

February 18, 2021

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

Via email

Dear Attorney General-Designate Garland:

Congratulations on your nomination to lead the U.S. Department of Justice (DOJ). For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. Your nomination comes at a moment when America faces an overdue reckoning with racial injustice that can start to be addressed with policies such as adopting a federal use-of-force standard, decriminalizing marijuana, ending mandatory minimum sentencing, and abolishing the death penalty. We applaud President Biden's pledge to heal our country and reform our criminal legal system, and we look forward to working with him and DOJ to advance our shared goals.

At your confirmation hearing before the Senate Judiciary Committee on February 22, we urge you to make clear that under your leadership DOJ will adopt policies to build a more racially just criminal legal system. In addition to matters we anticipate that you already plan to address, we urge you to make clear, on-the-record commitments on five critical issues: mass incarceration; policing; COVID-19 in federal detention; the death penalty; and solitary confinement.

Mass Incarceration

As you know, while the United States has less than 5% of the world's population, we have 20% of the world's incarcerated people.¹ And those we incarcerate are disproportionately Black and Hispanic.² Mass incarceration has deepened racial injustice, shattered neighborhoods, and separated families, all without evidence that it has improved public safety.³ The origins of mass incarceration and its racially-disparate impacts go back at least fifty

¹ Peter Wagner and Wanda Bertram, *What percent of the U.S. is incarcerated?*, Prison Policy Initiative (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

² Katie Mettler, *States imprison black people at five times the rate of whites—a sign of a narrowing yet still-wide gap*, Wash. Post (Dec. 4, 2019) (stating the ratio between Black and white people in federal prison is 7:1, and the ratio between white and Hispanic people is 4.6:1), <https://www.washingtonpost.com/crime-law/2019/12/04/states-imprison-black-people-five-times-rate-whites-sign-narrowing-yet-still-wide-gap/>.

³ ACLU, *A Presidential Roadmap to Ending Mass Incarceration*, at 5, (Jul. 2019), <https://www.rightsforall.org/wp-content/uploads/070919-CJ-Briefing-Roadmap.pdf>.



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years, to when the federal government declared its War on Drugs and began instituting tough-on-crime sentencing policies like mandatory minimum sentencing laws. Merely reversing Trump era policies will not do enough to end mass incarceration. Reducing the federal prison population will require substantial changes to DOJ charging and sentencing policies.

Perhaps the single most impactful action you can take, if confirmed as Attorney General, to begin to reduce mass incarceration is to stop charging mandatory minimums.⁴ Your office will have the authority to expand the 2013 Holder memo, which gave prosecutors discretion to avoid charging mandatory minimums in certain drug cases.⁵ We urge you to broaden this policy and direct prosecutors to not bring charges that trigger mandatory minimum sentences in all cases where alternative charges are available. You can also direct prosecutors to stop seeking a trial penalty to punish accused people for exercising their constitutional right to a fair trial,⁶ and to stop seeking longer sentences based on acquitted conduct.⁷ The Trump DOJ's efforts to thwart Congressional intent behind the FIRST STEP Act of 2018 should also be reversed: DOJ should support application of the Act's reduced penalties at all sentencings, including resentencings in cases where an illegal sentence was vacated.⁸

Your office will also have the power to begin to unwind the War on Drugs, starting with marijuana. At a minimum, that means rescinding the Sessions Memo on marijuana enforcement⁹ and reinstating the Cole Memo discouraging federal prosecution of marijuana activity that complies with state law.¹⁰ We urge you to go beyond that and commit to deprioritize marijuana prosecutions, as well as misdemeanor possession cases for all types of controlled substances. DOJ should also direct Health and Human Services (HHS) to begin a

⁴ Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, The Sentencing Project (Nov. 5, 2018) (“At the federal level, the prison population expanded from 20,000 in 1980 to 189,000 by 2016. The combined effect of the surge in drug prosecutions and the expansion of mandatory minimum sentences was a key factor in this growth. As of 2016, 55% of the federal prison population had been sentenced under a mandatory provision.”), <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/>.

⁵ *Attorney General Eric Holder's Memorandum Re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

⁶ See Emma Andersson and Jeffery Robinson, *The Insidious Injustice of the Trial Penalty: “It is not the intensity but the duration of pain that breaks the will to resist.”* Fed. Sentencing Rep., Vol. 31 no. 4-5 (April/June 2019).

⁷ Sarah Lustbader, *You Can Be Sentenced, Even If You Were Acquitted*, The Appeal (Nov. 12, 2019), <https://theappeal.org/you-can-be-sentenced-even-if-you-were-acquitted/>.

⁸ See Brief for Amicus Curiae United States Senators Richard J. Durbin, Charles E. Grassley, and Cory A. Booker in Support of Defendant-Appellant and Vacatur, *United States v. Mapuatuli*, CA No. 19-10233, ECF No. 22 (9th Cir. May 12, 2020) (“Reduced to its simplest form, [DOJ's] interpretation assumes that Congress intended to give legal effect to sentences that otherwise are void. . . . That unquestionably is not what Congress intended.”).

⁹ *Memorandum from Attorney General Jefferson B. Session Re: Marijuana Enforcement* (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

¹⁰ *Memorandum from Deputy Attorney General James M. Cole Re: Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

review of whether marijuana should remain a schedule I substance. If you are confirmed as Attorney General, you should also support the MORE Act, which de-schedules marijuana and includes reparative justice and reinvestment provisions for the communities of color that marijuana prohibition has most harmed.¹¹

We urge you to commit to specific charging and sentencing policies that would have a quantifiable impact on mass incarceration at the federal level, and outline your plans for effectuating those policies at U.S. Attorney's Offices around the country.

Policing

The police murder of George Floyd last year was another wake-up call for many Americans about racism in policing. It was also a reminder that past efforts to address racist police practices have failed repeatedly. If you are confirmed as Attorney General, your office will need to begin by reversing the damage done by the Trump administration's explicit endorsements of police violence and its wholesale retreat from the notion that the federal government has a role to play in promoting police transparency, accountability, and best practices.¹²

An important first step in reining in excessive police use of force is to set clear national standards, requiring all police departments to adhere to common-sense limitations and best practices. President Biden has already committed to the creation of a national, model use-of-force standard as one of his racial equity priorities.¹³ We urge you to ensure that this model standard truly conforms to the best practices in the field by embracing the principles set forth in the PEACE Act, which would permit officers to use force only when necessary, proportional, and as a last resort, after less extreme alternatives are exhausted.¹⁴ We further urge you to adopt this standard as a binding DOJ standard for federal agents, and to incentivize state and local police departments to adopt it.

We urge you to commit to remove arbitrary barriers against holding police departments and officers accountable for misconduct. That begins by rescinding the Sessions Memo that restricts DOJ's ability to negotiate consent decrees to address patterns or practices of police misconduct by state and local law enforcement agencies.¹⁵ DOJ should further promote police accountability by supporting legislation that abolishes qualified immunity, a judge-

¹¹ See MORE Act of 2020, H.R. 3884, 116th Cong. (2020).

¹² See, e.g., Mark Berman, *Trump tells police not to worry about injuring suspects during arrests*, Wash. Post (July 28, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/>; Jeff Sessions, Op-Ed, *Jeff Sessions: 'Avoid harmful federal intrusion'*, USA Today (Apr. 17, 2017), <https://www.usatoday.com/story/opinion/2017/04/17/jeff-sessions-avoid-harmful-federal-intrusion-editorials-debates/100579848/>.

¹³ Mark Berman and Tom Jackman, *Biden, a longtime ally of police, will enter White House pushing for reform*, Wash. Post (Jan. 11, 2021), <https://www.washingtonpost.com/politics/2021/01/11/biden-police-reform/>.

¹⁴ See Police Exercising Absolute Care with Everyone Act of 2019, H.R. 4359, 116 Cong. (2019).

¹⁵ *Memorandum from Attorney General Jeff Sessions Re: Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109621/download>.

made doctrine that allows police officers to escape liability for unconstitutional and illegal acts.¹⁶

Federal civil forfeiture, which allows law enforcement to seize and take property from someone who has not been convicted of a crime, has long been used to carry out the War on Drugs and has the same disproportionate impact on people of color. DOJ's participation in equitable sharing with state and local police also fuels police militarization, as police departments are able to purchase military weapons and equipment using the profits from forfeitures, with little oversight or accountability. For example, between 2008 and 2014, police departments spent \$2.5 billion from federal civil forfeiture seizures, with over \$177 million of that being spent on weapons,¹⁷ and the DOJ Asset Forfeiture fund had a net balance of about \$1.5 billion in 2018.¹⁸ We urge you to commit, at a minimum, to reissue Attorney General Holder's prohibition on equitable sharing to reduce abuse of civil asset forfeiture.¹⁹ We further urge you to announce a prohibition on asset forfeiture for property seized by joint federal-state task forces, many of which focus on drug enforcement.

DOJ should also finally enforce the Death in Custody Reporting Act of 2013, which requires DOJ to publicly report data from state and local law enforcement departments on in-custody deaths.²⁰ Without official data, the public must rely on estimates of deaths in custody based on public reporting.²¹ This is insufficient. We urge you to commit to take steps to ensure state and local police departments comply with the Act.

COVID-19 in Federal Detention

Trump's DOJ failed to use available levers for release to mitigate the spread of COVID-19 in detention facilities, allowing hundreds of individuals to die unnecessarily in the custody of the federal Bureau of Prisons (BOP) and the U.S. Marshals Service (USMS).²² In the CARES Act, Congress expanded BOP's authority to release individuals from prison to home confinement during the pandemic.²³ But Attorney General Barr issued guidance restricting release by, among other things, excluding individuals with a minor disciplinary action in

¹⁶ Jeffery Robinson, Carl Takei, and Paige Fernandez, *How Do We End Racism in Policing?*, ACLU (Feb. 2, 2021), <https://www.aclu.org/news/criminal-law-reform/how-do-we-end-racism-in-policing>.

¹⁷ Alberto Cuadra, Ted Mellnik, and Shelly Tan, *Spending Seized Assets*, Wash. Post (Oct. 11, 2014), <https://www.washingtonpost.com/wp-srv/special/investigative/asset-seizures/>.

¹⁸ Christopher Ingraham, *No, Asset Forfeiture will not Pay for the Wall*, Wash. Post (Jan. 14, 2019), <https://www.washingtonpost.com/business/2019/01/14/no-asset-forfeiture-will-not-pay-wall/>.

¹⁹ See U.S. Dep't of Justice, *Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety* (Jan. 16, 2015), <https://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>.

²⁰ See Death in Custody Reporting Act of 2013, 34 U.S.C.A. §60105 (formerly codified as 42 U.S.C.A. §13727).

²¹ Ethan Corey, *How the Federal Government Lost Track of Deaths in Custody*, The Appeal (June 24, 2020), <https://theappeal.org/police-prison-deaths-data/>.

²² See Federal Bureau of Prisons, *BOP: COVID-19 Update* (reporting at least 222 individuals incarcerated in BOP have died from the virus as of Feb. 16, 2021), <https://www.bop.gov/coronavirus/>; U.S. Marshals Service, *COVID-19 Prisoner Statistics* (reporting at least 28 COVID-19 related deaths as of Feb. 11, 2021), <https://www.usmarshals.gov/coronavirus/stats.html>.

²³ See *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act), P.L. 116-136 § 12003(b)(2) (2020).

the last 12 months²⁴ and requiring a minimum score on a risk assessment tool that has racially-disparate impacts.²⁵ And now, unless a memo issued in the final days of the Trump Administration is rescinded, those individuals who were released to home confinement will be sent back to prison at the conclusion of the pandemic even if they have successfully complied with the terms of their release from prison.²⁶

Trump's DOJ also failed to use compassionate release to mitigate the spread of COVID-19. This process was recently expanded by the FIRST STEP Act of 2018: it allows individuals to request release from BOP and, if the request is denied or ignored, to request release from the court, based on age, illness, or other extraordinary and compelling reasons.²⁷ But the Trump DOJ either failed to act on or opposed nearly every request for compassionate release, allowing incarcerated people to die during the pandemic while their requests were pending.²⁸

To address this tragedy, we urge you to commit to direct BOP and USMS to swiftly offer vaccinations with appropriate patient education and incentives to all persons in custody, including all persons incarcerated in private contract facilities. We also urge you to commit to safely decarcerate individuals by expanding BOP's use of home confinement and directing prosecutors to make individualized assessments of compassionate release motions.

The Federal Death Penalty

The federal death penalty is plagued by racial bias, geographic arbitrariness, and unfairness—just like the death penalty in the states.²⁹ The Trump administration recklessly carried out an unprecedented number of federal executions, all during the pandemic, leading to spikes in COVID-19 cases and subjecting staff, witnesses, loved ones of the victims, and people incarcerated in federal prisons alike to escalated risk of

²⁴ Memorandum from Attorney General William Barr to BOP Director Michael Carvajal (Mar. 26, 2020), <https://www.justice.gov/file/1262731/download>; Memorandum from Attorney General William Barr to BOP Director Michael Carvajal (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download>.

²⁵ Based on DOJ's own analysis of the risk assessment tool it uses, PATTERN, only 7% of Black men in its data sample were classified as minimum, compared to 30% of White men. U.S. Dep't of Justice, *The First Step Act of 2018: Risk and Needs Assessment System*, at 62, Table 8 (July 2019), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf.

²⁶ U.S. Dep't of Justice, *Home Confinement of Federal Prisoners After the COVID-19 Emergency*, 45 Op. O.L.C. __ (Jan. 15, 2021), <https://www.justice.gov/sites/default/files/opinions/attachments/2021/01/17/2021-01-15-home-confine.pdf>.

²⁷ See 18 U.S.C. § 3182(c)(1)(A).

²⁸ Justin William Moyer and Neena Satija, *Frail inmates could be sent home to prevent the spread of covid-19. Instead, some are dying in federal prisons*, Wash. Post (Aug. 3, 2020) (“the bureau routinely has opposed or not responded to requests for compassionate release”), https://www.washingtonpost.com/local/public-safety/frail-inmates-could-be-sent-home-to-prevent-the-spread-of-covid-19-instead-some-are-dying-in-federal-prisons/2020/08/02/992fd484-b636-11ea-9b0f-c797548c1154_story.html.

²⁹ Cassandra Stubbs, *The Death Penalty in 2019: A Year of Incredible Progress, Marred by Unconscionable Executions*, ACLU (Dec. 13, 2019) (“Geography, money, and race are still the best predictors of who will receive the death penalty.”), <https://www.aclu.org/news/capital-punishment/the-death-penalty-in-2019-a-year-of-incredible-progress-marred-by-unconscionable-executions/>.

infection.³⁰ Moreover, former Attorney General Barr adopted a protocol for lethal injection that inflicts torturous pain on people sentenced to death, and promulgated guidelines and regulations to accelerate the execution process at the expense of due process.³¹

We urge you to pledge to immediately suspend all federal executions, withdraw authorization of the death penalty in all pending trial cases, make it the policy of DOJ to not seek the death penalty in any case, and withdraw the execution protocol and the related federal regulations. We further urge you to support executive clemency for individuals currently on federal death row.

Solitary Confinement

Prior to the pandemic, 80,000 men, women, and children in the United States were locked in isolation on any given day.³² Although international human rights standards require that solitary confinement be used only as a last resort and under no circumstances for more than 15 days,³³ it is common for people in our nation's prisons to be isolated for months, years, and even decades.³⁴ Additionally, during the pandemic, infection rates and deaths have been exacerbated due to misguided attempts to mitigate the spread of the virus through increased use of solitary confinement in lieu of medical isolation.³⁵ The result has been nearly a 500% increase in the use of solitary confinement in 2020, with an estimated 300,000 people in solitary at any one time.³⁶

To address the current spike in confinement, we urge you to commit to swiftly end the ineffective and inhumane use of solitary confinement by BOP and USMS during the pandemic, which has exacerbated the virus spread.³⁷

DOJ should also pick up where it left off in 2016 with its *Report and Recommendations Concerning the Use of Restrictive Housing*, which sets forth specific policy recommendations

³⁰ Nathalie Baptiste, *How Trump's Rush to Execute Inmates Is Spreading COVID*, Mother Jones (Dec. 8, 2020), <https://www.motherjones.com/crime-justice/2020/12/how-trumps-rush-to-execute-inmates-is-spreading-covid/>.

³¹ See Isaac Arnsdof, *Inside Trump and Barr's Last-Minute Killing Spree*, ProPublica (Dec. 23, 2020), <https://www.propublica.org/article/inside-trump-and-barrs-last-minute-killing-spree>; U.S. Dep't of Justice, *Justice Manual*, 9-10.190, 200, 210 (rules added or amended by Attorney General Barr in Dec. 2020 and Jan. 2021 that accelerate the capital case process).

³² Dan Nolan and Chris Amico, *Solitary by the Numbers*, Frontline (Apr. 18, 2017), <http://apps.frontline.org/solitary-by-the-numbers/>. "Solitary confinement" is defined as "confinement of prisoners for 22 hours or more a day without meaningful human contact." United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, Rule 44 ("The Mandela Rules").

³³ The Mandela Rules, Rules 43, 44.

³⁴ Stephanie Wykstra, *The Case Against Solitary Confinement*, Vox (Apr. 17, 2019), <https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform>.

³⁵ See Unlock the Box, *Solitary Confinement is Never the Answer*, at 1, 5-6 (June 2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf>;

³⁶ *Id.*, at 1, 3-4.

³⁷ See Letter from Senators Richard J. Durbin and Elizabeth Warren to Attorney General William Barr and BOP Director Michael Carvajal, at 1-2, 4 (Oct. 2, 2020), <https://www.warren.senate.gov/imo/media/doc/Letter%20from%20Warren%20and%20Durbin%20to%20AG%20Barr%20and%20Director%20Caraval%20re%20solitary%20confinement%20during%20COVID-19%20pandemic%2010.2.20%20FINAL.pdf>.

for limiting the use of restrictive housing in the BOP and other DOJ entities, as well as more general guiding principles for all correctional systems.³⁸ We urge you to commit to appoint a working group that includes public health professionals, criminal justice reform advocates, and directly impacted solitary survivors or their surviving family members to immediately implement the recommendations in that report, and empower them to propose updated recommendations on an established timeline.

We urge you to announce that the working group is a first step toward complying with the Mandela rules, which recognize that solitary confinement is inhuman torture and therefore ban solitary confinement lasting longer than 15 days and categorically ban solitary for people with serious mental illness, children, pregnant women, and other medically fragile individuals (except in extraordinary circumstances).³⁹ DOJ should incentivize states and localities to do the same.

Thank you for your consideration of these important issues facing DOJ. We look forward to hearing your testimony before the Senate Judiciary Committee on February 22, and working with you in the future. If you have any questions or need further detail, please feel free to contact senior policy counsel Aamra Ahmad (aahmad@aclu.org).

Sincerely,



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³⁸ U.S. Dep't of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (Jan. 2016), <https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing#principles>.

³⁹ The Mandela Rules, Rule 45.