

United States Senate

WASHINGTON, DC 20510

December 19, 2023

The Honorable Ronald L. Davis
Director
US Marshals Service
1215 S. Clark St.
Arlington, VA 22202

The Honorable Merrick Garland
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Director Davis and Attorney General Garland:

We write to express continued concerns that the U.S. Marshals Service (USMS) appears to be circumventing President Biden’s Executive Order (EO) 14006, which seeks to “phas[e] out the Federal Government’s reliance on privately operated criminal detention facilities.”¹ Despite President Biden’s order that “the Attorney General shall not renew Department of Justice contracts” with private facilities,² USMS continues to house roughly one third of its detainees in these facilities. It does so by using local governments as middlemen to contract with private operators indirectly and by receiving waivers from the White House to continue private contracts directly.³ These arrangements undermine the intent of the EO. We urge USMS to come into compliance with both the letter and spirit of Executive Order 14006.

Within a week of his inauguration in 2021, President Biden issued Executive Order 14006 directing the Department of Justice (DOJ) — including the Bureau of Prisons (BOP) and USMS — to “not renew Department of Justice contracts with privately operated criminal detention facilities.”⁴ The EO reasoned that such facilities feed into profit-based incentives to incarcerate, and they underperform federal facilities in the safety and services provided to incarcerated individuals.⁵ The BOP complied; it announced in December 2022 that it had ended all contracts with private prison operators.⁶ However, DOJ has continued to rely on private facilities through

¹ The White House, “Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities,” January 26, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/>.

² *Id.*

³ Letter from the American Civil Liberties Union to U.S. Marshals Service Director Ronald L. Davis, September 18, 2023, p. 1, <https://www.aclu.org/documents/u-s-marshals-services-failure-to-comply-with-executive-order-14006>.

⁴ The White House, “Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities,” January 26, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/>.

⁵ *Id.* A 2016 OIG report found that “contract prisons incurred more safety and security incidents per capita than comparable BOP institutions.” U.S. Department of Justice, Office of the Inspector General, “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons,” August 2016, p. 44, <https://www.oversight.gov/sites/default/files/oig-reports/e1606.pdf>.

⁶ Federal Bureau of Prisons, “BOP Ends Use of Privately Owned Prisons,” December 1, 2022, https://www.bop.gov/resources/news/20221201_ends_use_of_privately_owned_prisons.jsp.

the Marshals Service: USMS has leveraged workarounds to continue holding roughly 20,000 of its 63,000 detainees in privately run facilities.⁷

First, USMS accomplishes this workaround by forming intergovernmental agreements (IGAs) with county governments; the counties in turn contract with the private detention operators on USMS's behalf.⁸ The use of IGAs is standard for USMS, which does not operate its own facilities.⁹ At the time Executive Order 14006 was issued, over half of USMS detainees were housed under IGAs with state and local governments.¹⁰ However, over the past two years, USMS has used IGAs as a means of circumventing the EO.

In December 2021, Senate Judiciary Committee Democrats sent a letter to DOJ highlighting the policy and safety concerns associated with USMS continuing to contract with private prisons through IGAs.¹¹ In response to this letter, DOJ noted that, although USMS does not own or operate any detention facilities, it is responsible for approximately 64,000 detainees and strives to ensure that detainees in its custody are located as close as practicable to the federal court with jurisdiction over their criminal case.¹² At the time of its response, DOJ reported six active USMS contracts with private prisons pending termination and 31 IGAs with state or local governments that had contracted with private prisons.¹³ As of May 2022, 6,786 adults in USMS custody were housed in private facilities through direct contracts and 14,860 were housed in private facilities through IGA contracts.¹⁴

In March 2023, DOJ's Office of the Inspector General (OIG) issued an audit further detailing this practice, reinforcing earlier reports by media outlets and advocates.¹⁵ The audit focused on

⁷ Letter from the American Civil Liberties Union to U.S. Marshals Service Director Ronald L. Davis, September 18, 2023, p. 1, <https://www.aclu.org/documents/u-s-marshals-services-failure-to-comply-with-executive-order-14006>.

⁸ *Id.* at p. 3; Washington Post, "Marshals Service uses go-between to dodge Biden's private prison order," Joe Davidson, March 31, 2023, <https://www.washingtonpost.com/politics/2023/03/31/marshals-service-private-prison-biden-order/>.

⁹ U.S. Marshals Service, "Prisoner Operations Fact Sheet," 2020, <https://www.usmarshals.gov/what-we-do/prisoners/operation/fact-sheet>; U.S. Department of Justice, Office of the Inspector General, "Review of Concerns Raised Related to the United States Marshals Service's Implementation of Executive Order 14006," March 2023, p. 7, <https://oig.justice.gov/sites/default/files/reports/23-055.pdf>; U.S. Marshals Service, "USMS Impact to Executive Order on the Use of Private Prisons," February 10, 2021, <https://www.mtctrains.com/wp-content/uploads/2021/08/USMS-Analysis-of-Need-for-Private-Operators.pdf>.

¹⁰ U.S. Marshals Service, "USMS Impact to Executive Order on the Use of Private Prisons," February 10, 2021, <https://www.mtctrains.com/wp-content/uploads/2021/08/USMS-Analysis-of-Need-for-Private-Operators.pdf>.

¹¹ Letter from Senators Durbin, Leahy, Feinstein, Klobuchar, Booker, and Padilla to Attorney General Merrick Garland, December 10, 2021, p. 1, [https://www.judiciary.senate.gov/imo/media/doc/2021-12-10%20SJC%20Dems%20letter%20re%20Private%20Prisons%20with%20signatures%20\(001\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2021-12-10%20SJC%20Dems%20letter%20re%20Private%20Prisons%20with%20signatures%20(001).pdf).

¹² Letter to Chair Durbin from Peter S. Hyun Acting Assistant Attorney General Department of Justice, June 9, 2022, p.1, on file with the Office of Richard J. Durbin.

¹³ *Id.* at 3, 5.

¹⁴ *Id.* at 5.

¹⁵ U.S. Department of Justice, Office of the Inspector General, "Review of Concerns Raised Related to the United States Marshals Service's Implementation of Executive Order 14006," March 2023, <https://oig.justice.gov/sites/default/files/reports/23-055.pdf>; Brennan Center for Justice, "Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts," Lauren-Brooke Eisen, August 27, 2021, <https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts>; Detention Watch Network, "Broken Promises: Limits of Biden's Executive Order on Private

USMS’s reliance on the private prison contractor CoreCivic to operate the Northeast Ohio Correctional Center (NEOCC) in Mahoning County, Ohio.¹⁶ Leveraging a loophole within President Biden’s directive, USMS formed an IGA with the Mahoning County government that allows USMS to use the “same contractor, to continue to house the detainees at the same facility.”¹⁷ According to USMS, the White House approved this arrangement.¹⁸ Based on OIG’s findings, this use of a pass-through agreement appears to be the worst of both worlds: detainees remain in the same private facility, yet USMS pays more for the facility’s operation and has even less oversight of conditions at the facility.¹⁹

Second, the White House has approved at least seven exceptions to Executive Order 14006 for USMS to continue contracting directly with private prison operators.²⁰ For example, USMS considered using an IGA with the City of McFarland to house detainees at the privately operated Western Region Detention Facility in San Diego.²¹ Instead, the White House Counsel’s Office issued a waiver for USMS to continue its contract with the private operator directly.²² The Administration does not publish information regarding these exemptions.²³

As mentioned above, USMS has justified these decisions as preferable to the alternative of relocating detainees to federal facilities located hours away from the judicial districts of detainees’ proceedings.²⁴ USMS tries to ensure that every detainee is located within 50 miles of

Prisons,” 2021, p. 21, https://www.detentionwatchnetwork.org/sites/default/files/reports/Broken%20Promises_DWN%20and%20Project%20South.pdf; The Intercept, “Private Prison Companies Pursue Creative Workarounds To Biden Executive Order,” Max Rivlin-Nadler, October 22, 2021, <https://theintercept.com/2021/10/22/private-prisons-jails-geo-group-biden/>.

¹⁶ U.S. Department of Justice, Office of the Inspector General, “Review of Concerns Raised Related to the United States Marshals Service’s Implementation of Executive Order 14006,” March 2023, p. 1, <https://oig.justice.gov/sites/default/files/reports/23-055.pdf>.

¹⁷ *Id.* at i.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Letter from the American Civil Liberties Union to U.S. Marshals Service Director Ronald L. Davis, September 18, 2023, p. 1-2, <https://www.aclu.org/documents/u-s-marshals-services-failure-to-comply-with-executive-order-14006>.

²¹ McFarland City Council, “Agenda,” August 18, 2021, p. 2, https://www.mcfarlandcity.org/AgendaCenter/ViewFile/Agenda/_08182021-282.

²² U.S. Department of Justice, Office of the Inspector General, “Review of Concerns Raised Related to the United States Marshals Service’s Implementation of Executive Order 14006,” March 2023, p. 4, <https://oig.justice.gov/sites/default/files/reports/23-055.pdf>; The Intercept, “Private Prison Companies Pursue Creative Workarounds To Biden Executive Order,” Max Rivlin-Nadler, October 22, 2021, <https://theintercept.com/2021/10/22/private-prisons-jails-geo-group-biden/>; The San Diego Union-Tribune, “Downtown San Diego private prison looks to remain open despite Biden order,” Kristina Davis, September 21, 2021, <https://www.sandiegouniontribune.com/news/public-safety/story/2021-09-21/san-diego-geo-private-prison>; Detention Watch Network, “Broken Promises: Limits of Biden’s Executive Order on Private Prisons,” 2021, p. 21, https://www.detentionwatchnetwork.org/sites/default/files/reports/Broken%20Promises_DWN%20and%20Project%20South.pdf.

²³ Letter from the American Civil Liberties Union to U.S. Marshals Service Director Ronald L. Davis, September 18, 2023, p. 1, <https://www.aclu.org/documents/u-s-marshals-services-failure-to-comply-with-executive-order-14006>.

²⁴ U.S. Department of Justice, Office of the Inspector General, “Review of Concerns Raised Related to the United States Marshals Service’s Implementation of Executive Order 14006,” March 2023, p. 4, <https://oig.justice.gov/sites/default/files/reports/23-055.pdf>; NPR, “Biden Phase-Out Of Private Jails Worries U.S.

their applicable courthouse, in order to avoid straining transportation to courthouses and access to counsel.²⁵ This is an appropriate goal, and due to these logistical and due process concerns, some Federal Defenders and judges have also opposed alternatives that would result in relocating detainees to remote federally run facilities.²⁶

But for many in USMS custody, options exist beyond either remaining in privately run jails or relocating hours away from their families and courts. Some of USMS's contracts are with private facilities near major population centers where government-run alternatives exist.²⁷ Others are with private facilities so remote as to not satisfy USMS's convenience argument.²⁸ And overall, DOJ should pursue pretrial release whenever appropriate after considering any public safety or flight risks, which would free space in government-run facilities. USMS should work with the relevant offices at DOJ to expand the scope of cases in which U.S. Attorneys Offices decline to request pretrial detention,²⁹ and increase the funding it provides to the federal court system to support alternatives to pretrial detention.³⁰

We are encouraged to see the White House's assurance that DOJ is "working toward full compliance with the executive directive."³¹ And we applaud USMS's successful termination of some of its private contracts.³² But we are concerned that, more than two years after the issuance of Executive Order 14006, USMS has only ended private contracts for seven facilities holding just three percent of the population in its custody,³³ while continuing to hold a much larger share of its detainees in private facilities. These contracts are lucrative for private prison corporations,

Marshals Who Transport Detainees," Carrie Johnson, April 1, 2021, <https://www.npr.org/2021/04/01/982408763/biden-phase-out-of-private-jails-worries-u-s-marshals-who-transport-detainees>.

²⁵ U.S. Marshals Service, "USMS Impact to Executive Order on the Use of Private Prisons," February 10, 2021, p. 1, <https://www.mtctrains.com/wp-content/uploads/2021/08/USMS-Analysis-of-Need-for-Private-Operators.pdf>.

²⁶ Government Executive, "Following Concerns, Watchdog Advises DOJ on Ending Private Detention Contracts," Courtney Bubl , April 4, 2023, <https://www.govexec.com/oversight/2023/04/watchdog-advises-doj-ending-private-detention-contracts/384795/>.

²⁷ Letter from the American Civil Liberties Union to U.S. Marshals Service Director Ronald L. Davis, September 18, 2023, p. 8, <https://www.aclu.org/documents/u-s-marshals-services-failure-to-comply-with-executive-order-14006>.

²⁸ *Id.*

²⁹ *Id.* at p. 7; NYTimes, "Opinion: How Did the 'Worst of the Worst' Become 3 Out of 4?," Alison Siegler and Kate M. Harris, February 24, 2021, <https://www.nytimes.com/2021/02/24/opinion/merrick-garland-bail-reform.html>.

³⁰ United States Marshals Service, "Federal Prisoner Detention Appropriation," May 2021, p. 25, <https://www.justice.gov/jmd/page/file/1399426/download>.

³¹ Washington Post, "Marshals Service uses go-between to dodge Biden's private prison order," Joe Davidson, March 31, 2023, <https://www.washingtonpost.com/politics/2023/03/31/marshals-service-private-prison-biden-order/>.

³² U.S. Department of Justice, Office of the Inspector General, "Review of Concerns Raised Related to the United States Marshals Service's Implementation of Executive Order 14006," March 2023, p. 7-8, <https://oig.justice.gov/sites/default/files/reports/23-055.pdf>.

³³ Letter from the American Civil Liberties Union to U.S. Marshals Service Director Ronald L. Davis, September 18, 2023, p. 3-4, <https://www.aclu.org/documents/u-s-marshals-services-failure-to-comply-with-executive-order-14006>.

the two largest of which receive around 20 percent of their revenue from USMS.³⁴ This fuels the “profit-based incentives to incarcerate” that President Biden’s EO aims to address.³⁵

We urge USMS to swiftly come into full compliance with both the text and spirit of Executive Order 14006. To help us understand the actions DOJ is taking to end its reliance on private prison operators, we request your responses to the following questions no later than [DATE], 2024:

1. What steps is DOJ currently taking to ensure USMS’s full compliance with Executive Order 14006?
2. How is DOJ specifically addressing OIG’s report about NEOCC?
3. Which USMS facilities are currently operated by private contractors? For each facility:
 - a. What is the contract end date?
 - b. On a daily average, how many beds were filled by USMS detainees during fiscal year (FY) 2023?
 - c. What is the cost of the contract to USMS, including the total FY2023 cost, the per-diem rate and any minimum guaranteed occupancy level?
 - d. What is USMS’s plan for relocating detainees upon expiration of the contract? What other facilities or release options are being considered?
 - e. Does USMS intend to form an IGA to continue housing detainees at the same privately operated facility? If so, with which government entity?
 - f. If USMS plans to relocate detainees, what steps is USMS taking to ensure that detainees will remain in reasonable proximity to their applicable courthouses?
4. Is DOJ exploring alternatives that would involve moving for, or consenting to, the release of pretrial detainees who do not pose a public safety threat or a flight risk?
 - a. If not, why not?
 - b. If so, please describe what specific alternatives DOJ is exploring.
5. What, if any, criteria are used to determine if USMS will seek a waiver to continue contracting with a private detention facility?
 - a. Will DOJ make these considerations — as well as the specific considerations evaluated in each instance in which a waiver was granted — publicly available?
 - b. Which individuals are responsible for approving these waivers?
6. How many waivers have been provided to USMS to continue contracting with private facilities? Please list all waivers, the date when they were issued, and explain the reason they were provided.


³⁴ Letter from the American Civil Liberties Union to U.S. Marshals Service Director Ronald L. Davis, September 18, 2023, p. 4, <https://www.aclu.org/documents/u-s-marshals-services-failure-to-comply-with-executive-order-14006>.

³⁵ The White House, “Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities,” January 26, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/>.

7. Will USMS commit to publicly disclose any waivers to Executive Order 14006 that it receives in the future?
 - a. If not, what is USMS's justification for not disclosing the waivers it receives?
8. What portion of USMS funding in FY2023 was allocated to the U.S. Courts for Alternatives to Detention (ATD)?
 - a. What portion of USMS funding in FY24 is expected to be allocated to the courts for Alternatives to Detention (ATD)?
9. Does USMS currently have any contracts with Immigration and Customs Enforcement (ICE) to house any USMS detainees in ICE facilities?
 - a. If so, how many ICE facilities hold USMS detainees, and how many USMS detainees are held in those facilities?
 - b. How many of those ICE facilities are privately operated?
10. Private vendors that provide critical services to incarcerated people, such as health care, commissary, and telecommunications, raise some of the same carceral incentive concerns as private prison facilities. Is DOJ taking steps to reduce its reliance on private vendors?
 - a. If not, why not?
 - b. If so, please describe any steps taken.

We look forward to your prompt response.

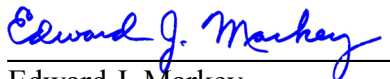
Sincerely,



Elizabeth Warren
United States Senator



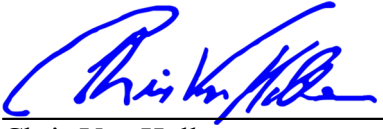
Richard J. Durbin
United States Senator



Edward J. Markey
United States Senator



Peter Welch
United States Senator



Chris Van Hollen
United States Senator



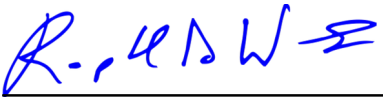
Bernard Sanders
United States Senator



Martin Heinrich
United States Senator



Benjamin L. Cardin
United States Senator



Raphael Warnock
United States Senator