



June 30, 2015

The Honorable Loretta E. Lynch
The Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: ACLU Recommendations for Attorney General Loretta Lynch

Dear Attorney General Lynch:

On behalf of the American Civil Liberties Union, we offer our congratulations to you on becoming Attorney General of the United States.

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. The ACLU takes on the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

We look forward to working with you and continuing our important work with other Department of Justice officials to protect and respect the civil liberties and rights of people across the country. We are writing to offer several policy, legislative, and litigation recommendations for the Department to support or continue.

Religious Liberty

- **Office of Legal Counsel (OLC) memo:** The Attorney General should direct OLC to review and withdraw its memo interpreting the Religious Freedom Restoration Act. The memo endorses taxpayer-funded hiring discrimination in direct contravention of statutory non-discrimination protections and provides a guide to agencies and states that wish to perpetuate a culture of intolerance. In that regard, it is erroneous and threatens core civil rights and religious freedom protections. In particular, it harms the rights of LGBT individuals and those who seek access to basic reproductive health care.

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Criminal Justice Reform and Border Prosecutions

- **Smart on Crime Initiative:** The Department should enforce, track, study, and analyze former Attorney General Holder's 2013 guidance directing federal prosecutors to decline to charge drug amounts that would trigger mandatory minimum sentences unless defendants meet, and the government could prove, a list of enumerated factors justifying mandatory penalties. The Department should publish the district by district data regarding U.S. Attorney's compliance with the guidance on charging in drug cases. We also urge you to incorporate the August 2013 guidance in the U.S. Attorneys' manual so that the guidance becomes a permanent Department policy.
- **Border Prosecutions:** The Department should return immigration enforcement to civil authorities and focus resources on the prosecutorial priorities detailed in the Smart on Crime Initiative. Specifically, the Department should direct U.S. Attorneys to pursue 8 U.S.C. § 1325 and 8 U.S.C. § 1326 charges only against individuals who have convictions for serious, violent felonies and whose sentences for those felonies were completed within the previous five years. The Department should also direct U.S. Attorneys to exercise discretion not to pursue a § 1326 charge when the prior removal order, prior entry conviction, or prior reentry conviction was obtained without due process. In addition, DOJ should direct U.S. Attorneys to exercise discretion not to pursue § 1325 and § 1326 charges against certain categories of vulnerable individuals (for example, survivors of domestic abuse and the elderly), or against individuals with significant U.S. ties. Finally, the Department should direct U.S. Attorneys to decline Border Patrol referrals of asylum seekers, whose criminal prosecutions for unlawful entry squarely violate U.S. obligations under Article 31(1) of the Refugee Convention. The Department of Homeland Security's Office of the Inspector General recently found that Border Patrol lacks guidance to safeguard asylum seekers from improper referral for criminal prosecution relating to their entry.
- **Juvenile Justice Reform:** The Department should issue a statement of support for legislation reauthorizing the Juvenile Justice and Delinquency Prevention Act (JJDP). There is broad bipartisan congressional support for reauthorizing the program, which provides federal standards for conditions of confinement for youth and keeping status offenders out of locked custody.
- **End Operation Streamline.** The Department should cease its cooperation in Operation Streamline hearings, in which defendants appear before a federal judge in groups of up to 70 and accept plea agreements en masse, with severely limited opportunities to understand their rights and assert asylum protection, citizenship, or other claims to legal relief in the United States.

Policing and Racial Profiling

- **Task Force on 21st Century Policing:** The Department should implement the recommendations made by the President's Task Force on 21st Century Policing. Specific recommendations for the Department include developing case studies on community trust with law enforcement, providing technical assistance and best practices for civilian oversight of law enforcement, supporting research on crime reduction through non-discriminatory policing, and establishing national standards for the research and development of new technology.

- **Militarized Policing:** The Department should make the recent recommendations from the Law Enforcement Equipment Working Group retroactive and recall all military weapons and equipment that are now prohibited, as well as require law enforcement possessing military weapons and equipment that are now controlled to adhere to the recommendations in order to keep it.
- **DOJ Guidance on Race:** The Department should revise the Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity (“the new Guidance”), issued in December of 2014 with substantive reforms including changes that would 1) make the Guidance enforceable; 2) apply the Guidance to state and local law enforcement who work in partnership with the federal government or receive federal funding; 3) close the loopholes for border integrity and national security; and 4) cover surveillance activities.
- **Issuance of DOJ Guidance on Gender-Biased Policing:** In its investigations of police misconduct in Puerto Rico, New Orleans, Maricopa County, AZ and Missoula, MT, the Department has done groundbreaking work in documenting discriminatory law enforcement responses to domestic and sexual violence cases and has called for the adoption and implementation of clear, evidence-based policies for investigating domestic and sexual violence, including policies on violence perpetrated by officers. The Department should build on this work by issuing guidance on law enforcement response to domestic and sexual violence. Such guidance should recognize that gender-biased policing is a civil rights issue and provide proactive guidelines to law enforcement agencies in order to prevent discriminatory responses in the future.
- **Profiling in Immigration Enforcement:** The Department should increase oversight of state and local police who racially profile for immigration enforcement purposes. This oversight should include establishing uniform data collection requirements for federal, state, and local law enforcement agencies; barring State Criminal Alien Assistance Program reimbursement for jurisdictions that engage in biased policing; and removing civil immigration information from the National Crime Information Center database, as recommended by the Major Cities Chiefs Association and the President's Task Force on 21st Century Policing.
- **End Racial Profiling Act:** The Department should issue a statement of support for the End Racial Profiling Act of 2015, which would prohibit profiling, mandate law enforcement training and require data collection, and provide accountability for law enforcement agencies that continue to engage in profiling.

Immigration

- **Immigration Enforcement at Courthouses:** The Department should investigate and curtail DHS immigration enforcement on courthouse premises, with attention to impact of immigration enforcement on access to justice and crime victim protection.
- **Immigration Courts:** The Department should limit its reliance on no-process deportations (which now account for 83% of removal orders), and instead provide removal hearings to all eligible individuals.

- **Access to Counsel:** The Department should provide counsel for all children fighting deportation as well as for all family units and other vulnerable populations.
- **Detention:** The Department should initiate bond hearings after no more than 6 months for all Immigration and Customs Enforcement (ICE) detainees along with other reforms to decrease wasteful reliance on jail custody.
- **Customs and Border Protection (CBP) Officers and Agents Use of Force:** The Department should increase the efficiency and transparency of Civil Rights Division investigations of CBP officers and agents and make every effort to bring those investigations to a prompt conclusion. Moreover, the Department should assist in CBP's efforts to introduce body-worn cameras with appropriate privacy protections.

Surveillance and Privacy

- **Executive Order 12333:** The Department should work with the intelligence community to reform policies governing intelligence collection under Executive Order (EO) 12333 to limit bulk collection; prevent collection reasonably likely to return U.S. person information and communications; halt the transmission of U.S. person information with foreign intelligence partners; limit retention and use of EO 12333 information; and ensure that information shared with foreign partners is not used to commit human rights abuses.
- **Section 702 of the Foreign Intelligence Surveillance Act:** The Department should reexamine the Administration's current position, in which the government asserts the right to search through information collected under Section 702 with known U.S. person identifiers without a warrant. The Department should require a warrant for these searches and support legislative efforts to codify such a policy, and enact comprehensive Section 702 reform.
- **Stingrays/Dirtboxes:** Last year, the Department reportedly updated guidance on the use of law enforcement surveillance using cell site simulators, commonly referred to as "stingrays" or "dirtboxes." These devices mimic cell phone towers, causing all devices within a given area to connect to them and share location and other sensitive information. The Department should update and make public existing guidance on the use of cell site simulators to close loopholes permitting use without a warrant; require warrant applications to provide sufficient information regarding the nature of the devices and impact on non-targets; mandate the immediate purging of non-target information; and require state and local law enforcement using these devices to adopt appropriate privacy protections.
- **Communications Assistance for Law Enforcement Act (CALEA):** Last year, FBI Director Comey expressed support for requirements that would require technology companies to build backdoors into their products to facilitate law enforcement access. The Department should reconsider this position, and decline to pursue regulatory action or legislation that would expand the existing requirements in CALEA.
- **Presidential Policy Directive-28 Implementation:** The Department should work with the intelligence community to put in place safeguards to ensure that non-U.S. person information shared with foreign intelligence partners is not used to facilitate human

rights abuses or circumvent international and domestic laws, and is provided the same protections as U.S. person information.

- **Malware:** The Department should make public DOJ's policies that govern federal agencies' use of malware as a surveillance tool, including any policies governing the purchase, use and disclosure of '0-day' security vulnerabilities or impersonation of media or other individuals to deliver malware.

Voting

- **Democracy Restoration Act:** Following up on Attorney General Holder's statements embracing the easing of restoration requirements, the Department should endorse the Democracy Restoration Act. The Department should clarify its support for automatic restoration of voting rights to citizens upon their release from incarceration for disfranchising convictions, and oppose restrictions for those on parole or probation or with unpaid fees or fines.
- **Bureau of Prison (BOP) information on voting rights restoration:** The BOP should take administrative steps to provide information to incarcerated individuals regarding voting rights restoration immediately upon release and return to their home state.
- **Require prosecutors to disclose when plea agreements disfranchise:** The Department should require federal prosecutors to provide notice to defendants in federal criminal cases regarding the loss of their right to vote as a result of a plea agreement to any disfranchising crime (misdemeanor or felony). Prosecutors should also use their discretion when charging crimes that will result in a voter's disfranchisement.
- **Enforcement of voter intimidation protections:** As we approach the 2016 election, the Voting Section should increase enforcement of Section 2 and Section 11b (voter intimidation) of the Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act. This is increasingly important, as it will be the first presidential election following the Supreme Court's *Shelby County v. Holder* decision, removing Section 5 protections of the Voting Rights Act.
- **Voter Accessibility:** The Voting Section and the Disability Rights Section of the Civil Rights Division should increase resources and place enhanced attention on voter accessibility issues to ensure that people with disabilities have adequate access to the ballot box. Currently, those with disabilities face barriers to voting. A majority of polling places are wheelchair inaccessible. Many voting machines are inaccessible or have poll workers who don't know how to operate them. And voter suppression efforts disproportionately affect people with disabilities.

First Amendment

- **Investigation and prosecution of national security whistleblowers and the press:** The Obama administration has prosecuted more national security whistleblowers under the Espionage Act than all other presidencies combined. Following the disclosure of a subpoena for phone records from the Associated Press covering 20 separate phone lines, used by over 100 reporters, Attorney General Holder laudably called for a review of the department's guidelines, which were revised partly in line with the ACLU's

recommendations. Attorney General Holder also pledged not to investigate journalists for newsgathering. The Department should provide a public report on its compliance with revised guidelines and the aforementioned pledge.

LGBT Rights

- **Attorney General Memo on Title VII and Sexual Orientation Discrimination:** Consistent with evolving case law and numerous EEOC decisions, the Department should take the position in litigation that the prohibition on sex discrimination in Title VII extends to claims of discrimination based on an individual's sexual orientation. This position would build on the December 2014 memorandum regarding the treatment of transgender employment discrimination claims under Title VII.

Private Prisons

- **New BOP Private Prison Beds:** The Department should withdraw existing pre-solicitations and solicitations for new private beds or prisons and develop a long-term plan for phasing out the use of private prisons – which currently incarcerate approximately 10 percent of the entire Bureau of Prisons (BOP) population – in concert with a reduction in the total federal prison population.
- **FOIA Requests:** When responding to Freedom of Information Act (FOIA) requests relating to private prisons, BOP should limit its use of FOIA Exemption 4, the provision intended to protect trade secrets. Specifically, BOP should not withhold contracts, operating procedures, operating records, monitoring documents, or other similar documents relating to private prisons. In the rare circumstances where an exemption may be appropriate, the use of Exemption 4 should be supported by an individualized, detailed written justification approved at the time of initial withholding by the relevant Regional Director, the Chief of the BOP Acquisitions Branch, and appropriate staff in both the Central Office and relevant Regional Office of the BOP Office of General Counsel.

Other Civil and Human Rights Issues

- **Material support prosecutions:** The current “material support” statute does not provide adequate legal protection to humanitarian groups providing aid to people in areas under the control of a designated terrorist organization, hurting efforts to deliver much needed humanitarian assistance to innocent people. In addition, the statute does not provide adequate legal protection for the free speech rights of individuals, including those engaged in political advocacy, or of journalists and human rights groups that document atrocities and human rights violations in turbulent parts of the world. The Department should limit prosecutions under this statute to conduct that is both knowingly and actually intended to further unlawful conduct.
- **Access to Justice Initiative:** In an effort to demonstrate its commitment to addressing the access to counsel crisis we face throughout the nation, in 2010 the Department established the Access to Justice Initiative (ATJ). The Department should continue to invest in and provide resources to ATJ and create a grant program dedicated exclusively to indigent defense at the state and local levels.

- **Reentry Programming:** The Department should support congressional efforts to ensure robust funding for Second Chance Act and other reentry programming.
- **Legal Barriers to Reentry:** The Department should express support for the bipartisan Record Expungement Designed to Enhance Employment (REDEEM) Act, the Restoring Education and Learning (REAL) Act, and other legislative proposals to reduce legal barriers to reentry.

In addition to these suggested policy advances, there are many admirable Department activities and initiatives that require no change. We would be remiss if we did not acknowledge some of the actions advanced by your predecessor that we hope you will maintain or enhance:

- **Clemency Initiative:** We urge the Department to maintain Attorney General Holder's commitment that the Office of the Pardon Attorney will review the over 20,000 cases that could possibly qualify for commutations under the criteria announced by Deputy Attorney General James Cole in April 2014. These criteria should be used by the Justice Department and White House when considering clemency petitions from federal prisoners.
- **Pattern or Practice Investigations:** Given the significant number of fatal police shootings this past year, the Department's Special Litigation Section should continue to prioritize the investigation of police misconduct and pursue pattern or practice cases, as well as use consent decrees as models for policing nationwide.
- **Civil Asset Forfeiture:** The Department should maintain the recently issued policies on "adoptions" and "structuring" and build upon them by eliminating the practice of equitable sharing completely.
- **Statement of Interest:** The Department should continue filing statements of interest in right to counsel and related cases as it has done in *Wilbur v. City of Mount Vernon*, *Hurrell-Harring v. New York*, *Varden v. City of Clanton*, and *N.P. v. Georgia*.
- **Ineffective Assistance:** The Department should maintain its new policy directing federal prosecutors to no longer ask defendants to waive future claims of ineffective assistance of counsel in plea agreements.
- **21 U.S.C. 851 Motions:** The Department should maintain and enforce its charging guidance directing federal prosecutors to decline to file an information pursuant to 21 U.S.C. 851 unless defendants meet a list of enumerated factors justifying harsher sanctions.
- **Bail Reform:** The Department should continue filing statements of interest in cases challenging the abuse and misuse of bail, as it has done in *Varden v. City of Clanton*, a case challenging the incarceration of individuals solely because of their inability to pay a cash bond.
- **Federal Interagency Reentry Council:** The Department should continue to invest in the work of the Federal Interagency Reentry Council, which has made significant

progress in advancing administrative reforms to reduce the barriers to reentry for individuals with criminal convictions since its establishment in 2011.

We would greatly appreciate having the opportunity to meet with you to discuss any one or more of our suggestions for the Department and for your tenure in your new role. Please feel free to contact me at mmacleod@aclu.org or 202-675-2309.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Macleod-Ball". The signature is written in a cursive, slightly slanted style.

Michael W. Macleod-Ball
Acting Director, Washington Legislative Office