WRITTEN STATEMENT OF THE CONSTITUTION PROJECT

For a Hearing on

"The State of Civil and Human Rights in the United States"

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

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I. Introduction

The Constitution Project ("TCP") submits this statement for the hearing of the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights on "The State of Civil and Human Rights in the United States," and congratulates the Subcommittee for holding a hearing on such a vital topic.

TCP was founded in 1997 as a nonpartisan organization that promotes and defends constitutional safeguards. We bring together legal and policy experts from across the political spectrum to promote consensus-based solutions to pressing constitutional issues. Our work includes reforming the nation's broken criminal justice system, strengthening access to justice, protecting civil liberties, and ensuring government transparency and accountability. TCP undertakes original research; develops policy recommendations; issues reports, statements, and policy briefs; files *amicus* briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers.

TCP's policy recommendations and in-depth reports are guided by several bipartisan and diverse committees[1] that include current and former judges, prosecutors, defense attorneys, legal scholars, former agency and administration officials, policy experts, and advocates. These individuals have come together for one common purpose: to push for practical reforms that will better ensure adherence to constitutional safeguards, make a real difference in communities across the country, and improve the state of civil and human rights in the United States.

In light of the tragic deaths of Michael Brown, Eric Garner, and too many others like them – the effects of which have rippled across the country – the nation is paying special attention to our criminal justice system's failure to ensure equal access to justice and a level playing field for all those touched by the system. It is virtually impossible to divorce our broken criminal justice system from the current precarious state of civil and human rights in the United States. Consequently, there is an urgent need for the practical, bipartisan approach to reform that TCP has promoted for nearly two decades. A path to replacing existing practices, which have enormous financial and human costs, is found in TCP's many substantive reports,[2] issued by our expert committees. Below, we set forth some of our recommendations for reform to improve adherence to human and civil rights in the criminal justice system.

II. Indigent Defense

Ensuring that poor people accused of crimes receive competent legal representation is a bedrock principle of our criminal justice system. The work of public defenders and others who represent indigent defendants is not simply a discretionary expenditure. It is a constitutional mandate. Moreover, because individuals accused of crimes are disproportionately poor and people of color, the right to effective assistance of counsel is a critical civil and human rights issue. Unfortunately, over 50 years after the Supreme Court recognized the right to counsel as "fundamental and essential to fair trials" in *Gideon v. Wainwright*,[3] states and counties continue to resist meeting their constitutional responsibility to provide effective defense counsel, or struggle to do so. The problem is exacerbated by the federal government's unbalanced provision of resources in favor of prosecution and police functions, with far less funding available to ensure that those who face criminal prosecution are also provided with a competent lawyer to defend them. TCP's National Right to Counsel Committee has examined the inadequacies in our country's provision of indigent defense and offered the following recommendations for the federal executive and legislative branches to protect the Sixth Amendment right to counsel for all Americans.[4]

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[1] The list of TCP policy and issue committees is available at: http://www.constitutionproject.org/about-us/policy-and-issue-committees/.
[2] A full list of TCP reports is available at: http://www.constitutionproject.org/documents/.
[3] 372 U.S. 335 (1963).
[4] For detailed recommendations and examples of advocacy by TCP's National Right to Counsel Committee, *see* http://www.constitutionproject.org/issues/criminal-justice-reform/right-to-effective-counsel/.

A. Establish Federal Research and Grant Parity

Although funding of indigent defense has increased considerably since the 1960s, inadequate financial support continues to be one of the greatest obstacles to delivering competent, diligent, and effective assistance of counsel, as required by the rules of the legal profession and the Sixth Amendment. In light of this, TCP is troubled that government funding for indigent defense services is dramatically less than the resources and financial support provided to prosecution and law enforcement. In its 2009 report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* ("*Justice Denied*"), TCP's bipartisan National Right to Counsel Committee highlighted its concern regarding the dramatic funding disparity and proposed the solutions below.[5]

Justice Denied noted that public defenders are asked to represent far too many clients; sometimes defenders have over 100 clients at a time, with many clients charged with serious offenses in courts managing heavy dockets and moving cases quickly through the system. These excessive caseloads make it virtually impossible to provide constitutionally sufficient representation, or to practice law in accordance with the profession's ethical and other rules. Attorneys cannot interview clients properly, effectively seek pretrial release, conduct the necessary fact-finding investigations, file appropriate motions, responsibly negotiate with the prosecutor, or adequately prepare for hearings.

In courtrooms across the country, overloaded dockets result in a complete lack of counsel, or provision of counsel too late, for people facing felony and misdemeanor charges. *Justice Denied* found that judges may advise large groups of defendants in custody that they have the right to a lawyer, but that the circumstances almost impel indigent defendants to plead guilty and give up their right to counsel, often because it is the only way to obtain release before trial.[6] The inability to provide adequate representation is perhaps the most visible sign of inadequate funding to indigent defense services.

The resulting effect of disparate funding practices is not simply denial of a constitutional right. Ineffective lawyering is also one of the chief causes of wrongful convictions in this country.

While the federal government supports commendable projects, programs, and financial support to indigent defense in many jurisdictions in the country, it is still substantially less than the sum spent to support prosecution and law enforcement services. In order to make meaningful progress in supporting indigent defense – and to ensure a level playing field for poor people accused of crimes – Congress must require that financial support of prosecution and defense be substantially equal. Congress should also request that the Government Accountability Office (GAO) regularly gather data and track the distribution of federal funds to state and local criminal justice systems to assess how it is divided between law enforcement, prosecution, and indigent defense. At present, such information is not collected.

B. Create a National Body and Standards for Indigent Defense Services

The federal government should also establish an independent, adequately funded National Center for Defense Services ("Center") and establish national standards for the provision of indigent defense. The duty to provide indigent defense derives from decisions of the U.S. Supreme Court and the federal Constitution's Sixth Amendment, yet it is states and local governments that are struggling to meet this obligation. A federal program can assist states defray the costs of defense services. Decades ago, the American Bar Association endorsed the creation of a federally funded center for defense services. In *Justice Denied*, creation of the

[5] THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, 200-201, Rec. 12 (2009), [*hereinafter* JUSTICE DENIED] *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf.

[6] JUSTICE DENIED at 85-86.

Center was a major recommendation to address the neglect of indigent defense services.[7] The Center would strengthen the services of publicly funded defender programs in all states through the administration of grants, pilot projects, and supporting training, research, and critical data collection and analysis. Creation of the Center would support provision of competent counsel in some of the neediest jurisdictions that presently and exclusively rely on appointed and contract counsel. It could also have a tremendous impact on addressing crushing caseloads and by increasing training and support services for defense counsel, thereby drastically improving fundamental fairness and meaningful access to counsel in our criminal justice system. Finally, it would give defenders the vital independence to do their jobs that prosecutors and other actors in the system already have, but that defenders are denied.

III. Criminal Discovery Reform

Just as effective legal representation is a cornerstone of a fair and impartial justice system, so too is meaningful discovery and adherence to the dictates of *Brady v. Maryland*,[8] in which the Supreme Court held that prosecutors have a constitutional obligation to provide the defense with "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." Thorough discovery protects innocent individuals from wrongful convictions and ensures that a person who is the subject of a criminal prosecution has the opportunity for a full and fair hearing. Thus, a critical component of a fair federal criminal justice system is U.S. Attorneys' adherence to discovery requirements and appropriate remedies when prosecutors fail to do so.

Over the past few years, TCP has observed a troubling number of cases involving failures to disclose evidence to the defense pursuant to *Brady*. Perhaps no case is more notable in this regard than the prosecution of the late Senator Ted Stevens. The U.S. Department of Justice ("DOJ") moved in April 2009 to set aside the jury verdict in Senator Stevens's case and dismiss the indictment after discovering that prosecutors had withheld evidence they were required to disclose—evidence that would have impeached the trial testimony of a key government witness and bolstered the Senator's defense. A subsequent, court-ordered investigation concluded that the prosecution had been "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."[9]

Further, prosecution discovery policies have a direct impact on defender workloads and competent and diligent representation of indigent defendants. When evidence subject to *Brady* and other disclosure obligations is not provided, defense attorneys must spend additional time, resources, and costs to obtain the same information that is already in the possession of the prosecution. The additional time and process leads to higher costs for courts and prosecution, as defense counsel must file and litigate motions, delay plea deals, or even proceed to trials that could have been avoided. Most troubling, innocent clients are more likely to be convicted due to the inability of their attorneys to present a proper defense.

A. Encourage Open File Discovery Policies

TCP's National Right to Counsel Committee endorses the practice of open file discovery, in which prosecutors provide defense counsel with access to all evidence in their possession.[10] This practice promotes the prompt and fair disposition of cases and is a way to prevent accidental or erroneous failures to disclose. This policy would also significantly reduce indigent defense costs and workloads. In jurisdictions around the country that provide open file discovery, these benefits have occurred.

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[7] *Id.* at 201-202, Rec. 13.
[8] 373 U.S. 83 (1963).
[9] Report to Hon. Emmett G. Sullivan of Investigation Conducted Pursuant to the Court's Order ("Schuelke Report"), Apr. 7, 2009, *In re Special Proceedings*, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012), *available at* http://www.wc.com/assets/attachments/Schuelke%20Report.pdf
[10] *Id.* at 77-78, 207, Rec. 16.

B. Clarify Federal Prosecutors' Discovery Obligations and the Appropriate Remedies for Violations

Presently, the constitutional obligation to disclose exculpatory evidence is anything but clear. Even when prosecutors are acting in good faith, the inconsistent, shifting and sometimes contradictory standards for criminal discovery have made compliance with *Brady* difficult. Even more, many violations often go uncovered unless discovered by defense counsel. Although it is impossible to know how often *Brady* violations occur, groups and individuals across the political spectrum have noted that these violations occur with enough frequency and with significant human costs[11] that Congressional action is necessary.

In 2012, Senator Lisa Murkowski (R-AK) introduced the *Fairness in Disclosure of Evidence Act*, S. 2197, to clarify what evidence prosecutors must disclose and to provide remedies for *Brady* violations. TCP urged Congress to pass this bill.[12] Over 140 former judges, prosecutors, law enforcement, defense attorneys, and conservative leaders joined a letter[13] urging Congress to pass similar legislation that would include the following:

1. Rather than a materiality standard, provide that the scope of the prosecution's discovery obligation extends to *all* information, regardless of inadmissibility, that could be reasonably considered favorable to the defendant, with respect to pretrial motions, guilt, witness impeachment, or sentencing.

2. Clarify that a prosecutor must exercise due diligence in obtaining favorable evidence from other parties involved in the investigation and/or prosecution, including law enforcement or other agencies.

3. Require that prosecutors disclose information without delay, clarifying that the Jencks Act (requiring the disclosure of law enforcement-collected statements) does not trump the disclosure requirement. If the prosecution has legitimate objections to disclosure, the concerns may be raised with the court.

4. Impose an appropriate remedy for violations, including exclusion of evidence or witness testimony, a new trial, dismissal of the charges, an order that the government reimburse defendant's attorneys' fees related to the violation, criminal contempt, or other remedies to be determined by the court. Courts generally have the power to fashion appropriate remedies under their general supervisory powers, but this law would clarify that the court shall use that power to fashion an appropriate remedy each time a violation of the disclosure requirement has occurred.

Such reforms are necessary to address a troubling problem that goes to the heart of fairness and accuracy in the criminal justice system.

C. Implement Legislation Regarding Forensic Science Reform

In its 2014 report, TCP's Death Penalty Committee, comprising former governors, judges and prosecutors who have overseen the death penalty in their respective jurisdictions, highlighted increasing concerns about problems in forensic laboratories and the importance of reliability for forensic testimony in criminal cases.[14] For example, forensic science facilities often have inadequate educational programs and typically lack mandatory and enforceable standards founded on rigorous research, testing, certification requirements, and

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[11] National Association of Criminal Defense Lawyers (NACLD), *Faces of* Brady*: The Human Cost of* Brady *Violations*, May 2013, *available at* http://www.nacdl.org/Champion.aspx?id=28479

[12] The TCP letter was submitted for the 2013 Senate Judiciary Committee hearing entitled "Ensuring that Federal Prosecutors Meet Discovery Obligations." The text of the letter is available at: http://www.constitutionproject.org/wp-content/uploads/2012/08/60512_senatecriminaldiscoveryhearingletter.pdf

[13] The text of the letter is available at: http://www.constitutionproject.org/wp-content/uploads/2012/10/callforcriminaldiscoveryreform.pdf

[14] THE CONSTITUTION PROJECT, IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT, 11-22, Rec. 9 (2014), [*hereinafter* IRREVERSIBLE ERROR] *available at* http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf.

accreditation programs. The facilities are often in terrible condition and are under-funded and under-staffed, leading to significant backlogs that could contribute to errors and discourage submission of evidence to reduce backlogs. Failures to test or errors in testing important evidence could lead to wrongful convictions or failure to exonerate the innocent.

Currently, no federal standards exist regarding the accreditation of forensic laboratories. TCP recommends that Congress establish federal standards and procedures for accrediting forensic laboratories and improving the use of forensic evidence in criminal cases. It further recommends that states should apply these federal standards or adopt their own, more stringent standards.

Two bills are pending in the Senate that could improve the state of forensic science. The first is the *Criminal Justice and Forensic Science Reform Act*, S. 2177, co-sponsored by Senators Patrick Leahy (D-VT) and John Cornyn (R-TX). The second bill, the *Forensic Science and Standards Act of 2014*, S. 2022, was introduced by Senator John "Jay" Rockefeller (D-WV). These bills would improve the use of forensic evidence in criminal cases with unified federal strategy and research and create enforceable federal standards for forensic evidence. Passage of such legislation will strengthen and promote confidence in criminal justice proceedings by ensuring consistency and scientific validity in forensic testing.

IV. Protections and Remedies for Innocent Individuals

Nationwide, an astounding number of wrongfully convicted individuals have been exonerated post-trial, some of whom have spent decades in prison – or even on death row – for crimes they did not commit. Most often, such exonerations come after pain-staking and *pro bono* work by dedicated teams of attorneys, law students, and journalists who investigate innocence claims long after the appeals process has ended. While wrongful convictions exact an intangible toll on those who languish in prison for crimes they did not commit, they are also costly. In Texas, for example, the state has paid over $60 million to those it has wrongfully imprisoned. Finally, wrongful convictions present a serious public safety concern: the innocent are imprisoned while the guilty are free, in some cases committing additional crimes. TCP sets forth several possible remedies to reduce the likelihood of the errors that lead to conviction of the innocent.

A. Reauthorize the Justice for All Act

The *Justice for All Act of 2004*[15] was signed into law by President George W. Bush and passed Congress with overwhelming bipartisan support. The *Justice for All Reauthorization Act of 2013*, S. 822 ("JFAA"), co-sponsored by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT), is widely supported and should be passed. As the justice system is made up of many parts, JFAA necessarily addresses various components of the system which can lead to wrongful convictions.

The Act protects victims of federal crimes, works to eliminate the substantial backlog of DNA samples collected at crime scenes, provides resources for states to improve DNA and non-DNA forensics, and offers post-conviction DNA testing to exonerate the innocent. The Act includes bipartisan improvements to the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG"), the largest federal grant earmarked for public safety and administered by the U.S. Department of Justice. The Act also takes important steps in protecting the constitutional right to effective assistance of counsel. Finally, the Act reauthorizes the Debbie Smith DNA Backlog Reduction Act, addressing the backlog of untested rape kits and other important DNA evidence. The Act not only reauthorizes the Justice for All Act of 2004, but it includes meaningful improvements and strengthens key provisions and grant programs in the original bill. Many of these changes also help the government save money in the long term and responsibly reduce the total authorized funding under the Justice for All Act.

[15] H.R. 5107, Public Law 108-405.

B. Establish an Innocence Commission to Identify Appropriate Reforms

The most critical function of our criminal justice system is convicting the guilty and exonerating the innocent. When the criminal system fails, the government must take a hard look at this failure to determine the causes and appropriate reforms. The establishment of an innocence commission at the federal level would be an important first step toward this important goal. TCP recommends that the DOJ establish and Congress appropriate funds for a specific office tasked with reviewing innocence claims.[16] Further, jurisdictions, including the DOJ, should have in place ongoing mechanisms to identify process improvements to avert wrongful convictions before they occur.

V. Sentencing Reform and Recidivism Reduction

As is now well-known, the implementation of mandatory minimum sentencing has had a profound negative impact on the rate and length of incarceration in this country, increasing our nation's federal prison population by 500% over the last 30 years. Over a decade ago, TCP began to examine this issue and established a Sentencing Initiative to study the federal sentencing regime instituted in the mid-1980s and offer its recommendations for reform. The Sentencing Initiative is guided by a Committee comprising a former U.S. Attorney General, other prosecutors, judges, defenders, and legal scholars from across the political spectrum. Its first report was issued 2000.[17] Its second major report was in response to the U.S. Supreme Court's decisions in *Blakely v. Washington*[18] and *United States v. Booker*[19], which redefined the constitutional landscape of sentencing and presented opportunities for policymakers to consider meaningful sentencing reform.

TCP's Sentencing Committee focuses on addressing a dysfunctional federal sentencing regime with practical, bipartisan solutions. While it is critical of a number of components of the Federal Sentencing Guidelines, the Sentencing Committee believes the best mechanism for consistency, individualization, transparency, and enhanced due process is a system of guidelines. In its view, "mandatory minimum sentences are generally incompatible with the operation of a guidelines system and thus should be enacted only in the most extraordinary circumstances."[20] It has forced judges to impose "one-size-fits-all" sentences without allowing judges to consider the circumstances of an individual case or whether there is a real risk public safety. Mandatory minimum sentences for drug offenders have also had a disproportionate impact on communities of color and eroded trust between these communities and law enforcement.

TCP's commonsense, bipartisan recommendations are aimed at reducing crime *and* spending. There is no doubt that our prison populations are fueled in large part by our sentencing policies, which favor costly incarceration over cheaper and effective alternatives and/or rehabilitation. Generally, legislation must be passed to: (a) reduce the severity and scope of mandatory minimum penalties; (b) improve and expand the federal safety valves for mandatory minimum sentencing to allow for more judicial discretion; and (c) eliminate the crack/powder cocaine sentencing disparity from 18:1 to 1:1. TCP also proposes that the savings from implementing its recommendations be allocated to treating addiction or funding community-based programs to reduce recidivism.

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[16] IRREVERSIBLE ERROR at 7-8; Rec. 4(b)-(c), supra note 14.
[17] THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT (2005) [hereinafter PRINCIPLES], available at http://www.constitutionproject.org/wp-content/uploads/2012/10/34.pdf.
[18] 542 U.S. 296 (2004) (striking down the Washington state sentencing guideline system, finding it in violation of the Sixth Amendment right to trial by jury).
[19] 543 U.S. 220 (2005) (finding the Federal Sentencing Guidelines unconstitutional as applied and invalidating sections of the Sentencing Reform Act of 1984 to make the guidelines "essentially advisory").
[20] PRINCIPLES at 27.

These recommendations are not only an important step forward for fairer administration of justice, but would also save valuable taxpayer dollars. The federal prison population is above capacity, with about half of those incarcerated for drug offenses and sentenced in accordance with lengthy mandatory minimum laws. Note, for example, the U.S. Sentencing Commission's announcement that the government saved over half a billion dollars when guidelines for crack cocaine offenses, modified by the Fair Sentencing Act, were made retroactive.

It is clear that Members of Congress appreciate the need for a comprehensive approach to address mass incarceration and a number of vehicles presently exist to make federal sentencing reform and recidivism reduction a reality.

A. Pass Legislation Aimed at Restoring Judicial Discretion and Reducing Recidivism

One year ago, TCP coordinated a letter to Senators Dick Durbin (D-IL) and Mike Lee (R-UT) in strong support of their bill to address harsh sentencing practices, the *Smarter Sentencing Act*, S. 1410 ("SSA").[21] The letter was signed by over 100 former judges, law enforcement officials, and prosecutors. The signatories emphasized the consequences of harsh federal mandatory minimum sentences on the explosive and costly growth in incarceration and the need for reforms included in the bill. Some of these important reforms include changes to drug-related mandatory minimums, such as reducing some mandatory minimums and providing retroactivity for the Fair Sentencing Act of 2010. The SSA is aimed at reducing our nation's massive prison population by addressing nonviolent drug offenses and restoring some judicial discretion so judges may sentence according to the individual circumstances of each case. The SSA also saves taxpayers money. Just this September, a study by the Congressional Budget Office found that the SSA would reduce the costs of incarceration by $4.36 billion over ten years.[22]

In another letter coordinated by TCP last year, many of the same signatories wrote to Senators Patrick Leahy (D-VT) and Rand Paul (R-KY) in support of their bipartisan *Justice Safety Valve Act*, S. 619.[23] If enacted, the bill would authorize federal courts to impose a prison sentence below the mandatory minimum in cases where the minimum is not necessary to protect the public, the defendant is not likely to re-offend, and in other situations where the minimum is unwarranted. For example, in a drug case, a court could determine that a shorter prison term combined with mandatory drug treatment would be more likely to prevent an individual from reoffending.

B. Pass Legislation Aimed at Reducing Recidivism

TCP encourages Congress to pass the *Recidivism Reduction and Public Safety Act*, S. 1675, introduced by Senators Sheldon Whitehouse (D-RI) and John Cornyn (R-TX). The bill, which passed with broad bipartisan support out of the Senate Judiciary Committee in March, requires the Bureau of Prisons to assess the risk of recidivism for each prisoner and provide programming to reduce that risk. It also permits some prisoners to earn time in pre-release custody.

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[21] The letter is available at: http://www.constitutionproject.org/wp-content/uploads/2013/12/Letter-re-Smarter-Sentencing-Act-12-9-13.pdf

[22] Emily Long, "Smarter Sentencing Bill would reduce prison costs by more than $4 billion," KCSG.com, Sept. 15, 2014, a*vailable at* http://www.kcsg.com/view/full_story/25783253/article-Smarter-Sentencing-Bill-would-reduce-prison-costs-by-more-than-$4-billion?instance=more_local_news1.

[23] The letter is available at: http://www.constitutionproject.org/wp-content/uploads/2013/07/JSVA-Letter-from-Former-Prosecutors-and-Judges-7-17-2013.pdf?utm_source=PR%3A+Release+-+Former+Federal+LEOs+on+JSVA&utm_campaign=Release+-+LEO+Letter+on+JSVA&utm_medium=archive

In addition to the bills outlined above, there are a number of other pieces of legislation that have been introduced in the Senate that have a positive impact on sentencing, reentry, and the criminal justice system. TCP asks Congress to consider passage of these bills. These include the *Reclassification to Ensure Smarter and Equal Treatment Act* of 2014, RESET Act, S. 2657 (to eliminate the crack/powder cocaine sentencing disparity) and the *Record Expungement Designed to Enhance Employment*, REDEEM Act, S. 2567 (providing a process for sealing or expungement of records related to nonviolent or juvenile offenses).

VI. Ensuring Consular Access

Article 36 of the Vienna Convention on Consular Relations ("VCCR") requires that foreign nationals detained for any reason shall be notified "without delay" of their right to communicate with consular offices of their home country.[24] Article 36 embodies mutual obligations that apply to foreign authorities who arrest or detain U.S. citizens abroad. The policies underlying the VCCR are similar to those underlying the right to counsel guaranteed by the United States Constitution.

Unfortunately, in 2005, the U.S. withdrew from the Optional Protocol to the VCCR ("Optional Protocol"), which grants jurisdiction to the International Court of Justice ("ICJ") to resolve disputes with respect to VCCR.[25] In *Medellin v. Texas*, U.S. Supreme Court subsequently held that without implementing legislation, ICJ decisions are not binding federal law.[26] Thus, the ICJ no longer has jurisdiction over claims from foreign countries whose citizens have been convicted in the U.S., in violation of the VCCR. This should be deeply troubling to Congress, as the U.S. is precluded from asserting the rights of U.S. citizens convicted in foreign courts without consular access. Further, since *Medellin*, Texas has executed three Mexican nationals who were denied consular access when arrested in the United States and, consequently, denied the opportunity for consular officials to provide their nationals with competent trial counsel.

The U.S. is still a party to the VCCR and must still remain in compliance to uphold its international law obligations. In order for the VCCR to preempt state criminal procedures and have meaningful effect, the U.S. should rejoin the Optional Protocol and Congress should adopt implementing legislation to ensure full compliance. TCP recommends Congressional action and further believes that law enforcement or other government officials have an obligation to notify consular officials as soon as they realize that an arrested person is a foreign national. Further, we recommend additional compliance incentives, such as exclusionary rules barring the introduction of evidence obtained in the absence of consular notification and legislation rendering foreign nationals ineligible for the death penalty if they are not provided with their consular rights in a timely fashion. Our Death Penalty Committee commends federal and state law enforcement agencies that have created educational materials about the VCCR, but believes implementing legislation is required to give domestic effect to the Optional Protocol.[27]

VII. Safeguarding Racial Fairness, Civil Rights, and Civil Liberties

Study after study consistently demonstrates glaring racial disparities in our capital punishment and criminal justice system. For example, a 2013 study by the U.S. Sentencing Commission confirms racial disparities and racial discrimination in the U.S. justice system: prison sentences of black men are nearly 20 percent longer than those of white men who commit similar crimes.[28] These disparities have diminished the public's faith and trust in our justice system. It is critical that race and other factors, such as ethnicity or

[24] Organization of American States, Vienna Convention on Consular Relations art. 36(b), Apr. 24, 1963.
[25] The U.S. withdrawal occurred in response to the ICJ decision in *Mexico v. United States of America*, in which Mexico sought to halt the execution of 54 Mexican nationals; the ICJ found that the U.S. had failed to inform 51 of those individuals of their rights under the VCCR and that the U.S. must review and reconsider the convictions and sentences. *See Avena & Other Mexican Nat'ls*, 2004 I.C.J. 12, 53-55 (Mar. 31).
[26] 552 U.S. 491 (2008).
[27] IRREVERSIBLE ERROR at 120-23; Rec. 33, supra note 14.
[28] Joe Palazzolo, *Racial Gap in Men's Sentencing*, WALL ST. J., Feb. 15, 2013 at A3.

gender, are not the countervailing factors that determine whether a person faces arrest, conviction or a particular form of punishment.

Given the complexity of racial and ethnic disparities, TCP acknowledges the difficulty of crafting recommendations for a "remedy." There is evidence that even subconscious or implicit bias plays a role in our system, which can affect jury deliberations and sentencing. Instead, TCP encourages gathering data and experimenting with solutions, with people of color playing substantial leadership roles in reform efforts. It is also critical that each jurisdiction ensure that people of color are part of every decision-making process within the criminal justice system, including in the ranks of defense counsel, prosecutors, jurors, and judges.

Today, TCP is considering the Obama administration's request to fund body cameras for local law enforcement. In 2007, TCP's Liberty and Security Initiative released a report regarding guidelines for public video surveillance.[29] TCP believes many of the civil liberties concerns regarding public video surveillance are applicable to the use of body cameras. Body cameras can create a strong sense of transparency and accountability that is needed in many regions to strengthen trust between communities and law enforcement. Such cameras provide documentary evidence of encounters between law enforcement and the public and may also serve as a check against the abuse of power by officers and protect police officers against false allegations of abuse. At the same time, the legal, social, and technological issues are complex and evolving, particularly with respect to retention of data, prospects for increased government surveillance, and privacy concerns. The bottom line is that body cameras can be a valuable tool if designed to preserve accountability and strong procedural safeguards are implemented to protect rights of privacy, freedom of speech, and freedom of expression.

VIII. Conclusion

The Constitution Project thanks Chairman Durbin and the Committee for its attention to the pressing civil and human rights concerns presented by the current operation of the criminal justice system in the United States. We continue to believe that multi-partisan agreement can be forged on each of the problems described above as we have, over the last 17 years, been able to foment consensus among our committee members of diverse partisan stripes and experience on these very issues. We are convinced of the immediate and vital need to transform our criminal justice system and offer our support to the Committee as it reinvigorates existing reform efforts and develops new solutions to create a fairer, impartial and more accurate criminal justice system.

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[29] THE CONSTITUTION PROJECT, GUIDELINES FOR PUBLIC VIDEO SURVEILLANCE: A GUIDE TO PROTECTING COMMUNITIES AND PRESERVING CIVIL LIBERTIES, *available at* http://www.constitutionproject.org/documents/guidelines-for-public-video-surveillance-a-guide-to-protecting-communities-and-preserving-civil-liberties/.