



LAW ENFORCEMENT LEADERS

To Reduce Crime & Incarceration

Hon. Merrick Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

July 9, 2020

Re: Support for Granting Clemency to Individuals Placed on Home Confinement Pursuant the CARES Act

Dear Attorney General Garland:

I write on behalf of Law Enforcement Leaders to Reduce Crime & Incarceration, a national coalition including over 200 current and former law enforcement officials, across the political spectrum, dedicated to protecting public safety and reducing unnecessary incarceration. We are deeply troubled by the U.S. Department of Justice’s (“DOJ”) inaction as it pertains to the approximately 4,500 individuals who face the threat of reincarceration due to the prior administration’s January 15, 2021, Office of Legal Counsel memo (“OLC memo”). The OLC memo advises that these individuals — placed on home confinement pursuant the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act — be returned to full custody in federal prison upon the end of the COVID-19 pandemic.¹ For the reasons outlined below, we respectfully urge the DOJ to recommend that President Biden grant clemency to these individuals, who have already been safely returned to their communities.²

Enacted by Congress in March of 2020, the CARES Act granted the Attorney General emergency authority to expand home confinement as long as emergency conditions “materially affect” the functioning of the Bureau of Prisons (BOP).³ As a result, Attorney General Bill Barr directed the BOP to place eligible incarcerated individuals on home confinement following the review of extensive criteria including: age and vulnerability to COVID-19, security level, PATTERN score, conduct while incarcerated, and initial crime, among other factors.⁴ Individuals whose primary offense was violent or sexual in nature were also ineligible.⁵ Because public safety was prioritized when making these determinations, and due to the extensive use of electronic monitoring, as of April 2021, only one person put on home confinement pursuant the CARES Act committed a new violent offense, leaving 99.9 percent of individuals with no new violations.⁶

Despite this clear success story, the OLC memo authorizes the BOP to rescind home confinement status following the emergency period of the COVID-19 pandemic.⁷ And though the COVID-19 pandemic continues to pose a threat to people behind bars — especially considering the rise of variants (namely the “delta” and “delta plus” strains) and insufficient vaccination rates among

incarcerated people and correctional officers — the OLC memo has left individuals placed on home confinement in fear, as the potential for reincarceration hangs over them and their families.⁸

Forcing the return of individuals who are safely serving their sentences at home, as the OLC memo details, has no public safety rationale and will overwhelm the already strained federal system. The BOP is currently understaffed, with a third of federal correctional officer positions vacant, and disturbing reports of prison cooks, teachers, and nurses “guarding” against incarcerated people.⁹ As for the DOJ and federal courts, the revocation of home confinement is likely to needlessly overwhelm them too — considering the First Step Act allows each of the 4,500 individuals who are returned to federal prison to bring a motion for compassionate release in court.¹⁰ It is both an unnecessary and illogical drain on DOJ resources to reincarcerate individuals that have already qualified for home confinement.

Clemency offers a clear solution to this problem. Specifically, the DOJ should recommend that President Biden use his clemency power to ensure that people who have been successfully placed on home confinement under the expanded CARES Act authority need not return to full custody. These individuals deserve an opportunity to reintegrate into their communities without the persistent threat of reincarceration. While campaigning for president in 2020, President Biden pledged to prioritize and “broadly use his clemency power.”¹¹ There is no better opportunity to fulfill this promise than to grant clemency to low-risk individuals who are already serving their sentences at home without issue. Notably, the president’s clemency authority is more than broad enough to support, for example, a commutation to time-served, or an order directing that the remaining sentence be carried out in a less restrictive format — such as home confinement.¹² And, the DOJ has other tools at its disposal to prevent these individuals from unnecessarily returning to prison, including the Elderly Offender Home Detention program, compassionate release, and furlough authority.¹³

For the reasons stated herein, we urge the DOJ to act now and to ensure that individuals placed on home confinement pursuant the CARES Act are not returned to prison upon the end of this pandemic, whenever that may be. There is no public safety basis to incarcerate these individuals, especially when doing so would place an unnecessary burden on the federal system.

Sincerely,



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Law Enforcement Leaders
to Reduce Crime & Incarceration
Retired Police Superintendent
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cc: Hon. Joseph R. Biden
President of the United States
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¹ CARES Act, H.R. 748, 116th Cong. (2020).

² Jennifer Mascott to General Counsel, Federal Bureau of Prisons, January 15, 2021, Home Confinement of Federal Prisoners After the COVID-19 Emergency, <https://www.justice.gov/olc/file/1355886/download>; <https://famm.org/wp-content/uploads/Letter-to-Attorney-General-Garland-re-OLC-Memo.pdf>.

³ CARES Act, H.R. 748, 116th Cong. (2020).

⁴ Attorney General William P. Barr to Director of Bureau of Prisons, March 26, 2020, Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic, https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

⁵ “Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic,” *National Association of Criminal Defense Lawyers*, April 10, 2020, https://www.nacdl.org/getattachment/331f9b07-72b3-416c-b1e1-0bc529233705/bop-hc_faqs-ao040920.pdf.

⁶ Zolan Kanno-Youngs and Maura Turcotte, “Thousands of Prisoners Were Sent Home Because of Covid. They Don’t Want to Go Back,” *New York Times*, June 27, 2021, <https://www.nytimes.com/2021/06/27/us/politics/biden-prison-coronavirus.html>; Walter Pavlo, “Federal Inmates On Home Confinement Face Uncertainty Of Returning To Prison,” *Forbes*, April 22, 2021, <https://www.forbes.com/sites/walterpavlo/2021/04/22/federal-inmates-on-home-confinement-face-uncertainty-of-returning-to-prison/?sh=62e59c6a56e3>.

⁷ Senators Richard J. Durbin and Cory Booker to Attorney General Merrick Garland, April 23, 2021, <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20DOJ%20on%20OLC%20memo%204.23.2021%20final%20CAB%20SIGNED%20RJD.pdf>.

⁸ Holly Ellyatt, “Delta Covid variant has a new mutation called ‘delta plus’: Here’s what you need to know,” *CNBC*, June 24, 2021, <https://www.cNBC.com/2021/06/24/delta-plus-variant-heres-what-you-need-to-know.html>; Wanda Bertram and Wendy Sawyer, “With the majority of corrections officers declining the COVID-19 vaccine, incarcerated people are still at serious risk,” *Prison Policy Initiative*, April 22, 2021, <https://www.prisonpolicy.org/blog/2021/04/22/vaccinerefusal/>.

⁹ Associated Press, “Federal prisons forced to use cooks, nurses to guard inmates due to staff shortages,” *NBC News*, May 21, 2021, <https://www.nbcnews.com/news/us-news/federal-prisons-forced-use-cooks-nurses-guard-inmates-due-staff-n1268138>.

¹⁰ First Step Act of 2018, S.756, 115th Cong. (2018).

¹¹ “The Biden Plan for Strengthening America’s Commitment to Justice,” *JoeBiden.com*, accessed July 6, 2021, <https://joebiden.com/justice/>.

¹² *Schick v. Reed*, 419 U.S. 256, 266 (1974) (holding that the president’s clemency power was intended to vest “plenary authority in the President to ‘forgive’ the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable”); Justin Wm. Moyer and Neena Satija, “A grandmother didn’t answer her phone during a class. She was sent back to prison,” *Washington Post*, June 26, 2021, https://www.washingtonpost.com/local/public-safety/inmates-pandemic-biden-trump-policy/2021/06/25/e89aa28e-d376-11eb-baed-4abcfa380a17_story.html.

¹³ Kevin Ring to Attorney General Merrick Garland, June 7, 2021, <https://famm.org/wp-content/uploads/AG-letter-June-Home-Confinement.pdf>.