



April 25, 2012

Dear Senator:

**RE: ACLU Views on the Violence Against Women Reauthorization Act of 2011 (S.1925)**

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, and its more than half a million members, countless additional activists and supporters, and 53 affiliates nationwide, we write to express our views on the Violence Against Women Reauthorization Act of 2011 (S. 1925) for consideration by the Senate as it takes up the proposed legislation. While we have long supported the underlying legislation, there are key additions contained in the current bill. We support some of those additions, but strongly oppose others. This letter will detail those elements of the bill we support as well as those we oppose.

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We want to acknowledge the work of the Senate Judiciary Committee on this bill and for its efforts to combat domestic violence, dating violence, sexual assault and stalking by reauthorizing this important piece of legislation. Congress has long recognized the destructive impact of domestic and sexual violence on the lives of women and their families. Through passage of the Violence Against Women Act (VAWA) of 1994 and its reauthorization in 2000 and 2005, Congress has taken important steps in providing legal remedies and services for survivors of intimate partner abuse, sexual assault, and stalking. These efforts are vital to ensuring that women and their children can lead lives free of abuse.

The ACLU has been a leader, for decades, in the battles to ensure women's full equality. We have taken an active role at the local, state, and national levels in advancing the rights of survivors of domestic violence, sexual assault, and stalking by engaging in litigation, legislative and administrative advocacy, and public education. As such, we believe reauthorization of VAWA should be a top priority for this Congress. The legislation currently before the Senate contains several important and laudable provisions that will greatly improve the nation's response to domestic violence, dating violence, sexual assault and stalking. We support the advancement of these provisions. Unfortunately, S. 1925, as reported out of the Senate Judiciary Committee on February 7, 2012, also contains several provisions that raise significant civil liberties concerns and which we oppose.

## A. Expanding Housing Protections in VAWA

In the last VAWA reauthorization, Congress specifically acknowledged the interconnections between housing and abuse.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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 S. 1925 strengthens the current housing protections in several critical ways.

### 1. VAWA 2011 applies protections consistently across housing programs

VAWA currently covers only the public housing and Section 8 programs, leaving tens of thousands of victims of violence in other subsidized housing programs without protection.<sup>4</sup> Section 601 of S. 1925 extends VAWA's protections to other programs, including the Low-Income Housing Tax Credit program; Section 811 supportive housing for persons with disabilities; Section 202 supportive housing for the elderly; the McKinney-Vento homelessness programs; Section 236 low-income housing; Section 221(d)(3) low-income housing; the HOME Investment Partnership Program; the Housing Opportunities for Persons with AIDS (HOPWA) program; and the rural housing assistance programs provided under sections 514, 515, 516, 533 and 538 of the Housing Act of 1949.<sup>5</sup> Extending VAWA's protections to these supported housing programs will promote consistency across programs and provide many more survivors with the protections they deserve.

### 2. VAWA 2011 protects survivors of sexual assault

Section 601 also extends VAWA's housing protections to sexual assault survivors. Currently, VAWA covers only victims of domestic violence, dating violence, and stalking, leaving victims of non-intimate partner sexual assault vulnerable to evictions related to the violence committed against them. The bill addresses these concerns by explicitly including sexual assault victims among those who are covered by VAWA's housing protections.

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<sup>1</sup> See 42 U.S.C. § 14043e (2011).

<sup>2</sup> 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](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).

<sup>3</sup> Information about these cases can be found at [www.aclu.org/fairhousingforwomen](http://www.aclu.org/fairhousingforwomen).

<sup>4</sup> 42 U.S.C. § 1437d (2011); 42 U.S.C. § 1437f (2011).

<sup>5</sup> Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong., § 601 (as reported by S. Comm. on the Judiciary, Feb. 7, 2012) [hereinafter S. 1925].

### 3. VAWA 2011 requires policies on emergency relocation

Currently, VAWA provides no specific mechanism for survivors to relocate, on an emergency basis, to other subsidized or affordable housing. This omission left housing providers unclear as to how they could help survivors move to different housing without violating other obligations under federal law, and it has forced survivors to choose between their safety and their housing subsidy. The legislation requires housing providers to adopt an emergency transfer policy that allows survivors to transfer to another safe housing unit, where available, if the survivor expressly requests the transfer and the survivor reasonably believes that he or she is threatened with imminent harm if he or she remains at the current dwelling. Section 601 will also require the Department of Housing and Urban Development (HUD) to establish policies and procedures under which a survivor seeking emergency relocation can receive, subject to availability, a Section 8 voucher.

### 4. VAWA 2011 requires notice of housing rights

Current law provides only that public housing authorities must give tenants notice of their VAWA housing rights. Section 601 makes VAWA's notice provision more effective by clarifying that notice must be given when an individual applies for federally-supported housing, when the tenant moves into the federally supported housing unit, and when an eviction proceeding is initiated against the individual.

## **B. LGBT Protections**

We are pleased that VAWA 2011 explicitly includes coverage of lesbian, gay, bisexual, and transgender (LGBT) victims, who are underserved and often face discrimination when accessing services. The reauthorization includes a non-discrimination provision that would prohibit any program or activity funded by the legislation from excluding from participation, denying benefits to or discriminating against any person based on his or her actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, or disability.<sup>6</sup>

Additionally, S. 1925 includes the LGBT community in two different VAWA grant programs – STOP Grants and Underserved Population Grants.<sup>7</sup> Finally, the reauthorization amends the campus crime reporting statute to require campuses to collect and distribute statistics on hate crimes based on gender identity and national origin.<sup>8</sup> This change would more closely mirror the Hate Crime Statistics Act, which requires the FBI to collect statistics on hate crimes based on race, gender and gender identity, religion, disability, sexual orientation, and ethnicity.

These LGBT-inclusive provisions represent a critical step forward for VAWA, ensuring that it reaches 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 fewer than one

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<sup>6</sup> *Id.* at §3(b)(4).

<sup>7</sup> *Id.* at § 101 (STOP Grants), §108 (Underserved Population Grants).

<sup>8</sup> *Id.* at § 304.

in five LGBT victims of domestic violence receives help from a service provider and fewer than one in ten victims reports violence to law enforcement.

### **C. Improving Delivery of Health Care to Victims**

Domestic and sexual violence has a significant impact on our country's health. Victims of abuse are more likely to suffer from depression and substance abuse<sup>9</sup>, and the Centers for Disease Control and Prevention (CDC) estimate that intimate partner violence costs the health care system over \$8.3 billion annually.<sup>10</sup>

The last VAWA reauthorization included a new health title that created three programs that support the public health response to domestic and sexual violence by improving the health care system's identification, assessment and response to victims. We are pleased that S.1925 streamlines these programs to better address the health needs of abuse victims. Specifically, section 501 of S. 1925 increases accountability and evaluation by consolidating the three existing programs that provide grants to foster public health responses to intimate partner violence and sexual violence, training and education of health professionals, and support research on effective public health approaches to end intimate partner violence.

### **D. Improving Immigrant Protections in VAWA**

#### **1. 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. But we are pleased that section 1002(c) of S. 1925 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, to recognize a unanimous Congress's intent under PREA to cover all immigration detainees.

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

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<sup>9</sup> Amy E. Bonomi et al., *Intimate Partner Violence and Women's Physical, Mental and social Functioning*, 30 AM. J. PREV. MED., 458, 462 (2006), available at <http://download.journals.elsevierhealth.com/pdfs/journals/0749-3797/PIIS0749379706000961.pdf>.

<sup>10</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET: UNDERSTANDING INTIMATE PARTNER VIOLENCE (2012), available at [http://www.cdc.gov/ViolencePrevention/pdf/IPV\\_Factsheet-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/IPV_Factsheet-a.pdf).

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.”

## 2. Protection of battered immigrants

Title VIII of the bill strengthens existing federal protections for immigrant victims by modifying current provisions established through past bipartisan bills to ensure that these protections actually work as intended. These protections are necessary because immigrant survivors are particularly vulnerable to violence and are often forced to choose between living with abuse and facing deportation. Nearly 75% of abused immigrant women in one survey reported that their spouses had never filed immigration applications for them, even though they were eligible for legal status. Abusers who eventually filed for their immigrant spouses waited almost 4 years to do so.<sup>11</sup> Moreover, victims without legal status can be half as likely as those with stable status to call police.<sup>12</sup> VAWA's immigration provisions address these vulnerabilities by taking away the ability of an abuser to manipulate a victim's fears about her immigration status. Title VIII carries out this intent by including dating violence and stalking as qualifying crimes for eligibility for U visa relief, clarifying the evidentiary requirements for a U visa, and addressing the backlog in U visa applications.

### **E. New Aggravated Felony under Immigration Law**

Section 1008 of S.1925, an amendment adopted by the Judiciary Committee, would prospectively make third drunk-driving convictions with a one-year sentence an “aggravated felony” under the immigration laws. This is regardless of the underlying conduct's severity, even if the conviction is for a misdemeanor that results in a year-long suspended sentence with no jail time served. The “aggravated felony” designation is known as the “immigration death penalty” because it subjects people to mandatory detention and mandatory deportation. Since 1996 Congress has voted only once to expand the aggravated felony definition, and that was for human trafficking.

This provision has nothing to do with domestic violence, sexual assault, dating violence, stalking, or human trafficking. It is wholly outside the scope of violence against women and therefore irrelevant to the legislation. Immigration issues that have nothing to do with violence against women should be dealt with in immigration bills. VAWA is a completely inappropriate vehicle for such a provision lacking any connection to the underlying legislation.

Moreover, this provision will affect all immigrants, including lawful permanent residents who have lived in the U.S. for decades, many having U.S. citizen family members. It employs a “one-size-fits-all” approach, treating drunk-driving crimes the same even if there is no damage to persons or property. In some states a person can be convicted of DUI even if there is no attempt to drive the vehicle, such as when someone falls asleep in a parked car.

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<sup>11</sup> Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. POVERTY LAW & POL'Y 245, 259 (2000).

<sup>12</sup> Leslye Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L. J. 43, 60 (2003).

This provision would also override well-settled Supreme Court case law on aggravated felony “crimes of violence.” The Court has unanimously held that drunk driving does not constitute a crime of violence because “[t]he ordinary meaning of this term, combined with [the statutory definition’s] emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.”<sup>13</sup> Enacting this provision would run contrary to the accepted legal understanding that crimes of violence exclude accidental or negligent conduct; in the Court’s words, making DUI a crime of violence “would blur the distinction between the ‘violent’ crimes Congress sought to distinguish for heightened punishment and other crimes.”

## **F. Combatting Violence Against Native American Women**

### **1. VAWA 2011 removes legal barriers to prosecuting domestic violence crimes**

The crisis of violence against Native American women has been well documented.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> This is particularly significant because the legal decision that stripped Indian tribes of criminal jurisdiction over non-Indians<sup>17</sup>— 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.<sup>18</sup> 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<sup>19</sup>, unable or

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<sup>13</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

<sup>14</sup> 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>.

<sup>15</sup> 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](http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf).

<sup>16</sup> 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>.

<sup>17</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>18</sup> 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).

<sup>19</sup> “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>.

unwilling to investigate or prosecute, victims are left without legal protection or redress and abusers act with increasing impunity.

VAWA 2011 takes an important step forward to address this legal impediment 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. In doing so, S. 1925 appropriately empowers tribal governments to more fully respond to the cycle of violence in Indian country and to hold perpetrators, no matter their race or ethnicity, accountable.

2. VAWA 2011 clarifies tribal authority regarding protection orders

S. 1925 correctly asserts and clarifies that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian, thereby confirming the intent of Congress in enacting the Violence Against Women Act of 2000. Without this clarification, tribal courts could be found to lack the ability to rely on this critical tool, as one federal court has held.<sup>20</sup> Civil orders of protection are important safety measures that victims should be able to access through tribal courts, without regard to whether the respondent is Indian or non-Indian. They are effective in eliminating or reducing violence against women and are also a cost-effective intervention.<sup>21</sup>

3. VAWA 2011 ensures that non-tribal defendants in criminal cases receive all the same Constitutional rights and privileges that defendants would receive if the cases were proceeding in federal court

The ACLU further supports S.1925 because Section 904 will require all tribes that prosecute non-Indians to provide such defendants with the same constitutional rights in tribal court as they would have in federal and state courts. Under S.1925, therefore, non-Indian defendants would be entitled to the full panoply of constitutional protections, including due-process rights and an indigent defendant's right to appointed counsel (at the expense of the tribe) that meets federal constitutional standards. This includes the right to petition a federal court for habeas corpus to challenge any conviction and to stay detention prior to review, and explicit protection of "all other rights whose protection is necessary under the Constitution of the United States."

4. VAWA 2011 fails to clarify that non-Indian defendants have the right to direct appellate review of their sentences in tribal appellate courts in addition to petitioning for writ of habeas corpus in Federal courts

While the ACLU supports the provisions giving criminal jurisdiction over non-Indians to tribal governments, S. 1925 does not clarify whether non-Indian defendants would have a direct right of appeal to a tribal appellate court or even whether all local tribal courts have access to appellate courts. While the legislation does provide that there would be a right to petition a Federal court for a *writ of habeas corpus* for non-Indians who are prosecuted in tribal courts, *habeas corpus* is only one method of challenging a sentence and it should by no means be the only way for a

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<sup>20</sup> Martinez v Martinez, 2008 WL 5262793, No. C08-55-3 FDB (W.D. Wash. Dec. 16, 2008).

<sup>21</sup> TK Logan & Robert Walker, *Civil Protective Orders Effective in Stopping or Reducing Partner Violence* (2011), <http://www.carseyinstitute.unh.edu/publications/IB-Logan-Civil-Protective-Order.pdf>.

defendant to challenge his or her sentence. In the normal course of a criminal case, a defendant would have several opportunities for a federal or state court to rectify mistakes or constitutional errors made by a lower court during trial before filing a *writ of habeas corpus*. Considering the extension of jurisdiction that is being proposed in S. 1925, non-Indian defendants should also have the right to appeal their sentence to an appellate court to ensure their constitutional rights are not being violated. We urge the Senate to provide funding and appropriate assistance to support the creation of appellate courts if a tribe does not already have one.

### G. “Cyber-Stalking” Criminal Expansion

We are concerned that S. 1925 would expand the existing “cyber-stalking” law, 18 U.S.C. § 2261A (2006), in a manner that would violate the First Amendment.<sup>22</sup> We recognize that perpetrators of domestic and sexual violence and stalking can use the Internet to inflict harm. However, laws addressing this problem must be narrowly tailored to target “true threats” in order to comply with the Constitution. We urge the Senate to amend section 107 of VAWA 2011 to ensure that communications protected by the First Amendment are not covered by this section, and we look forward to working with Senators to fix the legislation.

#### 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.<sup>23</sup> Relevant to the current statute, the only threatening or intimidating speech that does *not* receive full First Amendment protection is the “true threat.”<sup>24</sup> 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.”<sup>25</sup> 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.

Without bright lines delineating lawful speech from unlawful “true” threats, vague or overbroad statutes criminalizing speech that could be construed as threatening or intimidating have a significant chilling effect on protected speech while simultaneously failing to cover actual “true” threats, which themselves have a chilling effect on the exercise of other constitutional rights and

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<sup>22</sup> See S. 1925, § 107.

<sup>23</sup> 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).

<sup>24</sup> *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).

<sup>25</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).



may be legitimately proscribed.<sup>26</sup> As written, section 107 of VAWA 2011 would be both vague and overbroad, and should be amended to carve out First Amendment-protected speech.

## 2. VAWA 2011 would inappropriately expand existing cyber-stalking law

As amended, section 107 of VAWA 2011 would significantly expand existing cyber-stalking law, codified at 18 U.S.C. § 2261A (2006), which, notably, was recently invalidated in an as-applied constitutional challenge.<sup>27</sup> *Cassidy* involved the posting of offensive and possibly threatening messages on publicly accessible blogs and on Twitter.<sup>28</sup> The comments at issue, though crude and in poor taste, were critical of a public religious figure, which raised additional First Amendment concerns. Further, and crucially, 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.<sup>29</sup>

As amended by section 107, 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 members.<sup>30</sup> Under section 107, the amended statute would merely require that the speech be “reasonably expected to cause substantial emotional distress.”<sup>31</sup> Accordingly, purely private speech that is *never seen* by the intended recipient would become criminal, as would 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,” the terms “harass” and “intimidate” will still cover protected speech.

Second, section 107 would add two additional electronic facilities that, if used, could trigger the statute. Currently, § 2261A only lists “interactive computer service,” which is defined in 47 U.S.C. § 230(f) 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

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<sup>26</sup> 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).

<sup>27</sup> *United States v. Cassidy*, 814 F. Supp. 2d 574, 576 (D. Md. 2011).

<sup>28</sup> *Id.* at 577-78.

<sup>29</sup> *Id.* at 585.

<sup>30</sup> See 18 U.S.C. § 2261A(1)-(2) (2006).

<sup>31</sup> S. 1925, § 107(b)(1)(B), (b)(2)(B).

interstate commerce.”<sup>32</sup> To the extent these added terms are intended to broaden the scope of the statute to online public forums like Facebook or Twitter, they must be accompanied by an amendment clarifying that First Amendment-protected communications are exempt from the scope of this statute, or they should be removed.<sup>33</sup>

3. The existing cyber-stalking statute can already be misused to violate Americans’ First Amendment rights to freedom of speech, assembly, petition and press; VAWA 2011 would substantially increase the possibility of misuse

The current “cyber-stalking” statute is already subject to misuse, and has been deployed to reach public speech on matters of public importance in online public forums. Such speech is protected under the First Amendment freedoms of speech, assembly, petition and press. 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 actual “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 harm and where the recipient reasonably fears for her safety.<sup>34</sup>

The appropriate amendment to section 2261A in this case would be to limit the scope of the statute exclusively to “true threats.” Instead, S. 1925 would unconstitutionally extend the scope of the “cyber-stalking” statute to purely public, constitutionally protected speech, including speech that is never even seen by the intended recipient and that causes no harm whatsoever. We urge the Senate to adopt an amendment to section 107 clarifying that communications protected by the First Amendment may not form the basis for prosecution under this section.

#### **H. New Mandatory Minimum Sentences for Aggravated Sexual Abuse**

Section 1007 of S. 1925 creates a new five year mandatory minimum sentence for aggravated sexual abuse that occurs in special maritime and territorial jurisdiction or Federal prison. This new mandatory sentence could be charged in cases of sexual assault that involve force or threat.

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.

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<sup>32</sup> *Id.* at § 107(b)(2).

<sup>33</sup> 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.

<sup>34</sup> *Cf. Cassidy*, 814 F. Supp. at 585-86 (“[I]t is questionable whether the same interest exists in the context of the use of the Internet alleged in this case because harassing telephone calls ‘are targeted towards a particular victim and are received outside the public forum.’ . . . Twitter and Blogs are today’s equivalent of a bulletin board that one is free to disregard, in contrast, for example to e-mails or phone calls directed to a victim.” (quoting *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004))).

In October 2011, the United States Sentencing Commission (“the Commission”) released its most recent report on mandatory minimum sentences. In this 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. Although the Commission 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.

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 (BOP) currently over its capacity by 37 percent. The ACLU urges the Senate to strip this provision of VAWA and focus its efforts on providing victims of domestic violence with the resources to combat violence in their communities.

### **I. New Crime of Strangulation and Suffocation**

S. 1925 amends the federal criminal code to provide a ten 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 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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Thank you for the opportunity to express our views on this important piece of legislation. We would be pleased to answer any questions you may have. Please don’t hesitate to contact Senior Legislative Counsel Vania Leveille at 202-715-0806 or [vleveille@dcacclu.org](mailto:vleveille@dcacclu.org) if we can be of any assistance.

Sincerely,



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