



Hon. Joseph R. Biden
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

September 24, 2021

Re: Law Enforcement Urges Clemency for *All* Individuals Placed on Home Confinement Pursuant the CARES Act

Dear President Biden:

We write as individuals and on behalf of our respective national organizations — Law Enforcement Leaders to Reduce Crime & Incarceration, Law Enforcement Action Partnership, and Fair and Just Prosecution — as it pertains to the approximately 4,000 individuals placed on home confinement pursuant the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, who face the continued threat of reincarceration due to the prior administration’s January 15, 2021, Office of Legal Counsel memo (“OLC memo”).¹ We are pleased to see reports that your Administration is beginning to consider commutations for individuals who have committed nonviolent drug offenses and have been placed on home confinement pursuant the CARES Act.² Joining members of Congress, justice reform advocates across the political spectrum, and companies that currently employ these individuals, we seek to add our law enforcement perspective and urge you to grant clemency to *all* individuals placed on home confinement pursuant the CARES Act — regardless of underlying offense or sentence.³

As current and former members of law enforcement, our priority, above all else, is public safety. Following the enactment of the CARES Act by Congress in March of 2020, Attorney General Bill Barr used his emergency authority to direct the BOP to place eligible incarcerated individuals on home confinement following the review of extensive criteria pertaining to public safety 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 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 three individuals put on home confinement pursuant the CARES Act committed new offenses, leaving 99.9 percent of individuals with no new violations (which is notable considering the average recidivism rate among individuals formerly incarcerated at the federal level is 49 percent).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,” “delta plus,” and “mu” 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 an already strained federal system, thereby presenting a health risk not simply to people housed in these facilities (places that have been among the nation’s largest COVID-19 hot spots), but also the staff who work there. The BOP is currently understaffed, with a third of federal correctional officer positions vacant, and disturbing reports of prison cooks, teachers, and nurses “guarding” incarcerated people.⁹

Your Administration’s choice to consider clemency for individuals who have committed nonviolent drug offenses is a promising first step.¹⁰ However, we urge you to use your clemency power to ensure that all people successfully placed on home confinement under the CARES Act do not return to full custody. Whether their underlying offenses were drug related or not, *all* individuals on home confinement deserve an opportunity to reintegrate into their communities without the persistent threat of reincarceration. While campaigning for president in 2020, you pledged to prioritize and “broadly use [your] clemency power.”¹¹ There is no better opportunity to fulfill this promise than to grant clemency to all low-risk individuals who are already serving their sentences at home without issue. Notably, as you are aware, your 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 setting — 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 you to act now and to ensure that all individuals placed on home confinement pursuant the CARES Act are not returned to prison upon the end of this pandemic, whenever that may be. Every day that passes without definitive action or clarity from your Administration, families and communities suffer — which only serves to undermine formerly incarcerated individuals’ rehabilitation and reentry. Ultimately, there is no public safety rationale to exclude some individuals from clemency, especially when doing so would place an unnecessary burden on the federal system and exacerbate health dangers to those who are housed and work within these overcrowded facilities.

Sincerely,

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¹ CARES Act, H.R. 748, 116th Cong. (2020).

² Sam Stein, “Biden starts clemency process for inmates released due to Covid conditions,” *Politico*, September 13, 2021, <https://www.politico.com/news/2021/09/13/biden-clemency-covid-inmates-511658> (reporting that drug offenders released to home confinement under the CARES Act with four years or less on their sentences may formally submit commutation applications).

³ *Right-Left Coalition Urges Biden Administration to Grant Clemency for Individuals on Home Confinement*, 2021, <https://www.aclu.org/press-releases/right-left-coalition-urges-biden-administration-grant-clemency-individuals-home>; Durbin, Booker Urge President Biden To Use Executive Authority To Allow Federal Inmates To Remain On Home Confinement, 2021, <https://www.durbin.senate.gov/newsroom/press-releases/durbin-booker-urge-president-biden-to-use-executive-authority-to-allow-federal-inmates-to-remain-on-home-confinement>; Kevan McAnally et al. to President Joseph R. Biden, August 25, 2021, <https://famm.org/wp-content/uploads/letter-from-employers-of-CARES-Act-August-25-2021.pdf>; 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>.

⁴ CARES Act, H.R. 748, 116th Cong. (2020); 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> (only one of the three new offenses was a violent crime); 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>; Kim Steven Hunt and Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Overview*, United States Sentencing Commission, 2016, 5, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

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/>; Brian Hamrick, “Mu COVID-19 variant: What to know about new strain in Ohio, Kentucky, Indiana,” *WLWT5*, September 7, 2021, <https://www.wlwt.com/article/what-to-know-about-mu-new-covid-19-variant-in-ohio-kentucky-indiana/37503502#>.

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 Zolan Kanno-Youngs and Charlie Savage, “White House Weighs Clemency to Keep Some Drug Offenders Confined at Home,” *New York Times*, August 30, 2021, <https://www.nytimes.com/2021/08/30/us/politics/drug-offenders-commute-sentence.html>.

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>.