WASHINGTON
LEGISLATIVE OFFICE

May 16, 2012

Dear Representative:

RE: ACLU Urges NO Vote on the Violence Against Women Reauthorization Act of 2012 (H.R. 4970)

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, we write to urge Members of the House of Representatives to vote NO when the Manager's Amendment (Adams Amendment #1) to the Violence Against Women Reauthorization Act of 2012 (H.R. 4970) comes to the House floor.

In a letter to members of the House Judiciary Committee, before markup of H.R 4970, we provided the Committee with our views and urged the Committee to address certain critical deficiencies in the bill and model certain elements of the Senate-passed bill (S. 1925). Unfortunately, after the markup, not only did the deficiencies – such as coverage for LGBT survivors and protections for Native American and immigrant survivors of domestic violence – remain, but new harmful language was added, via the Gowdy Amendment.

Although we recognize that at least one element of the House bill improves upon S. 1925, specifically in the provisions relating to cyberstalking, on balance, H.R. 4970 contains far too many deficiencies; unlike S. 1925, the bad simply outweighs the good and we must urge Members to oppose.

The Manager's Amendment does not cure the deficiencies. In fact, as discussed in section D below, the amendment creates additional problems with the bill.

A. Applying PREA Standards to All Immigration Detainees

The Prison Rape Elimination Act of 2003 (PREA), which set standards for preventing, detecting, and responding to sexual abuse in custody, was intended to protect every detainee from sexual abuse and assault. To date, that has not occurred. We are mostly pleased that section 1002(c) of H.R. 4970 has taken a positive step forward by requiring that the Department of Homeland Security (DHS), which detains almost 400,000 persons annually, and the Department of Health and Human Services (HHS), which detains 9,000 unaccompanied alien children annually, recognize a unanimous Congress's intent under PREA to cover all immigration detainees.

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Section 1002(c) allows DHS and HHS to undertake their own rulemaking, but under a strict deadline of 180 days and with "due consideration" to the extensive work conducted by the National Prison Rape Elimination Commission. The PREA Commission concluded that "[n]o period of detention, regardless of charge or offense, should ever include rape." Section 1002(c)'s compliance provision would require DHS and HHS to conduct and include PREA performance assessments in their evaluations of detention facilities, ensuring system-wide oversight based directly on PREA's requirements. This uniformity of coverage across criminal and civil facilities is supported by the National Sheriffs' Association, which has advised Congress that "DHS PREA standards need to be consistent with [the Department of Justice's] PREA standards. This would ensure that there are not differing standards for jails based on the federal, state, or local detainees held, as well as help with the swift and successful implementation of final PREA standards."

We are concerned, however, that H.R. 4970 lacks a definitional provision as compared with section 1002(c) in S. 1925, passed by the Senate on April 26, 2012. This provision states that "[a]s used in this section, the term 'detention facilities operated under contract with the Department' includes, but is not limited to contract detention facilities and detention facilities operated through an intergovernmental service agreement [IGSA] with the Department of Homeland Security." The manager's amendment to H.R. 4970 at markup explicitly added IGSAs to the bill's coverage, but DHS detention facilities operate under a wide variety of contractual arrangements and it is important for section 1002(c)'s language to be as inclusive as possible to ensure universal and uniform PREA coverage of detainees. Without this definitional provision, H.R. 4970 risks misinterpretation that would perpetuate the patchwork PREA coverage the bill commendably aims to prevent.

B. Protections for Immigrant Survivors of Violence

The amendments offered by Rep. Adams ("manager's package") are inadequate and do not correct serious problems with H.R. 4970's treatment of battered immigrants. H.R. 4970 would still roll back existing protections for battered immigrants created with bipartisan congressional support. When VAWA was conceived, Congress recognized that the noncitizen status of battered immigrants makes them particularly vulnerable. Abusers exploit their victims' undocumented status, leaving the victim afraid to report abuse to law enforcement and making victims fearful of assisting with criminal prosecutions.

Even as modified, H.R. 4970 eradicates protections which have been available for almost twenty years to immigrant victims of violence; establishes an extremely onerous adjudication process before victims are protected that is not required in other contexts; and wastes government resources based on fraud allegations that have not been substantiated.

1. <u>H.R. 4970 eliminates protections for crime victims offered by the U visa.</u>

The bill deters immigrant victims from reporting crimes by denying nearly all U-visa recipients the protections offered by lawful permanent resident status. By allowing only temporary relief, H.R. 4970 would eliminate an important incentive for victims to report crimes, silencing victims who fear deportation. Victims could routinely be deported and forced to leave their children behind with an abuser if he has legal status but she does not. H.R. 4970 also endangers crime victims by needlessly requiring, as a prerequisite for protection, that an investigation or prosecution be actively pursued. Current law already requires that law enforcement certify that a victim has been or is likely to be helpful to an investigation or prosecution. Finally, H.R. 4970 requires that the victim help identify the

perpetrator, ignoring the fact that many sexual assault victims never get a good look at a perpetrator or are deeply affected by the trauma they experienced.

2. H.R. 4970 denies battered immigrants the protections of "self-petitioning."

The bill empowers perpetrators to interfere with a victim's immigration case by forcing every VAWA self-petitioner to participate in two face-to-face interviews with DHS officials. This cumbersome process subjects victims to unnecessary additional screening creating danger for victims monitored by their abuser. H.R. 4970 also requires untrained local field office staff to conduct in-person interviews with victims of domestic violence and sexual assault. Long delays to secure initial interviews at local offices would put victims trying to leave abusive relationships at greater risk. Moreover, the bill endangers the safety of battered immigrants by suspending adjudication of their cases if there is an open criminal investigation or prosecution of the perpetrator.

C. Making Deportation Proceedings Less Efficient and Less Fair By Discarding Well-Established Supreme Court Precedent on Evidentiary Rules in Immigration Court

During the markup of H.R. 4970, Rep. Gowdy introduced an amendment titled "consideration of other evidence," which would allow the use of documents beyond conviction records to determine whether an individual is deportable for a crime of domestic violence. The amendment was passed by voice vote. The Gowdy amendment would introduce enormous inefficiencies into both criminal trials and civil deportation proceedings by erasing the important dividing line between them. The Supreme Court has repeatedly said that only an individual's conviction record may be considered in determining whether criminal grounds exist to supportdeportation, and this doctrine can be traced back to 1914.[1] Immigration proceedings should not become protracted mini-trials collaterally assessing evidence that was unnecessary to a criminal conviction.

As of March 2012 there was a backlog of more than 300,000 immigration cases, which would be significantly exacerbated by the Gowdy amendment.[2] The American Bar Association emphasizes that the current rules targeted by the Gowdy amendment promote "uniform treatment of convictions, fairness, and due process, as noncitizens convicted under identical provisions of criminal law will face the same set of immigration consequences and will not be forced to defend themselves against old criminal allegations without the due process protections of a criminal proceeding."[3] The Gowdy amendment would second-guess the results of criminal trials, with new evidence debated in immigration court that was not scrutinized at trial. Witnesses may no longer remember what happened or be available to testify, and equally "reliable" records may provide conflicting versions of relevant events. Moreover, without knowing that a person's conviction record is all that can be examined in future immigration proceedings, criminal defense attorneys would be unable to provide constitutionally-required advice on a criminal conviction's deportation consequences. This would bog down criminal courts and hamper plea bargaining, with domestic violence survivors compelled to testify against their abusers or have cases dismissed.

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[1] *See* Taylor v. United States, 495 U.S. 575 (1990); Shepard v. United States, 544 U.S. 13 (2005); *see also* Rebecca Sharpless, *Towards a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979, 994-95 (July 2008) (describing case law from 1914 on setting out categorical approach for immigration adjudications).

[2] TRAC Immigration, "Historic Drop in Deportation Orders Continues as Immigration Court Backlog Increases." (Apr. 24, 2012), available at http://trac.syr.edu/immigration/reports/279/

[3] American Bar Association, "Preserving the Categorical Approach in Immigration Adjudications." (Aug. 2009).

The Gowdy amendment fundamentally would undermine the rights of immigrants to a fair deportation proceeding. The government is required to provide clear, unequivocal, and convincing evidence of deportability.[4] By failing to mention exculpatory evidence, however, the amendment unfairly weights the scales of justice by favoring one side of what is designed to be an adversarial proceeding. This at once reduces the independence of immigration courts and their due process protections.

The severe consequences of deportation on criminal grounds, including destruction of families with U.S. citizen spouses and children, must not depend on evidence untested by the rigors of a criminal trial. Under the Gowdy amendment, even an anonymous 911 call could become the basis for deportation so long as the document satisfies an undefined test of "reliability." Police reports, use of which the amendment explicitly encourages, are not prepared as judicial documents; their accuracy varies greatly and depends on police officers' time pressures which limit investigations, state and local jurisdictions' divergent policies and practices, language barriers, and the vagaries of human memory. The Gowdy amendment would allow all sorts of currently inadmissible evidence to deport immigrants without any benchmark of accuracy. Erroneous deportations are repugnant to American values of due process and the rule of law, which the Supreme Court's well-established precedent on conviction records in immigration proceedings should continue to govern.

D. Taxpayer-Funded Employment Discrimination

The Senate-passed bill, S. 1925, and the version of H.R. 4970 approved by the House Judiciary Committee included important prohibitions against discrimination against those who receive services under and are employed by taxpayer-funded programs authorized by VAWA. The manager's amendment, however, strips protections for employees in taxpayer-funded jobs. This is an attack on the very core of civil rights protections historically supported by the federal government. Seventy years ago, the first success of the modern civil rights movement was a decision by President Franklin Roosevelt to bar federal contractors from discriminating based on race, religion, or national origin. This was the first action taken by the government to promote equal opportunity for all Americans, and the start of our longstanding, national commitment to barring even private organizations from discriminating in hiring using federal funds. That first presidential decision led to the enactment of scores of civil rights statutes that prohibit discrimination, especially by recipients of federal funds. The manager's amendment undermines this enduring commitment.

The manager's amendment to H.R. 4970 changes the nondiscrimination provision to allow religious organizations that perform social services with taxpayer funds to use those funds to refuse to hire an otherwise qualified candidate for a government-funded job based on her religious beliefs, or lack thereof.[5] Under Title VII, when using their own funds, religious organizations can choose their employees on the basis of religion or religious beliefs. When taxpayer dollars are used to fund jobs, however, taxpayer-funded organizations must respect the civil rights of all Americans. The provision in the manager's amendment is a license to use religion to discriminate, but taxpayer dollar must not fund discrimination.

[4] *See, e.g.*, Woodby v. United States, 385 U.S. 276 (1966).

[5] This means that religious organizations can, when hiring for government-funded jobs, ask not only what faith tradition you follow (or if you even have one), but what your specific religious beliefs are. They would also be permitted, for instance, to ask questions about your marital status if you are pregnant, whether your previous marriage was annulled, and your views on homosexuality.

E. Housing Protections

In the last reauthorization of the Violence Against Women Act, Congress specifically acknowledged the interconnections between housing and abuse.[6] It recognized that domestic violence is a primary cause of homelessness; that 92% of homeless women have experienced severe physical or sexual abuse at some point in their lives; that victims of violence have experienced discrimination by landlords; and that victims of domestic violence often return to abusive partners because they cannot find long-term housing.[7] The ACLU has represented victims of violence who faced eviction because of the abuse perpetrated by their batterers, and worked closely with survivors, advocates, and housing managers to preserve their access to safe housing.[8] VAWA's current housing protections make it unlawful to evict survivors of domestic violence, dating violence, and stalking from certain federal housing programs solely because the tenant is a survivor. We are pleased that H.R. 4970 strengthens the current housing protections by applying protections consistently across housing programs and protecting survivors of sexual assault, and requiring notice of housing rights.

The provision relating to emergency relocation and transfer, however, does not enhance protections for survivors because it does not require that public housing agencies and owners or managers of housing covered by VAWA adopt the emergency relocation and transfer plan developed by federal agencies. Instead, adoption of the plan remains voluntary. Public housing agencies and owners already have the option to create and implement emergency relocation plans. But although HUD has encouraged adoption of these plans for the last nine years, the vast majority of PHAs and owners still have not. Unless VAWA requires that covered PHAs and owners adopt a plan based on the model plan developed by HUD and other federal agencies, they will have little incentive to do so. The status quo—victims forced to choose between staying in a dangerous location or losing their housing subsidy and becoming homeless—will endure. Requiring adoption of a plan would ensure that PHAs and owners have policies in place, tailored to their resources and capacities, when survivors need to pursue alternative safe housing.

Additionally, H.R. 4970 does not require that survivors be given notice of their VAWA housing rights at the time of eviction. Without such notification, domestic violence victims may never know that their eviction was improper or unlawful. It defies commonsense to expect, as some have suggested, that a survivor should rely on the notice of VAWA rights that she received at the time she moved into her housing. Years will have passed, along with the exigencies of everyday life, since that initial notice of VAWA rights and it's therefore unreasonable to expect a survivor of domestic violence to have ready or easy access to such a document. The House shouldn't countenance such a pinched approach to access to information for victims of domestic violence.

F. Complete Omission of Coverage for Those Who Are LGBT

We oppose the complete omission of explicit coverage for the lesbian, gay, bisexual, and transgender (LGBT) community in H.R. 4970. By contrast, the ACLU supports the inclusion of the LGBT community in the Senate-passed reauthorization, S. 1925.

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[6] *See* 42 U.S.C. § 14043e (2011).
[7] Lisa A. Goodman et al., *No Safe Place: Sexual Assault in the Lives of Homeless Women* (2006), *available at* http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=558; Lenora Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 J. GENDER, SOC. POL'Y & LAW 377 (2003).
[8] Information about these cases can be found at www.aclu.org/fairhousingforwomen.

The LGBT-inclusive provisions in S. 1925 represent a critical step forward for VAWA, ensuring that it will reach those most in need of its services, regardless of sexual orientation or gender identity. The need could not be clearer. Studies indicate that LGBT people experience domestic violence at roughly the same rate as the general population. However, it is estimated that less than one in five LGBT domestic violence victims receives help from a service provider and less than in one in ten victims reports violence to law enforcement. H.R. 4970 does nothing to address the unacceptable discrimination that LGBT people often face when attempting to access services for those who experience intimate-partner violence, and nothing to change the fact that the LGBT community is underserved in this area.

G. Protections for Native American Survivors of Abuse

The crisis of violence against Native American women has been well documented.[9] Native American women are almost three times as likely to be raped or sexually assaulted as all other races in the United States and more than one-quarter of Native women have reported being raped at some point in their life.[10] Additionally, while violence against white and African-American victims is primarily intra-racial, nearly four in five American Indian victims of rape and sexual assault described their offender as white.[11] This is particularly significant because the legal decision that stripped Indian tribes of criminal jurisdiction over non-Indians[12]—even for crimes committed against Native American women on tribal lands—and thus placed non-Indian perpetrators of violence outside the reach of tribal courts, has exacerbated the cycle of violence on tribal lands.[13] Because tribal governments lack the authority to prosecute an alleged non-Indian abuser and federal law enforcement officers and prosecutors are, for a variety of reasons,[14] unable or unwilling to investigate or prosecute, victims are left without legal protection or redress and abusers act with increasing impunity.

We are disappointed that H.R. 4970 fails to address this legal impediment, which it could have done by restoring tribal authority to exercise concurrent criminal jurisdiction over non-Indian perpetrators of domestic violence and dating violence that occurs in the Indian country of a participating tribe. Giving tribes such authority, while at the same time providing those accused of such crimes all the constitutional rights to which they are entitled—including the opportunity to have their sentences reviewed by an appellate court, would have empowered tribal governments to respond more fully to

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[9] *See e.g.*, AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), *available at* http://www.amnesty.org/en/library/asset/AMR51/035/2007/en/cbd28fa9-d3ad-11dd-a329-2f46302a8cc6/amr510352007en.pdf.

[10] RONET BACKMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN, 33 (2008), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf; CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT, 3 (2011), *available at* http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf.

[11] DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME, 9 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf.

[12] Oliphant v Suquamish Indian Tribe, 435 U.S. 191 (1978).

[13] SAVE Native Women Act: Hearing on S.1763 Before the S. Comm. on Indian Affairs, 112th Cong. (2011) (statement of Thomas J. Perrelli, Associate Attorney General).

[14] "Federal resources . . . are often far away and stretched thin [and] [f]ederal law does not provide the tools needed to address the types of domestic or dating violence that elsewhere in the United States might lead to convictions and sentences ranging from approximately six months to five years—precisely the sorts of prosecutions that respond to the early instances of escalating violence against spouses or intimate partners." Letter from Ronald Weich, Assistant Attorney General, to Hon. Joseph R. Biden Jr., Vice President, (July 21, 2011), *available at* http://www.justice.gov/tribal/docs/legislative-proposal-violence-against-native-women.pdf.

the cycle of violence in Indian country and to hold perpetrators, no matter their race or ethnicity, accountable.

H. New Mandatory Minimums and New Death Penalties under Sections 1001 for Sexual Abuse of a Minor and 1005 for Aggravated Sexual Abuse

Section 1001 of H.R. 4970 would result in a person convicted of sexually abusing a minor or ward being subject to the penalties that would include new 5- and 10-year mandatory minimums and a 30-year mandatory minimum for aggravated sexual abuse of a child under 16. Such provisions would also make it unlawful, in the course of committing a civil rights offense under 18 U.S.C. §§ 241-249 or the Fair Housing Act under 42 U.S.C. § 3631, to engage in conduct that "would constitute" sexual abuse under Chapter 109A of the federal code and subject these new crimes to the penalties for sexual abuse under Chapter 109A. The penalties for sexual abuse that would apply to civil rights and Fair Housing Act offenses would include the new 5- and 10-year mandatory minimums for sexual abuse of a minor, the 30-year mandatory minimum for aggravated sexual abuse, and the death penalty for aggravated and any other crime of sexual abuse if a the crime resulted in murder.

Section 1005 of H.R.4970 creates new 5- and 10-year mandatory minimum sentences for aggravated sexual abuse that occurs in special maritime and territorial jurisdiction or Federal prison. This new 10-year mandatory sentence could be charged in cases of sexual assault that involve force or threat and the 5-year mandatory minimum in cases that the victim was rendered unconscious or involuntary administered a drug or intoxicant.

We oppose the death penalty because we think that it inherently violates the constitutional ban against cruel and unusual punishment and the guarantees of due process of law and of equal protection under the law. Furthermore, we believe that the state should not kill with premeditation and ceremony, in the name of the law or in the name of its people, or in an arbitrary and discriminatory manner. The number of people being sentenced to death for murder in the United States has declined in recent years. In 2010, the number of new death sentences was 104,[15] the lowest level in 30 years. However, the United States remains the only advanced Western democracy that fails to recognize capital punishment as a profound human rights violation and as a frightening abuse of government power.

Also, we oppose mandatory minimum sentences because they generate unnecessarily harsh sentences, tie judges' hands in considering mitigating circumstances in individual cases, create racial disparities in sentencing, and empower prosecutors to force defendants to bargain away their constitutional rights. Mandatory minimum sentences defeat the traditional rehabilitative purposes of sentencing by taking discretion away from judges and ceding it to prosecutors who then use the threat of lengthy sentences to frustrate defendants' asserting their constitutional rights.

In October 2011, the United States Sentencing Commission ("the Commission") released its most recent report on mandatory minimum sentences. In its report, the Commission concluded that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984, and recommended reform to mandatory sentencing.[16] Although the Commission

[15] DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (2012), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

[16] U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, p. xxx (2010), *available at*

did not come to a consensus about mandatory minimum penalties as a whole, it unanimously agreed that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently in the federal system. [17]

In addition, the Chair of the Commission, Judge Patti Saris, acknowledged that mandatory minimum sentences have contributed to federal prison overcrowding, with the federal Bureau of Prisons currently over its capacity by 37%.

I. "Cyber-Stalking" Criminal Expansion

H.R. 4970 fails to address certain constitutional deficiencies in existing "cyber-stalking" law, 18 U.S.C. § 2261A (2006) ("section 2261A"), though we note that section 1003 of the bill is preferable to its Senate-passed counterpart, S. 1925.[18] We recognize that perpetrators of domestic and sexual violence and stalking can use the Internet to inflict harm. Laws addressing this problem, however, must be narrowly tailored to target "true threats" in order to comply with the Constitution.

Below we address H.R. 4970, § 1003 and first provide comments on the deficiencies in the Senate-passed legislation to permit comparisons between the two.

1. Only "true threats" do not receive full First Amendment protection

Under settled law, even the most heinous and offensive speech receives full First Amendment protection, unless it falls within one of a small number of narrow exceptions.[19] Relevant to the current statute, the only threatening or intimidating speech that does ***not*** receive full First Amendment protection is the "true threat."[20] At the heart of the cases attempting to define what constitutes a true threat are the same considerations at play in cases of violent incitement. Under those cases, the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing ***imminent*** lawless action and is ***likely*** to produce such action."[21] Extending this analysis to the "true threats" doctrine, the harm from a "true threat" must be immediate, the individual making the threat must have the specific intent to threaten, and the threat must proximately cause the recipient to reasonably be in fear of her safety.[22]

Without bright lines delineating lawful speech from unlawful "true" threats, vague or overbroad statutes criminalizing speech that could be construed as "harassing," "intimidating," or that is claimed to cause "serious" or "substantial" emotional distress, have a significant chilling effect on protected

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http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf.

[17] *Id.* at 367-69.

[18] Please note that we do not address H.R. 4271, § 107 and H.R. 4982, § 107 which are both identical to the S. 1925, the Senate-passed version.

[19] *Cf.* United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) (finding emails containing fantasies about violence against women and girls, sent to third party, protected by First Amendment and not subject to punishment under statute criminalizing threats sent in interstate commerce).

[20] Watts v. United States, 394 U.S. 705 (1969) (finding statement that, "[i]f they ever make me carry a rifle the first man I want to get in my sights in L.B.J.," in the context of a small political rally, ***not*** a "true threat" and protected under First Amendment).

[21] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).

[22] Though context-specific, threats targeted at certain relations, including immediate family members, may also rise to the level of a true threat (given that the threat will ultimately be communicated to that individual).

speech. Simultaneously, they may fail to cover actual "true" threats, which themselves have a chilling effect on the exercise of other constitutional rights and may be legitimately proscribed.[23] As written, section 1003 would not fix the existing unconstitutional overbreadth and vagueness in section 2261A but is preferable to the Senate legislation.

2. Section 107 of the Senate bill would inappropriately expand existing cyber-stalking law

Section 107 of the Senate bill would significantly expand section 2261A, which, notably, was invalidated in a recent as-applied constitutional challenge.[24] That case, *United States v. Cassidy*, involved the posting of offensive messages on publicly accessible blogs and Twitter.[25] The comments at issue, though crude and in poor taste, were critical of a public religious figure and were thus fully protected by the First Amendment. The court ruled that the application of 2261A to the communications was a content-based restriction on protected speech, prompting strict scrutiny and requiring invalidation of the law as applied because the government lacked a compelling reason to criminalize offensive speech that does not rise to the level of a true threat.[26]

Additionally, the comments were posted on what the court found to be the equivalent of a physical bulletin board, from which, unlike direct one-on-one threats, the individual targeted can "avert[] her eyes" and avoid any harm.[27] Because the government has no compelling interest in regulating protected *public* speech that merely inflicts emotional harm, the statute also failed strict scrutiny as applied to Cassidy.[28]

As amended by section 107 of the Senate bill, section 2261A would provide the government even more leeway to target the kind of protected speech at issue in *Cassidy*.

First, the revised statute would remove the requirement of ***actual harm***. Under current law, the defendant must (1) travel in interstate or foreign commerce with the requisite intent, and the travel must "*[p]lace [the victim] in reasonable fear of the death of, or serious bodily injury to, or cause[] substantial emotional distress to*" the victim or certain close family members; or (2) use the mail, any interactive computer service or any facility of interstate or foreign commerce, with the requisite intent, "*in a course of conduct that causes substantial emotional distress to [the victim] or places [the victim] in reasonable fear of the death of, or serious bodily injury to*," the victim or certain close family

[23] *See* Brief for Am. Civil Liberties Union Found. of Or., Inc. as Amicus Curiae Supporting Affirmance at 3, Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).
[24] United States v. Cassidy, 814 F. Supp. 2d 574, 576 (D. Md. 2011).
[25] *Id.* at 577-78.
[26] *Id.* at 582-84.
[27] *Id.* at 585.
[28] *Id.* The court also rejected the government's claim that section 2261A regulates conduct, not speech, and that any impact on speech would be incidental and content-neutral. The court again noted the difference between restrictions on intimidating or harassing speech posted on Twitter and blogs, which the target is free to disregard, and those on telephone harassment, which arguably serve a "strong and legitimate" interest because of the one-on-one nature of the communications and the fact that harassing phone calls arguably involve more conduct than speech. *Id.* at 585-86. Even if section 2261A is largely concerned with conduct, however, the court then found that any restriction on speech is not incidental, and restricts exactly the type of speech the First Amendment is intended to protect. The court noted that convictions under even telephone harassment statutes had been vacated when their impact on protected speech was more than incidental. *Id.* at 586-87 (citing United States v. Popa, 187 F.3d 672, 677 (D.C. Cir. 1999) (holding statute restricting calls made with intent to "annoy" to be unconstitutionally applied to individual calling U.S. Attorney's Office with complaints containing racial epithets and comments on police brutality)).

members.[29] Under section 107 of the Senate bill, the amended statute would merely require that the speech be "reasonably expected to cause substantial emotional distress."[30] Aside from the overarching concern with criminalizing speech that merely results in emotional distress, this amendment could result in the criminalization of purely private speech that is ***never seen*** by the intended recipient. Further, it would apply equally to postings in an online public forum like Twitter without any showing that the speech had any harmful effect on a third party. While the amended section does limit the specific intent requirement to "the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate,"[31] the terms "harass" and "intimidate" are still likely vague, overbroad and accordingly violative of the First and Fifth Amendments.

Second, section 107 would add two additional electronic facilities that, if used, could trigger the statute. Currently, section 2261A only lists an "interactive computer service," which is defined in 47 U.S.C. § 230(f) (2006) as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Section 107 would add to "interactive computer service" both "electronic communication service[s]" and "electronic communication system[s] of interstate commerce."[32] To the extent these added terms are intended to broaden the scope of the statute to online public forums like Facebook or Twitter, from which the recipient of a potentially threatening communication can "avert her eyes," they are unconstitutional.[33] As it is, the term "interactive computer service" likely warrants limitation to carve out protected, public speech on forums like Twitter or blogs.

3. <u>Section 1003 of H.R. 4970 does not fix the underlying problem with section 2261A, but is preferable to the Senate language</u>

H.R. 4970 effectively streamlines the existing statute by collapsing the paragraphs covering conduct associated with interstate or foreign travel and "use of the mail, any interactive computer service or a facility of interstate or foreign commerce in a course of conduct" into one section. It helpfully does not extend the triggering electronic devices or services beyond an "interactive computer service." Additionally, it limits the intent standard for the "use of the mail" provision by removing liability for actions taken merely with the "intent to . . . cause substantial emotional distress," which is currently in section 2261A(2)(A) and was at issue in *Cassidy*.

On the flip side, H.R. 4970 would, similar to section 107 of the Senate bill, extend the intent standard to conduct taken with the "intent . . . to intimidate," which previously had just been included in the "place under surveillance" clause. In other words, action taken *without* the intent to place an individual under surveillance only triggers the law when it is taken with the intent to "kill, injure or

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[29] *See* 18 U.S.C. § 2261A(1)-(2) (2006). For paragraph (1), which covers conduct associated with interstate or foreign travel, the intent standard is "with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate. . . ." For paragraph (2), the intent standard is "with the intent . . . to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress . . . or to place a person . . . in reasonable fear of . . . death . . . or serious bodily injury."

[30] H.R. 4271, § 107(b)(1)(B), (b)(2)(B).

[31] Paragraph (2)(A) of *current* section 2261A covers conduct taken with the intent merely to "cause substantial emotional distress," which was of particular concern to the *Cassidy* court. *Cassidy*, 814 F. Supp. 2d at 580-81.

[32] H.R. 4271, § 107(b)(2).

[33] Granted, Twitter also has a "direct message" functionality, which allows for private messages between Twitter users. However, one must affirmatively "follow" the other individual in order to exchange direct messages.

harass." Again, the term "harass" is likely unconstitutionally vague and overbroad, but adding conduct taken simply with the intent to "intimidate" would exacerbate the vagueness and overbreadth problems in existing law. By untethering the language from the "place under surveillance" requirement, the section could now be extended to, for instance, a vigorous business negotiation or a parent threatening a disobedient child (assuming that the speech in question causes "substantial" emotional distress).

Last, the section adds five years to the maximum term of imprisonment if the offense (1) involves the violation of a protection order; or (2) if the victim is under 18 or over 65, the offender is over 18 and the offender knew or should have known the victim's age. Extending the maximum sentence is unnecessary given the significant sentences already provided for in existing law, and is overly punitive given the danger that the law could be used to criminalize protected speech.

4. The existing cyber-stalking statute can already be misused to violate Americans' First Amendment rights to freedom of speech, assembly, petition and press

The current "cyber-stalking" statute is already subject to misuse, and has been used by prosecutors to reach public speech on matters of public importance in online public forums. Further, the speech that was prosecuted was not alleged to have conveyed a threat of physical harm; it was merely alleged to be emotionally distressing. Such speech is protected under the First Amendment freedoms of speech, assembly, petition and press, and it occurs with regularity in contemporary discourse. As the *Cassidy* court noted, the First Amendment protects speech "even when the subject or manner of expression is uncomfortable and challenges conventional religious beliefs, political attitudes or standards of good taste."[34]

Section 2261A thus goes beyond punishing the "true threats" that may receive lesser First Amendment protection. Cyber-stalking laws targeting speech (as opposed to conduct) should be limited to these "true threats," which occur only when an individual engages in communications directed at the recipient where the speaker has a *subjective* intent to cause the recipient to be in apprehension of harm and where the recipient reasonably fears for her safety.

The appropriate amendment to section 2261A in this case would be to limit the scope of the statute exclusively to "true threats." Instead, H.R. 4970 would still permit the application of the statute to purely public, constitutionally protected speech.

J. New Crime of Strangulation and Suffocation

H.R. 4970 amends the federal criminal code to provide a 10-year offense for assaulting a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate. In its current form, the bill does not clearly define the intent required to commit either strangling or suffocating. Instead, the bill simply states that intent "to kill or protractedly injure the victim" is not required.

While we recognize that this provision is intended to address the difficulties of prosecuting strangulation, we urge that the bill be amended to clarify the requisite intent and harm, so as to avoid prosecution for crimes that are not adequately defined. For example, the legislation could clarify that the acts of strangling or suffocating require the intent to harass, put in fear of injury or death, or cause

[34] *Cassidy*, 814 F. Supp. 2d at 581-82.

injury or death. Without such language, this provision could be applied to situations where such malicious intent does not exist and impose inappropriate criminal penalties.

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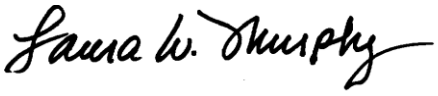
Because of the deficiencies outlined, above, we urge House members to oppose H.R. 4970 as amended by the Adams manager's amendment. Should you have any questions, please don't hesitate to contact Senior Legislative Counsel Vania Leveille at 202 715-0806 or vleveille@dcaclu.org.

Sincerely,



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