



**Written Statement of the American Civil Liberties Union
Before the U.S. House Judiciary Committee**

Oversight Hearing on

“Policing Practices”

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Submitted by the

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I. Introduction

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. With more than three million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, DC to advance the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin. Consistent with this mission, the ACLU advocates for reforms that will build trust and legitimacy between law enforcement and the communities they serve.

The ACLU's work to reform police practices is multifaceted. We pursue litigation against police departments that are using unconstitutional tactics that harm the communities they are sworn to protect. The ACLU sued the Milwaukee Police Department over its aggressive and unconstitutional stop and frisk policy, securing reforms in 2017 that include data collection, training, and accountability. The organization is also working with state affiliates and grassroots partners across the country to secure policies that promise to build trust between law enforcement and community. Last month's enactment of the California Act to Save Lives (AB392), which changes the police use of force standard from "reasonable" to "necessary," is an example of how the ACLU is advancing 21st century policing in state legislatures. Finally, we advocate at the federal level to achieve reforms that will reach police departments nationwide. The 2014 enactment of the Death in Custody Reporting Act, which mandates state reporting of deaths that occur in police custody, was a response to the hundreds of police caused fatalities that occur annually with no accounting.

The ACLU commends the House Judiciary Committee for providing a much needed examination of policing in this country. Incidents across this country – from Los Angeles to Cleveland, from Ferguson to New York City, and from North Charleston to Baltimore – offer an opportunity to change the culture of policing. This culture, as it currently exists, results in a relationship based on mistrust between law enforcement and our low income communities and communities of color. The United States has the opportunity to go beyond dealing with a few bad apples in police departments and to reform an entire system. Fairness and justice demand that we seize this opportunity to ensure accountability and transparency in police departments across the country.

II. House Judiciary Must Conduct Oversight of the Department of Justice

A critical responsibility of the House Judiciary Committee is to conduct oversight of the Department of Justice (DOJ). The Committee must examine the Department's recent policies and practices with respect to local police departments. Entities like the Civil Rights Division (CRT), Community Oriented Policing Services (COPS) Office, and Office of Justice Programs

(OJP) require attention given their role in local police accountability. Additionally, the Congress provides millions of dollars to local law enforcement annually and oversight is necessary to understand how those dollars are used to police communities.

A. House Judiciary Must Examine DOJ's Failure to Enforce DICRA

According to its proposal for implementation, the Department of Justice (DOJ) plans to delay implementation of the Death in Custody Reporting Act (DCRA) until Fiscal Year 2020, a full five years after it was signed into law and two years after DOJ last published its near-final compliance plan and guidelines.¹ DOJ's delayed implementation of DCRA is unacceptable, as there continues to be an unreliable national census of custodial and arrest-related deaths, including national statistics on mortality rates, demographic impact, circumstances of these deaths, and implicated law enforcement agencies.

Simply put, the federal government does not know how many people are killed by law enforcement every year. Instead, the responsibility of tracking police-caused fatalities falls on outlets like The Washington Post, which estimates at least 3,693 people have been killed by police since DICRA was enacted in December 2014.² Knowing the number and circumstances of police-caused fatalities is crucial to developing policies and best practices that could reduce the number of such fatalities. This data is also critical to providing the public and DOJ the information needed to ensure law enforcement agencies are complying with civil rights laws, and to assisting DOJ with fulfilling its enforcement responsibilities.

B. House Judiciary Must Scrutinize CRT's Failure to Enforce Consent Decrees

On November 7, 2018, then Attorney General Jeff Sessions issued a policy that sets unprecedented barriers for the Department of Justice Civil Rights Division attorneys to negotiate settlement agreements and consent decrees. Consent decrees are a vital tool to hold state or local government actors accused of serious civil rights and civil liberties violations accountable.³ Consent decrees can remedy these violations at a systemic level, with implementation overseen by a court-appointed monitor until the agency has successfully carried out the required reforms. Sessions' action now makes it almost impossible for the federal government to hold state and

¹ Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection: Death in Custody Reporting Act Collection, 83 Fed. Reg. 44,064, 44,065 (Aug. 29, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-06-11/pdf/2018-12503.pdf>.

² Julie Tate et al., *Data-Police-Shootings*, Washington Post, <https://github.com/washingtonpost/data-police-shootings> (last visited Dec. 16, 2018).

³ Jefferson B. Sessions, Att'y Gen., Memorandum for Heads of Civil Litigating Components & United States Attorneys on the Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (November 7, 2018), <https://www.justice.gov/opa/press-release/file/1109621/download>.

local law enforcement agencies accountable for systemic unconstitutional and unlawful policing that is found after a Section 14141⁴ pattern or practice investigation.

C. House Judiciary Must Consider the Dismantling of COPS Collaborative Reform

On September 15, 2017, DOJ changed the purpose of the Collaborative Reform Initiative for Technical Assistance,⁵ a Community Oriented Policing Services program that provided federal resources to law enforcement agencies that were experiencing serious policing failures.⁶ Collaborative reform was started in 2011 at the request of local law enforcement. It was a voluntary program for police departments and local officials to seek federal assistance to “strengthen and build the mutual trust”⁷ between law enforcement and communities, often in the midst of a tragedy, like a fatal police shooting. Collaborative reform promoted constitutional policing, addressing practices that fell short of that, including excessive force and racial profiling. Instead of promoting constitutional and community policing through collaborative reform and other technical assistance and training the COPS office provided, DOJ is now asking local police departments to partner only around violent crime.⁸

The police departments that were benefiting from collaborative reform prior to September 15, 2017, were in cities like Milwaukee, Wisconsin,⁹ where Dontre Hamilton was fatally shot by police; Saint Anthony, Minnesota,¹⁰ where Philando Castile met the same fate; and North Charleston, South Carolina,¹¹ where Walter Scott was also fatally gunned down by a police officer. It is troubling that these jurisdictions and others, in the midst of a national crisis caused by fatal police shootings and other police violence, have been abandoned by DOJ. The perversion of the collaborative reform program is consistent with then Attorney General Jeff Sessions’ belief that DOJ oversight of local police departments amounted to “federal intrusion.”¹² And it is fully

⁴ 42 U.S.C. § 14141.

⁵ Press Release, Department of Justice, Department of Justice Announces Changes to the Collaborative Reform Initiative (Sept. 15, 2017), <https://www.justice.gov/opa/pr/departement-justice-announces-changes-collaborative-reform-initiative>.

⁶ Department of Justice, Community Oriented Policing Services, *Collaborative Reform Initiative for Technical Assistance* (June 2016), https://cops.usdoj.gov/pdf/technical_assistance.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ Ashley Luthern, *U.S. Department of Justice halts ongoing review of Milwaukee Police Department*, Milwaukee Journal Sentinel (Sept. 17, 2017), <http://www.jsonline.com/story/news/crime/2017/09/17/doj-retools-collaborative-reform-halting-ongoing-review-milwaukee-police/673424001/>.

¹⁰ Jon Collins, *Justice Dept. changes community policing; St. Anthony uncertain about effect*, MPR News (Sept. 15, 2017), <https://www.mprnews.org/story/2017/09/15/st-anthony-justice-department-community-policing>.

¹¹ Alan Blinder, *Justice Department to Review North Charleston Police Force*, The New York Times (May 17, 2016) <https://www.nytimes.com/2016/05/18/us/north-charleston-police-walter-scott-shooting.html?mcubz=0>.

¹² Jeff Sessions, *Avoid harmful federal intrusion*, USA Today (April 17, 2017) <https://www.usatoday.com/story/opinion/2017/04/17/jeff-sessions-avoid-harmful-federal-intrusion-editorials-debates/100579848/>.

inconsistent with the civil rights enforcement that DOJ is charged with as it pertains to unconstitutional policing.

D. House Judiciary Must Oversee DOJ Funding of Militarization

Militarized policing is not limited to 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.¹³ Rather, SWAT teams are now overwhelmingly used to serve search warrants in drug investigations and by Customs and Border Protection. Our June 2014 report, *War Comes Home: The Excessive Militarization of American Policing*, found that 79% of the incidents reviewed involved the use of a SWAT team to search a person’s home, and more than 60% of the cases involved searches for drugs.¹⁴ Additionally, just as the War on Drugs has disproportionately impacted people and communities of color, we have found that 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% were minorities.¹⁵

Federal programs providing equipment transfers and funding have contributed to the militarization of American policing. These programs include the Homeland Security Grant Program (HSGP) and its two main components, the State Homeland Security Program (SHSP) and the Urban Areas Security Initiative (UASI),¹⁶ the Department of Justice Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program, and the Department of Defense (DOD) 1033 Program. There are several troubling aspects of the 1033 Program, which transfers surplus DOD military weapons and equipment to state and local law enforcement at no cost. Through an executive order¹⁷ issued in August 2017, the oversight and regulation of these programs was eliminated, even in the wake of a Government Accountability Office (GAO) July 2017 report that found the DOD 1033 program issued \$1.2 million worth of military gear to a fictitious law enforcement agency.¹⁸ In order to address these issues, the House Judiciary and Oversight Committees should convene an oversight hearing on the federal programs that provide weapons to law enforcement.

¹³ Daryl Gates, *Chief: My Life in the LAPD* 131 (Bantam Books, New York, 1992). For an excellent summary of the creation and evolution of SWAT, see Radley Balko, *Rise of the Warrior Cop* (PublicAffairs, 2013).

¹⁴ ACLU, *War Comes Home: The Excessive Militarization of American Policing*, 3, June 23, 2014, available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>.

¹⁵ *Id.* at 36-37.

¹⁶ U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties, *Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers*, 6 (March 1, 2013), available at https://www.dhs.gov/sites/default/files/publications/DHS%20Support%20to%20National%20Network_0.pdf.

¹⁷ Exec. Order No. 13809, 82 C.F.R. 41499 (2017) available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-restoring-state-tribal-local-law-enforcements-access-life-saving-equipment-resources/>.

¹⁸ U.S. Office of Government Accountability, *DOD Excess Property: Enhanced Controls Needed for Access to Excess Controlled Property*, 20 (July 2017) available at <https://www.gao.gov/assets/690/685916.pdf>.

E. House Judiciary Must Reconvene the Policing Strategies Working Group

The House Judiciary Committee should continue to lead the bipartisan House Policing Strategies Working Group, which should advance and reform federal policy on policing. In the 115th Congress, the Working Group held a series of private roundtables to discuss police use of excessive force and officer safety. In the 116th, the Working Group should continue this examination, but in more public forums and with meaningful constituent representation. The working group meetings should serve as the foundation for official Committee hearings, federal policy reforms, and other congressional action, including Congressional Research Service (CRS) reports and agency briefings. The working group should examine police accountability mechanisms, including liability insurance, “cooling off” periods, and a police misconduct database.

III. House Judiciary Must Advance Legislative Reforms

The House Judiciary Committee must take up legislation that will reform police practices and build trust between police and community nationwide. The Committee has several bills before it that are deserving of consideration and favorable reporting for Floor consideration. As the Committee of primary jurisdiction, it is Judiciary’s responsibility to lead on federal policies implicating policing. This hearing lays the foundation for several bills to now be taken up.

A. House Judiciary Must Consider PEACE Act

Excessive and deadly use of force, disproportionately against people of color and people with psychiatric disabilities, is driving national discourse. Jaywalking and selling individual cigarettes should not result in death. The House Judiciary Committee should take up the Police Exercising Absolute Care with Everyone (PEACE) Act (H.R. 4359) introduced by Representatives Ro Khanna (D-CA) and William Lacy Clay (D-MO) to reform the legal use of force standard that fails to protect and preserve human life. The PEACE Act requires that law enforcement use force only when necessary. This change in legal standard has proven to decrease excessive use of force incidents while causing no greater risk of harm to officers.¹⁹

B. House Judiciary Must Vote Out End Racial and Religious Profiling Act

Racial profiling in law enforcement is a persistent problem in the United States. As tragedies across the country make clear, there is a 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.²⁰ The House

¹⁹ Seattle Police Monitor, *Ninth Systemic Assessment: Use of Force*, 32 (April 2017) available at <https://www.documentcloud.org/documents/3538083-Assessment-Use-of-Force.html>.

²⁰ 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), available at https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf.

Judiciary Committee should take up the End Racial and Religious Profiling Act, which would prohibit profiling on the basis of race, religion, ethnicity, gender, sexual orientation, gender identity and expression, and national origin and mandate law enforcement training on racial profiling and data collection on all law enforcement routine or investigatory activities.

C. House Judiciary Must Take Up Stop Militarizing Law Enforcement Act

The images on the news of police wearing helmets and masks, toting assault rifles, and riding in mine-resistant armored vehicles are not isolated incidents—they represent a nationwide trend of police militarization. The House Judiciary Committee should advance the Stop Militarizing Law Enforcement Act (H.R. 1714), sponsored by Representatives Hank Johnson (D-MI) and Tom McClintock (R-NC), which would prohibit the DOD 1033 program transfer of offensive military weapons and equipment to state and local law enforcement and provide much needed transparency and oversight to the 1033 program.

D. House Judiciary Must Move Fifth Amendment Integrity Restoration (FAIR) Act

Civil forfeiture allows police to seize — and then keep or sell — any property they allege is involved in a crime. Property owners do not have to be arrested or convicted of a crime for their cash, cars, or homes to be taken away permanently by the government. Many police departments use forfeiture to benefit their bottom lines, making seizures motivated by profit rather than crime-fighting. The House Judiciary Committee should advance the Fifth Amendment Integrity Restoration (FAIR) Act (H.R. 1895), sponsored by Representatives Tim Walberg (R-MI) and Jamie Raskin (D-MD), which would eliminate the profit incentives driving civil asset forfeiture, provide property owners with the right to counsel in all civil forfeiture proceedings, and increase the burden of proof from a “preponderance of the evidence” to “clear and convincing evidence” before the government can take someone’s property believed to be connected to a crime.

E. House Judiciary Must Prioritize Excessive Use of Force Prevention Act

The House Judiciary Committee should advance the Excessive Use of Force Prevention Act (H.R. 4408) sponsored by Representative Hakeem Jeffries (D-NY). The legislation would ban the use of a chokehold under federal law and is a direct response to the death of Eric Garner at the hands of police. Even though many police departments across the nation, including in New York City, prohibit law enforcement from using chokeholds, the practice is not illegal under federal law. Mr. Garner’s death demonstrated that police department policy is insufficient in preventing this type of tragedy.