LAW & POLICY

Home Rule

In weighing the future of thousands placed on home confinement during the pandemic, the government should prioritize where they are now: in their communities.

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In late December, thousands of people serving federal sentences on home confinement received welcome news. The Department of Justice rescinded a legally erroneous Trump-era memo that would have required the federal Bureau of Prisons to recall them to prison 30 days after the pandemic emergency is declared over — no matter how much they may have reestablished ties to their communities in the interim and how much they have demonstrated that they pose no threat. As we explained previously here in *Inquest*, home confinement is typically the final step in a person's sentence, and is intended to help that person readjust to life outside — reestablishing relationships, securing jobs, locating housing, finding medical care, and applying for educational opportunities. Each of these goals was frustrated by the constant threat of reincarceration erected by the prior administration. As Attorney General Merrick Garland testified before the Senate, "It would be a terrible policy to return these people to prison after they have shown that they are able to live in home confinement without violations."

In announcing DOJ's reversal of the Trump-era memo, Garland announced a rulemaking process "to ensure that the Department lives up to the letter and spirit of the CARES Act," the 2020 law that made it possible for thousands to serve out the remainder of their federal sentences in home confinement. He explained that DOJ will "exercise [its] authority so that those who have made rehabilitative progress and complied with the conditions of home confinement, and who in the interests of justice should be given an opportunity to continue transitioning back to society, are not unnecessarily returned to prison."

What DOJ's press release didn't mention was that in a December 10, 2021 memorandum, obtained by the American Civil Liberties Union through a Freedom of Information Act request, BOP — the agency supervising people placed on home confinement — had different criteria in mind: "Sentence length," which is to say, the amount of time that remains on a person's sentence, "is likely to be a significant factor" in determining who would be re-imprisoned.

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Sentence length is not a reason to re-imprison anyone on home confinement. As we demonstrate below, a rule that includes sentence length as a "significant factor" for reincarceration, as well as other factors mentioned in the BOP memo, would likely not be legally defensible — and it would be simply unfair.

Federal agency rulemaking can establish procedures implementing federal law. A typical rulemaking process means that the federal agency will publish a draft of a proposed rule and provide a period, often 30 or 60 days, for any member of the public and civic society

to submit a comment on the proposal. The agency must then consider whether to modifythe substance of the proposed rule in light of the comments, and then issue a final rule addressing the comments and explaining why its text did or did not incorporate the proposed changes. The rule that emerges out of this process would be binding unless invalidated in litigation as arbitrary or capricious or otherwise contrary to law.

Although other procedural avenues are sometimes available — for instance, issuing an interim final rule, or proceeding with non-binding guidance documents instead — we'll assume the Justice Department and BOP are planning, as indicated in their public statements, to proceed with traditional notice-and-comment rulemaking; this process provides the important opportunity for widespread public participation. When a federal agency engages in notice-and-comment rulemaking, it has to ensure that the rule is consistent with law, internally consistent, and not obviously contradicted by the evidence. In other words, the agency's choices have to make reasonable sense.

The BOP memo suggests that the agency may be inclined to craft a rule that would require it to weigh a number of factors in determining whether there is, in BOP's language, an "actual penological reason" to send someone back to prison. Those factors, discussed individually below, include the availability of programming in BOP facilities; the possibility of earning early-release credits while reincarcerated; the deterrent effect on future offenses; the length remaining on a sentence; adjustment to home confinement; participation in programs or employment by the person on confinement; the potential impact on victims or witnesses; and the views of the U.S. Attorney's Office that brought the initial prosecution. Of these factors, BOP notes that the length of a sentence "is likely to be a significant factor, as the more time that remains will provide the agency a more meaningful opportunity to provide programming and services to the offender in a secure facility."

It is too early to know precisely what rule BOP is envisioning, but a rule premised largely on a balancing of these factors identified in BOP's memo — and, in particular, giving significant weight to the length of sentence — would likely be internally inconsistent, unsupported by the evidence, and at odds with public statements made by DOJ and BOP officials. In other words, such a rule would be arbitrary and capricious and could be subject to legal challenge.

At the outset, it is worth clarifying what placement on home confinement does and does not mean. People on home confinement have significant and meaningful opportunities to reconnect to their families and communities, seek employment, obtain medical treatment, and invest in education and training. But they are still serving a sentence: They are subject to significant restrictions and are subject to significant punitive measures that restrict their freedom and impact their quality of life, including restrictions on where they can go and with whom they can communicate. Keeping that in mind, BOP's proposed factors make little sense.

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For starters, BOP's emphasis on programming and treatment as a rationale for reincarceration is perplexing if adopted in the eventual rule. BOP programming is aimed at reintegration, but that same goal would be frustrated by severing the ties someone had made in their community during home confinement. People who are on home confinement can benefit from programming and employment opportunities as well, with those services occurring in *their* communities, creating networks for future support and job opportunities. It would make little sense to force someone to leave their family, leave

their job, leave their education, and leave their community support, only to receive instruction in "programming" on how to re-establish each of those things in a prison environment. And even if a particular person has made less progress on reintegrating into the community, there is no reason to believe that process would be helped along by reincarceration, rather than additional support within the community.

Moreover, it is unlikely that people reincarcerated after being placed on home confinement could consistently obtain the benefit, if any, of these programs. As a recent Bureau of Justice Statistics report reflects, the availability of programming in federal prisons varies wildly. For instance, Forrest City FCI reports twenty workforce development partnership programs, but dozens of other prisons report zero. BOP's Residential Drug Abuse Programs — the agency's signature drug treatment program, better known as RDAP — is offered at just more than half of federal prisons, and fewer than a third of federal prisons incarcerating women. Moreover, as Table 11 of the report shows, the programs providing the most credit tend to be those least readily available.

Even if BOP could guarantee it would reincarcerate someone in the precise prison that has the programming best suited to their needs — which could well be a prison so far away that the person's family is unable to visit, further straining the person's ties to the community — that person may not even get a spot in the program. For example, people who are eligible for RDAP are often not placed in the program until they are close to the end of their sentence. And even if someone were placed in RDAP immediately upon reincarceration, it would make little sense to deprive someone already in prison of a spot in that limited program for the supposed benefit of a person who is able to receive similar treatment in the community, and whose failure to recidivate has already demonstrated that such treatment is either effective or unnecessary. As the BOP memo notes, one of the primary incentives for participating in RDAP is a sentence reduction awarded for successful completion. But it makes no sense, penological or otherwise, to take someone out of their community to permit them to earn an early return to that community. What's more, some services may be better obtained outside of federal

facilities. For example, Wendy Hechtman reports that she "often had to wait for weeks" to obtain approval for addiction counseling while incarcerated, but has attended weekly counseling sessions since being placed onhome confinement.

It would likewise make no rational sense to return people to prison for the purpose of earning credits to reduce their time in prison. That is because incarceration is not a prerequisite to obtaining good time credits. BOP just issued a final rule providing that people on home confinement *can* earn time credit off their sentence for participating in such programming, which is offered through halfway houses and might include non-residential drug treatment, mental health treatment, and work programs. Simply put, if people on home confinement are able to receive the benefits of programming, in terms of both credits earned and skills obtained, then programming cannot provide a basis for reincarceration.

As to deterrence, BOP's own numbers show that people placed on home confinement pursuant to the CARES Act do not need to be returned to prison to prevent them from committing crimes. According to BOP data, only 9 of the 4,879 people placed on home confinement under the CARES Act — that is, less than two-tenths of a percent — have been reincarcerated for new criminal conduct. By way of comparison, more than 100 BOP employees have been arrested, convicted of, or sentenced for crimes since the beginning of 2019. Given that BOP has 36,739 employees, BOP employees have a 1.5 times higher rate of alleged criminal conduct than the people the agency supervises on CARES Act home confinement, over a roughly similar period.

Remaining sentence length alone is itself no reason to return someone to prison. The length of time that a person may remain on home confinement is not a valid "penological reason" for reincarceration, particularly if reincarceration disrupts their reintegration into their lives with their families and their broader communities. Moreover, as Table 10 of a recent Bureau of Justice Statistics report demonstrates, BOP's recidivism risk assessment scores have no correlation with length of sentence. Thus, relying on factor of sentence length — let alone deeming it "significant," as BOP indicated — would be

arbitrary and capricious. To the extent someone might argue that sentence length could be considered as necessary to provide "just punishment," that argument would be inconsistent with the BOP director's recent testimony to Congress that BOP is "not here for punishment." And in any event, as described above, home confinement is itself a punitive measure.

Other potential factors outlined in the BOP memo also run into logical roadblocks. A person's "adjustment while on home confinement" and employment "participation in the community" are directly undermined by living under the threat of reincarceration. Any "potential impact on any victims or witnesses" by seeing a person placed on home confinement has already been felt by the fact of that placement itself. And the "interests," if any, of the U.S. Attorney's Office that initially prosecuted a given case were already taken into account when BOP made its initial decisions about the limited set of people it would place in CARES Act home confinement in the first place: BOP was directed by then-Attorney General Bill Barr to assess the person's "crime of conviction" and any "danger" posed to the community.

The only remaining factor, already in use by BOP to reincarcerate people on home confinement, is whether a person has violated the terms of that home confinement. A rule setting forth this factor as the *only* possible basis for reincarceration is likely to be the most legally defensible — but such a rule would still need to be carefully tailored to provide appropriate protections, including ensuring that those accused of violating the terms of their home confinement are able to meaningfully contest those allegations. Recent experience shows that BOP should be required to take into account mitigating factors, and that the rule should be carefully crafted to implement substantive and procedural safeguards. For example, when Gwen Levi was placed on home confinement at the age of 74, she signed up for a computer class to build her skills and increase her opportunities for employment. But the building in which the class was held was designed to block GPS, and in fact blocked the signal from her ankle monitor. Because Ms. Levi missed a phone call during the class — where her phone was turned off — and the ankle monitor did not ping, Ms. Levi was reincarcerated for alleged "escape."

Ms. Levi was ultimately released from prison, thanks to vigorous litigation on her behalf that resulted in a court order. But her experience, while egregious, is not unique. Jeffery Martinovich, for instance, was reincarcerated for alleged "escape" after he missed his daily telephone call from a halfway house — even though BOP's own GPS data showed that he had not left his house that day. And after Lynn Espejo was placed on home confinement — where she found a job at her church, enrolled in her final semester of graduate school, and hosted a radio show — she was sent back to prison simply for e-mailing people who were still incarcerated. It is difficult to comprehend a "penological justification" that could justify interrupting Ms. Espejo's education and employment in this manner. In sum: BOP should not impose unreasonable rules, and then incarcerate people who allegedly break them.

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Any rule addressing potential violations of the terms of home confinement should therefore be carefully designed to account for situations like Ms. Levi's, Mr. Martinovich's, and Ms. Espejo's — and many others — where there could be no reasonable penological justification for reincarcerating someone. Such a rule should also be carefully crafted to include safeguards against wrongful reincarceration — including, for example, notice, the right to representation, a right to discovery of any GPS tracking data from a person's ankle monitor, and a meaningful opportunity to contest any allegations.

In addition to these substantive issues, a rule relying on the factors set forth in the BOP memo would contradict positions previously set forth by both DOJ and BOP. BOP itself has acknowledged that "[t]he benefits to home confinement from a penological standpoint is as one of the last steps of a reentry program." As BOP has explained, people

who have been placed on home confinement "would not be returned to a secured facility, unless there was a disciplinary reason for doing so, as the benefit of home confinement is to adjust to life back in the community, and therefore removal from the community would obviously frustrate that goal." In its revised memo rescinding the prior OLC memo, DOJ noted that "[e]xercising discretion to return compliant prisoners from home confinement would still be a departure from BOP's ordinary practice." Indeed, the statutory basis for home confinement requires "conditions that will afford [a person] a reasonable opportunity to adjust to and prepare for [their reentry] into the community." Any rule BOP issues must be consistent with that purpose.

DOJ's decision to reverse the prior memo was the legally correct choice. But it was also the right thing to do: It provided people placed on home confinement with the stability required to rebuild their families and plan for the future. BOP should not implement this new legal interpretation in ways that undermine that stability. Clear rulemaking that puts people on notice of the limited circumstances that may result in their reincarceration is critical to making their transition home less difficult than it already is — and to fulfilling the goals that DOJ and BOP have expressed. The forthcoming rule can and should prevent the "terrible policy" of reincarceration that Attorney General Garland has already denounced.

Image: James Cousins/Unsplash

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