



February 11, 2016

The Honorable Bob Goodlatte
Chairman
United States House of Representatives
Committee on the Judiciary
2309 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
United States House of Representatives
Committee on the Judiciary
2426 Rayburn House Office Building
Washington, D.C. 20515

**Re: Comprehensive Criminal Justice Reform
& H.R. 759 Managers' Amendment**

Dear Chairman Goodlatte and Ranking Member Conyers:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we write to urge you to pass comprehensive criminal justice reform early this year. Today's consideration of the Corrections and Recidivism Reduction Act of 2016 (H.R. 759 Amendment) demonstrates the Judiciary Committee's ongoing intent to pass criminal justice reform on a piecemeal basis. However, LDF urges the Committee to adopt comprehensive legislation to ensure that expansive criminal justice reform occurs this year.

Since its founding by Thurgood Marshall in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. Throughout its history, LDF has consistently worked to promote laws and policies that are administered fairly and without regard to race, from police stops¹ to sentencing² to reentry.³

LDF welcomes Congress' bipartisan efforts to reform federal laws that have resulted in the mass incarceration of far too many persons, disproportionately persons of color, for far too long at great economic and social costs. The federal prison population has exploded

¹ See, e.g., Complaint, *Davis, et al. v. City of New York, et al.*, Case No. 1:10-cv-00699-SAS-HBP (S.D.N.Y. Jan. 28, 2010) (challenging the unlawful stop, questioning and arrest of African-American and Latino public housing residents and their guests by New York City Police Department officers), <http://www.naacpldf.org/update/court-approves-final-settlement-federal-class-action-lawsuit-challenging-police-practices-nyc>.

² See, e.g., Case of Duane Buck, <http://www.naacpldf.org/case-issue/duane-buck-sentenced-death-because-he-black>. See also *United States v. Blewett*, Case Nos. 12-5226/5582 (6th Cir. Dec. 3, 2013), <http://www.naacpldf.org/case-issue/united-states-v-blewett>.

³ See, e.g., LDF Statement on President Obama's Actions to Promote Rehabilitation and Reintegration of Persons with Criminal Records (Nov. 3, 2015), <http://www.naacpldf.org/press-release/ldf-statement-president-obama%E2%80%99s-actions-promote-rehabilitation-and-reintegration-perso>.

from over 24,000 in 1980 to approximately 219,000 in 2013.⁴ Consequently, the Federal Bureau of Prisons' (BOP) annual budget has increased from \$330 million to over \$7.4 billion this year.⁵ This burgeoning federal population is due in large part to federal prosecutors' and law enforcement officers' disproportionate and aggressive enforcement of drug-related crimes in minority neighborhoods and the imposition of mandatory minimum sentences on persons of color.⁶ And, after these individuals have paid their debt to society and are released from prison, various discriminatory policies and practices often prevent them from accessing employment, housing, voting and other opportunities because of their criminal convictions.⁷

While we applaud Congress' ongoing efforts to address certain longstanding inequities in the criminal justice system, LDF urges this Committee to advance legislation that comprehensively addresses widespread racial bias in policing. Our nation has witnessed repeated and horrific acts of lethal violence by police against African Americans and other communities of color,⁸ which are not isolated incidents, but instead part of a widespread and historical pattern of excessive force and longstanding abuse and mistreatment of communities of color at the hands of law enforcement. As Congress considers enacting bipartisan criminal justice reform, it is unfathomable that it would not take all steps within its power to combat these abuses that have ignited a crisis in confidence in our nation's law enforcement⁹ and criminal justice system as a whole, and have undermined the trust between law enforcement and the communities they are charged to protect and serve.

Accordingly, LDF urges House members to advance federal legislation that: 1) creates federal grant programs that impose specific conditions for the receipt of federal funds, such as police body-worn camera programs that require protocols for the protection

⁴ See, Federal Bureau of Prisons, *Population Statistics, Past Inmate Population Totals*, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Dec. 7, 2015).

⁵ See, U.S. Department of Justice, *FY 2016 Budget Request, Prisons and Detention*, http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/4_prisons_and_detention_fact_sheet.pdf.

⁶ See generally, United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Executive_Summary.pdf.

⁷ Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, National Institute of Justice (Sept. 2013), <https://www.ncjrs.gov/pdffiles1/nij/241927.pdf>.

⁸ See, e.g., Artemis Moshtaghian and Sara Sidner, *\$1.5 million settlement for woman beaten by California patrol officer*, CNN (Sept. 25, 2014), <http://www.cnn.com/2014/09/25/justice/california-police-videotape-beating/>; See also, Meghan Keneally and Olivia Smith, *Walter Scott Shooting: Breaking Down the Witness Video Frame by Frame* (Apr. 9, 2015), <http://abcnews.go.com/US/walter-scott-shooting-breaking-witness-video-frame-frame/story?id=30159871>; Catherine Shoichet, *Laquan McDonald video: Shot teen spins, falls onto road*, CNN (Nov. 24, 2015), <http://www.cnn.com/2015/11/24/us/chicago-laquan-mcdonald-shooting-video/index.html>.

⁹ Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup, Inc. (June 19, 2015), <http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx>.

of privacy and civil rights and use of force data collection (*e.g.*, Police CAMERA Act, H.R. 1680); 2) prohibits racial profiling by law enforcement agencies and agents and requires policies and practices that will eliminate racial profiling (*e.g.*, End Racial Profiling Act of 2015, H.R. 1933); 3) requires mandatory use-of-force and traffic and pedestrian stops data collection and provides for additional funding for civil rights investigations by the U.S. Department of Justice (*e.g.*, Law Enforcement Trust and Integrity Act, H.R. 2875); and 4) prohibits the Department of Defense from transferring to law enforcement certain military equipment, such as mine-resistant ambush-protected vehicles (*e.g.*, Stop Militarizing Law Enforcement Act, H.R. 1232).

Additionally, we note the promising provisions in the Sensenbrenner-Scott SAFE Justice Act of 2015 (H.R. 2944) that also promote comprehensive criminal justice reform. Specifically, H.R. 2944 would create and implement procedures to reduce over incarceration due to pretrial detention. It would also create a citizen complaint process that allows convicted criminal defendants who believe their prosecutions were mishandled to file complaints, as well as provides for disciplinary sanctions for prosecutors who have engaged in cases of misconduct or handled cases inappropriately. H.R. 2944 also provides that, during sentencing, a court cannot consider conduct of which a person has been acquitted, has the discretion to disregard the amount of and type of drugs or firearms used in a crime that was solicited by an informant, and may consider only the type or quantity of drug that is connected to the conduct of a person who conspires to commit a crime. Finally, the bill would ensure accurate and reliable evidence during criminal cases and allow persons on probation to earn discharge credits for each month that they comply with the terms of their supervision, thus permitting them to reduce their supervision time.

Furthermore, LDF urges the passage of legislation that would reform the collateral consequences of a criminal conviction and imprisonment – for both youth and adults – such as: 1) the automatic restoration of voting rights of persons released from prison (*e.g.*, Democracy Restoration Act of 2015, H.R. 1459); 2) limitations on the use of background checks during the hiring process (*e.g.*, Fair Chance to Compete for Jobs Act of 2015, H.R. 3470); 3) restoration of federal Pell grant eligibility for students who are incarcerated (*e.g.*, Restoring Education and Learning Act (REAL) of 2015, H.R. 2521); and 4) the expungement and sealing of nonviolent criminal and juvenile records, and the limitation of the use of solitary confinement of youth (*e.g.*, Record Expungement Designed to Enhance Employment (REDEEM) Act of 2015, H.R. 1672).

The bill considered by the Committee today, H.R. 759 Amendment, has the potential to prepare persons who are incarcerated for their eventual release from federal prisons. Specifically, it will allow certain individuals to participate in prison-based recidivism-reduction programs, and award time credits for each month that they successfully participate in programs. However, LDF is concerned that a person's eligibility for these programs will be determined by a BOP assessment tool that will ascertain a person's risk of reoffending, and that the subjectivity inherent in that type of determination may lead to

racial disparities in risk classifications.¹⁰ We recognize that there is language in H.R. 759 that requires the Attorney General to evaluate the Post-Sentencing Risk and Needs Assessment System to ensure that it does not result in “unwarranted disparities...including disparities among similarly classified prisoners of different demographic groups.” However, we believe that such evaluations need to be as rigorous as possible and that the Attorney General should make all necessary adjustments to the System to completely eliminate any racial disparities.

Also, LDF welcomes the use of dynamic factors in the risk assessment system – such as a person’s acquisition of new skills and changes in behavior – to determine an individual’s risk of reoffending over time. However, we are concerned that the assessment will also consider static factors, such as a person’s criminal history, which may result from racial discrimination and, therefore, have a racially-disparate impact on individuals’ eligibility for recidivism-reduction programs.

LDF supports H.R. 759 Amendment’s provisions that prohibit the use of physical restraints on persons who are pregnant or in post-partum recovery, except in cases where corrections officials or law enforcement officers believe that the person is a flight risk or may seriously harm herself or others. This provision essentially codifies current BOP rules, and aligns with national anti-shackling efforts to ensure the humane treatment of persons who are pregnant and incarcerated.¹¹ We also support the provision requiring de-escalation training for BOP officers and employees to diminish violent responses during encounters with civilians and prisoners, including individuals with mental illness. However, the bill should also require BOP supervisors to monitor officers’ and employees’ use of de-escalation practices and take necessary corrective actions when the training is not followed.

LDF believes the provisions in H.R. 759 Amendment that would exclude from monitoring electronic communications between persons held in BOP facilities and their attorneys are critical to protecting the constitutional right to effective assistance of counsel. This will allow these electronic communications to have the same protections as written and oral communications. However, to the extent that the bill allows BOP officials to retain electronic communications, it must also clearly state and limit persons who may access this information.

We also commend the Judiciary Committee for its recent efforts to address sentencing disparities. We support various provisions of the Sentencing Reform Act of 2015, H.R. 3713, such as the retroactive application of the Fair Sentencing Act of 2010 (“FSA”).

¹⁰ See, e.g., Jesse Jannetta, *et al*, *Examining Ethnic and Racial Disparities in Probation*, 8, Urban Institute, Apr. 2014, <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF> (noting that “disparities are an issue at decision points throughout the criminal justice system.”).

¹¹ See, e.g., Myrna Raeder, *Pregnancy and Child-Related and Policy Issues Concerning Justice Involved Women*, U.S. Department of Justice, National Institute of Corrections, Dec. 2013, <https://s3.amazonaws.com/static.nicic.gov/Library/027701.pdf>.

The FSA reduced the disparities in sentences for crack and cocaine convictions from 100:1 to 18:1. LDF has consistently argued in litigation that FSA applies retroactively,¹² and we are pleased that this bill settles the debate. We continue, however, to advocate for the elimination of any disparity between crack and powder cocaine sentences, which is proposed in the Fairness in Cocaine Sentencing Act of 2015 (H.R. 1255).

LDF also supports H.R. 3713's expansion of the categories of persons to whom the application of the existing federal safety valve may be applied. By broadening the criteria for safety valve eligibility, judges are afforded an opportunity to craft appropriate sentences for drug offenses when sentencing persons with up to four criminal history points if he or she does not have certain prior convictions. Judges may also find eligible persons if disqualifying convictions over-represent the nature of the person's criminal history or the likelihood that the individual will commit other crimes. We are hopeful that the expansion of the safety valve will result in fairer sentences for all individuals in criminal proceedings, particularly people of color.

We view H.R. 3713's provisions that reduce certain mandatory minimums, such as the reduction of the mandatory life sentence for two or more felony drug offenses to 25 years, as an important, yet insufficient step towards the elimination of all mandatory minimums. LDF has consistently maintained its opposition to mandatory minimums and is disappointed that this bill does not eliminate any mandatory minimums. Additionally, the new sentencing enhancements imposed upon persons who traffic heroin containing fentanyl is concerning and may potentially unfairly increase the sentences of persons who are unaware of the presence of this lethal drug. We agree with Representative Jerrold Nadler's comment during the markup of this bill that the impact of this enhancement is unknown and more research on this issue is needed before enacting such a provision.

While LDF lauds the retroactivity of the reductions in mandatory sentences in the bill, we are troubled by the provisions that exclude individuals convicted of serious violent felonies from the application of mandatory sentence reductions under the 18 USC § 924. Judges should have the discretion to apply retroactively sentencing reductions to all persons who are eligible under H.R. 3713. It is unclear whether this exemption will have a racially discriminatory impact in application. Also, the companion sentencing reform bill in the Senate, Sentencing Reform and Corrections Act of 2015 (S. 2123), does not include this exception, and LDF urges House members to follow the lead of the Senate during final passage.

LDF applauds the Committee for its recent approval of the Second Chance Reauthorization Act of 2015 (H.R. 3406), which seeks to improve and expand grant programs for government agencies and non-profit organizations that provide supportive services, such career training and placement, to individuals who return to communities

¹² For example, we submitted an amicus brief and offered oral argument in the Sixth Circuit in *United States v. Blewett* in support of that position. See, Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Defendants-Appellants, *United States v. Blewett*, 746 F.3d 647 (6th Cir. 2013) (Nos. 12-5226, 12-5582), 2013 WL 5304321.

after a period of incarceration. As LDF stated in its letter of support, thousands of persons are released from prison each year and are unable to meet their basic needs because of their criminal records. Without the type of programs and services that H.R. 3406 will support, these individuals will likely lose hope and return to prison within three years of their release. We ask House members to move this important bill to final passage.

In conclusion, LDF appreciates the Judiciary Committee's efforts to undertake criminal justice reform. We believe that the elimination of racial bias and longstanding inequities throughout our criminal justice system should be the paramount focus of Congress this year. The Corrections and Recidivism Reduction Act of 2016 and other bills considered by the Committee represent important steps in a long but necessary process. We look forward to working with the House on these bills and other legislation to bring about robust and comprehensive criminal justice reform. If you have any questions, please contact Monique L. Dixon, Deputy Director of Policy at mdixon@naacpldf.org or 202.682.1300.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Leslie Proll", written in a cursive style.

Leslie Proll
Director of Policy

Monique L. Dixon
Deputy Director of Policy and Senior Counsel

cc: Members of the House Judiciary Committee