



August 4, 2017

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Dear Mr. Busby:

On behalf of the American Civil Liberties Union (ACLU), we would like to thank you for organizing the CERD Consultation with Civil Society held on July 24, 2017. The ACLU calls on the U.S. Government to submit a comprehensive periodic report to the CERD Committee, which thoroughly reviews both U.S. progress and setbacks in implementing the 2014 Concluding Observations on the federal, state and local levels. In furtherance of this objective, the ACLU is submitting these additional comments on the topics of education, immigration, criminal justice, and voting rights.

### **Education**

In Paragraph 14 of the 2014 CERD Concluding Observations, the Committee recommended that the United States intensify its efforts to ensure equal access to education by developing a comprehensive plan to address racial segregation in schools and neighborhoods, increasing federal funding for programs that promote school integration, reauthorizing legislation with provisions that address school segregation, and continuing to work with state and local education authorities to strengthen measures to address the educational achievement gap.<sup>1</sup>

The federal government has not yet met CERD's recommendation to develop and adopt a comprehensive plan to address racial segregation in schools and neighborhoods. While President Obama proposed a competitive grant program to increase socioeconomic diversity in his fiscal year 2017 Department of Education

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<sup>1</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: United States," CERD/C/USA/CO/7-9 (25 Sept. 2014).

(ED) budget,<sup>2</sup> Congress did not authorize or include that program in the final budget for that year. In December 2016, then-Secretary of Education John King announced a similar grant program which would have contributed \$12 million dollars to socioeconomic diversity, but it was quickly ended by the Trump administration.<sup>3</sup> To the extent integration programs exist, they occur primarily through local efforts.<sup>4</sup>

In accordance with CERD's recommendation to reauthorize the Elementary and Secondary Education Act,<sup>5</sup> the U.S. CERD report should note that Congress passed the Every Student Succeeds Act (ESSA), which President Obama signed into law on December 10, 2015.<sup>6</sup> However, the report should also mention that the U.S. has fallen short of CERD's recommendation that the legislation include provisions to support and encourage solutions to address school segregation.<sup>7</sup> While schools can choose to use funds under Title I of the law to focus on desegregation efforts, ESSA did not include explicit desegregation provisions or requirements. Instead, ESSA provides the ED with the authority and responsibility to issue regulations and guidance on the law's accountability standards. While such guidance could potentially focus on solutions to address school desegregation, the ED to date has not issued regulations or guidance pertaining to school desegregation.

Instead, the current Department of Justice (DOJ) budget proposal stated that its Civil Rights Division will work collaboratively with the ED's Office of Civil Rights (OCR) "to prioritize the review of approximately 170 longstanding consent decrees" on school desegregation, suggesting that it will try to eliminate such decrees.<sup>8</sup> Additionally, in a recent directive to regional directors, the ED's OCR said that it would "no longer follow the existing investigative rule of obtaining three (3) years of past complaint data/files..." when investigating complaints.<sup>9</sup> This is troubling because it indicates that this ED is not interested in assessing racially discriminatory policies and procedures on a systemic basis, which may affect the success of integration and desegregation efforts.

Such systemic concerns include disciplinary policies that lead students of color to be disproportionately punished, suspended, expelled, or pushed out of schools. This exacerbates the "school-to-prison pipeline," a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems. The CERD Committee

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<sup>2</sup> Press Release, Department of Education, President Obama's 2017 Budget Seeks to Expand Educational Opportunity for All Students (Feb. 9, 2016), available at <https://www.ed.gov/news/press-releases/president-obamas-2017-budget-seeks-expand-educational-opportunity-all-students>.

<sup>3</sup> Emma Brown, *Trump's Education Department nixes Obama-era grant program for school diversity*, WASH. POST (Mar. 29, 2017), [https://www.washingtonpost.com/news/education/wp/2017/03/29/trumps-education-department-nixes-obama-era-grant-program-for-school-diversity/?utm\\_term=.c95f79424736](https://www.washingtonpost.com/news/education/wp/2017/03/29/trumps-education-department-nixes-obama-era-grant-program-for-school-diversity/?utm_term=.c95f79424736).

<sup>4</sup> HALLEY POTTER, KIMBERLY QUICK & ELIZABETH DAVIES, THE CENTURY FOUNDATION, A NEW WAVE OF SCHOOL INTEGRATION: DISTRICTS AND CHARTERS PURSUING SOCIOECONOMIC DIVERSITY (2016), <https://tcf.org/content/report/a-new-wave-of-school-integration/>.

<sup>5</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: United States," CERD/C/USA/CO/7-9 (25 Sept. 2014).

<sup>6</sup> *Every Student Succeeds Act*, U.S. Dep't of Educ., available at <https://www.ed.gov/esea>.

<sup>7</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: United States," CERD/C/USA/CO/7-9 (25 Sept. 2014).

<sup>8</sup> Adam Server, *Jeff Sessions's Agenda for the Civil-Rights Division*, THE ATLANTIC (May 25, 2017), [https://www.theatlantic.com/politics/archive/2017/05/civil-rights-sessions/528126/?utm\\_source=hpfb](https://www.theatlantic.com/politics/archive/2017/05/civil-rights-sessions/528126/?utm_source=hpfb)

<sup>9</sup> *OCR Instructions in the Field re Scope of Complaints*, U.S. Dep't of Justice, available at <https://assets.documentcloud.org/documents/3863019/doc00742420170609111824.pdf>.

recognized this problem in Paragraph 21 of its Concluding Observations and called on the U.S. to intensify its efforts to address racial disparities in the application of disciplinary measures as well as the resulting school-to-prison pipeline.<sup>10</sup> An analysis of the ED's civil rights data from 2013-14 shows that Black students comprise 15.5% of school enrollment nationwide, but also constitute 33.4% of students arrested.<sup>11</sup> The U.S. CERD report should recognize these disparities and highlight the 2014 joint guidance issued by OCR and the DOJ Civil Rights Division addressing concerns with racially discriminatory discipline policies.<sup>12</sup>

Additionally, the U.S. CERD report should mention the current administration's indicated preference for funding private school vouchers and charter schools. ED's fiscal year 2018 budget request included more than \$1 billion in funds for new voucher programs.<sup>13</sup> Similar proposals have been shown to exacerbate educational disparities and the achievement gap and would divert desperately-needed resources away from the public school system.<sup>14</sup>

Finally, the U.S. CERD report should address Paragraph 7 of CERD's Concluding Observations, including the Committee's concerns regarding the increasing restrictions on the use of affirmative action in school admissions and their recommendation to adopt and strengthen the use of special measures.<sup>15</sup> The U.S. Supreme Court has affirmed that institutions of higher education have a compelling governmental interest in diversity, and that those institutions may accordingly create admissions programs that take race and ethnicity into account as one of a range of factors in determining qualification for admission.<sup>16</sup> Despite that such programs seek to create opportunities to admit students of color and others who have been traditionally under-represented on college campuses, the current administration has signaled its intent to target such programs for investigation.<sup>17</sup> This prioritization of the interests of white students threatens to undo advances in making school admissions fairer, runs counter to the previously held position of DOJ,<sup>18</sup> and contravenes U.S. obligations under ICERD.

### **Immigration & Racial Profiling**

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<sup>10</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: United States," CERD/C/USA/CO/7-9 (25 Sept. 2014).

<sup>11</sup> Evie Blad & Alex Hawin, *Black Students More Likely to Be Arrested at School*, EDUC. WEEK (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html>.

<sup>12</sup> U.S. Dep't of Justice & U.S. Dep't of Educ., Joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

<sup>13</sup> *Fiscal Year 2018 Budget, Summary and Background Information*, U.S. Dep't of Educ., *available at* <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>.

<sup>14</sup> Ian Thompson, American Civil Liberties Union, "The Miseducation of Betsy DeVos (Apologies, Lauryn Hill)," May 25, 2017, *available at* <https://www.aclu.org/blog/washington-markup/miseducation-betsy-devos-apologies-lauryn-hill>.

<sup>15</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: United States," CERD/C/USA/CO/7-9 (25 Sept. 2014).

<sup>16</sup> See *Gutter v. Bollinger*, 439 U.S. 306 (2003); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

<sup>17</sup> Charlie Savage, "Justice Dept. to Take On Affirmative Action in College Admissions," N.Y. TIMES (Aug. 1, 2017) [https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html?\\_r=0](https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html?_r=0); American Civil Liberties Union, "ACLU Comment on Reports Justice Department will Target Affirmative Action," Aug. 2, 2017, *available at* <https://www.aclu.org/news/aclu-comment-reports-justice-department-will-target-affirmative-action>.

<sup>18</sup> U.S. Dep't of Justice & U.S. Dep't of Educ., Joint Dear Colleague Letter (May 6, 2014), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-schuette-guidance.pdf>.

Paragraph 8 of CERD's Concluding Observations urges the United States to end the practice of racial profiling and includes a recommendation to end "immigration enforcement programs and policies which indirectly promote racial profiling, such as the Secure Communities programme and the Immigration and Nationality Act section 287(g) programme."<sup>19</sup>

The U.S. CERD report should highlight actions during President Obama's tenure aimed at curtailing racial profiling in the national security and immigration context. On December 22, 2016, the Obama administration fully rescinded the National Security Entry-Exit Registration System (NSEERS), the special profiling program for Muslim and Arab lawful visitors to the U.S. enacted in the aftermath of 9/11.<sup>20</sup> Moreover, the U.S. report should mention the June 2015 Customs and Border Protection (CBP) Integrity and Advisory Panel's recommendations that both address CBP misconduct, including racial profiling, and improve transparency at the CPB.<sup>21</sup> Further, the U.S. report should highlight the efforts of the U.S. judiciary to enforce compliance with U.S. law against racial profiling. For example, in May 2016, an Arizona federal court found the Maricopa County Sheriff's Office in contempt for repeatedly violating court orders to stop racially profiling Latinos as part of unlawful enforcement operations targeting immigrants.<sup>22</sup>

Alongside these efforts, the U.S. CERD report should also note the December 2014 revised guidance, which updated the 2003 policy regarding the use of race by federal law enforcement agencies.<sup>23</sup> The inclusion of new categories such as national origin, religion, sexual orientation and gender identity, the establishment of data collection and training, and the closing of some of the existing carve-outs for law enforcement activities represented positive steps. However, the revised guidance is inadequate and contains national security and border-related loopholes that permit bias-based profiling by the Federal Bureau of Investigation (FBI), the Transportation Security Administration (TSA) and CBP.<sup>24</sup> The ACLU has documented pervasive racial profiling by border patrol agents.<sup>25</sup>

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<sup>19</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: United States," CERD/C/USA/CO/7-9 (25 Sept. 2014).

<sup>20</sup> American Civil Liberties Union, "ACLU Comment on Obama Rescinding Muslim and Arab Special Registration System," Dec. 22, 2016, available at <https://www.aclu.org/news/aclu-comment-obama-rescinding-muslim-and-arab-special-registration-system>. The full rescission of NSEERS made permanent the 2011 suspension of the program. See Chris Rickerd, American Civil Liberties Union, "Homeland Security Suspends Ineffective, Discriminatory Immigration Program" May 6, 2011, available at <https://www.aclu.org/blog/speakeasy/homeland-security-suspends-ineffective-discriminatory-immigration-program>.

<sup>21</sup> HOMELAND SECURITY ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL, (Mar. 15, 2016), available at <https://www.documentcloud.org/documents/2761266-HSAC-CBP-IAP-Final-Report-DRAFT-FINAL.html>; American Civil Liberties Union, "Implementing Law Enforcement Best Practices for our Nation's Biggest Police Force," Nov. 15, 2015, available at

[https://www.aclu.org/sites/default/files/field\\_document/aclu\\_background\\_re\\_cbp\\_profiling\\_and\\_police\\_best\\_practicesfinal.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_background_re_cbp_profiling_and_police_best_practicesfinal.pdf).

<sup>22</sup> American Civil Liberties Union, "*Ortega Melendres, et al. v. Arpaio, et al.*," July 20, 2016, available at <https://www.aclu.org/cases/ortega-melendres-et-al-v-arpaio-et-al>. On July 31, 2017, the court convicted former Sheriff Arpaio of criminal contempt. Richard Perez-Pena, *Former Arizona Sheriff Joe Arpaio Is Convicted of Criminal Contempt*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/us/sheriff-joe-arpaio-convicted-criminal-contempt.html>.

<sup>23</sup> *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, Dep't of Justice (Dec. 2014), available at <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

<sup>24</sup> American Civil Liberties Union, "ACLU Response to Revised DOJ Guidance on the Use of Race by Federal Law Enforcement Agencies," Dec. 8, 2014, available at <https://www.aclu.org/news/aclu-response-revised-doj-guidance-use-race-federal-law-enforcement-agencies>; Ian S. Thompson, American Civil Liberties Union, "New DOJ Profiling Guidance: LGBTQ-Inclusive, But Inadequate," Dec. 10, 2014, available at <https://www.aclu.org/blog/new-doj-profiling-guidance-lgbtq-inclusive-inadequate>.

<sup>25</sup> James Lyall & Daniella Martinez, American Civil Liberties Union, "Welcome to the Border Region Where the Border Patrol Has Implemented Its Own Southwest 'Stop and Frisk' Policy," Oct. 15, 2015, available at <https://www.aclu.org/blog/speak>

In contravention to CERD Recommendation 8(c), the U.S. government continued section 287(g) agreements between Immigration and Customs Enforcement (ICE) and state and local law enforcement. The Obama administration reduced the number of agreements to about three dozen and limited them to jails, thereby eliminating the notorious 287(g) taskforces that facilitated racial profiling and discriminatory raids. While jail agreements are less visible, they still enable racial profiling and civil rights abuses, while diverting scarce resources from traditional local law enforcement functions.<sup>26</sup> This has resulted in many officers improperly relying on race or ethnicity as proxies for status as an undocumented immigrant.

The Trump's administration's massive expansion of local and state immigration enforcement represents a further setback in meeting this CERD recommendation. Instead of rolling back the use of Secure Communities and the section 287(g) programs, the Trump administration significantly expanded them. Since the president's inauguration, ICE has already entered into new 287(g) contracts with 23 law enforcement agencies across the country, an increase of over 40 percent.<sup>27</sup> Moreover, the Department of Homeland Security (DHS) issues immigration detainers requesting that state or local police hold individuals for up to 48 hours after they are eligible for release, so that the immigration authorities can decide if they want to take them into federal custody. The Trump administration has not only pushed for the increased use of such unconstitutional detainer requests, but have gone so far as to threaten jurisdictions that refuse to abide by them.<sup>28</sup> The 287(g) agreements and the widespread use of detainers across jurisdictions allow the government to incarcerate people at-will without due process, without any charges pending, and without probable cause of a criminal violation. This has resulted in widespread wrongful detentions, including detentions of U.S. citizens.<sup>29</sup>

### **Immigration Enforcement**

Paragraph 18 of CERD's Concluding Observations calls upon the U.S. to ensure that the rights of non-citizens are fully guaranteed in law and practice by responding to breaches of immigration law through the civil, not criminal, immigration system, undertaking thorough and individualized assessments in detention and deportation decisions, and guaranteeing access to legal representation in all immigration-related matters, among other recommendations.<sup>30</sup>

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[freely/welcome-border-region-where-border-patrol-has-implemented-its-own-southwest-stop](#); Jorge Rodriguez, American Civil Liberties Union, "Border Patrol Chief Must End Biased Policing to Restore Trust in Communities," Sept. 12, 2016, *available at* <https://www.aclu.org/blog/washington-markup/border-patrol-chief-must-end-biased-policing-restore-trust-communities>.

<sup>26</sup> Chris Rickerd, American Civil Liberties Union, "Local Police Should Just Say no to Federal Agreements That Make Their Officers Part of Trump's Deportation Force," Apr. 7, 2017, *available at* <https://www.aclu.org/blog/washington-markup/local-police-should-just-say-no-federal-agreements-make-their-officers-part> (describing Obama's reduction of the program and its expansion under President Trump).

<sup>27</sup> 287(g) *Results and Participating Entities*, U.S. Immigration and Customs Enf't (July 2017), *available at* <https://www.ice.gov/factsheets/287g>.

<sup>28</sup> Executive Order 13768; *Enhancing Public Safety in the Interior of the United States*, U.S. Dept. of Justice (May 22, 2017), *available at*: <https://www.justice.gov/opa/press-release/file/968146/download>.

<sup>29</sup> See, e.g., *Morales v. Chadbourne*, 996 F.Supp.2d 19 (D.R.I. 2014), *affirmed*, *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015), *affirmed*, *Morales v. Chadbourne*, No. CV 12-301-M-LDA, 2017 WL 354292 (D.R.I. Jan. 24, 2017), *available at* <https://www.aclu.org/legal-document/morales-v-chadbourne-memorandum-and-order>.

<sup>30</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: United States," CERD/C/USA/CO/7-9 (25 Sept. 2014).

The U.S. CERD report should reaffirm the United States' commitment both to respecting the human rights of all migrants, regardless of immigration status, and to the importance of combatting xenophobia and discrimination against refugees and migrants.<sup>31</sup> The report should note the December 2016 Homeland Security Advisory Council recommendation that DHS shift away from using private prisons to detain immigrants. The Advisory Council presented evidence that private prisons are generally inferior, in both accountability and conditions of confinement, to federally-run facilities.<sup>32</sup> Three-quarters of the agency's non-partisan expert council, which included former high-level DHS officials, police chiefs, retired generals, and executives and defense contractors, voted that it is unacceptable for the current immigration detention system to continue as is.<sup>33</sup> Further, the U.S. report should note a 2015 Ninth Circuit decision requiring that the government provide individualized bond hearings when immigration detention exceeds six months, and every six months after.<sup>34</sup> The Supreme Court is set for re-argument on the case in October 2017.<sup>35</sup>

The U.S. CERD report should also mention the 2015 revised CBP standards governing transport, escort, search, and detention (TEDS). The reformed standards include restrictions on the use of shackles as a punitive measure while in CBP custody and the adoption of principles required by the federal Prison Rape Elimination Act. Despite this progress, the U.S. report should note that the standards do not fully guarantee fair and lawful treatment for those in CBP custody and do not include a structure for oversight or accountability.<sup>36</sup>

The Trump administration's immigration policies embody a dangerous disregard for the rights of migrants, refugees and racial, ethnic, and religious minority groups, and as a whole constitute a major impediment to realizing CERD's recommendations on immigration. Five days into his administration, President Trump signed Executive Order 13767, "Border Security and Immigration Enforcement Improvements,"<sup>37</sup> and Executive Order 13768 "Enhancing Public Safety in the Interior of the United States."<sup>38</sup> These Orders call for a physical border wall

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<sup>31</sup> CARRIELYN D. GUYMON, ED., OFFICE OF THE LEGAL ADVISOR, U.S. STATE DEPARTMENT, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 42-43 (2016), <https://www.state.gov/documents/organization/272128.pdf>.

<sup>32</sup> See also American Civil Liberties Union, "Written Statement Before the United Nations Working Group on the Use of Mercenaries," Apr. 27, 2017, available at [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_un\\_private\\_prisons\\_testimony\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_un_private_prisons_testimony_final.pdf).

<sup>33</sup> HOMELAND SECURITY ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES, (Dec. 1, 2016), available at <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>;

Carl Takei & Joanne Lin, American Civil Liberties Union, "In Stunning Reversal, Law Enforcement, Military, and Security Advisors Urge Homeland Security to Shift Away from Private Persons," Dec. 2, 2016, available at <https://www.aclu.org/blog/speak-freely/stunning-reversal-law-enforcement-military-and-security-advisors-urge-homeland>.

<sup>34</sup> American Civil Liberties Union, "Supreme Court Hears Arguments in ACLU Immigration Detention Case," Nov. 29, 2016, available at <https://www.aclu.org/news/supreme-court-hears-arguments-aclu-immigration-detention-case>.

<sup>35</sup> *Jennings v. Rodriguez*, SCOTUS BLOG, available at <http://www.scotusblog.com/case-files/cases/jennings-v-rodriguez/>.

<sup>36</sup> CBP Implements Agencywide National Standards on Transport, Escort, Detention, and Search, U.S. Customs and Border Protection, (Oct. 5, 2015), available at <https://www.cbp.gov/newsroom/national-media-release/cbp-implements-agencywide-national-standards-transport-escort>; American Civil Liberties Union, "Revised CBP Standards Promise Reform But Fall Short of Accountability," Oct. 5, 2015, available at <https://www.aclu.org/news/revised-cbp-standards-promise-reform-fall-short-accountability>.

<sup>37</sup> The White House, Executive Order 13767: Border Security and Immigration Enforcement Improvements. Jan. 27, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements> [hereinafter Executive Order 13767].

<sup>38</sup> Executive Order 13768.

between the U.S. and Mexico, the construction of additional detention facilities, the continuous detention of non-citizens apprehended for suspected violations of U.S. immigration law and an increase in the number of border patrol agents. Further, the Orders made clear that nearly all of the 11 million undocumented immigrants in the United States are now targets for arrest, detention and deportation.<sup>39</sup>

The Executive Orders also establish a mass mandatory detention system, allowing DHS to lock up children, families and asylum seekers without individualized considerations and due process protections. A DHS factsheet states that the Executive Orders will expand the category of immigrants subject to expedited removal, by allowing a DHS agent and not an impartial judge to determine the fate of the individual without judicial review.<sup>40</sup> According to a July 2017 memo obtained by the Washington Post, DHS would have the authority to request expedited removal for undocumented immigrants unable to prove that they have lived continuously in the country for more than 90 days.<sup>41</sup> These issues are compounded by the lack of access to legal counsel, which in practice mean most immigrants remain without representation throughout immigration proceedings, a concern the CERD Committee noted in a May 2016 follow up letter.<sup>42</sup> The CERD Committee recommended the U.S. consider appointing state counsel for immigrants and increase access to free legal assistance in all immigration proceedings.<sup>43</sup> Further, the Trump administration is relying on private companies to meet the growing demand for space in immigration detention facilities.<sup>44</sup> This represents a significant setback from the December 2016 DHS recommendation to shift away from using private prisons to detain immigrants.<sup>45</sup>

President Trump justified these policies by claiming that many individuals “who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to the national security and public safety.”<sup>46</sup> This language further stereotypes immigrants and noncitizens, promoting xenophobia and discrimination.

In April 2017, Attorney General Sessions instructed federal prosecutors’ offices, even those far from the border, to prosecute all immigration-related offenses, reversing prior DOJ policies and

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<sup>39</sup> American Civil Liberties Union, “Written Statement Submitted to the Inter-American Commission on Human Rights Regarding the Commission’s Emergency Hearing On the Impact of Recent Executive Orders,” Mar. 21, 2017, *available at* <https://www.aclu.org/hearing-statement/written-statement-submitted-inter-american-commission-human-rights-0>.

<sup>40</sup> *Fact Sheet: Executive Order: Border Security and Immigration Enforcement Improvements*, Dep’t of Homeland Security, (Feb. 21, 2017), *available at* <https://www.dhs.gov/news/2017/02/21/fact-sheet-executive-order-border-security-and-immigration-enforcement-improvements>.

<sup>41</sup> Abigail Hauslohner & David Nakamura, *In memo, Trump administration weighs expanding the expedited deportation powers of DHS*, WASH. POST (July 14, 2017), [https://www.washingtonpost.com/world/national-security/in-memo-trump-administration-weighs-expanding-the-expedited-deportation-powers-of-dhs/2017/07/14/ce5f16b4-68ba-11e7-9928-22d00a47778f\\_story.html?utm\\_term=.3f48e1d45410](https://www.washingtonpost.com/world/national-security/in-memo-trump-administration-weighs-expanding-the-expedited-deportation-powers-of-dhs/2017/07/14/ce5f16b4-68ba-11e7-9928-22d00a47778f_story.html?utm_term=.3f48e1d45410).

<sup>42</sup> Letter from Anastasia Crickley, Chair, Committee on the Elimination of Racial Discrimination, to Pamela K. Hamamoto, Permanent Representative of the United States to the United Nations Office Geneva (May 24, 2016), *available at* [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_FUL\\_USA\\_23994\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_FUL_USA_23994_E.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> Meredith Hoffman, *Immigrant Center to Be Built in Texas for \$110M*, U.S. NEWS, (Apr. 13, 2017), <https://www.usnews.com/news/best-states/texas/articles/2017-04-13/texas-getting-first-immigrant-lockup-built-under-trump>.

<sup>45</sup> Carl Takei, American Civil Liberties Union, “The ACLU Is at the UN Tomorrow to Testify on the Horrific Human Rights Record of US Private Prison Companies,” Apr. 26, 2017, *available at* <https://www.aclu.org/blog/speak-freely/aclu-un-tomorrow-testify-horrific-human-rights-record-us-private-prison-companies>.

<sup>46</sup> Executive Order 13767.

prosecutorial priorities.<sup>47</sup> The DOJ joined DHS in promoting the arrest of undocumented immigrants in courthouses, even when appearing for proceedings unrelated to their immigrant status.<sup>48</sup> This led to a sharp increase of immigration arrests in state courthouses across the country. For example, a Texas domestic violence survivor was arrested when she went to court to obtain a restraining order, and so were a Michigan father in court to seek custody of his children, a Brooklyn father in court for a child support hearing, and a Vermont dairy worker arrested before he could appear for his court hearing.<sup>49</sup>

The Trump administration's attempts to restrict federal funding for sanctuary cities reflects an additional impediment to full implementation of the CERD recommendations. The administration has threatened to limit critical funding unless such cities give federal agents access to local jails holding immigrants, even without warrants, among other measures.<sup>50</sup> The DOJ budget also includes changes that would prohibit cities and states from enacting policies that would bar local law enforcement from inquiring about immigration status and allow suspensions of grants for those that do not comply.<sup>51</sup> On July 25, 2017, the DOJ announced a policy that creates additional criteria for certain federal grants for state and local law enforcement. To be eligible for this funding, cities and states must notify ICE officials at least 48 hours before an incarcerated undocumented immigrant is set to be released when ICE has expressed interest in detaining them, allow ICE agents to access local jails, and abide by a federal law that requires local jurisdictions to refrain from prohibiting their employees from sharing information about immigration status with the federal government.<sup>52</sup>

Further, the U.S. CERD report should highlight the Trump administration's decision to maintain the Deferred Action for Childhood Arrivals (DACA) program.<sup>53</sup> While this position is a step in the right direction and should be noted in the U.S. report, it is important to also mention the continued uncertainty around DACA and the arrest and deportation of dreamers despite President Trump's announcement.<sup>54</sup> Further, earlier this month, then-DHS Secretary John Kelly told

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<sup>47</sup> *Renewed Commitment to Criminal Immigration Enforcement*, Office of the Attorney General, (Apr. 11, 2017), available at <https://www.justice.gov/opa/press-release/file/956841/download>.

<sup>48</sup> David Nakamura & Matt Zapotosky, *Sessions seeks greater role for Justice in immigration enforcement*, WASH. POST (Mar. 31, 2017).

<sup>49</sup> Joanne Lin, American Civil Liberties Union, "Immigration Arrests at State Courthouses Are on the Rise in 2017," Apr. 6, 2017, available at <https://www.aclu.org/blog/speak-freely/immigration-arrests-state-courthouses-are-rise-2017-heres-why-thats-dangerous-all>.

<sup>50</sup> Vivian Yee & Rebecca R. Ruiz, *Sessions Once Again Threatens Sanctuary Cities*, N.Y. TIMES (July 26, 2017), [https://www.nytimes.com/2017/07/26/us/politics/sessions-sanctuary-cities.html?utm\\_source=huffingtonpost.com&utm\\_medium=referral&utm\\_campaign=pubexchange\\_article](https://www.nytimes.com/2017/07/26/us/politics/sessions-sanctuary-cities.html?utm_source=huffingtonpost.com&utm_medium=referral&utm_campaign=pubexchange_article).

<sup>51</sup> Elliot Minberg, *The Real Reasons Why Jeff Sessions is a Failure as Attorney General*, HUFFPOST (July 27, 2017), available at [http://www.huffingtonpost.com/entry/the-real-reasons-why-jeff-sessions-is-a-failure-as-us\\_5979f7b6e4b09982b7376283?ncid=engmodushpmg00000004](http://www.huffingtonpost.com/entry/the-real-reasons-why-jeff-sessions-is-a-failure-as-us_5979f7b6e4b09982b7376283?ncid=engmodushpmg00000004); Alan Neuhauser, *DOJ Budget Seeks Sweeping Changes to Crack Down on Sanctuary Cities*, U.S. NEWS (May 23, 2017), available at <https://www.usnews.com/news/national-news/articles/2017-05-23/doj-budget-contains-sweeping-change-to-immigration-law>.

<sup>52</sup> *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*, U.S. Dep't of Justice, (July 25, 2017), available at <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial>.

<sup>53</sup> *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents*, U.S. Dep't of Homeland Security, (June 15, 2017), available at <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>.

<sup>54</sup> American Civil Liberties Union, "ACLU Comment on Trump DACA Stance," June 16, 2017, available at <https://www.aclu.org/news/aclu-comment-trump-daca-stance>.

lawmakers that the Trump administration would not commit to defending DACA.<sup>55</sup> The Trump administration's continuous wavering on the future of DACA both furthers the immense distress and violates the rights of the hundreds of thousands of youth and adolescents protected under this program.

### **The Muslim and Refugee Bans**

In 2004, CERD issued a General Recommendation that “xenophobia against non-nationals, particularly migrants, refugees, and asylum seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.”<sup>56</sup> In order to promote full compliance with ICERD, the General Recommendation further calls on states to “ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.”<sup>57</sup>

Perhaps the Trump administration's most striking contradiction of that CERD recommendation is the 2017 Executive Orders banning entry of refugees and nationals from certain Muslim-majority countries. The 2014 Concluding Observations obviously could not anticipate the religious ban; however, the U.S. CERD report should recognize that President Trump's Executive Order, “Protecting the Nation from Foreign Terrorist Entry into the United States,” in both its January 27<sup>th</sup> and March 6<sup>th</sup> iterations,<sup>58</sup> contravenes ICERD and past CERD recommendations as well as other U.S. human rights obligations.<sup>59</sup> At the same time, the U.S. report should also acknowledge the actions of several federal courts which have temporarily overturned parts of the Executive Orders and recognized them as impermissibly discriminatory.<sup>60</sup>

The Executive Orders were a transparent attempt to deliver on President Trump's campaign promise for a “total and complete shutdown of Muslims entering the United States.”<sup>61</sup> After the initial Executive Order was blocked by several federal courts across the country, the Trump administration was forced to rewrite and narrow the original ban. The revised Executive Order bans nationals of six Muslim-majority countries (Iran, Sudan, Syria, Libya, Somalia and Yemen) for at least 90 days as well as all refugees for at least 120 days. President Trump characterized

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<sup>55</sup> Ted Hesson, *Kelly won't commit to defending DACA in court*, POLITICO (July 12, 2017), <http://www.politico.com/story/2017/07/12/john-kelly-daca-legal-challenge-240470>

<sup>56</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

<sup>57</sup> *Id.*

<sup>58</sup> The White House, Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States. Jan. 27, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>; The White House, Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States. Mar. 6, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>59</sup> Jamil Dakwar, *All international laws Trump's Muslim ban is breaking*, AL JAZEERA (Feb. 2, 2017),

<http://www.aljazeera.com/indepth/opinion/2017/02/international-laws-trump-muslim-ban-breaking-170202135132664.html>.

<sup>60</sup> See *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017); *Darweesh et al. v. Trump et al.*, No. 1:17-cv-480 (E.D.N.Y. filed Jan. 28, 2017); *Aziz et al. v. Trump*, No. 1:17-cv-116 (E.D.Va. Feb. 13, 2017).

<sup>61</sup> Jenna Johnson, *Trump calls for 'total and complete shutdown of Muslims entering the United States,'* WASH. POST (Dec. 7, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.7e789bdd26e8](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.7e789bdd26e8).

this Order as a “watered down, politically correct version [the Justice Department] submitted to the S[upreme] C[ourt]” and asserted that DOJ “should have stayed with the original Travel Ban.”<sup>62</sup>

These Executive Orders were motivated by animus towards Islam. They are discriminatory and require separate and unfair treatment of entire groups of predominately Muslim people based on their national origin. This impacts not only individuals who want to enter the United States but also citizens and non-citizens in the U.S. who are nationals of these countries and may experience heightened levels of xenophobia and discrimination, especially at ports of entry, as a result of the ban. As a result of the first Executive Order, at least 756 individuals were wrongfully detained for prolonged periods of time by CBP agents at airports and other ports of entry.<sup>63</sup>

Additionally, the backdoor deal that the Trump administration formed with the government of Iraq prior to the issuance of the revised Executive Order represents further discrimination based on national origin. In exchange for removing Iraq from the list of banned countries under the revised Order, Iraq agreed to begin accepting Iraqi deportees from the United States.<sup>64</sup> Just last week, a federal judge in Michigan granted an ACLU request to block the imminent deportation of any Iraqi national in the U.S. with a final removal order. The judge ruled that the irreparable harm faced by Iraqi detainees outweighs the government’s desire to deport them as quickly as possible.<sup>65</sup>

The U.S. report should also mention the adverse impact of these Executive Orders on refugees.<sup>66</sup> According to Human Rights First, in the six months following the January 27<sup>th</sup> Executive Order, the U.S. has seen a 52% decline in refugee resettlement. They report that refugee processing around the world has all but ceased, case referrals have mostly stopped, U.S. processing staff has been laid off, and DHS interviewing officers were returned to the U.S. from overseas.<sup>67</sup> Syrian refugees, who are in most need of resettlement globally, have faced an 80% cut in U.S. resettlement post-January 27<sup>th</sup>, as compared to the same period last year. In fact, Muslims represent only 38% of all U.S. resettled refugees, a 76% decrease in the number of Muslims refugees resettled since the Executive Order.<sup>68</sup>

## **Criminal Justice**

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<sup>62</sup> Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), <https://twitter.com/realDonaldTrump/status/8716752450438881>.

<sup>63</sup> Liz Robbins, *U.S. List of Those Detained for Trump’s Travel Ban Is Called Incomplete*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/nyregion/travel-ban-trump-detained.html>.

<sup>64</sup> Bonsitu A. Kitaba-Gaviglio, American Civil Liberties Union, “Trump Administration Can’t Deport 1,400 Iraqi Nationals Who Fear Prosecution, Torture, or Death... For Now,” July 25, 2017, available at <https://www.aclu.org/blog/speak-freely/trump-administration-cant-deport-1400-iraqi-nationals-who-fear-persecution-torture>.

<sup>65</sup> *Id.*

<sup>66</sup> The ACLU filed a federal lawsuit challenging the executive order on behalf of individuals affected by the ban and refugee groups including the International Refugee Assistance Project (IRAP) and HIAS. *See Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). In addition, the ACLU filed amici curiae briefs in other legal challenges to these policies.

<sup>67</sup> HUMAN RIGHTS FIRST, U.S. LEADERSHIP FORSAKEN: SIX MONTHS OF THE TRUMP REFUGEE BANS, (July 27, 2017), available at <http://www.humanrightsfirst.org/resource/us-leadership-forsaken-six-months-trump-refugee-bans>.

<sup>68</sup> *Id.*

In Paragraph 20 of the CERD Concluding Observations, the Committee called upon the U.S. to eliminate racial disparities at all stages of the criminal justice system by amending laws and policies leading to racially disparate impacts, implementing effective national strategies aimed at eliminating structural discrimination, imposing a moratorium on the death penalty, among other recommendations.<sup>69</sup>

The U.S. CERD report should acknowledge that racial disparities in the criminal justice system have continued to persist. Based on data from 2014 to 2016, the Prison Policy Initiative (PPI) reports the following statistics:<sup>70</sup>

	White	Black	Hispanic
U.S. Population	62.1%	13.2%	17.4%
Jail Incarceration	47.4%	35.4%	14.9%
State & Federal Incarceration	33.6%	35.4%	21.6%
Death Row Population	42.5%	41.7%	13.0%

These numbers present a clear picture of the disparate impact of the criminal justice system on Black and Hispanic communities. Moreover, the U.S. report should highlight racial disparities in arrests for drug possession. According to the ACLU and Human Rights Watch, Black people were nearly six times more likely than white people to be in prison for drug possession.<sup>71</sup> In 2014, Black adults accounted for just 14 percent of those who used drugs in the previous year but close to a third of those arrested for drug possession.<sup>72</sup> Further, using data from all 50 states, we concluded that Black adults were more than four times as likely to be arrested for marijuana possession than white adults.<sup>73</sup>

Further, the U.S. CERD report should incorporate the July 2017 U.S. Sentencing Commission findings about fiscal year 2016, which includes analysis about racial disparities in sentencing.<sup>74</sup> Specifically, the Sentencing Commission documented that Black offenders receive the highest average sentence overall (66 months), which the report noted is a 13.2% decrease in sentence from fiscal year 2010.<sup>75</sup> The Commission found that of those convicted of an offense carrying a

<sup>69</sup> Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination: United States,” CERD/C/USA/CO/7-9 (25 Sept. 2014).

<sup>70</sup> Alison Walsh, Prison Policy Initiative, “The criminal justice system is riddled with racial disparities,” Aug. 15, 2016, available at <https://www.prisonpolicy.org/blog/2016/08/15/cjrace/>.

<sup>71</sup> HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES, (Oct. 2016), 9, available at [https://www.aclu.org/sites/default/files/field\\_document/usdrug1016\\_web.pdf](https://www.aclu.org/sites/default/files/field_document/usdrug1016_web.pdf)

<sup>72</sup> *Id.* at 6.

<sup>73</sup> American Civil Liberties Union, The War on Marijuana in Black and White, (June 2013), 48, available at [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rell.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf).

<sup>74</sup> UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, (July 2017), available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf).

<sup>75</sup> *Id.* at 45.

mandatory minimum, 40.4% are Hispanic, 29.7% are Black, 27.2% are white, and 2.7% are other races.<sup>76</sup>

While racial disparities remain alarming, we encourage the U.S. report to include actions taken to lower racial disparities in the criminal justice system. These include civil rights investigations into racial profiling, harassment, arrests, and assaults by various police departments across the country<sup>77</sup> as well as DOJ training on implicit bias.<sup>78</sup> Alongside other actions of the Obama administration, the U.S. CERD report should note DOJ guidance that recognized that incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection of the Fourteenth Amendment.<sup>79</sup>

Despite noticeable progress made between 2014 and 2016 to address racial disparities in the U.S. criminal justice system, the U.S. report must also include recent serious setbacks in implementing the CERD recommendations in this area. In May 2017, Attorney General Sessions instructed federal prosecutors to pursue the harshest possible charges and sentences against all crime suspects, including non-violent drug offenders.<sup>80</sup> AG Sessions also personally wrote to Congress requesting they remove a bipartisan appropriations rider that has prohibited DOJ from prosecuting users of medical marijuana where it is legal under state law.<sup>81</sup> AG Sessions also reversed DOJ policy on private prisons, announcing that DOJ will use private facilities despite evidence that they remain less safe and less accountable for both prison staff and prisoners.<sup>82</sup>

In a May 2016 letter, the CERD Committee mentioned its regret regarding “the low number of criminal indictments against police officers despite the high number of fatal police shootings of members of ethnic minorities in recent years.”<sup>83</sup> Instead of addressing this concern, the Trump administration has reversed its policy on police reform, calling for a review of all activities in this area including existing consent decrees with police departments.<sup>84</sup> For example, in

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<sup>76</sup> *Id.* at 36.

<sup>77</sup> American Civil Liberties Union, “Department of Justice Findings Regarding the Baltimore City Police Department,” Aug. 10, 2016, available at <https://www.aclu.org/news/departments-justice-findings-regarding-baltimore-city-police-department>.

<sup>78</sup> Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel, U.S. Dep’t of Justice, (June 27, 2016), available at <https://www.justice.gov/opa/pr/departments-justice-announces-new-department-wide-implicit-bias-training-personnel>.

<sup>79</sup> U.S. Dep’t of Justice, Dear Colleague Letter, (Mar. 14, 2016), available at <https://www.justice.gov/crt/file/832461/download>; Nusrat Choudhury, American Civil Liberties Union, “The Department of Justice Throws Its Weight Behind Ending the Jailing of the Poor for Unpaid Fines,” Mar. 15, 2016, available at <https://www.aclu.org/blog/speak-freely/departments-justice-throws-its-weight-behind-ending-jailing-poor-unpaid-fines>.

<sup>80</sup> Rebecca R. Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), [https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html?utm\\_source=huffingtonpost.com&utm\\_medium=referral&utm\\_campaign=pubexchange\\_article](https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html?utm_source=huffingtonpost.com&utm_medium=referral&utm_campaign=pubexchange_article).

<sup>81</sup> Department of Justice Appropriations, Office of the Attorney General, (May 1, 2017), available at [https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections?irgwc=1&content=10079&campaign=Skimbit%2C%20Ltd.&ad\\_group=38395X1559799X956d78a6859a18031d75bf41f1f547ef&keyword=f750noi&source=impactradius&medium=affiliate](https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections?irgwc=1&content=10079&campaign=Skimbit%2C%20Ltd.&ad_group=38395X1559799X956d78a6859a18031d75bf41f1f547ef&keyword=f750noi&source=impactradius&medium=affiliate).

<sup>82</sup> Laura Jarrett, *DOJ walks back guidance discouraging use of private prisons*, CNN (Feb. 23, 2017), <http://www.cnn.com/2017/02/23/politics/doj-walks-back-guidance-discouraging-use-of-private-prisons/index.html>

<sup>83</sup> Letter from Anastasia Crickley, Chair, Committee on the Elimination of Racial Discrimination, to Pamela K. Hamamoto, Permanent Representative of the United States to the United Nations Office Geneva (May 24, 2016), available at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_FUL\\_USA\\_23994\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_FUL_USA_23994_E.pdf).

<sup>84</sup> David A. Graham, *Can Trump’s Justice Department Undo Police Reform?*, THE ATLANTIC (Apr. 4, 2017), <https://www.theatlantic.com/politics/archive/2017/04/the-beginning-of-the-end-of-federal-police-reform/521847/>.

Baltimore, the DOJ attempted to delay the signing of a comprehensive plan to reform police practices, claiming it would “reduce the lawful powers” of the police, even though the City of Baltimore itself supported the decree.<sup>85</sup> And on July 28, President Trump effectively endorsed police brutality, telling police officers they should not “be too nice” when transporting suspects.<sup>86</sup>

Further, President Trump has signed Executive Orders directing the Department of Justice to expand the criminal code and establish “new mandatory minimum sentences for existing crimes of violence against law enforcement officers,” even though laws already exist imposing the strictest penalties for violence against police officers.<sup>87</sup>

Taken together, these policies will significantly exacerbate existing racial disparities in the criminal justice system, including in arrests, incarceration and sentencing. Instead of enacting policies in accordance with CERD’s recommendations and U.S. treaty obligations, these measures will advance and entrench existing structural discrimination and racial disparities at all stages of the criminal justice system.

### **Voting Rights**

In Paragraph 11 of its Concluding Observations, CERD recommended that the United States take effective measures to enforce federal voting rights legislation, adopt legislation to prevent the implementation of voting regulations that have a discriminatory impact in light of the Supreme Court decision *Shelby County v. Holder*, among other recommendations.<sup>88</sup>

The U.S. report should reference H.R. 2978, the Voting Rights Advancement Act, introduced in the House of Representatives in June 2017. The legislation would strengthen voting rights by responding to the modern-day challenges of voting discrimination. Specifically, the legislation would modernize the formula for determining which states ought to have any changes in voting regulations approved by the DOJ, ensure that last-minute voting changes would not adversely affect voters, protect voters from voting changes that are likely to discriminate including those that relocate polling places and reduce the availability of non-English voting materials, allow DOJ to send observers to any location deemed to present substantial risk of racial discrimination at the polls, and offer better access to voter registration and absentee voting on Indian reservations.<sup>89</sup> If this proposed legislation were to become law, it would represent significant progress towards fully implementing CERD’s recommendations on voting rights.

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<sup>85</sup> Juliet Linderman, *Trump objections don’t stop overhaul of Baltimore police*, YAHOO NEWS (Apr. 8, 2017), <https://www.yahoo.com/news/trump-objections-dont-stop-overhaul-baltimore-police-060513436.html>.

<sup>86</sup> Jeffery Robinson, American Civil Liberties Union, “Donald Trump’s Talk to Police Officers Was Police-State Authoritarianism Distilled to Its Essence,” July 31, 2017, available at <https://www.aclu.org/blog/speak-freely/donald-trumps-talk-police-officers-was-police-state-authoritarianism-distilled-its>.

<sup>87</sup> Jeffery Robinson, American Civil Liberties Union, “Trump Effort to Protect Cops Doesn’t Match Facts,” Feb. 17, 2017, available at <https://www.aclu.org/blog/speak-freely/trump-effort-protect-cops-doesnt-match-facts>.

<sup>88</sup> Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination: United States,” CERD/C/USA/CO/7-9 (25 Sept. 2014).

<sup>89</sup> Tyler Ray, American Civil Liberties Union, “Can Congress Stand Up Against Voter Suppression?,” June 25, 2015, available at <https://www.aclu.org/blog/washington-markup/can-congress-stand-against-voter-suppression>.

The U.S. report should address the controversial Election Integrity Commission, created by a May 2017 Executive Order entitled “Establishment of Presidential Advisory Commission on Election Integrity.”<sup>90</sup> The Commission has already violated the Federal Advisory Committee Act, failing on both transparency and accountability by holding their first meeting behind closed doors and without any public notice.<sup>91</sup>

Further, the Commission’s Vice Chair Kris Kobach, a notorious champion of voter suppression, requested that all 50 states turn over the personal information of every voter in the country. The U.S. report should highlight states’ rejections of this request, which recognize that such data may be used to suppress voting rights in the future. Specifically, the state of Delaware worries that the commission is “a disingenuous and inappropriate campaign against one of the nation’s foundational institutions.”<sup>92</sup> Kentucky gauges that the commission is “at best a waste of taxpayer money and at worst an attempt to legitimize voter suppression efforts across the country.”<sup>93</sup> And Pennsylvania has “serious reservations about the true intentions of this effort in light of the false statements this administration has made regarding voting integrity, the historical suppression of voting rights, and the way that such data has been used in the past.”<sup>94</sup> While the Election Integrity Commission represents a setback in meeting CERD’s recommendations, the states’ lack of cooperation shows their unwillingness to support a body intent on promoting discrimination.

As the CERD Concluding Observations noted, the Supreme Court decision in *Shelby County v. Holder* has had a monumental impact on voting rights in the United States. The U.S. CERD report should reference the many state measures implementing barriers to voting, often in discriminatory ways, following this Supreme Court decision. The U.S. CERD report should also highlight the actions of the judicial branch, which has struck down restrictive voting laws in multiple jurisdictions.

In North Carolina, the state legislature passed the Voter Identification Verification Act (VIVA) which eliminated a week of early voting, ended same-day registration, and prohibited “out-of-precinct” voting.<sup>95</sup> Before passing the act, the North Carolina legislature requested racial data on the usage of specific voting practices. The data showed that Black North Carolinians were much more likely to use early voting, same-day registration, and out-of-precinct voting, and they were much less likely to have a DMV-issued photo ID.<sup>96</sup> In July 2016, a federal appeals court struck down the entirety of the law. “Faced with this record,” the court held it could “only conclude that

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<sup>90</sup> The White House, Executive Order: The Establishment of Presidential Advisory Commission on Election Integrity. May 11, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/05/11/presidential-executive-order-establishment-presidential-advisory>.

<sup>91</sup> American Civil Liberties Union, “Voter Suppression Behind Closed Doors,” July 19, 2017, available at [https://action.aclu.org/secure/sham-election-commission?ms=web\\_170710\\_votingrights\\_electionintegrity](https://action.aclu.org/secure/sham-election-commission?ms=web_170710_votingrights_electionintegrity).

<sup>92</sup> Delaware, *Delaware will not provide voter information to White House commission*, (July 3, 2017), available at <https://news.delaware.gov/2017/07/03/delaware-will-not-provide-voter-information-white-house-commission/>.

<sup>93</sup> Kentucky, *Secretary Grimes Statement on Presidential Election Commission’s Request for Voters’ Personal Information*, available at <http://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=129>.

<sup>94</sup> Pennsylvania, *Governor Wolf Denies Trump Administration Request for Voter Information*, (June 30, 2017), available at <https://www.governor.pa.gov/governor-wolf-denies-trump-administration-request-for-voter-information/>.

<sup>95</sup> American Civil Liberties Union, “*League of Women Voters of North Carolina, et al. v. North Carolina*,” May 15, 2016, available at <https://www.aclu.org/cases/league-women-voters-north-carolina-et-al-v-north-carolina>.

<sup>96</sup> Dale Ho, American Civil Liberties Union, “Supreme Court’s Decision Maintains Ruling that Discrimination Has No Place at the Polls,” May 15, 2017, available at <https://www.aclu.org/blog/speak-freely/supreme-courts-decision-maintains-ruling-discrimination-has-no-place-polls>.

the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent.”<sup>97</sup>

In Texas, the state government implemented a voter ID law on the same day that the Supreme Court issued its decision in *Shelby County v. Holder*. This voter ID law, like others in different states, discriminated against people of color as minority voters disproportionately lack ID and the permissible forms of ID were chosen in a discriminatory manner. Specifically, the state law allowed concealed weapons permits for voting, but did not accept state-issued student ID cards. In July 2016, the appeals court agreed with the lower court and held that the Texas voter ID law violated the Voting Rights Act because of its discriminatory impact on minority voters.

While the court decisions overturning Texas’ law is consistent with ICERD and should be highlighted in the U.S. CERD report, the DOJ’s response should be mentioned as well. In February 2017, despite these court decisions, the DOJ abandoned its claim that the Texas voter ID law was enacted with the intent to discriminate. Were the courts to rule that the state acted with discriminatory intent, Texas could be required to submit future changes to voting laws for review by DOJ before enforcing them. Instead of encouraging voter participation in line with the CERD recommendation, the DOJ is tacitly supporting Texas’ effort to suppress it.<sup>98</sup>

To better meet the CERD Committee recommendations and fully comply with ICERD, the federal government should be pursuing voting rights legislation, like the Voting Rights Advancement Act, and actively monitoring and investigating state voting measures that have direct or indirect discriminatory impacts.

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The ACLU is very troubled by the United States’ serious regression in implementing the CERD Committee recommendations since the last review in 2014. We remain especially concerned about the rollback of civil rights enforcement efforts across the federal government since January 2017. The current administration has the responsibility to uphold U.S. treaty obligations under ICERD and ensure that new policies and actions are consistent with U.S. human rights obligations. The federal executive branch must fully explain each reversion or failure to implement the CERD Committee recommendations.

The government must also detail the lack of progress in adopting “a national plan of action to combat structural racial discrimination” and to achieve full ICERD implementation based on meaningful consultation with civil society and affected communities as well as collaboration with local, state and tribal governments. Further, the United States should also reaffirm its commitment to promote racial and ethnic equality in the U.S. as part of the International Decade

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<sup>97</sup> Julie Ebenstein, American Civil Liberties Union, “Victory: North Carolina Legislators Won’t Be Able to Suppress the Vote This Election,” July 29, 2016, available at <https://www.aclu.org/blog/speak-freely/victory-north-carolina-legislators-wont-be-able-suppress-vote-election>.

<sup>98</sup> American Civil Liberties Union, “ACLU of Texas Comment on Justice Department’s Reversal in Texas Voter ID Case,” Feb. 28, 2017, available at <https://www.aclu.org/news/aclu-texas-comment-justice-departments-reversal-texas-voter-id-case>.

for People of African Descent, including by actively supporting positive discourse on human rights at home.<sup>99</sup>

We look forward to the U.S. government's report and will submit further comments to the CERD Committee closer to the review in 2018. Should you have further questions regarding the information in this letter, please contact Jamil Dakwar at [jdakwar@aclu.org](mailto:jdakwar@aclu.org) or 212-519-7850.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Faiz Shakir".

Faiz Shakir  
National Political Director

A handwritten signature in blue ink, appearing to read "Jamil Dakwar".

Jamil Dakwar  
Director, Human Rights Program

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<sup>99</sup> Mission of the United States to the United Nations Office Geneva, "Dialogue with Working Group of Experts on People of African Descent," 33<sup>rd</sup> Session of the Human Rights Council, Sept. 26, 2017, *available at* <https://geneva.usmission.gov/2016/09/26/dialogue-with-working-group-of-experts-on-people-of-african-descent/>.