



July 10, 2012

The Honorable Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

**RE: ACLU Views on the Commerce, Justice, Science, and Related Agencies
Appropriations Act, 2013 (S. 2323)**

Dear Leaders Reid and McConnell:

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, and its more than half a million members, countless additional activists and supporters, and 53 affiliates nationwide, we write to express our views on S. 2323, the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2013 ("Act") While there are certain provisions in the bill we support, we strongly oppose others. This letter will detail those provisions.

A. Ban on Prosecuting Guantanamo Detainees in Federal Criminal Court

The ACLU opposes Section 530, which continues forward for another fiscal year a provision enacted in last year's Commerce, Justice, Science and Related Agencies Appropriations Act. The section would prohibit the Department of Justice from using funds to prosecute the alleged planners or conspirators in the September 11, 2001 attacks in regular Article III federal courts. These are the same federal courts where the Department of Justice regularly tries and convicts defendants charged with international terrorism crimes. This law needlessly ties the President's hands in resolving the problem of Guantanamo and disposing of cases in a way that comports with human rights principles and the rule of law. The law restricts the government's ability to employ one of the most valuable counterterrorism tools available—criminal prosecutions in regular federal courts. We urge Senators to offer and support an amendment removing Section 530 from the bill.

B. Funding for the Association of Community Organizers Now

The ACLU opposes Section 532, which would forbid the distribution of any funds made available by the Act to the now-defunct Association of Community Organizers Now ("ACORN"). Section 532 is facially unconstitutional as a

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violation of Article I, Section 9, Clause 3 of the U.S. Constitution (forbidding bills of attainder), and the First, Fifth and Fourteenth Amendments. It has long been settled that the Bill of Attainder Clause applies to all laws imposing punishment on specific individuals or groups of individuals without a judicial trial, including, especially, appropriations bills.¹ Furthermore, the ban on funding appears motivated by Congressional disapproval of ACORN's former mission and political inclination (ACORN has repeatedly been cleared by inquiries into any mishandling of federal funds). At the core of the First Amendment is the principle that Congress may not punish an individual or group of individuals because of disagreement with that individual's or group's message or mission. Additionally, the use of an appropriations bill to defund an entire group is a violation of the due process clause of the Fifth Amendment, and denies such a group the equal protection of the laws under the Fourteenth Amendment. That ACORN was forced to close its doors in part due to the removal of federal funding makes such a provision all the more offensive. Finally, we would point out the obvious: Congress has effectively shut down ACORN through its appropriations ban, rendering Section 532 unnecessary. We urge Senators to offer and support an amendment removing Section 532 from the bill.

C. Funding for Computer Networks

The ACLU opposes Section 539 in its current form as potentially overbroad. Section 539 would prohibit the use of any funds appropriated by the Act for any computer network unless it "blocks the viewing, downloading, and exchanging of pornography" (with a carve-out for law enforcement and judicial purposes). Although the government may implement narrowly tailored restrictions to preserve network security and prevent unlawful activity on its own systems, internet blocking technology frequently covers content that is both protected by the First Amendment and necessary for government officials to perform their duties in a non-law enforcement or judicial context. For instance, internet blocking software often uses keywords or other indicators to blacklist certain sites. Officials and employees at all three departments may be denied access for non-law enforcement or judicial functions to sites discussing topics like sexual health or LGBT issues, which frequently are blocked as false positives by such software. As a matter of First Amendment law, this is inappropriate and as a matter of good governance, this is unwise. At the very least, Congress should adopt an additional exception permitting government officials to remove the blocking software as reasonably necessary for their work. Moreover, to the extent Section 539 would apply to systems where adults are permitted unfettered access to all lawful content (such as in libraries), the exception should permit such unfettered access without undue inquiry into the reasons behind removal of the block.

D. Funding for the Executive Office for Immigration Review

S. 2323 includes an \$8.4 million increase for the Executive Office for Immigration Review ("EOIR"), as requested by the Administration.² The ACLU is pleased with this increase in funding, which will allow for modest expansion of the highly successful and cost-saving Legal Orientation Program ("LOP"). LOP, which will receive an additional \$2 million, seeks to ameliorate incrementally the serious problems that arise in immigration proceedings due to immigrants' lack of counsel. The program allows contracted non-governmental and public interest organizations to explain the mechanics of removal hearings to individuals in immigration detention facilities.³ The "orientation" includes a group presentation, individual counseling, and a potential

¹ See *United States v. Lovett*, 328 U.S. 303, 316 (1946) ("The fact that the punishment is inflicted through the

² S. Rep. No. 112-158, at 48 (2012).

³ *Legal Orientation Program*, U.S. DEP'T OF JUSTICE, available at <http://www.justice.gov/eoir/probono/probono.htm#LOP>.

referral to pro bono legal counsel. A 2008 Vera Institute of Justice study found that LOP participants conclude their immigration court cases an average of 13 days sooner than other detainees.⁴

The immigration adjudication system is currently facing an “immigrant representation crisis,”⁵ as approximately 85% of detained immigrants lack counsel necessary to the fundamental fairness of their proceedings.⁶ A recent study concluded that representation crucially affects whether or not an immigrant in removal proceedings receives relief to which he or she is legally entitled.⁷ Given the complexity of immigration law and the grave deportation consequences that immigrants face – along with their U.S. citizen and other relatives – adequate representation is critical in immigration proceedings. LOP, while not providing direct representation is a necessary basic step in the right direction. Regrettably, LOP is only available in larger immigration detention facilities, excluding hundreds of other locations. We encourage continued growth in LOP funding so that the program’s benefits and savings may soon be universally available.

E. Funding for the Residential Abuse Treatment Program

The ACLU supports increasing funding for the Bureau of Prisons’ (“BOP”) Residential Drug Abuse Treatment Program (“RDAP”).⁸ Congress has mandated that the BOP make available substance abuse treatment for each person in BOP custody with a “treatable condition of substance addiction or abuse,”⁹ and it has created an incentive for people convicted of nonviolent offenses to complete the drug treatment program by authorizing a reduction of incarceration of up to one year. However, the full cost-saving benefits of RDAP are not currently being realized. For example from 2009 to 2011, according to a recent Government Accountability Office report assessing the program, only 19% of those who qualified for a 12-month sentence reduction after completing the program received the maximum sentence reduction. On average, eligible RDAP graduates received only an eight-month reduction.¹⁰ In addition to supporting the BOP’s 2013 budget request to “enhance” RDAP and allow eligible graduates to benefit from the full 12-month reduction by ensuring timely placement in the program, the ACLU also believes that the BOP can change its own policy in candidate placement by prioritizing RDAP slots for those who are eligible for a sentence reduction.

⁴ *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, VERA INST. FOR JUSTICE, May 2008, <http://www.vera.org/download?file=1780/LOP%2BEvaluation...final>.

⁵ NEW YORK IMMIGRANT REPRESENTATION STUDY GROUP, *ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS* (2011) at 1, *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

⁶ Written Follow-Up Questions by Senator Leahy, Hearing on “Improving Efficiency and Ensuring Justice in the Immigration Court System,” May 18, 2011, *available at* <http://www.judiciary.senate.gov/resources/transcripts/upload/051811QFRs-Grisez.pdf>.

⁷ *ACCESSING JUSTICE*, *supra* note 3, at 3.

⁸ S. Rep. No. 112-158, at 65 (2012).

⁹ 18 USC § 3621(b)

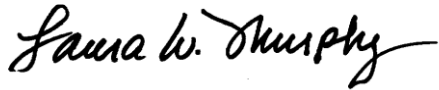
¹⁰ GOVERNMENT ACCOUNTABILITY OFFICE, *ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES’ TIME IN PRISON 13-14* (2012), *available at* <http://www.gao.gov/products/GAO-12-320>.

F. Funding for Juvenile Justice Programs

The ACLU supports robust funding to federal juvenile justice programs – particularly the Juvenile Justice and Delinquency Prevention Act (“JJDP A”).¹¹ This funding aids state efforts to prevent juvenile delinquency and protect those youth who come in contact with the justice system. Still, over the last ten years, the funding levels for juvenile justice programs have been drastically reduced. In order to ensure that state, local, and private dollars are leveraged effectively to promote public safety, prevent delinquency, and protect our most vulnerable children, the ACLU urges fully funding the JJDP A and similar programs designed to increase public safety and keep youth on the right track. Cutting these programs in the name of reducing federal spending endangers public safety, jeopardizes the well-being of youth, and prevents smart investments in community-based programs that reach at-risk youth most effectively.

Thank you for the opportunity to express our views on this important piece of legislation.

Sincerely,



Laura W. Murphy
Director



Michael W. Macleod-Ball
Chief of Staff

cc: United States Senate

¹¹ S. Rep. No. 112-158, at 79 (2012).