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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 50th anniversary of the Civil Rights Act, the 5th 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 50th 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 21st 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.”ⁱ 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.ⁱⁱ

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.ⁱⁱⁱ 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.^{iv} 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.^v 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.^{vi} 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.^{vii} 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.^{viii} Equally troublesome are reports of statewide voter purges in Florida and Virginia.^{ix}

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, 21st 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.^x 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.^{xi} 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.^{xii} The practice, together with many of other measures, were used as a means to circumvent the requirements of the Fifteenth Amendment,^{xiii} which prohibited states from preventing individuals from voting on the basis of “race, color, or previous condition of servitude.”^{xiv}

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.^{xv} 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.^{xvi} Approximately 2.6 million individuals who have completed their sentences remain disenfranchised due to restrictive state laws.^{xvii}

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.^{xviii} 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).^{xix} 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.^{xx}

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.^{xxi} 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.^{xxii} 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.^{xxiii} 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.^{xxiv} This data indicate that the vast majority of individuals in these states remain disenfranchised.^{xxv}

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.^{xxvi}

Research has also shown that formerly incarcerated individuals who vote are less likely to be rearrested.^{xxvii} 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.^{xxviii} 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.^{xxix}

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.^{xxx}

Recent efforts from both Democrats and Republicans are underway to address this problem, at least in federal elections. In the 113th 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 114th 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.^{xxxii} 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.^{xxxii} 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.^{xxxiii} 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.^{xxxiv} 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.”^{xxxv}

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.^{xxxvi} 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.^{xxxvii}

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,^{xxxviii} 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.^{xxxix}

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.^{xi} 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.^{xii} During a September 9, 2014 Senate hearing, we learned that one-third of the equipment being transferred through the program is new.^{xiii} 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.^{xiiii} Ultimately, the hearing raised more questions than it provided answers.

The White House^{xliv} and Congress^{xlv} 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.^{xlvi} 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.^{xlvii} Further, in the recent NDAA reauthorization, the counterterrorism and counter-drug language was removed.^{xlviii} 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.^{xlix} 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.^l 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.^{li} In 2010, states spent an estimated \$346 million on misconduct-related civil judgments and settlements, not including sealed settlements, court costs, and attorney fees.^{lii}

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^{liii} 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.^{liv} 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-20th 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.^{lv} 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.^{lvi}

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.^{lvii} 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.^{lviii} Further, in those instances in which relief from the mandatory minimum penalty occurred, it occurred least often for Black offenders.^{lix}

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.^{lx} 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.^{lxi}

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.^{lxiii} 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.^{lxiii} In 2013, the United States will spend more than 12 times that amount, reaching \$6.8 billion.^{lxiv} Mandatory minimums are cost-ineffective. Taxpayers spend almost \$70 billion a year on prisons and jails,^{lxv} raising state spending on corrections more than 300 percent over the last two decades.^{lxvi} 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.^{lxvii}

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.^{lxviii}

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.^{lxix}

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.^{lxx} Only about 14,500 law enforcement agencies (out of about 18,000) reported in 2012.^{lxxi} 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.^{lxxii}

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.

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

ⁱⁱ 152 CONG. REC. S8372 (2006).

ⁱⁱⁱ 42 U.S.C. § 1973 (2006).

^{iv} *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2636 (2013).

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

^{vi} *Id.*

^{vii} Ryan Reilly, *Harsh Texas voter ID law 'immediately' takes effect after Voting Rights Act ruling*, HUFF. POST, June 25, 2013.

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

^{ix} *Id.*

^x *Id.*

^{xi} Erwin Chemerinsky, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 901 (4th ed. 2011).

^{xii} 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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- ^{xiii} 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).
- ^{xiv} U.S. CONST. amend. XV, § 1.
- ^{xv} 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.
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- ^{xvii} *Id.*
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- ^{xix} Uggen et al., *supra* note 1-2.
- ^{xx} *Id.* at 17.
- ^{xxi} E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUSTICE STATISTICS, 8 (Sept. 30, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.
- ^{xxii} Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, 71 (2006).
- ^{xxiii} 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>.
- ^{xxiv} *Id.*
- ^{xxv} *Id.*
- ^{xxvi} 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/>.
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- ^{xxviii} 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.
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- ^{xxx} The Leadership Conference on Civil and Human Rights, *Felony Disenfranchisement*, available at <http://www.civilrights.org/voting-rights/felony-disenfranchisement/>.
- ^{xxxi} Adam Goldman, *Eric Holder makes case for felons to get voting rights back*, WASH. POST., Feb. 11, 2014.
- ^{xxxii} E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUSTICE STATISTICS, 1 (Sept. 30, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.
- ^{xxxiii} *Id.* at 8.
- ^{xxxiv} 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>.
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- ^{xxxvii} *Id.* at ¶ 39 (noting that religious profiling, for example, directly violates ICERD recommendations).
- ^{xxxviii} 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>.
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- ^{xl} Def. Logistics Agency, *About the 1033 Program*, <http://www.dispositionservices.dla.mil/leso/Pages/default.aspx>.

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- ^{xli} Def. Logistics Agency, *About the 1033 Program*, <http://www.dispositionsservices.dla.mil/leso/Pages/default.aspx>.
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- ^{xli viii} Nat'l Def. Authorization Act of 2012, H.R. 1540, 112th Cong. § 2 (2011).
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- ⁱⁱⁱ *Id.*
- ⁱⁱⁱⁱ 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.
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^{lxxii} *Id.*