

United States Senate

WASHINGTON, DC 20510

October 6, 2021

The Honorable Merrick B. Garland
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland:

We the undersigned write in reference to Executive Order 14006—entitled “Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities” (“Executive Order”). We are particularly concerned about the Executive Order’s impact on the rights of the accused, overall public safety, and the livelihoods of thousands of American workers.

We were encouraged to see that the administration agreed to grant a six-month extension of the contract between the United States Marshals Service (“USMS”) and the Willacy County Regional Detention facility in Raymondville, Texas. In that spirit, we are determined to find a permanent solution to the unintended consequences that will be caused by the Executive Order.

As you know, the United States Marshals Service (“USMS”), unlike the Bureau of Prisons, neither owns nor operates its own detention facilities. As a result, the USMS has, in many instances, partnered with private detention facilities—in states such as Texas, Tennessee, Kansas, Arizona, Georgia, South Carolina, and California—to house pretrial detainees. The USMS makes every effort to house pretrial detainees in close proximity to the prosecuting judicial district, given that both defense counsel and prosecutors require routine access. The Executive Order, however, will shut down private detention facilities, where thousands of pretrial detainees are housed in close proximity to their lawyers and the federal courts.

The Framers of our Constitution built in robust protections for those accused of crimes—and for good measure. At the pretrial stage, the government has not yet proven beyond a reasonable doubt the defendant’s guilt. Thus, the weight and might of the federal government is checked by both procedural and substantive protections for the accused, including the right to a speedy trial, the right to counsel, and the right to confront witnesses, among others.

Unfortunately, the Executive Order jeopardizes the constitutional rights of the accused in numerous jurisdictions. For example, the closing of the Willacy County Regional Detention Facility will cause hundreds of pretrial detainees to be multiple hours (and hundreds of miles)

from their counsel. According to the Federal Public Defender for the Southern District of Texas, the Executive Order “will have a devastating impact on our practice and will significantly undermine our ability to represent our clients effectively as required under the Sixth Amendment.”

In a white paper prepared in response to the Executive Order, the USMS stated that:

“Losing the use of these private detention facilities would be detrimental to USMS districts that currently rely on private facilities. Each user district would have its own set of challenges, but the common denominator is that there is simply not enough bedspace in the regions to accommodate the more than 23,000 USMS prisoners housed in private facilities operating under direct contract with USMS or under contract with the state and local governments through which the USMS has an agreement to house its prisoners. The primary impact of losing the privately operated detention space is the effect it will have on the operational mission, as well as the capability to house prisoners proximate to the federal courthouses where they are being prosecuted.”

The public safety and health issues implicated by the Executive Order are also of deep concern. As you know, transferring thousands of pretrial detainees to new facilities comes with a number of challenges, including coordinating medical treatment for prisoners, ensuring that pretrial detainees are not housed near or with sentenced defendants, and providing a safe and secure environment for both the pretrial detainees and the public, especially in light of rise of the Delta variant of COVID-19.

In addition to those critical impacts, the Executive Order could cause the loss of hundreds, if not thousands, of good jobs across the country. And this is only part of the story as businesses and local communities that service the government-contract, detention facilities will also suffer.

Lastly, it is our understanding that in at least one instance related to the Executive Order – at the Northeast Ohio Correctional Center – the administration decided that moving pretrial detainees over 5 hours away from the federal courthouse was untenable and entered into an agreement with the county government to continue operations at the facility with a contract facility operator.

In light of the growing concerns about the Executive Order’s impact on pretrial detainees’ constitutional rights, public safety, and a defendant’s constitutional rights, we write to request that you provide answers to some of the questions.

1. What are your plans to ensure individuals can easily and readily access legal counsel and attend all court appointments if you shut down contractor facilities?
2. What metrics or criteria does DOJ use to determine the facilities that receive special exemption from the Executive Order?

3. Will any of the facilities whose contracts end—including in Tennessee, Kansas, Texas, and California—receive the opportunity to enter an agreement like the Northeast Ohio Correctional Center did?
4. Has the administration done an analysis of the jobs that will be lost and the harm to the local economies due to the impact of the Executive Order?
5. What type of review has DOJ and the administration done of alternative sites to ensure that the public facilities are safe and secure environments for pretrial detainees?
6. How will you ensure that the new government-run facilities will receive the same level of oversight and accountability as the current contractor-operated facilities utilized by USMS?

Regards,



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