

RICHARD J. DURBIN, ILLINOIS, CHAIR

PATRICK J. LEAHY, VERMONT
DIANNE FEINSTEIN, CALIFORNIA
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT
MAZIE K. HIRONO, HAWAII
CORY A. BOOKER, NEW JERSEY
ALEX PADILLA, CALIFORNIA
JON OSSOFF, GEORGIA

CHARLES E. GRASSLEY, IOWA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
BEN SASSE, NEBRASKA
JOSHUA D. HAWLEY, MISSOURI
TOM COTTON, ARKANSAS
JOHN KENNEDY, LOUISIANA
THOM TILLIS, NORTH CAROLINA
MARSHA BLACKBURN, TENNESSEE

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 23, 2021

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

Dear Attorney General Garland:

We respectfully request that you rescind the Office of Legal Counsel's January 15, 2021 memorandum opinion entitled "Home Confinement of Federal Prisoners After the COVID-19 Emergency" ("OLC opinion"). The OLC opinion incorrectly finds that following the emergency period of the pandemic, the Bureau of Prisons ("BOP") must recall federal inmates released to home confinement pursuant to the CARES Act and require these inmates to complete their sentences at BOP facilities. In fact, the CARES Act does not require or permit BOP to recall these prisoners.

On March 27, 2020, Congress passed and the President signed the CARES Act, providing critical relief from the effects of the coronavirus pandemic. In order to give BOP broader authority to reduce prison populations to help contain the spread of the virus, the CARES Act expanded BOP's home confinement authority. The Act provides that during the covered emergency period, BOP may lengthen the maximum amount of time a prisoner may be placed in prerelease home confinement under 18 U.S.C. § 3624(c)(2).

Section 3624(c)(2) provides that BOP must ensure that prisoners serving terms of incarceration spend the final months of that term "under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." Ordinarily, prisoners may be placed "in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." Under the CARES Act, if the Attorney General found that the pandemic materially affected the functioning of BOP, the Director of BOP was authorized to expand this period and place prisoners on home confinement earlier than otherwise authorized. Attorney General William Barr made the necessary finding on April 3, 2020, and BOP began exercising this authority.

Since March 26, 2020, BOP has released more than 24,000 inmates to home confinement. This includes inmates who were near completion of their sentence and eligible for home confinement under § 3624(c)(2) prior to the CARES Act and those released pursuant to the expanded authority under the CARES Act. Most of these inmates have completed their

sentences, and almost all have been successful on home confinement. On April, 15, 2021, at a hearing before the Senate Judiciary Committee, BOP Director Michael Carvajal testified that BOP returned just 151 of the more than 24,000 prisoners released to home confinement and halfway houses during the pandemic to BOP facilities due to rule violations, and just three of those were for a new criminal offense.

According to the OLC opinion, those on home confinement under the CARES Act authority must be returned to custody when the emergency period of the pandemic ends. The CARES Act, however, contains no such requirement, and recalling prisoners who are successfully transitioning to the community through home confinement is contrary to the requirements and purpose of § 3624(c)(2). The plain text of the CARES Act provides BOP with authority to lengthen the amount of time a prisoner may serve in home confinement. It is that authority (the authority to make a placement decision), not the consequences of those decisions, that is limited to the emergency period of the pandemic. As long as BOP exercises its authority during the covered emergency period, the consequences of those decisions—prisoners serving time in home confinement—continue beyond that period. The purpose of § 3624(c)(2) is to allow prisoners to finish the remainder of their sentence in home confinement to allow “a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.” Recalling prisoners, absent a violation of the terms of release, is contrary to that goal.

For the reasons above, the OLC opinion incorrectly interprets the CARES Act, and we ask you to rescind it. In addition, we ask that you provide us with the number of prisoners on home confinement who would not qualify for home confinement absent the authority of the CARES Act.

Thank you for your time and consideration. We look forward to your prompt response.

Sincerely,



Richard J. Durbin
Chair

U.S. Senate Committee on the Judiciary



Cory A. Booker
Chair

U.S. Senate Judiciary Subcommittee on
Criminal Justice and Counterterrorism