

United States Senate

January 4, 2022

The Honorable Merrick Garland
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland:

I write today regarding the Department of Justice's recent decision to ignore the clear limits placed by Congress on pandemic-related home confinement of convicted federal criminals.

When Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in 2020, it granted temporary, emergency authority for the Department of Justice to house federal inmates in home confinement without regard for the typical limits on home confinement under federal law. The Department's Office of Legal Counsel correctly concluded in January 2021 that the only tenable reading of the CARES Act is that the Bureau of Prisons (BOP) could only exercise expanded home confinement placement authority during the coronavirus national emergency, and that the law requires that the BOP return such inmates to prison and follow the limits of longstanding federal law following the end of the emergency.¹ Activists asked the Department to ignore the law to reach their preferred policy outcome of mass early release of serious criminals, but ignoring the law is not within your authority. Indeed, it was publicly reported this summer that the Biden administration had reviewed the law in the hopes of pleasing those activists, but found that it could not.²

Unfortunately, it seems that you have now decided to bow to the pressure from political activists rather than do your job. The Office of Legal Counsel, at your direction, issued a slapdash opinion reversing itself in December 2021.³ That new opinion is not based on the law, but rather on the policy goals of criminal leniency. It even admits as much.⁴ Your opinion would also allow absurd results; under your baseless reading of the CARES Act, even after the coronavirus

¹ *Home Confinement of Federal Prisoners After the COVID-19 Emergency*, 45 Op. O.L.C. __ (Jan. 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

² Charlie Savage & Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, THE NEW YORK TIMES (Jul. 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html>.

³ *Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency*, 45 Op. O.L.C. (Dec. 21, 2021), <https://www.justice.gov/olc/file/1457926/download>.

⁴ Id. ("focusing solely on the purpose of the CARES Act would overlook the broader purpose of home confinement," and "Congress's expansion of home confinement in recent years demonstrates that 'the use of incarceration is being re-evaluated as compared to the societal benefits of non-custodial rehabilitative programs.'")

national emergency ends, the BOP would have 30 days during which it could release as many inmates as possible to home confinement and have them stay there until the end of their sentences, whether for years or even for the remainder of their lives. Such a scenario is not plausibly contained within the temporary authority that Congress granted to you, yet would be allowable under your new opinion.

It is Congress's duty to oversee the enforcement of federal law. Accordingly, please answer the following questions no later than 5:00PM on Wednesday, January 12, 2021:

1. Did anyone in the White House direct you to have the Office of Legal Counsel reconsider or rescind its January 15, 2021 opinion?
2. Please provide a list of all meetings and phone calls between you, your staff, or any Department of Justice component with any outside group or individual between January 20, 2021, and December 21, 2021, in which the CARES Act or the BOP's authority to place inmates on home confinement was discussed. Note that there can be no justification for refusing to provide such a list to Congress, as all such information is required to be disclosed even to the general public upon request under the terms of the Freedom of Information Act.
3. Please provide copies of all written communications between you, your staff, or any Department of Justice component with any outside group or individual between January 20, 2021, and December 21, 2021, in which the CARES Act or the BOP's authority to place inmates on home confinement was discussed. Note that there can be no justification for refusing to provide such copies to Congress, as all such information is required to be disclosed even to the general public upon request under the terms of the Freedom of Information Act.
4. The CARES Act provides that, to grant an otherwise-ineligible inmate temporary home confinement during the pandemic, the Attorney General must first find that the emergency is "materially affect[ing] the functioning" of the BOP. On April 3, 2020, Attorney General Barr made such a finding based on the need to protect at-risk inmates from contracting COVID-19. Given that every inmate in BOP custody has now been vaccinated or offered the vaccine, please provide a written justification for continuing any use of the temporary home confinement authority under the CARES Act, and explain the conditions under which you plan to withdraw such continuing authority.
5. Please provide a list of all inmates who are currently placed on home confinement under the temporary authority granted by the CARES Act, broken down by primary offense, total sentence length, and the number of months remaining under their sentence.

6. How many inmates who were placed on home confinement under the temporary authority granted by the CARES Act have had their home confinement rescinded or have been rearrested for a new offense? Please provide a description of the offenses for which any such inmates have been rearrested, or the reasons for which their home confinement was rescinded.

I look forward to your prompt response regarding this important matter.

Sincerely,



Tom Cotton
United States Senator