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HRW.org

June 8, 2015

The Honorable Loretta Lynch
Attorney General
Department of Justice
Robert F. Kennedy Building
Tenth Street and Constitution Avenue, NW
Washington, D.C. 20530

RE: Human rights priorities for the Department of Justice

Dear Attorney General Lynch:

Congratulations on your confirmation as Attorney General. The Department of Justice plays a critical role on a wide array of human rights issues in the United States, and we are looking forward to working closely with your office in the coming months to strengthen rights protections in this country. Accordingly, we write to request a meeting in the near future to discuss some of our priority concerns in the areas of national security, criminal justice, and immigration. These include:

1. National Security

Pursuing accountability for torture

The recently released summary of the Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program discloses significant new information indicating the commission of serious federal crimes, including torture, homicide, conspiracy, and sexual assault. The Justice Department investigation led by prosecutor John Durham before the release of this summary was incomplete at best. For instance, we have been unable to find any evidence that the Durham investigation included interviews of any current or former CIA detainees. In addition, according to reports, the Durham investigation excluded potential crimes by people operating within the guidelines of the Office of Legal Counsel (OLC). Yet the Senate report summary includes evidence that senior CIA officials knew their conduct amounted to torture before OLC issued any guidance. Further, even if the Justice Department's investigation only looked at conduct that went beyond what was authorized, the Senate study contains extensive new information about conduct that met such criteria, such as unauthorized cases of waterboarding, so-called "waterdousing," the use of stress positions on detainees with broken bones, and rectal feedings. For these

and additional reasons detailed in our December 22, 2014 letter¹ to Attorney General Eric Holder, we urge you to appoint a special prosecutor to conduct a thorough investigation into these federal crimes.

We also ask that you examine the Justice Department's posture with regard to civil remedies for CIA torture. So far, the Justice Department has blocked every suit brought by former detainees of the CIA seeking redress by relying principally on the state secrets privilege, and claiming that litigating the cases would jeopardize national security or foreign relations. However, according to a 2009 memorandum from the Attorney General, the state secrets privilege should only be invoked "when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests."² The privilege should not be used to "conceal violations of law," or "prevent embarrassment to a person, organization or agency of the United States Government." In light of the release of the Senate torture report summary, a great deal of information concerning the CIA program is already in the public domain. Accordingly, we urge you to reevaluate the Justice Department's position concerning the applicability of the state secrets privilege. The Justice Department should also consider settling cases with detainees who have meritorious claims, rather than forcing case dismissals on national security grounds.

Addressing flaws in domestic terrorism investigations and prosecutions

In our July 2014 report, *Illusion of Justice*, Human Rights Watch documented a number of cases in which the Federal Bureau of Investigation (FBI) targeted particularly vulnerable individuals from American Muslim communities in federal terrorism investigations, including the indigent and those with intellectual and mental disabilities, absent any real suspicion of criminal activity. In many of these cases, the person might never have been involved in criminal activity if it had not been for the FBI's encouragement and support. The government, often acting through paid informants, actively developed the plot, persuading and sometimes pressuring the targets to participate, and provided the resources to carry it out. These types of sting investigations have not only led to injustices and harm to the individuals targeted, but have also contributed to a great deal of fear and suspicion in American Muslim communities, undermining the trust that the FBI has said it needs to build with precisely those communities. Not all terrorism investigations raise these concerns, but it is critical that the Justice Department and the FBI review its use of these tactics—including its use of paid informants and how and when to target individuals for investigation.

The Justice Department's December 2014 guidance on the use of race by federal law enforcement agencies took a positive step forward by adding religion as a prohibited basis for profiling. But this change alone does not address the underlying problems we

¹ Letter from Human Rights Watch to Attorney General Holder, "Requesting Appointment of a Special Prosecutor for Torture," December 22, 2014, <http://www.hrw.org/news/2014/12/22/letter-attorney-general-holder-requesting-appointment-special-prosecutor-torture>.

² Memorandum from the US Attorney General, "Policies and Procedures Governing Invocation of the State Secrets Privilege," September 23, 2009, <http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf> (accessed June 5, 2015).

documented in our research into flawed federal terrorism investigations. Accordingly, we urge you to also amend the Attorney General's Guidelines for Domestic FBI Operations to permit the FBI to initiate a full investigation only if it is supported by articulable facts giving rise to a reasonable indication that a violation of federal law may occur.

The December 2014 guidance also purported to eliminate a national security exemption found in the prior guidance. However, the revision still allows the FBI to continue community mapping programs. Through these programs, the FBI collects information on where ethnic and religious communities are located. The danger of community mapping is that it serves as a pretext for heightened law enforcement in those communities, causing mistrust of law enforcement in precisely the communities where law enforcement officials need to build trust. We urge you to end the use of community mapping.

A significant contributing factor to the problems we documented in federal terrorism cases is the Justice Department's misuse of material support charges under 18 USC §2339B to punish behavior that did not demonstrate an intent to support terrorism. Absent a legislative change requiring specific intent to further terrorism, we urge you to advise prosecutors not to pursue such charges without evidence of specific intent. Appropriate instructions to prosecutors can also address other problems we documented, such as overreliance on classified evidence, and the introduction of inflammatory evidence about terrorist acts in which the defendants played no part.

2. Criminal Justice

Tackling disproportionately long punishments

As your predecessor Attorney General Holder noted, US prisons are replete with people serving sentences that are "too long for too little." The federal prison population has grown immensely in the past four decades—721 percent since 1980. This is likely due to Congress's zeal to be "tough on crime" since the 1980s and its embrace of longer sentences, be it by eliminating federal parole or by multiplying the number and length of mandatory minimum sentences. Criminal sentences should be no longer than necessary to further the purposes of punishment and tailored to the gravity of the offense and the culpability of the offender. Federal sentences however, especially in relation to drug offenses, have become untethered from the principle of proportionality primarily because of mandatory minimum sentences. Mandatory minimums, the abolition of parole, and the failures of the compassionate release program, have also given the Bureau of Prisons an increasingly aging population whose confinement serves no public safety purpose.

Mandatory minimum legislation: We were gratified the administration of President Barack Obama supported elimination of the notorious 100-1 crack-powder cocaine sentencing disparity in federal law. More work needs to be done, of course, to reform federal drug sentencing laws, and we are encouraged that you support the Smarter Sentencing Act. However, as currently drafted, that act fails to sufficiently reform the enhanced sentencing provisions based on prior record (known as "851" enhancements). A low-level federal offender can still be sentenced to life without parole if she has two prior

minor drug offenses. The legislation also fails to address existing draconian provisions for possessing firearms (“924(c)” gun stacking enhancements) in connection with drug offenses—provisions that can produce grotesquely long sentences based on the number of guns possessed, and regardless of whether the guns were actually ever carried or used during drug-related activities.

Prosecutorial charging policies: Attorney General Holder sought to avoid the imposition of mandatory minimum drug sentences on low-level offenders who met certain criteria by directing federal prosecutors not to charge the specific drug quantity necessary to trigger a mandatory minimum sentence for these defendants. He also directed prosecutors not to seek or threaten to seek sentencing enhancements for drug defendants simply to coerce them into a plea agreement. We hope you keep these policies in place. To determine whether and to what extent prosecutors are in fact following them, the Justice Department should implement data gathering mechanisms to track and analyze prosecutorial charging practices in federal drug cases. Data gathered by the United States Sentencing Commission does not, for example, reveal whether prosecutors withdraw or refrain from seeking 851 enhancements if the defendant agrees to plead.

Compassionate release: Attorney General Holder also announced minor reforms to the BOP’s programs to secure early release for dying, permanently incapacitated, and elderly inmates. Those reforms do not, however, tackle the biggest problem with compassionate release: the BOP’s refusal to let federal courts make the determination as to whether inmates who meet the medical or age criteria should be released early. Even when inmates meet the criteria, the BOP may refuse to send their cases to the courts because its officials do not support early release. The BOP’s use of compassionate release also suffers from lack of transparency. We hope you will require it to publish data at least annually, if not more frequently, that tells the public how many prisoners sought early release, on what grounds, and what happened to their requests at the warden’s level and at BOP headquarters.

Reducing unnecessary and harmful use of solitary confinement

The harms caused by prolonged solitary confinement and its needless imposition have been well-documented in extensive literature, in multiple Senate hearings chaired by Senator Richard Durbin, as well as in recent reports from the Government Accountability Office and the Justice Department’s Inspector General.

The recent CNA Corporation review of the BOP’s use of solitary confinement—modest as it was—also documented a number of troubling practices. For one, only a small percentage (15 percent) of federal prisoners in isolation are being held for disciplinary reasons; the rest are being held for various non-punitive reasons: pending transfer or awaiting the outcome of an investigation. According to the review, a disproportionate number of inmates in solitary confinement were in protective isolation, and were held in conditions similar to those inmates in disciplinary isolation, including similar restrictions on movement, frequency of recreation, visitation and telephone access.

The review was also particularly critical of how BOP addressed mental health concerns for people in isolation: inmates received mistaken mental health diagnoses undertaken by practitioners without training in psychiatry, courses of treatment prescribed were incorrect, and mental health programming was deficient. In addition, we note with grave concern that inmates with mental disabilities are being held in solitary under harsh and punitive conditions for prolonged periods of time, a practice that has recently been condemned by the United Nations Committee against Torture and which the Department of Justice has itself criticized when undertaken by states.

While the external review made a positive contribution, it risks being ineffective if BOP does not take steps to address the problems it identified. So far, we have seen only a cursory response by BOP to the review's findings. We urge you to push BOP to more fully commit to reforming its solitary confinement practices, especially by prohibiting the use of solitary confinement for inmates with mental disabilities. BOP should follow the examples of several US states that have vastly reduced their inmate population in isolation without adverse effects on facility safety. We also urge more transparency with regard to the BOP's use of solitary. For example, the BOP has stated that many inmates at the US Administrative Maximum Facility (ADX) are able to progress out of that prison through a step-down system. But to our knowledge, it has never provided data that indicates how many inmates have been able to progress out and how long it took them to do so. Nor has it ever indicated the length of time the current ADX population has been held in isolation.

Other criminal justice issues

We appreciate your support of the administration's policies regarding states that choose to decriminalize or legalize the use, production, distribution, and sale of marijuana. As other states consider marijuana decriminalization or legalization, we would urge you to maintain that support.

We also appreciate the Justice Department's use of pattern and practice investigations to look into possible unconstitutional police practices, such as the investigation in Baltimore, Maryland after the death of Freddie Gray in police custody. We are further encouraged to see the Justice Department support the goals of the Prison Rape Elimination Act, most recently by rejecting the weak "assurance" by the state of Texas that it is working to implement the act "when feasible."

3. Immigration

Immigration cases—the majority of them prosecutions for illegal entry and reentry—continue to dominate the federal criminal docket. Although the number of non-citizens convicted of illegal reentry has started to decrease, prosecutions for felony reentry continue to target non-citizens with minor or no criminal history. Recent data from the US Sentencing Commission makes clear that the trend identified in our 2012 report, *Turning Migrants into Criminals*, continues. In 2014, 23 percent of illegal entry offenders were in the lowest criminal history category, and 5 percent in the highest—a stark change

from 2002, when 8 percent were in the lowest criminal history category and 15 percent in the highest.

In addition, many of the individuals convicted have strong ties to this country and are unlikely to be deterred by the prospect of prosecution. The Sentencing Commission's recent report on illegal reentry offenders found that almost 50 percent had children living in the United States, confirming our finding that a significant number of illegal reentry defendants are motivated to enter the country illegally in order to return to US families. The Sentencing Commission also found the average offender had been deported over three times.

We remain concerned that the rapid prosecutions and convictions that occur under Operation Streamline infringe on the due process rights of immigration defendants, including those who may have a claim to asylum but were not given an opportunity to apply by Customs and Border Protection agents in violation of international law. The justification for Operation Streamline—to deter illegal immigration—is clearly unproven given the repeated efforts many offenders make to reenter the United States. We urge you to end Operation Streamline and to direct your US Attorneys to focus prosecutions for illegal reentry on those who pose a threat to public safety.

Nine months ago, you served as part of the delegation that represented the United States before the UN Committee on the Elimination of Racial Discrimination. At that review, you spoke of your commitment to safeguarding civil and human rights, stating:

From the reduction of the use of solitary confinement, to the expansion of the federal clemency program, to our support for the retroactive reduction of penalties for non-violent drug offenders to the reduction in the sentencing disparity between crack and powder cocaine, we have worked to improve our criminal justice system in furtherance of our human rights treaty obligations. We look forward to the future and the opportunity to do even more.

We share your interest in doing more to ensure the US complies with its international human rights obligations. We look forward to meeting with you to discuss these priorities in further detail. Antonio Ginatta, US advocacy director, will be contacting your office to request a meeting. Included is an appendix with our recent reports on these issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth Roth', with a stylized flourish at the end.

Kenneth Roth
Executive Director
Human Rights Watch

Human Rights Watch reports

- [*Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*](#) (July 12, 2011)
- [*Delivered Into Enemy Hands: US-Led Abuse and Rendition of Opponents to Gaddafi's Libya*](#) (September 6, 2012)
- [*Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*](#) (October 10, 2012)
- [*A Red Herring: Marijuana Arrestees Do Not Become Violent Felons*](#) (November 23, 2012)
- [*The Answer is No: Too Little Compassionate Release in US Federal Prisons*](#) (November 30, 2012)
- [*Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions*](#) (May 22, 2013)
- [*An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*](#) (December 5, 2013)
- [*Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*](#) (July 21, 2014)
- [*"You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm*](#) (October 16, 2014)
- [*Callous and Cruel: Use of Force against Inmates with Mental Disabilities in US Jails and Prisons*](#) (May 12, 2015)