

December 13, 2021

Michael Carvajal
Director
The Bureau of Prisons
320 First Street, NW
Washington, D.C. 20534

Re: First Amendment Rights and CARES Act Home Confinement

Dear Director Carvajal:

The Bureau of Prisons (“BOP”) policies on communications with the media and persons in BOP custody, in halfway houses, or on home confinement are unclear and inconsistently applied. As a result, persons in custody or under supervision are frequently discouraged from exercising their First Amendment rights, or those rights are denied outright. On behalf of FAMM, formerly Families Against Mandatory Minimums, we write to seek immediate clarification of the BOP policy that permits interactions between the press and persons in BOP custody under community supervision absent an important or substantial governmental interest in restricting the speech.

a. Factual Background: Policy and Practices at Issue

More than 7,000 people have been placed on home confinement by the BOP in response to the outbreak of COVID-19 in federal prisons and as part of the Coronavirus Aid, Relief and Economic Security (“CARES”) Act of March 2020. Many have completed their sentences, but somewhere between two and three thousand people today remain on home confinement due to the CARES Act. Most have been home for more than a year and have rejoined their families and rebuilt their lives. Under BOP policy, they are at risk of being returned to prison at the conclusion of the public health emergency period. The White House and the Department of Justice are both currently considering policy choices that will determine whether people can remain home, or will once again be taken from their families and communities.¹ These are questions of great public concern, and questions upon which those who have

¹ The Department of Justice’s Office of Legal Counsel (“OLC”) released a memorandum in January 2021, concluding that “the CARES Act authorizes the Director of BOP to place prisoners in home confinement only during the statute’s covered emergency period and . . . should that period end, or should the Attorney General revoke the finding, the Bureau would be

been placed on home confinement not only have a personal stake in the outcome, but a unique perspective to offer policymakers and the public. Restrictions on their speech, both through formal denials of requests or through the chilling effect of unclear rules or inconsistent application, violate these individuals' fundamental constitutional rights and deprives the public of critical information on an important issue. While we respectfully urge the BOP to clarify its policy for all persons in its custody, the need for BOP to cure the problem for persons on home confinement is most urgent.

i. Unclear and Inconsistently Applied Media Policy

The BOP's Program Statement is written to address the media's access to people in prison and to address the security interests and needs of the news media's access to BOP facilities. It was not written with persons on home confinement or in halfway houses in mind. Program Statement 1480.5 (the "Media Policy") notes that "[a] news media representative who desires to make a visit or conduct an interview **at an institution** must make application in writing to the Warden, indicating that he or she is familiar with the rules and regulations of the institution and agrees to comply with them," recognizing that "[t]hese rules apply to inmates in Federal institutions."^{2,3} Nevertheless, the BOP appears to be imposing these rules on persons on home confinement or in a halfway house; in other words, persons residing outside of an institution are being instructed that they must seek prior approval before talking to the media.

FAMM has worked with individuals on home confinement who sought to obtain approval for media interviews to no avail. In one instance, a disabled veteran, who was transferred to home confinement and sought to share her story with the media, asked FAMM for assistance in navigating the BOP's rules to ensure she avoided any repercussions. FAMM's President attempted to do so, but, as he recounted to us below, he hit a dead end:

On July 22, 2021, I called [redacted staff name], the director of the [redacted name] halfway house in [redacted location]. I left a voicemail message in which I explained why I was calling. She didn't call back. The next day, July 23, I called back and asked for her deputy director, [redacted staff name], and told her I was with FAMM and that we were

required to recall the prisoners to correctional facilities unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2)."

² Bureau of Prisons, *Program Statement, News Media Contacts*, 1480.05 (Sep. 21, 2000) available online at https://www.bop.gov/policy/progstat/1480_005.pdf (emphasis added). As we understand it, an incarcerated person must complete form BP-A0233, the "News Interview Authorization," which requires the individual to identify the media representative and the affiliated media organization and sign their consent to the interview. The media representative must complete form BP-A0232, "Media Representative's Agreement," which requires acknowledging their familiarity and willingness to comply with Program Statement 1408.5, "Contact with the News Media." Finally, the Facility Warden must approve the request. *Id.*

³ "Institutions" are defined in BOP regulations to include "a U.S. Penitentiary, a Federal Correctional Institution, a Federal Prison Camp, a Federal Detention Center, a Metropolitan Correctional Center, a Metropolitan Detention Center, a U.S. Medical Center for Federal Prisoners, a Federal Medical Center, or a Federal Transportation Center." 28 CFR § 500.1(d). Accordingly, we do not believe a halfway house, or a person's home, meet this definition. Relatedly, we also understand that there is a similar media policy related to "contract facilities." Bureau of Prisons, *Program Statement, Community Corrections Manual*, (Jan. 12, 1998) at Ch. 2, available online at https://www.bop.gov/policy/progstat/7300_009_CN-3.pdf. That said, this policy also does not appear to apply to at-home confinement or halfway houses, for the same reasons discussed herein.

hoping that [redacted name] could share her story with the media. [Redacted staff name] said she had no idea what the policy was regarding people being able to speak to the media and said she might have to talk to the corporate headquarters. She told me she would speak to [redacted staff name] and get back to me. She didn't. A week later, I left [redacted staff name] a voicemail message. She never responded.

Similarly, another person on home confinement appeared on a podcast to discuss her experience during the pandemic. A month later, she received an email from the halfway house that supervises her home confinement, stating “you [are] not permitted to have any social meeting communication, this is including Podcast, The News, Facebook, Instagram, TicTok [sic], ETC, while at [redacted location name].” That individual was not informed of these restrictions prior to appearing on the podcast and was given no insight as to why the policy was appropriate for someone on home confinement.

Another individual sought to secure permission for an interview, but he was denied without any explanation or reference to a particular policy. FAMM attempted to help this person secure permission and received an email stating, “we have received your request regarding inmate [redacted name]. Your request to interview this individual has been declined.” No other explanation was provided. Recently, FAMM reported the denial of a request by an individual on home confinement who asked for permission to speak to CBS Evening News, as well as a request by Reuters to conduct a phone interview of a woman on home confinement. In the latter instance, a case manager at the relevant halfway house declined the request and refused a follow up request to consult with the manager. The Reuters correspondent, however, was able to talk to another individual on home confinement, who had permission from his halfway house to participate in the interview. There has been no explanation for these widely disparate outcomes, nor is one self-evident.

Individuals on home confinement are faced with an intractable dilemma—to speak up and advocate for themselves and risk unclear but potentially devastating consequences, or remain silent. On the one hand, their ability to remain in home confinement will depend on convincing the public and policymakers that the program is justified and should be maintained. On the other hand, they are particularly—and justifiably—worried that any failure to follow BOP rules could send them back to prison, risking their lives, and that any effort to tell their story might result in retaliation.

Public reporting justifies the fears that individuals on home confinement have with respect to arbitrary BOP treatment. One example is the highly visible case of Michael Cohen, who was released from prison on a medical furlough in May 2020, and then transferred to home confinement. During the transition to home confinement, Mr. Cohen was presented a Federal Location Monitoring Program Participant Agreement (“FLM Agreement”) that stipulated the following:

No engagement of any kind with the media, including print, tv, film, books, or any other form of media/news. Prohibition from all social media platforms. No posting on social media and a requirement that you communicate with friends and family to exercise discretion in not posting on your behalf or posting any information about you. The purpose is to avoid glamorizing or bringing publicity to your status as a sentenced inmate serving a custodial term in the community.

Michael Cohen TRO Memo at 11. When Cohen protested the broad nature of the prohibition, he was remanded to a corrections facility. Ultimately, Cohen successfully sued the BOP, arguing he was sent back to prison to halt the publication of his book on President Trump in violation of his rights. He was returned to home confinement on July 24, 2020.

For those on CARES Act home confinement who have more than a year to serve, this dilemma is particularly fraught. The consequences of a rule violation—resulting in incarceration for years—is much more dire than for those individuals on pre-release home confinement whose incarceration for a rules violation can, by definition, last no more than six months. What is more, the lack of clarity surrounding the policy—particularly on timelines for approval, valid reasons for rejection, and what appears to be unfettered discretion for facility directors—provides little confidence that a request will be approved, let alone approved in time to meet a reporter’s deadline. Ultimately, people have found the risks too high and the likely rewards too low, and are, therefore, simply declining to share their stories.

b. BOP Policy and Practice Violates the First Amendment

Prisoners retain their First Amendment rights when they enter prison, and limitations on speech directed outside of prisons must be based on an important or substantial governmental interest of security, order, and rehabilitation and be narrowly tailored to impose the least restriction necessary to achieve that interest.⁴ These First Amendment protections apply whether the policies and practices are formal or informal, and whether they are written or not. The First Amendment is violated when a policy or practice has the effect to “chill” the speech of incarcerated individuals, and block those individuals from engaging in constitutionally protected communication with others.⁵ Courts have repeatedly affirmed that proposition, explaining that when an incarcerated plaintiff alleges a “pattern or practice” of government officials engaging in conduct that “chills, inhibits, or interferes with” that person’s speech, then the plaintiff states a valid claim for violation of a “free speech right,” even if there is no written policy to be challenged.⁶

As discussed below, current BOP policy and practice violates the First Amendment rights of the incarcerated and the press. The policy or practice of requiring prior approval for media interviews for those in home confinement, as well as the uncertainty regarding under what circumstances incarcerated individuals may permissibly speak, results in chilled speech without the requisite justification.

i. The BOP Lack an Important or Substantial Governmental Interest in Requiring Pre-Approval of Media Interviews for Persons on Home Confinement

The BOP has no recognized important or substantial governmental interest in prohibiting or limiting persons located *outside* a prison institution from being interviewed about their experience while on home confinement and how they have been affected by the OLC memo.⁷ The governmental interest

⁴ See *Mitchell v. Peoples* 10 F.4th 1226, 1229 (11th Cir. 2021); *Thornburgh v. Abbott*, 490 U.S. 401, 411–12 (1989); *Procunier v. Martinez*, 94 S.Ct. 1800, 1811 (1974).

⁵ *Id.* at 1231.

⁶ See *e.g., id.* (internal citations and quotation marks omitted).

⁷ *Procunier*, 94 S.Ct. at 1811-12.

sufficient to justify limitation of speech must generally be one of security, order, and rehabilitation.⁸ Interviews of persons on home confinement about their experience “cannot reasonably be expected to present a danger to the community *inside* the prison.”⁹

Where communications from an incarcerated individual are sent *outside* the prison, “the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion,” and thus, the Supreme Court recognizes “a closer fit between the regulation and the purpose it serves may safely be required.”¹⁰ That is because communications outside of the prison clearly present less of a security concern than those inside.¹¹ And that is precisely the situation here, where individuals seek to make a plea directed to the public *outside* prison walls.

Nor do the policy justifications underpinning the Media Policy reasonably apply to home or halfway-house confinement. In describing the purpose and scope of the Media Policy, the BOP notes “[t]he Bureau of Prisons also has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, an interview in an institution must be regulated to insure **the orderly and safe operation of the institution.**”¹²

It is difficult to conceive of any way that the hurdles placed in front of those in halfway houses and home confinement for communication with the media (or the chilling effect resulting from uncertainty associated with such a policy or practice) could further the interests of prison security and order or the rehabilitation of the affected individuals or any other individuals under the BOP’s jurisdiction. If anything, clarifying that a prior approval would not be required would *reduce* federal expenses on this issue, and with little risk to the privacy rights of other incarcerated individuals or BOP employees.

ii. *BOP Policy is not Narrowly Tailored to Any Important or Substantial Governmental Interest*

Even if the BOP has some important or substantial governmental interest in restricting media access to persons on home confinement—which is impossible to divine from anything enshrined in the policy itself—the current policy is not narrowly tailored to that interest. The policy as drafted is, at best, ambiguous in its application to people on home confinement. Those charged with implementing the policy do so in an inconsistent and arbitrary fashion, and the First Amendment rights of individuals have, in fact, been violated.

Program Statement 1480.5 does not readily—or even logically—apply to in-person interviews for those in home or halfway-house confinement, or for that matter, interviews over the phone or by email or social media for those in confinement, and thus any application of the policy in those settings would by definition be arbitrary. Further confusion is created by the fact that there are inconsistencies

⁸ *Id.*

⁹ *Thornburgh v. Abbott*, 490 U.S. 401, 411–12 (1989) (*discussing Procunier*, 94 S.Ct. at 1812) (emphasis in original).

¹⁰ *See id.* at 412.

¹¹ *See id.*

¹² Bureau of Prisons, *Program Statement, News Media Contacts*, 1480.05 (Sep. 21, 2000) at §540.60, available online at https://www.bop.gov/policy/progstat/1480_005.pdf (emphasis added).

in BOP policy. For example, Policy Statement 5264.06 appears to authorize incarcerated individuals to speak to the media without prior approval if the interview is conducted by telephone. Program Statement “Inmate Telephone Regulations” explains “inmates may submit telephone numbers for any person they choose, including numbers for courts, elected officials and members of the news media.”¹³

Nonetheless, incarcerated persons and BOP staff and contractors alike have reported a widespread belief that BOP policy *requires* prior approval of *any* media interactions for individuals in halfway houses or home confinement. What is more, there is a practice of failing to respond to those requests for approval or denying those requests without giving reasons. This has given rise to a fear on the part of people under supervision that making such requests will result in retaliation or some inadvertent violation of BOP rules, resulting in a return to prison. FAMM’s contacts in the community have reported that the effect is significant, as individuals across the country choose to stay silent for fear of having to go back to prison during a pandemic.

Finally, even assuming that the policy or practice serves a legitimate penological interest (and we believe it does not), there should be readily available alternatives to ensure some level of access to the media or the ability to exercise their free speech. The exercise of free speech rights by those who are on home confinement raises few if any of the security concerns that have warranted previous speech restrictions on the incarcerated.¹⁴ Any and all interests of the BOP could be served by simply making clear that interactions with media are held to the same standards as interactions with other non-prisoners, and as a result, BOP employees may not treat incarcerated individuals’ interactions with journalists differently, at the very least in the context of home confinement or halfway houses.

To the extent that there are individualized reasons for restricting media interactions applicable to certain individuals, we struggle to see why those should legitimize potentially chilling the speech of thousands, especially as it relates to those affected by the CARES Act. A proper alternative, then, would be to treat those individuals in a tailored approach, restricting media interactions through individuated release-agreements, and limiting the restrictions in the agreement to those topics that may cause harm—such as the crime itself, not, for example, that individual’s fears related to the pandemic.

iii. Journalists’ First Amendment Rights

The BOP’s policies and practices directly implicate the rights of journalists, as well. We understand that those on home confinement as well as halfway houses are often free to interact with the general public, such as through employment, as long as they meet certain neutral restrictions, like being home by a certain time or limiting visits to certain hours or locations. Certainly for those individuals, there is no conceivably valid First Amendment justification to place additional burdens on media interviews, particularly because doing so would impermissibly place the media’s access to inmates *below* that of the general public. The Supreme Court has made clear that prison policies limiting media access may not “place the press in any less advantageous position than the public generally,” or deny the press

¹³ Program Statement “Inmate Telephone Regulations,” P5264.08, (Feb. 11, 2008), *available online at* https://www.bop.gov/policy/progstat/5264_008.pdf.

¹⁴ See Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 St. John’s L. Rev. 1, 11-12 (2018).

access to information sources available to the general public.¹⁵ Again, although the courts have granted the BOP deference to restrict cameras and face-to-face interviews within secure facilities, in light of the proffered security concerns, where low-risk persons are not even inside a prison at all, we do not believe that a policy or practice that discriminates against the media, and the media only, stands any reasonable prospect of surviving judicial review.¹⁶

As a final note, these policies are significantly undermining the mission of FAMM, which is to “to create a more fair and effective justice system that respects our American values of individual accountability and dignity while keeping our communities safe.” Indeed, the violations noted above strike at the heart of our American values of free speech and undermine our public health response to the pandemic. What is more, FAMM has been forced to spend considerable resources to help its constituents try to navigate these issues—that is to exercise their rights while also staying within the scope of the BOPs rules. These resources could, and would, be spent elsewhere if the BOP’s policies were clarified and consistent with the First Amendment.

In light of the above, we request that the BOP immediately clarify, internally and externally, that Program Statement 1480.05 does not apply to persons on home confinement or in halfway houses, and the individuals on home confinement or in halfway houses may speak freely with the press, so long as those interactions conform to neutral policies applicable to incarcerated individuals’ interactions with third parties, without prior approval.

Thank you for your consideration of this request. Should you need any additional information, we would be happy to discuss these issues further and can be reached at the contact information below.

Respectfully,

/s/ Michael J. Gottlieb

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¹⁵ See *Saxbe v. Washington Post Co*, 417 U.S. 843, 848-50 (1974).

¹⁶ Indeed, “this deference is not limitless”—particularly, when, as here, “neither common sense nor evidence” can justify banning individuals from speaking out to the press about an issue of such public importance as the pandemic. See *Haze v. Harrison*, 961 F.3d 654, 659 (4th Cir. 2020) (internal citations omitted); accord *Heyer v. U.S. Bureau of Prisons*, 984 F.3d 347, 356 (4th Cir. 2021); see also *Turner* 482 U.S., at 86 (1987) (recognizing that courts “should ordinarily defer” to prison administrators’ regulation on media interviews, but suggesting that deference is triggered by “judgments regarding prison security” and that less deference is due where the “challenged regulation caused a ‘consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners.’”) (quoting *Martinez* 94 S.Ct. at 1809).

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