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Freedom of Information Act Request: Politicization of the Department of Justice's Office of Legal Counsel

America First Legal Foundation (AFL) is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans. Our core mission includes informing and educating the public regarding the operations and activities of the federal government. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL's email list contains over 25,000 unique addresses, our Twitter page has nearly 10,000 followers, the Twitter page of our Founder and President has over 98,500 followers, and we have another 22,000 followers on GETTR.

I. Background

On March 27, 2020, just two weeks after President Trump declared a national emergency for the COVID-19 pandemic,¹ Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).² Section 12003(b)(2) of the CARES Act temporarily expanded the authority of the Director of the Bureau of Prisons (BOP) to place federal prisoners in home confinement, “[d]uring the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of [BOP].”³ Under this authority, BOP transferred thousands of federal prisoners into home confinement during the emergency.⁴

On January 15, 2021, the Department of Justice (DOJ) Office of Legal Counsel (OLC) issued a memorandum opinion concluding that the “[CARES Act] authorizes the Director of [BOP] to place prisoners in home confinement only during the Act’s covered emergency period,” and, “[should] that period end, or should the Attorney General revoke the finding, [BOP] would be required to recall the prisoners to correctional facilities unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2).”⁵

During his campaign, President Biden promised he would cut the prison population by more than fifty percent.⁶ Nevertheless, the Biden legal team concluded that the January 15 opinion “correctly interpreted the law.”⁷ Reportedly, “[s]everal officials characterized the decision as an assessment of the best interpretation of the law, not a matter of policy preference.”⁸

Key Biden administration stakeholders, however, remained intent on reversing OLC’s opinion and allowing convicted criminals to remain out of prison indefinitely.⁹ In July 2021, Senator Dick Durbin (D-IL) personally lobbied Attorney General

¹ Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

² Pub. L. No. 116-136 (Mar. 27, 2020).

³ Pub. L. No. 116-136, § 12003(b)(2).

⁴ See *Oversight of the Federal Bureau of Prisons and the U.S. Marshals Service Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary* (Dec. 2, 2020) (statement of Michael D. Carvajal, Director, BOP).

⁵ *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>.

⁶ Katherine Miller, *Joe Biden Told a Voter He’ll “Go Further” Than Cutting Incarceration by 50%*, BUZZFEED NEWS (July 9, 2019), <https://www.buzzfeednews.com/article/katherinemiller/joe-biden-incarceration-prison-population-cut-aclu>.

⁷ Charlie Savage & Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, THE NEW YORK TIMES (July 19, 2021), <https://www.ny-times.com/2021/07/19/us/politics/biden-prisoners-covid.html>.

⁸ *Id.*

⁹ Blackman, *Biden OLC Reverses Trump OLC Position On BOP Home Confinement*, REASON – THE VOLOKH CONSPIRACY (Dec. 22, 2021), <https://reason.com/volokh/2021/12/22/biden-olc-reverses-trump-olc-opinion-on-bop-home-confinement/>.

Garland to overturn OLC's opinion.¹⁰ In August 2021, Biden stakeholders, led by Democracy Forward, a front group created by political operatives including Ron Klain (current White House Chief of Staff), Marc Elias (architect of the Russia collusion hoax), and John Podesta, sent a letter to OLC demanding it change the legal analysis.¹¹ This letter produced no results. Then on November 30th, the stakeholders met with Susan Rice, the domestic policy advisor. Soon after this meeting¹² Attorney General Garland directed OLC to "reconsider."¹³

On December 21, 2021, OLC published a new opinion, this time discovering Congress gave BOP has "discretion to permit prisoners in extended home confinement to remain there" indefinitely.¹⁴ To justify this result, OLC leaned heavily on policy arguments, such as BOP had already placed nearly five thousand convicted criminals in home confinement under the emergency authority, and that under OLC's January 2021 opinion, 2,830 of these individuals would need to return to prison. OLC now deemed this unacceptable, preferring instead to avoid "disrupt[ing] the community connections these prisoners have developed."¹⁵

These facts raise credible concerns that the Biden Administration has inappropriately politicized OLC and plowed through the longstanding institutional guardrails protecting OLC's independence. OLC's core function is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of Federal Government.¹⁶ OLC's obligation is to provide its view of the correct answer on the law, taking into account all reasonable counterarguments, not simply provide an advocate's defense of the contemplated action or position proposed by an agency or the Administration.¹⁷ Because OLC issues opinions pursuant to the Attorney General's delegated authority, the leadership offices are kept informed about OLC's work, and OLC benefits from suggestions about additional interests OLC should consider or views OLC should solicit before finalizing its opinions. But OLC's opinions are *nevertheless supposed to be based on its independent analysis and*

¹⁰ Katie Benner *et al.*, *Some Inmates Can Stay Confined at Home After Covid Emergency*, *Justice Dept. Says*, The New York Times (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/us/politics/prison-covid-home-confinement.html>.

¹¹ Democracy Forward, *Trump-Era Home Confinement Memo Based on Flawed Legal Analysis, Orgs Urge DOJ to Rescind* (August 4, 2021), <https://democracyforward.org/press/trump-era-home-confinement-memo-based-on-flawed-legal-analysis-orgs-urge-doj-to-rescind/>.

¹² Benner, *supra note 16*.

¹³ Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency, 45 Op. O.L.C. __ (Dec. 21, 2021) ("You have asked us to reconsider our earlier opinion"), <https://www.justice.gov/olc/file/1457926/download>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions, O.L.C. at 1 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

¹⁷ *Id.* at 1, 4.

judgment.¹⁸ “OLC must always give candid, independent, and principled advice – even when that advice is inconsistent with the aims of policymakers.”¹⁹

Of course, “as with any system of precedent,” past OLC decisions “may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.”²⁰ Here, however, the new opinion fails to articulate a competent legal basis for reconsideration, while the record suggests appropriate processes were overrun because of improper political considerations. The Biden administration, it seems, has turned OLC into nothing more than an advocate for its pro-criminal policies.

Accordingly, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 et seq., AFL requests the following records. In processing our requests, OLC has affirmed it will not “withhold information simply because it may do so legally.” In particular, OLC will not withhold records merely to avoid embarrassment “to the Office or to individual officials, to hide possible errors in legal reasoning, or ‘because of speculative or abstract fears’”²¹

II. Custodians

Relevant custodians include:

1. Associate Attorney General Vanita Gupta.
2. Assistant Attorney General Christopher H. Schroeder.
3. All executives in Bureau of Prisons (BOP) leadership, as published on the official BOP website at <https://www.bop.gov/about/agency/leadership.jsp>.
4. All career officials with a grade of GS-14 or higher and all political appointees in the (a) Office of the Attorney General (OAG), (b) Office of the Deputy Attorney General (DAG), (c) Office of Legal Counsel (OLC), (d) Office of Legal Policy (OLP), and (e) Office of Legislative Affairs (OLA).

III. Records Requested

The timeframe for each request is January 21, 2021, to the date this records request is processed.

- A) For custodians Gupta, Schroeder, OLC, and OAG, all records containing any or all the following words or phrases (1) “home confinement” or “home detention” or “Section 12003”, (2) “Ron” or “Klain”, (3) “Podesta”, (4) “Susan” or “Rice”, (5) “Perryman”, (6) “Democracy Forward”, (7) “Lev”, and (8) “DPC”.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 1.

²⁰ *Id.* at 2.

²¹ *Id.* at 6.

- B) For all other custodians, all records containing the phrases “home confinement” or “home detention or “Section 12003”.
- C) For all custodians, all records referring to the OLC memorandum of January 15, 2021, titled “Home Confinement of Federal Prisoners After the COVID-19 Emergency” available at <https://www.justice.gov/olc/file/1457926/download>.
- D) For custodians Schroeder and OLC, all records that OLC referred to when it stated in the document “Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency”, 45 Op. O.L.C. __ (Dec. 21, 2021) that the attorney general had “asked us to reconsider our earlier opinion.”
- E) For all custodians, all communications with any email domain containing “@famm.org”, “@democracyforward.org” or “@aclu.org” and any or all the terms or phrases “OLC”, “DPC”, “Vanita”, “White House”, “Ron”, “Counsel”, “home confinement” or “home detention” or “Section 12003”.
- F) For all custodians, all records referring to the OLC memorandum of December 21, 2021, entitled “Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency” available at <https://www.justice.gov/olc/file/1457926/download>.

IV. Redactions

Redactions are disfavored as the FOIA’s exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, then Department of State must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; see also *Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, the Department should produce email attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails,

facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.

- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain time period; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

V. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii), AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest. This has previously been recognized by the Departments of Defense, Education, Energy, Interior, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."

VI. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, please provide records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, D.C. 20003.

VII. Conclusion

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at FOIA@aflegal.org. Finally, if AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Thank you in advance for your cooperation.

Sincerely,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation