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July 28, 2015

The Honorable Loretta Lynch
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

**Re: Prosecutions for Illegal Entry (8 U.S.C. § 1325) & Illegal Reentry
(8 U.S.C. § 1326)**

Dear General Lynch:

Many congratulations on your recent confirmation. The Constitution Project (TCP) looks forward to working with you and your staff on a number of our priorities. As you may know, TCP is a nonpartisan organization that promotes and defends constitutional safeguards. TCP undertakes original research; issues reports, statements, and policy briefs; files *amicus* briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers. Our work – which is driven by bipartisan committees of experts who craft consensus solutions to the issues we address – includes reforming the nation’s broken criminal justice system and strengthening access to justice.

I write to express TCP’s deep concern with the ongoing federal criminal prosecutions for illegal entry and reentry under 8 U.S.C. § 1325 and 8 U.S.C. § 1326, which have amounted to over half of federal criminal convictions this year.¹ As TCP engages with policymakers and leaders on the left and right to push for criminal justice reform and a reduction in mass incarceration and over-criminalization, we are troubled by the rate at which prosecutions for illegal entry and reentry, under a program known as Operation Streamline, have skyrocketed. TCP is particularly alarmed by the lack of due process and effective assistance of counsel provided to defendants under Operation Streamline. The program, which completes a criminal case with incarceration and deportation consequences in under two days,² has been compared to a “conveyor belt” system of justice rather than a real courtroom.³

Under Operation Streamline, defendants are detained for one to 14 days before appearing in court for the first time and are usually unrepresented until the day of their hearing. Just hours before their appearance, defendants will meet with defense attorneys for three to 30 minutes, during which the attorney quickly presents the government’s plea deal⁴ and urges the defendant to sign for his or her deportation and plead guilty.⁵

Due to the rapid processing system, defense attorneys have little to no time for consultation or investigation regarding the charges, to file a pretrial motion to suppress evidence or statements due to constitutional violations, or to discuss the


consequences of the conviction and potential avenues for relief, according to a federal public defender who testified before a congressional committee after Operation Streamline started in Tucson, Arizona.⁶ Potential defenses — such as being a juvenile, mental illness, or eligibility for citizenship or asylum — slip through the cracks.⁷ Hearings are then conducted *en masse*, with courts addressing up to 80 defendants at a time and only nominally individualizing plea agreements.⁸ These hearings — which often combine the initial appearance, arraignment, plea, and sentencing — sometimes take as little as 25 seconds per defendant.⁹

Policymakers are increasingly emphasizing the need for criminal justice reform to save taxpayer dollars. In light of this fiscal austerity, mass prosecutions for illegal entry and reentry overwhelm federal courts along the Southwest border,¹⁰ leading even judges and prosecutors to speak out against the program's use of resources and question its efficacy.¹¹ Indeed, the program has had to take a number of troubling shortcuts because it has expanded so rapidly. For example, in many jurisdictions, Border Patrol attorneys have been deputized as special assistant U.S. Attorneys to prosecute cases, raising prosecutorial-independence concerns.¹² In Tucson, the federal public defender's office can only afford to send a representative to the court once a week, leaving a panel of private lawyers paid over \$100 per hour by the government to manage the remaining cases.¹³

The right to effective representation by counsel is a fundamental principle in our criminal justice system. TCP has been working for years on the Sixth Amendment right to counsel, through the reports and policy recommendations of our blue-ribbon National Right to Counsel Committee, comprised of former judges, prosecutors, defenders, scholars, and others with firsthand experience in the system. In light of the Committee's recommendations, TCP believes that prosecutions for illegal entry and reentry under Operation Streamline are profoundly troubling. Overloaded dockets of Streamline defense attorneys, in conjunction with the mass plea agreements and rushed proceedings, undermine due process and fairness in our criminal justice system. We urge you to reconsider the rapid rate at which the Department of Justice is prosecuting these cases.

We are happy to discuss our concerns in more detail with you or your staff. Please contact Madhu Grewal, Senior Counsel, at (202) 580-6939 or mgrewal@constitutionproject.org with any questions.

Sincerely,



Virginia Sloan

¹ Christie Thompson, *The Nonviolent Offenders Congress Forgot*, THE MARSHALL PROJECT, July 22, 2015, available at <https://www.themarshallproject.org/2015/07/22/the-nonviolent-offenders-congress-forgot>.

² *Oversight Hearing on the Executive Office for United States Attorneys Before the Subcomm. of Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong.* (2008) (Written Statement of Heather Williams, First Assistant, Fed. Pub. Defender, Dist. of Ariz.-Tucson) (Appendix 1-1) [hereinafter Williams Cong. Testimony], available at http://judiciary.house.gov/_files/hearings/pdf/Williams080625.pdf.

³ Amanda Sakuma, *Operation Streamline: An Immigration Nightmare for Arizona Courts*, WASH. POST, July 1, 2014, available at <http://www.msnbc.com/msnbc/operation-streamline-immigration-nightmare-arizona-courts>.

⁴ *Id.*

⁵ When asked what their attorney informed them regarding their rights, 40% of defendants surveyed stated that their lawyer simply informed them they needed to sign their deportation and plead guilty and 7% stated “their lawyers did not tell them anything.” JEREMY SLACK ET AL., IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY 29 (Univ. of Ariz. 2013), available at http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013print.pdf.

⁶ Williams Cong. Testimony, *supra* note 2.

⁷ *Id.*

⁸ Joanna J. Lydgate, *Assembly Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481, 532 (2010), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1100&context=californialawreview> (“Operation Streamline’s accelerated, *en masse* hearings implicate both the Due Process Clause and Federal Rule of Criminal Procedure 11, which details the requirements a court must satisfy before it can accept a defendant’s guilty plea. The court must address the defendant ‘personally,’ make sure she understands the constitutional rights she is waiving, and determine that her plea is voluntary.”).

⁹ Fernanda Santos, *Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border*, N.Y. TIMES, Feb. 11, 2014, available at <http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html>.

¹⁰ For example, in FY 2013, illegal entry and reentry prosecutions constituted more than 80 percent of all prosecutions in the District of Arizona, District of New Mexico, Western District of Texas, and Southern District of Texas. See TRAC, “*Going Deeper*” Tool, available at <http://tracfed.syr.edu/index/index.php?layer=cri>.

¹¹ Joanna J. Lydgate, *Policy Brief: Assembly Line Justice: A Review of Operation Streamline*, at 8, available at https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (quoting a federal prosecutor in Las Cruces, NM as stating, “Because of the [immigration] caseload, we can’t always be as proactive as we’d like to be because we’re so busy being reactive. [Drug and human trafficking] cases do exist, we do work them up the ladder. To be very honest, would I like to spend a lot more time trying to work up the ladder to some of these organizations? Most definitely.”).

¹² Lydgate, *supra* note 8, at 530; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1332 (2010), available at <http://ssrn.com/abstract=1710182>.

¹³ Sakuma, *supra* note 3.