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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

December 10, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

We write in response to recent reporting by *The Wall Street Journal* that the U.S. Marshals Service (USMS) may be using “pass-through” or intergovernmental contracts for federal pretrial detainees in a way that undercuts President Biden’s Executive Order directing the Federal Bureau of Prisons (BOP) to end the use of privately-operated detention facilities.¹ While we acknowledge and appreciate BOP’s recent statement regarding its commitment to ending its reliance on private prisons, we are requesting information to better understand the private detention landscape and steps taken thus far to comply with the Executive Order.

On January 26, 2021, President Biden issued an Executive Order intended to phase out the Department of Justice (DOJ)’s reliance on privately-operated criminal detention facilities.² As part of the mandate, the President ordered that the Attorney General “shall not renew Department of Justice contracts with privately operated criminal detention facilities, as consistent with applicable law.”³ Following the January 26 order, DOJ confirmed that the President’s directive includes private contracts awarded through USMS for the housing of pretrial detainees.

However, USMS has entered at least one intergovernmental contract to house federal pretrial detainees in a private facility and is further considering others.⁴ Through these contracts,

¹ Saeedy, Alexander, *Private Prisons Still Make Money from Federal Inmates Despite Biden’s Executive Order*, THE WALL STREET JOURNAL, (October 8, 2021 10:41am ET), <https://www.wsj.com/articles/private-prisons-still-make-money-from-federal-inmates-despite-bidens-executive-order-11633685401>

² Exec. Order No. 14006, 86 Fed. Reg. 7483 (January 26, 2021)

³ *Id.*

⁴ See Dennis, Justin, *Though Biden wants to stop using them, Marshals can keep using Youngtown’s private prison*, MAHONING MATTERS (May 27, 2021 11:26am), <https://www.mahoningmatters.com/local-news/though-biden-wants-to-stop-using-private-prisons-mahoning-can-keep-using-neocc-3814922>; ACLU Letter to the White House Domestic Policy Counsel and the Leavenworth County Commission regarding the Closure of CoreCivic Leavenworth dated September 2, 2021 https://www.aclukansas.org/sites/default/files/field_documents/letter_regarding_corecivic_leavenworth_redacted.pdf

USMS will contract with state and local governments who will assume responsibility for housing federal pretrial detainees, and they will in turn sub-contract their housing responsibilities to private prisons.

The continued housing of federal pretrial detainees in private prisons is concerning for a number of reasons. First, as a policy matter, the President's Executive Order recognizes that "[t]o decrease incarceration levels, we must reduce profit-based incentives to incarcerate."⁵ While pretrial detention rates in the federal system have improved from record high levels in 2018, continued use of private prisons, either through direct or work-around contracts, perpetuates a financial incentive for pretrial incarceration.⁶

Second, safety risks for incarcerated persons are in some cases higher in private facilities than in BOP- managed facilities.⁷ In 2016, the DOJ Office of the Inspector General found that private facilities incurred more safety and security incidents per capita than comparable BOP institutions, including higher incidents of contraband, assaults, and improper use of Special Housing Units (SHU).⁸ The safety and security of incarcerated individuals should be a top priority for the Department.

Lastly, as the President's Executive Order notes, "privately operated criminal detention facilities consistently underperform Federal facilities with respect to correction services, programs, and resources."⁹ USMS should prioritize placements at BOP and state and locally-operated facilities, especially where these facilities allow for greater access to legal representation, family visitation, services, and other resources.

Given these concerns, please provide responses to the following requests as soon as possible, but no later than January 7, 2022:

- 1) Please identify all active USMS contracts with privately-operated criminal detention facilities, categorized by jurisdiction, and provide the expiration date of each contract.
- 2) Based on the information provided in response to question 1, for all contracts that expire in 2021 or 2022, please provide plans to house or transfer impacted federal pretrial detainees.
- 3) Please identify all active USMS contracts with state or local governments for the housing of pretrial detainees. Please further highlight contracts with state or local governments

⁵ Exec. Order No. 14006, 86 Fed. Reg. 7483 (January 26, 2021)

⁶ See Rowland, Matthew, *The Rising Federal Pretrial Detention Rate, in Context*. 82 Federal Probation 13 (2018); See also United States Courts Caseload Statistic Data Tables, Table H-14, [https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=H-](https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=H-14&pn=All&t=All&m%5Bvalue%5D=&y%5Bvalue%5D%5Byear%5D=)

[14&pn=All&t=All&m%5Bvalue%5D=&y%5Bvalue%5D%5Byear%5D=](https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=H-14&pn=All&t=All&m%5Bvalue%5D=&y%5Bvalue%5D%5Byear%5D=)

⁷ See Office of Inspector General's [Review of Federal Bureau of Prisons' Monitoring of Contract Prisons](https://www.justice.gov/insagr/reports/review-of-federal-bureau-of-prisons-monitoring-of-contract-prisons) ([justice.gov](https://www.justice.gov)) dated August 2016

⁸ *Id.*

⁹ Exec. Order No. 14006, 86 Fed. Reg. 7483 (January 26, 2021)

that have retained a privately- operated detention facility to fulfill their housing responsibilities. Please provide the expiration date for each contract.

- 4) Please provide the most recently available data for the number of federal pretrial detainees currently housed in the following categories:
- a. directly in privately- operated detention facilities;
 - b. indirectly in privately-operated facilities through an intergovernmental contract;
 - c. in state and local facilities; and
 - d. in BOP facilities.

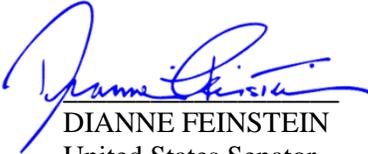
Finally, the Committee recognizes the effect that ending DOJ contracts with private detention centers may have on the men and women employed in these facilities. We welcome further conversation and information on the potential for these employees to seek and obtain employment in the Federal correctional system, if they desire to continue their career in service to incarcerated individuals and the public.

Thank you for your prompt attention to this matter. We look forward to your response.

Sincerely,



RICHARD J. DURBIN
Chair



DIANNE FEINSTEIN
United States Senator



CORY A. BOOKER
United States Senator



PATRICK LEAHY
United States Senator



AMY KLOBUCHAR
United States Senator



ALEX PADILLA
United States Senator

cc: The Honorable Ronald L. Davis, Director of the United States Marshals Service