



April 14, 2021

Hon. Richard Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Hon. Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Hearing on Oversight of the Federal Bureau of Prisons

Dear Chairman Durbin and Ranking Member Grassley:

On behalf of the Justice Action Network, the country's largest bipartisan organization dedicated to advancing criminal justice reform at the state and federal levels, we write to thank you for holding this important hearing and to express our concerns regarding the management of our federal prison system. We write specifically to convey our concerns about efforts to mitigate the spread of COVID-19 in federal prisons and the status of implementation of the First Step Act of 2018.

Mitigation of COVID-19 in Federal Prisons

The Justice Action Network, dozens of other organizations, and over two dozen Members of Congress have urged the Biden administration to take immediate action to reverse the pernicious effects of the Department of Justice Office of Legal Counsel's opinion entitled, "Home Confinement of Federal Prisoners After the COVID-19 Emergency" issued on January 15, 2021 in President Trump's final days in office (the "OLC Memo").¹ As explained in a recent news article in Reuters, the OLC Memo directs the Bureau to send back to prison all individuals who are on home confinement due to the pandemic once the emergency is declared over, regardless of whether they have successfully remained law abiding and reintegrated into their communities.²

The Justice Action Network has worked to address some of the most pervasive and unjust disparities within our criminal justice system, including working to enact the First Step Act in 2018 and its previous iteration, the Sentencing Reform and Corrections Act. One of the major tenets of the First Step Act was the creation of back-end reforms to allow relief to individuals who have shown tremendous progress yet face overly long or unjust prison sentences. With the advent of the COVID-19 pandemic, efforts to release prisoners early through compassionate release and home confinement have become even more critical, as prisons and jails proved to be some of the most dangerous hotspots for outbreaks of the virus throughout the nation.

To face this challenge and equip the Bureau of Prisons with the necessary tools to mitigate the spread of the virus, Congress rightly included expanded authority under the CARES Act that would allow the Bureau to depart from existing statute to place more individuals on home confinement to allow for greater social distancing within federal correctional facilities.³

According to the Bureau of Prisons, over 24,000 individuals have been placed on home confinement since March 26, 2020, with 7,336 individuals currently serving time on home confinement.⁴ While this is a tremendous development that has no doubt saved lives, we now find ourselves at an inflection point where many of these individuals, who have successfully transitioned to their homes and communities, may be required to go back to prison. These individuals face a tenuous situation and much uncertainty. It is difficult if not impossible for someone to apply for a job, go back to school, start forming relationships with children and grandchildren, if they believe that at any moment, they could be sent back to prison under the OLC Memo. Leaving individuals in limbo is unnecessary and inhumane. Further, the end effect of leaving this memorandum on the books will be thousands of individuals sent back to federal prison, causing a dramatic increase in the current federal prison population. This would reverse years of progress under previous administrations to decrease this population.⁵

This raises a myriad of questions that must be answered before people are required to return to prison. To be clear, Justice Action Network vehemently opposes the OLC Memo and finds the legal reasoning flawed and its impact devastating to families and to public safety. The Justice Action Network was proud to sign a letter to Attorney General Merrick Garland and President Biden along with over two dozen organizations across the political spectrum urging the rescission of this cruel and unjust memo.⁶ Additionally, 28 members of the House of Representatives sent a letter last week to the President Biden urging him to revoke the memo.⁷

The Bureau's presence at this oversight hearing can help address outstanding questions, including:

- The Bureau has not delineated between the individuals who are currently serving time on home confinement under previous statutes versus those serving time on home confinement under the CARES Act emergency authority. How many individuals would the OLC Memo impact, and how many of those individuals have remained infraction-free during their time on home confinement?
- How does the Bureau intend to return thousands of individuals back to prison in a safe and orderly manner? Does the Bureau have the resources to implement such cumbersome process and what are the expected costs?
- Can the Bureau provide an assurance that they have the requisite staffing capability to take on this increase in population?
- Has the Bureau discussed with the Administration or Justice Department ways to avoid sending these individuals back to federal prison unnecessarily, including through executive action, Departmental action, or outright rescission of the OLC Memo? If so, what are the options under consideration?

Additionally, the Bureau has the authority to grant those who have remained infraction-free during their service on home confinement sentence reductions through compassionate release. However, in previous testimony, Director Carvajal did not provide much clarification on the Bureau's internal process and decision making when granting compassionate release motions, which often leads to court involvement. We ask the Director commit to providing clear guidelines for how these decisions will be made going forward and whether they will consider granting motions to individuals who are forced to return to prison.

First Step Act Implementation

The Justice Action Network's concerns and questions extend beyond the OLC Memo as we remain apprehensive about implementation of the First Step Act. It has been more than two years since Congress passed and the President signed into law the First Step Act, a groundbreaking prison and sentencing reform law to help those behind bars prepare for successful reentry and ease federal sentencing laws. The Trump Administration was slow to fully implement this Act, and its Justice Department actively impeded full implementation.⁸ We believe this oversight hearing is an important opportunity to ask the Bureau about the exact status of First Step Act implementation, and its plans to implement this critical law fully and swiftly.

Additionally, on November 25, 2020, the Bureau of Prisons issued a rule regarding the procedures for earning, awarding, losing, and restoring earned time credits as required by the First Step Act's risk and needs assessment provision.⁹ The rule has many shortcomings that are inconsistent with the Act and the legislative intent of Congress. For instance, one shortcoming is the determination that 8 hours in evidence-based recidivism reduction programming will equal one day of earned time. This would strictly limit the amount of earned time individuals can accrue as most programs do not run on full 8-hour days for one day of programming. Earlier this year, the Justice Action Network along with FAIMM and the National Association of Criminal Defense Lawyers submitted comments on the proposed rule highlighting additional shortcomings and harmful effects of the rule.¹⁰ We also ask that the Bureau provide information as to whether it plans to revisit this rule.

We hope that these issues and many others plaguing our federal prison systems, such as understaffing and staffing retention, conditions for incarcerated pregnant women, COVID-19 vaccination distribution, and more, will receive ample attention from Director Carvajal during the hearing and in written responses to questions.

Thank you for your leadership on these issues and for holding this oversight hearing on the Federal Bureau of Prisons. Bipartisan criminal justice reform continues to unite Congress and the country, and we hope that this shared success will continue to change laws and change lives.

Sincerely,

Inimai Chettiar, Federal Director
Cortland Broyles, Federal Affairs Coordinator

¹ Jennifer Mascott, Memorandum Opinion for General Counsel, Federal Bureau of Prisons, Home Confinement of Federal Prisoners After the COVID-19 Emergency (Jan. 15, 2021).

² Sarah N. Lynch, *Thousands of low-level U.S. inmates released in pandemic could be headed back to prison*, Reuters, (Apr. 11, 2021), <https://www.reuters.com/article/us-health-coronavirus-usa-justice/thousands-of-low-level-u-s-inmates-released-in-pandemic-could-be-headed-back-to-prison-idUSKBN2BY0AU>.

³ Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281, § 12003, (2020).

⁴ FED. BUREAU OF PRISONS, COVID-19 Home Confinement Information, Coronavirus (Apr. 2021), <https://www.bop.gov/coronavirus/>.

⁵ FED. BUREAU OF PRISONS, Population Statistics, Past Inmate Population Statistics (Apr. 2021), https://www.bop.gov/mobile/about/population_statistics.jsp#old_pops.

⁶ Letter from FAMM and Justice Action Network et al to Merrick Garland, Att’y Gen., U.S. Dep’t. of Just. (Apr. 1, 2021). <https://famm.org/wp-content/uploads/Letter-to-Attorney-General-Garland-re-OLC-Memo.pdf>.

⁷ Letter from Hon. Bonnie Watson Coleman, Rep., U.S. House of Reps., et al to Hon. Joseph R. Biden, President, United States (April 8, 2021). https://watsoncoleman.house.gov/uploadedfiles/letter_to_president_biden_-_regarding_home_confinement_guidelines.pdf.

⁸ Neena Satija, Wesley Lowery, and Josh Dawsey, *Trump boasts that his landmark law is freeing these inmates. His Justice Department wants them to stay in prison*, Washington Post, (Nov. 7, 2019), https://www.washingtonpost.com/investigations/trump-brags-that-his-landmark-law-freed-these-inmates-his-justice-department-wants-them-to-stay-in-prison/2019/11/07/5f075456-f5db-11e9-a285-882a8e386a96_story.html.

⁹ FSA Time Credits, 85 Fed. Reg. 75268 (proposed Nov. 25, 2020).

¹⁰ FAMM, Justice Action Network, and Nat’l. Assn. of Criminal Defense Lawyers, Comment Letter on Proposed Federal Bureau of Prisons FSA Earned Time Credits Rule (Jan. 25, 2021), <https://www.nacdl.org/getattachment/a39b698a-0b7d-4a15-b382-b0e9267058f2/nacdl-famm-jan-comments-to-bop-on-proposed-first-step-act-earned-time-credits-rule-january-2021.pdf>.