



DECEMBER 9, 2014

# STATE OF CIVIL AND HUMAN RIGHTS IN THE UNITED STATES

U.S. SENATE, COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS

ONE HUNDRED AND THIRTEENTH CONGRESS, FIRST SESSION

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**Statement of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
Hearing on “The State of Civil and Human Rights in the United States”  
December 9, 2014**

Dr. Martin Luther King, Jr., said, “The arc of the moral universe is long, but it bends towards justice.” However, the arc does not bend towards justice without effort. We must put in the necessary hard work – as well as build the foundation and structure – for justice to prevail. It has taken the blood, sweat, and tears of many Americans to push for a “more perfect union.” We must not stop now.

There are too many cracks in this foundation, especially in areas such as voting rights, the criminal justice system, and privacy and civil liberties. In the area of voting rights, states continue to pass restrictive voting laws that disenfranchise millions of voters, a disproportionate number of which are minorities. Discriminatory voting laws have become even more common in the wake of last year’s Supreme Court decision dismantling key provisions of the Voting Rights Act.

Our criminal justice system incarcerates too many individuals, especially non-violent drug offenders, because of its reliance on mandatory minimum sentences. And there continues to be distrust between law enforcement and communities of color because of a long history of unfair treatment towards minorities.

On privacy, we have seen that the Federal government can overreach when we do not remain vigilant. We have seen the privacy rights of American citizens violated through the indiscriminate bulk collection of data about their lives without compelling justification. These are just some of the significant problems that continue to test our Nation – and which we have not adequately addressed.

As Chairman of the Judiciary Committee and as a Senator who has served the state of Vermont and this country for nearly 40 years, I will continue to fight to address these problems. I believe in being part of a constructive process to reform our system and address these injustices. That is why I have introduced bipartisan bills this past Congress to help ensure that the moral arc continues to bend towards justice.

In January 2014, on the eve of the weekend celebrating Dr. Martin Luther King’s holiday, I introduced the Voting Rights Amendment Act of 2014 along with Congressmen Jim Sensenbrenner, John Conyers, and John Lewis that would have restored the most fundamental protections of the law. Senator Durbin was an original cosponsor of our legislation. This bill was drafted in response to the Supreme Court’s decision in *Shelby County v. Holder* in which five justices disregarded extensive findings of Congress and gutted the Voting Rights Act. A narrow and conservative majority of the Court struck down the coverage formula and dramatically undercut the Act’s ability to protect Americans from racial discrimination in voting. I have been disappointed that not a single Senate Republican has joined our efforts to restore the voting rights of all Americans, despite mounting evidence that in too many places, racial discrimination in voting persists.

Within weeks of the Supreme Court's ruling, Republican governors and state legislatures exploited the *Shelby County* decision in order to implement sweeping voter suppression laws that disproportionately prevent African Americans from voting. In North Carolina, the Republican legislature and governor passed the most comprehensive voter suppression law in recent memory. That state law resulted in many minorities, students, elderly and lower income individuals being disenfranchised this past election. In Texas, then-Attorney General Greg Abbott pushed to immediately implement the most restrictive voter ID law in the country. A Federal judge found the restrictive Texas voter ID law to be an "unconstitutional poll tax" that could disenfranchise up to 600,000 voters, most of whom would be African Americans and Hispanics. Nevertheless, the Supreme Court allowed the law to be implemented for this past November's election. We *must* act in the new Congress to restore the protections of the Voting Rights Act.

Reforming our nation's sentencing laws must also remain a high priority. The United States has a mass incarceration problem. Between 1970 and 2010, the number of people incarcerated grew by 700 percent. Although the United States has only five percent of the world's population, we incarcerate almost a quarter of its prisoners. This is largely driven by inflexible and unfair mandatory minimum sentences, which disproportionately impact communities of color. Our one-size-fits-all approach to sentencing has been a great mistake, and Congress must fix it. Our Smarter Sentencing Act would allow reductions in certain drug sentences by providing judges more discretion to determine an appropriate sentence. It is time to stop relying on decades-old policy that has been disproven and is simply unjust. The Judiciary Committee approved this legislation on a bipartisan basis this year, and I hope we can work together so that the full Senate can pass this legislation next year.

Right now, Americans are having an important conversation about the loss of human life in communities across the country. A critical piece of this conversation is about the relationship between law enforcement and communities of color. We must reexamine the militarization of our law enforcement because while no one questions that law enforcement must maintain order, equipping police officers with the tools of war does nothing to repair a torn community. I have long worked to improve our civil asset forfeiture program, and I am confident both parties can work to address this in the new year.

The issue of privacy and our civil liberties is also in need of reform. The advancement of our civil rights includes the preservation of our civil liberties. Last summer, Americans learned for the first time that the government is secretly collecting the telephone records of innocent Americans – regardless of whether there is any connection whatsoever to terrorism or criminal activity. In response, I introduced the USA FREEDOM Act to end the indiscriminate bulk collection of our private records and enact much-needed reforms to the government's surveillance authorities. This bipartisan bill was supported by the Intelligence Community, privacy and civil liberties groups of all interests and viewpoints, the high-tech industry, and lawmakers across the political spectrum. I fought to advance the bill last month because it was of critical importance, both to preserve the civil liberties of our citizens but also to protect our national security. Despite its broad support, Senate Republicans would not even allow a debate to begin on our legislation, but I will continue to fight for these reforms in the new Congress.

As the 113th Congress comes to a close, it is essential to have this critical examination of the state of civil rights in this Nation and I thank Senator Durbin for chairing this important hearing. Bending the arc towards justice can oftentimes be very, very difficult. We know from our shared experience that we cannot be the Nation that we strive to be by setting the dial on autopilot and assuming that all will be well. Recently we have seen and experienced setbacks. We must, however, continue the fight by building bridges and proposing solutions. I will continue to do so in my role as a United States Senator and hope that other members of this body will as well.

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**Opening Statement of U.S. Senator Richard J. Durbin**  
*(As prepared for delivery)*

**Senate Committee on the Judiciary**  
**Subcommittee on the Constitution, Civil Rights and Human Rights**  
**Hearing on “The State of Civil and Human Rights in the United States”**  
**Tuesday, December 9, 2014**

Our identity as Americans is based on ideas and values, not ethnicity or creed. This is what makes our nation unique. But since its founding, there has been a divide between the promise and the reality of America. The man who wrote in our Declaration of Independence that “All men are created equal” was a slaveholder. And the Constitution – our founding charter – treated African Americans as property and women as second-class citizens.

The history of our country has been a slow march to fulfill the promise of our ideas. Brave men and women have fought and sacrificed – sometimes even giving their lives – in the struggle to create the “more perfect union” that our national charter promised.

The election of our first black president shows that we have come a long way as a nation. But it is important to recognize – and to say clearly – that there is still a problem with racism in America and we still have work to do.

This Subcommittee has tried to look in the mirror – to examine what more needs to be done to protect civil and human rights in our country.

We have tried to understand the human impact of the issues we debate by hearing directly from the people who are most affected. We have given a platform to voices that are not often heard in the halls of Congress.

I have often said that this Subcommittee focuses on legislation, not lamentation. And we have taken the words of our witnesses and translated them into action.

I worked with the first Ranking Member of this Subcommittee – Senator Tom Coburn – to pass four laws that give the government more power to prosecute human rights abusers. In 2012, the Obama Administration used this authority to deport Liberian warlord George Boley for using child soldiers.

After we heard the powerful testimony of Cedric Parker, I worked with Senator Jeff Sessions and other members of the Judiciary Committee to pass the Fair Sentencing Act, which significantly reduced the sentencing disparity between crack and powder cocaine and repealed a mandatory minimum sentence for the first time since the Nixon Administration.

After this Subcommittee held the first-ever Congressional hearings on solitary confinement – where we heard from Anthony Graves and Damon Thibodeaux – the federal Bureau of Prisons agreed to my request to submit to the first independent assessment of its solitary confinement policies and practices.

After we heard the brave testimony of Harpreet Singh Saini, I successfully pushed the Justice Department to begin tracking hate crimes against Sikh Americans, Arab Americans, and Hindu Americans.

But, we have been reminded in recent days that there is much more work to do.

When our government still believes that it is acceptable – in the name of security – to profile people based on their race, national origin or religion, there is more work to do.

When Muslim Americans are the targets of violent hate crimes simply because of their religion, there is more work to do.

When states around the country adopt laws that make it harder for minority communities to vote, there is more work to do.

When unarmed African-American men and boys are killed, and their names – Trayvon Martin, Jordan Davis, Michael Brown, and Eric Garner – bring tears to our eyes, there is more work to do.

When protestors take to the streets to shout out:

- “Hands up, don’t shoot.”
- “I can’t breathe.”
- “Black lives matter.”

... there is more work to do.

When a significant part of the American family is disenfranchised and does not trust the police or the criminal justice system, there is more work to do.

Congress must play our part. We should start with a number of bipartisan efforts to protect civil and human rights. For example, we should pass the Smarter Sentencing Act, which I introduced with Senator Mike Lee, and which is cosponsored by Senator Leahy, the Chairman of the Committee, and Senator Cruz, the Ranking Member of this Subcommittee. The Smarter Sentencing Act would make important reforms to our sentencing laws for nonviolent drug offenses.

We should restore federal voting rights for ex-offenders, which Senators Cardin and Paul have both proposed. There are some 5.8 million Americans who, after paying their debt to society, are still denied the right to vote. And this type of disenfranchisement has a disproportionate impact on people of color.

We also should pass the Voting Rights Amendment Act, which was authored by Chairman Leahy, and Republican Congressman Jim Sensenbrenner. This bipartisan legislation is a response to the Supreme Court's 2013 *Shelby County* decision, which gutted the Voting Rights Act.

This is my last hearing as Chairman of this Subcommittee before I turn over the gavel to Senator Cruz, the incoming Chairman. Clearly, there is much more work to do, and I look forward to working with Senator Cruz in the 114<sup>th</sup> Congress as we continue the struggle to create a more perfect union.

**TESTIMONY**  
**CONGRESSMAN LUIS V. GUTIÉRREZ**

Thank you, Chairman Durbin, for inviting me to testify at this hearing regarding the current state of civil and human rights in the United States, and thank you for advocating for justice and equality. I have always valued your advice and counsel. Your leadership on the Judiciary Committee and as Chairman of this Subcommittee has contributed greatly to our nation and to protecting the civil rights of all of us.

Before I begin, I want to extend my heartfelt condolences to the families and friends of Michael Brown and Eric Garner. I think we can all agree that the loss of life is a grave tragedy. As a parent, I especially want to say to the parents, that I am so sorry for your loss.

In the wake of the grand jury decisions to not indict the officers involved in the deaths of Michael Brown and Eric Garner, communities throughout the country have taken to the streets to protest. Many are deeply dissatisfied with the decisions not to prosecute the police officers in Ferguson and Staten Island and transparently examine their actions and the circumstances that lead to the deaths of two unarmed black men. The protests also expose an equally disturbing issue—that the killings of Brown and Garner are not isolated incidents.

I believe the visceral reaction around the country is because these cases represent the countless young men who are treated unjustly by the police and many question their ability to receive justice through the courts. These deaths exposed gaps in our criminal justice system, in particular, the grand jury process and the inherent conflict in bringing charges against law enforcement. Clearly we have more work to do to build trust between communities and law enforcement and our system of justice.

African Americans and Latinos are disproportionately impacted by the criminal justice system overall. Racial profiling, condoned officially and unofficially by some in law enforcement, forces blacks and Latinos to contend with the criminal justice system more frequently and in a completely different way than many others in society. Minority communities have a higher prosecution rate, and at the post-conviction stage sentencing orders tend to be harsher among minority defendants. All too often, Latinos and blacks are victims of excessive use of force at the hands of rogue police officers. The issue is only exacerbated when local and state police departments are equipped with military equipment, as was the case in Ferguson, Missouri this past summer.

The cycle continues, as we saw just last week, when Grand Juries, guided by prosecutors who work on a daily basis with the police, fail to even call for a trial in open court. It is not surprising that the system breeds mistrust.

This vicious cycle not only affects individuals but also harms our African-American and Latino communities as a whole. When we see children like Michael Brown and Eric Garner and Trayvon Martin, we see our own families and loved ones. Ask any Latino or African-American

parent – whether they live in a suburb or in a housing project – and they will tell you they fear for their children’s safety every time they leave the house. Rather than thinking of the police as public servants who will protect the safety of their children, too often they think of the local police as one of the hazards their children face.

I think of when my daughter was stopped because she was driving in “too nice a car” with her friends in her own neighborhood or when I was stopped coming into the Capitol complex earlier in my career because I didn’t “look like a Congressman.” Too many have faced profiling, subtle and explicit, annoying, -- and yes, potentially dangerous -- when the profiler has a badge and a gun.

I respect and appreciate the hard work that law enforcement officers do to keep our communities safe. We have worked to get more cops on the streets, to invest in violence reduction programs, to reduce the number of guns in our communities that often target cops and to make sure we honor and pay police officers for the dangerous and often thankless work they do.

I am also a proud original cosponsor of the End Racial Profiling Act, which I think is clearly and sorely needed.

With regard to the revised profiling guidelines issued yesterday by the Department of Justice, I am disappointed they did not close significant loopholes, especially as they pertain to the Department of Homeland Security, which will allow whole sections of America’s largest law enforcement entities, including Customs and Border Patrol and the Transportation Security Administration, to continue to profile many innocent Americans. I am also perplexed and disheartened that the new guidance applies only to federal agents, but exempts local, county, and state law enforcement.

Civil and human rights today in America continues to be a work in progress. Thanks to the leadership of Chairman Durbin and many of my colleagues, including those seated with me today, we are able to celebrate the strides we have made to create a more equal and just nation for all, and chart the course for continued progress in the future, but it is tempered by knowing that we cannot rest in the pursuit of justice and fairness, especially in the face of the tragic and needless loss of life. Thank you again for the opportunity to testify.

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# Rep. Ellison Testifies in Senate Hearing on Civil and Human Rights

Dec 9, 2014  
Press Release

*WASHINGTON—Rep. Keith Ellison (D-MN) testified in front of Senate Judiciary Committee on the Constitution, Civil Rights, and Human rights today during a hearing entitled “The State of Civil and Human Rights in the United States.” The hearing was chaired by Senator Dick Durbin (D-IL) and Rep. Ellison was joined by his colleagues Senator Cory Booker (D-NJ) and Rep. Luis Guterrez (D-IL).*

*Rep. Ellison’s written testimony submitted for the record to the committee is below.*

Last week 15 year old Abdisamad Sheikh-Hussein was run over by a man in an SUV that had a bumper sticker that said "Islam Is Worse Than Ebola" on it. Discrimination and hate exist everywhere and we should shine a light on them. Today I'd like to focus on state-sponsored violations of our civil rights and liberties and the context in which these violations occur.

Why? Because the government’s job is to promote the general welfare. Because we entrust our government with the right to protect and serve our communities, we expect more of them. Most of the time our public servants diligently uphold this social contract; but when the state fails it is all the more devastating and deserves our attention.

President Obama and Attorney General Holder have demonstrated leadership that has brought important reforms like the Hate Crimes Prevention Act, the repeal of Don’t Ask Don’t Tell, and the Fair Sentencing Act. We still have a long way to go.

Our system of justice works for some, not all. This injustice takes place in a social and economic context. When Officer Wilson confronted Michael Brown on Canfield Drive in Ferguson, the interaction didn’t take place in a vacuum. Like many of our communities, Ferguson suffers from economic abandonment.

Ferguson Missouri’s unemployment is 13%, over double the national average. The number of low-income people in Ferguson doubled over the last 10 years. In 2012, almost all of Ferguson’s neighborhoods had a poverty rate of over 20%, the threshold at which the negative effects of poverty emerge.

Do we respond to this with policies that create jobs, improve infrastructure, and promote education? No. We build more prisons and give our police weapons designed for a war zone. Our low income and minority communities are over-policed and under-protected.

We cannot continue to try to address our economic problems with criminal justice solutions. It isn't fair to our communities. It isn't fair to law enforcement. And it solves neither the criminal justice nor the economic justice problems.

If we only buy body cameras and don't address structural and economic inequality, we will find ourselves here again, year after year.

We know we have an inequality problem when the CEO of Wal-mart makes over \$12,000 per hour and the average Wal-mart employee makes \$8.48, or when the CEO of McDonalds makes \$9,200 an hour and the cashier makes \$8.25.

I'd also like to talk about another form of state sponsored discrimination – one that I have experienced myself.

It isn't a secret that I have experience with the divisive rhetoric and fear-mongering that some public officials use to gain power. Many will recall the House Committee on Homeland Security hearings to discuss the threat posed by Muslims in America. My request to broaden the hearing to include all forms of violent extremism was rejected.

Now, years later, public officials around the country continue to use divisive rhetoric. A county commissioner in Coffee County, TN posted on his public Facebook page an image of a man holding a shotgun with the caption "How to Wink at a Muslim." A state senator in Oklahoma said that American Muslims are a "cancer in our nation that needs cutting out." And in my own state of Minnesota, a GOP County chairman called Muslims parasites that should be fragged. To frag someone means to violently kill them.

These are not rare occurrences. These examples demonstrate that these toxic views have spread.

This type of bigotry is contrary to what we stand for as Americans, and when our public officials engage in it, it gives the American public a signal that it is ok to do the same. Public officials have an increased responsibility and when they begin to treat a particular group differently because of their faith, they should be called out and held accountable.

Our words matter.

Beyond changing the rhetoric, we have to change our policies.

Shortly after he took office President Bush said that racial profiling is "wrong, and we will end it in America." Over a decade later we still have bad policies on the books.

In New York and many other US cities, Muslim communities are mapped, infiltrated, and surveilled simply because they are Muslim. The Departments of Homeland Security and Justice conduct extensive operations in Arab, Middle Eastern, Muslim, and South Asian communities under the guise of countering violent extremism.

Study after study has shown that acts of violent extremism in the United States are motivated by a variety of ideologies and that only a small percentage are committed by American Muslims. According to the FBI, only 6% of acts of terrorism on American soil between 1980 and 2005 were committed by those Muslims. Yet, nearly all programming targeted towards countering violent extremism is geared towards Muslim communities.

I am not against surveillance. I am against surveillance without reasonable suspicion. We should not be singling out communities and harassing and spying on them without cause. Intelligence gathering should never be based on religion or race.

If you think this is just a “Muslim problem” – you’re wrong. Local law enforcement, encouraged by the federal government, raid Latino communities and workplaces. There is FBI surveillance, without suspicion, of Chinese and Russian communities in the US.

And as we know, there is the routine practice of profiling African American young men. A young black man is 21 times more likely to be shot and killed by a police officer than his white counterpart.

As the co-chair of the Progressive Caucus I have joined the chairs of the Congressional Black Caucus, The Congressional Hispanic Caucus, and The Asian Pacific Caucus to urge the Department of Justice to issue revised profiling guidance that will help stop law enforcement from discriminating against our citizens based on their religion, national, origin, ethnicity, and sexuality. Yesterday the Department of Justice issued the revised guidance that expands protections for some, but allows the FBI, TSA, and Border Patrol to continue mapping, monitoring, and targeting Americans based on their religion or what they look like.

We should not continue to violate the civil liberties of our citizens in the name of national security. Discriminatory profiling is wrong. It doesn’t help prevent crime. It creates a culture of fear and resentment within our communities. It is contrary to our core constitutional principles when federal dollars are spent perpetuating law-breaking activity like entrapment.

Lastly, this isn’t just about criminal and economic justice. It’s about being able to choose who represents us. With the Supreme Court rulings in Citizens United, Shelby County, and McCutcheon it is becoming easier to buy an election and harder to vote in one. In the political marketplace of ideas, the voices of working Americans are drowned out by corporate money.

Further, many states have found creative ways to keep minorities from voting. Voter ID laws, ending same-day registration and early-voting are all popular ways to make it harder to vote. Thirty-two states have voter ID laws that keep some 23 million Americans from voting. Those without photo ID are disproportionately low-income, disabled, minority, young, and older voters. We need an enumerated right to vote in the Constitution. In Minnesota we have same day voting; every state should have it. We should be enacting policies that make it easier to vote, not harder.

When we talk about ways to stop inequality we can’t have blinders on. This is about criminal justice, economic justice, and justice at the polls.

I'd like to thank Senator Durbin for convening this hearing and for inviting me to participate.

I'd also like to thank the distinguished Members and advocates that are testifying with me today. Their service and hard work have resulted in progress for civil and human rights in our country.

While we have made some progress, there is still much to do. But we have reason to be hopeful.

Americans of every religion, race, and ethnicity are taking to the streets to demand change. People are angry. They are unsatisfied with the status quo. The only way to affect change is to keep organizing. The Civil Rights Movement didn't start or end when the Civil Rights Act was passed – it started with a small group of committed people demanding change.

**Testimony of Dr. Cedric Alexander**  
**National President of the National Organization of Black Law Enforcement**  
**Executives (NOBLE)**  
**Before the Senate Judiciary Committee Subcommittee on the Constitution, Civil**  
**Rights and Human Rights**  
**Hearing on “The State of Civil and Human Rights in the United States”**  
**December 9, 2014**

Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee, I bring you greetings on behalf of the Executive Board and members of the National Organization of Black Law Enforcement Executives – NOBLE.

My name is Dr. Cedric Alexander, National President of NOBLE, and Deputy Chief Operating Officer for Public Safety, DeKalb County, GA. It is an honor to be here today to participate as a witness in the Senate’s hearing on “The State of Civil and Human Rights in the United States”. I want to acknowledge and thank Chairman Durbin for holding this hearing and inviting me to participate.

I speak to you from the perspective of a person who has over 37 years of law enforcement experience and who has held positions at the highest levels both at the federal, county, and city levels. In addition, I hold a Ph.D. in clinical psychology.

I represent an organization, NOBLE, whose mission is to ensure EQUITY IN THE ADMINISTRATION OF JUSTICE in the provision of public service to all communities, and to serve as the conscience of law enforcement by being committed to JUSTICE BY ACTION.

It is my position that this country has the unique opportunity TODAY to address the lack of trust and understanding of law enforcement by communities of color. It is imperative to every citizen that we collectively deploy solutions in the areas of training, community policing, and technology to ensure that America is secure both domestically and internationally.

Secondly, through these solutions, we are able to further the hopes and dreams of many of our forefathers in realizing true Civil Rights and Human Rights as stated in the Declaration of Independence: *“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”*

The recent events in Ferguson, Missouri and in Staten Island, New York, when combined with real and/or perceived attacks on civil rights legislation, have created an environment where many people of color feel disenfranchised by their national and local governments. More importantly, there is a pervasive belief (right or wrong) that the lives of minorities are of less value than that of their counterparts.

### **Solutions to Building Bridges of Understanding and Partnership Between Law Enforcement & Communities They Are to Protect & Serve**

#### **Training**

Cultural competency is a critical component to bridging the gap amongst law enforcement and communities of color. It is the foundation for people of different cultures and socio-economic backgrounds to interact effectively. When developed and implemented as a framework, cultural competency enables systems, agencies, and groups of professionals to function effectively to understand the needs of culturally diverse groups. It is critical that law enforcement reevaluate its training methodologies to ensure that they reflect the 21<sup>st</sup> century needs and incorporate cultural competency training for police officers that is part of the recruit and in-service training.

Militarization of police has become a growing concern and interest throughout our country in recent years due to the use of tactical equipment and gear to combat everyday crimes. The 1033 Program was created by the National Defense Authorization Act in 1997 as part of the U.S. Government's Defense Logistics Agency Disposition Services (DLA) to transfer excess military equipment to law enforcement agencies. Every year, hundreds of millions of dollars worth of military equipment flows from the federal government to state and local police departments. As a result, departments have implemented the use of military equipment, as seen during recent events in Ferguson, which has unfairly targeted American citizens. There must be justification, accountability and training to support the continued use of such tactical measures. NOBLE feels that training is a key component of ensuring the correct application of this type of resource.

### **Community Oriented Policing**

It is our recommendation that the law enforcement community adopt community policing as the philosophy of policing in the U.S.

Here are the key components of community policing:

- Community policing allows officers to demonstrate their support for the community. Residents and officers are allies. Officers respect and protect

the civil rights of residents. Racial profiling and other forms of discrimination are strictly prohibited.

- Community policing demands that officers interact with people who live or work in neighborhoods that they patrol. Officers are trained to communicate with people, solve community problems and develop an appreciation of cultural and ethnic differences.
- Community policing emphasizes the importance and value of human life. The use of excessive force is absolutely prohibited and deadly force is reserved strictly for when an officer's life or the life of a citizen is at risk.

NOBLE has launched a pilot program entitled "The Law and Your Community" through funding from the Department of Justice – COPS Office. The program's aim is to develop trust and understanding between law enforcement and the community. The Law and Your Community is an interactive training program for young people ages 13-18 designed to improve their communications with law enforcement officers and their understanding of their federal, state and local laws. Components of the program include:

- Citizenship: What does it mean to be a citizen? What are the laws governing everyday life including traffic laws? What are your rights as a citizen?

- Basic Laws: Understanding the basic laws governing issues such as “stand your ground,” gun ownership, staying safe within your community, and maintaining positive affiliations – including peer relationships, maintaining good grades, adult relationships, and benefits of mentors.
- Law Enforcement Engagement: Educating young people and adults on how to engage and navigate communication with law enforcement officers, what is community policing?, and understanding the realities of working in law enforcement.

### **Technology**

We feel that technology can be leveraged to support the effective implementation of community policing and ensure maximum transparency to the public. Through technology, partnerships with communities can be strengthened in the areas of problem-solving and partnership initiatives. Likewise, there is an important role in applying technology in improving the effectiveness of law enforcement training.

Listed below are technology recommendations:

- Requirement of body cameras for law enforcement officers.

- Deployment of various social media platforms to allow law enforcement departments to better communicate and interact with local residents.
- Use-of-force and firearms training systems.

By implementing these recommendations on training, community policing and technology, we believe that real progress can be made in improving the relationship between law enforcement and the communities they serve. This would greatly improve the state of civil rights and human rights in America. I thank the Subcommittee for the opportunity to testify and I would be happy to answer any questions.



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Japanese American Citizens League  
Mark Perriello  
American Association of  
People with Disabilities  
Anthony Romero  
American Civil Liberties Union  
David Saperstein  
Religious Action Center  
of Reform Judaism  
Shanna Smith  
National Fair Housing Alliance  
Richard L. Trumka  
AFL-CIO  
Randi Weingarten  
American Federation of Teachers  
Dennis Williams  
International Union, UAW

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## **The State of Civil and Human Rights in the United States** **Hearing Before the Senate Judiciary Subcommittee on the** **Constitution, Civil Rights, and Human Rights** **December 9, 2014**

Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee: I am Wade Henderson, president & CEO of The Leadership Conference on Civil and Human Rights. I want to thank you for the opportunity to submit testimony for the record regarding the state of civil and human rights in the United States.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, seniors, the lesbian, gay, bisexual, and transgender (LGBT) community, and faith-based organizations.

The Leadership Conference is committed to building an America as good as its ideals – an America that affords everyone access to the polls, ensures economic and educational opportunity for all, and guarantees that our justice system operates in a manner that is fair to all Americans.

This is the critical and necessary work of not only the civil and human rights community, but our elected officials, in order to continue to meet the current challenges we face in our society.

As such, we welcome the opportunity that this important and timely hearing provides to look back on what this subcommittee has accomplished and look forward to the work that is left undone in order to further advance civil and human rights in the areas of voting, justice system reform, and hate crimes protections.

### **I. Introduction**

The Leadership Conference's goal - to create an America as good as its ideals - is not just rhetoric. We have come a long way from the race riots and physical violence of just decades ago. But we have far more work to do to create a fair and equal society, where all members are treated as first class citizens.

We mark a number of anniversaries this year –the 50<sup>th</sup> anniversary of the Civil Rights Act, the 5<sup>th</sup> Anniversary of the Hate Crimes Prevention Act, the 20-year commemoration of the United States' ratification of the Convention on the Elimination of All Forms of Racial

Discrimination (CERD), and the 10-year anniversary of the last OSCE anti-Semitism convening—while, next year, we commemorate the 50<sup>th</sup> anniversary of the Voting Rights Act. These anniversaries provide an ideal opportunity to reflect on how far we have come, and to rededicate ourselves to what lies ahead.

In addition to marking these significant anniversaries, this year, the United States was reviewed on its compliance with international human rights standards under treaties like CERD, the Convention against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR). These treaties obligate member nations to take steps to reduce racial and ethnic discrimination and disparities within their borders. During the United States' review, voting rights, racial discrimination, criminal justice, and police brutality were consistently recognized as continuing problems that alienate a significant portion of our society.

These issues are among the most important for our nation to address in the 21<sup>st</sup> century. While much progress has been made, we still face struggles on many fronts. For the past several decades, our laws have largely failed to ensure the justice that we all seek. We need to fix our voting system so no voter is kept from the ballot box, and we must eradicate any and all racial discrimination in voting. We must reform our racially and ethnically discriminatory justice system. We need vigorous enforcement of hate crime protections and expanded, coordinated police-community efforts to track and respond to hate violence and improve hate crime data collection efforts.

These are big challenges. But historic anniversaries remind us that our journey toward justice is like an Olympic relay. We take the torch from those who came before and pass it along to those who will follow. We applaud efforts to address civil rights issues and spark reform, but a significant portion of the country continues to be alienated and disenfranchised. We must continue to work together to better protect and promote justice throughout the United States.

We hope this committee will continue to build on its impressive legacy. While much has been achieved, there is much left to do, and we look forward to working with the subcommittee on voting rights, criminal justice reform, and hate crimes, as well as other issues important to ensuring fairness and justice for all Americans. Moving forward, we must continue to work together to protect the right to vote for all Americans, by passing legislation like the Voting Rights Amendment Act (VRAA) and the Democracy Restoration Act (DRA). Indeed, this recent mid-term election made clear that voting discrimination remains a real and ongoing problem that must be actively rooted out. Moreover, tragic current events highlight systemic issues of police brutality and racial discrimination that persist at every stage of our justice system. We must enact policies aimed at improving the system in ways that reduce mass incarceration, assist in successful re-entry, and dispel racial biases that are pervasive throughout our country. Moreover, it is imperative to address violence committed against individuals because of their race, religion, ethnicity, national origin, gender, gender identity, or sexual orientation.

Although significant progress has been made to advance civil and human rights, these issues demonstrate the continued need for bipartisan collaboration to break down discriminatory barriers and promote justice throughout the United States. In partnership with civil and human rights groups and civic leaders, Congress and law enforcement officials can and should advance these reforms.

## **II. Voting Rights**

### *The Aftermath of Shelby*



Voting rights is a cornerstone of our democracy—if you don’t vote, you don’t count. The Voting Rights Act (VRA) is universally recognized as the most significant piece of legislation to emerge from the civil rights movement. It enshrined our most fundamental values by guaranteeing to all of our citizens the right to vote, which the U.S. Supreme Court has called “preservative of all rights.”<sup>i</sup> It assures voters of color the utmost protection to participate fully in our political process.

As one of this country’s most successful pieces of civil rights legislation, the VRA stands as a shining example of bipartisan cooperation. It has enjoyed broad, bipartisan support every time it has come up for reauthorization. In fact, since it was passed in 1965, each of the last four reauthorizations of the VRA were signed into law by Republican presidents. In each instance, members of both parties recognized the ongoing importance of protecting minority voters from discrimination and, during the most recent renewal in 2006, they worked together to amass an extensive record to establish the ongoing need for these protections.<sup>ii</sup>

Since the adoption of the VRA, Section 5 of the Act has been a particularly important and effective tool in the fight against voting discrimination.<sup>iii</sup> It requires review of any proposed voting changes in states with the worst histories of voting discrimination. However, in June 2013, in *Shelby County v. Holder*, the U.S. Supreme Court, in a bare majority vote, struck down a core provision of the VRA – Section 4(b) – which functioned to gut Section 5’s federal “preclearance” compliance review process.<sup>iv</sup> In its wake, there is no comparable safeguard. That is why the *Shelby* decision was devastating not only to communities who have been protected by Section 5, but also to our nation’s democratic process. The Court undermined congressional authority and wrongly gutted one of the most important protections the VRA contains. By striking down the coverage formula—Section 4(b)—the Court effectively removed the ability of Section 5 to do its job. Section 2 alone, involving cases are long, expensive, and complex, is insufficient to protect the rights of minorities and other marginalized groups. Accordingly, we now must look to Congress to renew its efforts to ensure that all voters are able to participate in the democratic process by passing legislation to correct the *Shelby* decision.

The VRA has provided significant protection to voters of color, particularly in areas where historical forms of discrimination in voting have proliferated. Although the days of poll taxes, literacy tests, and brutal physical intimidation are behind us, efforts at disenfranchisement of voters of color continue to this day. The *Shelby* decision made millions of voters of color more vulnerable to voting discrimination by opening the door for formerly covered states and localities to implement new and onerous restrictions on voting.<sup>v</sup> Two months after the Court’s decision, the North Carolina state legislature passed a wide-ranging bill that adds numerous procedural barriers to voting and reduces voting opportunities by requiring a government-issued photo identification card, limiting early in-person voting, and prohibiting citizens from registering to vote in conjunction with early voting.<sup>vi</sup> Likewise, within mere hours of the *Shelby* decision, Texas state officials announced that they would immediately begin to enforce a 2011 photo-identification requirement for in-person voting—a requirement that had been blocked under Section 5 not only by an administrative objection by DOJ, but also by the judgment of a three-judge federal court.<sup>vii</sup> In the immediate wake of the *Shelby* decision, the city of Pasadena, Texas, changed the structure of its district council by eliminating two seats elected from predominantly Latino districts, and replacing those seats with two at-large seats elected from majority white districts. Within several months after *Shelby*, changes to early voting were announced in Georgia and Florida.<sup>viii</sup> Equally troublesome are reports of statewide voter purges in Florida and Virginia.<sup>ix</sup>

Although statewide changes to redistricting or voter qualifications are more widely known, the lack of preclearance is particularly troublesome at the local level where a number of counties and cities have

eliminated elected positions once held by people of color, altered voting districts or methods of election, moved or closed polling places, and shifted the dates of or even cancelled elections—all of which can effectively disfranchise voters of color, and which can occur without any prior public notice or legal challenge.

In the pre-*Shelby* world, states and local jurisdictions with a recent history of racial discrimination in voting had to notify their local community members of all proposed changes to the voting laws in the jurisdiction. By eliminating the requirement that states and localities have those proposed changes reviewed by the federal government to determine whether they are racially discriminatory, the Court also eliminated the notice requirement. Thus, there is no requirement that state or local government provide *any notice at all* to the local community when they plan to change the rules governing the voting process – including no notice of changes to polling place locations, changes in the times for early voting, or changes to the rules governing electoral districts. Where there used to be information sharing, collaboration among communities, and transparent government decision-making informed by the perspective of the local community, there is now silence and confusion.

The question for our country is whether this “new normal” is consistent with our vision of a vibrant, inclusive, 21<sup>st</sup> century democracy. Are we comfortable with a system that makes it harder for you to vote if you are poor, Black, Native American, or have a disability? The answer must be “no.”

Voting should make us truly equal, whether we’re rich or poor, young or old, famous or unknown, male or female, gay or straight, White, Black, Asian, or Latino. But in state after state, we’ve seen politicians manipulating the election rules to make it harder for people – primarily people of color, low-income people, and students – to register, vote, and have an equal political voice in our democracy.

Rather than blocking access to our democracy, we must all work together to ensure that all voters have a voice.

#### *Why We Need the VRAA*

The recent midterm federal election was the first to be held without the protection of Section 5. In it, we witnessed the most unfair, confusing and discriminatory election landscape in almost 50 years.<sup>x</sup> And it’s a disgrace to our citizens, to our nation, and to our standing in the world as a beacon of democracy. However, it comes as no surprise. This is the predictable outcome of the first major election since the Supreme Court’s decision in *Shelby*.

In elections across the country, from congressional races to local school board elections, the right to vote – and our democracy – took a brutal and totally unacceptable beating. The real losers in this election were the voters.

We cannot allow this recent mid-term election – with its discriminatory voting laws and mass confusion – to become the new normal. That’s why Congress must restore the VRA.

We applaud bipartisan efforts to introduce legislation in Congress to address the gaping holes left by the *Shelby* decision. A group of senators and representatives, including Senator Durbin, cosponsored the Voting Rights Amendment Act of 2014, which updates the Voting Rights Act of 1965 in response to the *Shelby* decision. This bipartisan bill contains a modern, flexible and forward-looking set of protections that work together to ensure an effective response to racial discrimination in voting in every part of the country. It will enhance the power of federal courts to stop discriminatory voting changes before they go

into effect; establish a flexible coverage formula that is updated annually to require preclearance for all voter rule changes in places with numerous recent voting rights violations; require increased transparency through public reporting requirements that will help keep communities informed about voting changes across the country; and continue the federal observer program in order to combat racial discrimination at the polls.

Without congressional action, decades of progress in combating racial discrimination in our electoral system is now at risk. Our common aim is to ensure that all Americans can participate equally in the political process. It is crucial that we work together to ensure that no one is denied the right to vote, particularly because of his or her race or ethnicity.

### Felon Disenfranchisement

Disenfranchisement of formerly incarcerated persons is contrary to our democratic principles, disproportionately impacts minorities, and is a barrier to successful reintegration.

Though, until the *Shelby* decision, the nation has made consistent progress toward expanding and securing the right to vote for all citizens, the denial of voting rights for formerly incarcerated individuals remains a huge issue. In one form or another, laws that disenfranchise individuals with felony convictions have existed in the United States since its founding. In fact, 29 states had such laws on the books at the time of the ratification of the Constitution.<sup>xi</sup> These laws were based on the concept of a punitive criminal justice system; because those convicted of a crime had violated social norms, they had therefore proven themselves unfit to participate in the political process. Beginning around the end of Reconstruction—many southern states significantly broadened felony disenfranchisement and began focusing on crimes believed to be disproportionately committed by African Americans.<sup>xii</sup> The practice, together with many of other measures, were used as a means to circumvent the requirements of the Fifteenth Amendment,<sup>xiii</sup> which prohibited states from preventing individuals from voting on the basis of “race, color, or previous condition of servitude.”<sup>xiv</sup>

Currently, individuals with felony convictions in the United States are subject to a patchwork of state laws governing their right to vote. The scope and severity of these laws varies widely, ranging from the uninterrupted right to vote to lifetime disenfranchisement, despite completion of one’s full sentence.

While some states provide only for the disenfranchisement of those currently serving their sentence, the vast majority of disenfranchised individuals have completed their prison term.<sup>xv</sup> Of the estimated 5.85 million American adults barred from voting, only 25 percent are in prison. By contrast, 75 percent of disenfranchised individuals reside in their communities while on probation or parole, or after having completed their sentences.<sup>xvi</sup> Approximately 2.6 million individuals who have completed their sentences remain disenfranchised due to restrictive state laws.<sup>xvii</sup>

Further, there is clear evidence that state felony disenfranchisement laws have a disparate impact on African Americans and other minority groups. At present, 7.7 percent of the adult African-American population, or one out of every thirteen, is disenfranchised. This rate is four times greater than the non-African-American population rate of 1.8 percent.<sup>xviii</sup> In three states, at least one out of every five African-American adults is disenfranchised: Florida (23 percent), Kentucky (22 percent), and Virginia (20 percent).<sup>xix</sup> Nationwide, 2.2 million African-Americans are disenfranchised on the basis of involvement with the criminal justice system, more than 40 percent of whom have completed the terms of their sentences.<sup>xx</sup>

Information on the disenfranchisement rates of other groups is extremely limited, but the available data suggests felony disenfranchisement laws may also disproportionately impact individuals of Hispanic origin and others. Hispanics are incarcerated in state and federal prisons at higher rates than non-Hispanics: about 2.2 times greater for Hispanic men and 1.7 times for Hispanic women.<sup>xxi</sup> If current incarceration trends hold, 17 percent of Hispanic men will be incarcerated during their lifetimes, in contrast to less than 6 percent of non-Hispanic white men.<sup>xxii</sup> Given these disparities, it is reasonable to assume that individuals of Hispanic origin are likely to be barred from voting under felony disenfranchisement laws at disproportionate rates.

Although voting rights restoration is possible in many states, it is frequently a difficult process that varies widely among states. Individuals with felony convictions are typically unaware of their restoration rights or how to exercise them. Further, confusion among election officials about state law contributes to the disenfranchisement of eligible voters.<sup>xxiii</sup> Reliable information on the rate and number of individuals whose rights have been restored is difficult to obtain, but preliminary data suggest that in states that continue to disenfranchise after the completion of an individual's sentence, the percentage of restoration ranges from less than 1 percent to 16 percent.<sup>xxiv</sup> This data indicate that the vast majority of individuals in these states remain disenfranchised.<sup>xxv</sup>

It is detrimental to individuals and society for voting rights to be taken away for life simply because a crime has been committed, especially after the individual's sentence has been completed and amends have been made. According to the American Civil Liberties Union:

*Studies have shown that the benefits of voting are numerous. Individuals who vote generally help to make their communities safer and more vibrant by giving to charity, volunteering, attending school board meetings, serving on juries and participating more actively in their communities.*<sup>xxvi</sup>

Research has also shown that formerly incarcerated individuals who vote are less likely to be rearrested.<sup>xxvii</sup> In Florida, where former Governor Charlie Crist briefly made it easier for people with felony convictions to get their voting rights restored, a parole commission study found that re-enfranchised people with felony convictions were far less likely to reoffend than those who hadn't gotten their rights back.<sup>xxviii</sup> According to the report, the overall three-year recidivism rate of all formerly incarcerated people was 33.1 percent, while the rate for formerly incarcerated people who were given their voting rights back was 11 percent.<sup>xxix</sup>

When someone has served time in prison, society must restore that person's right to vote. There is no rationale for continuing to deny individuals the right to vote after the completion of their sentence. Simply put, no one in a democracy is truly free unless they can participate in it to the fullest extent possible.<sup>xxx</sup>

Recent efforts from both Democrats and Republicans are underway to address this problem, at least in federal elections. In the 113<sup>th</sup> Congress, Senator Ben Cardin introduced the Democracy Restoration Act (DRA), restoring voting rights in federal elections to disenfranchised individuals upon their release from incarceration. In addition, Senator Rand Paul introduced the Civil Rights Voting Restoration Act, which does not go as far as DRA, but would restore federal voting rights for non-violent offenders. Both Senators Cardin and Paul have pledged to work on a bipartisan basis to combine the two pieces of legislation and we hope they will continue to work in that fashion to pass reform legislation in the 114<sup>th</sup> Congress.

The administration has also expressed its support for re-enfranchising individuals with convictions. In February of this year, Attorney General Eric Holder recognized that it was time to reconsider laws that permanently disenfranchise individuals who have been released from incarceration.<sup>xxxii</sup> Unfortunately, the attorney general placed limitations on the department's support for removing voting bans. We encourage the Department of Justice to expand its support of automatic restoration and oppose restrictions for those on parole or probation or with unpaid fines.

The ability to vote—to have a part in choosing the elected officials whose decisions impact our lives, families, communities, and country—is at the core of our democracy and what it means to be an American. The VRAA and Democracy Restoration Act are workable approaches to resolve these problems and we must continue to work together to ensure no one is denied the right to vote because of racial discrimination or a former criminal conviction.

### **III. Justice System Reform**

Our justice system is in crisis. The United States has the highest rate of incarceration in the world, with almost 2 million people incarcerated and 7 million people under some form of correctional supervision or control.<sup>xxxii</sup> Further, racial and ethnic minorities continue to be overrepresented in state and federal prisons. Though African Americans and Latinos make up 13 percent and 17 percent of the U.S. population, respectively, they comprise 40 percent and 35 percent of the federal prison population.<sup>xxxiii</sup> This is evidence of the continued racial bias and discrimination that persist at every stage of our justice system, from policing to trial to sentencing and finally to reentry. Without a doubt, tragic events like the deaths of unarmed individuals Michael Brown in Ferguson, Missouri, Eric Garner in New York City, New York, and Tamir Rice in Cleveland, Ohio, among others, provide a teachable moment for our nation – and an urgent opportunity to discuss and address the need for systemic reform.<sup>xxxiv</sup> The failure to do so will continue to erode any remaining trust that communities of color have in our justice system operating fairly and impartially.

#### *Racial Profiling*

More than a decade after President Bush announced racial profiling is “wrong and we will end it in America,” communities of color across the country are still subjected to profiling in a variety of contexts. In particular, Muslim Americans and those perceived to be Muslim, including Arabs, South Asians, Middle Easterners, and Sikhs have been subject to heightened scrutiny, invasive questioning, and wide spread surveillance and mapping by federal law enforcement based on cultural and ethnic behavior since the 9/11 terror attacks.

Racial or discriminatory profiling involves the unwarranted screening of certain groups of people, assumed by the police and other law enforcement agents to be predisposed to criminal behavior. Multiple studies have proven that profiling results in the misallocation of law enforcement resources and therefore the failure to identify actual crimes that are planned and committed. In addition, by relying on stereotypes rather than proven investigative procedures, the lives of innocent people are needlessly harmed by law enforcement agencies and officials.

According to the U.S. Constitution, federal laws, and guidelines, every person has the fundamental right to equal protection under the law, regardless of race, ethnicity, religion, national origin, gender, sexual orientation, or gender identity. Profiling is antithetical to the founding principle in the Declaration of Independence that “all men are created equal” and to the constitutional right to equal protection under the law. Biased law enforcement practices primarily designed to impact certain groups are ineffective and

often result in the destruction of civil liberties for everyone. Racial profiling makes us all less safe, by distracting law enforcement from the pursuit of individuals who pose serious threats to security.

Racial profiling also violates international standards against non-discrimination and undermines U.S. human rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights. Multiple international human rights bodies, including the United Nations Committee on the Elimination of Racial Discrimination (which monitors implementation of the ICERD), have raised concerns about the persistence of racial and ethnic profiling by U.S. law enforcement. In its 2014 concluding observations to the United States, the Committee stated “it remains concerned at the practice of racial profiling of racial or ethnic minorities by law enforcement officials.”<sup>xxxv</sup>

Indeed, discrimination and racial disparities persist at every stage of the U.S. criminal justice system, from policing to trial to sentencing. Police officers, whether federal, state, or local, exercise substantial discretion when determining whether an individual’s behavior is suspicious enough to warrant further investigation.<sup>xxxvi</sup> Profiling is so insidious and pervasive that it can affect people in their homes or at work, or while driving, flying, or walking, causing distrust in our diverse communities. Moreover, tragedies like the recent shooting death of Michael Brown, highlight the reality that military-style response by the local police to demonstrators, and allegations of racially biased law enforcement, are the result of longstanding and corrosive limitations on our nation’s law enforcement policies that allow unlawful profiling to persist across the country.

For more than a decade, we have consistently urged the Department of Justice to revise its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies to clarify ambiguities, close loopholes, and eliminate provisions that allow for any form of discriminatory profiling. Although the 2003 Guidance prohibited the use of race and ethnicity by federal law enforcement as an element of suspicion absent any suspect-specific information, it contained a blanket exception for national and border security. It also did not cover profiling based on religion, national origin, gender, sexual orientation, or gender identity and was not applicable to, nor binding on, state or local law enforcement.<sup>xxxvii</sup>

We applaud Attorney General Holder’s commitment to ending racial profiling and the release of the long-awaited Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity. The revised guidance is a significant step forward from the 2003 Guidance by: including gender, national origin, religion, sexual orientation and gender identity as protected categories in addition to race and ethnicity; removing some of the existing loopholes, including one for national security; requiring enhanced data collection, additional training and oversight measures for federal law enforcement agencies; and applying to state and local authorities participating in federal task forces.

While these are significant advances, we remain troubled by the exceptions that remain for the screening and inspection activities for border and transportation security and U.S. Border Patrol activities in the vicinity of the border and ICE Homeland Security Investigation activities at ports of entry. These excluded activities create continued cause for concern, particularly because Latinos and religious minorities are disproportionately affected by their practices. In addition, we remain troubled by provisions that allow the offensive practice of collecting racial and ethnic information and “mapping” American communities around the country based on stereotypes. These mapping activities have unfairly targeted Arab, Muslim, Sikh, South Asian, and Middle Eastern communities. Moreover, the revised guidance does

not appear to curtail the Federal Bureau of Investigation's authority to engage in unlawful and abusive surveillance of innocent Americans.

Finally, we hope the 2014 Guidance will be used as an example for state and local law enforcement agencies of unbiased law enforcement practices. We remain committed to working with DOJ to ensure greater accountability for state and local police agencies that receive federal funds. It is more critical now than ever to ensure practices that end the ability for state and local agencies to profile individuals or communities and to continue to reward those agencies that adopt best practices.

In addition, we applaud and support federal legislative efforts to prohibit profiling through the End Racial Profiling Act (ERPA). ERPA would prohibit profiling and mandate training for federal law enforcement officials on these issues. As a condition of receiving federal funding, state, local, and Indian tribal law enforcement agencies would be required to collect data on both routine and spontaneous investigatory activities. The Department of Justice would be authorized to provide grants to state and local law enforcement agencies for the development and implementation of best policing practices, such as early warning systems, technology integration, and other management protocols that discourage profiling. Lastly, this important legislation would require the attorney general to issue periodic reports to Congress assessing the nature of any ongoing racial profiling.

Despite bipartisan energy supporting legislation like ERPA, racial profiling continues to be a pervasive and harmful practice that negatively impacts both individuals and communities. We look forward to working with policymakers and this committee to ensure progress of this important legislation.

#### *Police Militarization and Excessive Use of Force*

In addition to a reliance on unlawful profiling, issues of excessive use of force and militarization of law enforcement agencies are of grave concern to communities of color. Policing in the United States has become dangerously militarized, largely through federal programs that arm state and local agencies with weapons for use in law enforcement activities. The police response in Ferguson in the aftermath of the August 9, 2014, shooting death of Michael Brown brought national attention to the issue. The nation watched as peaceful protestors took to the streets to express their angst over Michael Brown's death and police responded with armored vehicles, assault rifles, and other military weapons and equipment. The country soon learned that such highly militarized responses were not limited to Ferguson. In fact, Special Weapons and Tactics (SWAT) teams have long been carrying out the so-called War on Drugs, though most often for low level drug offenses, in militarized fashion,<sup>xxxviii</sup> which disproportionately affects minority communities. Indeed, for drug investigations involving minorities, SWAT teams were twice as likely to force entry into an individual's home using violent tactics and equipment.<sup>xxxix</sup>

The Department of Defense excess property program, known as DoD 1033, provides surplus DoD military equipment to state and local civilian law enforcement agencies for use in counter-narcotics and counter-terrorism operations, and to enhance officer safety.<sup>xi</sup> Since the 1990s, DoD 1033 has provided more than \$5 billion worth of surplus military equipment to state and local agencies at no cost to those agencies, yet at substantial cost to federal taxpayers.<sup>xii</sup> During a September 9, 2014 Senate hearing, we learned that one-third of the equipment being transferred through the program is new.<sup>xiii</sup> Hearing witnesses also revealed a lack of communication and coordination between the Department of Defense and the other agencies providing funding to local agencies for military equipment.<sup>xiiii</sup> Ultimately, the hearing raised more questions than it provided answers.

The White House<sup>xliv</sup> and Congress<sup>xlv</sup> have begun examinations of DOD, DOJ, and DHS programs that transfer excess military equipment and weapons to police departments for counterterrorism and drug interdiction purposes.<sup>xlvi</sup> Specifically, the White House recently asked for federal funds to reform police departments to focus on improving officer training when given access to high-powered weapons.<sup>xlvii</sup> Further, in the recent NDAA reauthorization, the counterterrorism and counter-drug language was removed.<sup>xlviii</sup> These are steps in the right direction, but more work must be done to prevent any future Fergusons from happening.

Additionally, the shooting death of Michael Brown is but one instance in a long list of unexplained deaths that has raised significant questions about misconduct and excessive use of force by police officers. Federal, state, and local police continue to use force, and in particular, more deadly force, disproportionately against individuals and communities of color.<sup>xlix</sup> The National Police Misconduct Statistics and Reporting Project, run by the Cato Institute, reports that there were 4,861 unique reports of police misconduct that involved 6,613 sworn law enforcement officers and 6,826 alleged victims in 2010, the most recent year for which there are data.<sup>l</sup> There were 247 deaths associated with the tracked reports in 2010 and 23.8 percent of the reports involved excessive use of force, followed by sexual misconduct complaints at 9.3 percent.<sup>li</sup> In 2010, states spent an estimated \$346 million on misconduct-related civil judgments and settlements, not including sealed settlements, court costs, and attorney fees.<sup>lii</sup>

Though telling, these data are limited and do not provide a full picture of the scope of the problem. Currently, there is no federal requirement to collect data disaggregated by race on use of force or deaths in custody by state and local police, illustrating the crucial need for systemic reform at the federal level to address these issues.

The administration recently announced several new initiatives to study these issues and provide recommendations for solutions, including the purchasing of body worn cameras for police in the field, a pilot project to improve community police relations and more than 200 million dollars for better training of law enforcement officials. Though a step in the right direction, there is more to be done to restore the confidence that so many have lost in our justice system and to address issues of police misconduct.

Congress must act to collect reliable and comprehensive data disaggregated by race<sup>liii</sup> and use its federal funding authority to require state and local police departments to take necessary steps to reduce the use of deadly force and decrease instances of police misconduct. Further, the administration must continue to launch both criminal and civil rights investigations in cases of misconduct or excessive use of force by state and local police.

### Sentencing

The proliferation of the use of mandatory minimum penalties, particularly at the federal level as a result of the “War on Drugs,” has had a significant impact on minority communities and fueled the country’s incarceration rates. This country has enacted policies that have contributed to an incarceration rate on a scale that exists nowhere else in the world, which, in turn, has resulted in a system that is racially and ethnically discriminatory – and, ultimately, unsustainable.

The economic, societal, and human costs of these policies have been devastating. We’ve destroyed Black and Brown communities all over the nation by locking up millions of Black and Brown men and thus robbing those communities of fathers, brothers, uncles, and sons. And we have accelerated the incarceration rate of Black women, making them the fastest growing segment of the prison population. This has been accomplished through a misguided so-called War on Drugs that has disproportionately

targeted nonviolent low-level drug offenders and others who are not necessarily threats to public safety and cohesion.

As a result, the federal prison system is out of control. The Bureau of Prisons is currently operating at 33 percent over capacity, housing about 219,000 inmates, 50 percent of which are drug offenders, and thereby eating up nearly a quarter of the Justice Department's annual budget.<sup>liv</sup> Perhaps no single factor has contributed more to these rising costs and over population than mandatory minimum sentences, meted out to low-level, non-violent drug offenders.

Beginning in the mid-20<sup>th</sup> century, Congress expanded its use of mandatory minimum penalties by enacting more mandatory minimum penalties generally, broadening its use of mandatory minimums to different offenses, particularly controlled substances, and lengthening the mandatory minimum sentencing.<sup>lv</sup> Mandatory minimums require uniform, automatic, binding prison terms of a particular length for people convicted of certain federal and state crimes without taking circumstances or individualized factors into account.<sup>lvi</sup>

Mandatory minimums were enacted for a variety of reasons. Proponents believed that they would: increase certainty in sentencing; act as a deterrent to potential offenders; warn that specific behaviors would result in harsh punishment; and increase public safety by removing dangerous criminals from our streets. This ideology was further buttressed by the belief by some that significant declines in crime over the last several decades were directly related to federal mandatory minimum penalties. Yet, since that time, we have learned that the imposition of mandatory minimum penalties have decreased certainty in sentencing; have not significantly deterred criminal behavior; have no causal relationship to reductions in crime; have increased the likelihood of recidivism; and have had a direct impact on rising incarceration costs.

Mandatory minimum sentencing systems are especially problematic because they require judges to act on a "one-size-fits-all" mandate for individuals, eliminating any of their judicial discretion and preventing courts from considering all relevant factors, such as culpability and role in the offense, and tailoring the punishment to the crime and offender. There is no space to check and balance the prosecutors' decisions in individual cases. In 2010, the U.S. Sentencing Commission conducted a study that demonstrated the quantitative impact of mandatory minimums. The Sentencing Commission found that in 2010, of the nearly 80,000 cases for which it had information, almost 25 percent of the offenders were sentenced to some sort of mandatory minimum penalty.<sup>lvii</sup> More specifically, 77.4 percent of those convictions that carried a mandatory minimum penalty were for drug trafficking offenses and minorities comprised three-quarters of those serving a mandatory sentence for a federal drug trafficking offense.<sup>lviii</sup> Further, in those instances in which relief from the mandatory minimum penalty occurred, it occurred least often for Black offenders.<sup>lix</sup>

Finally, the study also found racial disparities in the percentage of all federal offenders who were subject to a mandatory minimum penalty sentencing. Black offenders remained subject to the highest rate of any racial group at 65.1 percent of their cases, followed by Whites at 53.5 percent, Hispanics at 44.3 percent, and Other Races at 41.1 percent.<sup>lx</sup> Those who were convicted of their offense were subjected to 139 months, compared to 63 months for those offenders who received relief from their mandatory minimum penalty.<sup>lxi</sup>

As a result of this report, the Commission concluded that "If Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties . . . such penalties should (1) not be

excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.<sup>lxiii</sup> Clearly, what was once thought to be sound criminal justice policy has had the unintended consequence of increasing disparities in the administration of justice and has led to mass incarceration.

Furthermore, the cost to incarcerate individuals for lengthy periods of time has become too great. Since 1980, and the transition from the War on Poverty to the War on Drugs in 1982, the United States has spent about \$540 billion on federal prisons.<sup>lxiii</sup> In 2013, the United States will spend more than 12 times that amount, reaching \$6.8 billion.<sup>lxiv</sup> Mandatory minimums are cost-ineffective. Taxpayers spend almost \$70 billion a year on prisons and jails,<sup>lxv</sup> raising state spending on corrections more than 300 percent over the last two decades.<sup>lxvi</sup> The Department of Justice has cut funding for crime-fighting equipment and personnel, and spends one out of four of its dollars to lock up mostly non-violent offenders.<sup>lxvii</sup>

In a time of such financial crisis, there is simply no rationale to spend millions of dollars on the prison system. Our country must look towards criminal justice models that rely less on punishment and focus more on rehabilitation and prevention. Resources should be funneled to programs that have that been proven to impact criminal behavior by diverting low level non-violent offenders away from prison and to treatment.

We have proven that we can work to correct wrongheaded policies, restore equality, and reduce costs without any significant impact on public safety. As recently as 2010, a bipartisan effort led by Senators Durbin and Sessions resulted in the passage of the Fair Sentencing Act (FSA), which reduced the sentencing disparity between powder and crack cocaine offenses, capping a longterm effort to address the disproportionate impact the sentencing disparity had on African-American defendants. In addition the U.S. Sentencing Commission has worked to address these systemic issues, voting in 2010 to adjust guideline ranges to comport with the FSA and making those new guidelines retroactive, and in 2014, to reduce sentencing guidelines by two levels across all drug offenses, making those changes retroactive, and allowing more than 50,000 incarcerated individuals to be eligible for a reduction in sentence.

Though admirable and a critical step in the right direction, these reforms are just a down payment on larger systemic reform needed to stem the flow of person into the justice system, reduce racial disparities, restore fairness in sentencing and decrease federal spending on incarceration. Progressives and conservatives alike agree, though for different reasons, that our current system is failing and must be reformed.

We applaud recent bipartisan efforts by members of this Subcommittee to make further changes. This Congress, Senators Dick Durbin and Mike Lee introduced The Smarter Sentencing Act of 2014, a narrow and incremental approach to address front end sentencing reform and reduce federal spending on prisons. If enacted, the legislation would narrowly expand the current “safety valve” to offenders who have two criminal history points, but do not pose a public safety risk; reduce the 5, 10, and 20 year mandatory minimums to 2, 5, and 10 years for certain drug offenses; and make the FSA retroactive, providing relief to approximately 8,000 individuals currently serving sentences under the old 100-1 disparity. Further, these proposed changes would have a significant impact on the federal budget, with the Congressional Budget Office estimating the bill would save \$4.36 billion over 10 years and DOJ estimating \$7.4 billion over 10 years.<sup>lxviii</sup>

We have an opportunity to correct our previous mistakes. Restoring certainty and fairness in sentencing and reducing an exploding prison population is both the moral and financially responsible course of

action. Studies have demonstrated that mandatory minimums are inherently unfair and ineffective. They have a disproportionate impact on communities of color, eliminate judicial discretion in the sentencing process, and apply a one size-fits-all approach, resulting in exactly what policymakers intended to guard against—uncertainty in sentencing and no real deterrent in criminal behavior. It is our hope that in the new Congress, policymakers will reach across the aisle to introduce and pass legislation that meets our collective goals and interests.

#### **IV. Hate Crimes**

Prior to the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, the Department of Justice could only investigate hate crimes motivated by the victim's race, color, religion, and national origin when the victim is engaged in a federally protected activity, such as serving on a jury. This law expanded the definition of federal hate crimes to include sexual orientation, gender, gender identity, and disability. It also removed obstacles that had made it difficult for the federal government to adequately prosecute these crimes. The HCPA encourages partnerships between state and federal law enforcement officials to more effectively address hate violence, and provides expanded authority for federal hate crime investigations and prosecutions when local authorities are unwilling or unable to act. It is the most important, comprehensive, and inclusive federal crimes civil rights enforcement law in the past 40 years.

We worked for more than a decade to secure passage of the Hate Crimes Prevention Act. The law stands as a testament to the power of effective and persistent work by a broad group of collaborators. Working closely with our House and Senate champions, including Senator Durbin, and through the leadership of The Leadership Conference, The Anti-Defamation League, and the Human Rights Campaign, we built a powerfully diverse coalition of support. We were able to amass a large, diverse coalition of more than 300 civil rights, professional, civic, educational, and major religious groups, 26 state attorneys general, U.S. Attorney General Eric Holder, former U.S. Attorney General Dick Thornburgh, and virtually every major national law enforcement organization in America, including the International Association of Chiefs of Police and the Police Executive Research Forum, in support of the bill.

None of this came easily, of course. But with our diverse coalition standing side by side the many members of Congress who supported this bill, we were able to celebrate a huge victory at the end of a 12-year fight.

Violence committed against individuals because of their race, religion, ethnicity, national origin, gender, gender identity, or sexual orientation remains a serious problem in the United States. In the more than twenty years since national hate crime reporting began, the number of hate crimes reported has consistently ranged around 6,000 to 7,000 or more annually—that's nearly one bias-motivated criminal act every hour of every day.<sup>lxix</sup>

The fifth anniversary of this important law provides a teachable moment for advocates, the administration, and Congress to promote awareness of the HCPA, to report on the progress our nation has made in preventing hate violence, and to rededicate ourselves and our nation to effectively responding to bias crimes when they occur.

The FBI has been tracking and documenting hate crimes reported from federal, state, and local law enforcement officials since 1991 under the Hate Crime Statistics Act of 1990 (HCSA). Though incomplete, the FBI's annual HCSA report provides a national snapshot of bias-motivated criminal

activity in the United States. Overall, reported hate crimes directed against individuals because of race, religion, sexual orientation, and national origin increased in 2012, as compared to 2011, but this comparison may still be misleading because of under-reporting. Notably, more than a quarter of law enforcement agencies did not provide the FBI with their hate crime statistics.<sup>lxx</sup> Only about 14,500 law enforcement agencies (out of about 18,000) reported in 2012.<sup>lxxi</sup> Almost 90 cities with populations over 100,000 either did not report hate crime data to the FBI or they affirmatively reported zero hate crimes.<sup>lxxii</sup>

The FBI, the Justice Department, and U.S. attorneys should create incentives for participation in the FBI's HCSA data collection program – including national recognition, targeted funding, and mechanisms to promote replication of effective and successful programs. In partnership with civil and human rights groups and civic leaders, Congress and law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.

## **V. Conclusion**

Moving forward, we must continue bipartisan collaboration to provide equal access to the right to vote, reform the justice system, and dispel racial disparities that are pervasive throughout our country. Half a century ago, civil rights activists fought to fulfill the promise of the Emancipation Proclamation from a century before. Fifty years later, we still struggle to turn the language of landmark civil rights legislation into living realities for all of our people. Legislation like the Voting Rights Amendment Act, the Democracy Restoration Act, the End Racial Profiling Act, and the Smarter Sentencing Act represent important steps toward addressing the deep injustices that plague our society.

However, these efforts alone are insufficient to fully address the depths of systemic issues of racial bias and discrimination. Federal enforcement of these policies has been slow and racial inequities continue to create barriers that stifle full participation in our democracy. Moving forward, we must continue to foster bipartisan collaboration to protect and advance civil and human rights for all Americans. Again, thank you for convening this hearing and for the opportunity for The Leadership Conference to express its views on the state of civil and human rights in the United States.

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<sup>i</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>ii</sup> 152 CONG. REC. S8372 (2006).

<sup>iii</sup> 42 U.S.C. § 1973 (2006).

<sup>iv</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2636 (2013).

<sup>v</sup> Wendy Weiser, *How much of a difference did new voting restrictions make in yesterday's close races?* BRENNAN CENTER FOR JUSTICE, Nov. 5, 2014.

<sup>vi</sup> *Id.*

<sup>vii</sup> Ryan Reilly, *Harsh Texas voter ID law 'immediately' takes effect after Voting Rights Act ruling*, HUFF. POST, June 25, 2013.

<sup>viii</sup> Wendy Weiser, *How much of a difference did new voting restrictions make in yesterday's close races?* BRENNAN CENTER FOR JUSTICE, Nov. 5, 2014.

<sup>ix</sup> *Id.*

<sup>x</sup> *Id.*

<sup>xi</sup> Erwin Chemerinsky, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 901 (4th ed. 2011).

<sup>xii</sup> Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 217 (2011).

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- <sup>xiii</sup> Angela Behrens, *Voting--Not quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).
- <sup>xiv</sup> U.S. CONST. amend. XV, § 1.
- <sup>xv</sup> E. Ann Carson & Daniela Golinelli, *Prisoners in 2012-Advance Counts*, BUREAU OF JUSTICE STATISTICS (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>; Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States*, 2010 (July 2012), THE SENTENCING PROJECT, [http://www.sentencingproject.org/doc/publicationsfd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://www.sentencingproject.org/doc/publicationsfd_State_Level_Estimates_of_Felon_Disen_2010.pdf).
- <sup>xvi</sup> *Id.*
- <sup>xvii</sup> *Id.*
- <sup>xviii</sup> E. Ann Carson & Daniela Golinelli, *Prisoners in 2012-Advance Counts*, BUREAU OF JUSTICE STATISTICS (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>; Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States*, 2010 (July 2012), THE SENTENCING PROJECT, [http://www.sentencingproject.org/doc/publicationsfd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://www.sentencingproject.org/doc/publicationsfd_State_Level_Estimates_of_Felon_Disen_2010.pdf).
- <sup>xix</sup> Uggen et al., *supra* note 1-2.
- <sup>xx</sup> *Id.* at 17.
- <sup>xxi</sup> E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUSTICE STATISTICS, 8 (Sept. 30, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.
- <sup>xxii</sup> Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, 71 (2006).
- <sup>xxiii</sup> The Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices on Minority Civic Participation in the United States (2009); Our Broken Voting System and How to Repair It: The 2012 Election Protection Report, <http://www.866ourvote.org/newsroom/publications/the-2012-election-protection-report-ourbroken-voting-system-and-how-to-repair-it>).
- <sup>xxiv</sup> *Id.*
- <sup>xxv</sup> *Id.*
- <sup>xxvi</sup> Kathleen Macrae, *Voting Rights are due to All*, ACLU, March 9, 2012, <http://www.aclu-de.org/news/voting-rights-are-due-to-all/2012/03/09/>.
- <sup>xxvii</sup> ACLU. *Voter Disenfranchisement*. <http://www.aclu.org/voting-rights/voter-disfranchisement>.
- <sup>xxviii</sup> Florida Parole Commission. *Status Update: Restoration of Civil Rights Cases Granted 2009 and 2010*. Presented July 1, 2011. [http://thecrimereport.s3.amazonaws.com/2/4a/4/1150/blog\\_mansfield\\_florida\\_parole\\_commission\\_report.pdf](http://thecrimereport.s3.amazonaws.com/2/4a/4/1150/blog_mansfield_florida_parole_commission_report.pdf).
- <sup>xxix</sup> *Id.*
- <sup>xxx</sup> The Leadership Conference on Civil and Human Rights, *Felony Disenfranchisement*, available at <http://www.civilrights.org/voting-rights/felony-disenfranchisement/>.
- <sup>xxxi</sup> Adam Goldman, *Eric Holder makes case for felons to get voting rights back*, WASH. POST., Feb. 11, 2014.
- <sup>xxxii</sup> E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUSTICE STATISTICS, 1 (Sept. 30, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.
- <sup>xxxiii</sup> *Id.* at 8.
- <sup>xxxiv</sup> See, for example, Anti-Defamation League, *Privilege, Discrimination, and Racial Disparities in the Criminal Justice System*, available at: <http://www.adl.org/assets/pdf/education-outreach/privilege-discrimination-and-racial-disparities-in-the-criminal-justice-system.pdf>.
- <sup>xxxv</sup> U.N. Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 8, U.N. Doc. CERD/C/USA/CO/7-9 (August 2014).
- <sup>xxxvi</sup> Leadership Conference Education Fund, *American Dream? American Reality!: A Report on Race, Ethnicity, and the Law in the United States*, 7, ¶ 35 (January 2008) (hereafter 2008 American Dream Report).
- <sup>xxxvii</sup> *Id.* at ¶ 39 (noting that religious profiling, for example, directly violates ICERD recommendations).
- <sup>xxxviii</sup> See ACLU, *War Comes Home: The Excessive Militarization of American Policing*, June 23, 2014, available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>.
- <sup>xxxix</sup> *Id.*
- <sup>xl</sup> Def. Logistics Agency, *About the 1033 Program*, <http://www.dispositionservices.dla.mil/leso/Pages/default.aspx>.

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- <sup>xli</sup> Def. Logistics Agency, *About the 1033 Program*, <http://www.dispositionsservices.dla.mil/leso/Pages/default.aspx>.
- <sup>xlii</sup> Tim Devaney, *Senators blast DOD program that 'militarized police,'* THE HILL, Sept. 9, 2014.
- <sup>xliii</sup> Niraj Chokshi & Sarah Larimer, *Ferguson-style militarization goes on trial in the Senate*, WASH. POST, Sept. 9, 2014.
- <sup>xliiv</sup> Steve Holland & Andrea Shalal, *Obama orders review of U.S. police use of military hardware*, REUTERS, Aug. 23, 2014.
- <sup>xli v</sup> Comm. on Homeland Sec. and Gov't Affairs, *Oversight of Federal Programs for Equipping State and Local Law Enforcement*, <http://www.hsgac.senate.gov/hearings/oversight-of-federal-programs-for-equipping-state-and-local-law-enforcement>.
- <sup>xli vi</sup> The American Civil Liberties Union had published a detailed report on the issue, with recommendation, *War Comes Home: The Excessive Militarization of American Policing*, in June, 2014: <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-re11.pdf>. The report also asserts that the "War on Drugs" has been disproportionately waged against people of color, often including an unnecessary deployment of police SWAT teams.
- <sup>xli vii</sup> Greg Jaffe, *In aftermath of Ferguson, White House puts new checks on sale of military gear to police*, WASH. POST, Dec. 1, 2014.
- <sup>xli viii</sup> Nat'l Def. Authorization Act of 2012, H.R. 1540, 112th Cong. § 2 (2011).
- <sup>xli x</sup> According to the U.S. Bureau of Justice Statistics, between 2003 and 2009, at least 4,831 people died in the course of being arrested by local police. Of the deaths classified as law enforcement "homicides," 2,876 deaths occurred of which 1,643 or 57.1 percent of the people who died were people of color. *Victor E. Kappeler, Being Arrested can be Hazardous to your Health, Especially if you are a Person of Color*, E. Ky. Univ. Police Studies Online (Feb. 18, 2014), <http://plsonline.eku.edu/insideloook/being-arrested-can-be-hazardous-your-health-especially-if-you-are-person-color>.
- <sup>1</sup> Nat'l Police Misconduct Reporting Project, *2010 Annual Report*, available at <http://www.policemisconduct.net/statistics/2010-annual-report/> (last accessed June 11, 2014) [hereinafter NPMRP].
- <sup>ii</sup> *Id.*
- <sup>iii</sup> *Id.*
- <sup>iiii</sup> The National Police Misconduct Statistics and Reporting Project, run by the Cato Institute, collects some data on police misconduct, but does not contain data on the race of the victim or perpetrator.
- <sup>lv</sup> E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUSTICE STATISTICS, 16 (Sept. 30, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.
- <sup>lv</sup> Henderson, Wade. Statement to the Senate Committee on the Judiciary. *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences*, Hearing, Sept. 18, 2013. available at: <http://www.civilrights.org/advocacy/testimony/henderson-mandatory-minimums.html>.
- <sup>lvi</sup> *Id.*
- <sup>lvii</sup> U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_PDF/Executive\\_Summary.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf).
- <sup>lviii</sup> *Id.*
- <sup>lix</sup> *Id.*
- <sup>lx</sup> *Id.*
- <sup>lxi</sup> Henderson, Wade. Statement to the Senate Committee on the Judiciary. *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences*, Hearing, Sept. 18, 2013. available at: <http://www.civilrights.org/advocacy/testimony/henderson-mandatory-minimums.html>.
- <sup>lxii</sup> U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011. Retrieved September 17, 2013, available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_PDF/Executive\\_Summary.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf).
- <sup>lxiii</sup> Families Against Mandatory Minimums. *The Facts* (with Sources/References). Retrieved Sept. 17, 2013, available at <http://fammm.org/the-facts-with-sourcesreferences/>.
- <sup>lxiv</sup> *Id.*

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<sup>lxv</sup> Families Against Mandatory Minimums. *The Cost*. Retrieved Sept. 17, 2013, available at <http://famm.org/the-facts/#thecost>.

<sup>lxvi</sup> *Id.*

<sup>lxvii</sup> *Id.*

<sup>lxviii</sup> Christina Mulka & Emily Long, *Durbin & Lee: According to CBO, Smarter Sentencing Bill would reduce prison costs by more than \$4 billion*, DICK DURBIN PRESS RELEASE (Sept. 15, 2014).

<sup>lxix</sup> 2012 Hate Crime Statistics Act Report, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012> and 2012 Hate Crime Addendum, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012-addendum>.

<sup>lxx</sup> Fed. Bureau of Investigation, *Hate Crime Zero Data Submitted* (2012), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012-addendum/table-14-addendum>.

<sup>lxxi</sup> 2012 Hate Crime Statistics Act Report, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012> and 2012 Hate Crime Addendum, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012-addendum>.

<sup>lxxii</sup> *Id.*



**Written Testimony of the  
American Civil Liberties Union**

**Laura W. Murphy**  
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For a Hearing on

**“The State of Civil and Human Rights in the United States”**

Submitted to the

**U.S. Senate Judiciary Committee  
Subcommittee on the Constitution, Civil Rights, and Human Rights**

December 9, 2014

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 up 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, gender identity, sexual orientation, disability, or national origin.

This written testimony provides a broad overview of the state of civil and human rights in the United States. While the ACLU advocates at the federal and state level, and litigates across a wide spectrum of civil and human rights and civil liberties issues, including immigration, racial disparities in education, employment discrimination, disability rights, privacy, and religious liberty, just to name a few of the very important issues we work to address, my statement today will be limited to the issues most at the heart of the Subcommittee's hearing today on the racial disparities that continue to exist in our voting and criminal justice systems.

We are standing at a crossroads in America right now. There is no doubt that we have made progress towards racial justice and equality as a nation. But one must only look to the crises of Ferguson, mass incarceration, over-policing, racial profiling, the stripping of protections for minority voters, and our dark history that has led to one in 13 African Americans today without the right to vote, to see that there is still much to achieve. We are also standing at a crossroads at this time of transition in Congress as well. We are at a pivotal moment where we need to safeguard any rollbacks of our civil rights laws by the courts and legislatures, while also seizing the momentum brought about by crises to push forward bipartisan reforms that proactively protect the civil rights and human rights of millions of Americans. More specifically, this statement will discuss voting rights, sentencing reform, solitary confinement, racial profiling, the militarization of police, law enforcement practices targeting American Muslim communities, and non-discrimination protections for LGBT Americans. I will provide recommendations that I urge the next Congress to act upon.

## **I. VOTING RIGHTS**

Voting is a fundamental right and a cornerstone of our democracy. As the Supreme Court has said, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."<sup>1</sup> All the other rights we discuss in this testimony are dependent on the ability of our citizens to participate in democracy. Voting barriers, and those disproportionately impacting our minority citizens, are at the heart of so many areas of concern to this Subcommittee.

### **A. Voting Rights Act**

#### **i. History of the Voting Rights Act**

Last year, the U.S. Supreme Court in *Shelby County v. Holder* severely limited critical protections of the Voting Rights Act of 1965 (VRA) that had protected minority and language minority voters for decades. On June 25, 2013, the Court struck down Section 4(b) of the VRA -- the "coverage formula" -- one of the Act's key provisions.<sup>2</sup> For decades under this provision, certain states and localities with a

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<sup>1</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>2</sup> *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013).

history of racial discrimination in voting had to submit all of their voting changes to the federal government (either the Department of Justice (“DOJ”) or the D.C. District Court) for approval before they could be implemented, a process known as Section 5 “preclearance.” The coverage formula determined which jurisdictions fell under the government’s purview. In *Shelby*, the Court declared the coverage formula unconstitutional.

Very significant progress has been made as a result of the passage and renewal of the Voting Rights Act. However, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language still deny many Americans their basic democratic rights. Although such discrimination today is often more subtle than it used to be, it still exists and must still be remedied. Before the Supreme Court struck down the coverage formula, Section 5 was actively combatting discriminatory barriers and deterring discriminatory voting changes.<sup>3</sup> Section 5 has given tangible protections to millions of voters since 1965.<sup>4</sup> Its absence, through the loss of Section 4(b), has made combatting discrimination and disfranchisement all the more difficult. Emboldened by *Shelby* and nearly fifty years after the passage of the VRA, many states and localities continue to impose restrictions on access to the polls.

November 2014 was the first election in 50 years in which voters of color did not have full protections at the poll. This past year alone, new discriminatory voting laws were enacted or proposed across the country. In 29 states, at least 83 restrictive voting bills have been introduced.<sup>5</sup> In 14 states, 2014 was the first major federal election with new voting restrictions in place.<sup>6</sup> If not for the work of the ACLU and other civil rights organizations, more states, including Pennsylvania, Wisconsin, and Arkansas would have had discriminatory voting laws in effect for the 2014 election.<sup>7</sup> On Election Day, there were widespread reports of voters having difficulty casting a ballot across the country due to new barriers and the lack of protections following the loss of Section 5 protections.<sup>8</sup>

## ii. Legislative Solution: Voting Rights Amendment Act

In January 2014, a bipartisan group of Members of Congress, led by Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and Representative Jim Sensenbrenner (D-WI), introduced the Voting Rights Amendment Act of 2014.<sup>9</sup> The bill responds directly to *Shelby*; it seeks to go beyond a static, geographically based statute and instead is flexible and forward-looking, capturing jurisdictions that have recently engaged in acts of discrimination. While the bill does not restore everything that was lost in the *Shelby* decision, when viewed holistically, this bill would give the public the opportunity to learn about

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<sup>3</sup> Deborah J. Vagins & Laughlin McDonald, *Supreme Court Put a Dagger in the Heart of the Voting Rights Act*, <http://www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act> (July 2, 2013).

<sup>4</sup> CAROLINE FREDRICKSON AND DEBORAH J. VAGINS, PROMISES TO KEEP: THE IMPACT OF THE VOTING RIGHTS ACT IN 2006, ACLU (March 2006), available at <http://www.aclu.org/voting-rights/promises-keep-impact-voting-rights-act-2006>.

<sup>5</sup> WENDY WEISER & ERIK OPSAL, BRENNAN CENTER FOR JUSTICE, THE STATE OF VOTING IN 2014 (2014), available at [http://www.brennancenter.org/sites/default/files/analysis/State\\_of\\_Voting\\_2014.pdf](http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf).

<sup>6</sup> *Id.* at 4. The Arkansas law was blocked by the courts prior to implementation. The ACLU successfully blocked the implementation of Wisconsin’s voter ID law, but other restrictions went into effect. See Dale Ho, *This Election Season, the ACLU Won Three of Five Against the Vote Suppressors*, <https://www.aclu.org/blog/voting-rights/election-season-aclu-won-three-five-against-vote-suppressors> (Nov. 3, 2014).

<sup>7</sup> Dale Ho, *This Election Season, the ACLU Won Three of Five Against the Vote Suppressors*, <https://www.aclu.org/blog/voting-rights/election-season-aclu-won-three-five-against-vote-suppressors> (Nov. 3, 2014).

<sup>8</sup> Press Release, Election Protection, Election Day 2014: Democracy Should Not Be This Hard (Nov. 4, 2014), available at <http://www.866ourvote.org/newsroom/releases/election-day-2014-democracy-should-not-be-this-hard>.

<sup>9</sup> Voting Rights Amendment Act of 2014, H.R.3899/S. 1945, 113<sup>th</sup> Cong. (2014).

discriminatory voting changes and stop them, through different sets of tools, before they could disfranchise voters. The bill would still require those jurisdictions with the worst, most recent records of discrimination to be subjected to preclearance, while also providing new nationwide tools to ensure an effective response to race discrimination wherever it occurs. In light of the new modest coverage formula, these other nationwide protections are critical in fulfilling the Voting Rights Act mandate of eradicating race discrimination in voting for all citizens.<sup>10</sup>

The Voting Rights Act has enjoyed a long history of bipartisan support in Congress and in multiple Administrations.<sup>11</sup> Its work of preventing racially discriminatory changes to election laws must continue. Congressional action must be taken before any more elections take place in order restore and modernize the VRA's critical protections.

## **B. Restoration of Voting Rights**

### **i. History of Criminal Disfranchisement**

In addition to the new barriers many citizens are facing due to the loss of the Voting Rights Act's full strength, there are also currently millions of Americans who have had their right to vote revoked because of a past criminal conviction. The Supreme Court has said the right to vote is "preservative of all rights;"<sup>12</sup> however, upon release from incarceration, these citizens work, pay taxes, live in our communities and bring up families, yet they are without a voice in all the other laws that impact them. An estimated 5.85 million citizens cannot vote as a result of criminal convictions, often for minor, low-level crimes and even some misdemeanors; nearly 4.4 million of those citizens have been released from prison and are living and working in communities across the nation.<sup>13</sup> One court has noted that "[d]isenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship."<sup>14</sup>

Worse even still, criminal disfranchisement laws proliferated during the Jim Crow era, and were enacted alongside poll taxes and literacy tests with the intent of keeping African Americans from voting.<sup>15</sup> The racial impact of these laws continues today. Nationwide, one in 13 African Americans of voting age has lost the right to vote – a rate four times the national average.<sup>16</sup> Latino citizens are also impacted

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<sup>10</sup> For a detailed analysis of the legislation see *The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to Shelby County v. Holder Hearing on S. 1945 Before the S. Comm on the Judiciary*, 113th Cong. (2014)(American Civil Liberties Union statement for the record), available at <https://www.aclu.org/voting-rights/aclu-statement-senate-judiciary-hearing-voting-rights-amendment-act-s-1945-updating>.

<sup>11</sup> Deborah J. Vagins, *The Most Conservative Principle in American Politics*, HUFFINGTON POST, June 25, 2014, available at [http://www.huffingtonpost.com/deborah-j-vagins/the-most-conservative-pri\\_b\\_5530104.html](http://www.huffingtonpost.com/deborah-j-vagins/the-most-conservative-pri_b_5530104.html).

<sup>12</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

<sup>13</sup> See CHRISTOPHER UGGEN, SARAH SHANNON, & JEFF MANZA, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (2012), available at [http://sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf). See e.g., Nina Liss-Schultz, *The Obama Administration Wants 6 Million Americans to Get Back Their Right to Vote. Here's How*, MOTHER JONES (Feb. 13, 2014), available at <http://www.motherjones.com/mojo/2014/02/felony-convictions-voting-rights-black-american-african-disenfranchisement> (citing ProCon.org, State Felon Voting Laws, <http://felonvoting.procon.org/view.resource.php?resourceID=286#misdemeanor> (last visited Dec. 5, 2014)).

<sup>14</sup> *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

<sup>15</sup> See DEBORAH J. VAGINS AND ERIKA WOOD, THE DEMOCRACY RESTORATION ACT: ADDRESSING A CENTURIES-OLD INJUSTICE 3-5 (Mar. 2010), available at <http://www.acslaw.org/files/ACS%20Issue%20Brief%20Vagins%20and%20Wood.pdf>.

<sup>16</sup> JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER, 2 (JUNE 2014), available at [http://sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

because they are disproportionately over-represented in the criminal justice system. Over the last few decades, the number of disfranchised citizens has been increasing because of an incarceration boom fueled by mandatory minimum sentences and the “war on drugs.” In turn, this has impacted the families of those who are disfranchised and the communities in which they reside by reducing their collective political voice.

Any democracy is stronger with broad civic engagement and election participation. The United States, however, is one of the few western democratic nations that excludes such large numbers of people from the democratic process. In fact, almost half of European countries preserve the right to vote for all incarcerated persons and a smaller number of countries impose a time limited ban on voting for a few categories of prisoners.<sup>17</sup>

By continuing to deny citizens the right to vote based on a past criminal conviction, the government is endorsing a system that expects these citizens to contribute to the community, but denies them participation in our democracy. Not only is disfranchising millions of citizens undemocratic, but it is counterproductive to the rehabilitation and reintegration into society of those released from prison.

Some progress has been made at both the federal and state levels, including Attorney General Eric Holder’s recent statements in support of the easing of restoration requirements,<sup>18</sup> and states like Virginia and Kentucky pursuing reforms. However, these reforms do not go far enough to address the disfranchisement of millions of Americans following a criminal conviction.

Currently, individuals with criminal convictions are subject to a patchwork of state laws governing their right to vote. The scope and severity of these laws varies widely, ranging from the uninterrupted right to vote to lifetime disfranchisement, despite completion of one’s full sentence.<sup>19</sup> Although voting rights restoration is possible in many states, and some recent progress has been made,<sup>20</sup> it is frequently a difficult process that varies widely across states.<sup>21</sup> In addition, individuals with criminal convictions may lack information about the status of their voting rights or how to restore them. Confusion among election officials about state law contributes to the disfranchisement of even eligible voters.<sup>22</sup> Nationwide reform is necessary to provide a uniform standard across the country.

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<sup>17</sup> LALEH ISPAHANI, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES* 3 (2006), available at <http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>.

<sup>18</sup> In February 2014, Attorney General Holder called upon state leaders and elected officials to pass reforms to restore voting rights. Although the calls for reforms are more limited than those provided in the Democracy Restoration Act, they are welcome statements from the DOJ. Attorney General Eric Holder, Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), available at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html>.

<sup>19</sup> Three states (Florida, Iowa, and Kentucky) permanently disfranchise citizens with felony convictions unless the state approves individual rights restoration; two states (Maine and Vermont) allow all persons with felony convictions to vote, even while incarcerated; all other states fall somewhere in between. See Voting Rights for People with Criminal Records, <http://www.aclu.org/map-state-felony-disfranchisement-laws> (last visited Dec. 4, 2014) (contains a map detailing state laws).

<sup>20</sup> Recently, bipartisan lawmakers in states with very restrictive laws, like Virginia and Kentucky, have made reforms and considered changes. See Letter from Robert F. McDonnell, Governor of the Commonwealth of Virginia, to the Honorable Janet V. Kelly, Secretary of the Commonwealth (May 29, 2013), available at <https://commonwealth.virginia.gov/media/1803/2013GovernorLettertoSOC.pdf>. See also Press Release, Senator Rand Paul, Sen. Paul Testifies in Support of Restoring Voting Rights; Constitutional Amendment Passes Kentucky Senate (Feb. 19, 2014), available at [http://www.paul.senate.gov/?p=press\\_release&id=1109](http://www.paul.senate.gov/?p=press_release&id=1109).

<sup>21</sup> *ACLU Factsheet The Democracy Restoration Act of 2014*, ACLU (July 22, 2014), available at <https://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2014>.

<sup>22</sup> ERIKA WOOD & RACHEL BLOOM, *DE FACTO DISENFRANCHISEMENT* 1 (2008) at 2, available at <http://www.aclu.org/votingrights/exoffenders/36992pub20081001.html>.

## ii. Legislative Solution: The Democracy Restoration Act<sup>23</sup>

Congressional action is needed to establish a standard that restores voting rights in federal elections to the millions of Americans who are living in the community, but continue to be denied their ability to fully participate in civic life.

In April 2014, Senator Ben Cardin (D-MD) and Representative John Conyers (D-MI) introduced the Democracy Restoration Act of 2014 (DRA).<sup>24</sup> The legislation would restore voting rights in federal elections to the 4.4 million Americans who have been released from prison and are living in the community and ensure that probationers never lose their right to vote in federal elections. In addition, the bill improves access to information by requiring notification about an individual's right to vote in federal elections when they are leaving prison, sentenced to probation, or convicted of a misdemeanor. Building on the momentum of state reforms, the first ever bipartisan congressional briefing on voting rights restoration was held in July 2014 featuring Senators Ben Cardin and Rand Paul (R-KY) discussing their respective bills and their shared interest in eliminating this draconian problem.<sup>25</sup>

Passage of the Democracy Restoration Act would create a uniform standard in federal elections and strengthen our democracy by creating a broader and more just base of voter participation. The legislation has also been endorsed and is strongly supported by the law enforcement community. Their continued support for passage of this bill is based on their experience that such a law would benefit the public safety by encouraging participation in civic life, assisting reintegration, reducing recidivism, and rebuilding ties to the community.<sup>26</sup> The DRA would improve election administration by streamlining registration issues and eliminating the opportunity for erroneous purges of eligible voters, and would eliminate the confusion about who is eligible to vote. And perhaps most importantly, it would put an end to this form of racial injustice.

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<sup>23</sup> *ACLU Factsheet The Democracy Restoration Act of 2014*, ACLU (July 22, 2014), available at <https://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2014>.

<sup>24</sup> Democracy Restoration Act of 2014, H.R. 4459/S. 2235, 113th Cong. (2014). Senator Rand Paul has introduced similar legislation to restore voting rights, but the Democracy Restoration Act adopts a more expansive approach. Civil Rights Voting Restoration Act of 2014, S.2550, 113th Cong. (2014).

<sup>25</sup> Press Release, Senators Ben Cardin (D-MD.) and Rand Paul (R-KY), Cardin, Paul Unite for Discussion of How Best to Restore Voting Rights for Millions of Americans (July 22, 2014), available at <http://www.cardin.senate.gov/newsroom/press/release/cardin-paul-unite-for-discussion-of-how-best-to-restore-voting-rights-for-millions-of-americans>.

<sup>26</sup> See Letter in Support of The Democracy Restoration Act (S.2235/H.R.445) from Law Enforcement and Criminal Justice Organizations, to Member of Congress (July 22, 2014), available at <https://www.aclu.org/racial-justice-voting-rights/law-enforcement-sign-letter-support-democracy-restoration-act-2014>. See also Letter in Support of The Democracy Restoration Act (S.2235/H.R.445) from Religious and Faith-Based Organizations, to Member of Congress (July 22, 2014), available at <https://www.aclu.org/racial-justice-voting-rights/religious-and-faith-based-sign-letter-support-democracy-restoration-a-0>; Letter in Support of The Democracy Restoration Act (S.2235/H.R.445) from Civil Rights and Reform Organizations, to Member of Congress (July 22, 2014), available at <https://www.aclu.org/racial-justice-voting-rights/civil-rights-coalition-letter-support-democracy-restoration-act-2014>.

## Recommendations

Congress should:

- Pass the Voting Rights Amendment Act
- Pass the Democracy Restoration Act

## II. SENTENCING REFORM

Voter disfranchisement is just one byproduct of our nation's flawed justice system. Fueling the problem, in the 1980s, Congress and most state legislatures enacted laws requiring prison sentences of 5, 10, and 20 years or longer for drug offenses, violent offenses, and "career criminals."<sup>27</sup> We now know that many of these policies and laws have resulted in an overincarceration crisis in both the federal and state criminal justice systems. Recent research has concluded that the main drivers of the growth in incarceration over the past 30 years have been changes in policies related to sentencing and punishment in this country.<sup>28</sup> One of the worst, most racially biased policies over the last 40 years has been "war on drugs." We've spent trillions of dollars on enforcing senseless drug laws and drug use has not declined. However, millions of people – to a disproportionate degree poor people and people of color – have increasingly been swept into federal and state jails and prisons as well as into a net of correctional control including probation and parole. This type of control under the auspices of the criminal justice system is difficult to escape and ruins lives.

One result of the "war on drugs" is that the cost of incarceration in the federal system accounts for nearly a third of the Department of Justice's discretionary budget. Federal incarceration has become one of our nation's biggest expenditures, swallowing the budget of federal law enforcement.<sup>29</sup> The Federal Bureau of Prisons (BOP) is at least 30 percent over capacity, and the safety of both prison guards and inmates is at risk. For the past two years, the Department of Justice's ("DOJ") Inspector General identified the growing crisis of overcrowding in the federal prison system as one of DOJ's top challenges.<sup>30</sup>

People convicted of drug offenses continue to make up almost 49 percent of the federal prison population, despite increases in the number of immigration and weapons offenders.<sup>31</sup> The increased time

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<sup>27</sup> COMM. ON LAW AND JUSTICE, NAT'L ACAD. OF SCI'S, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 3 (2014) [hereinafter NATIONAL ACADEMY REPORT], available at [http://www.nap.edu/catalog.php?record\\_id=18613](http://www.nap.edu/catalog.php?record_id=18613).

<sup>28</sup> *Id.*; KAMALA MALLIK-KANE, BARBARA PARTHASARATHY & WILLIAM ADAMS, URBAN INSTITUTE, *EXAMINING GROWTH IN THE FEDERAL PRISON POPULATION, 1998 TO 2010*, at 3 (2012) [hereinafter KAMALA URBAN INSTITUTE REPORT], available at <http://www.urban.org/uploadedpdf/412720-examining-growth-in-the-federal-prison-population.pdf>; NATHAN JAMES, CONG. RESEARCH SERV., R42937, *THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS* 9 (Jan. 22, 2013) [hereinafter CRS REPORT]; U.S. SENTENCING COMM'N, *SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM* (hereinafter USSC 2011 Mandatory Minimum Report) (October 2011).

<sup>29</sup> NANCY LA VIGNE & JULIE SAMUELS, URBAN INSTITUTE, *THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 1-2* (2012), available at <http://www.urban.org/UploadedPDF/412693-The-Growth-and-Increasing-Cost-of-the-Federal-Prison-System.pdf>.

<sup>30</sup> Horowitz, Michael, *Top Management and Performance Challenges Facing the Department of Justice*, Memo to Attorney General and Deputy Attorney General (November 10, 2014).

<sup>31</sup> *Quick Facts about the Bureau of Prisons*, FEDERAL BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last visited Dec. 4, 2014).

served by people who commit drug crimes accounted for almost one-third of the total federal prison population growth between 1998 and 2010.<sup>32</sup> It costs more than \$29,000 a year to house just one federal inmate, almost four times the average yearly cost of tuition at a public university.<sup>33</sup>

The costs have far more consequences than simply the fiscal expenditures necessary to incarcerate 25 percent of the world's prisoners in a country with just 5 percent of the world's population.<sup>34</sup> Like many of the issues discussed in this testimony, the true costs are human lives and particularly generations of young black and Latino men who serve long prison sentences and are lost to their families and communities.

That is why organizations across the political spectrum<sup>35</sup> support bipartisan sentencing reform legislation such as S.1410, the Smarter Sentencing Act, which was introduced by Constitution Subcommittee Chairman Dick Durbin (D-IL) and Senator Mike Lee (R-UT) and cosponsored by Chairman Leahy and Constitution Subcommittee Ranking Member Ted Cruz (R-TX). The Smarter Sentencing Act would address the ongoing crisis in the BOP. What groups such as Americans for Tax Reform, the Faith & Freedom Coalition, Heritage Action for America, and the American Federation of Government Employees (BOP prison guards union) recognize is that this current crisis in the Bureau of Prisons is unsustainable. Also, the ACLU along with the Leadership Conference on Civil and Human Rights, NAACP, NAACP Legal Defense Fund, Lawyers Committee for Civil Rights under Law, National Urban League, National Action Network, and National Council of La Raza all strongly support the Smarter Sentencing Act. With African Americans making up 37 percent and Hispanics 34 percent of the BOP population, civil rights groups think the time is now to address the federal sentencing policies that are resulting in so many people of color being incarcerated. This legislation is a top priority for many of these groups.<sup>36</sup>

As part of the Anti-Drug Abuse Act of 1986, Congress ignored empirical evidence and created a 100-to-1 disparity between the amounts of crack and powder cocaine required to trigger certain mandatory minimum sentences. In 2010, in recognition of the unfairness of the sentencing disparity, Congress passed the Fair Sentencing Act (FSA), bipartisan legislation authored by Chairman Durbin and Senator Jeff Sessions (R-AL), which reduced the disparity between the amounts of crack and powder cocaine required to trigger certain mandatory minimum sentences from 100-to-1 to 18-to-1. Unfortunately, over 8,800 people are still serving extreme sentences for crack cocaine related offenses because the FSA was not retroactive.<sup>37</sup>

Criminal sentences should be based on the nature of the offense and on relevant personal characteristics and circumstances of the defendant. Thus, the ACLU opposes mandatory sentences or any other sentencing scheme that unduly restricts a judge's ability to engage in individualized sentencing.

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<sup>32</sup> KAMALA URBAN INSTITUTE REPORT *supra* note 28.

<sup>33</sup> *Annual Determination of Average Cost of Incarceration*, FEDERAL BUREAU OF PRISONS, <https://federalregister.gov/a/2014-10859> (May 12, 2014).

<sup>34</sup> NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES 2* (2014).

<sup>35</sup> Americans for Tax Reform, the Faith & Freedom Coalition, Heritage Action for America, Justice Fellowship/Prison Fellowship Ministries, the National Association of Evangelicals and the American Federation of Government Employees (BOP Prison Guards) and the ACLU, Leadership Conference on Civil and Human Rights, NAACP, NAACP LDF have come together to support sentencing reform and the Smarter Sentencing Act.

<sup>36</sup> *Quick Facts about the Bureau of Prisons*, FEDERAL BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last visited Dec. 4, 2014).

<sup>37</sup> *Waiting on a Fix*, AL JAZEERA AMERICA (Mar. 24, 2014), <http://projects.aljazeera.com/2014/crack-cocaine/>.

Unless the number of people who are subjected to long and unfair sentences is addressed, any effort to reform the federal criminal justice system will have little to no effect on the current crisis in the BOP. Congress simply must make sentencing reform a priority.

### **Recommendations**

- Congress should enact S.1410 and H.R. 3382, the Smarter Sentencing Act, legislation that would reduce the length of some drug mandatory minimum sentences, allow judges to use more discretion to determine sentences for low-level drug offenses, and apply the Fair Sentencing Act (the law that reduced the crack-powder cocaine sentencing disparity) to those currently serving sentences for these offenses.

### **III. SOLITARY CONFINEMENT**

Another indirect result of overincarceration is that for the last two decades, corrections systems have increasingly relied on solitary confinement, even building entire “supermax” prisons, where prisoners are held in extreme isolation, often for years or even decades. Although supermax prisons were rare in the United States before the 1990s, today 44 states and the federal government have supermax units or facilities, housing at least 25,000 people.<sup>38</sup> But this figure does not reflect the total number of prisoners held in solitary confinement in the United States on any given day. Using data from the Bureau of Justice Statistics, researchers estimated in 2011 that over 80,000 prisoners are held in “restricted housing,” including administrative segregation, disciplinary segregation and protective custody—all forms of housing involving substantial social isolation.<sup>39</sup>

Solitary confinement is widely recognized as extremely harmful. Indeed, people held in solitary confinement experience a variety of negative physiological and psychological reactions: hypersensitivity to stimuli;<sup>40</sup> perceptual distortions and hallucinations;<sup>41</sup> increased anxiety and nervousness;<sup>42</sup> revenge fantasies, rage, and irrational anger;<sup>43</sup> fears of persecution;<sup>44</sup> lack of impulse control;<sup>45</sup> severe and chronic depression;<sup>46</sup> appetite loss and weight loss;<sup>47</sup> heart palpitations;<sup>48</sup> withdrawal;<sup>49</sup> blunting of affect and

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<sup>38</sup> DANIEL P. MEARS, URBAN INST., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 4 (2006).

<sup>39</sup> Angela Browne, Alissa Cambier, Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED’L SENTENCING REPORTER 46 (2011).

<sup>40</sup> Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450, 1452 (1983).

<sup>41</sup> *Id.*; Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 130 (2003); *see generally* Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 Soc. Just. 8 (1988).

<sup>42</sup> Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450, 1452-53 (1983). Haney, *supra* note 40, at 130, 133; Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. OF CORRECTIONAL HEALTHCARE 39, 48 (1994); *see generally* Stanley L. Brodsky & Forest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988).

<sup>43</sup> Grassian, *supra* note 42, at 1453; Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. & MENTAL HEALTH 85, 91 (1997); Haney, *supra* note 40, at 130, 134; *see generally* HANS TOCH, MOSAIC OF DESPAIR: HUMAN BREAKDOWN IN PRISON (1992).

<sup>44</sup> Grassian, *supra* note 42, at 1453.

<sup>45</sup> *Id.*; Miller & Young, *supra* note 43, at 92.

<sup>46</sup> Grassian, *supra* note 42, at 1453; Miller & Young, *supra* note 43, at 92; Haney, *supra* note 41, at 131.

<sup>47</sup> Haney, *supra* note 41, at 130; *see generally* Korn, *supra* note 41.

<sup>48</sup> Haney, *supra* note 41, at 131.

<sup>49</sup> Miller & Young, *supra* note 43, at 91; *see generally* Korn, *supra* note 41.

apathy;<sup>50</sup> talking to oneself;<sup>51</sup> headaches;<sup>52</sup> problems sleeping;<sup>53</sup> confusing thought processes;<sup>54</sup> nightmares;<sup>55</sup> dizziness;<sup>56</sup> self-mutilation;<sup>57</sup> and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement.<sup>58</sup> Additionally, suicide rates and incidents of self-harm are much higher for prisoners in solitary confinement. A February 2014 study by the American Journal of Public Health found that detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population, and that the effect was particularly pronounced for juveniles and people with severe mental illness. This research also found that in California prisons in 2004, 73% of all suicides occurred in isolation units—though these units accounted for less than 10% of the state’s total prison population.<sup>59</sup>

There is a common misconception that prisoners in solitary confinement are dangerous, the “worst of the worst,”<sup>60</sup> but few actually meet this description. Sadly, the thousands of people in solitary confinement include many with severe mental illness or cognitive disabilities, who find it difficult to function in prison settings or to understand and follow prison rules.<sup>61</sup> For example, Indiana prison officials admitted in 2005 that “well over half” of the state’s supermax prisoners suffer from mental illness.<sup>62</sup> On average, researchers estimate that at least 30 percent of prisoners held in solitary confinement suffer from mental illness.<sup>63</sup>

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<sup>50</sup> Miller & Young, *supra* note 43, at 91; *see generally* Korn, *supra* note 41.

<sup>51</sup> Haney, *supra* note 41, at 134; *see generally* Brodsky & Scogin, *supra* note 42.

<sup>52</sup> Haney, *supra* note 41, at 133.

<sup>53</sup> *Id.*

<sup>54</sup> Haney, *supra* note 41, at 137; *see generally* Brodsky & Scogin, *supra* note 42.

<sup>55</sup> Haney, *supra* note 41, at 133.

<sup>56</sup> *Id.*

<sup>57</sup> Grassian, *supra* note 42, at 1453; Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners*, 48 J. OF OFFENDER REHABILITATION 529, 539-40 (2009).

<sup>58</sup> Paul Gendreau, N.L. Freedman, G.J.S. Wilde & G.D. Scott, *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. OF ABNORMAL PSYCHOL. 54, 57-58 (1972).

<sup>59</sup> *See* Homer Venters et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104:3 AM. J. PUBLIC HEALTH 442, 442-447 (March 2014), *available at* <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>; Expert Report of Professor Craig Haney at 45-46 n. 119, *Coleman v. Schwarzenegger*, 2008 WL 8697735 (ED. Cal 2010) (No: Civ S 90-0520 LKK-JFM P).

Another study examined the impact of solitary confinement on the amount of time that passes between incidents in which prisoners harm themselves and found that prisoners in solitary harm themselves on average 17 months earlier than prisoners in general population. *See* Lanes, *supra* note 57, at 539-40.

<sup>60</sup> Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME AND JUST. 385, 391 (2001).

<sup>61</sup> Haney, *supra* note 41, at 127.

<sup>62</sup> Howard Greninger, *Suit Targets Carlisle Prison*, TERRE HAUTE TRIBUNE-STAR, Feb. 4, 2005.

<sup>63</sup> *See, e.g.*, James Ridgeway & Jean Casella, *Locking Down The Mentally Ill: Solitary Confinement Cells Have Become America’s New Asylums*, THE CRIME REP. (Feb. 20, 2010), <http://www.thecrimereport.org/archive/locking-down-the-mentally-ill>; MARY BETH PFEIFFER, *CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL* (2007); JENNIFER R. WYNN, ALISA SZATROWSKI & GREGORY WARNER, THE CORRECTIONAL ASSOCIATION OF NEW YORK, *MENTAL HEALTH IN THE HOUSE OF CORRECTIONS: A STUDY OF MENTAL HEALTH CARE IN NEW YORK STATE PRISONS* 48 (2004). For a recent indictment of states’ and the federal government’s practices of warehousing people with mental illness in prisons, *see generally* Nicholas Kristof, *Inside a Mental Hospital Called Jail*, N.Y. TIMES (Feb. 9, 2014), <http://www.nytimes.com/2014/02/09/opinion/sunday/inside-a-mental-hospital-called-jail.html> (not focusing on solitary confinement).

<sup>63</sup> HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, *GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES*, 132 (2012), *available at* <http://www.aclu.org/growinguplockeddown>

Children in both the adult and juvenile systems are routinely subjected to solitary confinement. In adult prisons and jails, youth are often placed in “protective custody” for safety reasons. Despite the prevalence of youth under the age of 18 in adult facilities in the United States—estimated at more than 95,000 in 2011—most adult correctional systems offer few alternatives to solitary confinement as a means of protecting youth.<sup>64</sup> Young people may spend weeks, months, even years in solitary.

Solitary confinement serves no demonstrable correctional purpose, yet costs more than any other form of imprisonment. There is little evidence on the utility of solitary confinement.<sup>65</sup> A 2006 study found that opening a supermax prison or Special Housing Units had no effect on prisoner-on-prisoner violence in Arizona, Illinois, and Minnesota,<sup>66</sup> and that creating isolation units had only limited impact on prisoner-on-staff violence in Illinois, none in Minnesota, and actually increased violence in Arizona.<sup>67</sup> A similar study in California found that supermax or administrative segregation prisons had increased violence levels.<sup>68</sup> Some researchers have concluded that the severe restrictions in solitary confinement increase violence and engender other behavioral problems.<sup>69</sup> Although there is little evidence that solitary confinement is an effective prison management tool, there is ample evidence that it is the most expensive. Supermax prisons and segregation units can cost two or three times as much as conventional facilities to build and operate.<sup>70</sup>

Not only is there little evidence that the enormous outlay of resources for these units makes prisons safer, there is growing concern that such facilities are actually detrimental to public safety. Indeed, release directly from isolation strongly correlates with an increased risk of recidivism. Preliminary research from California suggests that rates of return to prison are 20 percent higher for solitary confinement prisoners.<sup>71</sup>

A 2001 study in Connecticut found that 92 percent of prisoners who had been held at the state’s supermax prison were rearrested within three years of release, compared with 66 percent of prisoners who had not been held in administrative segregation.<sup>72</sup> Another study, in Washington State, tracked 8,000 former prisoners upon release and found that, not only were those who came from segregation more likely to reoffend, but they were also more likely to commit violent crimes.<sup>73</sup> Findings like these, suggesting a

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<sup>64</sup> HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES, 132 (2012), *available at* <http://www.aclu.org/growinguplockeddown>; WASH. COAL. FOR THE JUST TREATMENT OF YOUTH, A REEXAMINATION OF YOUTH INVOLVEMENT IN THE ADULT CRIMINAL JUSTICE SYSTEM IN WASHINGTON: IMPLICATIONS OF NEW FINDINGS ABOUT JUVENILE RECIDIVISM AND ADOLESCENT BRAIN DEVELOPMENT 8 (2009), *available at* [http://www.columbialegal.org/files/JLWOP\\_cls.pdf](http://www.columbialegal.org/files/JLWOP_cls.pdf).

<sup>65</sup> DANIEL P. MEARS, URBAN INST., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 1-2 (2006).

<sup>66</sup> Chad S. Briggs, et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1341-42 (2006).

<sup>67</sup> *Id.* at 1365-66.

<sup>68</sup> KERAMET REITER, PAROLE, SNITCH, OR DIE: CALIFORNIA’S SUPERMAX PRISONS & PRISONERS, 1987-2007 44-46 (2010).

<sup>69</sup> See Kurki & Morris, *supra* note 60, at 391; Miller & Young, *supra* note 43; Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. & MENTAL HEALTH 85, 91 (1997).

<sup>70</sup> CAROLINE ISAACS & MATTHEW LOWEN, AM. FRIENDS SERV. COMM., BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA’S PRISONS AND JAILS 14 (2007); Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 233, 260 (2006).

<sup>71</sup> REITER, *supra* note 68, at 50.

REITER, *supra* note 68, at 50.

<sup>72</sup> LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE, RECIDIVISM IN CONNECTICUT 41 (2001).

<sup>73</sup> COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 55 (2006), *available at* [http://www.vera.org/download?file=2845/Confronting\\_Confinement.pdf](http://www.vera.org/download?file=2845/Confronting_Confinement.pdf) (Hon. John J. Gibbons & Nicholas de B. Katzenbach, Co-Chairs).

link between recidivism and the debilitating conditions in segregation, have led mental health experts to call for prerelease programs to help prisoners held in solitary confinement transition to the community more safely.<sup>74</sup>

In recent years, a number of states have implemented significant reforms in solitary confinement. In addition, this Subcommittee held the first-ever Congressional hearings on solitary confinement.<sup>75</sup> At Chairman Durbin's request, the Bureau of Prisons is undergoing the first independent assessment of its solitary confinement policies and practices.<sup>76</sup> Immigration and Customs Enforcement issued important guidance limiting its use of solitary confinement for immigration detainees, the implementation of which we are monitoring closely.

## **Recommendations**

Congress should:

- Enact legislation that would establish a commission to create national standards to address the overuse of solitary confinement in federal, state and local prisons, jails and other detention facilities.
- Pass legislation to require reforms in the use of solitary confinement in federal facilities operated by or contracted with BOP. This legislation should include a BOP ban on the solitary confinement of juveniles held in federal custody and prisoners with mental illness.
- Engage in increased federal oversight and monitoring of BOP's use of solitary confinement and provide more funding to the agency for alternatives to solitary confinement in order to further the goals of transparency and substantive reform.
- Enact legislation that would require federal, state, and local prisons; jails; detention centers; and juvenile facilities to report to the Bureau of Justice Statistics (BJS) who is held in solitary confinement and for what reason and the length of their segregation. BJS should annually publish the statistical analysis and present a comprehensive review of the use of solitary confinement in the United States.

## **IV. RACIAL PROFILING**

The tragic shooting death of Michael Brown in Ferguson, Missouri and other similar events across the country highlight the need for systemic change throughout the United States in the implicit and explicit bias against people of color and particularly African American youth who are routinely targeted by law enforcement even within their own communities.<sup>77</sup> Racial profiling in law enforcement is a

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<sup>74</sup> Terry Kupers, *What To Do with the Survivors? Coping with the Long-term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005 (2008).

<sup>75</sup> *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences*, Hearing Before the Subcommittee on the Constitution, Civil Rights and Human Rights of the S. Comm. On the Judiciary, 112th Cong. (2012); *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences*, Hearing Before the Subcommittee on the Constitution, Civil Rights and Human Rights of the S. Comm. On the Judiciary, 113th Cong. (2014).

<sup>76</sup> Statement of Senator Dick Durbin on Federal Bureau of Prisons Assessment of its Solitary Confinement Practices (Feb. 4, 2013), available at [http://www.durbin.senate.gov/public/index.cfm/pressreleases?ContentRecord\\_id=07260483-4972-4720-8d43-8fc82a9909ac](http://www.durbin.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=07260483-4972-4720-8d43-8fc82a9909ac).

<sup>77</sup> See ACLU FOUNDATION OF MASSACHUSETTS & ACLU RACIAL JUSTICE PROGRAM, BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007-2010 (Oct.2014),

persistent problem in the United States. Although top U.S. officials and international human rights bodies<sup>78</sup> have condemned racial profiling, noting that it “can leave a lasting scar on communities and individuals” and is “bad policing,” current federal policy fails to protect against it.<sup>79</sup>

The ACLU has long advocated for revisions to the 2003 Guidance on the Use of Race by Federal Law Enforcement (“Guidance”),<sup>80</sup> including our testimony at this Subcommittee’s 2012 hearing.<sup>81</sup> The 2003 Guidance included exemptions for profiling practices that are related to “protecting the integrity of the Nation’s borders” and “investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security).” Furthermore, the Guidance did not ban profiling based on religion, national origin, or sexual orientation. As a result of these broad exemptions and omissions, the Guidance does not protect against profiling against numerous minority communities in the United States, whether it is Federal Bureau of Investigation (“FBI”) racial mapping; Transportation Security Administration (“TSA”) profiling; or immigration enforcement through programs like the recently-discontinued Secure Communities program.<sup>82</sup> Allowing profiling in “border integrity” investigations disproportionately impacts Latino communities and communities living and working within the 100-mile zone. Profiling in national security investigations has led to the inappropriate targeting of Muslims, Sikhs, and people of Arab, Middle Eastern, and South Asian descent.

On December 8, the U.S. Department of Justice released a revised version of its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

According to the White House and Justice Department, the revised Guidance will eliminate some of the existing carve-outs for law enforcement activities related to “protecting national security or the integrity of the borders.”<sup>83</sup> It will prohibit profiling based on national origin, religion, gender, sexual orientation, and gender identity, in addition to race and ethnicity. It also will apply to state and local law enforcement agencies participating in federal law enforcement task forces.<sup>84</sup>

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available at

[https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black\\_brown\\_and\\_targeted\\_online.pdf](https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf).

<sup>78</sup> U.N. Committee on the Elimination of Racial Discrimination [CERD], *Concluding observations on the combined seventh to ninth periodic reports of United States of America*, 3, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014), available at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD\\_C\\_USA\\_CO\\_7-9\\_18102\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf).

<sup>79</sup> See Eric Holder, Att’y Gen., Speech at the American-Arab Anti-Discrimination Committee’s 30th Anniversary National Convention (Jun. 5, 2010), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100604.html>.

<sup>80</sup> CIV. RIGHTS DIV., DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), available at [http://www.justice.gov/crt/about/spl/documents/guidance\\_on\\_race.pdf](http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf).

<sup>81</sup> *Ending Racial Profiling in America, Hearing Before the Subcommittee on the Constitution, Civil Rights and Human Rights of the S. Comm. On the Judiciary*, 112th Cong. (2012) (statement of Anthony D. Romero, Executive Director, American Civil Liberties Union), available at [https://www.aclu.org/files/assets/senate\\_hearing\\_ending\\_racial\\_profiling\\_in\\_america\\_written\\_statement\\_romero.pdf](https://www.aclu.org/files/assets/senate_hearing_ending_racial_profiling_in_america_written_statement_romero.pdf).

<sup>82</sup> See DEPARTMENT OF HOMELAND SECURITY MEMORANDUM FROM SECRETARY JEH JOHNSON, “RE: SECURE COMMUNITIES” (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf); AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS, (Oct. 2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

<sup>83</sup> CIV. RIGHTS DIV., DEP’T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (Dec. 2014), available at <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

<sup>84</sup> *Id.*

However, the Guidance does not eliminate exemptions permitting discrimination at the border by Transportation Security Administration (TSA) and both at and in the “vicinity” of the border by U.S. Customs and Border Protection (CBP), nor does it fully bar biased profiling in the national security context.

The release of this revised Guidance is an important signal of progress, but it does not completely address the need for reform of policing tactics at the state and local level. The inclusion of new categories such as national origin, religion, sexual orientation and gender identity; establishment of much-needed data collection and training, and coverage of some state and local law enforcement activities are important steps forward.

Nonetheless, several components of the Guidance do little to protect some minority populations that have to endure unfair targeting by law enforcement every day. Using race, the color of someone’s skin, religion, or ethnicity as any basis for suspicion or investigation is demoralizing, unconstitutional. Although, the government recognizes that bias-based policing is patently unacceptable, it will continue to allow the FBI, TSA, and CBP to profile racial, religious and other minorities at or in the vicinity of the border and in certain national security contexts, and does not apply the Guidance to most state and local law enforcement.

DOJ should release the full current version of the FBI Domestic Intelligence and Operations Guide (DIOG) and require the FBI to amend it to completely prohibit profiling in all contexts, require at least an articulable factual basis to open investigations, and prohibit the recruitment or tasking of informants when there is no reasonable suspicion of wrongdoing.

Furthermore, the Department of Homeland Security should revise its April 2013 memorandum to component heads regarding its commitment to non-discriminatory law enforcement and screening activities, which incorporates the Justice Department’s Guidance by reference, accordingly

This Guidance is not an adequate response to the crisis of racial profiling in America. The President should compel all his federal police, as well as state and local agencies to adhere to the law and stop engaging in biased profiling now. Moreover, legislative action such as the End Racial Profiling Act (ERPA) is needed to end racial profiling in all of its forms.

## **Recommendations**

- The government should eliminate exemptions to the Guidance that allows the FBI, TSA, and CBP to profile racial, religious and other minorities at or in the vicinity of the border and in certain national security contexts, and should also apply the Guidance to state and local law enforcement who receive federal funds. DOJ should release the full current version of the FBI Domestic Intelligence and Operations Guide (DIOG) and require the FBI to amend it to completely prohibit profiling in all contexts, require at least an articulable factual basis to open investigations, and prohibit the recruitment or tasking of informants when there is no reasonable suspicion of wrongdoing.
- DHS should make corresponding changes to its relevant memorandum on non-discriminatory law enforcement activities.
- Congress should pass the End Racial Profiling Act.

## V. MILITARIZATION OF POLICE AND POLICE REFORMS

In addition to the implicit and explicit bias against people of color and particularly African American youth, the recent events in Ferguson, Missouri, have given national attention to concerns about domestic policing. These concerns range from racial profiling, to excessive use of force, to militarization of state and local law enforcement agencies. In the immediate aftermath of the death of Michael Brown, the nation saw a highly and dangerously militarized response by law enforcement. Media reports indicate that the Ferguson Police Department, in conjunction with other state and local agencies, responded to protests and demonstrations with “armored vehicles, noise-based crowd-control devices, shotguns, M4 rifles like those used by forces in Iraq and Afghanistan, rubber-coated pellets, and tear gas.”<sup>85</sup> The protests and demonstrations that now follow a grand jury’s decision not to indict the police officer who killed Michael Brown have also been met with armored vehicles.<sup>86</sup>

Militarized policing is not limited to situations like those in Ferguson or emergency situations—like riots, barricade and hostage scenarios, and active shooter or sniper situations—that Special Weapons And Tactics (“SWAT”) were originally created for in the late 1960s.<sup>87</sup> Rather, SWAT teams are now overwhelmingly used to serve search warrants in drug investigations. Our June 2014 report, *War Comes Home: The Excessive Militarization of American Policing*, found that 79 percent of the incidents reviewed involved the use of a SWAT team to search a person’s home, and more than 60 percent of the cases involved searches for drugs.<sup>88</sup>

Just as the “war on drugs” has disproportionately impacted people and communities of color in many ways, including voter disfranchisement, as discussed above, the use of paramilitary weapons and tactics also primarily impacts people of color. Of the people impacted by SWAT deployments for warrants examined by the ACLU, at least 54 percent were minorities. When data was examined by agency (and with local population taken into consideration), racial disparities in SWAT deployments were extreme. In every agency, African Americans were disproportionately more likely to be impacted by a SWAT raid than whites, sometimes substantially so. For example, in Allentown, Pennsylvania, African Americans were nearly 24 times more likely to be impacted by a SWAT raid than whites. In Ogden, Utah, African Americans were 40 times more likely to be impacted by a SWAT raid than whites.<sup>89</sup>

The Department of Defense’s 1033 Program provides state and local law enforcement with military weapons and equipment. We are concerned that the 1033 Program, along with other federal programs, has resulted in the militarization of American policing. Since the 1990s, the 1033 program has provided more than \$5 billion worth of surplus military equipment to state and local agencies at no cost. During a September Senate hearing, we learned that one-third of the equipment being transferred through the program is new.<sup>90</sup> While we now know that assault rifles and mine-resistant ambush-protected vehicles (MRAPs) constitute 4% of what is transferred through 1033, that 4% translates into 78,000

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<sup>85</sup> David Nakamura & Niraj Chokshi, *Obama orders review of military equipment supplied to police*, WASH. POST (Aug. 23, 2014), [http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390\\_story.html](http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390_story.html).

<sup>86</sup> Representative Hank Johnson, *Why does Ferguson still look like Iraq? Congress can stop the military police*, THE GUARDIAN (Nov. 26, 2014, 6:15 PM), <http://www.theguardian.com/commentisfree/2014/nov/26/ferguson-congress-military-police-streets>.

<sup>87</sup> DARYL GATES, CHIEF: MY LIFE IN THE LAPD 131 (New York: Bantam, 1992),. For an excellent summary of the creation and evolution of SWAT, see RADLEY BALKO, RISE OF THE WARRIOR COP (New York: PublicAffairs, 2013).

<sup>88</sup> WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING, ACLU, June 23, 2014, 3, available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rell.pdf>.

<sup>89</sup> *Id.* at 36-37.

<sup>90</sup> Tim Devaney, *Senators blast program that ‘militarized police,’* THE HILL, Sept. 9, 2014.

pieces of such equipment for last year alone and 460,000 pieces of such equipment since the Program's inception.<sup>91</sup>

Problems with law enforcement go beyond militarization, certainly, and are evidenced by the police practices that are the cause for continued protest in Ferguson. For one, we do not have a complete picture of domestic policing – the stops, searches, arrests, excessive uses of force, and homicides by law enforcement – because we do not have data. As an example, in 2013 the FBI Uniform Crime Report indicates that there were 461 justifiable homicides by law enforcement, the highest in two decades. These numbers fail to represent the complete universe of police killings, however, because they are self-reported homicides.<sup>92</sup> What we do know is that African Americans are arrested at a rate 10 times greater than those who are not African American by at least 70 police departments,<sup>93</sup> which suggests some degree of bias in law enforcement. And certainly, as the situation in Ferguson demonstrates, there is a need for greater police force diversity. The Ferguson Police Department is 94 percent white in a town that is two-thirds black.<sup>94</sup>

These concerns about police practices, along with the increased militarization of police forces, demonstrate the need for comprehensive law enforcement reform. In the wake of the Administration's December 1, 2014, report on federal programs that have encouraged militarized policing, as well as its creation of a task force on 21<sup>st</sup> Century policing, the ACLU looks forward to working with both the White House and the Congress on solutions.

### **Recommendations**

Congress should:

- Impose a moratorium on the 1033 Program as it continues to be reviewed.
- Continue oversight of the 1033 Program and determine if certain military weapons and equipment are not suitable for law enforcement purposes under the Program.
- Condition state and local law enforcement agencies' receipt of federal funds on the implementation of body cameras, with the appropriate privacy protections.
- Condition state and local law enforcement agencies' receipt of federal funds on the implementation of community policing practices that include citizen review boards, police force diversity recruitment, and law enforcement diversion programs.
- Condition state and local law enforcement agencies' receipt of federal funds on the implementation of standards for SWAT/Tactical teams that include the circumstances under which they can be deployed, the equipment they can use, and the government oversight the teams will be given.
- Investigate whether the Department of Justice Byrne JAG program is skewing police priorities, in particular toward increasing low-level drug arrests.

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<sup>91</sup> Executive Office of the President, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION, Dec. 2014, *available at* [http://www.whitehouse.gov/sites/default/files/docs/federal\\_support\\_for\\_local\\_law\\_enforcement\\_equipment\\_acquisition.pdf](http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf).

<sup>92</sup> Kevin Johnson, *Police killings highest in two decades*, USA TODAY (Nov. 11, 2014), <http://www.usatoday.com/story/news/nation/2014/11/11/police-killings-hundreds/18818663/>.

<sup>93</sup> Brad Heath, *Racial gap in U.S. arrest rates: 'staggering disparity'*, USA TODAY (Nov. 19, 2014), <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>.

<sup>94</sup> Taylor Wofford, *After midterms, little changes in troubled Ferguson*, NEWSWEEK (Nov. 11, 2014), <http://www.newsweek.com/after-midterms-little-change-troubled-ferguson-283777>.

- Create a national federal database to collect and report data on stops, searches, arrests, excessive uses of force, and homicides by law enforcement.

## **VI. GOVERNMENT DISCRIMINATION AGAINST AMERICAN MUSLIM COMMUNITIES**

Many law enforcement agencies and policymakers continue to focus their counterterrorism efforts unjustly and unconstitutionally on American Muslim communities. Unfortunately, these agencies and officials rely on the widely debunked theory that Muslim religious belief, practices, and community engagement are the first step toward committing terrorist acts. The premise, rooted in ignorance and bias, ignores empirical evidence that there is no direct link between religious observance or radical ideas and violent acts. It is wrong, unfairly stigmatizes Muslims, and results in unjust targeting of these communities.

When law enforcement practices are premised on this flawed theory, the outcomes are very troubling. The Federal Bureau of Investigation (“FBI”) has used community outreach programs to gather intelligence. The FBI and local law enforcement have conducted sweeping surveillance and monitoring of American Muslim communities, including deploying undercover employees and informants to infiltrate mosques and community centers in the absence of particularized suspicion of wrongdoing. The FBI has pressured law-abiding American Muslims to become informants against their own communities, often in coercive circumstances.

Investigations have also revealed numerous FBI counterterrorism training materials that paint an inaccurate and bigoted portrait of Arab and Muslim communities, which have been used by the FBI and the Department of Homeland Security (“DHS”) to train federal, state and local law enforcement officers across the country for close to a decade,<sup>95</sup> perpetuating these problems and leading to biased policing that targets individuals and communities based on religion.

The White House is increasingly emphasizing its Countering Violent Extremism (CVE) program; though the purported goal is addressing all types of violent extremism in the United States, its focus on American Muslim communities stigmatizes them as inherently suspect. We are deeply concerned the abusive and discriminatory practices outlined above will be perpetuated under CVE. One method of implementing CVE may task community members to expansively monitor and report to law enforcement on the beliefs and expressive or associational activities of members of their own communities. That approach to American Muslim communities—or any belief community—reproduces the same harm as government surveillance and monitoring. The result of generalized monitoring—whether conducted by the government or by community “partners”—is a climate of fear and self-censorship, where people must watch what they say and with whom they speak, lest they be reported for engaging in behavior vaguely defined as suspicious. Religious exercise and political expression are among the casualties, as individuals may abandon discussions about religion and politics—or avoid mosque and community spaces altogether—to avoid being tracked into CVE programs.

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<sup>95</sup> Spencer Ackerman, *FBI ‘Islam 101’ Guide Depicted Muslims as 7th Century Simpletons*, WIRED (July 27, 2007), <http://www.wired.com/2011/07/fbi-islam-101-guide/>; Spencer Ackerman, *FBI Teaches Agents: ‘Mainstream’ Muslims are ‘Violent, Radical,’* WIRED (Sept. 14, 2011), <http://www.wired.com/2011/09/fbi-muslims-radical/>; Spencer Ackerman, *New Evidence of Anti-Islam Bias Underscores Deep Challenges for FBI Reform Pledge*, WIRED (Sept. 23, 2011), <http://www.wired.com/2011/09/fbi-islam-domination/>; *FBI’s Use of Anti-Arab and Anti-Muslim Counterterrorism Training Materials*, ACLU (Oct. 20, 2011), [https://www.aclu.org/files/assets/aclu\\_eye\\_on\\_the\\_fbi\\_alert\\_-\\_fbi\\_use\\_of\\_anti-arab\\_and\\_anti-muslim\\_counterterrorism\\_training\\_materials.pdf](https://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_fbi_use_of_anti-arab_and_anti-muslim_counterterrorism_training_materials.pdf).

Not only do these policies and practices harm religious exercise and political expression among American Muslims, but they also erode trust of law enforcement by the community. They also foster fear and suspicion of American Muslims among law enforcement and the general public, aggravating existing prejudices and reinforcing intolerance, which can only increase discrimination, bullying, harassment, and anti-Muslim violence.

Law enforcement practices and government policies must be changed to align with our nation's commitment to religious liberty, free association, free speech, and equal protection of the law for all, not just some. One crucial step toward ending abusive counterterrorism practices would be strengthened Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

### **Recommendations**

- The government should eliminate exemptions to the Guidance that allows the FBI, TSA, and CBP to profile racial, religious and other minorities at or in the vicinity of the border and in certain national security contexts, and should also apply the Guidance to state and local law enforcement who receive federal funds. DOJ should release the full current version of the FBI Domestic Intelligence and Operations Guide (DIOG) and require the FBI to amend it to completely prohibit profiling in all contexts, require at least an articulable factual basis to open investigations, and prohibit the recruitment or tasking of informants when there is no reasonable suspicion of wrongdoing.
- DOJ should release the full current version of the FBI Domestic Intelligence and Operations Guide (DIOG) and require the FBI to amend it to completely prohibit profiling in all contexts, require at least an articulable factual basis to open investigations, and prohibit the recruitment or tasking of informants when there is no reasonable suspicion of wrongdoing.
- The White House should ensure that CVE programs do not perpetuate discriminatory law enforcement practices and issue safeguards and guidance to address CVE programs' impact on religious exercise, freedom of expression, and the First Amendment's Establishment Clause.

## **VII. NON-DISCRIMINATION PROTECTIONS FOR LGBT AMERICANS**

While we have made incredible progress for lesbian, gay, bisexual, and transgender ("LGBT") Americans, like the other issues discussed above, this too remains a civil rights area where protections are lacking. Despite remarkable progress in recent years in expanding the number of states with the freedom to marry for same-sex couples, there is a startling dearth of explicit non-discrimination protections for LGBT Americans. Today, same-sex couples enjoy the freedom to marry in 34 states, as well as the District of Columbia.<sup>96</sup> In contrast, 18 states (plus DC) have explicit protections for LGBT people in employment<sup>97</sup> and housing.<sup>98</sup> The number drops to 17 states (plus DC) that have explicit public accommodation non-discrimination protections.<sup>99</sup> A mere 13 states (plus DC) have laws that explicitly protect LGBT students.<sup>100</sup> In addition, there are just two federal laws that provide explicit protections to individuals on the basis of their sexual orientation or gender identity – the Matthew Shepard and James

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<sup>96</sup> *Marriage and Relationship Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT [http://www.lgbtmap.org/equality-maps/marriage\\_relationship\\_laws](http://www.lgbtmap.org/equality-maps/marriage_relationship_laws) (last visited Nov. 24, 2014).

<sup>97</sup> *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited Nov. 24, 2014).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Safe Schools Laws*, MOVEMENT ADVANCEMENT PROJECT [http://www.lgbtmap.org/equality-maps/safe\\_school\\_laws](http://www.lgbtmap.org/equality-maps/safe_school_laws) (last visited Nov. 24, 2014).

Byrd, Jr., Hate Crimes Prevention Act of 2009 and the Violence Against Women Reauthorization Act of 2013.

The disproportionate impact of discrimination on LGBT Americans is not surprising given this lack of explicit protection in state and federal law. For example, a staggering 90 percent of respondents in a landmark transgender survey reported experiencing harassment, mistreatment or discrimination on the job or took actions like hiding who they are to avoid it.<sup>101</sup> From the ability to obtain a public education free from discrimination to being able to work and find housing without fear of being rejected because of who you are or who you<sup>102</sup> love, the lack of explicit protections for LGBT Americans is unacceptable. It is long past time for Congress to address this, and to do so in a holistic manner that is fully consistent with our existing civil rights laws that date back over 50 years.

### **Recommendation**

- Congress should pass a comprehensive LGBT non-discrimination bill that bans discrimination based on sexual orientation and gender identity.

### **VIII. Conclusion**

On behalf of the ACLU, I thank the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights for holding this capstone hearing to address the State of Civil and Human Rights in the United States. I would like to specifically thank Chairman Durbin for his leadership and tireless work as Chairman of this Subcommittee to protect the civil and human rights of all Americans. Addressing discrimination of any kind should not be, and has not been, partisan. Both parties have come together in the past, whether it has been on multiple Voting Rights Act extensions or on the Fair Sentencing Act, for example, to make historic changes for the most vulnerable in our society. We look forward to working with the new Chair and all Members of this Subcommittee in the 114th Congress on these critical and wanting areas considered today.

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<sup>101</sup> Jamie Grant, Lisa Mottet & Justin Tanis, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, EXECUTIVE SUMMARY (2011), available at [http://endtransdiscrimination.org/PDFs/NTDS\\_Exec\\_Summary.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf).