



An Investigation of Alleged Misconduct by  
Senior DOJ Officials for Leaking Department  
Investigative Activities Concerning COVID-19 in  
Nursing Homes to Members of the News Media  
in October 2020

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December 2024 (Revised January 2025)



## NOTICE

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This report was originally issued on December 30, 2024. The report was revised on January 16, 2025, after the DOJ OIG received information that the October 27, 2020 *New York Post* article referenced in the report was updated late in the evening on October 27, 2020, rather than on October 30, 2020, as reflected in the original report. Based on this information, the DOJ OIG made the following changes, which are not material and do not affect the report's findings or conclusions:

- On page 41, we inserted a paragraph reflecting that the October 27, 2020 *New York Post* article was updated late in the evening on October 27 and added two footnotes citing an archived source showing that the *New York Post* article was updated at 10:59 p.m. on October 27.
- On page 42, we deleted the paragraph describing an October 30, 2020 update to the (October 27) *New York Post* article as well as the two footnotes citing the October 30 update.

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## I. Introduction

This report describes the Department of Justice (Department or DOJ) Office of the Inspector General's (OIG) investigation into alleged misconduct by senior DOJ officials for leaking non-public information in October 2020, shortly before the 2020 election, concerning DOJ's investigative activity related to COVID-19 deaths in public and private nursing homes in New Jersey and New York. The OIG investigation resulted from allegations that the actions of DOJ's Civil Rights Division (CRT) in the summer and fall of 2020 in connection with its review, under the Civil Rights of Institutionalized Persons Act (CRIPA),<sup>1</sup> of state-run nursing home deaths in Michigan, New Jersey, New York, and Pennsylvania were politically motivated and violated the Hatch Act and DOJ policies. Specifically, the allegations the OIG received concerned (a) CRT leadership's selection in the summer of 2020 of those four states with Democratic governors to receive pre-investigation data requests despite having data showing other states had worse quality of care rankings for their state-run nursing homes;<sup>2</sup> (b) the Department's issuance of a press release on August 26, 2020, announcing that CRT had issued the pre-investigation data requests to the governors of those four states seeking data regarding COVID-19-related infections and deaths in state-run nursing homes; and (c) the Department's disclosure to a member of the news media on October 27, 2020, days before the 2020 election, of the Civil Division's (CIV) non-public letter to the State of New York seeking data regarding COVID-19-related deaths in New York's private nursing homes and a non-public letter from CRT and the U.S. Attorney's Office for the District of New Jersey (USAO NJ) to the Governor of New Jersey notifying the state of the Department's initiation of CRIPA investigations of two state-run veterans' homes.

The Department's August 26 press release was entitled, "Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents."<sup>3</sup> The press release announced the Department's letter requests to Michigan, New Jersey, New York, and Pennsylvania and stated that CRT was seeking to determine if those states' executive orders "requiring admission of COVID-19 patients to nursing homes [were] responsible for the deaths of nursing home residents." The August 26 press release cited the Centers for Disease Control (CDC) data of general statewide "death rates by population" (not death rates for nursing homes) in New Jersey and New York, which at the time had Democratic governors, and compared those figures unfavorably to the general statewide death rates by population in Texas and Florida, which at the time had Republican governors. The press release also cited as an ongoing matter a CRIPA investigation that the Department had initiated in April 2020 of the Soldiers' Home at Holyoke in Holyoke, Massachusetts ("Soldiers' Home," "Soldiers' Home at Holyoke," or

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<sup>1</sup> 42 U.S.C. §§ 1997-1997j.

<sup>2</sup> Unless otherwise noted, "CRT leadership" refers to the senior political appointees in the Office of the Assistant Attorney General for the Civil Rights Division (CRT).

<sup>3</sup> Department of Justice (DOJ) office of Public Affairs (OPA), Press Release, "[Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents](https://www.justice.gov/opa/pr/departments-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted)" (August 26, 2020), <https://www.justice.gov/opa/pr/departments-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted> (accessed December 19, 2024), attached as Appendix 1.

"Holyoke" investigation or matter).<sup>4</sup> However, at the direction of then Attorney General (Attorney General or AG) William Barr and then Deputy Attorney General Jeffrey Rosen, the Department had suspended its Holyoke investigation months earlier, just days after its opening.<sup>5</sup>

Two months later, in October 2020, a senior official in DOJ's Office of Public Affairs (OPA) proposed a plan to leak DOJ investigative information to the *New York Post* regarding its investigations involving nursing homes deaths in New Jersey and New York. The plan was consistent with an internal DOJ text sent by the same senior OPA official in mid-October that stated the effort "[w]ill be our last play on them before election but it's a big one." Consistent with this plan, on the evening of October 27, 2020, days before the 2020 election, the *New York Post* published an article entitled, "DOJ seeks more NY nursing home data after finding COVID-19 death undercount." The article cited to two non-public DOJ letters that had been finalized but not yet sent by DOJ to their intended recipients: one to the State of New York seeking data regarding COVID-19-related deaths in New York's private nursing homes and the other to the Governor of New Jersey notifying the state of the Department's initiation of CRIPA investigations of two state-run veterans' homes. The article also included a quote from an unnamed "administration official," which internal DOJ records reflect was a high-level CRT official.

During our investigation, the OIG reviewed public records as well as emails, telephone call logs, instant messages, text messages, and calendar entries of certain personnel from the Office of the Attorney General (OAG), the Office of the Deputy Attorney General (ODAG), CRT, CIV, the Office of Legislative Affairs, and OPA. We also reviewed digital and hard copies of select records from the files of DOJ and CRT leadership. In addition, we interviewed 12 witnesses, including career personnel from CRT, CIV, and multiple U.S. Attorneys' Offices.

The OIG sought voluntary interviews from former senior- and staff- level political appointees of CRT, OPA, and OAG; each appointee either affirmatively declined our request or failed to respond to our request. Specifically, the following former employees affirmatively declined the OIG's requests for voluntary interviews: Attorney General William Barr; [REDACTED]

[REDACTED]<sup>7</sup> Assistant Attorney General for CRT Eric Dreiband;<sup>8</sup> [REDACTED]<sup>9</sup>

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<sup>4</sup> In March 2023, the Commonwealth renamed the facility the Massachusetts Veterans' Home at Holyoke. See Paris Dunford and John O'Donoghue, "[Holyoke Soldiers' Home gets a new name, new state oversight](#)," Western Mass News (March 2, 2023), [www.westernmassnews.com/2023/03/02/holyoke-soldiers-home-gets-new-name-new-state-oversight](http://www.westernmassnews.com/2023/03/02/holyoke-soldiers-home-gets-new-name-new-state-oversight) (accessed December 20, 2024).

<sup>5</sup> William Barr served as the presidentially appointed Attorney General of the United States from February 14, 2019, until his resignation from the Department on December 23, 2020. Jeffrey Rosen was the presidentially appointed Deputy Attorney General from May 22, 2019, until January 20, 2021. Following Barr's departure, Rosen also served as Acting Attorney General from December 24, 2020, to January 20, 2021.

<sup>6</sup> [REDACTED]

<sup>7</sup> [REDACTED]

<sup>8</sup> Dreiband was the presidentially appointed Assistant Attorney General (AAG) for CRT from November 1, 2018, to January 8, 2021.

<sup>9</sup> [REDACTED]

[REDACTED]<sup>10</sup> [REDACTED]  
[REDACTED]<sup>11</sup> and [REDACTED] offered to respond in writing to any questions we provided, [REDACTED] offered to consider doing the same. The OIG does not believe that responding to written questions is a substitute for an interview under oath and, therefore, consistent with our practice, the OIG declined these offers. [REDACTED]  
[REDACTED] did not respond to the OIG's requests for voluntary interviews.<sup>12</sup> [REDACTED] also declined our request for a voluntary interview.<sup>13</sup> [REDACTED]  
[REDACTED]  
[REDACTED] Because the OIG does not have the authority to subpoena testimony from former Department employees, we were unable to compel these interviews.

## II. Executive Summary

As described in this report, we found that, between June and late August 2020, CRT leadership directed the Special Litigation Section (SPL) to focus on public nursing homes in Michigan, New Jersey, New York, and Pennsylvania for possible CRIPA investigations based on the connection between COVID-19 infections and deaths and orders regarding nursing home admission that had been issued by those states in March and April 2020.<sup>14</sup> The evidence also showed that CRT

<sup>10</sup> [REDACTED]  
[REDACTED]  
<sup>11</sup> [REDACTED]  
[REDACTED]  
<sup>12</sup> [REDACTED]  
[REDACTED]  
<sup>13</sup> [REDACTED]

<sup>14</sup> Although the OIG investigation focused on events that occurred between April and October 2020, we noted that subsequent data reporting and analysis confirmed that New York's initial reports of the number of nursing home residents who died of COVID-19 reflected a significant undercount. *See, e.g.*, State Comptroller Thomas P. DiNapoli, Office of the New York State Comptroller, Division of State Government Accountability, Department of Health: Use, Collection, and Reporting of Infection Control Data, 3 (March 2022) (finding that, "for certain periods during the pandemic, the [Department of Health] understated the number of deaths at nursing homes by as much as 50%"); Impeachment Investigation Report to Judiciary Committee Chair Charles Lavine and the New York State Assembly, Davis Polk & Wardwell LLP, 36-41 (November 22, 2021) (noting that New York officials underreported COVID-19 fatalities in nursing homes and did not include "out-of-facility deaths"); New York State Office of the Attorney General, Nursing Home Response to COVID-19 Pandemic, 10-12 (January 30, 2021) (revised) (reflecting preliminary analysis "that COVID-19 resident deaths associated with nursing homes in New York state appear[ed] to be undercounted by [the Department of Health] by approximately 50 percent"). We also noted that news reports and information released by the Office of the Governor of New York reflected that the state administration delayed responding to state legislative data requests regarding COVID-19 deaths in nursing homes due to apparent concerns about a potential federal investigation and the data being used against the state by federal investigators. *See* Lauren del Valle, "[New York governor's top aide admits administration delayed the release of Covid-19 deaths in long-term care facilities over federal investigation](#)"

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leadership directed SPL to focus specifically on New Jersey and New York despite having been provided data indicating that the nursing homes with the most significant quality of care issues were in other states.

Email records and witness testimony indicate that CRT leadership ultimately issued, and the Department publicly announced, the August 26 data requests to Michigan, New Jersey, New York, and Pennsylvania without knowing whether the “offending” state orders were still in effect (they were not, having been rescinded or revised months earlier), whether such orders were consistent with federal guidance at the time (they were largely consistent with federal guidance), or whether other states had issued similar orders (they had). The evidence further showed that CRT leadership—specifically [REDACTED]—drafted the August 26 announcement and sought input from OAG, ODAG, CIV, and OPA. We did not identify evidence that any of the Department attorneys, career or non-career, or public affairs specialists who reviewed the draft press release expressed to CRT concerns about its substance.<sup>15</sup>

However, many of the current and now former Department employees who agreed to be interviewed by the OIG stated that they found both the fact that the Department issued a press release in this instance and its content to be unusual and inappropriate. Email records showed that, after the Department issued the press release, numerous journalists contacted OPA with questions about the data requests, including about whether the Department’s actions were politically motivated.

Beginning in late September through October 27, 2020, while CRT was preparing to initiate formal CRIPA investigations of two public veterans’ facilities in New Jersey, CRT leadership pressed CIV, which has jurisdiction to ensure quality of care in *private* nursing homes through its enforcement of the False Claims Act,<sup>16</sup> to send a letter to New York seeking data regarding COVID-19-related deaths

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concerns,” CNN (February 12, 2021), <https://www.cnn.com/2021/02/12/us/new-york-aide-apology-covid-deaths-facilities/index.html> (accessed December 19, 2024); Statement from Secretary to the Governor Melissa DeRosa, Office of the Governor of New York (February 12, 2021) (incorporating transcript of Zoom call between Melissa DeRosa and New York state legislators), <https://www.governor.ny.gov/news/statement-secretary-governor-melissa-derosa-0> (accessed December 19, 2024).

<sup>15</sup> We noted that some of the content of the August 26, 2020 press release announcing CRT’s data requests to New York, New Jersey, Pennsylvania, and Michigan appeared to go beyond the information needed to reassure the public (the information does not appear to relate to public safety). However, as we explained in [A Report of Investigation Into the Department’s Release of Public Statements Concerning a Luzerne County, Pennsylvania, Election Fraud Investigation in September 2020](#), the relevant Justice Manual provision, Section 1-7.400(C), “does not address what information is appropriate to include in a public statement that officials have determined is necessary to reassure the public that the appropriate law enforcement agency is investigating a matter.” DOJ OIG, Oversight and Review Division Report 24-082, at 61 (July 2024), <https://oig.justice.gov/sites/default/files/reports/24-082.pdf>. Rather, Section 1-7.400(C) affords DOJ officials with discretionary authority to determine what information to include in a such a statement. *Id.* Because Section 1-7.400(C) allows statements that are a departure from the fundamental Department principle of not commenting about ongoing investigations, we recommended in that report that the Department revise this policy to require that the information contained in a statement released pursuant to Section 1-7.400(C) be reasonably necessary either to reassure the public that the appropriate law enforcement agency is investigating a matter or to protect public safety. *Id.* at 6.

<sup>16</sup> 31 U.S.C. §§ 3729-3733.

in private nursing facilities in the state. Certain CRT leadership and OPA personnel—specifically [REDACTED]—pushed to have the Department issue press releases announcing these actions involving New Jersey and New York before the 2020 election. For example, on October 17, 2020, in a communication about the press plans regarding the New Jersey CRIPA investigation and the New York letter, [REDACTED] stated: “I’m trying to get [CRT] and CIV to do letters to [New Jersey/New York] respectively on nursing homes. Would like to package them together and let [*New York Post*] break it. Will be our last play on them before election but it’s a big one.” With respect to CIV, email records and witness testimony indicated that CIV did not have an independent interest at that time in securing the data regarding COVID-19-related deaths in private nursing facilities in New York and was cautious about drafting an information request and a press release announcing the same, but ultimately complied because CIV was led to believe by CRT leadership that the direction was coming from Attorney General Barr. Documentary evidence and witness testimony also showed that both CRT leadership and OPA personnel sought to dictate the content of CIV’s letter and press release and objected to CIV’s narrowly tailored drafts.

Ultimately, the Department did not issue press releases announcing either the New Jersey CRIPA investigations or CIV’s information request to New York. However, email records showed that [REDACTED] in consultation with [REDACTED] and with [REDACTED] knowledge, directed OPA personnel to provide to a *New York Post* reporter on October 27, 2020, CRT’s and the USAO NJ’s non-public letter to the Governor of New Jersey regarding the initiation of the two CRIPA investigations, CIV’s non-public information request letter to the New York State health department, and other non-public background information. Later that day, the *New York Post* published an article—before designated New Jersey and New York officials had even learned of the Department’s actions—revealing that the Department was opening two CRIPA investigations in New Jersey and that CIV separately was seeking from New York State information regarding COVID-19-related deaths in private nursing facilities there. The *New York Post* article included hyperlinks to the two letters as well as quotes regarding the letters from an unnamed “administration official.”<sup>17</sup> DOJ email records establish that the unnamed “administration official” was [REDACTED] and that the disclosure of non-public DOJ investigative information to the *New York Post* was done with the knowledge and/or approval of [REDACTED] and [REDACTED].

The next day, October 28, *The Wall Street Journal* published an article about the New Jersey investigations that referenced statements provided by an unnamed “Justice Department official.”<sup>18</sup> DOJ email records establish that [REDACTED] [REDACTED] also was the source for the statements in *The Wall Street Journal* article and that he was prepared to be identified by name in the article, noting

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<sup>17</sup> Steven Nelson, “[DOJ seeks more NY nursing home data after finding COVID death undercount](https://nypost.com/2020/10/27/doj-demands-ny-nursing-home-data-after-covid-19-death-undercount),” *New York Post*, October 27, 2020 (7:50 pm), <https://nypost.com/2020/10/27/doj-demands-ny-nursing-home-data-after-covid-19-death-undercount> (accessed December 20, 2024).

<sup>18</sup> Chris Weaver, “[U.S. Investigating Veterans Nursing Homes in New Jersey for Possibly Understating Covid Deaths](https://www.wsj.com/articles/u-s-investigating-veterans-nursing-homes-in-new-jersey-for-possibly-understating-covid-deaths-11603900994),” *The Wall Street Journal*, October 28, 2020, <https://www.wsj.com/articles/u-s-investigating-veterans-nursing-homes-in-new-jersey-for-possibly-understating-covid-deaths-11603900994> (accessed December 20, 2024).

that he did not think being named [REDACTED]<sup>19</sup> However, [REDACTED] did not want [REDACTED] to be named in the article. Late on October 28, [REDACTED] reposted through her official DOJ [REDACTED] account both the *New York Post* and *The Wall Street Journal* articles.<sup>20</sup> These news reports (and others) quoted unnamed Department officials and referenced non-public information, including some information that had been included in draft DOJ letters and press releases, which information certain DOJ officials objected to including and which information was never released, other than by the leaks.

We found that [REDACTED] and [REDACTED] violated the Department's Confidentiality and Media Contacts Policy through their participation in and/or knowledge of the October 27 and 28, 2020 leaks of non-public DOJ investigative information to the *New York Post* and to *The Wall Street Journal*.<sup>21</sup> We also found that [REDACTED] violated the Confidentiality and Media Contacts Policy and the Department's Social Media Policy in contemporaneously posting on her official DOJ [REDACTED] account links to the *New York Post* and *The Wall Street Journal* articles.

Further, emails among senior officials expressing urgency about the Department's actions from June through October 2020 and related direction from those officials to career personnel, as described in more detail below, suggest that the then upcoming 2020 election may have been a factor in the timing and manner of these actions and announcing them to the public. We are therefore referring our findings to the U.S. Office of Special Counsel, which has exclusive jurisdiction regarding alleged Hatch Act violations, for its review and determination regarding whether any of the conduct described in this report violated the Hatch Act.

We have provided a copy of this report to the Office of the Deputy Attorney General and, because the report contains misconduct findings against attorneys, to the Professional Misconduct Review Unit for any action those offices deem appropriate. In addition, because the facts described in our report raise the possibility that certain former Department officials may have violated the Hatch Act, we are referring our findings to the U.S. Office of Special Counsel.

### III. Applicable Statutes, Policies, and Ethics Rules

Unless otherwise noted, the OIG applies the preponderance of the evidence standard in determining whether DOJ personnel have committed misconduct. The Merit Systems Protection Board applies this same standard when reviewing a federal agency's decision to take adverse action against an employee based on such misconduct.<sup>22</sup>

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<sup>19</sup> [REDACTED]

<sup>20</sup> [REDACTED]

[REDACTED] October 28, 2020, [REDACTED]  
[REDACTED]  
[REDACTED] October 28, 2020.

<sup>21</sup> We did not find evidence that anyone with authority under Department policy to approve media contacts about ongoing matters did so in this case. However, even if they did, the leaks still would have violated the Confidentiality and Media Contacts Policy for the reasons we describe in the analysis.

<sup>22</sup> See 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b)(1)(ii).

Several laws and Department policies are relevant to the conduct outlined in this report. We detail them below.

#### A. Confidentiality and Media Contacts Policy

The Department's Confidentiality and Media Contacts Policy, which is reflected in Justice Manual Section 1-7.000, prohibits Department personnel from disseminating non-public, sensitive information obtained in connection with their work, unless necessary to fulfill their official duties.<sup>23</sup> This policy exists because:

Much of DOJ's work involves non-public, sensitive matters. Disseminating non-public, sensitive information about DOJ matters could violate federal laws, employee non-disclosure agreements, and individual privacy rights; put a witness or law enforcement officer in danger; jeopardize an investigation or case; prejudice the rights of a defendant; or unfairly damage the reputation of a person.<sup>24</sup>

A provision of the policy in place from April 2018 to February 2024 also provided that, in communications with members of the news media, "DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations."<sup>25</sup> Section 1-7.400(B) continued: "Except as provided in subparagraph C of this section, DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress." Section 1-7.400(C) provided that "comments about or confirmation of an ongoing investigation may be necessary" when "the community needs to be reassured that the appropriate law enforcement agency is investigating a matter" or when "release of information is necessary to protect the public safety," subject to the approval of the appropriate Assistant Attorney General or U.S. Attorney.<sup>26</sup>

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<sup>23</sup> Justice Manual § 1-7.100.

<sup>24</sup> *Id.*

<sup>25</sup> Justice Manual § 1-7.400(B).

<sup>26</sup> The Department updated Justice Manual Section 1-7.400 in February 2024. Subsection (C) now provides: "when the community needs to be reassured that the appropriate law enforcement agency is investigating a matter, or where release of information is necessary to protect the public safety, comments about or confirmation of an ongoing investigation may be permissible."

## B. Restrictions on Partisan Political Activities

### 1. Hatch Act and Related Department Policies and Ethics Rules

The Hatch Act generally prohibits executive branch personnel from engaging in partisan political activity while on duty. All DOJ employees are subject to the Hatch Act's restrictions.<sup>27</sup> The U.S. Office of Special Counsel has exclusive jurisdiction for investigating Hatch Act violations.<sup>28</sup>

Among other provisions, the statute specifies that employees may not use their "official authority or influence for the purpose of interfering with or affecting the result of an election."<sup>29</sup> This admonishment applies equally to career and non-career employees.<sup>30</sup>

DOJ policy requires employees "to be aware of, and to comply with" the Hatch Act.<sup>31</sup> Additionally, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct) identify the Hatch Act as one of the statutes "to which an employee's conduct must conform."<sup>32</sup> The Standards of Ethical Conduct also provide that "employees shall endeavor to avoid any actions creating the appearance that they are violating the law" or the Standards of Ethical Conduct.<sup>33</sup>

### 2. Election Year Sensitivities and Restrictions on Political Activities

Consistent with DOJ practice in presidential election years, on May 15, 2020, Barr issued a Memorandum for All Department of Justice Employees reminding them of their responsibility to enforce the laws of the United States in a "neutral and impartial manner" and emphasizing that this obligation is "particularly important in an election year" (Barr Election Year Sensitivities

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<sup>27</sup> 5 U.S.C. § 7322(1)(A). The Hatch Act and DOJ policy provide that certain Executive Branch employees are subject to additional restrictions on their activities. *See e.g.*, Memorandum from Lee Lofthus, Assistant Attorney General for Administration, for All Department of Justice Career Employees Re: Restrictions on Political Activities (June 10, 2020); Memorandum from Lee Lofthus, Assistant Attorney General for Administration, for All Department of Justice Non-Career Employees Re: Restrictions on Political Activities (June 10, 2020). These "further" restrictions on Senior Executive Service and non-career DOJ employees are not relevant to this matter.

<sup>28</sup> 5 C.F.R. § 734.102(a).

<sup>29</sup> 5 U.S.C. § 7323(a)(1).

<sup>30</sup> 5 U.S.C. §§ 7322(1) and 7323(a).

<sup>31</sup> Justice Manual §§ 1-4.010 and 1-4.100(C).

<sup>32</sup> 5 C.F.R. § 2635.901; *see also* 5 C.F.R. § 2635.902(o).

<sup>33</sup> 5 C.F.R. § 2635.101(b)(14).

Memorandum).<sup>34</sup> The Barr Election Year Sensitivities Memorandum included two sections.<sup>35</sup> Section I, which was framed in the context of criminal matters, provided that “partisan politics must play no role in the decisions of federal investigators or prosecutors” and that “law enforcement officers and prosecutors may never select the timing of public statements (attributed or not), investigative steps, criminal charges, or any other action in any matter or case for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.”<sup>36</sup> This section, by its terms, did not apply to civil matters.

Section II reminded employees of their obligations under the Hatch Act, including that they may not use their official authority or influence for the purpose of affecting election results.<sup>37</sup> The Justice Manual also requires employees “to be aware of, and to comply with” the Hatch Act.<sup>38</sup>

A month after issuance of the Barr Election Year Sensitivities Memorandum, on June 10, 2020, the then Assistant Attorney General for Administration Lee Lofthus issued two memoranda—one to career Department employees and one to non-career appointees—reminding employees of the Hatch Act’s restrictions on partisan political activities (Lofthus Political Activities Memoranda).<sup>39</sup> Like the Barr Election Year Sensitivities Memorandum, the Lofthus Political Activities Memoranda emphasized the importance of maintaining the “integrity of our work” and highlighted that “the public trusts that we will enforce the laws of the United States based on the facts and the law, and not to achieve purely partisan election objectives.”<sup>40</sup>

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<sup>34</sup> William Barr, Attorney General, U.S. Department Justice, Memorandum for All Department of Justice Employees, Election Year Sensitivities May 15, 2020 (Barr Election Year Sensitivities Memorandum). At the time of the events detailed in this report, the Department had not yet revised the Justice Manual to address the recommendation reflected in our [Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election](#) that the Department “consider providing guidance to agents and prosecutors concerning the taking of overt investigative steps, indictments, public announcements, or other actions that could impact an election.” DOJ OIG, Oversight and Review Division Report 18-04, 500 (June 2018), <https://oig.justice.gov/sites/default/files/reports/18-04.pdf> (accessed December 20, 2024). In August 2022, the Department amended the Justice Manual to include a provision prohibiting federal prosecutors and agents from selecting “the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.” Justice Manual § 9-85.500. The provision further provides that “[a]ny action likely to raise an issue or the perception of an issue...requires consultation with the Public Integrity Section, and such action shall not be taken if the Public Integrity Section advises that further consultation is required with the Deputy Attorney General or Attorney General.” *Id.*

<sup>35</sup> Barr Election Year Sensitivities Memorandum.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Justice Manual §§ 1-4.010 and 1-4.100(C).

<sup>39</sup> See Lee Lofthus, Assistant Attorney General for Administration, U.S. Department of Justice, Memorandum for All Department of Justice Career Employees, Restrictions on Political Activities, June 10, 2020; Lee Lofthus, Assistant Attorney General for Administration, U.S. Department of Justice, Memorandum for All Department of Justice Non-Career Employees, Restrictions on Political Activities, June 10, 2020.

<sup>40</sup> *Id.*

## C. Social Media Policy

In June 2019, with the endorsement of [REDACTED] the Department issued updated guidance regarding components' management of social media content.<sup>41</sup> The updated guidance supplemented the initial policy statement regarding the use of social media to communicate with the public, which the Department issued in 2018.<sup>42</sup> The Social Media Policy, as reflected in both the 2018 initial policy statement and the 2019 updated guidance, "applies to all official social media accounts used or managed by Department employees for official business, whether the account is in the name of a Department component, office, official, program, initiative, etc."<sup>43</sup> The policy reminds components to comply with applicable laws and guidance, including government ethics rules, laws and policies regarding partisan political activities, regulations regarding the release of non-public information, and the Department's Confidentiality and Media Contacts Policy; and provides that the component head is responsible for ensuring compliance with all laws, regulations, policies, and rules related to official social media use.<sup>44</sup>

The policy generally provides that a component may only use its official social media account "to post information that may be shared with the public in the course of official business" and that a component "may not use social media to publish non-public information or information clearly unauthorized for disclosure."<sup>45</sup>

The policy also sets forth rules regarding linking and reposting "nongovernmental entity content."<sup>46</sup> This part of the policy provides in part: "Because linking to or reposting content may in some circumstances imply endorsement of the entity and/or the content that is being reposted, components are strongly encouraged to consult with" their ethics officials, Senior Component Official for Privacy, public affairs officials, or general counsel before linking to or reposting content from nongovernmental sources.<sup>47</sup>

## IV. Background

### A. Relevant Federal Statutes

#### 1. False Claims Act

Most of the Department's work ensuring the provision of quality care in nursing homes is handled by CIV and the U.S. Attorneys' Offices (USAO) through enforcement of the False Claims Act (FCA), which empowers the Department to seek damages and penalties from nursing facilities that seek

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<sup>41</sup> DOJ Policy Statement 0300.02.02, Social Media Content Management Requirements and Procedures.

<sup>42</sup> DOJ Policy Statement 0300.02, Use of Social Media to Communicate with the Public.

<sup>43</sup> *Id.*

<sup>44</sup> DOJ Policy Statement 0300.02; DOJ Policy Statement 0300.02.02.

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

<sup>46</sup> *Id.* § (II)(D)(5).

<sup>47</sup> *Id.*

reimbursement from Medicare and Medicaid when those facilities provide substandard care to residents.<sup>48</sup> Injunctive relief is not available under the FCA.<sup>49</sup> As a matter of practice, DOJ uses the FCA to enforce quality of care in private nursing facilities, which represent the vast majority of nursing facilities in the United States.

## 2. Civil Rights of Institutionalized Persons Act

The Department uses its authority under CRIPA to ensure quality of care in public nursing facilities.<sup>50</sup> The statute authorizes the federal government to bring civil enforcement actions against state and local governments that systemically violate the constitutional rights of persons institutionalized in public facilities.<sup>51</sup>

CRIPA and related Department policy, however, place restrictions on this authority, including requirements that any investigation be authorized by the Assistant Attorney General (AAG) for CRT and that several intermediate steps be taken before the Department files any complaint against a state or local government.<sup>52</sup> For example, the federal government must give written notice to the governor of the state in which the facility is located, the state Attorney General, and the facility director upon opening a CRIPA investigation and must wait 7 days thereafter before initiating investigative activity.<sup>53</sup> The Attorney General must personally endorse any formal complaint and, in doing so, must certify that the federal government has complied with the statutory pre-suit requirements.<sup>54</sup> In part due to these statutory restraints on federal authority, it has been longstanding practice for CRT to refrain from contacting the state for any information prior to the formal initiation of an AAG-approved CRIPA investigation.

The only remedy CRIPA affords is injunctive relief from the identified constitutional violations.<sup>55</sup> As a result, the Department's practice has been to initiate a CRIPA investigation where a constitutional violation is believed to be ongoing or "capable of repetition, yet evading review."<sup>56</sup>

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<sup>48</sup> 31 U.S.C. §§ 3729-3733

<sup>49</sup> 31 U.S.C. § 3729.

<sup>50</sup> 42 U.S.C. §§ 1997-1997j.

<sup>51</sup> 42 U.S.C. § 1997a.

<sup>52</sup> See 42 U.S.C. §§ 1997a and b; 28 C.F.R. § 0.50 (delegating to the AAG for CRT the responsibility to enforce all federal statutes affecting civil rights, including those pertaining to the civil rights of institutionalized persons); Justice Manual § 8-2.261 (providing that the AAG for CRT has the final authority to determine whether a CRIPA investigation should be opened and affirming that the Attorney General retains exclusive authority to sign formal CRIPA complaints).

<sup>53</sup> 42 U.S.C. § 1997b(a)(2).

<sup>54</sup> 42 U.S.C. §§ 1997b(a)(2) and (b).

<sup>55</sup> 42 U.S.C. § 1997a(a).

<sup>56</sup> This standard reflects an exception to the mootness doctrine, which ordinarily precludes civil action when the "controversy" no longer exists. See, e.g., *Globe Newspaper Co. v. Superior Ct. for City of Norfolk*, 457 U.S. 596, 603 (1982).

Within CRT, SPL handles CRIPA investigations. CRIPA enforcement in the nursing home context has been a small portion of SPL's portfolio in part because publicly run nursing homes make up a very small percentage of nursing homes in the United States.<sup>57</sup>

## **B. Federal and State Guidance Related to Nursing Homes Early in the COVID-19 Pandemic**

Given their congregate nature and vulnerable resident populations, nursing homes are high-risk environments for communicable airborne viruses, including COVID-19.<sup>58</sup> In the spring of 2020, nursing homes and other long-term care facilities experienced disproportionately high numbers of COVID-19 infections and related deaths.<sup>59</sup> Accordingly, throughout the pandemic, federal and state authorities issued guidance and executive orders directed toward mitigating COVID-19 transmission in nursing homes and other long-term care facilities.

### **1. U.S. Department of Health and Human Services Guidance to Mitigate COVID-19 Infections in Nursing Homes**

On March 13, 2020, the CDC and the Centers for Medicare & Medicaid Services (CMS), both components of the U.S. Department of Health and Human Services (HHS), issued guidance for infection prevention and control in nursing homes.<sup>60</sup> The CMS guidance provided that nursing homes could accept residents diagnosed with COVID-19 so long as the facility could implement certain practices.<sup>61</sup> The guidance also noted that "nursing homes should admit any individuals that they would normally admit to their facility, including individuals from hospitals where a case of COVID-19 was present" and, "if possible, dedicate a unit/wing exclusively for any residents coming or returning from the hospital."<sup>62</sup> Neither the CDC nor CMS guidance recommended prohibiting nursing homes from requiring COVID-19 testing prior to admission or re-admission, nor did the guidance recommend requiring testing prior to admission or re-admission from a hospital.

Thereafter, on multiple occasions during the time period relevant to our investigation—from mid-March through late August 2020—the CDC and the CMS issued updated guidance and

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<sup>57</sup> Prior to the pandemic, CRT used its CRIPA authority primarily to investigate and remedy constitutional violations in state-run prisons and jails.

<sup>58</sup> See Centers for Disease Control and Prevention (CDC), Preparing for COVID-19 in Nursing Homes, May 19, 2020; CDC, Testing Guidelines for Nursing Homes, July 17, 2020; see also CDC, Morbidity and Mortality Weekly Report, 1300, September 18, 2020.

<sup>59</sup> See *id.*

<sup>60</sup> See CDC, Preparing for COVID-19: Long-term Care Facilities, Nursing Homes, March 13, 2020; Centers for Medicare & Medicaid Services (CMS), Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes, March 13, 2020.

<sup>61</sup> See CMS, Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes, March 13, 2020.

<sup>62</sup> *Id.*

recommendations that were intended to help mitigate the spread and effects of COVID-19.<sup>63</sup> The CDC guidance and the CMS recommendations consistently provided that discharge from hospitals to nursing homes should be based on determinations of medical stability, and that confirmed or suspected COVID-19 infection was not a sufficient basis to deny an otherwise medically stable patient admission to a nursing home provided that the receiving nursing home had adequate infection prevention and control measures in place, including screening for symptoms, segregating or cohorting residents with known or suspected COVID-19 in designated units, and dedicating staff to those units.<sup>64</sup>

In every instance, the CDC and the CMS guidance did not recommend that admissions or readmissions to nursing homes be preceded by a negative COVID-19 test nor did they recommend that nursing homes be prohibited from requiring COVID-19 testing. Rather, the CDC and the CMS recommended that, to the extent that reliable testing was available, facilities use testing to screen residents, noting that the results could help inform decisions regarding resident care, medical interventions, and housing placement.<sup>65</sup>

## 2. States Issue Executive Orders to Address COVID-19 Infection in Nursing Homes

In March and April 2020, concurrent with the above-described guidance issued by the CDC and the CMS, multiple states, including New York, New Jersey, Pennsylvania, Michigan, Arizona, California, Georgia, Indiana, and others issued executive orders, directives, or guidance (collectively “orders”) regarding hospital discharges and nursing home admissions.<sup>66</sup> These orders specified that

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<sup>63</sup> See, e.g., CDC, Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings, March 19, 2020; CMS, COVID-19 Long-term Care Facility Guidance, April 2, 2020; CDC, Responding to Coronavirus (COVID-19) in Nursing Homes, April 30, 2020; CDC, Discontinuation of Transmission-Based Precautions and Disposition of Patients with COVID-19 in Healthcare Settings (Interim Guidance), May 2, 2020; CMS, Nursing Home Reopening Recommendations for State and Local Officials, May 18, 2020; CDC, Preparing for COVID-19 in Nursing Homes, May 19, 2020; CDC, Testing Guidelines for Nursing Homes, July 17, 2020; CMS, Interim Final Rule, Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency (requiring long-term care facilities to test residents and staff members for COVID-19 and, upon the identification of an individual with symptoms or who tests positive, to take measures to prevent further transmission), August 26, 2020.

<sup>64</sup> See CMS, COVID-19 Long-term Care Facility Guidance, April 2, 2020; CDC, Responding to Coronavirus (COVID-19) in Nursing Homes, April 30, 2020; CDC, Discontinuation of Transmission-Based Precautions and Disposition of Patients with COVID-19 in Healthcare Settings (Interim Guidance), May 2, 2020; CDC, Testing Guidelines for Nursing Homes, July 17, 2020.

<sup>65</sup> See CMS, COVID-19 Long-Term Care Facility Guidance, April 2, 2020; CDC, Responding to Coronavirus (COVID-19) in Nursing Homes, April 30, 2020; CMS, Nursing Home Reopening Recommendations for State and Local Officials, May 18, 2020; CDC, Preparing for COVID-19 in Nursing Homes, May 19, 2020; CDC, Testing Guidelines for Nursing Homes, July 17, 2020; CMS, Interim Final Rule, Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, August 26, 2020.

<sup>66</sup> See New York State Department of Health, Advisory: Hospital Discharges and Nursing Home Admissions, March 25, 2020; New Jersey Department of Health, Hospital Discharges and Admissions to Post-Acute Care Settings, March 31, 2020; Pennsylvania Department of Health, Interim Guidance for Nursing Facilities During COVID-19, March 18, 2020; State of Michigan, Executive Order 2020-50: Enhanced Protections for Residents

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discharge from hospitals to nursing homes should be based on hospital determinations of medical stability; prohibited nursing homes from denying admission or re-admission based solely on confirmed or suspected COVID-19; and either prohibited nursing homes from requiring COVID-19 testing prior to admission or re-admission of a hospitalized patient who had been determined medically stable or prohibited nursing homes from denying admission or re-admission based on testing requirements inconsistent with federal guidance.<sup>67</sup> These orders sparked concerns that discharging patients from hospitals to nursing homes would introduce COVID-19 into the facilities and place residents and staff members at risk of infection.<sup>68</sup>

By mid-May 2020, New York, New Jersey, Pennsylvania, Michigan, and California either had revised or rescinded their initial orders regarding nursing home admission.<sup>69</sup> New York's new order prohibited hospitals from discharging patients to nursing homes without first testing for COVID-19 and obtaining negative results.<sup>70</sup> New Jersey, Pennsylvania, Michigan, and California issued orders that required COVID-19 testing prior to admission or re-admission to nursing homes and provided that nursing homes should consider test results in making decisions regarding resident care and placement, but did not require negative COVID-19 results as a condition of admission or re-admission.<sup>71</sup> Other states, including Arizona, Indiana, and Georgia did not issue new orders, as their

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and Staff of Long-Term Care Facilities During the COVID-19 Pandemic, April 15, 2020; California Department of Health, All Facilities Letter (AFL) 20-33, Interim Guidance for Transfer of Residents with Suspected or Confirmed Coronavirus Disease (COVID-19), April 1, 2020; State of Arizona, Executive Order 2020-22, Protection of Vulnerable Residents at Nursing Care Institutions, Residential Care Institutions, ICF-IIDs and DD Medical Group Homes from COVID-19, April 7, 2020; Indiana State Department of Health, COVID-19 Guidance for Hospital Discharge to Long-Term Care Facilities, April 1, 2020; State of Georgia, Executive Order 04.08.20.03, Executive Order to Ensure the Safety of Employees and Residents of Nursing Homes and Long-Term Care Facilities, April 8, 2020.

<sup>67</sup> See *id.*

<sup>68</sup> See e.g., [Over 9,000 Virus Patients Sent into NY Nursing Homes](https://apnews.com/article/new-york-andrew-cuomo-us-news-coronavirus-pandemic-nursing-homes-512cae0abb55a55f375b3192f2cdd6b5), *Associated Press*, Feb. 11, 2021, <https://apnews.com/article/new-york-andrew-cuomo-us-news-coronavirus-pandemic-nursing-homes-512cae0abb55a55f375b3192f2cdd6b5> (accessed December 20, 2024); [Whitmer's Veto Continues Bad Nursing Home Policy](https://www.detroitnews.com/story/opinion/editorials/2020/08/06/editorial-whitmers-veto-continues-bad-nursing-home-policy/3300487001/), *Detroit News*, August 5, 2020, <https://www.detroitnews.com/story/opinion/editorials/2020/08/06/editorial-whitmers-veto-continues-bad-nursing-home-policy/3300487001/> (accessed December 20, 2024).

<sup>69</sup> See State of New York, Executive Order 202.30 re Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, May 10, 2020; New Jersey Department of Health, Executive Directive No. 20-013: COVID-19 Testing at Licensed Long-Term Care Facilities, Assisted Living Residences, Comprehensive Personal Care Homes, Residential Health Care Facilities, and Dementia Care Homes, May 12, 2020; Pennsylvania Department of Health, Advisory: Test-based Strategies for Preventing Transmission of the Virus that Causes COVID-19 in Skilled Nursing Facilities, May 12, 2020; State of Michigan, Executive Order 2020-95: Enhanced Protections for Residents and Staff of Long-Term Care Facilities During the COVID-19 Pandemic, May 21, 2020; California Department of Public Health, All Facilities Letter (AFL) 20-33.2, Interim Guidance for Transfer of Residents with Confirmed or Suspected Coronavirus Disease (COVID-19), May 15, 2020.

<sup>70</sup> See State of New York, Executive Order 202.30 re Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, May 10, 2020.

<sup>71</sup> See New Jersey Department of Health, Executive Directive No. 20-013: COVID-19 Testing at Licensed Long-Term Care Facilities, Assisted Living Residences, Comprehensive Personal Care Homes, Residential Health Care Facilities, and Dementia Care Homes, May 12, 2020; Pennsylvania Department of Health, Advisory: Test-based

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then existing orders required nursing homes to comply with CMS and CDC guidance, which evolved as summarized above.<sup>72</sup> These orders concerning nursing home admission and COVID-19 testing remained the subject of public discourse throughout the spring and summer of 2020, and federal and state responses to COVID-19 were discussed during the 2020 Democratic and Republican National Conventions.<sup>73</sup>

### C. DOJ Enforcement of Quality of Care in Nursing Homes Early in COVID-19 Pandemic

#### 1. DOJ Rolls Out a Nursing Home Initiative in Early March 2020 that is Unrelated to the COVID-19 Pandemic

On or about March 3, 2020, under the larger umbrella of the Department's Elder Justice Initiative and just days before the COVID-19 pandemic emergency was declared by President Trump on March 13, 2020, Attorney General Barr announced a Nursing Home Initiative (NHI) to "coordinate and enhance civil and criminal efforts to pursue nursing homes that provide grossly substandard

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Strategies for Preventing Transmission of the Virus that Causes COVID-19 in Skilled Nursing Facilities, May 12, 2020; State of Michigan, Executive Order 2020-95: Enhanced Protections for Residents and Staff of Long-Term Care Facilities During the COVID-19 Pandemic, May 21, 2020; California Department of Public Health, All Facilities Letter (AFL) 20-33.2, Interim Guidance for Transfer of Residents with Suspected or Confirmed Coronavirus Disease (COVID-19), May 15, 2020. *See also* CDC, Discontinuation of Transmission-Based Precautions and Disposition of Patients with COVID-19 in Healthcare Settings (Interim Guidance), May 2, 2020; CMS, Nursing Home Reopening Recommendations for State and Local Officials, May 18, 2020; CDC, Preparing for COVID-19 in Nursing Homes, May 19, 2020.

<sup>72</sup> *See* State of Arizona, Executive Order 2020-22, Protection of Vulnerable Residents at Nursing Care Institutions, Residential Care Institutions, ICF-IIDs and DD Medical Group Homes from COVID-19, April 7, 2020; Indiana State Department of Health, COVID-19 Guidance for Hospital Discharge to Long-Term Care Facilities, April 1, 2020; State of Georgia, Executive Order 04.08.20.03, Executive Order to Ensure the Safety of Employees and Residents of Nursing Homes and Long-Term Care Facilities, April 8, 2020. Georgia's April 8, 2020 order was effective for an initial period of 20 days; on April 30, the Governor of Georgia extended the April 8, 2020 order for an additional 43 days.

<sup>73</sup> *See, e.g., "Whitmer's Veto Continues Bad Nursing Home Policy," Detroit News*, August 5, 2020, <https://www.detroitnews.com/story/opinion/editorials/2020/08/06/editorial-whitmers-veto-continues-bad-nursing-home-policy/3300487001/> (accessed December 20, 2024); Bernard Condon, Jennifer Peltz and Jim Mustain, "AP count: Over 4,500 virus patients sent to NY nursing homes," *Associated Press*, May 24, 2020, <https://apnews.com/article/health-us-news-ap-top-news-weekend-reads-virus-outbreak-5ebc0ad45b73a899efa81f098330204c> (accessed December 21, 2024). The Democratic National Convention took place from August 17 through August 20, 2020. The Republican National Convention took place from August 24 through August 27, 2020. *See also* [Governor Andrew Cuomo, Gov. Cuomo Addresses the Coronavirus During the Democratic National Convention](#), August 17, 2020, <https://www.pbs.org/newshour/politics/watch-gov-cuomo-addresses-the-coronavirus-during-the-democratic-national-convention> (accessed December 20, 2024); [Governor Gretchen Whitmer, Governor Whitmer Speaks at Democratic National Convention](#), August 17, 2020, <https://www.freep.com/story/news/politics/elections/2020/08/17/governor-gretchen-whitmer-speech-democratic-convention-dnc/3385194001/> (accessed December 20, 2024); Tamar Lapin, "RNC 2020: Cuomo, de Blasio appear in video for botched COVID response," *New York Post*, August 24, 2020, <https://nypost.com/2020/08/24/rnc-2020-cuomo-de-blasio-appear-in-video-for-botched-covid-response/> (accessed December 20, 2024).

care.”<sup>74</sup> At the time of its announcement, the NHI was not focused on COVID-19 issues but rather on identifying the worst nursing homes around the country—those that had inadequate nursing staff, failed to adhere to basic hygiene and infection control protocols, failed to provide sufficient food to residents, withheld pain medication, and used physical or chemical restraints to restrain or sedate residents—and initiating civil or criminal actions to protect residents.<sup>75</sup> The NHI is supported by a contract between DOJ and a private contractor pursuant to which contract investigators analyze data collected and produced by the CMS and other information to identify problematic facilities. The NHI primarily is a collective effort by CIV and USAOs around the country.

Shortly after the NHI was announced, COVID-19 exposed infection control and other quality of care deficiencies in nursing homes, and CIV and the USAOs became busy gathering data to identify particularly problematic facilities and working to identify potential targets for federal law enforcement action.

## 2. CRT Publicly Announces COVID-19-related CRIPA Investigation of Soldiers’ Home at Holyoke in Massachusetts in April 2020

In early April 2020, during the initial wave of the COVID-19 pandemic, the U.S. Attorney’s Office for the District of Massachusetts (USAO MA) reached out to CRT and proposed opening a CRIPA investigation into the Soldiers’ Home at Holyoke in Holyoke, Massachusetts, a long-term care facility for veterans. According to the recommendation memorandum jointly prepared by SPL and the USAO MA, there had been numerous COVID-19-related deaths at the facility due to poor infection control procedures. The recommendation to open a CRIPA investigation moved quickly through the CRT approval process, and then AAG for CRT Dreiband authorized the CRIPA investigation on April 8, 2020.

Because the COVID-19 deaths at the Soldiers’ Home had received extensive media attention, then U.S. Attorney for USAO MA Andrew Lelling suggested announcing the investigation with a press release. Following Lelling’s request, Dreiband sent an email to [REDACTED] seeking his advice, writing: “[W]e normally do not issue [a] press release when we initiate an investigation,” but he noted the “unusual circumstance.” During the exchange, [REDACTED] suggested that Dreiband and Lelling issue a “barebones and straightforward” joint statement rather than a press release. On Friday, April 10, 2020, following further discussion, the Department issued a barebones press release announcing that the Department had “opened an investigation...to examine whether the Soldiers’ Home violated the rights of residents by failing to provide them adequate medical care generally, and during the coronavirus pandemic.”<sup>76</sup>

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<sup>74</sup> See DOJ OPA, Press Release, “[Department of Justice Launches a National Nursing Home Initiative](https://www.justice.gov/opa/pr/departments-justice-launches-national-nursing-home-initiative),” March 3, 2020, <https://www.justice.gov/opa/pr/departments-justice-launches-national-nursing-home-initiative> (accessed December 20, 2024).

<sup>75</sup> *Id.*

<sup>76</sup> DOJ OPA, Press Release, “Federal Investigation into Conditions at a Nursing Home for Veterans in Massachusetts Announced,” April 10, 2020.

### 3. DOJ Leadership Suspends COVID-19-related CRIPA Investigation of Soldiers' Home in April 2020

Emails show that, while CRT had notified OAG and the Office of the Associate Attorney General of the investigation, CRT did not notify ODAG of the investigation before its announcement.

After learning about the matter, on Saturday, April 11, 2020, Deputy Attorney General Rosen scheduled a meeting with Dreiband and Lelling for the following Monday, April 13. Rosen's notes of the April 13 discussion reflect a decision to suspend the federal investigation and await the findings of a then ongoing state investigation and to be prepared to assist state investigators, as needed.<sup>77</sup>

[REDACTED] told the OIG that, on April 13 or 14, [REDACTED] advised him to have SPL stand down on the investigation because of concerns raised by DOJ leadership.

[REDACTED] notes from a discussion with Dreiband on April 20 reflect that Department leadership wanted SPL to stand down on the Holyoke investigation both because there was already an ongoing state investigation and because "[the Department] should not be going into state institutions about [the] pandemic when [DOJ is] being criticized for [its] pandemic response." The Department did not issue a public announcement of the investigation's suspension.

## V. Factual Findings

### A. Events Related to CRT Leadership's Decision to Issue a Press Release on August 26, 2020, Announcing CRT's CRIPA Pre-Investigative Letter Requests to New York, New Jersey, Michigan, and Pennsylvania

#### 1. CRT Leadership Targets Public Nursing Homes in New Jersey and New York for Possible CRIPA Investigations

[REDACTED] told us that, in the 2 plus months following the April 2020 decision by the Department's leadership to suspend the Holyoke investigation, SPL did not pursue any other COVID-19-related CRIPA nursing home investigations, with the understanding that CRT and DOJ leadership were not supportive of such investigations at that time. He also told us that, during that time period, when USAOs inquired about opening COVID-19-related CRIPA investigations into nursing homes, he told them about the Holyoke matter and that leadership may not support such an investigation. However, beginning in June 2020, Dreiband instructed [REDACTED] to have SPL explore initiating CRIPA investigations into nursing homes in New Jersey and New York.

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<sup>77</sup> DOJ leadership's instructions allowed SPL and USAO MA to sit in on interviews conducted by state investigators in a passive role, which USAO MA did.

a. **CRT Leadership Encourages Investigation of COVID-19 Deaths in Public Nursing Facilities in New Jersey and New York**

On June 24, 2020, AAG Dreiband sent an email to [REDACTED] with the subject line “CRIPA—New York and New Jersey,” which stated: [REDACTED] I think I mentioned that we should look at nursing homes in both New York and New Jersey, but if I did not, please ask the team to do so.”

[REDACTED] told us that [REDACTED] informed him by phone of those instructions but stated that she did not want SPL to “distort [its] ordinary priorities” because Dreiband had asked for a particular focus on those two states. Consistent with [REDACTED] instruction, [REDACTED] told us that he directed his team to look at New Jersey and New York, but that he also told them that they should not limit their survey work to those states. He also reached out directly to the USAO NJ and the U.S. Attorney’s Offices in the Southern and Eastern Districts of New York (USAO SDNY and USAO EDNY) to alert them that there was an interest in identifying nursing facilities in their jurisdictions for possible CRIPA investigations.<sup>78</sup>

Our investigation did not uncover any additional internal communications among CRT leadership regarding COVID-19-related nursing home investigations in New Jersey and New York until the afternoon of August 10, when [REDACTED] sent Dreiband an update.<sup>79</sup> In that August 10 email, [REDACTED] informed Dreiband that the USAO NJ had submitted a request for authorization to open CRIPA investigations of two state-run veterans’ nursing facilities, but that USAO SDNY and USAO EDNY were not prepared at that time to recommend initiating CRIPA investigations. The next morning, August 11, Dreiband asked [REDACTED] in an email to let [REDACTED] know that “these matters are a priority and need to be moved forward promptly.” Dreiband also offered to reach out to the U.S. Attorneys for USAO SDNY and USAO EDNY, if needed, and copied then newly appointed [REDACTED] on the communications with [REDACTED]

On August 11, Dreiband and [REDACTED] exchanged emails stating that they needed preliminary recommendations on potential investigations of state-run veterans’ homes by the “end of the week,” and [REDACTED] apprised [REDACTED] of the deadline. Email communications, contemporaneous notes, and witness testimony reflect that [REDACTED] communicated this deadline to SPL.

In another email thread on August 11, [REDACTED] emailed [REDACTED] that preliminary research she had conducted yielded news articles showing large numbers of COVID-19 deaths in state-run veterans’ homes in New Jersey, North Carolina, Pennsylvania, and Louisiana. [REDACTED] email did not reference New York. It is not clear what prompted this research. Around the same time, after conferring with Dreiband, [REDACTED] advised [REDACTED] “As to [New York,] the goal would be to start a statewide investigation, based on the Governor’s statewide executive order and the harm it caused.” Late that evening, [REDACTED] sent [REDACTED] a copy of New York’s March 25, 2020 executive order—

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<sup>78</sup> [REDACTED] told us that he first learned of concerns about the conditions for residents at two public nursing facilities in New Jersey in April 2020. However, according to [REDACTED] the USAO NJ did not submit a request for authorization to open CRIPA investigations at that time because of the suspension of the Holyoke matter.

<sup>79</sup> This update was immediately preceded by an email exchange between [REDACTED] and [REDACTED] in which [REDACTED] wrote: “[Dreiband] just asked me to reach out to you for an update re: the preliminary investigations into the [New York] and [New Jersey] state-run nursing homes.”

which, as noted above, had been rescinded on May 10, 2020—that allowed hospitals to discharge patients to nursing homes without COVID-19 testing. In forwarding New York’s order to Dreiband and [REDACTED] the next morning, August 12, [REDACTED] wrote: “This order was a monumental mistake.”

On August 12, at the request of Dreiband, [REDACTED] reached out to a contact in the Office of the General Counsel for HHS to request data reflecting “which 10 states had the highest death rates in nursing homes due to COVID-19.” The following morning, August 13, [REDACTED] HHS contact forwarded a preview of data HHS planned to release publicly the following week that reflected the death rates per 1,000 residents of long-term care facilities—both public and private facilities—for all U.S. states and territories. According to HHS’s data at that time, the 10 states or territories with the highest death rates from COVID-19 in long-term care facilities were Massachusetts, New Jersey, Connecticut, Rhode Island, Louisiana, the District of Columbia, Pennsylvania, Mississippi, Maryland, and Delaware.

[REDACTED] forwarded the information to Dreiband [REDACTED] and [REDACTED] and, upon reviewing the data, [REDACTED] expressed doubt about New York not being included. In an ensuing exchange, [REDACTED] advised [REDACTED] that HHS did not require nursing homes to report COVID-19-related deaths until May 2020, which she stated “was after the height of the pandemic” in New York and opined that the delayed reporting requirement could explain why New York’s numbers may have seemed low.<sup>80</sup>

**b. CRT Seeks CIV’s Assistance in Identifying Public Nursing Facilities with High COVID-19 Deaths and Low Quality of Care Rankings**

On August 12, 2020 [REDACTED] emailed then [REDACTED] seeking a point of contact within CIV for CRT “to liaise with” because CRT was “doing some work in the COVID-19 space relative to nursing homes (moving quickly) and wanted to connect and coordinate with Civil.”<sup>81</sup> That same day, [REDACTED] communicated with [REDACTED] about CRT joining the NHI.<sup>82</sup> In an email to Dreiband summarizing her discussion with [REDACTED] [REDACTED] wrote: [REDACTED] and I think it would be helpful if you called her since you’ve spoken with the AG just to make sure we’re all on the same page.”

On Monday, August 17, Dreiband and [REDACTED] had a call with [REDACTED] and [REDACTED] [REDACTED] Dreiband’s notes of this call reflect that the participants discussed adding CRIPA enforcement to the NHI, and that they decided that SPL should confer with CIV’s elder justice team. Dreiband’s notes also reference “AG rollout” and “time announcement w/in week or so” and “can

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<sup>80</sup> See 42 C.F.R. § 483.80 (requiring nursing homes and other long-term-care facilities to electronically report to the CDC information regarding COVID-19 infections and deaths among residents and staff) (May 8, 2020).

<sup>81</sup> [REDACTED]  
[REDACTED]

<sup>82</sup> During the relevant time frame, the Department’s Elder Justice Initiative and the NHI were headed by [REDACTED] [REDACTED] who was also an Associate Deputy Attorney General.

announce investigations.”<sup>83</sup> Later that day, [REDACTED] set up an introductory call between CIV personnel (including a [REDACTED] and [REDACTED]<sup>84</sup> and CRT personnel (including [REDACTED] and other SPL attorneys and analysts). During the call and in a series of ensuing email and telephone communications both between CIV and SPL personnel and among CIV personnel, it became evident to CIV personnel that SPL had been directed to focus on specific states and that SPL was proceeding with a sense of “urgency.”<sup>85</sup>

**c. CIV Data Identifies Public Nursing Facilities with the Lowest Quality of Care Ratings, Most of Which Are in Texas and Indiana; None of the 30 Worst-Ranked Facilities Are in New York, New Jersey, Michigan, or Pennsylvania**

In an August 18 email, [REDACTED] advised [REDACTED] of SPL’s plan to use CIV’s data to identify public nursing facilities with quality of care issues and to overlay that information with publicly available data regarding COVID-19 infections and deaths to identify possible targets for CRIPA enforcement. Although SPL’s proposal was focused on identifying the “top worst 30 public facilities in the country” based on CIV’s established metrics, SPL nevertheless advised [REDACTED] that they also intended to gather and analyze data for the two facilities in New Jersey already under consideration (if they did not show up in the top 30), for a state-run facility in New York that was in the top five for COVID-19 deaths, and for a veterans’ home in North Carolina that [REDACTED] had identified.<sup>86</sup> [REDACTED] responded: “Since we’ve been asked to look at [New York],...we need to broaden our search beyond just the one [New York facility].... I also think we need the information for [New York, New Jersey, and North Carolina] as soon as possible (especially [New Jersey and New York] since [Dreiband] first asked about these states awhile back).”

On August 19, CIV’s elder justice team gathered and forwarded to SPL a spreadsheet reflecting quality of care ratings for over 1,000 state-owned nursing facilities throughout the country. None of the 30 facilities with the poorest quality of care identified by the data were located in New York, New Jersey, Michigan, or Pennsylvania. [REDACTED] flagged that “far and away the poorest quality government-owned facilities are in Texas and Indiana.”

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<sup>83</sup> Then Principal Associate Deputy Attorney General Richard Donoghue’s notes reflect that [REDACTED] briefed her ODAG colleagues that same day about CRT’s interest in “pairing” with CIV in “nursing home enforcement.” According to Donoghue’s notes, [REDACTED] reported that there was a “need to use data to identify potentially offending facilities” and that CIV and the USAOs “have been working on these.” Donoghue’s notes also reference an “announcement.”

<sup>84</sup> During the relevant time frame, this [REDACTED]

<sup>85</sup> In an August 17 email exchange between the [REDACTED] and [REDACTED] regarding CRT’s apparent focus on specific states [REDACTED] wondered “how do you separate out those nursing homes who are acting in good faith but got overwhelmed by the Covid-19 crisis from those whose practices contributed to any problems when COVID struck?”

<sup>86</sup> The evidence indicates that [REDACTED] also asked SPL to assess whether any public facilities in Louisiana and Pennsylvania may be worthy of investigation. Although SPL identified one facility in Pennsylvania with “troubling press,” facilities in those states had high scores for infection control and staffing and therefore SPL did not recommend “drilling down” any further.

## 2. CRT Leadership Decides to Send CRIPA Pre-Investigative Letter Requests to New York, New Jersey, Michigan, and Pennsylvania and to Issue an Accompanying Press Release

### a. CRT Leadership Receives CIV Data Showing Facilities with Poorest Quality of Care are in Texas and Indiana; CRT Leadership Prepares for Meeting with Barr

According to DOJ emails, on August 20, 2020, the day before CRT leadership had a scheduled meeting with Barr to report on “progress/strategy” with respect to the “nursing home initiative,” the [REDACTED] forwarded to [REDACTED] at her request, the spreadsheet that CIV had shared with SPL showing quality of care ratings for over 1,000 state-owned nursing facilities, as well as the transmittal flagging Texas and Indiana as having the poorest quality state-run facilities. [REDACTED] promptly forwarded the entire email chain, including the spreadsheet, to [REDACTED]

The following day, August 21, [REDACTED] sent an email to [REDACTED] asking why CRT leadership was not following the “standard Division practice of having the Section analyze the data and report to the [AAG’s Office].” In the email, [REDACTED] noted that [REDACTED] had contacted him twice within a 2-day period and also had asked him to generate a “status report” by close of business that day. [REDACTED] explained to us that he sent the email to [REDACTED] because, by that time, he “had enough concerns about what was going on” that he “wanted to make a record.”

Throughout the day on August 21, [REDACTED] and [REDACTED] exchanged via email versions of an outline that [REDACTED] prepared for the scheduled meeting with Barr later that day. [REDACTED] expressed her discomfort to [REDACTED] with the representation in his outline that CRT intended to investigate states with “reckless” orders, noting that CRT leadership had directed SPL to investigate New Jersey and New York and that SPL had since gathered “data to determine which facilities are the worst and then correlating that data with COVID-19 information.”

Later that afternoon, [REDACTED] sent [REDACTED] an email attaching the final version of the outline, which maintained that CRT’s objective was to “investigate effect of reckless state orders requiring nursing homes to accept COVID-infected patients and prohibiting testing” and noted that the orders appeared “to have caused the deaths of thousands of mostly elderly.” The outline referenced the orders in New York, New Jersey, Pennsylvania, Michigan, and California; excerpted portions of New York’s March 25, 2020 order; and indicated that the goal was to announce an investigation “in next 1-2 weeks.” [REDACTED] outline further reflected that California’s order had been withdrawn but did not indicate whether the other states’ orders were still in effect. The final bullet read: “Prepared to restart Holyoke Soldiers Home investigation OK?” [REDACTED] responded that she had “the same concerns that [she] mentioned earlier,” and the two agreed to meet in [REDACTED] office. We found no records reflecting what transpired during the meeting.

Also prior to the meeting with Barr on August 21, [REDACTED] sent [REDACTED] an email with the subject “Urgent Question” asking her to confirm whether “all the states that had orders requiring nursing homes to take COVID patients revoked them: [New York, New Jersey, Pennsylvania, Michigan, California].” [REDACTED] immediately responded that New York and California had revoked their orders but that she was not sure about the other identified states. [REDACTED] asked if she should check with SPL, and [REDACTED] responded, “no” and directed [REDACTED] to “keep after this issue.” After

Dreiband and [REDACTED] met with Barr, [REDACTED] emailed [REDACTED] “[New Jersey] appears to have revoked its original order that was identical to [New York’s].... [Michigan] appears to still have an order with same language but it’s not as clear as [New Jersey and New York].”

**b. CRT Leadership Meets with Barr**

Later that day, August 21, Dreiband and [REDACTED] met with Barr, [REDACTED] and [REDACTED]. Emails between various participants indicate that the discussion included CRT’s efforts to investigate COVID-related deaths in nursing homes.

That evening, after Dreiband and [REDACTED] met with Barr, the [REDACTED] forwarded [REDACTED] an update on SPL’s “efforts to analyze the [private contractor’s] data and the Covid-death data, along with other relevant factors, to identify nursing facilities for potential CRIPA investigations.” SPL’s update noted several limitations in the CMS data and explained that SPL had overlayed publicly available data regarding COVID-19 deaths in state-run nursing facilities with the quality scores attributed to those facilities by the private contractor and other criteria typically used to determine if a facility is providing substandard care. Per CRT leadership’s instruction to focus on public facilities in New York, SPL noted that four New York facilities had a high number of COVID-19 deaths, but those facilities were not among the facilities with poor quality scores. In the transmittal, [REDACTED] also noted that he had received an “updated memo” from the USAO NJ recommending that the Department initiate CRIPA investigations of the Menlo Park and Paramus Veterans’ Homes in New Jersey and that he intended to review the recommendation.

Over the weekend, on Saturday, August 22, [REDACTED] forwarded to Dreiband (copying [REDACTED] and [REDACTED]) August 21 update and commented that SPL’s approach was “not unreasonable” and acknowledged that SPL was focusing on New Jersey and New York at their direction. [REDACTED] suggested possibly notifying the governors of Michigan, New Jersey, New York, and Pennsylvania that the Department intended to investigate all of their state-run facilities to determine the extent to which the states’ orders regarding nursing home admission “resulted in death.” [REDACTED] indicated, however, that he continued to look for a “more efficient method” of investigating the “harm caused by the intake orders.”

**c. [REDACTED] Proposes Sending Pre-Investigative Letters to Michigan, New Jersey, New York, and Pennsylvania Because that Approach Would Allow Them to “Move Quickly”**

On Sunday, August 23, documents reflect that, at Barr’s request, a follow-up meeting was scheduled for Barr with Dreiband and [REDACTED] on Monday, August 24. Dreiband set up an internal CRT leadership call for the morning of August 24 to precede the meeting with Barr.

Early on Monday, August 24, prior to the scheduled meetings [REDACTED] sent an email to Dreiband, [REDACTED] outlining a “possible approach” to the nursing home matter that included asking the states that issued orders “requiring nursing homes to take infected patients without testing them” to provide data regarding the number of COVID-19-related deaths for all state-run

nursing facilities.<sup>87</sup> If a state did not provide CRT with the requested data, [REDACTED] suggested CRT could then decide whether to open CRIPA investigations of all state-run nursing homes in the state. He noted that the proposed approach would allow CRT to “move quickly and gather useful data.”<sup>88</sup>

[REDACTED] email also noted his plan to issue a press release disclosing the data requests and citing the “shocking deaths per million figures” in New Jersey and New York. We found no evidence in the documents that we reviewed that [REDACTED] Dreiband [REDACTED] or [REDACTED] or anyone else who was subsequently made aware (as we discuss below) of this plan to issue a press release, questioned or considered whether a press release would be appropriate under DOJ’s general prohibition of confirming or commenting on ongoing investigations or the Department’s longstanding election non-interference policy.

Emails exchanged between [REDACTED] and [REDACTED] subsequent to the internal CRT leadership meeting that same morning reflect the group’s apparent adoption of [REDACTED] proposal. Additionally, shortly after the internal CRT leadership meeting, [REDACTED] circulated several items to Dreiband [REDACTED] and [REDACTED]. First, [REDACTED] forwarded a brief that CRT and the USAOs for the Middle, Northern, and Southern Districts of Alabama filed jointly in November 2018 arguing that CRIPA permits multi-facility or statewide (rather than facility-specific) CRIPA investigations. Second, she sent a link to a June 2020 letter that two Republican Members of Congress had sent to the HHS OIG asking for an investigation into the New York, New Jersey, Pennsylvania, Michigan, and California state orders. Finally, [REDACTED] shared a link to a June 2020 press release issued by Republican members of the House Select Committee on the Coronavirus announcing the issuance of letters to the governors of the same five states and the Representatives’ investigation into those states’ orders. In addition, [REDACTED] emailed [REDACTED] asking her to conduct research to determine whether the COVID-19 state orders identified in the House Select Committee press release were still in effect.

On August 24, after the internal meeting among CRT leadership but before the AG meeting, [REDACTED] called [REDACTED] to discuss the proposal to send data requests to the four states. [REDACTED] told the OIG that, among other things, the discussion was very short, and [REDACTED] told him that the decision had been made to send the data requests. According to [REDACTED] he likely raised only “general or vague” objections about the proposed approach during the call because it was “rushed.” He recalled asking [REDACTED] whether the Holyoke investigation could proceed and [REDACTED] asking [REDACTED] to draft an update on the status of the Holyoke matter. [REDACTED] told us that at no point during this call did [REDACTED] mention a plan to issue a press release in connection with the data requests.

About an hour before the scheduled meeting with the AG [REDACTED] emailed [REDACTED] and asked her for a chart showing when Michigan, New Jersey, New York, and Pennsylvania implemented the

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<sup>87</sup> As noted above, contrary to [REDACTED] statement, none of the previously rescinded or revised orders that CRT leadership was focused on (Michigan, New Jersey, New York, and Pennsylvania) required nursing homes to accept COVID-19 positive patients without testing them. Rather, the orders prohibited nursing homes from denying admission based solely on COVID-19 status; nursing homes could deny admission, for example, if the facilities did not have the ability to care for COVID-19 positive patients or segregate them to protect other residents and employees.

<sup>88</sup> In a subsequent email [REDACTED] endorsed [REDACTED] proposed approach.

nursing home admission orders and the status of each state order. [REDACTED] replied that [REDACTED] was working on gathering that information and that she would forward it when it was complete. [REDACTED] did not produce the requested chart before the meeting with Barr.

Shortly before the AG meeting, [REDACTED] sent himself an email with the subject line: "Nursing Home Bullet Points for Press Release," attaching a document with the heading "Nursing Homes State Orders Causing Deaths." The attached document reflected his proposal to send pre-investigative letters to Michigan, New Jersey, New York, and Pennsylvania and requesting data regarding the number of COVID-19-related deaths for all public nursing facilities in those states. The document also noted the total number of COVID-19 deaths (not just in nursing homes) in New Jersey and New York and contrasted those with the total number of COVID-19 deaths in Texas.

That evening, Dreiband and [REDACTED] met with Barr, [REDACTED] and [REDACTED]. Subsequent email communications, discussed below, by Dreiband and [REDACTED] to others in CRT and OPA (none of which included Barr, [REDACTED] or [REDACTED]) state that the participants discussed [REDACTED] proposed plan to send pre-investigative data requests to Michigan, New Jersey, New York, and Pennsylvania, and that Barr endorsed the plan.

**d. CRT Leadership Directs SPL to Draft Pre-Investigative Letter Requests to Michigan, New Jersey, New York, and Pennsylvania**

Early the following morning, August 25, [REDACTED] emailed the [REDACTED]: "As I mentioned yesterday..., we have decided to request COVID-related nursing home data from four states that required nursing homes to accept COVID patients." [REDACTED] did not share with [REDACTED]—either in their discussion on August 24 or in the August 25 email—that the Department planned to issue a press release announcing the data requests or that CRT leadership had met with Barr.

In the same email, [REDACTED] asked the [REDACTED] to have his team draft letters to the governors of Michigan, New Jersey, New York, and Pennsylvania for issuance the following day—August 26. The [REDACTED] told us that, after receiving this email, he advised [REDACTED] that the Department might already have access to the information regarding COVID-19 deaths, and [REDACTED] indicated that he would both confirm whether the data already was available and draft the letters "in case we need them." [REDACTED] responded that he would be "very interested" in seeing the data and noted "there are reports that [New York] undercounted nursing-home related deaths, by not counting nursing home residents who died in hospital."<sup>89</sup>

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<sup>89</sup> In January 2021, the Office of the New York State Attorney General issued a report reflecting its preliminary findings in then ongoing investigations into New York nursing homes' responses to the COVID-19 pandemic. See New York State Office of the Attorney General, Nursing Home Response to COVID-19 Pandemic (January 30, 2021) (revised). According to the report, "preliminary data analysis...suggest[ed] that many residents died from COVID-19 in hospitals after being transferred from their nursing homes" and preliminary analysis of the data also showed "that COVID-19 resident deaths associated with nursing homes in New York state appear[ed] to be undercounted by [the Department of Health] by approximately 50 percent." *Id.* at 10-12.

██████████ told us that sending pre-investigation data requests to the states was inconsistent with the longstanding CRIPA practice not to contact the subject state prior to the formal initiation of an investigation approved by the AAG.

**e. ██████████ Circulates Draft Press Release to OPA, CRT Leadership, CIV Leadership, and OAG**

On August 25, 2020, ██████████ forwarded to OPA a draft press release that essentially tracked the bullet points described above. The draft press release suggested that the executive orders may have been responsible for the deaths of “thousands of elderly nursing home residents,” compared the total number of COVID-19 death rates (not just in nursing homes) in New Jersey and New York to those in Florida and Texas, and referenced the investigation of the Soldiers’ Home at Holyoke as an ongoing matter, even though it remained suspended.<sup>90</sup> In the transmittal email to OPA, ██████████ wrote: “At the AG’s request, tomorrow we likely will send letters to the governors of [New York, New Jersey, Pennsylvania and Michigan] requesting data on nursing home deaths.” In the same email chain regarding the press release, ██████████ alerted an OPA staff member: “The AG mentioned this to [Dreiband] this morning and asked if ██████████ had seen the draft.” The OPA staff member responded that she “just sent” it to ██████████ for review.

██████████ forwarded the draft press release via email to Dreiband, ██████████ and ██████████ as well as to ██████████ and ██████████. In the transmittal email, ██████████ wrote: “Our plan continues to be to send letters to [New York, New Jersey, Pennsylvania, and Michigan] tomorrow, and issue the press release then.” We were unable to determine whether ██████████ reviewed the draft (and, as described in Section V.A.3.b below, discovered evidence that ██████████ did not review the press release before it was issued) and did not find any documentary evidence that either of them responded to ██████████ email or shared its contents with Barr.

Dreiband responded via email that he would wait until after OAG and OPA had reviewed the draft before making any “minor” edits. We did not find evidence that anyone in OAG reviewed or provided edits regarding the draft press release. We also did not find evidence that Dreiband edited the press release following this email.<sup>91</sup>

██████████ circulated the draft to staff in the Office of the Associate Attorney General, which cleared the release. Although it was normal CRT practice for personnel in the responsible section to draft press releases, CRT leadership never circulated the draft release to SPL or to other personnel in CRT’s AAG’s Office, including those with CRIPA experience.

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<sup>90</sup> Also on August 25, the White House issued a press release about COVID-19 in nursing homes. See The White House, Press Release, “[President Donald J. Trump Is Taking Strong Action to Further Protect Nursing Homes From the Coronavirus](https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-is-taking-decisive-action-to-protect-vulnerable-citizens-in-americas-nursing-homes/),” August 25, 2020, <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-is-taking-decisive-action-to-protect-vulnerable-citizens-in-americas-nursing-homes/> (accessed December 21, 2024). We found no documentary evidence linking this White House press release to DOJ’s data requests or press release, which were issued the following day.

<sup>91</sup> Dreiband, however, did have a role in drafting the letters to the governors, making several edits around mid-day on August 26. Once the letters were final, Dreiband directed ██████████ and ██████████ to “please proceed.”

In the afternoon on August 25, [REDACTED] forwarded the draft press release to CIV personnel, and it was subsequently shared with [REDACTED] who complained internally that the data that CIV had provided to CRT did not support the allegation in the draft press release that public nursing homes in the four targeted states were providing substandard care. Both [REDACTED] and [REDACTED] also expressed discomfort with the draft press release linking CRT's efforts to the Elder Justice and Nursing Home Initiatives, which, as described above, primarily are CIV endeavors in partnership with USAOs.

**f. [REDACTED] Is Advised That the Four States Had Revised or Rescinded Their Nursing Home Admission Orders and [REDACTED] Provides Draft Letters and Details SPL's Concerns**

On August 26, [REDACTED] whom [REDACTED] tasked with confirming the status of the Michigan, New Jersey, New York, and Pennsylvania orders regarding nursing home admission produced the requested research, which reflected that all four states had rescinded or revised the orders at issue in some manner.

Also on August 26, [REDACTED] sent [REDACTED] an email with the draft letters to the governors of Michigan, New Jersey, New York, and Pennsylvania that [REDACTED] had requested the day before. His transmittal noted that CRT leadership had not consulted with SPL regarding whether to send the data requests, the unprecedented nature of the data requests, that most of the data was already available to CRT, that the focus on the four specific states was underinclusive, that many of the worst nursing facilities identified were in other states, and that the orders issued by the four states were not "substantially different" from HHS guidance at the time.

[REDACTED] responded by email to [REDACTED] objections 2 days later, after the letters and press release were issued. [REDACTED] explained that CRT leadership "had asked SPL to focus on New York and New Jersey" because "those states by far had the highest death rates in the country"; as noted above, [REDACTED] reference was to total COVID death rates, not death rates in public nursing facilities. [REDACTED] further indicated that CRT leadership "did not agree with the [data-driven] approach [SPL] suggested, because it would not have focused on states with the greatest loss of life." He also stated that "the public data appears unreliable/incomplete," and that SPL's "we always do it this way" approach did not make sense "even if accurate."

**3. CRT Leadership Issues CRIPA Pre-Investigative Data Request Letters to Michigan, New Jersey, New York, and Pennsylvania and an Accompanying Press Release**

**a. Issuance of Letters to Four States and an Accompanying Press Release on August 26, 2020**

At 12:50 p.m. on August 26, [REDACTED] texted Barr that "Dreiband will have nursing homes out by 3 pm today. All 3 states." [REDACTED] text did not specify what Dreiband was planning to have out by 3 p.m. or identify the three states (as compared to the four states that were sent letters that day). The text also did not reference a press release. Before 3 p.m. that day, CRT issued data request letters

signed by Dreiband to the governors of four states—Michigan, New Jersey, New York, and Pennsylvania—as well as the press release.<sup>92</sup>

The data request letters explained that CRT was evaluating whether to open CRIPA investigations of publicly owned or operated nursing facilities in the respective states and sought facility-specific data regarding COVID-19 infections and deaths and copies of “all state-issued guidance, directives, advisories, or executive orders” regarding nursing home admission. The letters requested that the states produce the information within 14 days.

The press release was captioned, “Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents.” The first sentence read: “Today the Justice Department requested COVID-19 data from the governors of states that issued orders which may have resulted in the deaths of thousands of elderly nursing home residents.” The press release indicated that CRT was seeking “to determine if the state orders requiring admission of COVID-19 patients to nursing homes is responsible for the deaths of nursing home residents.” The release unfavorably compared statewide COVID-19 death rates in New Jersey and New York with total statewide COVID-19 death rates in Texas and Florida (not limited to nursing home deaths), stating:

According to the Centers for Disease Control, New York has the highest number of COVID-19 deaths in the United States, with 32,592 victims, many of them elderly. New York’s death rate by population is the second highest in the country with 1,680 deaths per million people. New Jersey’s death rate by population is 1,733 deaths per million people—the highest in the nation. In contrast, Texas’s death rate by population is only 380 deaths per million people; and Texas has just over 11,000 deaths, though its population is only 50 percent larger than New York and has many more recorded cases of COVID-19—577,537 cases in Texas versus 430,885 cases in New York. Florida’s COVID-19 death rate is 480 deaths per million; with total deaths of 10,325 and a population slightly larger than New York.

Finally, the press release referenced the Department’s NHI and added: “As announced on April 10, 2020, the department is also investigating the Soldiers’ Home in Holyoke, Massachusetts....” However, as noted previously, the Soldiers’ Home investigation had been suspended in April 2020 at the direction of Barr and Rosen, and the investigation had not been resumed since that time. At the conclusion of the release, a paragraph noted the data requests and Soldiers’ Home investigation were not “accusations of fault or wrongdoing by the states or any other individual or entity, and the department has not reached any conclusions about these matters.”

██████████ told us he was “shocked” by the announcement, as he and his SPL colleagues only learned about the press release after it was issued. He also said that the “press release [was] so different from anything [they] do with CRIPA” and described it as “contentious,” “tying orders to COVID deaths” and a “political press release,” citing to the suggestion that the nursing home

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<sup>92</sup> DOJ OPA, Press Release, [“Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents,”](https://www.justice.gov/opa/pr/departments-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted) August 26, 2020, <https://www.justice.gov/opa/pr/departments-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted> (accessed December 19, 2024), attached as Appendix 1.

admission orders caused COVID-19-related deaths and the “comparison of democratic states with republican states,” where the republican states were not under investigation or relevant.

Other witnesses also shared with the OIG that they had similar concerns with the press release. [REDACTED] characterized the language as “completely out of the norm.... They are setting up these intentional dichotomies here that lead people to make inferences.” A seasoned Public Affairs Officer with over a decade of experience in the role told the OIG that the press release suggested that CRT already had reached a conclusion and was “working backwards” to develop supporting facts.

**b. Barr Calls [REDACTED] Immediately After Press Release Issues and [REDACTED] Complains that She Did Not See It**

Less than 10 minutes after the Department issued the press release, an email from [REDACTED] to [REDACTED] copying Dreiband, [REDACTED] and other OPA personnel indicates that Barr called [REDACTED] about the press release. [REDACTED] email did not reflect what she and Barr discussed during their call. Although email communications show that [REDACTED] had been sent the draft press release by CRT and OPA personnel multiple times before it was issued, the record indicates that she did not read any of the drafts.

In the email, [REDACTED] stated: “I would not have put out just now and instead given it to someone to break and worked with some reporters on it. Boss just called me about it and I had no idea what he was talking about.” In another email to her OPA colleagues, which she blind copied to [REDACTED] and [REDACTED] [REDACTED] complained that “[she] knew nothing about [the press release] and it’s important to the AG.”

**c. CRT Leadership and OPA Field Press Inquiries Regarding Alleged Political Motivation for Data Request Letters**

In the afternoon of August 26 and in the couple of days thereafter, OPA received numerous inquiries from reporters about the data requests and press release, including about (1) what information supported the suggestion that the state orders “contributed to thousands of deaths”; (2) why DOJ focused on the four selected states and not others, including those with rising infection rates or with similar orders;<sup>93</sup> (3) whether the letters were politically motivated (the Republican National Convention was that week);<sup>94</sup> (4) why the requests were being made so close to the election; (5) whether the cited state orders were consistent with federal guidance at the time; and (6) whether the Department was focusing only on state-run nursing homes as opposed to all nursing homes. In addition, the governors of New York and Michigan, both Democrats, issued a joint statement characterizing the letters as a “transparent politicization of the Department of Justice in the middle

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<sup>93</sup> For example, a reporter from *The Wall Street Journal* noted that federal data showed that per capita death rates were going down in New Jersey and New York and were going up in other states where there had been increases in community infection rates over the summer of 2020 (i.e., Texas and Florida), and asked if DOJ would be seeking data from those states as well. The same reporter also noted that Indiana, Kansas, and Georgia had policies similar to Michigan, New Jersey, New York, and Pennsylvania regarding nursing home admission.

<sup>94</sup> The Republican National Convention was from August 24 to 27, 2020.

of the Republican National Convention”<sup>95</sup> and noting that at least 14 other states, including Kentucky, Utah, and Arizona, had issued similar nursing home guidance “all based on federal guidelines.”

In response to the press inquiries about political motivation, [REDACTED] prepared talking points and sent them to OPA. The talking points referenced the investigation of the Soldiers’ Home in Massachusetts, which [REDACTED] noted had a Republican governor and suggested that this investigation was an active matter, even though it was suspended. [REDACTED] talking points also noted that federal data on COVID-19 deaths was not reliable; that the Department’s focus was on states with orders “requiring” nursing homes to accept COVID-19-infected patients and that, if a state with a Republican governor had a similar order, CRT would have targeted that state as well; that the focus was on states with the highest death rates; and that, at that time, the combined total number of COVID-19 deaths in New Jersey and New York was approximately 50,000. [REDACTED] separately charged [REDACTED] with—in short order—gathering information about infection rates in other states; determining whether the orders in Michigan, New Jersey, New York, and Pennsylvania complied with CDC guidance; and confirming whether other states had similar nursing home admission policies. [REDACTED] tasked a [REDACTED] to help with this research.

d. [REDACTED] and [REDACTED] Communicate About Reporting and [REDACTED] Circulates Favorable Editorial to “Hill Buddies” and “Allies”

In email communications with his CRT leadership and OPA colleagues regarding the press inquiries [REDACTED] expressed a desire to “walk through the numbers with one of the reporters on background.” Thereafter, [REDACTED] participated in a call with a reporter from *The Wall Street Journal*.

On August 27, 2020, *The Wall Street Journal* published an article about the data requests that quoted a public health professor disputing the allegation that the state orders were a “driving force” for nursing home deaths; and noted that deaths in the four states had come down and that the “sunbelt” states were experiencing a rise. In an email to [REDACTED] about the piece, [REDACTED] wrote: “They still are not reporting the shocking numbers that show [New York/New Jersey] are far worse than red states Texas and Florida.... Do you think...[*The Wall Street Journal*] editorial board would like to write about it? It is a great snooty New Yorker versus red state rubes story....”

The following day, August 28, *The Wall Street Journal* published an editorial criticizing then New York Governor Andrew Cuomo for the state’s policy of allowing COVID-19 patients to return to nursing homes, writing: “New Yorkers may finally get an honest accounting thanks to the Trump Justice Department.” The next day, Saturday, August 29, [REDACTED] forwarded the editorial to dozens of people both inside and outside of the Department, including Republican congressional staff members, White House personnel, and persons from conservative-leaning non-profit organizations. And, on Monday, August 30, [REDACTED] forwarded the editorial to Office of Legislative Affairs (OLA) personnel and [REDACTED] stating: “I sent to a few of my Hill buddies and they were very pleased. Worth sending to all [Republican] offices tomorrow morning? Members [of Congress] from [New York, New Jersey, Pennsylvania and Michigan] along with [a Republican Representative and Senator] may feel like piling on (if we give a nudge and push) and turning up the heat ahead of two week deadline...” (when

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<sup>95</sup> *Id.*

the states' responses to the data requests were due). In response, [REDACTED] wrote: "Thanks for sharing. We most definitely can distribute. However,...some [Democrats] on Ways & Means believe the DOJ announcement contradicts the Administration's guidance from CMS to states to continue admitting nursing home patients during the pandemic."

Regarding the Ways and Means concerns about the announcement contradicting CMS guidance, [REDACTED] wrote to [REDACTED] and OLA personnel: "Don't think it contradicts but no matter what I don't think should prevent us from pushing the editorial to our allies."<sup>96</sup> In a separate email to [REDACTED] and [REDACTED] reported that he had "talked to the House [Republican] Conference" and that "they are going to flag our letters to appropriate Members in states to back our ask for data. I told them there'd be another news hook when the two week window closes."

**e. State Officials Respond to the Pre-Investigative Letter Requests and Allege Political Motivation**

On September 9, 2020, Michigan, New Jersey, New York, and Pennsylvania submitted responses to CRT's data requests.

Michigan provided certain data along with a cover letter stating that most of the requested data was publicly available; expressing concern about the seemingly partisan nature or motivation of the requests, noting that the requests were issued only to 4 states with Democratic governors despite the fact that other states had similar orders regarding nursing home admission; and noting that Michigan ranked 31st in cases per 1,000 residents and 18th in deaths per 1,000 residents.

Pennsylvania provided the requested data but expressed concern about the request, including the citation to comparative death rates by population in the press release, and noting that "Pennsylvania ranks 14th in the country in this regard, behind a number of other states to include Mississippi and Arizona, which were not asked to provide information to the US DOJ."

New York provided the requested data but characterized DOJ's request and accompanying press release as "highly unusual"; explained that the March 25 order was modeled after then existing CDC and CMS guidance and noted that at least 11 other states issued similar guidance, including Arizona, Florida, Indiana, Kentucky, Nevada, and Utah; disputed the "irresponsible suggestion in the press

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<sup>96</sup> In a follow-up email later that day, [REDACTED] insisted that the New York order was not consistent with CMS guidance because it did not require COVID-19 testing upon entry. However, as explained in Section IV.B, and as [REDACTED] acknowledged in his email, CMS guidance at that time did not require testing prior to nursing home admission; rather CMS guidance recommended that nursing homes implement a host of infection control measures, including screening residents through testing, "if available." New York's March 25, 2020 order prohibited nursing homes from "requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or re-admission." New York State Department of Health, Advisory: Hospital Discharges and Nursing Home Admissions, March 25, 2020. As noted in Section IV.B.2, on May 10, 2020, the Governor of New York issued a new order that prohibited hospitals from discharging patients to nursing homes "without first performing a diagnostic test for COVID-19 and obtaining a negative result." State of New York, Executive Order 202.30, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, May 10, 2020.

release” that the health advisory caused the deaths of nursing home residents; and alleged that the request for data was an abuse of CRIPA authority.

New Jersey directed the Department to the State’s website, which reflected information regarding COVID-19 deaths; stated that CRT’s request was “inappropriate and premature” per CRIPA; and noted that New Jersey’s policies regarding nursing home admission were consistent with the CDC’s March 2020 guidance and that “at least ten other states” took a similar approach, including California, Delaware, Florida, Kansas, Maryland, Michigan, Minnesota, New York, Pennsylvania, and Utah.

**f. [REDACTED] Raises the Possibility of CIV Issuing a Request to New York for Private Nursing Home Data and an Additional Press Release**

On September 21, an OLA staff member wrote to [REDACTED] and others, including [REDACTED] [REDACTED] and [REDACTED] to ask if there was a plan to issue another press release relating to the nursing home data requests because “a few Hill offices...[had] asked for additional information and updates.” In response, [REDACTED] wrote:

[W]e hope to do so shortly. As to [New York], while we are still reviewing the data, they appear to show nursing home death rates are at least one-third higher than previously reported.... We are suggesting to Civil that it demand similar data through its elder justice initiative for [New York’s] 1000+ private nursing homes. Civil can do so through a letter and we could have a press release announcing our initial findings and Civil’s request. [New Jersey] refused to produce data and we likely will open a CRIPA investigation....

[REDACTED] weighed in: “This is a big story—OPA will want to tightly time the press around this.”

As we discuss in the next section, CRT leadership successfully urged CIV to issue a letter to New York in October seeking private nursing home data regarding COVID-19 deaths. Also in October, CRT leadership separately authorized CRIPA investigations of two public veterans’ homes in New Jersey. However, following objections from CIV, the USAO NJ, and SPL, the Department did not issue a press release regarding those matters, as CRT leadership and OPA wanted. Nonetheless, without the knowledge of CIV or the USAO NJ, CRT and OPA leadership disclosed to a reporter, days before the election, non-public information about the New York request and New Jersey investigations.

**B. Events Related to CRT and OPA Leadership’s Decision to Disclose to a News Reporter, Days Before the 2020 Election, Non-Public Letters Issued by DOJ to New York Seeking Private Nursing Home Death Data and to New Jersey Describing the Initiation of Two CRIPA Investigations**

**1. CRT Leadership Pushes CIV to Send Letter Request to New York for Private Nursing Home COVID-19 Death Data**

Consistent with [REDACTED] September 21 communication, referenced above, with OLA, OAG, and OPA, the following day, September 22, CRT leadership began pressing CIV to gather from New York data regarding the numbers of COVID-19-related deaths in private nursing homes in the state. At that time, [REDACTED] told [REDACTED] that Barr wanted CIV to send a letter to New York

requesting COVID-19 death data from private nursing homes in the state.<sup>97</sup> According to [REDACTED] [REDACTED] he discussed the request with [REDACTED] who indicated that CIV would need to “figure out what to do,” given they were told by [REDACTED] that the direction was coming from the AG and it’s “[his] Department of Justice.”

[REDACTED] then engaged with [REDACTED] about [REDACTED] request. On September 25, [REDACTED] reported to [REDACTED] that the publicly available data regarding COVID-19 deaths in New York nursing homes was incomplete. [REDACTED] told us that, because of the “potential utility” of complete data to ongoing and potential CIV matters, he was willing to accommodate [REDACTED] request “with appropriate guardrails,” such as only seeking data regarding COVID-19-related deaths in private nursing facilities in New York and avoiding any suggestion that CIV was investigating the State of New York, as any FCA action would be against a private nursing facility. Sometime between September 29 and October 2, he asked [REDACTED] to prepare a draft “information request.”

As evidenced by his subsequent communications with CRT leadership and OPA personnel, and as he told us, [REDACTED] predominantly was concerned about the possibility that Department leadership intended to publicize CIV’s request. In his OIG interview, he stated that the issuance of a data request to New York—a “third party fact witness” in this instance—was not “newsworthy,” and the issuance of a press release in those circumstances is not something that CIV ordinarily would do. [REDACTED] further explained that making statements about an ongoing investigation may prejudice a party under investigation, including by creating an inaccurate perception that a party has broken the law, or give the public a false sense that a party did not engage in wrongdoing if formal law enforcement action does not follow.

As we describe in the next section, on October 13, 2020, while awaiting a draft from CIV of the letter to New York, Dreiband approved two CRIPA investigations of veterans’ homes in the State of New Jersey.

## **2. Dreiband Approves CRIPA Investigations of Menlo Park and Paramus Veterans’ Homes in New Jersey in Mid-October**

As noted above in Section V.A, in August 2020, the USAO NJ submitted a memorandum to SPL seeking authorization (from the AAG of CRT) to open CRIPA investigations of two New Jersey veterans’ homes: Menlo Park and Paramus. [REDACTED] told us that SPL began its review of the USAO NJ’s memorandum when the USAO NJ first submitted it (in August), but SPL delayed submitting a recommendation to the AAG of CRT because SPL personnel believed they needed to review New Jersey’s response to the August 26 data request before finalizing SPL’s recommendation.

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<sup>97</sup> The next day, September 23, [REDACTED] forwarded to [REDACTED] the aforementioned (September 21) email exchange, see Section V.A.3, in which [REDACTED] reported to senior Department personnel, including [REDACTED] and [REDACTED] that CRT had suggested that CIV demand from New York data regarding COVID-19-related private nursing home deaths in the state and that the Department could announce CIV’s request in a press release. According to [REDACTED] the fact that [REDACTED] and [REDACTED] were included in these communications confirmed in his mind [REDACTED] representation that the AG was behind the request and that CIV’s “hands [were] tied.”

Although [REDACTED] and [REDACTED] were aware of the USAO NJ request in early August, CRT leadership did not expedite opening a CRIPA investigation at that time.

After receiving New Jersey's response to CRT's data request, the USAO NJ submitted an updated memorandum in early October reiterating its request for authorization to open CRIPA investigations of the Menlo Park and Paramus Veterans' Homes. During its preliminary investigation, the USAO NJ found that both facilities failed to implement and maintain infection control procedures, including social distancing, separating residents based on infection status, and using personal protective equipment. The USAO NJ further found that the veterans' homes failed to maintain adequate staffing during the pandemic and did not communicate the severity of the outbreak to patients' families. The updated request expressly identified New Jersey's response to CRT's August 26 data request as a source of information that the USAO NJ had considered and specifically acknowledged that New Jersey's March and April 2020 directives regarding nursing home admission were consistent with federal guidance at the time and stated that the directives "had no impact on COVID infections or deaths at Menlo Park" and were "not the cause of the outbreak at Paramus." In early October, SPL submitted the recommendation, and [REDACTED] included a separate cover memorandum reflecting his concurrence in the USAO NJ's recommendation.

In his interview with the OIG, [REDACTED] explained that he recommended initiating the proposed CRIPA investigations based on the rationale provided by the USAO NJ, and that he included a separate cover memorandum to highlight, among other considerations, that New Jersey's March 2020 guidance regarding nursing home admission could not have caused the COVID-19 deaths in the New Jersey facilities. He further stated that he included this information in part because "it showed that their hypothesis about the orders being the cause of the deaths wasn't accurate" at least as to the two New Jersey facilities that were the subject of the recommendation memorandum. In his cover memorandum, [REDACTED] also highlighted that the New Jersey Attorney General was investigating the Menlo Park and Paramus Veterans' Homes, but that SPL did not "know the nature or scope of the investigation." As explained in his memorandum and in his OIG testimony, [REDACTED] flagged the state investigation because Department leadership purportedly had suspended the CRIPA investigation of the Soldiers' Home at Holyoke in deference to the then pending investigation by Massachusetts state authorities. [REDACTED] cover memorandum noted that Massachusetts state authorities had completed their investigation and recommended that CRT also proceed with the Soldiers' Home CRIPA investigation.

Dreiband approved the CRIPA investigations of the Menlo Park and Paramus facilities on October 13, 2020. After learning that Dreiband had approved the New Jersey investigations, [REDACTED] asked [REDACTED] if the approval meant that SPL and the USAO MA would be able to move forward with an independent investigation of the Soldier's Home at Holyoke. [REDACTED] replied that a decision was "pending." [REDACTED] told us that he was troubled by the disparate handling of the New Jersey and Holyoke investigations.

### 3. CRT Leadership Proposes Notice Letter to New Jersey and Press Release Announcing New Jersey CRIPA Investigations, Which the USAO NJ Opposes

#### a. CRT Leadership Drafts a Notice Letter to New Jersey and a Press Release Stating that the CRIPA Investigations Covered All Public Nursing Homes in New Jersey

On October 14, 2020, following Dreiband's approval of the two New Jersey CRIPA investigations, SPL prepared and forwarded to [REDACTED] a draft letter notifying New Jersey of the investigations (notice letter), as required by the statute.<sup>98</sup> SPL's draft did not reference New Jersey's March 2020 order regarding nursing home admission or New Jersey's response to CRT's August 26 data request.

Earlier that same day, October 14, [REDACTED] prepared a draft press release that was circulated to Dreiband, [REDACTED], OPA personnel, Office of the Associate Attorney General (OASG) personnel, OAG personnel, and the USAO NJ. At that point, no one in CRT's AAG's Office or OPA had circulated the draft press release to SPL. [REDACTED] draft press release announced CRIPA investigations of *all* of New Jersey's public nursing homes, not just the Menlo Park and Paramus Veterans' Homes. The draft explained:

The investigation follows the Department's request for COVID-19 data from states that issued orders which may have resulted in the deaths of thousands of elderly nursing home residents. These states required nursing homes to admit COVID-19 patients to their vulnerable populations, often without adequate testing or protection to prevent infection. New Jersey was the only state that refused to produce data in response to the Department's request.

The draft also noted that "recent news reports" claimed that New Jersey had understated its COVID-19 death toll at some nursing homes. The draft ended with a reference (and a link) to the Department's April 10, 2020 announcement of its investigation of the Soldiers' Home at Holyoke, without disclosing that the investigation remained suspended.

That evening, [REDACTED] responded: "This is great. I pinged [REDACTED] to make sure the AG wants press. I can't imagine he'd want to keep this quiet. Would like to roll tomorrow or [Thursday] morning. We are going to have a ton of news next week so need to go this week."

Late on October 14, [REDACTED] learned about the draft press release from the USAO NJ and contacted [REDACTED]. After [REDACTED] responded to [REDACTED] via email the following day, October 15, that the press release was "still being drafted," [REDACTED] advised [REDACTED] that CRT's "standard practice" in those instances when issuing a press release announcing an investigation is to identify "our statutory authority, the institution(s) subject to the investigation, and the subject matter of the investigation—all in a neutral tone to convey that we have not made any pre-determinations about the investigation." [REDACTED] forwarded [REDACTED] email to [REDACTED].

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<sup>98</sup> See 42 U.S.C. § 1997b(a)(2).

On October 16—2 days after the draft press release had been circulated to CRT leadership, OPA, OASG, OAG, and the USAO NJ—[REDACTED] forwarded the draft press release to [REDACTED] for his “review and comment.” [REDACTED] also attached a draft notice letter to New Jersey that she had prepared. Unlike SPL’s version, [REDACTED] draft notice letter expressly referenced CRT’s August 26, 2020 data request and stated that “your office failed to produce the data requested.” [REDACTED] draft also cited to “recent reports” that New Jersey had “understated the number of COVID-19 deaths at some nursing homes” and stated that the Department was commencing an investigation of all public nursing homes in New Jersey. [REDACTED] proposed notice letter became the operative draft.

**b. The USAO NJ Expresses Opposition to the Draft Press Release and to Opening Investigations Beyond the Two Veterans’ Homes**

DOJ records reflect that the USAO NJ was troubled by [REDACTED] draft press release. On October 14, 2020, then U.S. Attorney for the District of New Jersey Craig Carpenito reached out to Dreiband to schedule a call, which took place that afternoon.<sup>99</sup>

Following the call, and per the agreement of the participants, the District of New Jersey [REDACTED] [REDACTED] sent Dreiband a detailed email summarizing the USAO NJ’s objections to the draft release. In the transmittal email, [REDACTED] noted that the USAO NJ “would not normally do press to announce the opening of a CRIPA investigation” but, understanding that others within the Department favored issuing a press release, [REDACTED] articulated the office’s “principal concerns” with the draft as follows:

- Regarding the language indicating that New Jersey’s orders regarding nursing home admission may have resulted in the deaths of thousands of nursing home residents, [REDACTED] wrote, “We have no basis to say this.” [REDACTED] explained that the USAO NJ did not believe that any of the deaths resulted from the actions taken in response to New Jersey’s COVID-19 orders regarding nursing home admission.
- Regarding the suggestion that the investigation was prompted by New Jersey’s response to the data requests, [REDACTED] clarified that the data request was unrelated to the USAO NJ’s preliminary assessment of the issues at the veterans’ homes.
- Regarding the statement that New Jersey required nursing homes to admit COVID-19 patients “without adequate testing or protection to prevent infection,” [REDACTED] stated that the USAO NJ had no evidence that the two entities at issue in this investigation admitted anyone from hospitals after the pandemic began; and, therefore, the statement was “highly misleading.”
- Regarding the statement that New Jersey was “the only state that refused to produce data in response to the Department’s request,” [REDACTED] noted that the request sought data that was mostly publicly available and that the USAO NJ viewed the statement as “unnecessary and unhelpful,” and as serving “no purpose other than to lose our goodwill with the State and to invite a lack of cooperation.”

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<sup>99</sup> Carpenito was the presidentially appointed U.S. Attorney for the District of New Jersey from January 5, 2018, to January 5, 2021.

- Regarding the reference to news reports claiming that New Jersey had understated the COVID-19-related death toll at some nursing homes, [REDACTED] noted that the statement was “speculative” and that the USAO NJ did not have data to support this claim. [REDACTED] also asserted that the Department “should not be suggesting in a public press release that the State has acted improperly on this point.”
- Regarding the statement that CRT and the USAO NJ “have opened investigations into New Jersey’s publicly run nursing homes,” [REDACTED] clarified that the investigation was limited to the Menlo Park and Paramus Veterans’ Homes.

Between October 14 and 19, CRT leadership communicated with USAO NJ leadership regarding both the scope of the investigations and the language of the proposed press release. On October 19, believing that the Department intended to make an announcement that day, Carpenito wrote to [REDACTED] (copying Dreiband and [REDACTED] to let them know that the USAO NJ opposed both the release and opening any investigations beyond the two that his office had recommended. In response, Dreiband assured Carpenito that the release would not be issued that day.

#### 4. Following the Approval of the Two New Jersey CRIPA Investigations, CRT and OPA Leadership Press CIV to Issue a Broad Request to New York for Private Nursing Home COVID-19 Death Data

On October 13, the same day that Dreiband approved the initiation of the two CRIPA nursing home investigations in New Jersey, [REDACTED] expressed interest in the status of CIV’s request of New York for private nursing home COVID-19 death data. [REDACTED] wrote to [REDACTED] “Need to know on [New York] as soon as you can find out. Need to coordinate on timing.” Later in the day, [REDACTED] told [REDACTED] “Need to step on the gas.” [REDACTED] responded: “We have been pushing Civil to move. Perhaps you can encourage them.”

That evening, October 13, [REDACTED] spoke by telephone with [REDACTED]. After the call, [REDACTED] wrote: “good talking to you—pls shoot us your letter when you have it done.” [REDACTED] responded, “Absolutely, will do—we should have a draft very soon.” Later that evening, October 13, [REDACTED] produced a draft letter addressed to the New York State Department of Health, which [REDACTED] forwarded to [REDACTED] and others the following day. The draft referenced CIV’s responsibility to “investigate[] and enforce[] certain laws against nursing homes that provide grossly substandard care to their Medicare and Medicaid beneficiaries” and requested data reflecting the “the total number of COVID-related nursing home resident deaths that occurred (both confirmed and presumed, and whether in the facility or elsewhere)” from March 9, 2020, to May 24, 2020, “in the privately operated nursing homes in New York.”

In his email transmitting the draft letter to [REDACTED] and others on October 14, [REDACTED] also inquired about whether there was “interest in referencing [the] request in a press release” and “welcomed the opportunity to discuss the potential options for doing so.” He told us it was his understanding that Department policy, to which CIV adhered, did not allow for comment on ongoing matters absent a determination from “senior leadership” that there is a unique, strong public interest for doing so.

Upon reviewing the draft, CRT leadership expressed concern about the narrowness of CIV’s proposed request, including that it covered a time frame that was too limited. On October 16, at

[REDACTED] urging, [REDACTED] forwarded to [REDACTED] a copy of CRT's August 26 letter to New York with the expectation that CIV would use it as a template for its next draft.

Later that day, [REDACTED] forwarded to [REDACTED] and others an updated draft, which [REDACTED] indicated then Acting CIV AAG Jeffrey Clark had approved.<sup>100</sup> This draft kept the same time period and added a reference to the FCA, but otherwise was identical to the draft circulated on October 14.

Internal communications among CRT leadership and between [REDACTED] and [REDACTED] on October 16 and 17 reflect their continued frustration with CIV. Both Dreiband and [REDACTED] expressed concerns about the limited time period covered by CIV's draft. And Dreiband complained that the "tone" of the draft letter was "too deferential" and that CIV seemed "embarrassed" by the request. Dreiband, [REDACTED] and [REDACTED] agreed to again urge CIV to draft a letter that tracked CRT's August 26 data request.

On October 19, [REDACTED] reported to Dreiband, [REDACTED] and [REDACTED] that she had spoken with the [REDACTED] and that [REDACTED] was going to "tweak the letter and then send it to him." That same day, [REDACTED] sent [REDACTED] a redlined draft that closely tracked CRT's August 26 data request to New York. [REDACTED] proposed draft included four requests, including the number of private nursing home residents, employees, other staff, guests, and visitors who contracted COVID-19; the number of private nursing home residents, employees, other staff, guests, and visitors who died of COVID-19, including those who died in a nursing home or after being transferred to a hospital or other medical facility, home care, or hospice; all State-issued guidance regarding the admission of persons to private nursing homes; and the number of persons admitted to a private nursing home from a hospital or another facility after testing positive for COVID-19. The draft did not specify a time period for the requested material.

##### **5. [REDACTED] Proposes to "Package" New Jersey CRIPA Investigations Letter and CIV's New York Letter and Have *New York Post* "Break It" as "Our Last Play...Before Election"**

While CRT leadership and OPA separately were communicating with the USAO NJ and SPL regarding the draft notice letter and press release regarding the New Jersey CRIPA investigations and with CIV regarding its draft data request letter to New York, CRT leadership and [REDACTED] continued to push forward with a press plan. On October 17, 2020, [REDACTED] texted [REDACTED] "I'm trying to get [CRT] and CIV to do letters to [New Jersey/New York] respectively on nursing homes. Would like to package them together and let [the *New York Post*] break it. Will be our last play on them before election but it's a big one. CRT is in good place. CIV is the problem." We did not find evidence that [REDACTED] responded to [REDACTED] text, or that she provided information about it to Barr, [REDACTED] or anyone else.

On October 23, [REDACTED] alerted [REDACTED] [REDACTED] and [REDACTED] to the prospect that CIV's letter to New York would "not be accompanied by a press release." In responding to everyone on [REDACTED] email, [REDACTED] wrote: "[F]ine with no press release, but we are going to give it to a reporter ahead of time.

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<sup>100</sup> Clark was the presidentially appointed AAG of the Environment and Natural Resources Division when he was appointed the Acting AAG for CIV from September 2020 until his departure from the Department in early 2021.

Otherwise, [New York Governor's] office will leak it and we lose the upper hand. This is going to be a big story up there and if we are going to send the letter we are going to do press right or we may as well not do it at all." [redacted] responded: "Agreed." In a separate email just to [redacted] wrote: "We gotta do all this next week. Have to."

**6. CIV Finalizes Letter to New York and Prepares Draft Press Release; the USAO NJ Agrees with CRT Leadership on CRIPA Press Release Language; Ultimately, No Press Releases are Issued**

**a. CIV Finalizes Letter to New York and Prepares Draft Press Release**

On October 26, [redacted] circulated to [redacted] and others an updated version of the letter to New York, which Clark signed later that day. CIV's final letter was consistent with the draft forwarded by [redacted] except that CIV did not request copies of any state guidance regarding nursing home admission. Like [redacted] did with each of the prior drafts, in forwarding the final version, he wrote: "What is the plan from a press standpoint—is there a press release in the works that we could take a look at?" [redacted] responded: "We should do release. Needs to be finalized by noon tomorrow." CIV agreed to prepare a draft, which [redacted] suggested CIV model after CRT's August 26 announcement.

The next day, October 27, [redacted] sent to [redacted] a short draft press release explaining that the Department "requested data from New York regarding the number of private nursing home residents who died from or were infected by COVID-19," including a quote from Clark regarding the Department's commitment to "protecting nursing home residents from abuse and neglect" and referencing the Department's NHI; the draft did not reference the FCA.<sup>101</sup> [redacted] forwarded the draft to an OPA staff member, after which the OPA staff member, [redacted] and [redacted] exchanged edits that resulted in the addition of a few details from the letter request and the deletion of the reference to the NHI.

**b. CRT Leadership and USAO NJ Leadership Agree on CRIPA Investigation Press Release Language**

Between October 19 and 27, Dreiband, [redacted] Carpenito, and [redacted] continued to communicate about the scope of the investigation and the content and tone of the press release. During this time period, given the concerns raised by the USAO NJ, Dreiband asked [redacted] to confirm that OAG insisted on issuing a press release.

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<sup>101</sup> In sending the draft to [redacted] for review, [redacted] wrote: "[A]s you know, the Civil Division does not discuss pending investigations much less data/information requests, so this is already a departure from our normal practice."

On October 27, following a meeting between CRT leadership and Barr,<sup>102</sup> [REDACTED] sent [REDACTED] an email stating that the “AG approved [New Jersey] and Holyoke” and directed her to alert [REDACTED] that the Department intended to issue the notice letter and the press release that day.

Ultimately, CRT leadership did agree to limit the scope of the investigations to the two veterans’ homes that the USAO NJ initially had identified. CRT leadership and the USAO NJ also eventually reached agreement regarding the content and tone of the press release. The agreed-upon final draft press release did not reference New Jersey’s executive orders regarding nursing home admission, the Department’s August 2020 data request, or New Jersey’s response thereto. In forwarding a revised press release to Carpenito (copying [REDACTED] mid-day on October 27, [REDACTED] acknowledged the USAO NJ’s preference not to issue a press release, but explained that “the sense here is that one is appropriate.”

**c. [REDACTED] Complains About Draft CRIPA Investigation Press Release; DOJ Does Not Issue Press Releases for Either the New Jersey CRIPA Investigations or New York Information Request**

On October 27, CRT was proceeding with plans to issue the notice letter to New Jersey and the accompanying press release that same day. That afternoon, upon learning that the language regarding New Jersey’s response to the August data requests (as well as the reference to “recent reports” that New Jersey had undercounted nursing home deaths) had been eliminated from both the notice letter and proposed press release, [REDACTED] protested to [REDACTED] “Why????????? That’s necessary context.” In a follow-up email to [REDACTED] wrote: “Whatever happens, this section HAS to stay in there. I will crawl over broken glass to ensure it is included.”

Later in the day, after [REDACTED] advised [REDACTED] that CRT was working with the USAO NJ and SPL to try to get the language re-inserted, [REDACTED] (who had been added to the email chain) wrote:

I’m less interested in the release (we don’t even need to do one) and far more interested in the substance of the letter. We owe it to the many families who lost loved ones in nursing homes during COVID to provide a clear update to assure them—and the public—that the Department of Justice is on this and taking it seriously.

Ultimately, the Department did not issue press releases announcing either the New Jersey CRIPA investigations or CIV’s information request to New York. We were unable to determine from the documents we reviewed, or from the witnesses who agreed to speak with us, who made the decision(s) not to issue the press releases or the reasons for the decision(s).

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<sup>102</sup> Calendar entries reflect that [REDACTED] also attended. Email records and calendar entries indicate that [REDACTED] was not included in the meeting.

7. OPA Provides CIV's New York Letter Request and CRT's Letter Notifying New Jersey of CRIPA Investigations to the *New York Post* Before Officials in New Jersey and New York Receive the Letters

In the late afternoon on October 27, as [REDACTED] previewed in his October 17 text to [REDACTED] packaged together the CRIPA notice letter to New Jersey and the data request letter to New York and had them provided to a *New York Post* reporter. Neither New Jersey nor New York had been provided the letters at the time.

[REDACTED] initially forwarded to a *New York Post* reporter via email copies of CRT's August 26 press release and data request letters to the governors of Michigan, New Jersey, New York, and Pennsylvania (the letters were public, as the Department attached copies of the letters to the August 26 press release), and promised "letters coming soon." Shortly thereafter, a non-career OPA staff member emailed the same reporter non-public copies of the CRT notice letter addressed to New Jersey Governor Phil Murphy as well as CIV's letter to the New York State Department of Health. [REDACTED] was copied on the email. The email further advised the reporter that [REDACTED] and the OPA staff member would call the reporter "when we lift the embargo on this."

At 6:47 p.m. on October 27, [REDACTED] alerted [REDACTED] "[The *New York Post* is] going to break nursing home story tonight and we will follow by sending out letter." [REDACTED] told us that he did not know at the time that OPA had affirmatively disclosed the information to the reporter.

The *New York Post* published the resulting article online at approximately 7:50 p.m. on October 27.<sup>103</sup> The article provided hyperlinks to the two non-public letters the *New York Post* received from OPA. The article began: "The Justice Department is requesting more data on COVID-19 deaths linked to New York nursing homes after receiving figures that indicate a significant under-count of deaths at publicly run nursing homes in the state."<sup>104</sup> Regarding CRT's actions, the article stated: "The division launched an investigation in April of a publicly run nursing home in Republican-governed Massachusetts and on Tuesday night informed New Jersey that it was opening an investigation of two of its three publicly run nursing homes, after New Jersey officials declined to supply data."<sup>105</sup> The article also included the following quote from "an administration official": "What we're trying to determine is why these people died so it doesn't happen again.... We're going where the greatest carnage occurred."<sup>106</sup> In an email the following day, [REDACTED] praised [REDACTED] for "bringing the heat" and by referencing "carnage" in the quote to the *New York Post*.

At 8:02 p.m., 12 minutes after the *New York Post* published its online article, [REDACTED] forwarded to dozens of reporters (i.e., those who regularly cover the DOJ) copies of both the CRIPA notice letter to New Jersey and the information request letter to New York. One minute later, at 8:03 p.m., [REDACTED]

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<sup>103</sup> Steven Nelson, "[DOJ seeks more NY nursing home data after finding COVID-19 death undercount](https://www.nypost.com/2020/10/27/doj-demands-ny-nursing-home-data-after-covid-19-death-undercount/)," *New York Post*, October 27, 2020 (updated October 30, 2020), [www.nypost.com/2020/10/27/doj-demands-ny-nursing-home-data-after-covid-19-death-undercount](https://www.nypost.com/2020/10/27/doj-demands-ny-nursing-home-data-after-covid-19-death-undercount/) (accessed December 20, 2024).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

circulated a link to the *New York Post* article to [REDACTED] and OPA personnel. [REDACTED] responded: "Nice job." No one else responded.

At 8:26 p.m., more than 30 minutes after the *New York Post* published its online article, CRT emailed the CRIPA notice letter to the New Jersey Governor's office; and, at approximately 9:00 p.m., CRT and the USAO NJ jointly alerted the New Jersey Attorney General's Office by telephone. CIV sent its data request letter to the New York State Department of Health via regular mail.<sup>107</sup>

Late in the evening on October 27, the *New York Post* posted an updated version of its article.<sup>108</sup> The updated piece quoted spokespersons for New York Governor Cuomo and New Jersey Governor Murphy accusing DOJ of taking the actions for political purposes and in proximity to the then upcoming election.<sup>109</sup>

On October 28, in consultation with [REDACTED] and an OPA staff member, DOJ records indicate that [REDACTED] spoke with a reporter from *The Wall Street Journal* about the New Jersey investigations. The resulting article, which was published online that same day, included comments by a "Justice Department official" who "disputed the idea [put forth by a spokesman for the New Jersey Governor] that the investigation was politically motivated."<sup>110</sup> The article reflects that the DOJ official provided non-public information to the reporter to respond to the allegation of political motivation, including that the USAO NJ "began investigating the state's veterans homes in the spring," that the USAO NJ had "provided a report in August" to CRT, that CRT had "continued the probe" after receiving the USAO NJ's report, and that "New Jersey had failed to respond" to the Department's August data request.<sup>111</sup> While [REDACTED] was identified as a "Justice Department official" rather than by name in the article, internal DOJ emails reflected his willingness to be quoted on the record. In one of those emails, [REDACTED] wrote: "It would not be the end of the world if they quoted me by name. I leave it to you. [REDACTED] [REDACTED] [REDACTED]"<sup>112</sup> [REDACTED] however, in an email to [REDACTED] with a copy to [REDACTED] stated that she wanted "it on background since they have the letter."

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<sup>107</sup> After learning of CIV's data request letter from press accounts, New York officials contacted the Department on October 29, and CIV emailed the letter to the identified New York State Department of Health point of contact.

<sup>108</sup> Steven Nelson, "[DOJ seeks more NY nursing home data after finding COVID-19 death undercount](https://www.nytimes.com/2020/10/27/us/politics/doj-seeks-more-ny-nursing-home-data-after-finding-covid-19-death-undercount.html)," *New York Post*, October 27, 2020 (updated 10:59 p.m.), <https://web.archive.org/web/20201028034015/https://nypost.com/2020/10/27/doj-demands-ny-nursing-home-data-after-covid-19-death-undercount/> (accessed January 8, 2025).

<sup>109</sup> *Id.*

<sup>110</sup> Chris Weaver, "[U.S. Investigating Veterans Nursing Homes in New Jersey for Possibly Understating Covid Deaths](https://www.wsj.com/articles/u-s-investigating-veterans-nursing-homes-in-new-jersey-for-possibly-understating-covid-deaths-11603900994)," *The Wall Street Journal*, October 28, 2020, [www.wsj.com/articles/u-s-investigating-veterans-nursing-homes-in-new-jersey-for-possibly-understating-covid-deaths-11603900994](https://www.wsj.com/articles/u-s-investigating-veterans-nursing-homes-in-new-jersey-for-possibly-understating-covid-deaths-11603900994) (accessed December 20, 2024). The article appeared in the print edition on October 29, 2020.

<sup>111</sup> *Id.*

<sup>112</sup> [REDACTED]

Late in the evening on October 28, using her Department [REDACTED] account, [REDACTED] both the *New York Post* and *The Wall Street Journal* articles.<sup>113</sup> [REDACTED] posts highlighted introductory quotes from both articles; the posts did not include any original or personal comments.<sup>114</sup>

## VI. Analysis

As discussed below, we found that [REDACTED], [REDACTED] and [REDACTED] violated the Department's Confidentiality and Media Contacts Policy through their participation in and/or knowledge of the disclosures to the *New York Post* and *The Wall Street Journal* on October 27 and 28, 2020, days before the 2020 election, of non-public DOJ information regarding both the New Jersey CRIPA investigations and CIV's information request to New York. In addition, we found that [REDACTED] violated the Confidentiality and Media Contacts Policy and the Department's Social Media Policy by posting on her official DOJ [REDACTED] account on October 28, 2020, links to the *New York Post* and *The Wall Street Journal* articles, which included references to the non-public DOJ investigative information that had been disclosed to those publications in violation of the Department's Confidentiality and Media Contacts Policy. We also found that the conduct of these senior officials raised serious questions about partisan political motivation for their actions in proximity to the 2020 election that warrant referral to the U.S. Office of Special Counsel, which has exclusive jurisdiction to investigate alleged Hatch Act violations, for its review and determination regarding whether their conduct violated the Hatch Act.

Separately, we intend to issue a Management Advisory Memorandum to the Department with recommendations to address the systemic concerns that we identified as a result of this investigation.

### A. October 2020 Disclosures to Reporters Regarding New Jersey CRIPA Investigations and CIV Letter to New York, and [REDACTED] Social Media Posts

#### 1. [REDACTED], [REDACTED] and [REDACTED] Violated Section 1-7.400 of the Department's Confidentiality and Media Contacts Policy

On October 27, at [REDACTED] direction, and with the knowledge and/or approval of [REDACTED] and [REDACTED] an OPA staff member provided to a *New York Post* reporter the non-public CRT notice letter to New Jersey and CIV's non-public information request letter to New York; in addition, [REDACTED] provided additional background material to the reporter and facilitated communications between the reporter and [REDACTED]. The resulting *New York Post* article that same day included hyperlinks to the two non-public letters and contained other non-public information that was not included in the letters. Email records confirmed that [REDACTED] was the unidentified administration official

<sup>113</sup> [REDACTED]  
 [REDACTED] October 28, 2020, [REDACTED]  
 [REDACTED]  
 [REDACTED] October 28, 2020, [REDACTED]  
 [REDACTED] October 28, 2020.

<sup>114</sup> *Id.*

responsible for the following quote in the article: “What we’re trying to determine is why these people died so it doesn’t happen again.... We’re going where the greatest carnage occurred.” Moreover, this information was provided to the *New York Post*—and the *New York Post* published the piece online—*before* the Department had even provided the letters to New Jersey and New York officials.

The evidence also showed that, on October 28, with [REDACTED] knowledge and approval, [REDACTED] and [REDACTED] provided non-public information regarding the New Jersey CRIPA investigations to a reporter for *The Wall Street Journal*, who published an article that same day that included the non-public information. Late that evening, [REDACTED] reposted links to both the *New York Post* and *The Wall Street Journal* articles on her official DOJ [REDACTED] account.

The CRT notice letter and CIV’s non-public information request letter and the substance of internal DOJ discussions and deliberations regarding these matters constituted non-public Department information about DOJ investigative matters that [REDACTED] [REDACTED] and [REDACTED] obtained in the course of their work. Accordingly, the Confidentiality and Media Contacts Policy set forth in Justice Manual Sections 1-7.001 through 1-7.900, which “governs the protection and release of information that DOJ personnel obtain in the course of their work,” applied to their actions.

Except as necessary to fulfill official duties, Section 1-7.100 expressly prohibits Department personnel from disseminating non-public, sensitive information obtained in connection with their work. The policy includes a statement as to the reason for its existence:

Much of DOJ’s work involves non-public, sensitive matters. Disseminating non-public, sensitive information about DOJ matters could violate federal laws, employee non-disclosure agreements, and individual privacy rights; put a witness or law enforcement officer in danger; jeopardize an investigation or case; prejudice the rights of a defendant; or unfairly damage the reputation of a person.<sup>115</sup>

In particular, Section 1-7.400(B) of the policy provides that the Department “generally will not confirm the existence of or otherwise comment on ongoing investigations. Except as provided in subparagraph C of this section, DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed.” The version of Section 1-7.400(C) in effect from April 2018 to February 2024 provided: “When the community needs to be reassured that the appropriate law enforcement agency is investigating a matter, or where release of information is necessary to protect the public safety, comments about or confirmation of an ongoing investigation may be necessary, subject to the approval” of the appropriate Assistant Attorney General or U.S. Attorney.<sup>116</sup>

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<sup>115</sup> Justice Manual § 1-7.100.

<sup>116</sup> Justice Manual §§ 1-7.400(C) and (A) (2018). In February 2024, the Department updated Justice Manual § 1-7.400; these 2024 modifications do not affect our findings in this report. Notably, the amended policy allows for a “designee” of the appropriate U.S. Attorney or AAG to contact the media; however, at the time of these events, [REDACTED] could not have been authorized by the AAG as a designee to approve a contact with the media about an ongoing investigation.

The decision by [REDACTED] [REDACTED] and [REDACTED] to disclose non-public investigative information to selected reporters outside of official DOJ channels violated the Department's Confidentiality and Media Contacts Policy. As we noted in *An Investigation of Alleged Misconduct by United States Attorney Rachael Rollins*, reassuring the public that the Department is investigating a matter necessarily involves doing so in a transparent and official manner, not by leaking the information to the news media.<sup>117</sup> We made a similar finding with regard to the FBI's media policy in *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe*, in response to McCabe's argument that his disclosure, through an anonymous source, of FBI investigative information was allowed under FBI policy.<sup>118</sup> As we further noted in the *Rollins* report, disclosing DOJ investigative information by leaking it to reporters, rather than reassuring the public, has the potential to have the opposite effect by undermining the public's trust and confidence in the Department and its personnel by, among other things, raising questions about why the Department itself was not making the information public, about the validity and accuracy of the public reports, and about the motivations of those involved in making the seemingly unauthorized disclosures.<sup>119</sup> That is particularly the situation where, as here, the investigative information concerns a potential politically sensitive matter and is leaked just days before an election.<sup>120</sup>

Moreover, here the documentary evidence showed that the upcoming election was the motivating factor for [REDACTED] plan to disclose to selected press the non-public letters to New Jersey and New York, a plan he communicated to [REDACTED] and [REDACTED]. The clearest evidence of this motivation is [REDACTED] text to [REDACTED] on October 17, 2020: "I'm trying to get [CRT] and CIV to do letters to [New Jersey/New York] respectively on nursing homes. Would like to package them together and let [the *New York Post*] break it. Will be our last play on them before election but it's a big one." Less than a week later, on October 23, when [REDACTED] learned that a press release might not be issued regarding

<sup>117</sup> DOJ OIG, *An Investigation of Alleged Misconduct by United States Attorney Rachael Rollins*, Oversight and Review Division Report 23-071 (May 2023), [oig.justice.gov/reports/investigation-alleged-misconduct-united-states-attorney-rachael-rollins](https://oig.justice.gov/reports/investigation-alleged-misconduct-united-states-attorney-rachael-rollins), 118-19.

<sup>118</sup> DOJ OIG, *A Report of Investigation of Certain Allegations Relating to Former Deputy Director Andrew McCabe*, Oversight and Review Division Report (February 2018), [oig.justice.gov/reports/report-investigation-certain-allegations-relating-former-fbi-deputy-director-andrew-mccabe](https://oig.justice.gov/reports/report-investigation-certain-allegations-relating-former-fbi-deputy-director-andrew-mccabe), 2. In rejecting McCabe's argument, we noted that "the FBI never officially confirms the existence of an ongoing criminal investigation through an anonymously quoted source." *Id.* at 35.

<sup>119</sup> DOJ OIG, *Rollins*, 119. We did not find evidence that anyone with authority under Department policy to approve media contacts about ongoing matters did so in this case or made a determination that doing so was necessary to reassure the public. However, even if they had, the leaks still would have violated the Department's Confidentiality and Media Contacts Policy. In the *Rollins* matter, U.S. Attorney Rollins had authority under the Confidentiality and Media Contacts Policy to disclose the existence of investigations if she determined that doing so was necessary to reassure the public. DOJ OIG, *Rollins*, 118. However, we determined that she violated the Confidentiality and Media Contacts Policy by leaking information because reassuring the public requires doing so overtly. DOJ OIG, *Rollins*, 118-19.

<sup>120</sup> We further found in the *Rollins* report that her decision to leak non-public DOJ investigative information to news reporters shortly before a local election was for the purpose of influencing an election and therefore violated Justice Manual § 9-85.500, entitled "Actions that May Have an Impact on an Election." *Id.* at 74-75. However, as noted earlier in this report, that provision of the Justice Manual was added in August 2022, subsequent to the events that occurred in this report, and we therefore do not address that provision in this report.

CIV's letter to New York, [REDACTED] wrote to [REDACTED] [REDACTED] and [REDACTED] "[F]ine with no press release, but we are going to give it to a reporter ahead of time. Otherwise, [New York Governor's] office will leak it and we lose the upper hand. This is going to be a big story up there and if we are going to send the letter we are going to do press right or we may as well not do it at all." [REDACTED] responded: "Agreed."<sup>121</sup>

[REDACTED] plan to disclose non-public DOJ information to a selected reporter was consistent with [REDACTED] reaction to the Department's August 26 press release regarding the data requests to the four states. At the time, [REDACTED] criticized the approach taken by CRT and her OPA colleagues in issuing the press release and explained in an email to [REDACTED] copying Dreiband, [REDACTED] and other OPA personnel, that she "would have given it to someone to break and worked with some reporters on it."<sup>122</sup>

We noted that [REDACTED] in an October 27 email to [REDACTED] and [REDACTED], referenced an interest in reassuring the public, even as she indicated her lack of interest in an official DOJ press release:

I'm less interested in the [press] release (we don't even need to do one) and far more interested in the substance of the letter. We owe it to the many families who lost loved ones in nursing homes during COVID to provide a clear update to assure them—and the public—that the Department of Justice is on this and taking it seriously.

Even if [REDACTED] was motivated by an interest to reassure the public, as [REDACTED] she surely knew that when the Department seeks to reassure the public that it is investigating an allegation, it

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<sup>121</sup> [REDACTED] did not respond in writing to either [REDACTED] text on October 17 or to his email on October 23, and we did not find evidence that she was otherwise made aware of the decision to disclose non-public DOJ information to the press on October 27 and 28.

<sup>122</sup> We noted that some of the content of the August 26, 2020 press release announcing CRT's data requests to Michigan, New Jersey, New York, and Pennsylvania appeared to go beyond the information needed to reassure the public (the information does not appear to relate to public safety). However, as we explained in *A Report of Investigation Into the Department's Release of Public Statements Concerning a Luzerne County, Pennsylvania, Election Fraud Investigation in September 2020*, the relevant Justice Manual provision, Section 1-7.400(C), "does not address what information is appropriate to include in a public statement that officials have determined is necessary to reassure the public that the appropriate law enforcement agency is investigating a matter." DOJ OIG, *A Report of Investigation Into the Department's Release of Public Statements Concerning a Luzerne County, Pennsylvania, Election Fraud Investigation in September 2020*, Oversight and Review Division Report 24-082 (July 2024), [oig.justice.gov/reports/report-investigation-departments-release-public-statements-concerning-luzerne-county](https://oig.justice.gov/reports/report-investigation-departments-release-public-statements-concerning-luzerne-county), 61. Rather, Section 1-7.400(C) affords DOJ officials with discretionary authority to determine what information to include in a such a statement. *Id.* Because Section 1-7.400(C) allows statements that are a departure from the fundamental Department principle of not commenting about ongoing investigations, we recommended in that report that the Department revise this policy to require that the information contained in a statement released pursuant to Section 1-7.400(C) be reasonably necessary either to reassure the public that the appropriate law enforcement agency is investigating a matter or to protect public safety. *Id.* at 6.

does so by issuing an official DOJ statement—not by leaking non-public DOJ records to a reporter and having an unnamed “administration official” confirm the existence of the investigation.<sup>123</sup>

In addition, [REDACTED] reposting of the two articles that resulted from the unauthorized disclosures on her official DOJ [REDACTED] account essentially affixed DOJ’s stamp of approval on their substance and, thereby, confirmed the existence of these investigative matters and verified the other non-public DOJ information reflected in the articles. For these reasons, [REDACTED] reposting through her official DOJ [REDACTED] account of the *New York Post* and *The Wall Street Journal* articles was an additional violation of Section 1-7.400 of the Confidentiality and Media Contacts Policy.

The facts and circumstances that we identified in this investigation also raised systemic concerns regarding the sufficiency of DOJ policy that we intend to address in a forthcoming Management Advisory Memorandum.

## 2. [REDACTED] Violated the Department’s Social Media Policy

The Department’s Social Media Policy provides that a component may only use its official social media account “to post information that may be shared with the public in the course of official business” and that a component “may not use social media to publish non-public information or information clearly unauthorized for disclosure.”<sup>124</sup> Component heads are responsible for ensuring compliance with all laws, regulations, and DOJ policies related to official social media use.<sup>125</sup>

The information contained in the *New York Post* and *The Wall Street Journal* articles, including the Department’s letters to New Jersey and New York state officials, was not authorized for public disclosure in compliance with Justice Manual 1-7.400, as described above. While there had been extensive internal discussions about issuing press releases announcing the New Jersey CRIPA investigations and CIV’s information request to New York, the Department ultimately did not issue either press release or make any other formal, on-the-record statement disclosing these actions. Email records reflect that [REDACTED] knew about these discussions and decisions, yet nonetheless supported and was involved in the decision to instead announce the Department’s actions by providing non-public DOJ records and other non-public background information to selected reporters. She thereafter reposted the resulting *New York Post* and *The Wall Street Journal* articles,

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<sup>123</sup> See Justice Manual § 1-7.400 (A) and (C). The information released does not appear to relate to public safety. Moreover, even if the statement had been issued as an official DOJ statement rather than leaked, under Justice Manual Section 1-7.400, [REDACTED] did not have the authority to make the determination as to whether the statements were necessary to reassure the public that the appropriate law enforcement agency was investigating the matters or to approve the release of a statement for public reassurance purposes.

<sup>124</sup> DOJ Policy Statement 0300.02.02, §§ (II)(A)(2) and (III)(C). The Social Media Policy also expressly requires components to comply with the Confidentiality and Media Contacts Policy. See *id.* § (II)(A)(1). The Social Media Policy includes a section on linking and reposting “nongovernmental entity content.” See *id.* § (II)(D)(5). However, that section neither conflicts with nor overrides the provision prohibiting Department personnel from using their official social media accounts to publish information that has not been authorized for public disclosure.

<sup>125</sup> DOJ Policy Statement 0300.02, § (III)(B).

which included links to the non-public DOJ letters that had been leaked to the reporters, on her official DOJ [REDACTED] account. Accordingly, because the Social Media Policy prohibits components from using social media to publish information clearly unauthorized for disclosure, [REDACTED] violated this prohibition of the Social Media Policy.

## B. Restrictions on Partisan Political Activities

On May 15, 2020, consistent with the practice of prior Attorneys General, Barr issued a Memorandum for All Department of Justice Employees (Barr Election Year Sensitivities Memorandum).<sup>126</sup> Section I of the Barr Election Year Sensitivities Memorandum, much like prior Attorneys General Election Year Sensitivities Memoranda, was framed in the context of criminal matters. It provided that “partisan politics must play no role in the decisions of federal investigators or prosecutors” and that “law enforcement officers and prosecutors may never select the timing of public statements (attributed or not), investigative steps, criminal charges, or any other action in any matter or case for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.”<sup>127</sup>

Because the language of Section I, on its face, seemingly applied only to criminal matters, we do not address it in this report because the events at issue here concerned civil matters. We intend to address our concerns about the limited nature of the Election Year Sensitivities Memoranda in the forthcoming Management Advisory Memorandum.

Section II of the Barr Election Year Sensitivities Memorandum reminds DOJ employees of their obligations under the Hatch Act, including the responsibility not to use their authority for the purpose of affecting election results.<sup>128</sup> Among the Hatch Act’s provisions is one specifying that an employee may not “use his official authority or influence for the purpose of interfering with or affecting the results of an election.”<sup>129</sup> This admonishment applies equally to career and non-career employees.<sup>130</sup> DOJ policy also specifically requires employees “to be aware of, and to comply with” the Hatch Act.<sup>131</sup>

In addition to the Barr Election Year Sensitivities Memorandum, on June 10, 2020, the then AAG for Administration issued two memoranda—one to career Department employees and one to non-career appointees (Lofthus Political Activities Memoranda)—reminding employees of the Hatch Act’s

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<sup>126</sup> William Barr, Attorney General, U.S. Department of Justice, Memorandum for All Department of Justice Employees, Election Year Sensitivities, May 15, 2020 (Barr Election Year Sensitivities Memorandum).

<sup>127</sup> *Id.* at 1.

<sup>128</sup> Barr Election Year Sensitivities Memorandum, 2.

<sup>129</sup> 5 U.S.C. § 7323(a)(1).

<sup>130</sup> Barr Election Year Sensitivities Memorandum, 2.

<sup>131</sup> Justice Manual §§ 1-4.010 and 1-4.100(C). Additionally, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct) identifies the Hatch Act as one of the statutes “to which an employee’s conduct must conform” and requires employees to “endeavor to avoid any actions creating the appearance that they are violating the law” or the Standards of Ethical Conduct. 5 C.F.R. § 2635.901; 5 C.F.R. § 2635.902(o); 5 C.F.R. § 2635.101(b)(14).



restrictions on partisan political activities.<sup>132</sup> Like the Barr Election Year Sensitivities Memorandum, the Lofthus Political Activities Memoranda emphasized the importance of maintaining the “integrity of our work” and highlighted that “the public trusts that we will enforce the laws of the United States based on the facts and the law, and not to achieve purely partisan election objectives.”<sup>133</sup>

As detailed in this report, communications among senior officials from June through October 2020 and related directions from those officials to career personnel raise questions about whether the senior officials were motivated by partisan considerations to take and announce certain actions in proximity to the then upcoming 2020 election. Accordingly, we are referring our findings to the U.S. Office of Special Counsel, which has exclusive jurisdiction to investigate alleged Hatch Act violations.

## VII. Conclusion

As explained above, we found that [REDACTED] [REDACTED] and [REDACTED] violated the Department’s Confidentiality and Media Contacts Policy through their participation in and/or knowledge of the disclosures to the *New York Post* and *The Wall Street Journal* on October 27 and 28, 2020, days before the 2020 election, of non-public DOJ information regarding both the New Jersey CRIPA investigations and CIV’s information request to New York. In addition, we found that [REDACTED] violated the Confidentiality and Media Contacts Policy and the Department’s Social Media Policy by contemporaneously posting on her official DOJ [REDACTED] account links to the *New York Post* and *The Wall Street Journal* articles.

We have provided a copy of this report to the Office of the Deputy Attorney General and, because the report contains misconduct findings against attorneys, to the Professional Misconduct Review Unit for any action those offices deem appropriate. In addition, because the facts described in our report raise the possibility that certain former Department officials may have violated the Hatch Act, we are referring our findings to the U.S. Office of Special Counsel.

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<sup>132</sup> See Lee Lofthus, Assistant Attorney General for Administration, U.S. Department of Justice, Memorandum for All Department of Justice Career Employees, Restrictions on Political Activities, June 10, 2020; Lee Lofthus, Assistant Attorney General for Administration, U.S. Department of Justice, Memorandum for All Department of Justice Non-Career Employees, Restrictions on Political Activities, June 10, 2020.

<sup>133</sup> *Id.*

## APPENDIX 1: THE DEPARTMENT'S AUGUST 26, 2020 PRESS RELEASE

Department of Justice Requesting Data From Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents...


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FOR IMMEDIATE RELEASE
 Wednesday, August 26, 2020

**Department of Justice Requesting Data From Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents**

Data will help inform whether the Department of Justice will initiate investigations under the Civil Rights of Institutionalized Persons Act (CRIPA) regarding New York, New Jersey, Pennsylvania and Michigan's response to COVID-19 in public nursing homes

Today the Justice Department requested COVID-19 data from the governors of states that issued orders which may have resulted in the deaths of thousands of elderly nursing home residents. New York, New Jersey, Pennsylvania, and Michigan required nursing homes to admit COVID-19 patients to their vulnerable populations, often without adequate testing.

For example, on March 25, 2020, New York ordered: "No resident shall be denied re-admission or admission to [a nursing home] solely based on a confirmed or suspected diagnosis of COVID-19. [Nursing homes] are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission."

"Protecting the rights of some of society's most vulnerable members, including elderly nursing home residents, is one of our country's most important obligations," said Assistant Attorney General for Civil Rights Division Eric Dreiband. "We must ensure they are adequately cared for with dignity and respect and not unnecessarily put at risk."

According to the Centers for Disease Control, New York has the highest number of COVID-19 deaths in the United States, with 32,592 victims, many of them elderly. New York's death rate by population is the second highest in the country with 1,680 deaths per million people. New Jersey's death rate by population is 1,733 deaths per million people – the highest in the nation. In contrast, Texas's death rate by population is 380 deaths per million people; and Texas has just over 11,000 deaths, though its population is 50 percent larger than New York and has many more recorded cases of COVID-19 – 577,537 cases in Texas versus 430,885 cases in New York. Florida's COVID-19 death rate is 480 deaths per million; with total deaths of 10,325 and a population slightly larger

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Department of Justice Requesting Data From Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Reside...

than New York.

The Department of Justice’s Civil Rights Division is evaluating whether to initiate investigations under the federal “Civil Rights of Institutionalized Persons Act” (CRIPA), which protects the civil rights of persons in state-run nursing homes, among others. The Civil Rights Division seeks to determine if the state orders requiring admission of COVID-19 patients to nursing homes is responsible for the deaths of nursing home residents.

On March 3, 2020, the Attorney General announced the Justice Department’s National Nursing Home Initiative. This is a comprehensive effort by the department, led by the Elder Justice Initiative and in strong partnership with the U.S. Department of Health and Human Services that uses every available tool to pursue nursing homes that provide substandard care to their residents. As announced on April 10, 2020, the department is also investigating the Soldiers’ Home in Holyoke, Massachusetts, where COVID-19 has taken the lives of at least 76 residents.  
<https://www.justice.gov/opa/pr/federal-investigation-conditions-nursing-home-veterans-massachusetts-announced>

The data requests and Soldiers’ Home investigation are not accusations of fault or wrongdoing by the states or any other individual or entity, and the department has not reached any conclusions about these matters.

Attachment(s):

- [Download Letter to Governor Cuomo](#)
- [Download Letter to Governor Murphy](#)
- [Download Letter to Governor Wolf](#)
- [Download Letter to Governor Whitmer](#)

Component(s):

[Civil Rights Division](#)

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