



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

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

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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."¹ 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.² For decades under this provision, certain states and localities with a

¹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

² *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.³ Section 5 has given tangible protections to millions of voters since 1965.⁴ 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.⁵ In 14 states, 2014 was the first major federal election with new voting restrictions in place.⁶ 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.⁷ 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.⁸

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 2014.⁹ 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

³ 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).

⁴ 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>.

⁵ 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.

⁶ *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).

⁷ 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).

⁸ 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>.

⁹ Voting Rights Amendment Act of 2014, H.R.3899/S. 1945, 113th 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.¹⁰

The Voting Rights Act has enjoyed a long history of bipartisan support in Congress and in multiple Administrations.¹¹ 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;"¹² 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.¹³ 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."¹⁴

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.¹⁵ 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.¹⁶ Latino citizens are also impacted

¹⁰ 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>.

¹¹ 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.

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

¹³ 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. 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)).

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

¹⁵ 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>.

¹⁶ JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER, 2 (JUNE 2014), available at 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.¹⁷

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,¹⁸ 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.¹⁹ Although voting rights restoration is possible in many states, and some recent progress has been made,²⁰ it is frequently a difficult process that varies widely across states.²¹ 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.²² Nationwide reform is necessary to provide a uniform standard across the country.

¹⁷ 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>.

¹⁸ 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>.

¹⁹ 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).

²⁰ 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.

²¹ *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>.

²² 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 Act²³

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).²⁴ 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.²⁵

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.²⁶ 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.

²³ *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>.

²⁴ 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).

²⁵ 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>.

²⁶ 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."²⁷ 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.²⁸ 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.²⁹ 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.³⁰

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.³¹ The increased time

²⁷ 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.

²⁸ *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).

²⁹ 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>.

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

³¹ *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 2010.³² 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.³³

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.³⁴ 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 spectrum³⁵ 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.³⁶

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.³⁷

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.

³² KAMALA URBAN INSTITUTE REPORT *supra* note 28.

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

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

³⁵ 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.

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

³⁷ *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.³⁸ 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.³⁹

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;⁴⁰ perceptual distortions and hallucinations;⁴¹ increased anxiety and nervousness;⁴² revenge fantasies, rage, and irrational anger;⁴³ fears of persecution;⁴⁴ lack of impulse control;⁴⁵ severe and chronic depression;⁴⁶ appetite loss and weight loss;⁴⁷ heart palpitations;⁴⁸ withdrawal;⁴⁹ blunting of affect and

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

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

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

⁴¹ *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).

⁴² 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).

⁴³ 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).

⁴⁴ Grassian, *supra* note 42, at 1453.

⁴⁵ *Id.*; Miller & Young, *supra* note 43, at 92.

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

⁴⁷ Haney, *supra* note 41, at 130; see generally Korn, *supra* note 41.

⁴⁸ Haney, *supra* note 41, at 131.

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

apathy;⁵⁰ talking to oneself;⁵¹ headaches;⁵² problems sleeping;⁵³ confusing thought processes;⁵⁴ nightmares;⁵⁵ dizziness;⁵⁶ self-mutilation;⁵⁷ and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement.⁵⁸ 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.⁵⁹

There is a common misconception that prisoners in solitary confinement are dangerous, the “worst of the worst,”⁶⁰ 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.⁶¹ For example, Indiana prison officials admitted in 2005 that “well over half” of the state’s supermax prisoners suffer from mental illness.⁶² On average, researchers estimate that at least 30 percent of prisoners held in solitary confinement suffer from mental illness.⁶³

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

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

⁵² Haney, *supra* note 41, at 133.

⁵³ *Id.*

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

⁵⁵ Haney, *supra* note 41, at 133.

⁵⁶ *Id.*

⁵⁷ 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).

⁵⁸ 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).

⁵⁹ *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.

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

⁶¹ Haney, *supra* note 41, at 127.

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

⁶³ *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).

⁶³ 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.⁶⁴ 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.⁶⁵ 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,⁶⁶ 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.⁶⁷ A similar study in California found that supermax or administrative segregation prisons had increased violence levels.⁶⁸ Some researchers have concluded that the severe restrictions in solitary confinement increase violence and engender other behavioral problems.⁶⁹ 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.⁷⁰

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.⁷¹

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.⁷² 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.⁷³ Findings like these, suggesting a

⁶⁴ 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.

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

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

⁶⁷ *Id.* at 1365-66.

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

⁶⁹ 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).

⁷⁰ 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).

⁷¹ REITER, *supra* note 68, at 50.

REITER, *supra* note 68, at 50.

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

⁷³ 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 (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.⁷⁴

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.⁷⁵ At Chairman Durbin's request, the Bureau of Prisons is undergoing the first independent assessment of its solitary confinement policies and practices.⁷⁶ 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.⁷⁷ Racial profiling in law enforcement is a

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

⁷⁵ *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).

⁷⁶ 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.

⁷⁷ 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 bodies⁷⁸ 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.⁷⁹

The ACLU has long advocated for revisions to the 2003 Guidance on the Use of Race by Federal Law Enforcement (“Guidance”),⁸⁰ including our testimony at this Subcommittee’s 2012 hearing.⁸¹ 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.⁸² 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.”⁸³ 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.⁸⁴

available at

https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf.

⁷⁸ 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.

⁷⁹ 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>.

⁸⁰ 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.

⁸¹ *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.

⁸² 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; 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.

⁸³ 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>.

⁸⁴ *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.”⁸⁵ 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.⁸⁶

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.⁸⁷ 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.⁸⁸

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.⁸⁹

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.⁹⁰ 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

⁸⁵ 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.

⁸⁶ 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>.

⁸⁷ 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).

⁸⁸ 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>.

⁸⁹ *Id.* at 36-37.

⁹⁰ 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.⁹¹

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.⁹² 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,⁹³ 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.⁹⁴

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 21st 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.

⁹¹ 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.

⁹² 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/>.

⁹³ 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/>.

⁹⁴ 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,⁹⁵ 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.

⁹⁵ 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.

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.⁹⁶ In contrast, 18 states (plus DC) have explicit protections for LGBT people in employment⁹⁷ and housing.⁹⁸ The number drops to 17 states (plus DC) that have explicit public accommodation non-discrimination protections.⁹⁹ A mere 13 states (plus DC) have laws that explicitly protect LGBT students.¹⁰⁰ 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

⁹⁶ *Marriage and Relationship Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT http://www.lgbtmap.org/equality-maps/marriage_relationship_laws (last visited Nov. 24, 2014).

⁹⁷ *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Nov. 24, 2014).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Safe Schools Laws*, MOVEMENT ADVANCEMENT PROJECT 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.¹⁰¹ 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 you¹⁰² 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.

¹⁰¹ 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.