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November 17, 2021

The Honorable Merrick B. Garland
Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Dear Attorney General Garland:

On January 15, 2021, the Office of Legal Counsel (OLC) at the Department of Justice under the Trump Administration issued a memorandum opinion for the Bureau of Prisons (BOP) interpreting the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) entitled “Home Confinement of Federal Prisoners After the COVID-19 Emergency.”¹ The CARES Act—passed and signed into law with bipartisan support at the outset of the ongoing public health pandemic in March 2020—expanded BOP’s existing statutory authority to place incarcerated individuals in home confinement to mitigate the spread of COVID-19 in federal correctional facilities, including at FCI Danbury in Connecticut. Notwithstanding this clear directive, BOP was “slow and inflexible”² to implement it, putting the health and safety of incarcerated individuals, correctional staff, and entire communities unnecessarily at risk.

OLC has since concluded that, at the end of the COVID-19 pandemic, “BOP must recall prisoners in home confinement to correctional facilities.”³ Last month, you testified before the Senate Committee on the Judiciary that “it would be terrible policy” to do so and announced that the Department is reviewing this opinion.⁴ To that end, I write to urge you to you rescind this eleventh-hour opinion from the last Administration and take steps to ensure that incarcerated individuals who have transitioned to home confinement can remain in home confinement for the remainder of their sentences and work to reintegrate with their communities.

¹ Memorandum Opinion from the Department of Justice Office of Legal Counsel for the General Counsel of the Federal Bureau of Prisons (Jan. 15, 2021), <https://www.justice.gov/olc/file/1355886/download> [hereinafter OLC Memorandum Opinion].

² *Whitted v. Easter*, No. 3:20-cv-00569 (D. Conn. May 12, 2020) (order granting temporary restraining order) [hereinafter May 2020 Temporary Restraining Order].

³ OLC Memorandum Opinion, *supra* note 1, at 15.

⁴ See *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021).

In April 2020, former Attorney General Barr specifically identified FCI Danbury as one BOP facility “experiencing significant levels of infection.”⁵ Unfortunately, in the following months, conditions did not substantially improve. In February 2021, the *New York Times* published a grim exposé describing the staggering conditions and experiences at FCI Danbury almost one year into the pandemic:

When inmates felt sick, they often had to chase down medics and plead to be tested, and later beg for results. . . . When prisoners were secluded in groups after testing positive, they were left largely to fend for themselves, without basic supplies like acetaminophen or extra fluids. To call for help, they banged on windows.⁶

These accounts were—and remain—shocking but, sadly, not surprising. In May 2020, the District Court for the District of Connecticut issued a temporary restraining order against FCI Danbury, finding that FCI Danbury had “[made] only limited use of . . . home confinement authority” but that “transfer to home confinement . . . [was] the only viable measure by which the safety of highly vulnerable inmates can be reasonably assured.”⁷

In turn, I repeatedly called on BOP to make robust and expedited use of its expanded home confinement authority as Congress intended in passing the CARES Act. The failure to place incarcerated individuals in home confinement in a timely manner exacerbated the toll the pandemic has taken at FCI Danbury and at other correctional facilities, and, in some cases, cost individuals their lives.

Moreover, home confinement has been “proven successful,” as you testified.⁸ In April, BOP Director Carvajal confirmed that conclusion, noting that only 151 of the 24,000 incarcerated individuals who had been placed in home confinement had been returned to BOP correctional facilities for cause.⁹ Further, those who have been placed in home confinement have been able to reunite with their families, re-enter the workforce, and reintegrate with their communities. It is critical that the strides these individuals have taken, and continue to take, to return to society are not upended due to policy judgments that are inconsistent with the policy objectives set forth in the law.

The OLC memorandum opinion issued in January 2021 threatens both this successful re-entry process and the health and safety of incarcerated individuals and correctional staff alike. In enacting the CARES Act, Congress gave BOP the explicit authority to place any incarcerated individual in home confinement. Nothing in the CARES Act, nor in the existing home confinement statute, indicates that those placed in home confinement must be recalled when the COVID-19 pandemic is over just because the emergency period has ended.

⁵ Memorandum from Attorney General William Barr to the Director of the Bureau of Prisons (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download>.

⁶ Roni Caryn Rabin, *Vulnerable Inmates Left in Prison as Covid Rages*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/27/health/coronavirus-prisons-danbury.html>.

⁷ May 2020 Temporary Restraining Order, *supra* note 2, at 2, 49.

⁸ See *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021).

⁹ See *Bureau of Prisons Oversight: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021).

The memorandum opinion is simply wrong on the policy and the law. It undermines BOP's already limited use of its home confinement authority, risks the progress we have made to combat the COVID-19 pandemic at FCI Danbury and other correctional facilities, and, most importantly, is contrary to the statutory text of the CARES Act.

I was encouraged to hear that the Department is reviewing this opinion and, for these reasons, urge you to rescind it while continuing to assist the incarcerated individuals who have been placed in home confinement under the CARES Act reintegrate with their communities.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in blue ink, reading "Richard Blumenthal".

Richard Blumenthal
United States Senator