Department of the Treasury to issue regulations allowing insured depository institutions and credit unions to provide loans under the Paycheck Protection Program (separately described in section 1102 of the CARES Act) "until the date on which the national emergency . . . expires."[48] But the loans issued under the Paycheck Protection Program do not disappear when the emergency expires; they generally mature in two to five years.[49] This makes perfect sense, given the nature of a loan. It is granted and then repaid over a course of time, just as home confinement is granted and then served over a course of time.

The Memo's review of other provisions of the CARES Act does not take into account the "specific context in which th[e] language is used" or the "broader context of the statute as a whole," as is required to properly discern the meaning of a statutory provision.[50] Indeed, another portion of the CARES Act *not* considered in the Memo illustrates that Congress was far more explicit when it intended to limit the duration of a benefit for prisoners. Section 1103(c)(1), which gives BOP authority to allow no-cost video and telephone visitations, expressly limits the benefit to the emergency period itself: "During the covered emergency period, if the Attorney General [makes a sufficient finding], the Director of the Bureau shall promulgate rules regarding the ability of inmates to conduct visitation through video teleconferencing and telephonically, free of charge to inmates, during the covered emergency period." Unlike in section 1103(b)(2) (the provision on home confinement), Congress used the phrase "during the covered emergency period" in section 1103(c)(1) twice: once at the beginning of the provision to indicate *when* BOP may issue a rule, and once at the end of the provision to indicate that the no-cost video and telephone visitations could only occur during the emergency period. Section 1103(b)(2) uses the same phrase only at the beginning of the provision to indicate *when* BOP has authority to lengthen a period of home confinement, but does not repeat the phrase to limit the period of home confinement. Despite the close proximity of section 1103(c)(1) to section 1103(b)(2), the Memo did not reconcile Congress's means for indicating temporariness in 1103(c)(1) with the lack of any such indication in 1103(b)(2).

The Memo attempts to discern congressional intent by pointing to the definition of "covered emergency period" as the period beginning on the date the President declared a national emergency and ending "30 days after" that emergency expires.[51] According to the Memo, "[w]e think that this 30-day period suggests that Congress had recognized that the termination of the emergency would have operational consequences and thus gave BOP 30 days to engage in the

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[47] Memo at 5.

[48] CARES Act § 1109.

[49] *See* Sean Ludwig, *How to Get Your PPP Loan Forgiven*, CO (June 1, 2021) https://www.uschamber.com/co/run/business-financing/getting-ppp-loan-forgiven#:~:text=All%20PPP%20loans%20have%20an,paid%20back%20in%20five%20years.

[50] *Nken v. Holder*, 556 U.S. 418, 426 (2009).

[51] *See* Memo at 6 (quoting CARES Act § 12003(a)(2)).

logistical operations needed to remove prisoners from home confinement."[52] In divining this unstated congressional intent, the Memo does not point to any legislative history supporting the view that Congress had reason to suppose it would be practical, or even possible, to recall several thousand prisoners within thirty days.[53] Indeed, arranging the staff and facilities alone would likely take much longer, not to mention transportation. Other possible explanations for the thirty-day buffer are more plausible. As Congress was no doubt aware, the process of placing a prisoner on home confinement is lengthy, involving multiple levels of review and often a 14-day quarantine.[54] Congress may have intended to give BOP a thirty-day period to complete placements that had already begun. Or, perhaps Congress believed that pandemic-related improvements in federal prisons may lag behind improvements in the general population such that the end of a national emergency does not immediately end the more acute BOP emergency. More importantly, statutory interpretation requires that we "give effect to the language Congress has enacted, not to read additional meaning into the statute that its terms do not convey."[55] The Memo's unfounded assumptions about Congress's thought process are insufficient, particularly given its inability to reconcile that assumption with the statutory text.

B. A Decision Whether to Place a Prisoner on Home Confinement is a Discrete Decision, Requiring Authority Only at the Time It Is Made.

A primary rationale in the Memo is that a BOP decision to place a prisoner on home confinement "is not a permanent, final decision," but rather an ongoing one that "requires ongoing action and therefore continuing legal authority" during the entire period of home confinement.[56] According to the Memo, the fact that "BOP and the probation system . . . have a continuing relationship with prisoners in prerelease custody and home confinement" means that a decision to place a prisoner on home confinement "is not a one-time event."[57] That conclusion is inconsistent with the plain language of the CARES Act, the nature of home confinement, and the way courts have interpreted BOP's section 3624(c) authority.

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[52] Memo at 6–7.

[53] Indeed, to the extent legislative history on the point exists, it points the other direction. For example, soon after the CARES Act passed, DOJ officials testified to Congress that BOP was using CARES Act authority to transfer prisoners to home confinement "for service of the remainder of their sentences." Carvajal and Allen Statement, *supra* n.14, at 6.

[54] Apr. Barr Memo, *supra* n.13, at 2; Andre Metevousian, Assistant Director, Correctional Program Division, *Memorandum for Chief Executive Officer: Home Confinement,* Nov. 16, 2020, *available at* https://www.bop.gov/foia/docs/Updated_Home_Confinement_Guidance_20201116.pdf.

[55] *Yates v. Collier*, 868 F.3d 354, 369 (5th Cir. 2017); *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) ("It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts." (internal quotation marks omitted).

[56] Memo at 7.

[57] *See* Memo at 7.

A decision to grant home confinement is a discrete decision in time. This is evident first from the plain statutory text. BOP's authority under section 3624(c)(2) is to "*place* a prisoner in home confinement."[58] And the CARES Act likewise changed the length of time "for which [BOP] is authorized to *place* a prisoner in home confinement."[59] To "place" a prisoner on home confinement is a specific, one-time event. The verb "to place" means "to put in or as if in a particular place or position" or "to assign a position in a series of or category."[60] In the statutory context, this means that BOP's authority is "to put" or "assign" a prisoner to the "particular place" or "category" of home confinement. One does not "put" or "assign" on an ongoing basis. These activities are complete once they have occurred. If Congress had intended to require that BOP have ongoing authority in order for prisoners to complete their home confinement terms, Congress could easily have used a different word, such as "maintain" or "supervise." But it did not.

The discrete nature of a home confinement placement decision is also evident from the very nature of home confinement. As noted above, moving to home confinement is not merely a change in confinement conditions, like moving to a different cell; it is a form of release from physical custody.[61] Before granting home confinement, BOP assesses whether the prisoner is an appropriate candidate and decides whether the "inmate[] should be granted home confinement"; if so, BOP must "transfer" the prisoner to home confinement.[62] As with decisions for early release, decisions of whether to grant home confinement are discrete decisions about custody that even give rise to a right to petition for *habeas corpus*.[63]

Importantly, if BOP were to *revoke* home confinement for a particular person, that, too, would be a discrete decision, based on BOP's rationale, and subject to challenge.[64] For example, in *Paige*, after a county corrections department attempted to revoke a prisoner's home confinement, he was able to bring due process challenges to that discrete decision under section 1983.[65] In *Kim*, a similar example, after a prisoner challenged a discrete decision to remove her

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[58] 18 U.S.C. § 3624(c)(2) (emphasis added).

[59] CARES Act § 12003(a)(2), (b)(2) (emphasis added).

[60] "Place," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/place.

[61] *Cheek*, 835 F. App'x at 739.

[62] Mar. Barr Memo, *supra* n.12, at 1.

[63] *See*, *e.g.*, *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify an early release decision); *Cheek*, 835 F. App'x at 739.

[64] *Ortega v. U.S. Immigr. & Customs Enf't*, 737 F.3d 435, 439 (6th Cir. 2013); *Paige v. Hudso*n, 341 F.3d 642, 643–44 (7th Cir. 2003) (transferring probationer from home confinement to jail was a "sufficiently large incremental reduction in freedom to be classified as a deprivation of liberty" that triggers due process and subjects the government to tort liability); *Kim v. Hurston*, 182 F.3d 113, 117–19 (2d Cir. 1999) (due process, including a hearing, was owed before a person could be returned to prison from a work release program, regardless of the degree of discretion maintained by prison officials under state law).

[65] *Paige*, 341 F.3d at 643–44.

from a work release program, the court held that she had a protected liberty interest and was entitled to a hearing.[66] The Memo's position that home confinement release is some sort of ongoing, continuing decision is not reconcilable with the case law establishing that modification or revocation of such decisions is discrete and challengeable.

The Memo is also wrong to conclude that the continuing relationship between BOP, the parole system, and people on home confinement affects the nature of the home confinement decision. The relationship here is akin to the continuing relationship that BOP has with a person on supervised release or probation or with prisoners in federal facilities. For example, the Supreme Court has held that the terms of supervised release must be set at the time of the release decision, under the law in place at the time of the decision.[67] An early release decision might result in an ongoing supervision relationship, but it is nonetheless a discrete decision that may not be disturbed by later changes in authority.[68] An initial sentencing decision has ongoing consequences but is a discrete, challengeable decision that does not require reassessment of authority absent a rare basis for retroactive relief.[69] In all three instances, the carceral decision itself is a one-time event, based on authority at the time of the event. And as in those instances, a home confinement decision—whether solely under BOP's section 3624(c) authority or under its expanded CARES Act authority—is a discrete decision that merely has ongoing consequences. As such, BOP needs to have authority to place a person in home confinement only at the time of its decision to do so.

Put another way, BOP needs authority to grant home confinement for a particular portion of the end of a prisoner's term at the time that BOP makes the placement decision. Any subsequent change in BOP's authority does not affect such a decision previously made.[70] Therefore, when BOP's CARES Act authority ends thirty days after the end of the Covid emergency, previously authorized releases will not be retroactively invalidated. And any discretion BOP will have to revoke home confinement at that time will remain the same as it always was under section 3624(c) because Congress, in the CARES Act, did not disturb that authority.

III. The Memo Overlooked Important Reliance Interests.

The statutory arguments laid out above provide ample reason to revisit the Memo. In addition, however, the Memo's conclusion that BOP is "required to recall the prisoners to

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[66] *Kim*, 182 F.3d at 115.

[67] *Johnson v. United States*, 529 U.S. 694, 702 (2000).

[68] *E.g.*, *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify a prisoner's early release decision after changing regulations to exclude similar prisoners from eligibility).

[69] *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (laying out test for retroactive relief).

[70] *See*, *e.g.*, *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify an early release decision).

correctional facilities"[71] overlooked the impact this would have on the people most affected. Specifically, the Memo overlooked the reliance interests acquired by those placed in home confinement given what BOP and others have previously said about the CARES Act home-confinement authority, as well as any process due to people on home confinement before they may be re-incarcerated. The absence of any consideration of these issues potentially places BOP in legal jeopardy and provides an additional ground for reconsidering the legal advice provided to that agency.

Somewhere between 2,000 and 3,600 prisoners are serving their sentences on home confinement under CARES Act authority.[72] BOP officials have told Congress and courts that those released under the CARES Act could serve the "remainder of their sentences" on home confinement.[73] Even beyond that, we have received reports that many of these individuals were told by BOP employees and probation officers that they would serve the remainder of their sentences on home confinement so long as they complied with the conditions of their release (e.g., gaining employment). People living on home confinement reestablished relationships and made investments and commitments to their families, current or prospective employers, and others whose help they need to reintegrate themselves into their communities. Indeed, demonstrating that such support was available to them was necessary to establish their eligibility for release in the first place.[74] The Memo's conclusion that those released pursuant to the CARES Act *must be* returned to prison came as a shock to the thousands who had been released over the prior eleven months, as well as to the families, employers, and communities with which

[71] Memo at 1.

[72] *See supra* Section I.B.

[73] Carvajal and Allen Statement, *supra* n.14, at 6; *see also* BOP Correctional Programs Administrator declaration, *supra* n.35.

[74] *See* Mar. Barr Memo, *supra* n.12, at 2 (requiring BOP to consider whether "the inmate has a demonstrated and verifiable re-entry plan" that accounts for limiting the risk of COVID-19 exposure); U.S. Bureau of Prisons, *Memorandum for Chief Executive Officers* at 2–3 (Apr. 13, 2021), *available at* https://bit.ly/2Tjn6ag (requiring consideration of, among other factors, where individual will be living, with whom, and whether "the inmate's medical needs can be met in the community"); *See* Statement of Michael D. Carvajal, Director, Federal Bureau of Prisons to the U.S. Senate Committee on the Judiciary at 5 (Apr. 15, 2021), *available at* https://www.judiciary.senate.gov/imo/media/doc/BOP%20Director%20-%20%20Written%20Statement%202021-04-15%20SJC%20Hearing%20.pdf ("[We cannot transfer inmates who do not have safe housing for themselves or housing with appropriate safeguards to home confinement."); Statement of Michael D. Carvajal, Director, Federal Bureau of Prisons to the U.S. Senate Committee on the Judiciary at 4 (Dec. 2, 2020) *available at* https://www.congress.gov/116/meeting/house/111100/witnesses/HHRG-116-JU08-Wstate-CarvajalM-20201202.pdf (asserting that BOP uses "home confinement to assist inmates reintegrate into their communities prior to completing their prison terms").

they had reconnected.[75] Requiring them to return to federal prison would upset settled reliance interests, including by negating investments made by the released prisoners and their families, friends, and employers.[76]

We encourage OLC to reconsider the Memo's conclusion that BOP is "required to recall the prisoners to correctional facilities" in light of these reliance interests. Federal agencies must engage in "reasoned decisionmaking,"[77] as reflected in the grounds laid out by the agency when it takes an action.[78] And *Department of Homeland Security v. Regents* eliminated any doubt that, when changing course from a prior policy, agencies must take into account any "serious reliance interests" in the prior policy.[79] An agency decision that fails to consider reliance interests before making a policy change is arbitrary and capricious and may be set aside.[80] For this reason, the Supreme Court held in *Regents* that the Department of Homeland Security violated the Administrative Procedure Act when it took action to implement a DOJ legal determination that a prior policy was illegal without considering reliance interests that would be affected by that course of action.[81]

BOP's policy prior to the Memo was to use CARES Act authority to release prisoners to home confinement for the "remainder of their sentences,"[82]and, as noted, it has communicated that policy publicly. The Memo represents a change in this policy. Typically, when OLC interprets an agency's statutory authority, how the agency will move forward in light of that interpretation "involve[s] important policy choices" that would be made by the agency.[83] But here, the Memo goes beyond statutory interpretation to instruct BOP "to recall the prisoners to

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[75] *See, e.g.*, Sarah Lynch, *Thousands of low-level U.S. inmates released in pandemic could be headed back to prison*, Reuters (Apr. 11, 2021), https://www.reuters.com/world/us/thousands-low-level-us-inmates-released-pandemic-could-be-headed-back-prison-2021-04-11/.

[76] *See, e.g.*, *id.* (noting that the uncertainty created by the Memo "is taking a toll on [the] mental health" of a disabled veteran of the Iraq War, "who was sentenced to five years on a drug-related offense" and released on home confinement pursuant to the CARES Act"); *see also Letter from Kevin A. Ring, President, Families Against Mandatory Minimums to the Hons. Dick Durbin and Chuck Grassley* at 4 (Apr. 14, 2021), https://bit.ly/3bHaqQY (describing the anguish of a woman whose father's status changed multiple times as BOP prepared to release individuals to home confinement).

[77] *Regents*, 140 S. Ct. at 1905.

[78] *Id.* at 1907.

[79] *Id.* at 1913 (internal quotation marks omitted); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

[80] *Regents*, 140 S. Ct. at 1913.

[81] *See id*. at 1910, 1913.

[82] Carvajal and Allen Statement, *supra* n.14, at 6; *see also* BOP Correctional Programs Administrator declaration, *supra* n.35.

[83] *Regents*, 140 S. Ct. at 1910.

correctional facilities,"[84] and BOP is required to abide by the Memo regardless of any reliance interests engendered by prior policy.[85] Not only did the Memo itself include no consideration of reliance interests; its instruction will also subject DOJ and BOP to *Regents* liability similar to that faced by the Department of Homeland Security.[86]

We also encourage OLC to consider, in reevaluating its Memo, the constitutionally protected due process rights held by people living on home confinement. "The Due Process Clause protects liberty, and 'freedom from bodily restraint' is at the very core of that protected interest."[87] A person who has been released from physical confinement has a liberty interest that derives not from any statute, but from "the fact of release from the incarceration" and the Constitution itself.[88] "The Supreme Court has repeatedly held that in at least some circumstances, a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—has a liberty interest that entitles him to constitutional due process before he is re-incarcerated."[89] And both the Supreme Court and several other federal courts have recognized that removal from "preparole" and home confinement amounts to a deprivation of a liberty interest warranting protection of due process.[90] This is because "disparities between

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[84] Memo at 1.

[85] 28 C.F.R. § 0.25 (delegating authority of the Attorney General to render legal opinions to the Office of Legal Counsel).

[86] The Memo itself is subject to the requirements of *Regents*. *Regents* applies to final agency actions under the Administrative Procedure Act. *See Regents*, 140 S. Ct. at 1913. This Memo constitutes final agency action under *Bennett v. Spear*, 520 U.S. 154, 177 (1997) because it (1) determined the obligations of BOP (to recall prisoners) and the rights of prisoners released under CARES Act authority (to remain on home confinement only for a limited period), and (2) marks the consummation of agency decisionmaking because it is binding on BOP. But even if this were not the case, the Memo places BOP in jeopardy under *Regents* when it complies with the Memo's instruction.

[87] *Hurd v. D.C., Gov't*, 864 F.3d 671, 682–83 (D.C. Cir. 2017) (citing U.S. Const. amend. V, XIV); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972); *see also Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) ("the absence of physical restraint" is the uncontested baseline liberty the Due Process Clause protects).

[88] *Harper v. Young*, 64 F.3d 563, 566 (10th Cir. 1995); *aff'd*, 520 U.S. 143 (1997) (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972); *see also Baptiste v. Elrod*, No. 85 C 2015, 1986 WL 5747, at *2 (N.D. Ill. May 14, 1986) (finding that a state statute "providing for early release create[d] a constitutionally protected liberty interest" and "that once the state has created such 'extra' liberties they cannot be taken away without due process of law.").

[89] *Hurd*, 864 F.3d at 682 (citing *Young v. Harper*, 520 U.S. 143, 152 (1997) (pre-parole conditional supervision); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation); *Morrissey*, 408 U.S. at 482 (parole)).

[90] *Young v. Harper*, 520 U.S. at 144–45 (pre-parole conditional supervision); *Paige*, 341 F.3d at 643–44; *see also Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 889–90 (1st Cir. 2010) (holding that "the Due Process Clause is particularly protective of individuals participating in non-institutional forms of confinement"); *Tarapchak v. Lackawanna Cnty.*, No. CV 15-2078, 2016

individual liberty in the" home confinement context, "as opposed to" the prison context, "amount to significant differences in kind, not degree."[91] More than merely facilitating creature comforts, home, "unlike institutional confinement of any kind, allow[s] the [prisoner] to live with their loved ones, form relationships with neighbors, lay down roots in their community, and reside in a dwelling of their own choosing (albeit subject to certain limitations) rather than in a cell designated by the government."[92]

At least two courts have held that these constitutional protections apply even in the more extreme circumstance where the removal of a prisoner from physical confinement was not authorized in the first place. In *Hurd v. District of Columbia*, the D.C. Circuit held that a person mistakenly released before the end of his sentence under circumstances "he reasonably believed reflected a deliberate sentence reduction" had a right to due process before he could be re-incarcerated to serve the remainder of his lawful sentence. And in *Johnson v. Williford*, noting due process concerns, the Ninth Circuit held that the government was prevented from enforcing a statutory provision that disallowed parole against a prisoner who had already been placed on parole.[93] Especially given what they have been told about the circumstances of their home confinement, if BOP moves to recall people living on home confinement to federal facilities, those people would have the right to raise these and similar claims in *habeas* petitions.[94] By failing to consider whether there is a constitutional or other legal barrier to recalling these individuals, the Memo has created a substantial logistical issue for BOP and DOJ, not to mention the thousands of affected prisoners. And the Memo's failure to account for constitutional

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WL 6821783, at *5–6 (M.D. Pa. Nov. 17, 2016) (finding that a prisoner's "interest in remaining . . . in home confinement"—after release on bail in that case—"falls within the contemplation of the liberty language of the [Due Process Clause].").

[91] *Ortega*, 737 F.3d at 439. To state the obvious:

> A prison cot is not the same as a bed, a cell not the same as a home, from every vantage point: privacy, companionship, comfort. And the privileges available in each are worlds apart—from eating prison food in a cell to eating one's own food at home, from working in a prison job to working in one's current job, from attending religious services in the prison to attending one's own church, from watching television with other inmates in a common area to watching television with one's family and friends at home, from visiting a prison doctor to visiting one's own doctor.

Id.

[92] *Gonzalez-Fuentes*, 607 F.3d at 889–90; *see also Kim*, 182 F.3d at 118 (a prisoner "enjoyed a liberty interest, the loss of which imposed a sufficiently 'serious hardship' to require compliance with at least minimal procedural due process" where the prisoner was permitted to live at home during the final phase of a work release program).

[93] *Johnson v. Williford*, 682 F.2d 868, 871–73 (9th Cir. 1982).

[94] *Cheek*, 835 F. App'x at 739 (prisoners may seek *habeas* relief related to home confinement decisions); *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify an early release decision).

ramifications further weakens its statutory interpretation, as the CARES Act should be read to avoid any conflict with these constitutional rights.

IV. OLC Should Not Apply Stare Decisis Here.

Although OLC does not routinely overrule prior opinions,[95] the home confinement memo presents a case where a reversal of course is appropriate.

OLC has adopted a form of stare decisis that permits the office to revisit prior decisions only in narrow circumstances. As the current best practices memo explains, "OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question."[96] But that principle has its exceptions. "[A]s with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes."[97]

Although the best practices memo does not state precisely how to identify an "appropriate case" for withdrawal of a prior opinion, commentators including Trevor Morrison and Harold Koh have suggested the framework adopted by the Supreme Court for revisiting its own precedent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992).[98] That is, "we may ask [1] whether the rule has proven to be intolerable simply in defying practical workability; [2] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; [3] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or [4] whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[99] Similarly, prior OLC opinions have reasoned that withdrawing precedent is appropriate "when intervening developments in the law appear to cast doubt upon [OLC's] conclusions"; "where the factual predicates have shifted or [OLC] ha[s] come to a better understanding of them"; where the reversed precedents "themselves had reversed established

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[95] *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1481 (2010) (finding that 5.63% of published OLC opinions between the beginning of the Carter administration and the first year of the Obama administration overruled or modified OLC precedent).

[96] David J. Barron, Office of Legal Counsel, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions 2 (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf (OLC Best Practices Memo).

[97] *Id*.

[98] *See* Morrison, *supra* n. 95, at 1504; Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 Cardozo L. Rev. 513, 523 (1993).

[99] *Casey*, 505 U.S. at 854–55 (internal quotation marks and citations omitted).

positions of the Executive Branch"; or "after identifying errors in the supporting legal reasoning."[100]

The Memo warrants a departure from stare decisis under the *Casey* test and the analogues to that test previously cited by OLC. Because the Memo is so recent, the third and fourth factors are not particularly illuminating here. The second factor weighs in favor of abandoning stare decisis here because, as set forth above, all the reliance interests are on the side of those released on home confinement. In any case, it would be impossible to say that BOP currently has a reliance interest in recalling prisoners when none have yet been recalled. And as to the first factor, although the ruling is not yet in practical effect while the state of emergency continues, it will likely defy workability if implemented: under the Memo's reasoning, BOP will have thirty days within which it must process the re-incarceration of thousands of prisoners, including finding and allocating bed space, ensuring appropriate staffing, arranging transportation logistics, and coordinating with probation officers across the country, likely while defending scores of legal challenges—all tasks that BOP did not plan for at the time it released these individuals to home confinement.[101] Moreover, as noted above, the Memo includes several "errors in the supporting legal reasoning," including a failure to consider important points of law. The most effective course, then, is to reconsider and rescind the Memo now.

Professor Morrison suggests that, in addition to the *Casey* factors, OLC undertake "a version of [the Supreme Court's] concern for the Court's integrity, credibility, and institutional role."[102] For example, in the context of the infamous torture memos (which OLC eventually overruled), he opined that "harm to OLC's institutional reputation was itself a sufficient basis upon which to withdraw the Memorandum, even though a replacement was not yet ready."[103] This consideration, too, counsels in favor of withdrawing the home confinement Memo.

The reasoning of the Memo is flawed and potentially harmful to the credibility of the office. It overlooks important points of law and does not address reliance or due process issues that might apply to its analysis. This does not comport with OLC's stated practice of ensuring that opinions "candidly and fairly address[] the full range of relevant legal sources and significant arguments on all sides of a question."[104] The Memo also includes errors of fact. For instance, it points to the statutory requirement that the U.S. Probation System offer assistance to

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[100] Office of Legal Counsel, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling* at 20–21 (Nov. 2, 2018), *available at* https://www.justice.gov/sites/default/files/opinions/attachments/2018/12/20/2018-11-02-wire-act.pdf (Wire Act Memo).

[101] *See* Carvajal and Allen Statement, *supra* n.14, at 6 (expressing expectation that BOP was transferring prisoners to home confinement "for the service of the remainder of their sentences").

[102] Morrison, *supra* n. 95, at 1510.

[103] *Id.*

[104] OLC Best Practices Memo, *supra* n. 96, at 2; *see also* Wire Act Memo, *supra* n. 100, at 21 ("Several factors justify reconsideration here. Although the 2011 Opinion directly addressed the question now before us, we believe that the 2011 Opinion devoted insufficient attention to the statutory text and applicable canons of construction . . . .).

people on home confinement as evidence of BOP's ongoing relationship with those individuals,[105] but the U.S. Probation Office is part of the U.S. Court system, not BOP.[106] The Memo likewise conflicts with other best practices of the office, such as the principle that it is "imperative that the Office's advice be clear, accurate, thoroughly researched, and soundly reasoned."[107] OLC should not permit these errors to stand.

To be sure, "OLC's practice of 'adhering to its own precedents even across administrations' is [a] means by which the Office seeks to establish 'some distance and relative independence from the immediate political and policy preferences of its clients across the executive branch.'"[108] But stare decisis serves those purposes only if the underlying analysis itself does not undermine those goals. Adhering to the flawed Memo would not serve these purposes.

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For these reasons, we respectfully request that OLC review the Memo and rescind it. Time is of the essence. Each day that this Memo remains in place is a day that interferes with the ability of people living on home confinement to make the kinds of investments in families and employment necessary to successfully reintegrate into society.

If you would like to discuss this request further, please contact Samara Spence and Jessica Morton at 202-701-1785, 202-843-1642, sspence@democracyforward.org, or jmorton@democracyforward.org.

Sincerely,

Democracy Forward Foundation
FAMM
Justice Action Network
The Leadership Conference on Civil and Human Rights
National Association of Criminal Defense Lawyers
Tzedek Association

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[105] Memo at 7.

[106] *Probation and Pretrial Services - Mission*, U.S. Courts, https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission (last visited July 30, 2021).

[107] *Id.*

[108] Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. Rev. 515, 535 (2021) (quoting Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097, 1133 (2013)); *see also* Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 Notre Dame L. Rev. 1339, 1352 (2008).

CC: Merrick Garland, Attorney General, Department of Justice
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