

Submitted via regulations.gov

July 21, 2022

Merrick B. Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave NW  
Washington, DC 20530

Re: Proposed Rule, Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act (BOP Docket No. 1179, RIN 1120-AB79)

Dear Attorney General Garland:

The American Civil Liberties Union, Color Of Change, Democracy Forward Foundation, Due Process Institute, Federal Public & Community Defenders, Justice Action Network, The Leadership Conference on Civil and Human Rights, the National Association of Criminal Defense Lawyers, and Tzedek Association appreciate the opportunity to comment in response to the Department of Justice’s recent Proposed Rule interpreting the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to permit individuals placed on home confinement during the COVID-19 emergency to remain on home confinement once the emergency ends.<sup>1</sup>

Commenters include attorneys who represent people impacted by this Proposed Rule, non-profit organizations that work with them, and organizations dedicated to the rule of law.

Commenters commend DOJ for its ongoing use of its CARES Act authority and for its efforts to use this authority in a manner consistent with the law. As discussed below, DOJ’s Proposed Rule correctly concludes that the CARES Act does not require the Bureau of Prisons to recall individuals on home confinement to a correctional facility once the COVID-19 emergency period ends. Indeed, the default rule under BOP’s pre-existing statutory authority is that people on home confinement remain there until the end of their sentence, absent a disciplinary reason. Any potential return to a correctional facility must be consistent with clearly established criteria and procedures that further the purpose of home confinement and comport with due process. Commenters thus recommend that, after this rule is finalized, BOP establish clear criteria and procedures—through notice-and-comment rulemaking—for how it will assess individuals subject to potential return to a federal facility. Commenters further refer DOJ to the comment on the Proposed Rule submitted by FAMM and Professor Sarah F. Russell, which includes detailed accounts of some of the individuals most affected.

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<sup>1</sup> See Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 87 Fed. Reg. 36,787 (June 21, 2022) (to be codified at 28 C.F.R. pt. 0) (“Proposed Rule”).

**I. The CARES Act Does Not Require BOP to Recall Individuals to a Correctional Facility Once the COVID-19 Emergency Ends, and, Under Pre-Existing Authority, Home Confinement Continues Until a Sentence is Completed.**

DOJ correctly concludes that nothing in the CARES Act, nor any other relevant statutory authority, requires the return of individuals placed on home confinement to a correctional facility. The CARES Act made only one change relevant here—to authorize BOP, during the emergency period, to “*lengthen the maximum amount of time* for which the Director is authorized to place a prisoner in home confinement” beyond the six-month maximum “under the first sentence of section 3624(c)(2) of title 18.”<sup>2</sup> DOJ is correct that this language is meaningfully distinct from other provisions of the CARES Act that are intended to provide only temporary respite to prisoners, such as the provision allowing teleconferencing visitations only during a limited period.<sup>3</sup>

DOJ also correctly identified errors in the now-rescinded January 2021 Office of Legal Counsel opinion concerning BOP’s CARES Act authority.<sup>4</sup> Foremost, DOJ is correct to now conclude that the act of “lengthen[ing]” a period of home confinement under the CARES Act is completed at the time that an individual is “place[d]” on home confinement.<sup>5</sup> And contrary to the rationale in the original OLC opinion, other authorities in the CARES Act do also provide benefits that extend beyond the pandemic emergency (such as certain loan programs).<sup>6</sup> The original OLC opinion was also wrong to conclude that the thirty-day grace period at the end of the pandemic emergency must have been provided to allow BOP to return thousands of individuals to prison *en masse*. As the Proposed Rule notes, there are many other explanations for this grace period, including to allow BOP to finish processing home confinement placements it has already begun.<sup>7</sup> DOJ is therefore correct that the best—indeed, the unambiguous—reading of the CARES Act does not require BOP to return people on home confinement to a federal facility at the end of the COVID-19 emergency period.<sup>8</sup>

The Proposed Rule recognizes that “[a]llowing certain inmates . . . to remain in home confinement after the expiration of the covered emergency period will also afford a number of operational benefits” for BOP, as well as “penological, rehabilitative, public health, public safety, and societal benefits” for individuals who are allowed “to effectively prepare for

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<sup>2</sup> CARES Act, Pub. L. 116-136, § 12003(a)(2), (b)(2), 134 Stat. 281, 515, 516 (2020) (emphasis added); 18 U.S.C. § 3624 (c)(2).

<sup>3</sup> CARES Act § 12003(c)(1), 134 Stat. at 516 (using the phrase “during the covered emergency period” twice to indicate that the services were only required during the pandemic emergency).

<sup>4</sup> 87 Fed. Reg. at 36,792.

<sup>5</sup> *Id.*

<sup>6</sup> CARES Act § 1109, 134 Stat. at 304–06.

<sup>7</sup> 87 Fed. Reg. at 36,792

<sup>8</sup> *See id.* at 36,791–92.

successful reentry after the conclusion of their criminal sentences.”<sup>9</sup> And it concludes that “any ambiguity in the CARES Act should be read to provide the Director with discretion to allow inmates placed in home confinement who have been successfully serving their sentences in the community to remain there, rather than return such inmates to secure custody *en masse* without making an individualized assessment or identifying a penological, rehabilitative, public health, or public safety basis for the action.”<sup>10</sup>

We certainly agree that the CARES Act does not require that people be returned to a correctional facility *en masse*, and that keeping individuals on home confinement after the covered emergency period expires is good policy. However, this language in the Proposed Rule could be read to mean that, once the pandemic emergency ends, BOP intends to individually evaluate every person on home confinement under CARES Act authority for possible return to a correctional facility. The CARES Act does not require this, and pre-existing statutory authority provides that most people on home confinement should remain there through the end of their sentence.

As DOJ notes, the CARES Act is silent “as to whether the Director has discretion to determine whether specific individuals placed in home confinement under the CARES Act may remain there” after the COVID-19 emergency ends.<sup>11</sup> The CARES Act is also silent as to BOP’s authority to *return* individuals placed on home confinement to a correctional facility. Thus, the CARES Act does not change the default rules governing whether and when a person on home confinement may be returned to a correctional facility.

The CARES Act modifies only the length of time BOP is authorized “to place a prisoner in home confinement” under “section 3624(c)(2) of title 18.”<sup>12</sup> Section 3624(c) gives BOP authority to place federal prisoners with “lower risk levels and lower needs” on home confinement for “a portion of *the final months of [their] term.*”<sup>13</sup> While BOP may “lengthen” the home confinement period under the CARES Act, that period—however long it may be—is intended to be served during the “final months of [their] term.”<sup>14</sup> BOP’s home confinement authority under Section 3624(c) is expressly intended to “afford th[e] prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.”<sup>15</sup> And section 3624(c) goes on to direct that BOP “shall, to the extent practicable,” place eligible prisoners on home

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<sup>9</sup> *E.g., id.* at 36,793.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 36,790.

<sup>12</sup> CARES Act § 12003(a)(2), (b)(2), 134 Stat. 515, 516; 18 U.S.C. § 3624 (c)(2).

<sup>13</sup> 18 U.S.C. § 3624(c)(1)–(2) (emphasis added).

<sup>14</sup> *Compare* 18 U.S.C. § 3624(c)(2) (providing for home confinement authority as part of prerelease custody) *with* 18 U.S.C. § 3622 (providing for temporary release of a prisoner).

<sup>15</sup> 18 U.S.C. § 3624(c)(1).

confinement “for the maximum amount of time permitted.”<sup>16</sup> Any “discretion” BOP may have to recall individuals to a correctional facility must start from the default rule that an individual, once placed on home confinement, will remain on home confinement until the end of their term, absent a serious violation of the terms of that home confinement that might justify reincarceration.

This interpretation is consistent with DOJ’s explanation of its pre-existing authority. For example, the Proposed Rule states that “[u]nder typical circumstances, inmates who have made the transition to home confinement would not be returned to a secure facility absent a disciplinary reason” because “[r]emoval from the community” would frustrate the goal of “allow[ing] inmates to readjust to life in the community.”<sup>17</sup> And it is also consistent with DOJ’s assessment of the success of the home confinement program. As the Proposed Rule notes, the vast majority of individuals serving sentences on home confinement have done so successfully.<sup>18</sup> Of the approximately 9,500 individuals placed on home confinement pursuant to the CARES Act, only 8 have been returned to secure custody for new criminal conduct, and none for violent conduct.<sup>19</sup>

## **II. Any Return to a Correctional Facility Should Be Triggered Only by a Serious Violation of the Conditions of Home Confinement, Determined on the Basis of Articulated Factors, and Consistent with Constitutional Due Process.**

The Department must establish clear criteria and procedures for returning an individual from home confinement to a correctional facility. Indeed, previous instances of revocation demonstrate the urgent need to develop a consistent, transparent, and fair process. Unsurprisingly, BOP’s exercise of unfettered discretion has already caused injustices. For example, Jeffery Martinovich was reincarcerated for alleged “escape” after missing his daily telephone call from a halfway house—even though BOP’s own GPS data showed he had not left his house that day.<sup>20</sup> Although Mr. Martinovich gathered evidence in his defense, he has stated that he was not provided an opportunity to present that evidence to BOP, and that a hearing officer failed to give Mr. Martinovich notice before finding that he had “escaped”—all despite the fact that halfway house staff had recommended he remain on home confinement.<sup>21</sup>

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<sup>16</sup> *Id.* § 3624(c)(2).

<sup>17</sup> 87 Fed. Reg. at 36,794.

<sup>18</sup> *Id.* at 36,790.

<sup>19</sup> *Id.*

<sup>20</sup> Peter Dujardin, *Former Newport News Investment Broker Back in Prison After Failing to Answer Phone One Night on Home Confinement*, Daily Press (July 14, 2021, 4:25 PM), <https://www.dailypress.com/news/crime/dp-nw-martinovich-back-federal-prison-20210714-gttonl2lrbamvgsyxzbquytiwm-story.html>.

<sup>21</sup> *See* Pet. for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, at 4–5, *Martinovich v. Scales*, Case No. 2:21-CV-376 (E.D. Va. July 9, 2021).

Mr. Martinovich’s example is not unique. Lynn Espejo was sent back to prison simply for e-mailing people who were still incarcerated—even though she had succeeded beyond all measure on home confinement, finding a job at her church, enrolling in her final semester of graduate school, and hosting a radio show.<sup>22</sup> And seventy-four-year-old Gwen Levi was likewise reincarcerated because she missed a phone call and an ankle monitor ping during a computer class meant to build her skills and increase her opportunities for employment—in a building that was, unbeknownst to her, designed to block GPS signal.<sup>23</sup>

Providing clear delineation of the events that could precipitate a return to a correctional facility will prevent BOP from reincarcerating people without penological justification and will ease administrability for all involved, including BOP. Consistent with these rationales and constitutional due process, any return to a correctional facility should be triggered only by a serious violation of the conditions of home confinement, determined through procedures that comport with due process, and on the basis of articulated factors.

First, only a serious violation of an individual’s conditions of home confinement, such as the commission of a new offense, should trigger an assessment of potential revocation of that home confinement. And there should be a presumption that an individual remains on home confinement until a final determination is made. As the Proposed Rule indicates, BOP does not typically return an individual to a correctional facility from home confinement “absent a disciplinary reason” because doing so undermines the very purpose of home confinement.<sup>24</sup> Additionally, as DOJ has noted, “[e]xercising discretion to return compliant prisoners from home confinement would . . . be a departure from BOP’s ordinary practice.”<sup>25</sup> Indeed, the former BOP Director testified to Congress that people who were placed on home confinement pursuant

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<sup>22</sup> Walter Pavlo, *Inmate on Home Confinement Spoke Out on Bureau of Prisons’ Policy and Ended Up Back in Prison*, Forbes (Feb. 6, 2021, 6:35 AM), <https://www.forbes.com/sites/walterpavlo/2021/02/06/inmate-on-home-confinement-spoke-out-on-bureau-of-prisons-policy-and-ended-up-back-in-prison/?sh=40d8af2d55ba>; Justin Wm. Moyer & Neena Satija, *A Grandmother Didn’t Answer Her Phone During a Class. She Was Sent Back to Prison.*, Wash. Post (June 26, 2021, 6:00 AM), [https://www.washingtonpost.com/local/public-safety/inmates-pandemic-biden-trump-policy/2021/06/25/e89aa28e-d376-11eb-baed-4abcfa380a17\\_story.html](https://www.washingtonpost.com/local/public-safety/inmates-pandemic-biden-trump-policy/2021/06/25/e89aa28e-d376-11eb-baed-4abcfa380a17_story.html) (discussing both Lynn Espejo and Gwen Levi).

<sup>23</sup> *The First Step Act, The Pandemic, and Compassionate Release: What are the Next Steps for the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec., H. Judiciary Comm.*, 117th Cong. (Jan. 21, 2022) (statement of Gwendolyn Levi), <https://docs.house.gov/meetings/JU/JU08/20220121/114349/HHRG-117-JU08-Wstate-LeviG-20220121.pdf>.

<sup>24</sup> 87 Fed. Reg. at 36,794.

<sup>25</sup> U.S. Dept’ of Justice Office of Legal Counsel, *Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency* 7 (Dec. 21, 2021), <https://www.justice.gov/olc/file/1457926/download>.

to the CARES Act were there “for service of the remainder of their sentences.”<sup>26</sup> As Attorney General Garland has observed, “[i]t would be a terrible policy to return [people on CARES Act home confinement] to prison after they have shown that they are able to live in home confinement without violations.”<sup>27</sup>

Importantly, not only are violations “rare,”<sup>28</sup> but also the overwhelming majority are technical and do not involve alleged new crimes. According to BOP, as of March 4, 2022, only 357 out of approximately 9,500 people granted home confinement under the CARES Act were returned to custody as a result of violations, and of that group only 8 were returned for alleged criminal conduct.<sup>29</sup>

The type of technical missteps that dominate violations rarely threaten or implicate the safety of the community, and should not automatically support revocation: as the examples described above demonstrate, sometimes the purported “violation” is simply a mistake or miscommunication; in other circumstances, the alleged violation is extraordinarily minor in the context of a holistic assessment of the person on home confinement, and cannot plausibly outweigh the policy reasons for continuing in that mode. Given the strict and burdensome conditions that govern home confinement, a technical violation is often minor in context.<sup>30</sup> Any decision to consider a person for return to a correctional facility should therefore consider any mitigating circumstances that weigh in the individual’s favor. No other factor besides a *serious* violation would provide a penological justification for reincarceration,<sup>31</sup> and no other factor would be consistent with the Congressional directive in Section 3624(c) that BOP “shall, to the extent practicable,” place eligible prisoners on home confinement “for the maximum amount of time permitted.”<sup>32</sup>

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<sup>26</sup> *Examining Best Practices for Incarceration and Detention During COVID-19: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (June 2, 2020) (statement of Michael D. Carvajal, Dir., Fed. Bureau of Prisons & Dr. Jeffrey Allen, Med. Dir., Fed. Bureau of Prisons, at 6) <https://www.judiciary.senate.gov/imo/media/doc/Carvajal-Allen%20Joint%20Testimony.pdf>.

<sup>27</sup> *Oversight of the United States Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 117th Cong., at 2:24:22 (Oct. 27, 2021), <https://www.rev.com/transcript-editor/shared/IB6-KSeo3OI85nQbryULyMUHsFqtzO5F9zp1psegkMBeHVpusmCzUgHYxU5kL8bwvtgoTjzCu1Pfv2sUwpC6F16VGBg?loadFrom=PastedDeeplink&ts=1931.37>.

<sup>28</sup> 87 Fed. Reg. at 36,788.

<sup>29</sup> *Id.* at 36,790.

<sup>30</sup> *Cf.* James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-carceration*, Inquest (July 30, 2021), <https://inquest.org/the-case-against-e-carceration/>.

<sup>31</sup> *See generally* Jessica Morton & Samara Spence, *Home Rule*, Inquest (Feb. 4, 2022), <https://inquest.org/home-rule/>.

<sup>32</sup> 18 U.S.C. § 3624(c)(2).

Second, once a person is alleged to have committed the sort of serious violation that could result in revocation of home confinement, any revocation proceedings should provide due process consistent with *Morrissey v. Brewer*, 408 U.S. 471 (1972). The Supreme Court has made clear that the guarantees of the Due Process Clause apply in certain post-conviction settings where an individual would “suffer grievous loss” if deprived of the post-conviction status at issue. *Id.* at 481. And the Court has likewise held that individuals who, while in the custody of the Department of Corrections, “kept [their] own residence,” “sought, obtained, and maintained a job,” and “lived a life generally free of the incidents of imprisonment” fell within the compass of *Morrissey*. *Young v. Harper*, 520 U.S. 143, 147–48 (1997).

Thus, an individual facing potential revocation of home confinement is entitled to a revocation hearing conducted by a “neutral and detached” decisionmaker; written notice of the alleged violation; disclosure of the evidence against the individual; and an opportunity to appear, present evidence, and question any adverse witnesses. *See Morrissey*, 408 U.S. at 485–89; *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 (parolees); *Young*, 520 U.S. at 144–45 (pre-parolees). The individual “must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.” *Morrissey*, 408 U.S. at 488. Consistent with *Gagnon* and Section 504 of the Rehabilitation Act of 1973, the individual should have access to counsel during these proceedings where required. *See Gagnon*, 411 U.S. at 790–91; 29 U.S.C. § 794(a). Finally, if home confinement is revoked, the individual must be provided with a written statement by the decisionmaker “as to the evidence relied on and reasons for revoking” home confinement. *See Morrissey*, 408 U.S. at 489.

Individual examples demonstrate the need for these protections: for instance, when Ms. Levi was accused of violating the terms of her release, she “was told to pack a bag and return to the halfway house,” where she “was questioned and told to sign a statement so that [she] could go home.”<sup>33</sup> Although her “attorney asked to be present while [she] was questioned,” that request was refused.<sup>34</sup> And instead of being sent home, Ms. Levi was arrested and taken to jail.<sup>35</sup> Needless to say, Ms. Levi was not provided with a hearing before a neutral and detached decisionmaker at which she could contest the allegations or explain why, under the circumstances, it was appropriate for her to stay on home confinement, and she was deprived of her counsel for the procedures that did occur.

Commenters therefore append to this comment sample language addressing the topics that should be included in a future rulemaking “to explain criteria that [BOP] will use to make individualized determinations as to whether any inmate placed in home confinement under the CARES Act should be returned to secure custody.”<sup>36</sup>

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<sup>33</sup> Statement of Gwendolyn Levi, *supra* n. 23, at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 87 Fed. Reg. at 36,795.

### **III. BOP Should Establish Procedures for Revoking Home Confinement by Rule, or, at Minimum, Should Subject Its Guidance to Notice-and-Comment Procedures.**

Regardless of the criteria and procedures BOP ultimately promulgates, Commenters strongly encourage DOJ and BOP to do so through published rule, subject to notice and comment. The Proposed Rule correctly determines that BOP is not required to recall individuals placed on home confinement to a correctional facility after the emergency period ends. But it also states that BOP has “discretion to determine” whether individuals on home confinement “should remain” so, indicates that determinations will be made “upon case-by-case assessments,”<sup>37</sup> and delegates that authority “as the Director determines appropriate.”<sup>38</sup> And the Proposed Rule explains that “[f]ollowing the issuance of a final rule, the Bureau will develop, in consultation with the Department, guidance to explain criteria that it will use to make individualized determinations as to whether any inmate placed in home confinement under the CARES Act should be returned to secure custody.”<sup>39</sup>

Commenters are concerned about the possibility that the process to promulgate this guidance will lack transparency, and even the final guidance itself may be hidden from public view. People on home confinement have a significant interest in knowing precisely what factors could affect any decision to return them to a correctional facility, so that they can make every effort to avoid or mitigate them. They likewise have a substantial interest in knowing that the procedures used to make these decisions will be consistent with due process, to alleviate the justifiable fear people currently have that the process will be arbitrary and unfairly interfere with their ability to readjust to the community.

The Proposed Rule refers to “internal guidance” that BOP relies upon to prioritize individuals for home confinement.<sup>40</sup> While there may be circumstances where it is appropriate for guidance to be “internal,” keeping secret any BOP procedures for evaluating individuals for return to a federal facility would be unfair, would deprive affected parties of notice, and would risk arbitrary and capricious decision-making.

Commenters strongly encourage DOJ and BOP to establish any such procedures through published rule, subject to public notice and comment. Indeed, this appears to have been DOJ’s original plan: when the OLC issued its opinion interpreting the CARES Act on December 21, 2021, Attorney General Garland issued an accompanying statement explaining that he had “directed that the Department engage in a rulemaking process to ensure that the Department lives up to the letter and the spirit of the CARES Act. We will exercise our authority so that those who have made rehabilitative progress and complied with the conditions of home confinement,

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<sup>37</sup> *Id.* at 36,794.

<sup>38</sup> *Id.* at 36,796.

<sup>39</sup> *Id.* at 36,795.

<sup>40</sup> *Id.* at 36,790.

and who in the interests of justice should be given an opportunity to continue transitioning back to society, are not unnecessarily returned to prison.”<sup>41</sup>

Attorney General Garland’s initial intention, to establish how BOP will assess individuals through a rule, rather than a guidance document, remains the best option. Proceeding by rule would support the purpose of home confinement. One of the most important goals of home confinement is to enable people to reintegrate into their communities, and part of that process should entail giving them a voice to share their lived experience and perspective on issues that will affect them most directly.<sup>42</sup> Worrying that they could be returned to a correctional facility at the discretion of someone in an office building, possibly hundreds of miles away, without knowing precisely why, and without the ability to explain to the decisionmaker why they should not be reincarcerated, is both psychologically devastating and directly undermines a person’s ability to succeed on home confinement. Moreover, successfully building the ties necessary to reintegrate into a community requires a clear set of expectations. It is difficult, for example, to secure long-term housing, or a mortgage, or apply to school, or take out student loans, or sign up for a volunteer position, or take a new job, or fight to regain custody of your children, if the rules governing your ability to remain on that path are vague, arbitrary, or secret.

A clear, publicly available rule that establishes *how* BOP will exercise any discretion, that is available to the public and individuals in BOP custody, and that is not subject to easy change outside the public view, will assist in providing that stability. Indeed, engaging in rulemaking here is legally mandated if BOP intends to treat this guidance as internally binding on BOP officials. For all relevant purposes, binding guidance constitutes a rule and should be subject to notice-and-comment procedures. *See generally Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000).

If, however, BOP does not intend to treat this guidance as binding, that would lead to another set of problems. Non-binding guidance would not give individuals the stability, discussed above, that they need to succeed at building the ties necessary to reintegrate into their community. Although non-binding guidance might give BOP personnel notice about the factors it will likely consider, it will not give adequate—or, likely, any—notice to people on home confinement about actions they can take (and not take) to avoid being returned to a correctional facility. It would also lead to potential inequitable decisions, such as those illustrated in the examples above.

Even if BOP does proceed by a non-binding guidance document, rather than a rule, Commenters strongly encourage BOP to subject any such guidance document to notice-and-comment procedures and to make the guidance document public. As the Administrative Conference of the United States explained decades ago, “many agencies have often utilized the notice-and-comment procedures set forth [in the Administrative Procedure Act], without regard to whether

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<sup>41</sup> Press Release, U.S. Dep’t of Justice, Statement by Attorney General Merrick B. Garland (Dec. 21, 2021), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-0>.

<sup>42</sup> Please refer to the comment submitted by FAMM and Professor Sarah F. Russell for perspectives from those who have lived experience with CARES Act home confinement.

their pronouncements” are substantive rules, interpretive rules, or policy statements.<sup>43</sup> As ACUS observed, “[t]his is, in general, beneficial to both the agencies and potentially affected elements of the public” because “[p]roviding opportunity for comment . . . makes for greater confidence in and broader acceptance of the ultimate agency judgments.”<sup>44</sup> ACUS has thus recommended that “[b]efore an agency issues . . . an interpretive rule of general applicability or a statement of general policy which is likely to have substantial impact on the public, the agency normally should . . . publish[] the proposed interpretive rule or policy statement in the Federal Register, with a concise statement of its basis and purpose and an invitation to interested persons to submit written comments.”<sup>45</sup>

At minimum, any guidance document, whether binding or not, should be made public and should be easily accessible on BOP’s website. None of the benefits discussed above with respect to permitting individuals on home confinement to take favored actions (and avoid others) and to achieve the stability required successfully to reintegrate with their communities can be achieved by non-public internal guidance.<sup>46</sup>

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Commenters appreciate the opportunity to comment and provide recommendations in this matter, and would be happy to provide further information as requested. If you have any questions or would like to discuss the information in this comment, please contact Jessica Morton and Samara

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<sup>43</sup> Administrative Conference of the United States, *Interpretive Rules of General Applicability and Statements of General Policy*, Recommendation No. 76-5, 41 Fed. Reg. 56,767, 56,769 (Dec. 9, 1976), <https://www.acus.gov/sites/default/files/documents/76-5.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> U.S. Dep’t of Justice, *Principles for Issuance and Use of Guidance Documents*, Justice Manual at 1-19.000 (Apr. 2022), <https://www.justice.gov/jm/1-19000-limitation-issuance-guidance-documents-1> (“The Department’s guidance documents should be clear, transparent, and readily accessible to the public”). Although there are certainly circumstances in which guidance issued without notice and comment is appropriate, the circumstances here—in which the benefits of notice and comment are not outweighed by the need for expediency and efficiency—are quite different.

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Respectfully submitted,

American Civil Liberties Union  
Color Of Change  
Democracy Forward Foundation  
Due Process Institute  
Federal Public & Community Defenders  
Justice Action Network  
The Leadership Conference on Civil and Human Rights  
National Association of Criminal Defense Lawyers  
Tzedek Association

## APPENDIX

Commenters propose the following sample language addressing the topics that should be included in a future rulemaking “to explain criteria that [BOP] will use to make individualized determinations as to whether any inmate placed in home confinement under the CARES Act should be returned to secure custody”<sup>47</sup>:

- (a) Subject to subpart (b) below, an individual placed in home confinement pursuant to the CARES Act shall remain in such status until placed on home confinement under separate authority or released consistent with 18 U.S.C. § 3624.
  
- (b) Revocation:
  - (1) The Director may return an individual to a correctional facility for any portion of the remaining term of imprisonment to which the individual was sentenced, only upon finding, by clear and convincing evidence, pursuant to the procedures set forth below, the individual to have violated one or more of the documented conditions of that individual’s home confinement.
    - (A) Any revocation hearing must be held within a reasonable time before a neutral and detached decisionmaker who has the authority to decide whether the individual will be reincarcerated. The hearing must be recorded by a court reporter or by a suitable recording device. The individual is entitled to:
      - i. written notice of the alleged violation;
      - ii. disclosure of the evidence against the individual;
      - iii. an opportunity to appear, present evidence (including witnesses), and question any adverse witness, unless the decisionmaker determines that requiring the adverse witness to appear would create a security concern;
      - iv. notice of the individual’s right to retain counsel or to request that counsel be appointed if the individual cannot obtain counsel; and

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<sup>47</sup> 87 Fed. Reg. at 36,795.

- v. an opportunity for the individual and their counsel to make a statement and present any information as to why reincarceration is inappropriate.
- (B) If the decisionmaker concludes that there is not a finding of a violation, BOP must dismiss the revocation proceedings.
- (2) (A) If the finding in subpart (b)(1) is made, the decisionmaker shall consider the following factors before returning an individual to a correctional facility:
- i. the nature and severity of the proven violations;
  - ii. the number of proven violations;
  - iii. the individual's adjustment to the conditions of home confinement (e.g., family and/or community ties; employment or other productive activities; housing; parenting and other caretaking roles; ongoing medical, psychological, or addiction treatment in the community; etc., as relevant);
  - iv. the individual's health circumstances, whether their needs can be adequately met, and whether they can provide appropriate self-care within the environment of a correctional facility;
  - v. any statement and information in mitigation presented by the individual and their representatives;
  - vi. whether there are any means by which penological, rehabilitative, public health, and public safety purposes can be satisfied by the individual remaining under supervision in the community; and
  - vii. whether the financial cost of re-incarceration is justified by the proven violations.
- (B) In considering the above factors, the decisionmaker shall apply a presumption against reincarceration for technical violations of the conditions of home confinement.
- (C) If the decisionmaker decides to revoke home confinement and return the individual to a correctional facility for any portion of the term of imprisonment to which the individual was sentenced, the decisionmaker must provide a written

statement of reasons as to the evidence relied on and the reasons for revoking home confinement, including the decisionmaker's assessment of each of the above factors.

- (3) Should the decisionmaker revoke home confinement, the individual shall have the right to immediately appeal that decision within BOP. The individual shall have the right to present a written submission articulating any errors in the decisionmaker's determination, as well any evidence of mitigation that should be considered on appeal.