



Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil and Political Rights

A shadow report by the American Civil Liberties Union
prepared for the United Nations Human Rights Committee
on the occasion of its review of

The United States of America's Second and Third Periodic Report
to the UN Committee on Human Rights Concerning the
International Covenant on Civil and Political Rights

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COVER PHOTOS FROM LEFT TO RIGHT:

- Jessica Gonzales with a picture of her three slain daughters, ages seven, nine, and 10.

- Prisoners were forced to break through windows to escape Hurricane Katrina.

- Father Roy Bourgeois, a religious leader and activist, has been spied on by the U.S. government.

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ABOUT THE ACLU

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under U.S. Constitution and other civil and human rights laws. Since the tragic events of September 11, the core priority of the ACLU has been to stem the backlash against human rights in the name of national security.

In 2004, the ACLU created a Human Rights Program specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. The ACLU Human Rights Program incorporates international human rights strategies into ACLU advocacy on issues relating to national security, immigrants’ rights, women’s rights and racial justice.

The ACLU welcomes the opportunity to comment on the United States’ compliance with the International Covenant on Civil and Political Rights through this shadow report to the Human Rights Committee. The shadow report is based primarily on the ACLU’s advocacy in federal and state legislatures and courts.

EXECUTIVE SUMMARY

In the last decade, Americans have witnessed serious setbacks in the protection of civil and political rights in the United States. The most vulnerable groups in society have suffered the brunt of these trends – minorities, immigrants and non-citizens, women, children, and the accused. The country has experienced a backlash against immigrants who are determined to defend their fundamental human rights, and the government has singled out Arabs, Muslims and South Asians for unfair targeting and treatment. Rights of privacy and free speech – once the hallmarks of American democracy – are under attack.

Women continue to face unequal treatment in the criminal justice system, and female victims of domestic violence remain unprotected against discrimination in housing and employment. Low-wage migrant women workers are economically and sexually exploited, and female domestic workers are sometimes held in indentured servitude.

Racial inequality and discrimination remains ongoing and pervasive in America, and the U.S. government has not done enough to end it. Hurricane Katrina exposed grave and persistent economic and social disparities in American society. Minorities are unfairly targeted through “racial profiling,” a practice used by law enforcement to target individuals for suspicion of crime based on race, ethnicity, religion or national origin. In the criminal justice system, minorities are selectively targeted, and disproportionately arrested, charged, indicted, prosecuted and sentenced. Detractors of remedial affirmative action programs are waging a frontal assault on programs seeking to remedy racial imbalances and historical racial inequalities in higher education, and in state and local governments.

Immigrants have become scapegoats of the generalized fear-mongering that is prevalent in today’s post-9/11 America. The government has sharply limited the right of immigrants to challenge the bases for their detention in the courts, unfairly discriminates against them in prisons, detains them for longer periods, and provides them no right to counsel in civil or criminal cases.

The right to counsel in criminal cases has become illusory for poor people, with indigent defense systems woefully inadequate and under-funded in many parts of the country. And contrary to both the Covenant and U.S. history, secrecy has become the hallmark of the government’s conduct in the criminal justice arena. The government routinely relies on secrecy to dismiss lawsuits and escape accountability for human rights abuses such as unlawful rendition, torture, and illegal electronic surveillance. At the government’s request, courts conduct judicial proceedings behind closed doors.

The U.S. government has violated bedrock principles and subjected detainees in its “war on terror” to torture, indefinite arbitrary detention and abuse. Additionally, the Central Intelligence Agency has transported suspects to countries where torture is routine and established secret prisons with “ghost” detainees overseas.

Inhuman and cruel conditions of confinement in various U.S. prisons and jails remain pervasive, and law enforcement officials and correctional authorities continue to use restraint chairs and electro-shock weapons, including Taser guns which have claimed many human lives.

The U.S. government has seriously eroded the right to privacy by expanding its surveillance of ordinary Americans in name of protecting national security. The National Security Agency is conducting massive wiretapping and data-mining of phone calls and emails, and the FBI is spying on peaceful political and religious groups and demanding personal records without court approval or probable cause. Dissent is now treated as unpatriotic.

Even children's rights are not sacrosanct. The government continues to detain disproportionate numbers of minorities in juvenile detention, and fails to meet the unique needs of girls in detention, whose ranks grow steadily. Over 2,500 juvenile offenders sentenced as adults for crimes committed under the age of 18 are serving a life sentence without the possibility of parole. And the disturbing national trend of the "school to prison pipeline" is causing many of the most vulnerable students to be funneled out of public schools directly into the juvenile and criminal justice systems.

Regarding the cherished right to vote, America is far out of step with the world on felony disfranchisement, shutting 5.3 million American citizens out of the process. Congress is debating reauthorization of the expiring provisions of the federal Voting Rights Act, which is the major safeguard against the constant assaults on the voting rights of minorities.

Since September 11, Arabs, Muslims and South Asians have become targets of overt and covert government activity. They have been arbitrarily detained and abused, misused as material witnesses, denied visas to enter the U.S. if the government finds the content of their speech objectionable, racially profiled, discriminated against for the peaceful practice of their religion, and subjected to unlawful monitoring and surveillance without any suspicion of criminal activity.

To avoid blatant violations of the Covenant by the U.S. in Iraq, Afghanistan, Guantánamo Bay and secret detention facilities outside the U.S., the government continues to maintain that the ICCPR does not apply to its actions outside the United States. The position is consistent with a disturbing trend that threatens to undermine the rule of law in America – the assumption that the Executive has unchecked authority to ignore the law. To regain its position as a beacon of freedom throughout the world, the United States must honor and protect the fundamental freedoms and rights enshrined in the U.S. Constitution and the ICCPR.

Although the ICCPR covers a broad spectrum of civil and political rights, this shadow report does not address all of them, but rather focuses on five substantive areas: national security, immigrant's rights, racial justice, women's rights and religious freedom. There are many areas of ACLU work not covered by this report, and issues within the areas addressed that are only partially covered. The full breadth of the ACLU's relevant work encompasses broader sets of rights covered by the ICCPR and can be seen on our web site, at www.aclu.org.

A. Equal Application Of Rights/Effective Remedies For Violations (Article 2)

Over the last decade, there has been a serious erosion in the ability of immigrants, prisoners and detainees in the "war on terror" to use the writ of habeas corpus in U.S. courts to challenge the constitutionality of their ongoing detention, significantly circumscribing the availability of a vital

remedy.¹ Recent U.S. Supreme Court cases have also sharply limited the ability of individuals to sue for civil rights violations. Rights available to women have been similarly curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and refusing to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order. Accordingly, the government is failing to ensure the enjoyment of rights to all individuals under its jurisdiction, in contravention of Article 2.

B. Equal Rights For Men and Women (Article 3)

While the U.S. government has made some efforts toward eliminating practices that “impair the equal enjoyment of rights”² women in the criminal justice system, female victims of domestic violence, and low-wage migrant women workers still suffer from unequal and discriminatory treatment.

C. Freedom From Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Article 7)

Evidence from a range of sources, including over 100,000 government documents produced to the ACLU through Freedom of Information Act (“FOIA”) litigation, show a systemic pattern of torture and abuse of detainees in U.S. custody in Iraq, Afghanistan and Guantánamo Bay, Cuba. This abuse was the direct result of policies promulgated from high-level civilian and military leaders and the failure of these leaders to prevent torture and other cruel, inhuman or degrading treatment by subordinates.

Despite the widespread and systemic nature of the torture and abuse, including over 120 reported deaths in custody, the United States has refused to authorize any independent investigation into the abuses and the government continues to assert that the abuse was simply the actions of a few rogue soldiers. The U.S. government has taken very limited measures to hold perpetrators accountable and to provide redress to victims of torture and abuse. Also in violation of the Covenant, the U.S. continues to engage in unlawful renditions in which the CIA kidnaps individuals and transfers them to countries known for their routine use of torture. Other detainees have been “disappeared” to secret detention facilities overseas.

U.S. violations of the prohibition against torture and other forms of abuse are not limited to actions by military personnel overseas in the “war on terror,” but in fact are far too ubiquitous at home. Prisoners and detainees inside the U.S. are subjected to conditions and brutal practices chillingly similar to those experienced by detainees abroad — prolonged solitary confinement, extreme temperatures, intimidation by dogs, painful restraints and electro-stun devices.

¹ Even before the government’s “war on terror”, this Committee expressed concern about the lower standards of due process afforded excludable aliens than other aliens. Using the “war on terror” as justification, the protections for undocumented workers have further significantly weakened.

² U.N. Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)* CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument).

D. Prohibition Of Slavery & Forced Labor (Article 8)

Migrant women workers in the U.S., particularly domestic workers, are held in conditions of servitude or forced labor in the U.S. The U.S. Report emphasizes abuse of those trafficked for sex work, and fails to recognize and address the serious abuses suffered by domestic workers. These workers remain highly vulnerable because they lack legal protections and because of the exploitative labor conditions to which they are subjected.

E. Right To Liberty and Security Of Person, Rights Of the Accused To Humane Treatment, and Expulsion Of Aliens Without Due Process (Articles 9, 10 & 13)

Since 1996, the U.S. government has dramatically scaled back the rights and remedies of aliens in removal proceedings, increasingly relying on harsh detention policies and creating new “expedited removal” proceedings that lack the most basic due process protections. In addition, in the aftermath of the September 11 terrorist attacks, the government embarked on a number of policies that systematically deprived aliens, particularly those from Muslim-identified countries, of their due process rights, and encouraged increased local enforcement of immigration law, thereby fueling anti-immigrant sentiment. These policies are particularly disturbing in light of the growing number of immigrants being detained – currently nearly 23,000 – a number that has doubled over the last ten years.³ Recent legislation would create a total of 60,000 detention beds for immigrants by 2010.⁴ Indeed, immigration detention now represents the fastest growing federal detention population in the country. National detention standards are routinely ignored and other abuses are widespread.⁵

F. Rights Of the Criminally Accused/Fair Trial (Article 14)⁶

Fundamental to a criminal justice system that is fair to all is the right of a person accused of a crime to be assisted by competent counsel. Yet, this right to counsel for the indigent accused, for both juveniles and adults, is fast becoming illusory in many U.S. states, in both nature and extent, and the brunt is often borne by the racial minorities who are confined at disproportionate rates. The U.S. Report refers to these indigent defense protections but fails to mention that today, many states are failing to adequately fund and supervise their indigent defense systems.

G. Right To Privacy (Article 17)

The U.S. government has seriously eroded the right to privacy by expanding its surveillance of ordinary Americans in the name of protecting national security. The USA Patriot Act authorizes the FBI to demand the personal records of people without probable cause or prior judicial approval. Documents show that the FBI has been monitoring and infiltrating peaceful political and religious groups. And most recently, the public learned that President Bush has authorized

³ See Forrest Wilder, “South Texas Hold’Em,” Texas Observer online (May 5, 2006), available at http://www.texasobserver.org/showArticle.asp?ArticleFileName=060505_holdem.html

⁴ The Intelligence Reform and Terrorism Prevention Act of 2004 approved a 40,000 bed increase in detention over the next five years. Pub. L. No. 108 – 408 §§ 7211 – 7214, § 5204, 118 Stat. 3638, 3825 – 3832 (2004).

⁵ See, e.g., January 11, 2006 letter to DHS Inspector General Richard Skinner from National Immigration Forum and other advocacy organization, documenting noncompliance with the standards and asking for audit; see also Nina Bernstein, “9/11 Detainees in New Jersey Say They Were Abused With Dogs,” New York Times (April 3, 2006).

the National Security Agency to conduct intrusive electronic surveillance of Americans with no check whatsoever against abuse.

H. Freedom Of Thought, Conscience & Religion (Article 18)

Although the U.S. has become increasingly pluralistic with regard to religion, and its laws do not on their face discriminate against others, Muslims have become targets of discrimination based on religion. Charitable funds are sequestered without publicly verifiable evidence of suspicious activity, and the government is not adequately promoting tolerance or enforcing anti-hate crimes laws to protect Muslims and also Jews.

I. Freedom Of Expression & Right Of Peaceful Assembly (Articles 19 & 21)

Historically the U.S. has been a staunch defender of freedom of expression. Since 9/11, however, the U.S. has engaged in policies that seriously threaten free expression rights and have a concrete chilling effect on the right of association. The U.S. government is denying visas to foreign scholars whose political views it disfavors pursuant to an “ideological exclusion” provision of the Patriot Act.⁷ The U.S. government has also been gathering intelligence information that is not connected to specific criminal activity, which has chilled lawful dissent. In another manifestation of this trend, the U.S. government has begun to take a highly restrictive interpretation of the federal open records request law, the Freedom of Information Act, and has refused to disclose a range of documents about its national security policies and practices.⁸

J. Freedom Of Association (Article 22, & Articles 17, 18 and 19)

Because of the U.S. government’s overbroad and unlawful monitoring and surveillance policies, and infiltration of groups without any suspicion of criminal activity, particularly of Arabs, Muslims and South Asians, these groups are now fearful of congregating as they used to do. This is in direct violation of the Article 22 mandate that “Everyone shall have the right to freedom of association with others ... ”

K. Rights Of the Child (Article 24 (& Articles 2 & 26: Non-Discrimination In the Enjoyment Of Rights))

The most vulnerable children are provided unequal education based on race; juvenile detention centers are warehouses of problem children rather than centers of rehabilitation, and poor children are barred – through no fault of their own – from certain state and federal welfare benefits. If children, whatever their beginnings, are to become good, productive citizens, these problems must be remedied, in accord with the Covenant rule that “Every child shall have without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a

⁷ 8 U.S.C. § 1182(a)(3)(B)(i)(VII).

⁸ See, e.g., <http://www.aclu.org/tortureFOIA>; <http://www.aclu.org/spyfiles>; Complaint, *ACLU of Northern California v. DOJ and FBI*, No. 3:04cv04447(N.D. Cal. filed Oct. 21, 2004), available at <http://www.aclunc.org/911/041021-foia.pdf>

minor,”⁹ an individual right that exists *in addition* to a child’s rights to all the civil rights enunciated in the Covenant.

L. Right To Vote & Political Participation (Article 25)

The U.S. maintains in its Report that “[t]he U.S. political system is open to all adult citizens without distinction as to gender, race, color, ethnicity, wealth or property.”¹⁰ While the government professes to equally enforce all laws, the hollowness of this claim becomes readily apparent when the U.S. has repeatedly failed to protect the voting rights of people with felony convictions, of marginalized communities and the millions of voters who continue to be disfranchised in large part because of their race, ethnicity or economic conditions making it more difficult for people to participate in the political process.

M. Equality Before the Law (Article 26)

As evidenced by the images that flashed across the world in the wake of Hurricane Katrina, many parts of the U.S. remain severely segregated by race. Communities of color receive grossly unequal attention by federal, state and private entities compared to their white counterparts. The disparate treatment of minorities is also evidenced by the persistence of racial profiling, a practice law enforcement officials use to target individuals for suspicion of crime based on race, ethnicity, religion or national origin. While profiling practices were traditionally aimed primarily at African-Americans and Latinos, after the tragic events of September 11, their targets now also include Arabs, Muslims and South Asians. Selective prosecution of the drug laws and the use of mandatory minimum sentences in sentencing also persist in many parts of the U.S., and their brunt disproportionately continues to be borne by minorities.

N. Protection Of Minority Rights (Article 27)

The Human Rights Committee has indicated that affirmative action may be “require[d]” when States Parties’ failure to take such affirmative steps would perpetuate discrimination.¹¹ Thus, carefully crafted race-based affirmative action programs to ensure equal enjoyment of rights by all racial groups are plainly permissible, and in some circumstances may be required, under the ICCPR. Just such programs are under legislative assault in the U.S. and the U.S. Supreme Court has taken a narrow view of what is permissible affirmative action.

O. Reservations, Declarations and Understandings Of the United States To the ICCPR

Contrary to this Committee’s mandates, the U.S. government, in its latest report, refuses to reconsider in whole or in part any of its reservations, understandings and declarations to the

⁹ ICCPR art. 24, ¶ 1.

¹⁰ U.S. Report, ¶ 397.

¹¹ *United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights*, 31 I.L.M. 645, 655 (May 1992) (earlier draft, adopted later by the Senate and President); *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 ¶ 10 (1994); U.N. Human Rights Committee, *General Comment No. 18: Non – Discrimination* ¶ 10 (Oct. 11, 1989), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

Covenant.¹² The U.S. government's failure to reconsider its positions together with the grossly inadequate domestic implementation of the ICCPR renders significant protections therein meaningless. Also significant, the U.S. continues to hew to its firmly held view that the Covenant does not apply to its actions outside the territory of the United States,¹³ thus claiming immunity for treaty violations by the U.S. military and the CIA in territories under U.S. control such as Iraq, Afghanistan and Guantánamo Bay. This position is inconsistent with the terms and purpose of the ICCPR and violates core principles such as the absolute prohibition on torture and other cruel, inhuman or degrading treatment or punishment.¹⁴

RECOMMENDATIONS TO THE UNITED STATES

Respect and Ensure Covenant Rights To All

- Ensure that federal judicial remedies, supplementing state jurisdiction, be available to redress discrimination and denial of constitutional and related statutory rights of persons detained in the “war on terror”, immigrants, minorities, women and undocumented persons.
- Undertake meaningful outreach to educate the federal, state and local judiciaries, as well as all levels of the American public, about U.S. government obligations under the Covenant.
- Take all necessary and reasonable measures to ensure the obligations of the Covenant apply throughout the territory subject to its jurisdiction and effective control.

Afford Equal Rights To Men and Women

- Revise federal sentencing guidelines and policies to reflect women's actual culpability with respect to drug crimes.
- Ensure that female prisoners are given training and educational opportunities equal to those given to male prisoners.
- Amend Violence Against Women Act to allow an individual to be able to seek redress, include economic security protections, and rescind the exception to the one-strike policy.
- Encourage the expansion of federal and state laws that protect domestic violence victims from housing and employment discrimination.

¹² U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 279, 292, U.N. Doc. No. CCPR/C/79/Add.50, A/50/40 (Oct. 3, 1995) [hereinafter *Concluding Observations concerning the United States*], available at <http://www.unhcr.ch/tbs/doc.nsf/0/b7d33f6b0f726283c12563f000512bd1?Opendocument>.

¹³ U.S. Dep't of State, Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant on Civil & Political Rights § I, ¶ 3 (Oct. 2005) [hereinafter *U.S. Report*], available at <http://www.state.gov/g/drl/rls/55504.htm>.

¹⁴ See Article 7; World Organization for Human Rights USA, *Torture, Arbitrary Detention, And Other Major Human Rights Abuses By the United States; U.S. Non –Compliance with the International Covenant on Civil and Political Rights in the Context of the “War on Terror”* 9 – 11 (Feb. 2006), available at <http://www.ohchr.org/english/bodies/hrc/docs/ngos/wofhr.pdf>.

Conduct Independent and Prompt Investigations Of Allegations Of Torture and Abuse

- Thoroughly and promptly investigate all allegations of torture and abuse in United States' prisons, jails and other detention facilities, including all facilities under the effective control of the United States.
- Establish independent oversight bodies to investigate complaints of torture and abuse by law enforcement and correctional officers and to monitor conditions in all prisons, jails, and detention centers in the United States.
- Hold accountable all individuals, including government officials, members of the armed forces, intelligence personnel, correctional officers, police, prison guards, medical personnel, and private government contractors and interpreters who have authorized, condoned or committed torture or cruel, inhuman or degrading treatment or punishment.

End Practice Of Unlawful Renditions and Secret Detentions

- Immediately end practice of rendering individuals to secret detention facilities or to countries where torture is a serious human rights problem.
- Ensure effective judicial review of all transfers of persons between the U.S. and other countries, and end reliance on diplomatic assurance to facilitate the transfer of detainees to countries if there are substantial grounds for believing that such persons might be subjected to torture or cruel, inhuman or degrading treatment or punishment.
- Cease all secret detentions, including in all detention facilities under the effective control of the United States. Hold all detainees only in officially recognized detention facilities and grant all detainees and prisoners the right to promptly challenge their detention and access to legal counsel and independent doctors.

Prohibit Slavery & Forced Labor

- Urge the UN to adopt codes of conduct regulating the treatment and protection of migrant domestic workers and require their staff to abide by that code, taking disciplinary action in the event of violations.

Restore Due Process Rights Of All Aliens and Rights and Remedies Of Aliens In Removal Proceedings

- Discontinue use of arbitrary and pretextual detentions.
- Reform immigration policy immediately and ensure its compliance with human rights standards.
- Ensure that any border protection activities are conducted in a manner consistent with the Covenant and other human rights standards.
- Decriminalize violations of immigration laws.
- Order states to refrain from enforcing immigration laws.

- Prohibit “indefinite” and “mandatory” detention of individuals who pose no security or safety risks.
- Ensure meaningful judicial review of removal orders and detention.
- Discontinue the use of “expedited removal” proceedings.
- Reduce the *de jure* and *de facto* discrimination faced by non – citizens in federal prisons.

Respect the Rights Of the Criminally Accused

- Require states to properly fund and supervise their indigent defense systems.
- Curtail the excessive secrecy in the administration of justice.
- End the disproportionate confinement of people of color in prisons, jails and juvenile detention facilities.

Restore the Right To Privacy

- Cease and desist domestic surveillance of Americans without probable cause and prior judicial approval.
- Turn over documents related to unlawful spying on peaceful political and religious groups and individuals.
- Repeal or seriously modify the REAL ID Act, so that sensitive personal information will not find itself in the hands of data brokers and identity thieves.
- Base air traffic-related searches of individuals on suspicion, and conduct them within appropriate parameters.

Ensure Freedom Of Thought, Conscience & Religion

- Cease sequestering Muslim charities’ funds unless there is publicly verifiable evidence of suspicious activity.
- Public officials should engage in increased efforts to promote tolerance and enforce the law with regard to hate crimes that disproportionately target Muslims and Jews.

Honor the Obligation To Allow Free Expression & Peaceful Assembly

- Cease using the Patriot Act’s Ideological Exclusion provision to exclude those whose views the government disfavors.
- Cease unlawful monitoring of political and religious groups.
- Revert to original standards concerning requests for information under the FOIA.

Guarantee Children’s Rights

- Reduce minority over-representation in juvenile detention systems.

- Develop policies and practices for girls in juvenile detention that acknowledge their unique needs.
- Require schools to develop adequate disciplinary criteria and referral procedures, explain racial disparities in disciplinary referrals, maintain accurate discipline records, and report all incidents of racial harassment.

Expand the Right To Vote, Renew the Voting Rights Act, and Improve Implementation Of Voter Access Laws

- Allow all citizens, regardless of their criminal history, to vote. In the alternative, require all states to restore voting rights upon completion of a criminal sentence.
- Urge the U.S. Congress to renew the expiring provisions of the Voting Rights Act in order to protect the voting rights of all Americans.
- Improve voter access by enforcing the Help America Vote Act and National Voter Registration Act.

Guarantee Equality Before the Law

- Effectively plan for crises such as Hurricane Katrina, including by seeking meaningful participation from the community at all stages.
- Eradicate the racial disparities and persistent poverty in the Katrina region.
- Ban all continuing racial profiling practices by state law enforcement officers and ensure that states comply with bans already in place.
- Urge U.S. Congress to pass the End Racial Profiling Act of 2005.
- Urge repeal of state “three strikes” law.

Protect Minority Rights

- Promote affirmative policies that seek to remedy past discrimination for minorities and women.

THE FAILURE OF THE UNITED STATES TO COMPLY WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Equal Application Of Rights/Effective Remedies For Violations (Article 2)

Actions of the federal legislative and judicial branches of the U.S have seriously imperiled both the equal application of rights and availability of effective (or, in some cases, any) remedies. Over the last decade, there has been a serious erosion in the ability of, among others, immigrants, prisoners and detainees in the “war on terror,” to use the writ of habeas corpus in U.S. courts to challenge the constitutionality of their ongoing detention, significantly circumscribing the availability of a most potentially significant remedy.¹⁵ Recent U.S. Supreme Court cases have also sharply limited the ability of individuals to sue for civil rights violations. The Court has ruled that claims of racial or national origin discrimination must be accompanied by proof of intentional discrimination; showing disparate impact, however egregious, is insufficient. Concerning undocumented migrant worker’s rights, courts have severely circumscribed available remedies including back pay, state tort remedies and workers’ compensation, and have also made immigration status relevant in such litigation. Rights available to women have been similarly curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and refusing to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order.

The U.S. Report fails to address this “roll back” of judicial remedies, saying simply that “U.S. law provides extensive remedies and avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights” citing those “previously reported” and additionally, the Violent Crime Control and Law Enforcement Act of 1994, for “violations committed by law enforcement officers.”¹⁶

The government’s obligations under Article 2 are of both a negative and positive nature: “...the obligation under the Covenant is not confined to the respect of human rights, but ...States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities to enable individuals to enjoy their rights” (emphasis added).¹⁷

1. *Legislative Stripping Of Federal Courts’ Habeas Powers*

a. *Anti-Terrorism and Effective Death Penalty Act Of 1996*

Congress began scaling back federal court power to grant habeas review with the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The AEDPA limits the ability of state detainees to bring habeas corpus claims in federal court and curtails the ability of federal courts to review

¹⁵ Even before the government’s “war on terror”, this Committee expressed concern about the lower standards of due process afforded excludable aliens than other aliens. Using the “war on terror” as justification, the protections for undocumented workers have weakened significantly further.

¹⁶ U.S. Report, ¶ 59.

¹⁷ U.N. Human Rights Committee, *General comment No.03: Implementation at the national level (Art. 2)* (1981), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/c95ed1e8ef114cbec12563ed00467eb5?OpenDocument&Click=](http://193.194.138.190/tbs/doc.nsf/(Symbol)/c95ed1e8ef114cbec12563ed00467eb5?OpenDocument&Click=).

state court decisions for constitutional error.¹⁸ Although the U.S. Justice Department also took the extreme position that the AEDPA, along with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), had eliminated habeas corpus review of deportation orders, the ACLU obtained an important Supreme Court victory limiting this view in *INS v. St. Cyr*, which preserved habeas corpus review for immigrants facing deportation.¹⁹

Pending legislation would even further restrict habeas review by federal courts in criminal cases.²⁰ That legislation, the Streamlined Procedures Act, would amend the AEDPA to further reduce federal courts' habeas powers by revoking federal court jurisdiction to review constitutional errors in sentencing deemed 'harmless' by the state courts. It would apply to all cases, including capital cases.

Before the AEDPA's passage, between 1976 and 1991, death row inmates were granted relief in 47 % of all habeas cases, underscoring the need for appellate review beyond the direct appellate process.²¹ Additionally, "there have been no systematic trial-level improvements that have coincided with the AEDPA's adoption and implementation."²² The new legislation will only perpetuate the flaws of the AEDPA creating a legal environment that will drastically curtail the ability of federal courts to adjudicate meritorious claims. Given the U.S. government's capital punishment reservation to Article 6, those safeguards are even more critical and warrant repeal of the AEDPA.

b. *The Detainee Treatment Act Of 2005 (DTA)*

Despite the Supreme Court's June 2004 decision in *Rasul v. Bush* confirming that Guantánamo detainees can bring habeas corpus petitions to challenge the legal and factual bases for their detentions in U.S. courts, recent legislation has stripped federal courts of their jurisdiction to hear habeas petitions brought by Guantánamo Bay detainees, in yet another escalation in the government's practice of claiming immunity for human rights abuses carried out in connection with its efforts to combat terrorism.

The DTA prohibits cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the U.S. government, and does so regardless of nationality or physical location.²³ However, it goes on to strip Guantánamo Bay detainees of their habeas rights, both in

¹⁸ Anti – Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104 – 132, § 101 – 08, 110 Stat 1214 (1996).

¹⁹ IIRIRA, Pub. L. No. 104 – 208, 110 Stat. 3009 – 546; *INS v. St Cyr*, 553 U.S. 289 (2001).

²⁰ *See, e.g.*, Streamlined Procedures Act of 2005, S. 1088 and H.R. 3035, 109th Cong. (2005).

²¹ Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?* 27 LOY. U. CHI. L.J. 523, 526 (1996).

²² James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411, 425 (2001).

²³ Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub.L. No. 109 – 148 § 1003, 119 Stat. 2680, 2793 (2005)

future *and* in pending cases, eliminating the only legal remedy previously available to them to challenge the legality of their prolonged and arbitrary detention.²⁴

In ensuing litigation, the government asserted that the *Rasul* holding is now limited by the DTA in that detainees are allowed to file court challenges but the courts – under the DTA – are prevented from ruling on those motions.²⁵ The DTA also purports to prohibit Guantánamo detainees from challenging the facts behind their designation as “enemy combatants,” even if new evidence comes to light; any mistreatment in detention or during interrogation; or rendition to a third country where they might be subjected to torture or other forms of cruel, inhuman, and degrading treatment. In addition, the DTA fails to clearly prohibit the Department of Defense from considering evidence obtained through torture or other coercive measures in assessing the status of detainees held in Guantánamo Bay. Somewhat ironically, the U.S. government, which immediately moved to dismiss all 186 pending Guantánamo Bay detainee habeas petitions, is now expressing concern about repatriating these detainees to their home countries for fear of torture and other ill treatment.²⁶ Both the U.N. Commission on Human Rights and the U.N. Committee Against Torture have expressed grave concern about the now even more limited procedures available to detainees.²⁷

c. *REAL ID Act*

In the past decade, the U.S. government has similarly restricted judicial review of immigration decisions, beginning in 1996 with the AEDPA and the IIRIRA. In 2002, the U.S. severely streamlined the administrative appeals allowed for individual non-citizens (including those

²⁴ *Id.* at § 1005. Under this legislation, detainees could only access a court for a very narrow set of claims after the initial designation as an “enemy combatant” by a Combatant Status Review Tribunal or after conviction by a military commission. Despite the fact that the statute did not take effect until December 30, 2005, and a presumption in U.S. law against retroactivity in statutes divesting petitioners from substantive rights, the Bush Administration has filed notice that it will seek have over 180 pending cases dismissed. Josh White, *Levin Protests Move to Dismiss Detainee Petitions*, WASH. POST, Jan. 5, 2006.

²⁵ On January 12, 2006, the Department of Justice filed a motion with the Supreme Court to dismiss *Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05 – 184), a case which challenges the constitutionality of military commissions. The government, citing the DTA, which states that the law “shall take effect on the date of the enactment of the Act,” argues that only the U.S. Court of Appeals for the District of Columbia has jurisdiction to hear cases by Guantánamo detainees. Brief for Respondent’s Motion to Dismiss for Lack of Jurisdiction, at 1 – 2, *Hamdan v. Rumsfeld*, No. 05 – 185 (S.Ct. filed Aug. 8, 2005). Thus, the government contended that all pending cases before any U.S. court should be dismissed for lack of jurisdiction. The Supreme Court heard oral argument in this case on March 28, 2006.

²⁶ Tim Golden, *U.S. Says It Fears Detainee Abuse in Repatriation*, NEW YORK TIMES (Apr. 30, 2006). “Since 2002, the Defense Department has sent 187 Guantánamo detainees to their home countries to be released and 80 more for continued incarceration. Panels of military officers at Guantánamo who reviewed the status of 463 prisoners last year recommended 120 transferred to foreign custody and 14 released outright. But only 15 of those 134 prisoners have thus far been sent home, a military spokesman said. The rest — along with 22 others whose transfer or release was approved earlier and 9 more who have been deemed ‘no longer enemy combatants’ — remain at Guantánamo.” *Id.*

²⁷ The U.N. Working Group on Arbitrary Detention recently noted that especially Section 1005 of the DTA – depriving courts of jurisdiction to hear habeas applications by Guantánamo Bay detainees – aggravated concerns raised by the shortcomings of the combatant status review tribunals and administrative review board procedures in place to try detainees. U.N. Commission on Human Rights, *Situation of Detainees at Guantánamo Bay* ¶ 29, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006). Conclusions and Recommendations of the Committee Against Torture, United States of America (Advance Unedited Version (May 18, 2006)) (CAT/C/USA/CO/2), paras. 28 – 30, available at <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>.

lawfully present). As a result, a body known as the Board of Immigration Appeals (BIA) began summarily affirming deportation orders without written legal opinions at an unprecedented rate.

The U.S. government also recently imposed severe restrictions on the availability of habeas corpus remedies in cases involving refugees and immigrants under the REAL ID Act, passed in 2005.²⁸ In particular, the statute seeks to eliminate habeas corpus review for immigrants challenging deportation for the first time. The government's purported justification is that it will provide an adequate substitute: appeal to the court of appeals. However, the REAL ID Act contains significant so-called streamlining provisions that could have the effect of restricting or eliminating federal court review over immigration deportation decisions in a wide range of cases, including where refugees seek asylum or are fleeing torture and where immigrants have lived in the U.S. for decades and have U.S. citizen family. The U.S. Attorney General has already taken a very narrow view of the kinds of challenges to deportation orders that are reviewable in the courts of appeals.

The REAL ID Act also effectively raises the bar for asylum applicants and individuals seeking relief from removal by manipulating evidentiary burdens and standards, and restricts the authority of the courts to overturn adverse rulings. Specifically, the bill would make it easier for the government to send asylum-seekers back to the countries they are fleeing by increasing their burden of proof and requiring written "corroboration" of their claims, contrary to international law. These heightened requirements apply not only to asylum applications but also to those brought pursuant to the Convention Against Torture and the federal Violence Against Women's Act, among others. Additionally, the REAL ID Act seeks to prohibit courts from reviewing an immigration judge's determination on the availability of corroborating evidence. The REAL ID Act would also make it possible to deport long-term, lawful, permanent residents for providing non-violent, humanitarian support to organizations labeled "terrorist" by the government. In violation of Article 15(1), this provision would apply even when such support was completely legal at the time it was provided.

As a result of these changes, most non-US citizens and foreign nationals challenging deportation, including those with legitimate fears of persecution and torture, now find appeal to a higher authority impossible to obtain, and those whose cases are reviewed are not sufficiently protected against illegal deportation in violation of both Articles 2(3) and 14 of the ICCPR.²⁹

2. *Constitutional Jurisprudence "Rolling Back" Civil Rights Remedies For Minorities*

Racial discrimination and racial injustice remain significant problems in American society. Despite the substantial progress of the last 40 years, people of color are substantially more likely to be poor, have less access to quality education, and in part because of these factors, more likely

²⁸ REAL ID Act of 2005, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109 – 13, Div. B, 119 Stat 231, 302 – 23 (2005).

²⁹ Article 14 provides that persons convicted under the law shall have the right to review by a higher court. But REAL ID purports to eliminate habeas review for immigrants who claim to have been unlawfully treated by the Department of Homeland Security. There is also a likely violation of Article 14 of the Universal Declaration of Human Rights, which provides for the right to seek asylum when an individual fears persecution for a fundamental aspect of their identity including race, religion, nationality, membership in a social group and political opinion.

to become court-involved. The legal and political successes of the civil rights movements of the 1950s and 1960s involved, mainly, the removal of formal, explicit barriers to equality and racial desegregation. An important first step, this was followed by gains in educational attainment, income, and political and civic participation. Since then, the challenge has been to address less explicit forms of discrimination and injustice. However, the tools with which these injustices may be tackled are being severely curtailed by court decisions. For example, in 2001, the Supreme Court held that individuals have no right of action for violation of disparate impact regulations prohibiting federally funded entities from discriminating based on race, color or national origin.³⁰ And in 2000, the Court held that the U.S. Constitution's Eleventh Amendment immunity for states prohibits state employees from suing for age and disability discrimination.³¹

The most damaging of these cases in the assault on private enforcement of civil rights laws is the Supreme Court's 2001 ruling in *Alexander v. Sandoval*, that the disparate impact regulations of Title VI of the 1964 Civil Rights Act, which covers a broad range of federally funded programs, are not privately enforceable.³² Private individuals can no longer sue for discrimination under civil rights statutes unless they can prove the discrimination was intentional. Similarly, the Supreme Court ruled in 2001 in *Garrett v. Board of Trustees of the Univ. of Alabama* and in 2000 in *Kimel v. Florida Bd. of Regents* that the Eleventh Amendment to the U.S. Constitution bars individuals from bringing damages actions against states under the federal Age Discrimination Act and the Americans with Disabilities Act. Finally, in *Gonzaga v. Doe*, the Supreme Court limited the ability of individuals to use the federal civil rights law known as Section 1983 when states or entities violate certain statutes. The Human Rights Committee has stated that "discrimination" prohibited by the ICCPR includes conduct that has a discriminatory purpose or effect.³³ It is vital to restore these legal remedies in order to continue to combat the ongoing racial discrimination and to comply with the Covenant.³⁴

3. Courts are Undermining Equal Protection Of Undocumented Migrant Workers

There are an estimated 9.3 million undocumented workers in the U.S.³⁵ In 2002, in *Hoffman Plastic Compounds, Inc. v. NLRB*, the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to order an award of back pay – compensation for wages an individual would have received had he not been unlawfully terminated before finding new employment – to an undocumented worker who had been the victim of an unfair labor

³⁰ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³¹ *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

³² *Alexander*, 532 U.S. 275 – 277.

³³ General Comment 18: Non – Discrimination: 10/11/89. CCPR General Comment No. 18 (General Comments), para. 7.

³⁴ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

³⁵ Jeffrey S. Passel, Randy Capps, and Michael Fix, *Undocumented Immigrants: Facts and Figures*, Urban Institute Immigration Studies Program (Jan. 2004), available at http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

practice by his employer.³⁶ Since then, employer defendants have invoked *Hoffman* to argue that undocumented workers are not entitled to backpay or other remedies under labor or employment-related statutes, including Title VII (employment discrimination), the Americans with Disabilities Act (disability discrimination), the Age Discrimination in Employment Act, the Fair Labor Standards Act (setting forth right to federal minimum wage and overtime), state workers' compensations schemes, and state law counterparts to the federal anti-discrimination and wage and hour laws.

a. *Courts Extend Hoffman Case*

Some courts have exported the *Hoffman* rationale into other contexts, curtailing both undocumented workers' access to courts and entitlement to various rights and remedies. For example, a New Jersey state court in *Crespo v. Evergo* effectively eliminated certain undocumented workers' right to be free from discrimination in the workplace by interpreting *Hoffman* to preclude the ability of undocumented migrants terminated for discriminatory reasons to avail themselves of the protection afforded by New Jersey's anti-discrimination law.³⁷ Because federal discrimination statutes only apply to private employers with a minimum of 15 employees, the practical effect of such a ruling is that any undocumented migrant who works for an employer with less than 15 employees in New Jersey has no enforceable right to be free from discriminatory termination in the work place.

In addition to excluding undocumented migrants from protection of state anti-discrimination laws, tort remedies or workers' compensation protection in some states, one collateral effect of all the post-*Hoffman* litigation has been to make immigration status a focal point in all employment-related litigation, such that employers vigorously seek documents during litigation concerning employee immigration status. Some courts have justified ordering such information to be turned over on the grounds that it is relevant to the employers' ability to defend against the workers' claims, such as by using their status to attack their credibility or limit their emotional distress damages. Immigrant workers are thus understandably afraid to come forward to enforce their rights, and are forced, when seeking compensation for workplace discrimination, to subject themselves to intrusive inquiries that could have very serious consequences, such as criminal prosecution or deportation. Even legally authorized workers are reluctant to come forward for a number of reasons, including fear that participation in an enforcement action might somehow expose the immigration status of loved ones.

For example, in *Campbell v. Bolourian*, a legally authorized live-in domestic employee denied federal or state minimum wage and overtime pay by defendants filed suit for back pay after leaving her employer.³⁸ During discovery, the Bolourians demanded information concerning her immigration status *after* she ceased working for them arguing that it was relevant because even though it was undisputed that she was legally authorized to work throughout the term of her

³⁶ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The ACLU filed a friend – of – the – court brief supporting the respondent, NLRB, in 2001, arguing that back pay awards were proper under the circumstances. Brief of Amici Curiae of American Civil Liberties Union Foundation and Make the Road by Walking, Inc. in Support of Respondent, *Hoffman Plastic Compounds, Inc. v. NLRB*, available at http://www.aclu.org/images/asset_upload_file821_21993.pdf.

³⁷ *Crespo v. Evergo*, 366 N.J.Super. 391 (N.J.Super.A.D., 2004).

³⁸ *Campbell v. Bolourian*, No. 250979 – V (Cir. Ct. Montg. Cty. May 6, 2005).

employment with them, it shed light on her motives for bringing the suit.³⁹ The trial judge ordered the discovery, which Campbell appealed.⁴⁰ The ACLU of Maryland, along with the Public Justice Center and other organizations, submitted a friend-of-the-court brief for Mrs. Campbell.⁴¹ It was argued, *inter alia*, that relevant federal and state wage laws applied regardless of an employee's immigration status, and that allowing such intrusive discovery demands would intimidate undocumented and other immigrant workers and dissuade them from pursuing legal recourse from abusive and unscrupulous employers. In addition, it was argued that even if immigration status were somehow relevant, Campbell was nonetheless entitled to a protective order against discovery of her current immigration status because the harms – the chilling effect on the enforcement of worker rights – greatly outweighed the employers' need for information.⁴²

In *Sierra v. Broadway Plaza Hotel*,⁴³ the ACLU represented 4 housekeepers from Mexico who worked in a large hotel in Manhattan where they were subjected to severe sexual harassment by the housekeeping supervisor and not paid for working overtime as required by federal and state law. Although this case ultimately settled, as a result of *Hoffman*, plaintiffs did not seek back pay remedies in order to avoid any inquiry into their immigration status in the course of the litigation.

By making immigration status potentially relevant in employment-related litigation, *Hoffman* has undermined the ability of all migrant workers, documented or not, to enforce their right to be free from discrimination, their right to a fair wage and overtime, their right to be compensated for work-related injuries, and other workplace rights. *Hoffman* has thus effectively undermined the equal protection and access to remedies of undocumented and other migrants under U.S. labor and employment laws.

The U.S. government emphasizes that *legal aliens* enjoy equal protection of the laws, but fails to discuss the legal standing of *undocumented* persons at all.⁴⁴ Although the government mentions *Hoffman* briefly in connection with labor association rights, it fails to acknowledge in its Article 2 discussion that *Hoffman* denied equal legal remedies to an undocumented worker, and that post-*Hoffman* litigation tactics by private employers have seriously weakened the enforcement of workplace rights for undocumented persons.⁴⁵ The government also fails to explain that while legal aliens nominally enjoy some rights, effective enforcement of those rights is a separate matter. In addition, the government fails to acknowledge that many immigrants are unfamiliar

³⁹ Press Release, Public Justice Center, Court of Appeals Will Hear Case of Discovery Abuse Against Lawful Immigrant Domestic Worker (Jan. 13, 2006), available at <http://www.publicjustice.org/news/index.cfm?newsid=93>.

⁴⁰ *Campbell v. Bolourian*, No. 869 (Md. Ct. Spec. App. Sept. 2005).

⁴¹ Brief of Amici Curiae of Public Justice Center, *et al.*, *Campbell v. Bolourian*, No. 869 (Md. Ct. Spec. App. Sept. 2005).

⁴² *Id.*; Press Release, Public Justice Center, Court of Appeals Will Hear Case of Discovery Abuse Against Lawful Immigrant Domestic Worker (Jan. 13, 2006). The Court of Appeals of Maryland (the state's highest court) decided to consider the case itself, but the parties reached a settlement agreement before oral argument. Press Release, Public Justice Center, PJC Brief Leads to Settlement for Immigrant (May 8, 2006), available at <http://www.publicjustice.org/news/index.cfm?newsid=111>.

⁴³ *Sierra v. Broadway Plaza Hotel* Equal Employment Opportunity Commission charges available at, <http://www.aclu.org/FilesPDFs/wrp%20complaint%20to%20eoc.pdf>.

⁴⁴ U.S. Report ¶¶ 42 – 45.

⁴⁵ U.S. Report ¶ 343.

with the complicated legal distinctions of immigration law, and that even some legal immigrants may be confused about their status and thus be afraid to come forward to enforce their rights out of fear of revealing their immigration status. Furthermore, many families are mixed-status families, and thus even legal immigrants may be reluctant to enforce their rights out of concern that such action may draw attention to the undocumented status of family members. Finally, immigration status is not static. Immigrants who have legal status for some time may eventually fall out of status. All of these factors bear on the weakened ability of immigrants, undocumented or not, to effectively enforce their rights under the law.

4. *Rollback Of Civil Rights Remedies For Women*

The rollback in civil rights protections has specific ramifications for women. Two Supreme Court cases in particular, *United States v. Morrison* and *Castle Rock v. Gonzales*, erode federal civil remedies for female victims of domestic violence.⁴⁶ In *Morrison*, the Court held that Congress did not have the power to create a private cause of action, and in *Gonzales*, the Court refused to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order.⁴⁷

Morrison arose out of an alleged sexual assault perpetrated against a college student. After the school's disciplinary procedures failed to punish the alleged perpetrators, the student filed suit under a provision that provides a federal civil remedy for victims of gender-motivated violence. In 2000, the U.S. Supreme Court held that this provision exceeded Congress's powers despite voluminous congressional findings justifying congressional power based on both Congress's reasoning that gender-motivated violence in the aggregate negatively impacts interstate commerce and the need to avoid gender bias in the state systems.⁴⁸ Apparently entirely unaware of the principle that ratified treaties federalize issues otherwise delegated to the states, the Court noted that the fact that the law applied uniformly nationwide bound even those municipalities without any history of discrimination or bias against victims of gender-motivated violence, and that violence against women is a local not national issue and a matter therefore for state law. Accordingly, there is now no federal judicial remedy to compensate women for violence by private actors.

The possibility of a federal remedy under a civil rights provision against local officials who fail to protect persons from privately inflicted violence when they know of it was also recently shut out in the *Gonzales* case. Mr. Gonzales violated a restraining order against him and abducted his daughters from his ex-wife's home. Ms. Gonzales reported the abduction to the police and informed them that her husband had a history of mental instability and erratic behavior. She phoned repeatedly and pleaded with the police to help her retrieve her children. The police repeatedly refused to enforce the restraining order. Ten hours after the abduction, Mr. Gonzales opened fire outside of the police station and was immediately shot and killed. The police discovered the bodies of the three murdered Gonzales children in his truck. Ms. Gonzales filed suit alleging violation of 42 U.S.C. Section 1983, a federal civil rights provision for denial of due process and equal protection of the laws. The U.S. Supreme Court refused to recognize her right

⁴⁶ *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Castle Rock*, 125 S. Ct. 2796 (2005).

⁴⁷ *Id.*

⁴⁸ *Morrison*, 529 U.S. at 618 – 20.

to relief, holding that the government had no affirmative duty to protect its citizens from privately inflicted violence despite the existence of a valid protective order, a state law requiring arrest for any violations of a protective order, knowledge of imminent harm and opportunity to act to prevent the harm. As a result, the only recourse for such violations is in state courts, which tend to discriminate against victims of gender violence, and also generally provide state officials immunity for such conduct. Accordingly, there is also now no federal remedy to compensate for the failure of state actors to protect women from and/or prevent domestic violence.⁴⁹

In an effort to seek redress for this systemic failure of the police and other governmental actors to respond to domestic violence victims, and to raise awareness of this problem, the ACLU filed a petition with the Inter-American Commission on Human Rights in December 2005. The Commission has notified us that it has passed the petition to the U.S. government for its response, due June 2006.

a. *Many States Do Not Provide Remedies For Domestic Violence Victims*

In some states, there are avenues for holding law enforcement officials accountable when police officers fail to provide the protection mandated by state law. But in others, including Colorado where the *Gonzales* suit arose, there are no such remedies. There, the doctrine of sovereign immunity sharply limits the utility of any such tort remedy shielding government officials from liability with certain stated exceptions. The sovereign immunity obstacles vary from state to state.

Few states have general, explicit anti-discrimination provisions protecting domestic violence victims that are enforceable through a private right of action. Instead, there are piecemeal protections in a handful of states for individuals in certain situations, often without a private enforcement option. Thus, without uniform federal legislation, many victims remain unprotected.

In the housing arena, no court, in litigation arising under the federal Fair Housing Act, has ruled definitively that the Act prohibits discrimination against women who have experienced domestic violence.⁵⁰ One court, however, has recognized that discrimination against victims of domestic violence is illegal sex discrimination when based on gender stereotypes and would therefore violate the Fair Housing Act's prohibitions against sex discrimination.⁵¹ Further, some states

⁴⁹ In this case, the Court's decision also distorts state legislatures' intent in requiring enforcement of protective orders and ignores the dynamics of police non – responsiveness to domestic violence that led to these laws. It displays blindness to the realities of domestic violence and the legal structures created to respond to it.

⁵⁰ Fair Housing Act, Pub. L. No. 90 – 284, 82 Stat. 73 (1968).

⁵¹ See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (finding police officer's statement to a domestic violence victim that he did not blame her husband for hitting her because of the way she was carrying on likely sufficient to support a claim of sex discrimination); *Bouley v. Young-Sabourin*, 394 F. Supp.2d 675 (D. Vt. 2005) (finding plaintiff stated a case of sex discrimination under the Fair Housing Act when she showed that less than 72 hours after her husband assaulted her, her landlord issued a notice to quit); *Smith v. Elyria*, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994) (finding plaintiff stated a claim for sex discrimination in challenging a police policy for responding to domestic violence complaints that assumed the complainant was an upset and irrational woman unlikely to press charges and that the alleged abuser had the right to exercise dominion and control over the victim's home); see also *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528 – 29 (D. Conn. 1984) (denying motion to dismiss claim of sex discrimination based on City's failure to provide police assistance to battered women).

have enacted legislation that offers greater protection for victims of domestic violence including Rhode Island, Washington, and North Carolina, which prohibit landlords from evicting or otherwise discriminating against tenants because they have experienced domestic violence.⁵² A tenant may also break her lease if she needs to move to protect herself.⁵³

In terms of economic security, while no federal law protects domestic violence victims, some recently enacted state laws do provide limited assistance to victims of domestic or sexual violence so that they can maintain the economic security they need to address the violence in their lives. About half of the states now explicitly provide unemployment insurance benefits to victims of domestic violence who have left a job because of the violence; several states require employers to provide victims time off from work to address the violence; and others provide defenses to individuals who are subject to eviction proceedings based on violence against them or their having sought emergency services.⁵⁴

B. Equal Rights For Men and Women (Article 3)⁵⁵

There is an affirmative obligation on state parties to the Covenant to “take all steps necessary” in the “public and private” sectors to eliminate practices that “impair the equal enjoyment of rights.”⁵⁶ While the U.S. government has made some efforts toward these ends, it has not affirmatively provided certain requisite protections. These include protections for women in the criminal justice system; housing and economic security protections for female victims of domestic violence; and, protections against the economic and sexual exploitation of low-wage migrant women workers. In its report, the U.S. government does discuss the recently reauthorized federal Violence Against Women Act (VAWA), commendable legislation that goes some way toward alleviating some of the housing problems female domestic violence victims suffer, but not without serious deficiencies including – but not only – because it allows public housing authorities to evict domestic violence victims if the landlord can prove that there is an

⁵² R.I. GEN. LAWS § 34 – 37 – 1 to 3 (1956); WASH REV. CODE ANN. §§ 59.18.570, .580, .585 (2006); N.C. GEN. STAT. ANN. § 42-40, - 42.2 (2005).

⁵³ See, e.g., WASH REV. CODE ANN. §§ 59.18.570-575 (2006); OR. REV. STAT. §§ 90.453-459.

⁵⁴ Legal Momentum, *State Law Guide: Housing Laws Protecting Victims of Domestic Violence* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/housing.pdf>; Legal Momentum, *State Law Guide: Unemployment Insurance Benefits* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/ui.pdf>; Legal Momentum, *State Law Guide: Time Off From Work For Victims Of Domestic Or Sexual Violence* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/timeoff.pdf>; Legal Momentum, *State Law Guide: Employment Discrimination Against Domestic or Sexual Violence Victims* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/discrim.pdf>; Legal Momentum, *Domestic Violence Workplace Policies* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/policies.pdf>; Legal Momentum, *State Law Guide: Workplace Restraining Orders* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/policies.pdf>.

⁵⁵ The ACLU's Reproductive Freedom Project works to protect everyone's reproductive rights and access to the full spectrum of reproductive health care, including sexuality education, family planning services, prenatal care, childbearing assistance, and abortion care. Although their work is not included in this report, please see <<http://www.aclu.org/reproductiverights/index.html>> <http://www.aclu.org/reproductiverights/index.html> for the full range of their activities. We note that another U.S. NGO working on similar issues, the Center for Reproductive Rights, has submitted a shadow report on reproductive rights. That report is on the Human Rights Committee's website at: http://www.ohchr.org/english/bodies/hrc/87ngo_info.htm.

⁵⁶ U.N. Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)* CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument).

“actual and imminent threat” to other tenants or staff if the victim is not evicted.⁵⁷ The U.S. report does not address VAWA’s limitations, measures to redress the inequities attendant on court and prison-involved women or the economic discrimination that plagues low-wage women migrant workers.

I. *Criminal Justice Discrimination*

a. *Drug Sentencing Policies Harm Women and Their Families*

The American drug war, premised on the reduction of the use, abuse, and sale of illegal drugs, has been largely ineffective in quashing the supply and demand of drugs in the U.S.⁵⁸ Instead, the policies have resulted, *inter alia*, in a dramatic increase in the number of women convicted for low-level drug offenses, disproportionately minorities. Nationally, there are over 1 million women under some form of criminal supervision.⁵⁹ In 2005, there were eight times as many women incarcerated in state and federal prisons and local jails as in 1980. The number increased from 12,300 in 1980 to 182,271 by 2002.⁶⁰ Women of color are significantly overrepresented in the criminal justice system. In 2004, black women were 4.5 times more likely than white women to be incarcerated.⁶¹ Women account for only 8% of convicted violent felons.⁶² In 1997, 44% of Hispanic women and 39% of African-American women incarcerated in state prison were convicted of drug offenses, compared to 23% of white women, and 26% and 24% of Hispanic and African-American men, respectively.⁶³ Between 1986 and 1999, the number of women incarcerated in state facilities for drug related offenses increased by 888%, surpassing the rate of growth in the number of men imprisoned for similar crimes.⁶⁴

To sharpen the teeth of anti-drug legislation, Congress extended the reach of the anti-drug laws to minor players and in some cases non-participants in drug trafficking by adding in 1988 the crime of “conspiracy to commit a drug offense” to the list of crimes that warrant the imposition of a federal “mandatory minimum” sentence, inflexible sentences that can be very long and give judges no discretion to depart therefrom.⁶⁵ Women, often the girlfriends and wives of the drug

⁵⁷ U.S. Report ¶¶ 81-86; Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

⁵⁸ See generally, ACLU; Break the Chains: Communities of Color and the War on Drugs; The Brennan Center at NYU School of Law, *Caught in the Net: The Impact of Drug Policies on Women and Families* 3 (Mar. 2005) (prepared by Lenora Lapidus, Namita Luthra, Anjali Verma, Deborah Small, Patricia Allard, Kirsten Levinston) [hereinafter *Caught in the Net*], available at http://www.aclu.org/images/asset_upload_file743_23513.pdf.

⁵⁹ Women in Prison Project, *Women in Prison Fact Sheet* 1, Correctional Association of New York (Mar. 2002) [hereinafter *Women in Prison Fact Sheet*], available at http://www.correctionalassociation.org/WIPP/publications/Women_in_Prison_Fact_Sheet_2006.pdf.

⁶⁰ *Caught in the Net*, at 3; Fox Butterfield, *Women Find a New Arena for Equality: Prisons*, New York Times, Dec. 29, 2003.

⁶¹ Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prison & Jail Inmates at Midyear 2004* 11 (Apr. 2005) (prepared by Paige M. Harrison and Allen J. Beck, Ph.D), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf>.

⁶² Bureau of Justice Statistics, U.S. Dep’t of Justice, *Criminal Offender Statistics*, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#women>.

⁶³ *Caught in the Net*, Executive Summary.

⁶⁴ *Caught in the Net*, Executive Summary.

⁶⁵ *Caught in the Net* at 35.

traffickers, are now vulnerable to prosecution and incarceration based on their associations rather than their conduct, and some serve longer prison sentences than the traffickers themselves.⁶⁶ Prosecutors offer pleas and reduced sentences to those who can supply “substantial assistance” to the drug investigators, which these low-level participants can rarely if ever, provide, and thus they cannot avail themselves of these reduced sentences. Fearing draconian mandatory minimum sentences, women will often plead guilty to any lesser charge even where totally uninvolved in the offense, giving prosecutors involved excessive and unfair bargaining power.⁶⁷

For example, Brenda Prather was sentenced to forty years to life in prison after being convicted of the crime of selling a controlled substance. Brenda was charged after her husband twice sold drugs to an undercover New York State police officer. The act triggering liability was Brenda’s handing her husband a roll of aluminum foil from their kitchen. Her husband used the foil in a subsequent drug transaction. Despite her husband’s testimony that Brenda had no knowledge of the drug transaction for which the state charged her, the state imputed knowledge of the drug transactions to her.⁶⁸

b. Prisons Provide Fewer Vocational and Education Programs To Women Than Men

The opportunity to gain skills in vocational and educational programs is obviously important in assisting formerly incarcerated women as they rebuild their lives and seek gainful employment. Yet, some state prison systems offer far fewer vocational and educational programs in women’s correctional facilities than in those of men. Until June 2005, the New York State Department of Corrections offered 30 different programs in male prisons and only 11 programs in female prisons.

c. Women On Death Row

1. Prosecution Of Women In Capital Cases Should Include Investigations Of Abuse

Women charged with capital crimes face nearly insurmountable obstacles, one of the most pressing being the difficulty in getting qualified counsel. Where counsel are obtained, they generally lack resources and bear heavy caseloads.⁶⁹ Studies have shown a high incidence of unqualified attorneys being assigned capital punishment cases, with disturbing results.⁷⁰

⁶⁶ *Caught in the Net* at 35, 47.

⁶⁷ *Caught in the Net* at 41-42.

⁶⁸ *Caught in the Net* at 36; see *New York v. Prather*, 249 A.D. 2d 954 (N.Y. App. Div. 1998).

⁶⁹ Phyllis Chesler, “A Double Standard for Murder,” *New York Times* (Jan. 8, 1992), and as reprinted in ACLU, et al., *The Forgotten Population: A Look at Death Row in the United States Through the Experiences of Women* 6-7 (Dec. 2004) [hereinafter *Forgotten Population*], available at <http://www.aclu.org/womensrights/crimjustice/13270pub20050120.html>

⁷⁰ *Id.* In states that do not offer public defender services, courts frequently appoint unqualified (no capital case experience) or ineffective counsel. Studies have also shown that a high number of capital defense attorneys have been subject to disciplinary actions. In Washington State, 20% of the 84 prisoners who faced execution from 1981 to 2001 had lawyers who were later disbarred, suspended, or arrested. *Id.*

An important mitigating factor in capital crimes is a history of abuse prior to the crime. Surveys of women prisoners and women Death Row inmates report a high incidence of previous abuse either in childhood or at the hands of intimate partners during adulthood. Of all the women in prisons and jails, almost half reported having been abused before their incarceration.⁷¹ Out of a sample of 66 women who were on Death Row – twenty (30%) reported that spouses or partners had regularly battered them, seven (11%) stated they had been severely beaten as children, and nine (14%) stated they had been abused as both children and adults.⁷²

2. *Conditions Of Confinement Include Extreme Isolation*

Women serving death sentences are often subject to extreme isolation. Of the states sentencing prisoners to death, seven states have a lone woman on Death Row. Many prison facilities housing women on death row limit their interaction with other prisoners and staff members.⁷³ This isolation has led to maltreatment at the hands of virtually unaccountable prison guards. For example, Aileen Wuornos, executed by the State of Florida in 2002, was, according to author Phyllis Chesler who developed a relationship with Wuornos before her death, physically and psychologically abused while isolated on Death Row in a Florida prison:

[S]he spent long periods of time in solitary confinement, freezing and naked. She had been deprived of daylight and exercise and is often forbidden to phone her lawyer. Ms. Wuornos cannot hear or see very well, but her frequent requests for a hearing aid and glasses have all been denied, as has her permission for her to see a gynecologist for her almost continual heavy bleeding. She has lost 40 pounds.⁷⁴

...guards spitting in food trays, brought hours late, tampering with air conditioning and water pressure, unnecessarily peering into the cells and talking about sexually assaulting her on the way to her execution.⁷⁵

Or, in the case of another Death Row inmate, when the prison chaplain came to tell her that her son had been murdered,

She was put in chains and then the chaplain told her. ... The body language of the officers made her afraid to show any emotions or react in a way that would make them strip her down or put her in confinement. She asked to see the psychiatrist; she was told that the psychiatrist had no time in her schedule for her.⁷⁶

Despite their isolation, women on death row still suffer sexual harassment and assault, usually committed by prison staff. One in five of those who replied to a survey reported having been

⁷¹ *Forgotten Population* at 10-11; Bureau of Justice Statistics, U.S. Dep't of Justice, *Prior Abuse Reported by Inmates and Probationers* (Apr. 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf>

⁷² *Forgotten Population* at 1, 10.

⁷³ *Forgotten Population* at 12.

⁷⁴ *Forgotten Population* at 13 (citing Phyllis Chesler, *A Double Standard for Murder*, N.Y. TIMES (January 8, 1992), at A19).

⁷⁵ *Forgotten Population* at 13 (citing Caroline J. Keough, *Death Row Complaints Cite Four Guards*, Miami Herald (July 13, 2002), at 1B).

⁷⁶ *Forgotten Population*, at 14 (citing comment by inmate's attorney).

assaulted or sexually harassed while in prison.⁷⁷ This Committee has expressed concerns about male staff in contact positions with women prisoners, and the Standard Minimum Rules for the Treatment of Prisoners require that only women guard women prisoners.⁷⁸

2. *Discrimination Against Victims Of Domestic Violence*

Domestic violence is a widespread problem that predominantly affects women in the U.S. One in 4 women have been physically or sexually abused by a husband or boyfriend at some point in their lives.⁷⁹ Domestic violence is also a key cause of homelessness among women and children. A 1997 survey of homeless parents in ten cities around the country found that 22% had left their last residence because of domestic violence. Among parents who had lived with a spouse or partner, 57% of homeless parents had left their last residence because of domestic violence.⁸⁰ In New York City, almost half of all homeless parents had been abused and one quarter of all homeless parents were homeless as a direct result of domestic violence in 2002.⁸¹ In addition, 47% of homeless school-aged children and 29% of homeless children under five have witnessed domestic violence in their families.⁸²

a. *The Federal Violence Against Women Act Protects Only Those Living In Public or Subsidized Housing*

Recognizing this correlation between domestic violence and homelessness, VAWA protects domestic violence survivors living in public or subsidized housing from discrimination by their landlords by prohibiting public housing authorities from denying leases to victims of domestic violence, dating violence, or stalking, and by disallowing landlords from evicting domestic violence victims under “zero tolerance for crime” or “one strike” policies that allow landlords to

⁷⁷ *Forgotten Population* at 14.

⁷⁸ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, ¶ 18, U.N. Doc. CCPR/C/CAN/CO/5 (Nov. 11, 2005), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/\\$FILE/G0641362.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf); Friends World Committee for Consultation (Quakers), *Integration of the Human Rights of Women and the Gender Perspective* (Feb. 2006), available at <http://www.quano.org/geneva/pdf/humanrights/CHR62WomeninPrison12.pdf>. The Friends World Committee defines contact positions as “posts that permit or require prison guards to be in physical proximity to the prisoners often unsupervised by other staff.” *Id.* at 3; Standard Minimum Rules for the Treatment of Prisoners, ¶ 53, Adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1955), approved by the Econ. & Soc. Council by its resolutions 663 C (XXIV) (July 31, 1957) and 2076 (LXII) (May 13, 1977), available at <http://www.ohchr.org/english/law/pdf/treatmentprisoners.pdf>.

⁷⁹ Nat’l Task force to End Sexual Violence against Women, *Violence Against Women Act 2005: Title IV Prevention* (2005), available at <http://www.vawa2005.org/title4.pdf> (citing, Nat’l Institute of Justice and the Centers for Disease Control and Prevention, *Extent, Nature and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*(2000) (prepared by Patricia Tjaden and Nancy Thoennes); The Commonwealth Fund, *Health Concerns Across a Woman’s Lifespan: 1998 Survey of Women’s Health* (May 1999)).

⁸⁰ ACLU Women’s Rights Project, *Domestic Violence and Homelessness 2* (2006) [hereinafter *Domestic Violence and Homelessness*], available at <http://www.aclu.org/pdfs/dvhomelessness032106.pdf> (citing Homes for the Homeless & Institute for Children and Poverty, *Ten Cities 1997-1998: A Snapshot of Family Homelessness Across America 3* (1998)).

⁸¹ *Domestic Violence and Homelessness* at 3 (citing Institute for Children and Poverty, *The Hidden Migration: Why New York City Shelters Are Overflowing with Families* (April 2002)).

⁸² *Domestic Violence and Homelessness* at 2 (citing Homes for the Homeless & Institute for Children and Poverty, *Homeless in America: A Children’s Story, Part One 23* (1999)).

evict entire families for the violent act of one household member.⁸³ No federal law explicitly protects domestic violence victims and survivors living in other kinds of housing. Relatedly, some cities have passed ordinances allowing for an imposition of fines on property owners if a resident calls for police assistance “too many times” in a particular period, creating an incentive for landlords to evict domestic violence victims in order to avoid such a fine. Milwaukee, Wisconsin is one such city.

b. Other Limitations Of the Violence Against Women Act

VAWA has key and troubling limitations, the first being an exception to the “one-strike” rule, pursuant to which public housing authorities can evict victims of domestic violence if the landlord shows an “actual and imminent threat to other tenants or those employed at or providing service to the property” if the tenancy or subsidized housing is not terminated.⁸⁴ These policies improperly hold the female tenants responsible for the abuser’s actions, and dangerously instill in them a fear of eviction, which prevents them from alerting the police or seeking outside assistance, and encourages the code of silence that women follow to guard against homelessness.⁸⁵

Second, VAWA does not allow an individual to bring a case to court. Instead, an aggrieved tenant must ask the government to bring the case on her behalf (a rare event in civil rights cases). The inability of victims to sue public housing agencies for civil damages leads to questions about the enforcement and ultimate effectiveness of the law. And finally, VAWA does not give domestic violence survivors economic security protection, by, among other things, failing to require employers to give their employees who are victims of domestic violence leave to tend to legal, medical, or other safety-related matters. As one court astutely observed, “the ability to hold on to a job is one of a victim’s most valuable weapons in the war for survival, since gainful employment is the key to independence from the batterer.”⁸⁶

c. Positive Federal Agency, Federal Court, and State Court Decisions Under the Fair Housing Act

The federal Fair Housing Act (FHA), which, unlike VAWA, allows plaintiffs to bring suit to enforce its provisions, has proved quite an effective remedy against discrimination by housing officials. Recently, a federal trial court in Vermont sustained a lawsuit against a landlord who had served a notice of eviction to a tenant 3 days after her husband physically attacked her, claiming that the incident caused the other tenants to fear future violent episodes.⁸⁷ The plaintiff alleged that her eviction was a result of sex discrimination and violated the FHA provision making it illegal to “refuse to sell or rent after the making of a bona fide offer, or to otherwise

⁸³ ACLU Women’s Rights Project, *The Rights of Domestic Violence Survivors in Public and Subsidized Housing 1*, available at <http://www.aclu.org/pdfs/subsidizedhousingdv.pdf>; Violence Against Women and Department of Justice Authorization Act of 2005, Title IV.

⁸⁴ *Id.*

⁸⁵ *Domestic Violence and Homelessness* at 1.

⁸⁶ *Reynolds v. Fraser*, 781 N.Y.S. 2d 885, 889 (N.Y. Sup. Ct. 2004).

⁸⁷ *Bouley v. Young-Sabourin*, 394 F.Supp.2d 675 (D. Vt. 2005).

refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁸⁸

The federal Department of Housing and Urban Development (HUD) has also brought suits under the FHA on behalf of domestic violence survivors. In October 1999, HUD filed charges against a property management company after the company attempted to evict a tenant 24 hours after her husband was arrested for physically assaulting her.⁸⁹ Noting that nationally women comprise 90-95 % of domestic violence victims, HUD asserted that the property management company discriminated against the tenant based on her sex in violation of the FHA.⁹⁰ Based on the HUD finding, the U.S. Department of Justice sued the apartment complex. Tiffany Alvera, represented by the ACLU Women’s Rights Program, intervened as a plaintiff. The case settled in 2001 with the company agreeing to end its zero tolerance policy as it applied to domestic violence victims, and to change its training manual to reflect these new policies.⁹¹

d. State Legislation Protecting Housing Rights Of Domestic Violence Victims

In addition to the federal housing discrimination remedies, some states have enacted legislation that prohibits sex discrimination and discrimination against victims of domestic violence. Laura K., a Michigan resident, detailed her housing discrimination trials and eventual triumphs to the U.N. Special Rapporteur on Housing. Laura K. was unable to sign a new apartment lease with her husband because she was unemployed at the time. When her husband began physically abusing her, she received a court order of protection prohibiting him from entering their home.⁹² The apartment complex ignored the order, evicted her, and changed the locks – at her husband’s request. She was left homeless with a 6-week old baby. Represented by the ACLU Women’s Rights Program, she sued the apartment complex alleging sex discrimination under Michigan’s landlord tenant law.⁹³ The management company settled out of court, in a confidential cash agreement, but also changed some policies to explicitly protect the housing rights of domestic violence victims and began requiring its managers to receive training in fair housing law and domestic violence.⁹⁴

⁸⁸ 42 U.S.C. § 3604 (a) (West 2006).

⁸⁹ U.S. Dep’t of House & Urban Dev., Charge of Discrimination ¶17, No. HUDALJ 10-99-0538-8 (HUD Ore. Apr. 16, 2001), available at <http://www.legalmomentum.org/issues/vio/Alvera%20Charge%20of%20Discrim.pdf>.

⁹⁰ *Id.* ¶ 28.

⁹¹ Press Release, ACLU Women’s Rights Project, Settlement Reached in Case of Oregon Domestic Abuse Victim Who Faced Eviction; Important Precedent Set for Battered Women Nationwide (Nov. 5, 2001), available at <http://www.aclu.org/womensrights/violence/13146prs20011105.html>.

⁹² *Testimony before U.N. Rapporteur on Adequate Housing by Laura K 2* (Oct. 16, 2005).

⁹³ *Id.* at 8. See also, Michigan Tenant Counseling Program, *The Basics of Discrimination*, http://www.michigantenants.org/resource.2005-06-20.8477853553/html_view.

⁹⁴ *Testimony before U.N. Rapporteur on Adequate Housing by Laura K 8* (Oct. 16, 2005).

3. *Employment Discrimination Against Low Wage Migrant Women Workers*

The U.S. has a population of between 28 and 30 million migrants.⁹⁵ These men and women make up 14 % of the total labor force and fill 20 % of the low-wage work positions.⁹⁶ Of the total migrant population, 9.3 million are undocumented, approximately 6 million of them undocumented migrant workers.⁹⁷ The manufacturing sector employs nearly 1.2 million undocumented migrant workers; the services sector employs almost 1.3 million, and 1 million to 1.4 million undocumented migrant workers labor in other fields.⁹⁸ In 2003, the average undocumented migrant worker earned \$12,000 annually – less than half of the \$24,300 earned by their native-born counterparts. Legal migrants earned \$20,400.⁹⁹

Federal law fails to protect the exploitation of low-wage migrant women workers. As discussed in Article 2, *Hoffman Plastics* and ensuing cases limited remedies for – and thus made – all migrant workers extremely vulnerable to exploitation. This vulnerability is even more marked with regard to women workers, who are regularly subjected to sexual harassment and other forms of gender discrimination in the work place. These women, who often work in undesirable occupations such as housekeeping, retail and factory work, are also extremely vulnerable to economic exploitation, frequently working for little or no compensation falling far below the legally required minimum wage and overtime. The right of undocumented workers to be free from workplace discrimination is particularly disturbing because it has created a subclass of women who have no enforceable right against workplace discrimination, as the *Crespo* decision discussed in Article 2 indicates.¹⁰⁰ Moreover, as also discussed earlier, efforts to reveal the immigration status of employees seeking compensation for discrimination have drastically discouraged women from holding accountable employers who discriminate against them.

The ACLU recently settled a lawsuit on behalf of two Fujianese women who worked at Rainbow Buffet, a New Jersey restaurant, and were economically and sexually exploited during their employment between November 2003 and August 2004.¹⁰¹ The waitresses said they worked for more than 60 hours per week for far below minimum wage. Each woman was paid only \$120

⁹⁵ Rebecca Smith & Sarah Paoletti, *Protecting the Rights of All Migrant Workers as a Tool to Enhance Development* 1 (Oct. 30, 2005) (submitted to the U.N. Committee on Migrant Workers) (hereinafter “*Protecting the Rights of All Migrant Workers*”), available at <http://www.ohchr.org/english/bodies/cmwr/docs/day.pdf> (citing U.S. Census Bureau, U.S. Dep’t of Commerce, *The Foreign-Born Population of the United States* 1 (2000)).

⁹⁶ *Protecting the Rights of All Migrant Workers*, at 1 (citing Urban Institute, *A Profile of the Low Wage Immigrant Workforce* 1 (Nov. 2003)).

⁹⁷ *Protecting the Rights of All Migrant Workers* at 1 (citing Jeffrey S. Passel, Randy Capps & Michael Fix, *Undocumented Immigrants: Facts and Figures* 1 (Jan. 12, 2004) [hereinafter *Undocumented Immigrants: Facts and Figures*]; B. Lindsay Lowell & Robert Suro, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* 7 (2002) [hereinafter “*How Many Undocumented*].

⁹⁸ *Protecting the Rights of All Migrant Workers* at 2 (citing *How Many Undocumented*, at 7-8).

⁹⁹ *Protecting the Rights of All Migrant Workers* at 2 (citing *Undocumented Immigrants: Facts and Figures*, at 30)

¹⁰⁰ See discussion of case in Article 2.

¹⁰¹ Press Release, ACLU, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit Brought by ACLU (May 2, 2006), available at <http://www.aclu.org/womensrights/employ/25392prs20060502.html>. We had alleged that the restaurant’s practices violated federal and state labor laws as well as state tort law and also filed sexual harassment and wrongful discharge charges on the women’s behalf with the Newark Area Office of the U.S. Equal Employment Opportunity Commission. *Id.*; see also Complaint ¶4-5, *Li v. Rainbow Group Inc.* No. 2:05-cv-05202-HAA-MF (D.N.J. filed Oct. 31, 2005), available at <http://www.aclu.org/FilesPDFs/rainbow%20buffet%20complaint%20&%20jury%20demand.pdf>.

per month in wages for nearly 300 monthly work hours. Buffet management also systematically confiscated portions of the tips the waitresses received from customers. Busboys and other employees at Rainbow Buffet intentionally hit them, touched them against their will, made humiliating and menacing sexual comments and threatened them, all with the full knowledge of management, who did nothing to stop the acts. In a similar, pending case, *Espinal v. Ramco*, the ACLU represents three female former employees of Ramco General Stores, Inc.¹⁰² We sued Ramco for violation of the Fair Labor Standards Act, the New York Labor Law, the New York State Human Rights Law, and the New York City Victims of Gender Motivated Violence Act. Plaintiffs allege that Ramco paid them below the minimum wage, refused to pay them any overtime, discriminated against them on the basis of gender, reduced their working schedules in retaliation for the women's refusal to have sexual relations with Ramco's president, and created a hostile work environment for female employees.

In addition to the lack of protection from gender discrimination, migrant women are also extremely vulnerable to economic exploitation because of the lack of enforcement against, and regulation of, the industries in which they work. Migrant women domestic workers have reported extreme abuse and exploitation by their employers.¹⁰³ Reportedly 92% of domestic workers are women, and most are also minorities and migrants.¹⁰⁴ These workers, often verbally and sexually abused, and economically exploited by their employers, are, despite the existence of extensive federal and state workplace anti-discrimination laws in the U.S., not covered by most of them.¹⁰⁵ Additionally, these laws are not adequately enforced, and, as discussed in Article 2, courts are curtailing remedies for undocumented workers rendering all migrant workers even more vulnerable to exploitation. As a result, employers act with near impunity, creating extremely difficult and hostile work environments for a very vulnerable population.

Many provisions of U.S. law that protect other workers exclude domestic workers from their protective provisions. Title VII, for example, which prohibits workplace discrimination and sexual harassment, extends only to employers with 15 or more employees, unlikely in the domestic context.¹⁰⁶ Furthermore, domestic workers are expressly carved out of certain laws, such as the Fair Labor Standards Act, and thus live-in domestic workers are not entitled to overtime pay for hours worked over 40 per week, as are other workers.¹⁰⁷ Also, employers of

¹⁰² *Espinal v. Ramco*, No. 1:04-cv-03594-TPG (S.D.N.Y. filed May 12, 2004)

¹⁰³ Human Rights Watch Report, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, (June 2001) Vol. 13, No. 2, at 8, 10, 12.

¹⁰⁴ Bureau of Labor Statistics, U.S. Dep't of Labor, *Table 14: Employed persons by detailed industry and sex, 2004 annual averages* 6 (2005), available at <http://www.bls.gov/cps/wlf-table14-2005.pdf>; Testimony before the Inter-American Commission on Human Rights by Margaret L. Satterthwaite (October 14, 2005); Kristi L. Graunke, *Just Like One of the Family: Domestic Violence Paradigms and Combating On-the-Job Violence against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 151 (2002).

¹⁰⁵ This problem has long been recognized by the U.N. In 1996, an expert group brought together by the Secretary General to study violence against women migrant workers, recognized that “[v]iolence against women migrant workers is a serious, complex and sensitive issue. The plight of women migrant workers who become victims of physical, mental and sexual harassment and abuse at the hands of their employers, their intermediaries, or the police – a situation exacerbated by economic exploitation – is one that calls for concerted action at the international, national and regional levels.” The Secretary-General, *Report on Violence Against Women Migrant Workers* ¶ 1, delivered to the Economic and Social Council and the General Assembly, U.N. Doc. E/1996/71 (June 20, 1996), available at <http://www.un.org/documents/ecosoc/docs/1996/e1996-71.htm>.

¹⁰⁶ 42 U.S.C. § 2000e(b) (West 2006).

¹⁰⁷ 29 U.S.C.A. § 213(b)(21) (West 2004)

domestic workers are exempt from keeping accurate contemporaneous records of time worked by the domestic worker making it extremely difficult for the worker to prove that she was not paid for all hours worked.¹⁰⁸ Domestic workers are also excluded from protections of the National Labor Relations Act, which protect workers from retaliation by their employers if they participate in labor organizing activities.¹⁰⁹ These various exclusions, in combination with those generally affecting immigrant workers, render migrant domestic workers extremely vulnerable to abuse.

Among domestic workers, perhaps the most vulnerable sub – group are those employed by diplomats, who are excluded from civil and criminal jurisdiction by diplomatic immunity. Each year the U.S. grants 4,000 two-year temporary work G-5 and A-3 visas, to domestic employees of diplomats and staff of international organizations.¹¹⁰ Many of these employers are immune from civil and criminal jurisdiction.¹¹¹ Consequently, workers employed by these individuals have no enforceable rights or remedies. Although numerous cases of abuse ranging from forced labor to wage violations have been reported, these workers have been unable to effectively assert their rights, relying only on occasional intervention by the U.S. State Department.

C. Torture and Cruel, Inhuman, or Degrading Treatment or Punishment (Article 7)

In April 2006, the ACLU submitted a separate and comprehensive shadow report to the Committee Against Torture documenting various violations of the non-derogable rights to freedom from torture and from cruel, inhuman, or degrading treatment or punishment both within the United States and abroad.¹¹² It is critical that the Human Rights Committee examine the U.S. government’s failure to uphold the absolute prohibition on the use of torture and cruel, inhuman, or degrading treatment or punishment, and its concomitant failure to take legislative, administrative, judicial and other measures to prevent and punish acts of torture and abuse.

1. Torture and Abuse In the “Global War On Terrorism”

Evidence from a range of sources, including government investigations, as well as over 100,000 government documents produced to the ACLU through the Freedom of Information Act (“FOIA”) litigation, show a systemic pattern of torture and abuse of detainees in U.S. custody in Afghanistan, the U.S. Naval Base Station at Guantánamo Bay, Cuba, Iraq, and other locations

¹⁰⁸ 29 C.F.R. 552.110(b) (1995)

¹⁰⁹ 29 U.S.C. § 152(3) (West 2006)

¹¹⁰ Lora Jo Foo, *Asian American Women: Issues, Concerns, and Responsive Human and Civil Rights Advocacy* (iUniverse 2003), relevant excerpt available at <http://www.modelminority.com/printout439.html>.

¹¹¹ U.S. Dep’t of State, *Diplomatic and Consular Privileges and Immunities From Criminal Jurisdiction*, available at <http://www.state.gov/documents/organization/20047.pdf>.

¹¹² ACLU, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad* (Apr. 2006) [hereinafter *Enduring Abuse*] available at http://www.aclu.org/safefree/torture/torture_report.pdf.

outside the United States.¹¹³ In many instances the harsh treatment was ordered as part of an approved list of interrogation methods to “soften up” detainees.¹¹⁴

Reported methods of torture and abuse used against detainees include prolonged incommunicado detention; disappearances; beatings; death threats; painful stress positions; sexual humiliation; forced nudity; exposure to extreme heat and cold; denial of food and water; sensory deprivation such as hooding and blindfolding; sleep deprivation; water-boarding; use of dogs to inspire fear; and racial and religious insults. While some of these techniques may not amount to physical or mental torture they constitute cruel, inhuman or degrading treatment and when used in combination or for prolonged periods of time may amount to torture. These techniques also violate the obligation to treat all persons deprived of their liberty with humanity and with respect to their human dignity as stipulated in article 10 of the Covenant.

In addition, over one hundred detainees in U.S. custody in Afghanistan and Iraq have died. The government has acknowledged that 29 detainee deaths in the custody of the Department of Defense involved suspected “abuse or other violations of law or policy,”¹¹⁵ and documents obtained under the ACLU FOIA litigation reveal that 21 deaths in U.S. custody were homicide, some caused due to “strangulation,” “hypothermia,” “asphyxiation,” and “blunt force injuries.”¹¹⁶ Death and autopsy reports obtained from the government confirm eight homicides that appear to have resulted from abusive techniques used on detainees, in some instances, by the CIA, Navy Seals and Military Intelligence personnel in Iraq and Afghanistan.¹¹⁷ Two documents show that in December 2002, U.S. forces beat two young Afghan detainees to death in Bagram, Afghanistan.¹¹⁸ On June 10, 2006, three detainees in Guantánamo were found dead in what were reported to be suicide deaths.¹¹⁹

¹¹³ In 2003, the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace filed a FOIA request seeking documents from the Central Intelligence Agency, Department of Justice, the Department of State, the Department of Defense and the Federal Bureau of Investigation, concerning treatment of detainees in U.S. custody in Afghanistan, Guantánamo Bay, Cuba, and Iraq. The vast majority of documents were released only following protracted and ongoing litigation and court orders directing government agencies to produce documents. Stipulation and Order, *American Civil Liberties Union Foundation v. Dep’t of Defense*, No. 04-cv-4151 (S.D.N.Y. Aug. 17, 2004), available at <http://www.aclu.org/torturefoia/legaldocuments/eeOrderforResponsivedocs.pdf>. The CIA has yet to release any documents to the ACLU and this issue is currently before the courts. See generally <http://www.aclu.org/torturefoia/legaldocuments/index.html> for the Torture FOIA legal documents.

¹¹⁴ *Treatment of Iraqi Prisoners: Hearing Before the S. Armed Services Comm.* 108th Cong. (2004), available at <http://www.aclu.org/projects/foiasearch/pdf/DODDOA010269.pdf>.

¹¹⁵ U.S. Diplomatic Mission to the United Nations in Geneva, *U.S. Delegation Oral Responses to CAT Committee Questions 12* (May 5, 2006)[hereinafter *U.S. Oral Responses to CAT of May 5*], available at <http://geneva.usmission.gov/Press2006/CAT-MAY5-SPOKEN.pdf>; *U.S. Oral Statements of May 8* at 6 (May 8, 2006).

¹¹⁶ Press Release, ACLU, *U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq* (May 24, 2005), available at <http://www.aclu.org/intlhumanrights/gen/21236prs20051024.html>.

¹¹⁷ *Id.*; Autopsy Reports, available at <http://action.aclu.org/torturefoia/released/102405/>.

¹¹⁸ Armed Forces Regional Medical Examiner, *Final Report of Postmortem Examination*, Jan. 13, 2003, available at <http://www.aclu.org/projects/foiasearch/pdf/DOD003146.pdf>; Armed Forces Institute of Pathology, *Autopsy Examination Report*, Feb. 25, 2003, available at <http://www.aclu.org/projects/foiasearch/pdf/DOD003156.pdf>.

¹¹⁹ James Risen and Tim Golden, *Three Prisoners Commit Suicide at Guantanamo*, N.Y. TIMES, June 11, 2006. While the official number of suicide attempts in Guantánamo since it opened in January 2002 has been less than 50, the real number of suicide attempts is far higher. *Id.*; Paisley Dodds, *23 at Guantanamo Tried Mass Suicide in '03*, ASSOCIATED PRESS, Jan. 24, 2005. The US department of defense rarely reports on suicide attempts and often calls

The well-documented, systemic and widespread abuse against detainees was the direct result of policies promulgated by high-level civilian and military leaders and the failure of these leaders to uphold their legal duty to prevent and prohibit torture and other cruel, inhuman or degrading treatment by subordinates. Thousands of detainees remain in U.S. military custody or control in Iraq, Afghanistan, Guantánamo and other locations, and remain subject to unlawful policies and practices in violation of the Covenant and other international human rights treaties.¹²⁰

Moreover, countless government documents reflect the accounts of government employees who themselves witnessed torture and abuse. For example, a memorandum from Navy Vice Admiral Jacoby states that Defense Intelligence Agency personnel in Iraq had witnessed members of Special Operations Task Force 6–26 abusing detainees and then attempting to cover up such abuse.¹²¹ FBI documents similarly record government agents witnessing abuse at Guantánamo Bay. A letter from T. J. Harrington, Deputy Assistant Director, FBI Counterterrorism Division, to Major General Donald J. Ryder, describes “highly aggressive interrogation techniques” witnessed by FBI agents at Guantánamo Bay in late 2002 — the techniques included sexual humiliation, sexual assault, “intense isolation” and using a canine “in an aggressive manner.”¹²²

One FBI employee specifically states in a government document that:

[H]ere is a brief summary of what I observed at GTMO. On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. . . . On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had

them incidents of “self harm” or “hanging gestures.” For example, in January 2005, army spokesman Lt Col Sumpter told the Associated Press that in 2003, there were 350 incidents of self-harm, including 120 “hanging gestures”, and in 2004 there were 110 incidents of self harm. *Id.*; Carol J. Williams, *4 Guantanamo Prisoners Attempt Suicide in One Day*, L.A. TIMES, May 19, 2006, at 10.

¹²⁰ There are roughly 465 detainees at Guantánamo (as of June 2006), 500 detainees at Bagram airbase in Afghanistan (as of June 2006), and roughly 15,387 detainees (as of April 2006). James Risen and Tim Golden, *Three Prisoners Commit Suicide at Guantanamo*, N.Y. TIMES, June 11, 2006; Carlotta Gall and Ruhullah Khapalwak, *33 Afghans U.S. Had Held Are Released*, N.Y. TIMES, June 9, 2006; United Nations Assistance Mission for Iraq, *Human Rights Report 6* (Apr. 2006), available at <http://www.uniraq.org/documents/HR%20Report%20Mar%20Apr%2006%20EN.PDF>.

¹²¹ Memorandum from L.E. Jacoby, Vice Admiral, U.S. Navy to Under Sec’y of Defense for Intelligence (June 25, 2004), available at <http://www.aclu.org/projects/foiasearch/pdf/DODDIA000154.pdf>.

¹²² Letter from T. J. Harrington, Deputy Assistant Director, FBI Counterterrorism Division, to Major General Donald J. Ryder (July 14, 2004), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI001914.pdf>.

apparently been literally pulling his own hair out throughout the night.¹²³

On December 2, 2002, Secretary Rumsfeld authorized interrogation techniques such as “stress positions,” “removal of clothing,” “hooding,” “isolation,” and using a “fear of dogs” in order “to induce stress,” for use at Guantánamo Bay.¹²⁴ Some of these techniques were withdrawn in January 2003 and Secretary Rumsfeld authorized new techniques in April 2003.¹²⁵ However, the report of Major General Fay demonstrates that Secretary Rumsfeld’s December 2, 2002 order resulted in the use of these abusive techniques in Iraq and Afghanistan.¹²⁶

Indeed, many of the December 2002 techniques (such as “stress positions” and the use of dogs) authorized by Secretary Rumsfeld were subsequently also authorized for use in Iraq by Lieutenant General Sanchez in a signed order dated September 14, 2003.¹²⁷ In November 2003, Iraqi General Mowhoush was suffocated to death in U.S. custody after being closely confined in a sleeping bag to bring on “claustrophobic conditions.”¹²⁸ The officer who applied this technique to Mowhoush described it as an example of a “stress position” which he believed was specifically authorized for use in Iraq.¹²⁹ The Taguba Report specifically found that the abuse of detainees in Abu Ghraib was “systemic.”¹³⁰

¹²³ E-mail from [name redacted], FBI to [name redacted], Inspection Division, FBI (Aug. 2, 2004), *available at* <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI002345.pdf>.

¹²⁴ The text of Secretary Rumsfeld’s order was leaked to the press prior to release of the Fay Report. *See* Memorandum from William J. Haynes, General Counsel to Donald Rumsfeld, Sec’y of Defense (Nov. 27, 2002) [hereinafter “Rumsfeld Order”], *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf>.

¹²⁵ Memorandum from Donald Rumsfeld, Sec’y of Defense to Commander USSOUTHCOM (Jan. 15, 2003), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15.pdf>; Memorandum from Donald Rumsfeld, Sec’y of Defense to Commander USSOUTHCOM (Apr. 16, 2003), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf> (authorizing, inter alia, “isolation”, “pride and ego down,” “environmental manipulation,” and “futility”).

¹²⁶ Major General George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 29* (2004) [hereinafter Fay-Jones Report], *available at* <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

¹²⁷ Memorandum from Lieutenant General Sanchez to Commander, U.S. Central Command (Sept. 14, 2003), [hereinafter Sanchez Sept. Order], *available at* <http://www.aclu.org/FilesPDFs/september%20sanchez%20memo.pdf>. This order was replaced by another order from LTG Sanchez dated October 12, 2003, which was largely based on the April 2003 techniques authorized by Secretary Rumsfeld for use in Guantánamo Bay, and authorized the use of “pride and ego down,” “fear up harsh” in interrogating detainees. Memorandum from Lieutenant General Sanchez to Commander, Combined Joint Task Force Seven, *Re: CJTF-7 Interrogation and Counter-Resistance Policy* (Oct. 12, 2003), *available at* <http://www.aclu.org/FilesPDFs/october%20sanchez%20memo.pdf>. The replacement of the order did not, however, bring an end to detainee abuse in Iraq. It was intentionally vague and drafted with the attitude that “MI doctrine suggests that use of approved approaches should be left to the imagination of the interrogator,” according to Sanchez’s chief legal advisor. Sworn statement of [name redacted], Senior Legal Advisor to Lieutenant General Sanchez (June 20, 2004), *available at* <http://www.aclu.org/projects/foiasearch/pdf/DOD000642.pdf>.

¹²⁸ Memorandum from Lewis E. Welshofer Jr., Chief Warrant Officer Third Class, U.S. Army to Commander 82d ABN DIV, Champion Base, Iraq (Feb. 11, 2004), *available at* <http://www.lchr.org/pdf/mem-dic021104.pdf>.

¹²⁹ *See id.*

¹³⁰ Dep’t of Defense, Article 15-6 Investigation of the 800th Military Police Brigade, “Regarding Part One of the Investigation” ¶ 5 (March 2004) [hereinafter Taguba Report], *available at* <http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm>.

As noted in the Fay Report, military staff in Iraq relied heavily on the advice of Major General Geoffrey Miller, a Guantánamo commander who was dispatched by senior Defense Department officials to Iraq to assist with interrogation there.¹³¹ That report also notes that “[d]og teams were brought to Abu Ghraib as a result of recommendations from MG G. Miller’s assessment team from GTMO.”¹³² Government documents received from the U.S. government under the FOIA record Major General Miller’s bias in favor of aggressive interrogation techniques, and objections by the Federal Bureau of Investigation (“FBI”) to the Defense Department’s use of “torture techniques” in Guantánamo Bay.¹³³

It is therefore not surprising that much of the conduct depicted in the horrific photographs of detainee abuse at Abu Ghraib prison bears some relation to techniques authorized for use in Guantánamo Bay. Another government report (purporting to investigate FBI allegations of abuse at Guantánamo), describes how Guantánamo detainees were made to stand naked before female soldiers, wear women’s underwear on their heads, and led around the room on a leash pursuant to specifically authorized interrogation techniques known as “Ego down” and “Futility.”¹³⁴ (Secretary Rumsfeld’s April 2003 order for Guantánamo also authorized these techniques.) Photographs of detainee abuse at Abu Ghraib leaked to the public show some of these techniques were applied to Abu Ghraib detainees — indeed, in perhaps the most well-known photograph, Pfc. Lynddie England appears holding a leash attached to a detainee’s neck.¹³⁵

a. *Lack Of Independent Investigations and Accountability For Abuse*

The U.S. government cited to 12 separate investigations into detainee abuse.¹³⁶ Many of the reports cited by the government in its written submission, however, remain unavailable to the public.¹³⁷ Each of these investigations, moreover, suffered from structural defects, limited

¹³¹ Fay Report at 24-25.

¹³² Fay Report at 10; *see also* R. Jeffrey Smith, *General is Said to Have Urged Use of Dogs*, WASH. POST, May 26, 2004, at A1.

¹³³ Electronic Communication from FBI General Counsel to FBI Counterterrorism Unit 2-4 (May 30, 2003), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003524.pdf>; E-mail from [name redacted] to Gary Bald, FBI; Frankie Battle, FBI; and Arthur Cummings, FBI (Dec. 5, 2003), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003160.pdf>.

¹³⁴ *See* Lieutenant General Randall M. Schmidt & Brigadier General John T. Furlow, Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility 19-20 (June 9, 2005) [hereinafter Schmidt-Furlow Report], available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>. Notably, “Pride and Ego Down” and “Futility” are techniques authorized by Army Field Manual 34-52, *see* U.S. DEPT. OF ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION § 3-18 (Sept. 28, 1992), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf>.

¹³⁵ Josh White, *Abu Ghraib Tactics Were First Used at Guantánamo*, WASH. POST, Jul. 14, 2005, at A1.

¹³⁶ U.S. Diplomatic Mission to the United Nations in Geneva, *Oral Statements by the United States Delegation to the Committee Against Torture* 7-8 (May 8, 2006) [hereinafter *U.S. Oral Statements of May 8*], available at <http://geneva.usmission.gov/Press2006/CAT-May8.pdf>.

¹³⁷ *See* U.S. Dep’t of State, Second Periodic Report to the Committee against Torture 75-76, U.N. Doc. CAT/C/48/Add.4 (June 2005). For example, the Formica and Route reports are completely unavailable. The only portion of the Church report that is publicly available is its Executive Summary. *Id.* Critical portions of the Fay Report remain classified. In addition, the Washington Post reported on an investigation by retired Colonel Stuart A. Herrington that concluded CIA agents had abused Iraqi detainees, but Herrington’s report remains classified. Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004, at A01.

authority, failing to investigate command officials, or due to a narrowly circumscribed mandate.¹³⁸ Not a single one was truly independent.¹³⁹ The Schlesinger report, which, by its title, purports to be an “independent” report, was the product of a panel all of whose members had been handpicked and appointed as full-time employees without pay by Defense Secretary Rumsfeld himself.¹⁴⁰ The Schlesinger panel had no subpoena power, and issues of personal accountability for detainee torture and abuse were expressly set so as to be beyond the terms of reference of this panel.¹⁴¹

No high-level officials involved in developing or implementing policies on the treatment of detainees in the “global war on terrorism” have been charged with any criminal activity related to the abuses. The U.S. government continues to assert that the abuse was simply the actions of a few rogue soldiers. There has been no investigation into the government’s secret transfer of detainees and the Office of Inspector General’s examination of the role of the CIA has not yet been made public.

There have been few prosecutions for homicide compared to the number of deaths of Afghans and Iraqis in U.S. custody, and the sentences awarded have been disproportionately light. Although the U.S. government acknowledged that 29 detainee deaths involved suspected “abuse or other violations of law or policy,” only 19 individuals received sentences of more than one year.¹⁴² In most of the official, publicly-known actions taken in response to allegations of abuse, the punishment has been non-judicial or administrative. In those cases in which an officer was convicted, the punishment generally was not commensurate with the gravity of the crime. For example, despite finding an army interrogator (the highest-ranking officer prosecuted to date) guilty of homicide, the tribunal only reprimanded the officer and levied a \$6,000 fine.¹⁴³ In another instance, a soldier who admitted to killing an unarmed, handcuffed Iraqi at point-blank range received a three-year sentence.¹⁴⁴ Such punishments send a message that torture and abuse committed by U.S. soldiers will only be lightly punished.

2. *Unlawful Renditions*

Renditions involve the clandestine abduction and detention, without legal process, of persons suspected of terrorist activities. The U.S. transfers these suspects to foreign intelligence services for interrogation, in countries where torture and abuse are routine. Rendition also includes the transfer of terror suspects into CIA custody in unknown secret detention centers overseas.¹⁴⁵ The U.S. openly defends the practice of rendition and considers it a “vital tool in combating

¹³⁸ See Human Rights First, *Getting to Ground Truth* 2, 16 (Sept. 2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf

¹³⁹ See *id.* at 2-3, 20.

¹⁴⁰ See *id.* at 2; Memorandum from Donald Rumsfeld, Sec’y of Defense to Hon. James R. Schlesinger, *et al.* (May 12, 2004), available at <http://f1.findlaw.com/news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>, at 106-107.

¹⁴¹ *Id.*

¹⁴² *U.S. Oral Responses to CAT of May 5*, at 6.

¹⁴³ *Iraq General’s Killer Reprimanded*, BBC WORLD SERVICE, Jan. 24, 2006.

¹⁴⁴ Gregg K. Kakesako, *Schofield Soldier gets 3-year term in Shooting*, HONOLULU STAR BULLETIN, Aug. 6, 2004.

¹⁴⁵ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005; Brian Ross and Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005; Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01.

transnational terrorism.”¹⁴⁶ While it denies transporting individuals “to countries where we believe or we know that they’re going to be tortured,” well-documented cases of renditions suggest otherwise.¹⁴⁷ Moreover, the U.S. does not deny the practice of rendition suspected terrorists to countries that the U.S. itself considers as violators of human rights and where individuals might be subjected to cruel, inhuman, or degrading treatment.¹⁴⁸ The U.S. government has therefore failed to meet its obligations under article 7 of the Covenant, which, *inter alia*, prohibits exposing “individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”¹⁴⁹

The former Director of the Central Intelligence Agency, George J. Tenet, publicly stated that in an unspecified period before September 11, the U.S. undertook over 70 such renditions, adding that the CIA had “racked up many successes, including the rendition of many dozens of terrorists prior to September 11, 2001.”¹⁵⁰ The media reported that the practice of “rendering” individuals was developed by military or CIA lawyers and “vetted by Justice Department’s office of legal counsel” and has been applied to hundreds of individuals in post-9/11 terrorism interrogations.¹⁵¹ Using civilian aircrafts, which have permission to land on U.S. military airfields worldwide, the CIA flies captured terrorist suspects from one country to another for detention and interrogation.¹⁵²

The exact number of persons rendered post September 11 is unknown. The news media has reported that over 100 suspected terrorists were sent by the CIA to foreign intelligence services and to CIA-run secret detention centers overseas.¹⁵³ About two dozen high-level terror suspects are in CIA custody in secret detention centers.¹⁵⁴ The remaining suspects – a group considered

¹⁴⁶ Sec’y of State Condoleeza Rice, Remarks Upon Her Departure for Europe at the Andrews Air Force Base (Dec. 5, 2005), available at <http://usinfo.state.gov/eur/Archive/2005/Dec/05-471726.html> (Rice also said, “Renditions take terrorists out of action, and save lives . . . Such renditions are permissible under international law”).

¹⁴⁷ R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005. See also Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Apr. 2005), available at <http://hrw.org/reports/2005/eca0405/>; *Enduring Abuse* at 68-72.

¹⁴⁸ U.S. Diplomatic Mission to the United Nations in Geneva, *Written Presentation by the United States to the Committee (Responses to questions)* (May 5, 2006), available at: <http://geneva.usmission.gov/Press2006/CAT-May5.pdf>

¹⁴⁹ U.N. Human Rights Committee, *General Comment 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment*, Art. 7 ¶ 9 (1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

¹⁵⁰ National Comm’n on Terrorist Attack Upon the United States, *Intelligence Policy, Staff Statement No. 7 2*, available at http://www.9-11commission.gov/staff_statements/staff_statement_7.pdf. *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States* 19 (Mar. 24, 2004) (statement of George Tenet, former Director of CIA), available at http://www.9-11commission.gov/hearings/hearing8/tenet_statement.pdf.

¹⁵¹ Dana Priest and Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons is Coming to Light*, WASH. POST, May 11, 2004 (detailing the existence of “interrogation rooms of foreign intelligence services—some with documented records of torture—to which the U.S. government delivers or ‘renders’ mid or low-level terrorism suspects for questioning”).

¹⁵² Dana Priest, *Jet is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004.

¹⁵³ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005; Douglas Jehl and David Johnson, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005.

¹⁵⁴ *Id.*

less important, with less direct involvement in terrorism and limited intelligence value — have been transferred to countries including Egypt, Jordan, Saudi Arabia, and Syria for interrogation.¹⁵⁵ The U.S. Department of State’s Human Rights Reports for these countries consistently state that the use of torture during interrogations in these countries is “routine.”

When rendering suspects to foreign intelligence services, U.S. officials claim that they obtain “diplomatic assurances” from the governments concerned that detainees will not be tortured. U.S. Attorney General Alberto Gonzales, in defending the practice, stated that the purpose of U.S. policy is not to send detainees “to countries where we believe or we know that they’re going to be tortured.” He added that if a country has a long history of torture, the United States seeks diplomatic assurances that torture will not be used. However, he acknowledged that it was not possible to “fully control” what other nations do.¹⁵⁶

In practice, officials do nothing to monitor whether those assurances will be honored. They reportedly suggest questions to foreign intelligence interrogators and then turn a blind eye to the methods employed to extract the information.¹⁵⁷ The ACLU considers diplomatic assurances are unreliable and ineffective in protecting against torture and abuse even with so-called post-return monitoring mechanisms. Such “assurances” are inherently unreliable, not legally binding, and provide no recourse for the transferred individual.

The case of Khaled El-Masri strikingly illustrates the dangers of the U.S. rendition program. El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia, held in incommunicado detention, handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan. There he was beaten, kicked, confined in squalid conditions, and detained without charge or public disclosure for several months.¹⁵⁸ Five months after his abduction, El-Masri was deposited at night, without explanation, on a hill in Albania.¹⁵⁹ Not long after El-Masri was flown to Afghanistan, Central

¹⁵⁵ *Id.*

¹⁵⁶ R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005. See also Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Apr. 2005), available at <http://hrw.org/reports/2005/eca0405/>. See also Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (Oct. 14, 2004), available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

¹⁵⁷ Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01 (quoting senior United States official as stating that after an individual is rendered, the CIA are “still very much in control” and that they will often “feed questions to their investigators”). See also Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002; David E. Kaplan, *et al.*, *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda*, U.S. NEWS & WORLD REPORT, June 2, 2003 (describing rendition of individuals to Jordan, Egypt, Morocco and Syria). For a comprehensive news report on the practice of rendition see Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005.

¹⁵⁸ Complaint ¶¶ 1, 23-48, *El-Masri v. George Tenet*, No. 1:05cv1417 (D.D.C. filed Dec. 6, 2005), [hereinafter El-Masri Complaint] available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf.

¹⁵⁹ *Id.* at ¶ 54.

Intelligence Agency officials realized that they had abducted and detained an innocent man, yet El-Masri's unlawful detention continued for two additional months.¹⁶⁰

On December 13, 2005, the ACLU filed suit on behalf of El-Masri against George Tenet, former director of the CIA, and the airline companies that facilitated his rendition for the injuries El-Masri suffered as a consequence of the rendition process, including prolonged arbitrary detention, torture and other cruel, inhuman or degrading treatment.¹⁶¹ In response to the lawsuit, the CIA made a successful motion to dismiss the suit on the ground that further legal proceedings may expose state secrets and jeopardize national security.¹⁶² The ACLU is planning to appeal the case in the Fourth Circuit.

3. *Torture and Abuse In the United States*

On the domestic front, the United States has failed to correct laws and practices regarding the use of torture and cruel, inhuman or degrading treatment or punishment. The ACLU shadow report to the U.N. Committee against Torture has documented several violations of the article 7 of the ICCPR, particularly in the context of supermax prisons, juvenile detention, and the use electroshock and restraint devices.¹⁶³ The ACLU continues to be particularly concerned about the following issues:

- Inhuman conditions of confinement, including inadequate medical and mental care: Cruel and inhuman conditions of confinement continue to exist in various jails and prisons, including supermax prisons, where prisoners, many of whom are mentally ill, are confined in solitary confinement for up to twenty-four hours a day. Medical and mental health care in prisons throughout the U.S. remains inadequate and has at times resulted in the deaths of prisoners.¹⁶⁴
- Sexual abuse in prisons: Prisoner rape by other prisoners and sexual abuse by correctional officers continues to occur with impunity in U.S. prisons and jails.¹⁶⁵

¹⁶⁰ *Id.* at ¶ 2. German Chancellor Angela Merkel told a joint news conference in Berlin with Secretary of State Condoleezza Rice that the United States had acknowledged it made a mistake in the case of Khaled el-Masri. U.S. administration officials later said the U.S. government did not admit to a "mistake" regarding El-Masri and that the U.S. had informed Germany about El-Masri's detention and release. Saul Hudson and Mark Trevelyan, *U.S. Germany Differ on CIA Abduction Case*, REUTERS, Dec. 6, 2005.

¹⁶¹ El-Masri Complaint ¶¶ 1, 23-48.

¹⁶² Opinion, *El-Masri v. George Tenet*, No. 1:05cv1417 (D.D.C. May 12, 2006), available at <http://jurist.law.pitt.edu/elmasriorder.pdf>.

¹⁶³ *Enduring Abuse* report, at 49-64.

¹⁶⁴ Julian Borger, *America's most unwanted turn to the law*, GUARDIAN, Jan. 12, 2002; Rachael Kamel and Bonnie Kerness, American Friends Service Committee, *The Prison Inside the Prison: Control Units, Supermax Prisons, and Devices of Torture 2-5* (2003), available at <http://www.afsc.org/community/prison-inside-prison.pdf>; Lorna A. Rhodes, *Pathological Effects of the Supermaximum Prison*, AMERICAN JOURNAL OF PUBLIC HEALTH (Oct. 1, 2005); *Enduring Abuse* at 51-58.

¹⁶⁵ See Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001), available at <http://www.hrw.org/reports/2001/prison/report.html>; U.S. Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004* (July 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf>; Eli Lehrer, *A Blind Eye, Still Turned: Getting Serious About Prison Rape*, NATIONAL REVIEW, June 2, 2003; *Enduring Abuse* at 56-58.

- Restraint devices and electro-shock weapons: U.S. law enforcement officials and correctional authorities continue to use restraint chairs and electro-shock weapons in ways that amount to cruel, inhuman or degrading treatment.¹⁶⁶
- The use of TASERs: Under certain circumstances, their use meets the Covenant definition of torture or cruel, inhuman or degrading treatment, but it is permitted under the U.S. Constitution's 8th Amendment. The Amendment protects only those convicted of crimes, and does not apply in the contexts in which TASERs are most often used – police encounters (although also used extensively in prisons and jails). TASERs are frequently used against non – aggressive, unarmed people for failure to comply with an official command. The deaths of 148 persons, from 1999 to September 2005, were attributed to Taser weapons.¹⁶⁷
- Children in prisons: Children under the age of eighteen continue to be housed with adults in some facilities. More than 2,200 juvenile offenders sentenced as adults for crimes committed under the age of eighteen are serving a life sentence without the possibility of parole.¹⁶⁸
- Mistreatment of non-citizens: In 2004, the Department of Homeland Security detained more than 200,000 non-citizens in jails and prisons for violating civil immigration laws. Reports of detainee mistreatment include unsanitary conditions of confinement, deaths due to inadequate medical treatment, and abuse by guards.¹⁶⁹

4. *Crime Of Torture Under U.S. Law*

The U.S. government has not made torture a distinct federal crime, except for acts committed outside U.S. territory (18 U.S.C. § 2340A). Notably, despite evidence of torture committed by some U.S. forces, no U.S. official has been charged under this law. Following reports of torture and abuse, a few low- ranking soldiers have been court-martialed for offenses committed

¹⁶⁶ *Enduring Abuse* at 58-61.

¹⁶⁷ ACLU of Northern California, *Stun Gun Fallacy: How the Lack of Taser Regulations Endangers Lives* 1 (Sept. 2005), available at <http://www.aclu.org/police/abuse/19977prs20051006.html>; *Enduring Abuse* at 58-61.

¹⁶⁸ Human Rights Watch and Amnesty International, *The Rest of their Lives: Life Without Parole for Child Offenders* 25 (2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>; ACLU, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* 7 (2004).

¹⁶⁹ Daniel Zwerdling, *The Death of Richard Rust*, NATIONAL PUBLIC RADIO, Dec. 5, 2005; Asjylyn Loder, *Speziale Boots Feds Probing Alleged Abuse of Detainees*, HERALD NEWS, Aug. 17, 2005; Daniel Zwerdling, *Immigrant Detainees Tell of Attack Dogs and Abuse*, NATIONAL PUBLIC RADIO, Nov. 17, 2004; Daniel Zwerdling, *U.S. Detainee Abuse Cases Fall Through the Cracks*, NATIONAL PUBLIC RADIO, Nov. 18, 2004; U.S. Dep't of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf>. U.S. Dep't of Justice, Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (Dec. 2003), available at <http://www.usdoj.gov/oig/special/0312/final.pdf>. See also ACLU, *America's Disappeared: Seeking International Justice for Immigrants Detained After September 11* (Jan. 2004), available at <http://www.aclu.org/FilesPDFs/un%20report.pdf>; *Enduring Abuse* at 63-64.

overseas under the Uniform Code of Military Justice (“UCMJ”).¹⁷⁰ The UCMJ prohibits many acts such as assault, cruelty, and murder, but fails to prohibit “torture” as a distinct crime. Moreover, the maximum punishment associated with simple assault is set at six months of confinement. For example, the maximum punishment for aggravated assault is only three to five years, and the maximum punishment for a charge of “cruelty and maltreatment” is only one year.

Although the newly enacted Detainee Treatment Act (“DTA”), attempts to close ambiguities in the extraterritorial application of the prohibition to subject persons in U.S. custody to cruel, inhuman or degrading treatment, it has three main shortfalls: First, the definition of cruel, inhuman or degrading treatment in the DTA remains vague and is not as broad as the Covenant and human rights law require and is limited to prohibited acts under the Fifth, Eighth and Fourteenth Amendments. Second, the DTA limits interrogations to standards codified in the updated but as yet unpublished Army Field Manual 34–52 — that Field Manual will not be applicable to the CIA, and is expected to be partially classified.¹⁷¹ Third, President Bush, who first threatened to veto the DTA, wrote at the time of signing the bill that he would construe the DTA “in a manner consistent with the constitutional authority of the President” and his powers as commander-in-chief, implying that he may continue to authorize acts prohibited by the DTA and other international human rights treaties at least with respect to intelligence agencies.¹⁷²

5. *US Constitutional Protections Against Cruel, Inhuman, or Degrading Treatment or Punishment*

The U.S. Constitution’s Fifth Amendment’s due process clause, applicable to interrogation procedures, prohibits actions taken under color of law (acting with government authority) that are “so brutal and offensive to human dignity” that they shock the conscience.¹⁷³ The Eighth Amendment’s prohibition on cruel and unusual punishment is applicable only to convicted persons and to pretrial detainees.¹⁷⁴ The U.S. Supreme Court has held that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁷⁵ Its prohibitions include disproportionate punishments, non-physical forms of cruel and unusual punishment, and wanton or unnecessary infliction of pain.¹⁷⁶

¹⁷⁰ See, e.g., Carlotta Gall, *2 U.S. Soldiers Are Charged With Assaulting Afghan Prisoners*, N.Y. TIMES, Oct. 31, 2005; Josh White, *Workers Surveyed On Detainee Abuse*, WASH. POST, Mar. 28, 2006, at A19; Matthew B. Stannard, *Court-martial’s quirks designed especially for armed forces’ needs*, S.F. CHRON., June 20, 2004.

¹⁷¹ Julian E. Barnes, *Congress Forces Delay of Interrogation Manual Release*, L.A. TIMES, May 11, 2006.

¹⁷² Edward Alden, *Bush statement appears to contradict anti-torture pledge*, FINANCIAL TIMES, Jan. 6, 2006, at 6.

¹⁷³ *Rochin v. California*, 342 U.S. 165, 172-173 (1952) (finding the illegal break-in of the petitioner’s home by government agents, the struggle to force open petitioner’s mouth, and the forcible extraction of his stomach’s contents to retrieve pills “shocks the conscience” and violated Rochin’s due process rights).

¹⁷⁴ See, e.g., *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) (affirming that due process rights of pretrial detainees are “at least as great as the Eighth Amendment protections available to a convicted prisoner”).

¹⁷⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁷⁶ The following cases, although not exhaustive, illustrate what conditions U.S. courts have found to constitute torture or cruel and unusual treatment. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding “gratuitous infliction of ‘wanton and unnecessary’” pain when officers made inmate take his shirt off, attached him to a hitching post in the sun for seven hours, given no bathroom break, given water only once or twice and at least one guard taunted Hope for being thirsty); *Estelle v. Gamble*, 429 U.S. 97 (1976) (failure to provide essential medical treatment constitutes cruel and unusual punishment); *Simpson v. Socialist People’s Libyan Arab Jamahriya*, 326

D. Prohibition Of Slavery & Forced Labor (Article 8)

1. Abuse Of Migrant Domestic Workers

Article 8 prohibits slavery, servitude or forced labor, whatever form they take in modern society, and covers situations involving public authorities as well as those involving relationships only between private individuals. Yet, migrant women workers in the U.S., particularly domestic workers, including those employed by diplomats, are held in conditions of servitude or forced labor in the U.S. Nearly 93% of domestic workers are women, and most are also minorities and migrants.¹⁷⁷ These workers, often verbally and sexually abused, and economically exploited by their employers, are not covered by most U.S. laws.¹⁷⁸ (See Article 3.) As the examples offered below demonstrate, these violations often entail violations of additional ICCPR rights including freedom from cruel, inhuman or degrading treatment under Article 7, right to privacy under Article 17 and rights of assembly and association under Articles 21 and 22.

Acknowledging the existence of “modern analogs” to traditional slavery, the government, in its report, discusses the Trafficking Victims Protection Act of 2000 as a tool to enhance its “ability to prosecute slaveholders and assist victims of human trafficking.”¹⁷⁹ The government emphasizes abuse of those trafficked for sex work, however, and not those trafficked for domestic work, also a largely female population. More importantly, the government focuses its prosecutorial energies on sex victims, too. A recent government report notes that

F.3d 230, 234 (D.C. Cir. 2003) (to assess whether an act is cruel or degrading treatment a court must look at the victims’ suffering which depends upon the totality of circumstances. “[T]orture is a label ‘usually reserved for extreme, deliberate and unusually cruel practices, for example . . . tying up or hanging in positions that cause extreme pain’”); *Abebe-Jiri v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (finding that the victim suffered severe pain constituting torture when she was hung from a pole, naked and with her arms and legs bound, and was severely beaten); *Doe v. Qi*, 349 F.Supp.2d 1258, 1318 (N.D. Cal. 2004) (finding that a victim who had been beaten and “hung from pipes for three days, handcuffed to other prisoners and not allowed to sleep” had been tortured); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1346 (N.D. Ga. 2002) (finding torture where a victim who was beaten, kicked in the face and torso, and subjected to a “long and nightmarish beating that included being hit while hanging upside down from a rope until he almost lost consciousness;” finding that the “threat of imminent death; or the threat that another person will imminently be subjected to death, [or] severe physical pain and suffering” can constitute mental torture).

¹⁷⁷ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Table 14: Employed persons by detailed industry and sex, 2004 annual averages* 6 (2005), available at <http://www.bls.gov/cps/wlf-table14-2005.pdf>; Testimony before the Inter-American Commission on Human Rights by Margaret L. Satterthwaite (October 14, 2005); Kristi L. Graunke, *Just Like One of the Family: Domestic Violence Paradigms and Combating On-the-Job Violence against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 151 (2002).

¹⁷⁸ This problem has long been recognized by the U.N. In 1996, an expert group brought together by the Secretary General to study violence against women migrant workers, recognized that “[v]iolence against women migrant workers is a serious, complex and sensitive issue. The plight of women migrant workers who become victims of physical, mental and sexual harassment and abuse at the hands of their employers, their intermediaries, or the police – a situation exacerbated by economic exploitation – is one that calls for concerted action at the international, national and regional levels.” The Secretary-General, *Report on Violence Against Women Migrant Workers* ¶ 1, delivered to the Economic and Social Council and the General Assembly, U.N. Doc. E/1996/71 (June 20, 1996), available at <http://www.un.org/documents/ecosoc/docs/1996/e1996-71.htm>.

¹⁷⁹ U.S. Report ¶¶ 151, 153.

Between fiscal years 2001 and 2005, federal prosecutors filed 68 cases of sex trafficking...charged 189 defendants with sex trafficking... [while the same government offices] filed 23 labor trafficking cases” and charged “59 defendants.”¹⁸⁰

2. *Abuse Of Domestic Workers By Diplomats*

In 2005, together with ANDOLAN, a South Asian domestic workers’ organization and Global Rights, the ACLU launched a broad campaign opposing the exploitation of domestic workers employed by diplomats. Unlike other employers, diplomats are generally immune from civil, criminal and administrative processes in the U.S. unless the sending countries waive their immunity. Aggravating the problem, U.S. courts have interpreted the commercial activity exception contained in Article 31(c) of the Vienna Convention on Diplomatic Relations to exclude the hiring and employment of domestic workers.¹⁸¹

Reiterating this position, the U.S. government has submitted “Statements of Interest” in lawsuits brought by abused workers, on diplomats’ behalf, arguing that the U.S. has entered into a number of treaties that establish its obligation to accord diplomatic immunity from prosecution.¹⁸² Pursuant to these treaties, diplomats are entitled to the same privileges and immunities in the U.S. as the U.S. accords to diplomatic envoys, immunities defined by the Vienna Convention, including immunity from the civil jurisdiction of the courts in this country.¹⁸³ And in *Tabion v. Mufti*, the federal court of appeals relied on what it called the State Department’s “narrow interpretation” of commercial activity and held that employment of a domestic servant did not constitute commercial activity.¹⁸⁴ As a result, certain diplomats are sheltered from the legal repercussions of exploiting employees including domestic workers. Yet domestic workers, including workers employed by diplomats, too often face a range of civil and human rights violations including forced labor and trafficking rising to the level of slavery.

For example, in *Chere v. Taye*, the ACLU represents Beletaschew Chere, an Ethiopian domestic worker trafficked by UNDP staff Alemtashai Girma and her husband Fesseha Taye to New Jersey and held in conditions of forced labor by them.¹⁸⁵ She was forced to work 75-80 hours per week, without payment or time off, verbally and sexually abused, denied needed medical care, prohibited from contacting her family or seeking help, made to sleep on the toddler’s

¹⁸⁰ U.S. Dep’t of Justice, Civil Rights Division, *Report on Activities to Combat Human Trafficking* (FY 2001-2005) 25, 27 (Feb. 2006), available at http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

¹⁸¹ Vienna Convention on Diplomatic Relations, done Apr. 18, 1961, *United States accession*, April 29, 1970, 23 U.S.T. 3227, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.

¹⁸² “Statements of Interest” cite Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26-Nov. 21, 1947, 61 Stat. 3416; Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, *United States accession*, April 29, 1970, 21 U.S.T. 1418. See, e.g., Statement of Interest of the United States, *Begum v. Saleh*, No. 1:99-cv-11834-RMB (S.D.N.Y. filed Dec. 7, 1999), available at www.state.gov/documents/organization/6655.doc.

¹⁸³ See, e.g., *Begum v. Saleh*, where the complaint sought damages for defendants’ allegedly holding plaintiff in involuntary servitude prohibited by the Thirteenth Amendment, failure to pay minimum wage under federal and state laws, assault and battery, false imprisonment, conversion, and trespass to chattels.

¹⁸⁴ *Tabion v. Mufti*, 73 F.3d 535, 537-540 (4th Cir. 1996).

¹⁸⁵ Complaint ¶¶ 2, 5, *Chere v. Taye*, No. 2:04-cv-06264-FSH-PS (D.N.J. filed Dec. 21, 2004), available at <http://www.aclu.org/FilesPDFs/wrp%20chere%20complaint%20final%20filed.pdf>. The case is currently in the discovery phase.

bedroom floor and eat the family's leftovers.¹⁸⁶ We filed suit against the employers for violations of several federal and state labor laws, federal statutes, the Thirteenth Amendment of the U.S. Constitution prohibiting involuntary servitude, and international law prohibiting forced labor and trafficking in persons under the Alien Tort Claims Statute and state tort laws. The Alien Tort Claims statute allows non-citizens to sue for damages in U.S. courts for injuries that violate international law. The case is proceeding.

And, in *Vishranthamma v. Al-Awadi*, the ACLU represents Swarna Vishranthamma, a domestic worker who was exploited and abused by her employer, the First Secretary to the Kuwaiti mission to the U.N. For 4 years, she was forced to work 7 days a week, 18 hours a day, and paid far below minimum wage and given no overtime compensation. She was also physically and sexually abused, repeatedly threatened, and verbally assaulted. Her employers confiscated her passport, threatened her with arrest should she try to leave, and severely restricted her contact with family and friends. Despite her fears of retaliation, she ultimately escaped from her employer's home. Ms. Vishranthamma filed a civil action against her employer seeking redress and compensation for the exploitation she endured but after 2 years of litigation, the case was dismissed, after the court concluded her employer was entitled to diplomatic immunity.

E. Right To Liberty and Security Of Person, Rights Of the Accused To Humane Treatment, and Expulsion Of Aliens Without Due Process (Articles 9, 10 & 13)

Since 1996, the U.S. government, rather than making progress in these areas, has dramatically scaled back the rights and remedies of aliens in removal proceedings, increasingly relying on harsh detention policies and creating new "expedited removal" proceedings that lack the most basic due process protections. In addition, in the aftermath of the September 11 terrorist attacks, the government embarked on a number of policies that systematically deprived aliens, particularly those from Muslim-identified countries, of their due process rights, and encouraged increased local enforcement of immigration law, thereby fueling anti-immigrant sentiment

The U.S. government, in its Report, describes many of these changes, which were enacted as part of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and most recently the REAL ID Act. But it fails to address their due process implications. Thus, while the U.S. government acknowledges its policy of "mandatorily" detaining certain immigrants pending removal proceedings,¹⁸⁸ it makes no mention of the extensive litigation triggered by this provision and the numerous court decisions finding that it violates due process, particularly when it results in prolonged detention of individuals who have bona fide challenges to removal.¹⁸⁹ Moreover, it ignores the general trend towards increased categorical detention of immigrants, even for those

¹⁸⁶ *Id.* at ¶¶ 19, 21, 29, 35, 38 43-49, 57-58.

¹⁸⁷ Chapter 39. *See generally* R.H. Helmholz, "Magna Carta and the Ius Commune," 66 *University of Chicago Law Review* 297 (1999). As noted by Blackstone in his Commentaries on the Laws of England, Chapter 39 alone merited the title of the Great Charter. William Blackstone, IV Commentaries on the Laws of England 424 (photo reprint.1978) (1783).

¹⁸⁸ U.S. Report at paras. 170, 227.

¹⁸⁹ *See, e.g., Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *see* Section XX, *infra*.

who are not subject to the mandatory detention laws.¹⁹⁰ Similarly, while the U.S. government notes that indefinite detention of aliens who cannot be removed is no longer authorized under the Supreme Court's decisions in *Zadvydas v. Davis*, and *Clark v. Martinez*,¹⁹¹ it makes no mention of its own systematic lack of compliance with these decisions, nor with legislation currently before Congress which would repeal both these decisions and expressly reinstate an indefinite detention policy. Finally, while the U.S. government mentions that it is detaining "approximately 19,000" aliens,¹⁹² the current number is closer to 23,000 (which represents more than a doubling over the last ten years),¹⁹³ and under recently enacted legislation the number of detention beds is slated to reach 60,000 by 2010.¹⁹⁴ Indeed, immigration detention now represents the fastest growing federal detention population in the country.

The U.S. government also notes that it now has national detention standards in place to monitor conditions at its facilities, and it cites several discrete incidents concerning the "health, welfare and safety" of detainees at facilities in Oklahoma and Washington, and the assault of a detainee in Louisiana.¹⁹⁵ But, while the detention standards clearly reflect an improvement, the government refused to promulgate them as regulations thereby making them virtually unenforceable. Thus, six years after their adoption, reports of noncompliance with the standards are widespread as well as other abuses.¹⁹⁶

The U.S. government's Report gives similar short shrift to the effect of new "expedited removal" proceedings on asylum seekers and refugees – although concerns on this issue were explicitly raised in the U.S. Commission on International Religious Freedom's Report in February 2005, an independent bipartisan U.S. government agency created to monitor freedom of thought, conscience and religion or belief abroad and to make independent policy recommendations to the President, Secretary of State and Congress.¹⁹⁷ Likewise, the U.S. government's Report downplays the policies adopted post September 11, many of which were roundly criticized by the Office of the Inspector General.

1. *Expansion Of Immigration Detention*

One of the most alarming developments, in terms of its implications for the liberty protections of aliens placed in removal proceedings, is the U.S. government's increased reliance on immigration detention. The number of immigrants in detention at any given time has more than

¹⁹⁰ See, e.g., *Matter of D-J* 23 I&N Dec. 572, 574 (A.G. 2003) (Attorney General decision upholding the categorical detention of Haitian refugees on alleged national security grounds, not because they individually posed any danger or flight risk, but rather because releasing them from detention could encourage other Haitian migrants to take to boats).

¹⁹¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005). See U.S. Report at paras. 171, 242, 243.

¹⁹² U.S. Report at para. 189.

¹⁹³ See <http://www.texasobserver.org>.

¹⁹⁴ The Intelligence Reform and Terrorism Prevention Act of 2004 approved a 40,000 bed increase in detention over the next five years. Pub. L. No. 108-408 §§ 7211-7214, § 5204, 118 Stat. 3638, 3825-3832 (2004).

¹⁹⁵ U.S. Report at paras. 190- 194.

¹⁹⁶ See, e.g., January 11, 2006 letter to DHS Inspector General Richard Skinner from National Immigration Forum and other advocacy organization, documenting noncompliance with the standards and asking for audit; see also Nina Bernstein, "9/11 Detainees in New Jersey Say They Were Abused With Dogs," *New York Times* (April 3, 2006).

¹⁹⁷ See U.S. Report at paras 235-237 describing expedited removal proceedings but making no mention of concerns expressed by U.S. Commission on International Religious Freedom.

doubled in the past ten years – from 9,303 in 1996 to close to 23,000 today.¹⁹⁸ Moreover, the numbers are slated to continue to increase dramatically. Under the Intelligence Reform and Terrorism Prevention Act of 2004, Congress approved a 40,000 bed increase in immigration detention over the next five years – which would bring the total number of immigration beds to more than 60,000 in 2010.¹⁹⁹ Legislation currently before Congress would increase this even more.

In addition, whereas immigration detention used to be relatively short, many immigrants are detained for prolonged periods of time while their cases are resolved. It is not unusual for immigration proceedings to extend for years. Other immigrants are detained even after their proceedings have been concluded because the U.S. government is unable to effectuate their removal.

Finally, at the same time as the U.S. government has increased its reliance on immigration detention, the due process protections against unnecessary and unlawful detention have been eroded. Thus, the last ten years have seen a steady move towards mandatory and categorical detention rather than detention based on individualized determinations that an individual poses a danger or flight risk. Moreover, given that immigrants have no right to appointed counsel in their immigration proceedings, and the fact that so many of them are indigent and unable to afford counsel, immigrant detainees can be locked up for years without the ability to mount any challenge to what is often unlawful detention.

a. Indefinite Detention

“Indefinite detention” is a problem that principally arises when an immigrant is ordered removed but the U.S. government is unable to effectuate the removal – either because the immigrant’s home country no longer exists, or because the U.S. does not have a repatriation agreement with that country (as is the case with Vietnam and Cuba), or because the person has been granted protection from removal because they would face torture or persecution. Prior to the Supreme Court’s decision in *Zadvydas v. Davis*,²⁰⁰ the U.S. government maintained that it had the authority to indefinitely detain such immigrants since they had been ordered removed and thus had no right to be released into the United States. As a result, thousands of immigrants were subjected to indefinite imprisonment simply because their countries would not accept their return. These individuals were routinely referred to as “lifers,” in recognition of the fact that they could spend the rest of their lives in prison – not because they had been sentenced for a crime, but merely because they had been ordered removed from the United States and no country would take them back.²⁰¹

In 2001, the Supreme Court struck down this policy, holding that a statute that permitted such indefinite potentially permanent detention would raise “a serious constitutional problem.”²⁰² The Court was particularly troubled that the only procedural protection available to such detainees was an administrative proceeding in which the detainees had to prove that they were neither

¹⁹⁸ See <http://www.usdoj.gov/ofdt> for 1996 statistics; for current statistics see <http://www.texasobserver.org>

¹⁹⁹ Pub. L. No. 108-408 §§ 7211-7214, § 5204, 118 Stat. 3638, 3825-3832 (2004).

²⁰⁰ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

²⁰¹ Donald Kerwin, “Throwing Away the Key: Lifers in INS Custody,” 75 Interpreter Releases 649 (1998).

²⁰² *Zadvydas*, 533 U.S. at 690.

dangerous nor flight risks.²⁰³ In light of the “serious constitutional threat,” that would be posed by permitting indefinite detention under such circumstances, the Court construed the immigration statute, 8 U.S.C. Section 1231, as authorizing post-final-order detention only insofar as an alien’s removal is “reasonably foreseeable.”²⁰⁴ Moreover, based on evidence “that Congress previously doubted the constitutionality of detention for more than six months,”²⁰⁵ the Court found that six months was a presumptively reasonable period of time for the government to effectuate an alien’s removal. After that, an alien who provides good reason to believe that removal is not reasonable foreseeable is entitled to release under “conditions that may not be violated.”²⁰⁶

In the aftermath of *Zadvydas*, the U.S. government took an overly narrow interpretation of the Court’s ruling in many respects. For example, it refused to apply the decision to aliens who had not officially “entered” the United States, even when they had been physically present in the country for many years. Thus thousands of Mariel Cubans – who were “paroled” into the United States in the early 1980’s after they fled Cuba – remained subject to indefinite imprisonment because they had been ordered removed but Cuba would not accept their return, and yet they had never officially “entered” the United States. The Supreme Court finally put an end to this policy in *Clark v. Martinez*,²⁰⁷ where it held that its decision in *Zadvydas* applied to *all* aliens who are detained pursuant to the statute, including those who have never officially “entered” the United States such as the “Mariel Cubans.”

The U.S. government’s Report mentions both *Zadvydas* and *Clark* and their requirement that aliens be released after six months if removal is not reasonably foreseeable.²⁰⁸ What the Report does *not* mention is that the U.S. government is at this very moment supporting legislation that would specifically reverse both these decisions.²⁰⁹ The government insists that these decisions are statutory, refusing to recognize their constitutional underpinnings. Indeed, in responding to this Committee’s specific recommendation that limitations be placed on the indefinite detention of aliens who have not “entered” the United States, the U.S. Report states that “in neither *Zadvydas* nor *Clark* did the Supreme Court purport to impose constitutional limits on indefinite detention, especially with regard to aliens who are dangerous to national security or who pose threats to public safety.”²¹⁰

Moreover, the U.S. government’s cramped view of the Supreme Court’s *Zadvydas* ruling is reflected in the regulations it promulgated to implement that decision. In direct violation of *Zadvydas*, these regulations authorize indefinite detention of aliens whose removal is not

²⁰³ *Zadvydas*, 533 U.S. at 691.

²⁰⁴ *Zadvydas*, 533 U.S. at 699.

²⁰⁵ *Zadvydas*, 533 U.S. at 701.

²⁰⁶ *Zadvydas*, 533 U.S. at 696.

²⁰⁷ *Clark v. Martinez*, 543 U.S. 371 (2005).

²⁰⁸ U.S. Report at paras. 171, 242, 243.

²⁰⁹ Section 202 of the immigration reform legislation recently passed by the Senate would specifically authorize indefinite detention without limitation of any alien who has not officially “entered” the country. In addition, even with respect to those aliens who have entered the country, the legislation would carve out huge exceptions to *Zadvydas*’ prohibition on indefinite detention, authorizing for example, indefinite detention of immigrants who have been convicted of relatively minor crimes based solely on the DHS Secretary’s “certification” that the alien’s release would pose a danger. See S.2611, 109th Cong. § 202 (2006).

²¹⁰ U.S. Report at paras. 464-467.

reasonably foreseeable based on a number of “special circumstances,” including if the alien is deemed “specially dangerous” due to mental illness.²¹¹ The ACLU is currently challenging these regulations in a case brought in the district court of Colorado on behalf of a Vietnamese refugee, Candal Nguyen, who has been imprisoned by the Department of Homeland Security (DHS) for approximately three years since he received a final order of removal to Vietnam. The government concedes that his removal to Vietnam cannot be effectuated but insists that because he suffers from schizophrenia he may pose a danger if released. Meanwhile, he is being imprisoned in a jail where his condition is deteriorating due to the lack of appropriate mental health treatment.²¹²

Indefinite detention also remains a problem for individuals entitled to release under DHS regulations because these individuals frequently lack the means to insure that DHS actually complies with its own regulations. This is because immigration detainees are not entitled to counsel at government expense and thus the overwhelming majority are unrepresented. Yet without the assistance of an attorney – and often suffering from a language disadvantage as well – it is very difficult for them to mount a challenge their unlawful detention.²¹³ The ACLU represented one such detainee, Ou Xian Da, who was detained for more than two years after receiving a final order of removal to China. The government maintained that Mr. Ou was failing to cooperate with his removal. Only after the ACLU took on his pro bono representation, and it became apparent that the problem was one of literacy and language, not non-cooperation, did the government agree to release Mr. Ou under an order of supervision. Without the assistance of an attorney, Mr. Ou might never have been released.

Indefinite detention also occurs when the government detains individuals pending completion of their removal proceedings but it is clear that those individuals can never be removed regardless of the outcome of their proceedings (e.g., because they are from a country that will not accept their return or because they are entitled to protection from removal on the grounds of persecution or torture). The U.S. government maintains that as long as removal proceedings are still pending, the detention is not “indefinite,” and *Zadvydas*’ prohibition on indefinite detention does not apply. The ACLU recently successfully challenged the government on this point in a case that involved the four and half year detention of a Sri Lankan torture victim who sought asylum in the United States. Ahilan Nadarajah fled torture and death threats in Sri Lanka. En route to Canada, he crossed the U.S. – Mexico border and was immediately detained. Over the next four years, immigration judges twice granted Nadarajah asylum status. The U.S. government did not dispute that Mr. Nadarajah was entitled to protection under the Convention Against Torture (since he was likely to face torture if returned to Sri Lanka). Nonetheless the U.S. government refused to release him pending completion of his removal proceedings citing national security concerns – concerns that the immigration judge had already rejected as unfounded. A federal appeals court held that Nadarajah’s prolonged detention was without statutory authorization because the government would not be able to remove him to another country in any event. In

²¹¹ See Section 241.14(f) of the Immigration and Nationality Act.

²¹² *Nguyen v. Gonzales*, Colorado ACLU Cases, http://www.aclu-co.org/docket/200506/200506_description.htm (last visited June 1, 2006). Two courts have already held that the regulations which purport to authorize indefinite detention of aliens who are “specially dangerous” due to mental illness are *ultra vires* and violate *Zadvydas*. See, *Thai v. Ashcroft*, 366 F. 3d 790 (9th Cir. 2004); *Tran v. Gonzales*, 411 F.Supp.2d 658 (W.D.La., 2006) (?)

²¹³ See, e.g., Kathleen Glynn and Sarah Bronstein, Catholic Legal Immigration Network, Inc., “Systemic Problems Persist in U.S. ICE Custody Reviews for Indefinite Detainees” (2005).

addition, the Court found that the detention was an abuse of discretion since there was no basis to believe the government's allegation that he posed a danger to national security.²¹⁴

b. Detention Without an Individualized Determination Of Danger or Flight Risk

Over the past 10 years the U.S. government has increasingly moved towards mandatory and categorical immigration detention. A 1996 law enacted by Congress requires the mandatory detention of immigrants who are facing removal based on criminal offenses or national security grounds.²¹⁵ Another statute enacted in 2001 authorizes the mandatory detention of aliens who are certified as terrorists or posing a threat to national security.²¹⁶ In addition, a regulation promulgated in 2001 allows the government to automatically stay the release decision of an immigration judge merely by filing a notice of appeal of the decision to the Board of Immigration Appeals (BIA).²¹⁷ This renders completely meaningless the right to a bond hearing, since the government can simply ignore an immigration judge's ruling by filing an appeal. Moreover, there is no time limit on how quickly the BIA must rule on such an appeal. Also alarming is a 2003 Attorney General decision, *Matter of D.J.*,²¹⁸ which purports to authorize categorical detention of immigrants on virtually any ground and regardless of whether they pose any individualized danger or flight risk. In that case the A.G. upheld the detention of Haitian refugees not because they posed any individualized danger or flight risk but merely because the government claimed that allowing them to be free on bond would encourage other Haitian migrants to take to the sea on boats and thereby pose a risk to national security.²¹⁹

The ACLU led the legal challenge to the 1996 mandatory detention statute, which was struck down as a violation of due process by four courts of appeals.²²⁰ The government appealed these decisions to the Supreme Court, which, in *Demore v. Kim*,²²¹ upheld the constitutionality of the mandatory detention provision for the "brief period" that removal proceedings are pending, and as applied to an alien who had no challenge to deportability.²²² The ACLU has continued to challenge mandatory detention post-*Demore* and has been successful in limiting *Demore* to these facts. For example, although the government argues that there is no limit on the length of mandatory detention that can be imposed pending removal proceedings, a number of courts have held that mandatory detention violates due process when it extends beyond the brief period contemplated in *Demore*, or when the detained alien has a bona fide challenge to removal.²²³

²¹⁴ ACLU, *Court says 'No' to Indefinite Detention*, (March 2006) available at <http://www.aclu.org/immigrants/asylum/24698prs20060317.html>. The regulation in question is 8 C.F.R 241.14(f)

²¹⁵ 8 U.S.C. 1226(c).

²¹⁶ 8 U.S.C. 1226a.

²¹⁷ See 8 C.F.R. § 1003.19(i)(2) (2006).

²¹⁸ *Matter of D-J* 23 I&N Dec. 572, 574 (A.G. 2003).

²¹⁹ See, *Matter of D-J* 23 I&N Dec. 572, 574 (A.G. 2003).

²²⁰ *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001), *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002), and *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002).

²²¹ *Demore v. Kim*, 538 U.S. 510 (2003).

²²² *Demore*, 538 U.S. at 516.

²²³ See, e.g., *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004).

The automatic stay regulation has also been struck down by a number of district courts as a violation of due process.²²⁴

c. Conditions Of Detention

In 2002, the Special Rapporteur on Specific Groups and Individual Migrant Workers issued a report after visiting the U.S.-Mexico border noting the impropriety of detaining those committing immigration offenses with those committing criminal offenses,²²⁵ noting also that migrants are open to “racist attacks” and that most prison personnel are not adequately trained to deal with foreign detainees.²²⁶

The Special Rapporteur also noted overcrowded and unhygienic conditions of the special detention centers for migrants, and the unavailability of personal hygiene products, which must then be provided by families, friends, NGO’s, or humanitarian organizations.²²⁷ Due to overcrowded or non-existent detainment facilities some migrants are detained with general prison populations and are subject to the same “severe restrictions” on movement, contact with friends and families, and limitations on access of outdoor recreational activities.²²⁸ Language differences and fear of retaliation often leave internal complaint procedures beyond the reach of migrant detainees.²²⁹

In its Report the U.S. government places great emphasis on its promulgation of national detention standards.²³⁰ But, while these standards clearly reflect an improvement, they remain deficient in significant ways – for example, they fail to require that detainees be allowed contact visits with family, and fail to require that detainees have access to a mental health practitioner. Moreover, the government refused to promulgate any of the detention standards as regulations, thus making them virtually unenforceable. Not surprisingly, six years after the adoption of the standards, there are widespread reports of noncompliance with the standards along with reports of other abuses.²³¹

2. Discrimination Faced By Non-Citizens In Federal Prison

According to official statistics of the U.S. Bureau of Prisons (“BOP”), as of April 29, 2006, 27.4% of the 189,764 inmates in federal prisons are not U.S. citizens.²³² The BOP subjects these non-citizen prisoners to significant discrimination on the basis of alienage. In designating a security classification for prisoners, the BOP automatically assigns a “Public Safety Factor”

²²⁴ See, e.g., *Uritsky v. Ridge*, 286 F. Supp. 2d 842 (E.D. Mich. 2003); *Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003).

²²⁵ Ms. Gabriela Rodriguez Pizarro, Special Rapporteur, Specific Groups and Individual Migrant Workers (December 2002) at 2 (hereinafter “Pizarro Report”).

²²⁶ Pizarro Report at 15.

²²⁷ Pizarro Report at 17.

²²⁸ Pizarro Report at 16.

²²⁹ Pizarro Report at 17.

²³⁰ U.S. Report at paras. 190-191.

²³¹ See, e.g., January 11, 2006 letter from advocates documenting noncompliance with the standards and asking for audit; see also Nina Bernstein, “9/11 Detainees in New Jersey Say They Were Abused With Dogs,” *New York Times*, April 3, 2006.

²³² See Quick Facts About the Bureau of Prisons, available at <http://bop.gov/news/quick.jsp> (last visited May 18, 2006).

(“PSF”) to all “deportable aliens.”²³³ A PSF ostensibly indicates that an inmate poses a particular risk; for example, it is also assigned to prisoners with a history of certain violent crimes.²³⁴ In practice, the BOP appears to define all non-U.S. citizens as “deportable aliens.” The attachment of a PSF to an inmate has serious negative consequences, resulting in both harsher conditions of confinement and, in many cases, in longer terms of incarceration. Prisoners with a PSF cannot be assigned to minimum-security facilities, which are the least restrictive prison environments.²³⁵ This ineligibility for minimum-security classification in turn leads to other harsh consequences, such as ineligibility for work furloughs,²³⁶ and ineligibility for early release programs like the Intensive Confinement Center program, which can lead to a sentence reduction of up to 18 months and also includes valuable educational and rehabilitative training.²³⁷

As a result of their ineligibility for “minimum” security classification, non-citizens are also ineligible for re-designation to community corrections (popularly known as “halfway houses”) for service of the last portion of confinement, which helps eligible inmates to transition successfully from prison to the outside world. This ineligibility for community corrections in turn makes the non-citizen prisoner ineligible for the BOP’s 500-hour residential drug rehabilitation program,²³⁸ which can lead to a sentence reduction of up to 12 months.²³⁹

Although the BOP’s regulations provide that non-citizens may apply for a waiver of the PSF, in practice it appears that the BOP does not grant such waivers to any non-U.S. citizens. As a result of the BOP’s discriminatory blanket application of the PSF, non-citizens as a group necessarily serve longer sentences under harsher conditions. Because such a large percentage of prisoners in U.S. federal custody are non-citizens, the discriminatory policy has a substantial impact.

3. *Expedited Removal*

In 1996, the U.S. Congress enacted a new policy of “expedited removal,” which for the first time deprives aliens who are coming to the United States, and are believed to be “inadmissible” (based on lack of proper documents) of the right to a hearing before an immigration judge.²⁴⁰ With limited exception these aliens are now subject to immediate removal solely based on the unreviewable determination of a low-level immigration officer. The only exception is for those aliens who express a fear of persecution. These aliens are supposed to be referred for a “credible fear” determination by an asylum officer, and if successful, are allowed to present their asylum claim to an immigration judge.²⁴¹ However, they are generally detained throughout this

²³³ U.S. Dep’t of Justice, Federal Bureau of Prisons, Program Statement 5100.07, Security Designation and Custody Classification Manual, ch. 7.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Program Statement 5280.08.

²³⁷ Program Statement 5390.08.

²³⁸ See 18 U.S.C. § 3621(e); Program Statement 5331.01 (2003).

²³⁹ Program Statement 5330.10, Drug Abuse Programs Manual, ch. 6.1 (1997).

²⁴⁰ INA Section 235.3(b). Those aliens found without proper documentation, or those who misrepresented a material fact to gain admission to the United States, or those who entered the United States without being admitted or paroled at a port of entry (and cannot prove continuous presence in the U.S. for 2 years) are all subject to expedited removal.

²⁴¹ INA Section 235.3(b)(4).

process.²⁴² Initially, expedited removal proceedings were applied only to aliens arriving at ports of entry.²⁴³ However, in August 2004, the DHS announced a pilot project applying expedited removal to aliens who were apprehended inside the country – within 100 miles of the border and within 14 days of having made such an entry. In, September 2005, the Department of Homeland Security announced that it had expanded this pilot project to the entire U.S.-Mexico border.²⁴⁴

Expedited removal raises serious due process problems, particularly with respect to asylum seekers and refugees. In February 2005, the official “United States Commission on International Religious Freedom” issued its “Report on Asylum Seekers in Expedited Removal” as mandated by the International Religious Freedom Act of 1998.²⁴⁵ The Report expressed concern that bona fide asylum seekers were being erroneously returned to countries where they face persecution because of inadequate procedural safeguards in the expedited removal process and that the program was being expanded “without an official mechanism – such a Refugee Coordinator – to resolve the problems which arise in its implementation.”²⁴⁶ The Report also criticized the conditions under which asylum seekers are detained – prisons where they are often mixed with the criminal population – and the lack of consistent release criteria.²⁴⁷

Notably, in its last Report, the Committee recommended that appropriate measures be adopted to ensure that excludable aliens have the same guarantees of due process that are available to other aliens. Expedited removal reflects a step in the opposite direction.

4. *Post 9/11 Policies*

a. *Round-Up and Arbitrary Detention Of Muslim Immigrants & Special Registration Program*

In our September 2005 Submission to this Committee, we discussed the U.S. government’s round-up, arbitrary detention and interrogation of hundreds of men from (or appearing to be from) Arab, South Asian or Muslim countries.²⁴⁸ Despite the lack of any concrete evidence, these men were said to have been investigated on suspicion of their possible involvement in terrorist activity, although even official sources found that few, if any, had any real links to terrorism and that the process of naming them as “of special interest” to the investigation was often based on the most tenuous and haphazard of connections. These men were detained often for months at a time, and while detained, subjected to a regime of physical and psychological abuse. Many after being found innocent of terrorism were deported. We refer the Committee to

²⁴² INA Section 235.3(b)(2)(ii)- (iii)

²⁴³ Alison Siskin & Ruth Ellen Wasem, *Immigration Policy on Expedited Removal of Aliens*, Congressional Research Service Report for Congress, Library of Congress Services (Jan. 16, 2006) available at <http://fpc.state.gov/documents/organization/54512.pdf>

²⁴⁴ Siskin, *supra*.

²⁴⁵ Available at www.uscirf.gov.

²⁴⁶ Commission Report at 52.

²⁴⁷ Commission Report at 55-58.

²⁴⁸ ACLU response to HRC's request of August 3, 2005, for information on counter-terrorism measures adopted by the United States following the events of September 11, 2001(Sept. 19, 2005), at 1, available at <http://www.aclu.org/intlhumanrights/gen/202241gl20050919.html#attach>

two ACLU reports that document the devastating impact that the deportation of these men has had on their families and the immigrant communities in the U.S.²⁴⁹

b. Special Registration Program

In that September Submission, we also advised the Committee about the U.S. Department of Justice's "special registration" program, also known as the National Security Entry-Exit System (NSEERS), which required selected visitors to the U.S. to be fingerprinted, photographed and questioned. The domestic component applied exclusively to male citizens and nationals of twenty-five countries, all but one predominantly Muslim and located in the Middle East, South Asia or North Africa. None of the individuals who reported for special registration were charged with terrorism. Again, many were detained and deported. In December 2003, with problems mounting as a consequence of the government's failure to provide adequate notice about re-registration requirements, the Department of Homeland Security, which had assumed responsibility for special registration, suspended the program's 30-day and annual re-registration requirements. However, some of the special registration requirements remain in effect to this day, including a little known requirement that those who went through special registration must restrict their departures from the U.S. to designated ports and formally register their departures before leaving. A recent study conducted by the Vera Institute For Justice for the U.S. Department of Justice and published in June 2006, found that Arab Americans fear the intrusion of federal policies and practices even more than individual acts of hate or violence.²⁵⁰

c. Abuse Of Non-Citizens During Detention

The U.S. government recently agreed to pay \$300,000 to settle one detention case brought in 2004 by an Egyptian man who was among the dozens of Muslims rounded up in New York after the September 11, 2001 attacks.²⁵¹ He was held for nearly a year in the Administrative Maximum Special Housing Unit of the Metropolitan Detention Center and deported after being cleared of links to terrorism.²⁵² Mr. El-Maghraby, who had been working in New York at the time of the September 11 attack, said he was physically and mentally abused while detained. Although the government did not admit official liability, the settlement is a form of accountability for what happened to Mr. El-Maghraby. The suit had charged then Attorney-General Ashcroft and other government and prison officials of conspiring to violate the rights of Muslim immigrant detainees on the basis of race, religion, and national origin.²⁵³

²⁴⁹ America's Disappeared, *supra*, fn. 1 and World's Apart: How Deporting Immigrants After 9/11 Tore Families Apart and Shattered Communities, *available at*:

<http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17163&c=206>

²⁵⁰ *Law Enforcement & Arab American Community Relations After September 11, 2001: Engagement in a Time of Uncertainty*, Vera Institute of Justice (June 2006).

²⁵¹ U.S. Is Settling Detainee's Suit in 9/11 Sweep, Nina Bernstein, *New York Times* (February 28, 2006).

²⁵² *El-Maghraby & Iqbal v. Ashcroft et al.*, Memorandum & Order, 04 CV 1409 (JG) (SMG) (EDNY). He eventually pleaded guilty to a minor federal criminal charge unrelated to terrorism, credit card fraud. Nina Bernstein, 2 Men Charge Abuse in Arrests After 9/11 Terror Attack, *New York Times* (May 3, 2004).

²⁵³ *Id.* (n. 74).

d. *Material Witness Legislation*

As the ACLU explained in its recent submission to the Committee Against Torture, following the September 11 attacks, the Department of Justice detained at least 70 men living in the U.S. – all Muslim but one — under a federal law that permits the government, in narrow circumstances, to arrest and briefly detain “material witnesses” who have information about a criminal case and who might otherwise flee to avoid testifying in a criminal proceeding. After September 11, the government in many cases used the material witness statute to secure indefinite detention of persons thought to be possible terrorist suspects but as to whom probable cause was lacking for a criminal arrest. While claiming a need for testimony from these individuals, the government frequently delayed or failed to take their testimony at all. The government’s use of the material witness statute in this manner enabled it to impose extended detention for the purpose of investigating the putative witnesses as suspects.

A report published jointly by the ACLU and Human Rights Watch in June 2005 documented how witnesses were often arrested at gunpoint in front of families and neighbors and transported to jail in handcuffs, often held around-the-clock in solitary confinement, and subjected to the harsh and degrading high-security conditions typically reserved for prisoners accused or convicted of the most dangerous crimes.²⁵⁴ They were taken to court in shackles and chains. In at least one case, a material witness was made to testify in shackles. The ACLU is also challenging in court the U.S. government’s post-9/11 use of the material witness law in the case of *al-Kidd v. Gonzales*.²⁵⁵

In October 2005, Senator Patrick Leahy introduced legislation to amend the material witness statute. The bill makes explicit that the government must meet a high standard to obtain a warrant for a witness’s arrest; places fixed limits on the detention of witnesses; and directs that witnesses who are detained should be held under the least restrictive conditions possible and, to the extent possible, in a facility separate and apart from persons charged with or convicted of criminal offenses.²⁵⁶ The bill also provides that persons arrested as material witnesses be shown the warrant for their arrest and be advised of their right to counsel. The bill also requires that an arrested material witness be given a prompt hearing to determine whether he or she should be released or detained pending the appearance to testify or the taking of a deposition.

The bill falls short in some respects, however. For example, it continues to permit the use of the material witness statute in grand jury proceedings, which pose the greatest potential for abuse. Among other things, because grand juries have wide latitude as investigative bodies, it is far more difficult for a detained witness to establish that his or her testimony is not “material” – or for a judge to evaluate materiality – at the grand jury stage. The bill also fails to limit or reform the secrecy of many material witness proceedings. At this submission, the bill has been pending since September 2005 before the Judiciary Committee of the U.S. Senate.

²⁵⁴ ACLU and Human Rights Watch, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11* (July 2005), available at <http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf>.

²⁵⁵ *al-Kidd v. Gonzales*, No. 05-093 (D. Idaho) (pending).

²⁵⁶ Senate bill 1739.

5. *Government Failure To Reform Immigration Policy*

The government's delay in comprehensively dealing with immigration policy reform has contributed to virulently anti-immigrant sentiment in the U.S. This has manifested itself in myriad forms.

In the early 1990's the U.S. government began a campaign to heavily militarize the Southwest border with *Operation Hold-the-Line* and *Operation Gatekeeper*.²⁵⁷ The strategy of the U.S. government was to seal off traditional crossing areas and force migrants to cross in more remote areas by building fences, adding more agents in urban areas, and increasing the number of sensors and cameras. The results: over 4,000 deaths.

This militarization of the border creates a low-intensity conflict zone where anybody with brown skin becomes a potential victim. Triple fences, stadium lights, humvee vehicles, and collaboration with the United States Armed Forces sends the message that those with brown skin are the enemy. Reports of racial profiling from community members whose families have lived in the border region for decades persist. The militarization has also resulted in a rise in para-military vigilante groups, many with ties to white supremacists.²⁵⁸ A public records request by the ACLU revealed a series of cases of migrants being kicked, hit, and shot at by private citizens, yet not a single vigilante has been arrested. Vigilante activity has not been limited to the border area, with a former Ku Klux Klan member being arrested in Tennessee for attempting to sell pipe bombs to undercover agents who he believed were going to blow up buses used by migrant workers.²⁵⁹

President Bush recently made an announcement that he will be sending 6,000 National Guard troops to the border.²⁶⁰ Soldiers are trained to kill the enemy and they lack training to respect and protect border community residents' civil liberties and safety.²⁶¹ In 1997, a Marine assisting the government's drug interdiction efforts shot and killed 18-year-old U.S. citizen Eziquiel Hernandez. In 1995, the Border Patrol reported apprehending more than 1.3 million undocumented immigrants. In 2005, with more than twice the number of agents as in 1995, the Border Patrol apprehended just under 1.2 million undocumented immigrants.²⁶² At the same time the number of deaths have soared dramatically.²⁶³ The U.S. Border Patrol is set to become the nation's largest law enforcement entity as President Bush aims to have over 18,000 Border Patrol agents by the end of his term. Undoubtedly, the number of deaths will continue to rise exponentially with the number of Border Patrol agents, as migrants will be forced to cross in increasingly remote areas.

²⁵⁷ See Joseph Nevins, *Operation Gatekeeper: The Rise of the 'Illegal Alien' and the Making of the U.S.-Mexico Boundary* (Routledge, 2002).

²⁵⁸ ACLU, *Creating the Minutemen: A Small Extremist Group's Campaign Fueled by Misinformation* (April 2006) available at <http://www.vigilantewatch.org/docs/CreatingtheMinutemen.pdf>

²⁵⁹ Anti-Defamation League, *Extremists Declare Open Season on Immigrants: Hispanics Target of Incitement and Violence*, (April 2006) available at http://www.adl.org/extremism/Extremists_and_Immigration_Report.pdf

²⁶⁰ Peter Baker, *Bush Set to Send Guard to Border*, Washington Post (May 15, 2006)

²⁶¹ ACLU, *ACLU Calls on President Not to Deploy Military Troops to Deter Immigrants at the Mexican Border* (May 15, 2006) available at <http://www.aclu.org/immigrants/gen/25575prs20060515.html>

²⁶² Kathy Kiely, *Arrests Stay Flat as Border Bolstered*, USA Today (April 21, 2006) available at http://www.usatoday.com/news/nation/2006-04-20-border-patrol_x.htm

²⁶³ Richard Marosi, *Border Crossing Deaths Set a 12-Month Record*, L.A. Times (October 1, 2005) available at

Another manifestation of the anti-immigrant climate is states taking enforcement of federal immigration law into their own hands. For example, a 9-month old law in Arizona effectively authorizes local police forces to enforce immigration law, preempting federal authority to regulate and enforce immigration law by authorizing civilian forces to seek out illegal immigrants in Arizona and either deport or charge and jail them.²⁶⁴ Additionally, states are increasingly “criminalizing” immigration violations, with debilitating immigration consequences of even the most minor offenses – especially nonviolent drug convictions – on all immigrants, including longtime permanent residents.

In April 2006, the Governor of Arizona vetoed a bill that would have criminalized unlawful presence in the U.S.²⁶⁵ A similar bill failed in New Hampshire after two cities in the state arrested undocumented immigrants on trespass charges. A state court dismissed the charges holding that the tactic was unconstitutional.²⁶⁶

State legislatures, impatient with the U.S. Congress’ failure to pass immigration reform legislation, have, as of April 28, 2006, introduced 461 bills in 43 states related to immigration or immigrants including relating to their employment, law enforcement, identification and education rights. Most are aimed at restricting immigrants’ access to public benefits and drivers’ licenses. Nineteen such bills have been enacted into law, 12 of them imposing significant restrictions on illegal immigrants. One such measure, passed by the Georgia legislature, bars illegal immigrants from many state benefits, requiring employers to verify the status of workers and mandating that jailers alert federal officials to anyone incarcerated who is in the country illegally. In November 2004, Arizona adopted a law barring illegal immigrants from receiving taxpayer-financed health and welfare services.²⁶⁷

F. Rights Of the Criminally Accused (Article 14)²⁶⁸

1. Right To Counsel

Fundamental to a criminal justice system that is fair to all is the right of a person accused of a crime to be assisted by competent counsel. Both are present in Article 14, which provides what the Committee represents to be ‘minimum guarantees’, requires that, in the determination of any criminal charge, all persons have “legal assistance ... in any case where the interests of justice so require, and without payment ... if [the individual] does not have sufficient means to pay for

²⁶⁴ Randal C. Archibold, *Arizona County Uses New Law for Illegal Immigrants*, N.Y. Times (May 10, 2006). The Arizona Statute in question is A.R.S. Section 13-3884.

²⁶⁵ Jacques Billeaud, *Gov vetoes effort to criminalize immigrants’ presence in Arizona*, ABC News, April 18, 2006, available at <http://abcnews.go.com/US/wireStory?id=1854838>.

²⁶⁶ Billeaud, *supra*.

²⁶⁷ Julia Preston, *State Proposals on Illegal Immigration Largely Falter*, N.Y. Times (May 9, 2006).

²⁶⁸ Although their work is not included within this report, the ACLU’s Capital Punishment Project is deeply involved in death penalty work, including by focusing on capital punishment’s arbitrariness, its racial bias, its unconstitutionality, innocent defendants, mentally ill and mentally retarded defendants, moratorium efforts and unequal justice issues. For more information on this aspect of ACLU work, please visit <http://www.aclu.org/capital/index.html>. A group of U.S. NGOs including NACDL, SCHR, Death Penalty Focus, has submitted a report on some of these as well as other issues to the Committee.

it.”²⁶⁹ This principle is also embodied in the Bill of Rights to the U.S. Constitution, and was reaffirmed 40 years ago in the landmark case *Gideon v. Wainwright*, the Supreme Court ruling that criminal defendants facing felony charges (punishable by more than one year in jail) who cannot afford an attorney must be provided one by the state. The Supreme Court thereafter expanded the right to other types of proceedings and required states to provide such persons with competent counsel.²⁷⁰

Yet, this right to counsel for the indigent accused, for both juveniles and adults, is fast becoming illusory in many U.S. states, in both nature and extent, and the brunt is often borne by the racial minorities who are confined – given discriminatory policing and selective prosecution – at disproportionate rates.²⁷¹ Although we focus below on criminal cases, we would like to alert the Committee that indigent immigrants do not have a constitutional right to appointed counsel, and that there is no right to counsel in civil proceedings.

Approximately 80% of felony criminal defendants rely on the state to appoint counsel to represent them. Each U.S. state has its own system of providing attorneys to the indigent accused of crime. In addition to the states’ obligations to promote basic principles of fairness, both state and local governments are charged with the proper use of public funds. Creation of oversight mechanisms is standard practice in government management of public services.

The U.S. Report refers to these indigent defense protections but fails to mention that today, many states are failing to adequately fund and supervise their indigent defense systems. Failing to remedy these deficiencies in the indigent defense system constitutes violations of Article 14, the Sixth and Fourteenth Amendments to the U.S. Constitution, and analogous provisions of state constitutions. Just a few examples follow.

a. *Michigan*

Michigan, in 1855, was one of the first states to require by statute that counsel be appointed and compensated for indigent defendants, placing the obligation of defense services on the counties, where it remains today.²⁷² Still, it is the state’s obligation to ensure that these legal services meet basic constitutional standards. Six counties have a public defender office, while the remaining

²⁶⁹ U.N. Human Rights Committee, *General Comment 13 (Article 14)*, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 135, U.N. Doc. HR1/GEN/1/Rev.7 (May 12, 2004) available at [http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf).

²⁷⁰ *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁷¹ This is shown both by actual cases (*Tulia and Hearne*), discussed in I.C.C.P.R. art. 26, and also documented by studies. With respect to juveniles, studies have shown that racial disparities in confinement are the result on disparate treatment at every stage of the justice system, from decisions about whether to prosecute to sentencing decisions. ACLU, *Disproportionate Minority Confinement in Massachusetts, Failures in Assessing and Addressing the Overrepresentation of Minorities in the Juvenile Justice System 1* (May 2003), available at http://www.aclu.org/FilesPDFs/dmc_report.pdf. In the adult context, while there has been little study, one study was done and that reveals that while the majority of those who deliver serious drugs are black, the majority arrested and charged are black. This was the result of focusing on open air drug markets in black neighborhoods while failing to focus on white outdoor markets. Katharine Beckett, *Race and Drug Law Enforcement in Seattle* (Prepared on behalf of the Defender Association’s Racial Disparity Project, May 3, 2004).

²⁷² The Task Force on Improving Public Defense Services in Michigan, A Project of the Mich. Council on Crime and Delinquency, *Model Plan for Public Defense Services in Mich.*, (Oct. 2002).

counties used contracted counsel or (a majority) assigned counsel.²⁷³ In 2001, at least 46 states provided some or all of the funding for indigent defense, and Michigan is not one of them.²⁷⁴ In the last 30 years, Michigan has launched two major reform efforts, one commissioned by the Chief Justice in 1975 and another by the State Bar in 1988.²⁷⁵ These efforts failed, and Michigan is at the bottom of the list in terms of the quality of its indigent defense services. More than one-third of all assigned defense counsel seek to be removed from the rosters each year, leaving inexperienced attorneys to represent defendants. In some areas fees have been cut by 10% and are at 1970 levels, often paid months late.²⁷⁶ While 38 states have statewide standards for appointed attorneys, Michigan has none.²⁷⁷

b. Washington State

In a 2004 report, the ACLU documented the problems with Washington State's indigent defense system, where public defense services are handled at the city and county level.²⁷⁸ Although the state passed legislation requiring local governments to adopt standards for the delivery of indigent defense services in 1989, 15 years later a majority of counties had not adopted them, the result being a checkered system of legal defense with no guarantee that a person both poor and accused receives a fair trial.²⁷⁹ Although indigent defense systems are publicly supported with tax dollars, they are not held to the standards of accountability generally expected of government programs.

In December 2004, the ACLU and Columbia Legal Services sued Grant County, the Washington State County with most deficient indigent defense system, for violating the Sixth and Fourteenth Amendments to the U.S. Constitution as well as provisions of the state constitution. Grant county suffered from systemic inadequacies in its public defense system including the failure to monitor and oversee the public defense system; to provide adequate funds for it; to ensure public defenders are qualified and that they have reasonable caseload limits, adequately communicate

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* Facts that set this problem in its larger context: The 2006 budget has earmarked \$1.88 billion for the Department of Corrections, around 20 % of the state fund. Currently, the state is spending \$313 million less on colleges than corrections. Michigan has the largest prison system in the country, with 42 correctional centers and 10 correctional camps. In the last 25 years, Michigan's prison population grew at 38 times the rate of its total population. Michigan is number 6 nationally in prison population; it is number 4 in its prison budget; and number 3 in the %age of state spending earmarked for corrections. While total state staffing has declined by 30% over the last 15 years, the DOC staffing has risen by 25%. The DOC now employs over 18,000 employees – about one third of the state workforce. While the incidence of violent crimes in Michigan has dropped steadily over the past few years, the prison population has continued to rise. About one of every five tax dollars goes to prison funding. The average cost to keep a prisoner in prison is \$30,000. State spending on public education rounds out to \$6,700 per student. The per day cost of operating Michigan's prisons is \$4 million. From 1985 to 2000, Michigan increased spending on higher education by 27%, but corrections spending grew by 227%. Corrections spending grew at 8 times the rate of higher education spending. In 2000, there were more African American men in Michigan's prison system (24,300) than there were in Michigan's colleges (21,454). Between 1980 and 2000, African American men were added to Michigan's prisons at 13 times the rate they were added to Michigan's colleges. American Bar Association Presidential Task Force on Access to Justice in Civil Cases, Draft, Apr. 7, 2006 (forthcoming Aug. 2006).

²⁷⁸ ACLU of Washington, *The Unfulfilled Promise of Gideon* (Mar. 2004), available at http://www.aclu-wa.org/library_files/Unfulfilled%20Promise%20of%20Gideon.pdf.

²⁷⁹ *Id.* at 1.

with clients, to not overlook important evidence concerning innocence, to not fail to interview witnesses, to not waive important rights without properly advising clients of them; and to not fail to file critical motions.²⁸⁰ As a result, indigent defendants in Grant County make decisions about their rights or contest issues without adequate factual or legal investigation by their attorneys, are deprived of meaningful opportunities to present defenses, and deprived of services of investigators and experts, to name just a few problems. The lawsuit was settled in November 2005, with Grant County agreeing to overhaul its public defense system, by improving its quality, complying with standards endorsed by the state bar association, and submitting to comprehensive monitoring.

c. Montana

In Montana, the ACLU brought a class-action suit in February 2002 seeking to remedy the state's failure to provide sufficient funding or guidance to county-based indigent defense systems in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and also sections of the Montana Constitution and state laws.²⁸¹ Montana, like Michigan and Washington, has a fragmented indigent defense system with the counties responsible for design and administration of indigent defense programs. The state, required to set standards for the provision of such services, failed to do so, or to exercise any supervision to ensure that services were constitutionally adequate. The state failed to require the counties to hire qualified defenders, train them in criminal defense, issue written practice standards, or monitor or limit excessive workloads. The State also permitted counties to under-fund these services such that the lack of financial resources actually impeded the delivery of representation, refusing to guarantee full reimbursement of allowed expenses. This obstructed defense lawyers' ability to engage in the legally required adversarial advocacy and indigent clients suffered multiple deprivations of rights, including being unable to present meritorious defenses, challenge the evidence against them, receiving harsher sentences than warranted by the facts; and much more. The state had been aware of these problems since 1976.²⁸²

Recognizing these problems, in June 2005, the Montana legislature passed the Montana Public Defender Act, groundbreaking public defender legislation creating a new statewide office.²⁸³ Passed in the wake of the ACLU lawsuit, the Montana bill is the first in the nation crafted with the intent of addressing the "Ten Principles of a Public Defense Delivery System" adopted by the American Bar Association (ABA) in 2002. The Ten Principles were created in response to the growing national crisis in the delivery of indigent defense services. They provide for, among other things, the assignment of counsel as soon as possible after arrest, reasonable attorney

²⁸⁰ Complaint ¶ 3 *Best v. Grant County*, No. 04-2-00189-0 (Superior Court of the State of Washington in and for Kittitas County, filed Dec. 21, 2004).

²⁸¹ Complaint ¶¶ 1-2, *White v. Martz*, No. C DV-2002-133 (Montana First Judicial District Court, Lewis & Clark County, filed Apr. 1, 2002).

²⁸² *Id.* ¶8.

²⁸³ S.B. 146, 59th Leg., Montana Public Defender Act, Chapter 449, Laws of Montana (Mont. 2005), available at http://publicdefender.mt.gov/docs/SB146_TEXT.pdf.

caseloads, and the supervision and systematic review of public defenders' skills and performance.²⁸⁴

d. Louisiana

When the levees broke on August 30, 2005 in Louisiana, there were approximately 7,000 men and women awaiting trial in New Orleans who needed counsel. Nearly 5,000 were in Orleans Parish Prison, and most remain locked up there or elsewhere, and most still have not had any access to counsel, some having fully served their sentences.²⁸⁵ Louisiana is the only state in the nation to attempt to fund the majority of its constitutional obligation to provide indigent defense services through court costs assessed primarily on traffic tickets. For over 30 years, the state has been on notice that its funding structure threatens the integrity of the entire system of justice. In fact, Louisiana fails 9 and a half of the 10 ABA principles above, with its unstable funding combined with its failure to enact, enforce and monitor compliance with nationally recognized standards.²⁸⁶ While some modest reforms were passed in 2006 (advancing uniformity in the system and improving oversight), much more remains to be done.

Post-Katrina, the situation has deteriorated such that in Orleans Parish, where there were once 41 public defenders (all part-time), there are now 7. There was no way to pay them as traffic tickets were not being assessed at the same rate as pre-storm. These 7 attorneys have enormous caseloads, so much so that at least two judges have halted prosecutions on indigent defendants in their courtrooms.²⁸⁷ Bond hearings lasted less than a minute.²⁸⁸ Additionally, attorneys are seeking the release of over 4,000 individuals being held in pretrial detention since the storm in August 2005 without constitutionally afforded counsel.²⁸⁹

e. Juvenile Waiver Of Counsel In Ohio

Children should not be left to navigate complex and adversarial delinquency proceedings on their own. Juvenile delinquency court judges and officers, and the rules under which they operate, should ensure that children's due process rights are protected at all costs. The U.S. Supreme Court has held that juveniles facing delinquency proceedings have the right to the aid of counsel to protect their interests.²⁹⁰ In their standards, leading professional bodies concur, and state further that children should never be permitted to waive appointment of counsel. For example, in 2005, the National Council of Juvenile and Family Court Judges, a membership organization

²⁸⁴ American Bar Association, *Ten Principles of a Public Defense Delivery System* 2-3 (Feb. 2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

²⁸⁵ Southern Center for Human Rights, *A Report on Pre- and Post-Katrina Indigent Defense in New Orleans* 4 (Mar. 2006), available at <http://www.schr.org/indigentdefense/Press%20Releases/SCHR%20REPORT%20ON%20PRE-%20AND%20POST-KATRINA%20INDIGENT%20DEFENSE%20IN%20NEW%20ORLEANS.FINAL.pdf>.

²⁸⁶ National Legal Aid & Defender Association, *In Defense of Public Access to Justice* 19 (Mar. 2004), available at http://www.nlada.org/Defender/Defender_Evaluation/la_eval.pdf.

²⁸⁷ National Legal Aid & Defender Association, *An Evaluation of the Indigent Defense System in Orleans Parish, Louisiana* 7-8 (Spring 2006) [hereinafter *Indigent Defense System*].

²⁸⁸ Northwestern University School of Law, *Access Denied: Pre-Katrina Practices in Post-Katrina Magistrate and Municipal Courts* 1-2 (Apr. 2006), available at <http://www.law.northwestern.edu/legalclinic/docs/NewOrleansReport06.pdf>.

²⁸⁹ *Indigent Defense System* at 2, 5-6, 8-9.

²⁹⁰ *Application of Gault*, 387 U.S. 1 (1967).

consisting of over 1,700 juvenile and family court judges, commissioners, magistrates and referees, issued national juvenile delinquency guidelines including one calling for juvenile court administrators to ensure that “counsel is available to every youth at every hearing ...”²⁹¹ The Council advised that judges should only permit children to waive counsel after consultation with an attorney.²⁹² Also in January 2005, the American Council of Chief Defenders and the National Juvenile Defender Center promulgated core national criteria by which indigent defense delivery systems and the branches of government responsible for provision of counsel may do so, beginning with “uphold[ing] juveniles’” right to counsel throughout the delinquency process and recognizing the need to zealously represent children.²⁹³ That principle further notes that the “system should ensure that children do not waive appointment of counsel.”²⁹⁴

In Ohio, however, this right to counsel in juvenile delinquency proceedings simply does not exist. There, court rules permit waiver of counsel in juvenile delinquency proceedings before consulting an attorney.²⁹⁵ As many as 80% of children charged with criminal wrongdoing in some Ohio juvenile courts are not represented by counsel.²⁹⁶ Most of these children waive their right to legal representation shortly after their arrest.²⁹⁷ A growing number of cases show that youth not represented by attorneys are more likely to enter guilty pleas even when they may have viable defenses or may be innocent.²⁹⁸ Many Ohio youth also fail to understand the serious charges they may face: roughly 75% of incarcerated youth need mental health services, and nearly half of those incarcerated at Ohio Department of Youth Services facilities need special

²⁹¹ The National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 25 (Summer 2005), available at <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/01chapter.pdf>.

²⁹² *Id.*

²⁹³ American Council of Chief Defenders and National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems* 2 (Jan. 2005), available at http://www.njdc.info/pdf/10_Principles.pdf.

²⁹⁴ *Id.*

²⁹⁵ Petition from ACLU, Children’s Law Center, ACLU of Ohio, and Office of the Ohio Public Defender, to Secretary Jo Ellen Cline, Supreme Court of Ohio 1 (Mar. 9, 2006) [hereinafter *Petition*], available at <http://www.aclu.org/pdfs/ohiowaiverpetition20060309.pdf>.

²⁹⁶ American Bar Association Juvenile Justice Center and National Juvenile Defender Center & Children’s Law Center Central Juvenile Defender Center, *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio* 25 (Mar. 2003), available at http://www.njdc.info/pdf/Ohio_Assessment.pdf.

²⁹⁷ *Id.*

²⁹⁸ ACLU, *A Call to Amend the Ohio Rules of Juvenile Procedures to Protect the Right to Counsel* (Jan. 2006) citing American Bar Association Juvenile Justice Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 44 (1995).

educational services.²⁹⁹ Additionally, many children in the justice system have been abused or neglected, and are 50% more likely to be arrested as juveniles than other children.³⁰⁰

In March 2006, the ACLU, its Ohio affiliate, the Children's Law Center, and the Ohio Public Defender's Office filed a petition calling for the court to protect children's right to counsel when they are accused of crime, by changing the court rules allowing pre-consultation waiver to require every child to consult with an attorney prior to waiving the right to counsel.³⁰¹ An estimated two-thirds of the 147,867 juveniles who were the subject of delinquency proceedings or unruly complaints resolved in 2004 faced those proceedings without an attorney, and roughly 15% of children committed to Ohio Department of Youth Services, and 20% of those placed at community corrections facilities, were unrepresented by counsel during their delinquency proceedings.³⁰² Most children waive this right and do so without an appreciation of their rights or understanding the consequences of waiver, and court officials do not take sufficient time to ensure the children are aware of the role defense counsel can play, and the possible repercussions of a finding against them.³⁰³

2. *Excessive Government Secrecy*

The provisions of Article 14 apply to all tribunals within the scope of the article, ordinary or specialized.³⁰⁴ The Committee has further opined that military or special courts which try civilians could present a problem as far as the equitable, impartial and independent administration of justice is concerned, and emphasized that trials of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the guarantees stipulated under Article 14.

The government is, however, arbitrarily detaining and indefinitely holding (and abusing) detainees in its "war on terror." Often they are never charged and the proceedings are secret.³⁰⁵ In many cases, even the location of their detention is secret. And the government uses "national security" as a pretext for these egregious violations of, *inter alia*, Article 14 rights. Here is just one example of how this justification is overused and abused: In arguing that U.S. citizen Mujahid Menepta needed to be detained as a "material witness," not a criminal suspect, federal

²⁹⁹ ACLU, *A Call to Amend the Ohio Rules of Juvenile Procedures to Protect the Right to Counsel* (Jan. 2006) citing Fred Cohen, Esq., *Interim Report: Scioto Juvenile Correction Facility: Girls Units* (Sept. 2004) at 3-4; Ohio Coalition for the Education of Children with Disabilities, *Students with Disabilities Over-represented in Juvenile Justice System; Does Disability=Delinquency?*, Vol. XXII, Issue 4, FORUM, 1 (Nov.-Dec. 2004), available at http://www.ocecd.org/ocecd/h_docs/FORUM/04_1112.pdf.

³⁰⁰ ACLU, *A Call to Amend the Ohio Rules of Juvenile Procedures to Protect the Right to Counsel* (Jan. 2006) citing American Bar Association Juvenile Justice Center, R. Famularo, R. Kinscherff, T. Fenton, and S.M. Bolduc, *Child Maltreatment Histories Among Runaway and Delinquent Children*, *Clinical Pediatrics* 20 (12) (Dec. 1990) at 713-18.

³⁰¹ *Petition* at 2.

³⁰² *Petition* at 1 and Attachment 3.

³⁰³ *Petition*, Attachment 4.

³⁰⁴ U.N. Human Rights Committee, *General Comment 13, Article 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. No. HRI/GEN/1/Rev.1 at 14 (1994).

³⁰⁵ ACLU, *Enduring Freedom: Torture and Cruel Treatment by the United States at Home and Abroad* (Apr. 27, 2006), at 27-33.

prosecutors contended there was national security evidence that could not be disclosed.³⁰⁶ The attorney for Menepta, Susan Otto, found herself unable to counter this argument:

It's hard to argue about a national security argument. Anytime I ask what the basis was it would be a canned national security argument. I would ask what's the justification? The government responds: "National security." I would say "what does that mean?" The government would say: "I can't tell you."³⁰⁷

a. *Secret Evidence*

The Freedom of Information Act (FOIA) was passed nearly 40 years ago to give the American people a statutory right to access information freely about their government — a government, in the immortal words of the President Abraham Lincoln, “of the people, by the people, for the people.” The Declaration of Independence proclaimed that the just power of government derives “from the consent of the governed,” but it took nearly 200 years for federal law to recognize that this consent must be informed in order to be meaningful. The Supreme Court has made clear that “disclosure, not secrecy, is the dominant objective” of FOIA but secrecy, not openness, seems to be the dominant trend.³⁰⁸

A clear example is our effort to obtain unprivileged documents and information concerning the government's treatment of detainees in its “war on terror.” In 2003, the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace filed a FOIA request seeking documents from the Central Intelligence Agency, Department of Justice, the Department of State, the Department of Defense and the Federal Bureau of Investigation, concerning treatment of detainees in U.S. custody in Afghanistan, Guantánamo Bay, Cuba, and Iraq. For almost a year, the request received no meaningful response. Moreover, documents that were ultimately turned over were heavily redacted.³⁰⁹ Albeit produced reluctantly and over years, the documents received, as well as evidence from a range of other sources including government investigations, reveal a systemic pattern of torture

³⁰⁶ The material witness law is a narrow federal law that permits the arrest and brief detention of material witnesses who have important information about a crime, if they might otherwise flee to avoid testifying in court or before a grand jury.

³⁰⁷ *Witness to Abuse* citing Telephone Interview with Susan Otto, attn'y for Mujahid Menepta, Oklahoma City, OK (Apr. 20, 2004).

³⁰⁸ *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

³⁰⁹ As the ACLU's CAT Report notes, in many instances the harsh treatment was ordered as part of an approved list of interrogation methods to “soften up” detainees. Reported methods of torture and abuse used against detainees include prolonged incommunicado detention; disappearances; beatings; death threats; painful stress positions; sexual humiliation; forced nudity; exposure to extreme heat and cold; denial of food and water; sensory deprivation such as hooding and blindfolding; sleep deprivation; water-boarding; use of dogs to inspire fear; and racial and religious insults. In addition, around one hundred detainees in U.S. custody in Afghanistan and Iraq have died. The government has acknowledged that 27 deaths in U.S. custody were homicide, some caused due to “strangulation,” “hypothermia,” “asphyxiation,” and “blunt force injuries.” These techniques constitute cruel, inhuman or degrading treatment and when used in combination or for prolonged periods of time may amount to torture.

and abuse of detainees in U.S. custody in Afghanistan, the U.S. Naval Base Station at Guantánamo Bay, Cuba, Iraq, and other locations outside the U.S.³¹⁰

However, the U.S. government continues to withhold certain critical policy documents that would shed light on who is ultimately responsible for the abuse. Many investigative reports concerning the treatment and abuse of detainees remain unpublished, and in other cases published reports are classified in large part. Invoking the *Glomar* doctrine, the CIA is refusing to even admit or deny the existence of two key documents that relate to interrogation techniques and overseas detention facilities.³¹¹ Discussed extensively in the press, these documents are: (1) a directive signed by President Bush granting the CIA authority to set up detention facilities outside the U.S. and outlining interrogation methods that may be used against detainees; and (2) a Department of Justice memorandum to the CIA authorizing the use of certain interrogation techniques on detainees. Especially in the face of government reports that detainees have died in CIA custody, these documents are critical to informing the American public about the rules governing the CIA's treatment of detainees of custody, and about the role of high-ranking officials in authorizing abuse. The disclosure of these documents would serve FOIA's central objective: to disclose to the American public the information it needs to hold the government accountable to the people.

b. *Secret Detention Centers With Ghost Detainees*

Numerous governmental and non-governmental sources report that the CIA operates secret prisons overseas, at which it illegally and indefinitely holds and tortures detainees. The U.S. has kept the names of some prisoners in Iraq and Afghanistan off the official detainee list and hidden from the International Committee of the Red Cross.³¹² A U.S. Army investigation into the abuse of detainees at Abu Ghraib prison in Iraq sharply criticized the practice of keeping "ghost detainees."³¹³ The Navy Inspector General Vice Admiral Church's investigation of Department of Defense detainee operations and interrogation techniques reported thirty cases of "ghost detainees" who were held under "oral, ad hoc agreements" and that were "the result, in part, of the lack of any specific, coordinated interagency guidance."³¹⁴ Official documents obtained

³¹⁰ The vast majority of documents were released only following protracted and ongoing litigation and court orders directing government agencies to produce documents. Stipulation and Order of Aug. 17, 2004, *American Civil Liberties Union v. Dep't of Defense*, No. 04-cv-4151 (S.D.N.Y., filed June 2, 2004). The CIA has yet to release any documents to the ACLU and this issue is currently before the courts. See generally <http://www.aclu.org/torturefoia/legaldocuments/index.html> for the Torture FOIA legal documents.

³¹¹ The *Glomar* doctrine may only be invoked when even confirming or denying the existence of records would reveal the contents of the documents that would disclose sensitive national security information otherwise protected by one of FOIA's statutory exemptions. See Jan. 12, 2005 Brief for Plaintiffs at 29, *ACLU v. Department of Defense*, No. 04-CV-4151 (S.D.N.Y., filed June 2, 2004), available at <http://www.aclu.org/torturefoia/released/042905/SJMemo011305.pdf>.

³¹² Stephanie Nebehay, *ICRC in Intense Talks with US Over Detainee Access*, REUTERS, Dec. 9, 2005.

³¹³ U.S. Dep't of Defense, *Article 15-6 Investigation of the 800th Military Police Brigade*, "Regarding Part Two of the Investigation" ¶ 33 (Mar. 2004) [hereinafter Taguba Report], available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf. The Taguba Report is an investigative report on alleged abuses at U.S. military prisons in Abu Ghraib and Camp Bucca, Iraq.

³¹⁴ U.S. Dep't of Defense, *Review of DoD Detention Operations and Detainee Interrogation Techniques, Executive Summary* 18 (Mar. 2005) [hereinafter Church Report], available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>.

pursuant to the ACLU FOIA litigation confirmed the existence of a memorandum of understanding between the U.S. military and the CIA on “Ghost Detainees.”³¹⁵

In congressional testimony, Gen. Paul Kern, the senior officer who oversaw the U.S. Army inquiry (Fay-Jones investigation), told the Senate Armed Services Committee, “The number [of ghost detainees] is in the dozens, to perhaps up to 100.”³¹⁶ Another Army investigator, Maj. Gen. George Fay, put the figure at “two dozen or so.”³¹⁷ Both officers said they could not give a precise number because no records were kept and because the CIA refused to provide information to the investigators.³¹⁸

Documents released through the ACLU FOIA litigation refer to a sworn statement by a soldier regarding the death of an OGA detainee. “The OGA then packed the detainee in ice and placed him in a local taxi. The taxi driver was paid to take the body away. . . . [redacted] allowed OGA to house their detainees at the AG facility in ‘ghost cells’ in block 1A. Witnessed a detainee wearing only pink underwear.”³¹⁹ An Army report into intelligence activities at Abu Ghraib refers to the same November 2003 case, in which a detainee was brought to the prison by CIA employees but never formally registered with military guards. He died at the site and his body was removed after being wrapped in plastic and packed in ice.³²⁰

The National Commission on Terrorist Attacks upon the United States report (“the 9/11 Commission”) also reported that some detainees are held in secret locations and have been subjected to torture and abuse.³²¹ These reports are supported by a preliminary report from the European Parliament, investigating alleged illegal CIA activities in Europe.³²² That report discloses that the CIA conducted more than 1,000 secret flights over European territory since

³¹⁵ Josh White, Army, CIA “Agreed” on Ghost Prisoners, WASH. POST, Mar. 11, 2005 at A16; ACLU, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad*, annex B63-69, Sworn Statement of [officer name redacted] taken in Baghdad, Iraq on May 23, 2004 (April 2006) [hereinafter *Enduring Abuse*]. The officer “recommended that a Memorandum of Understanding be written up . . . to establish procedures for a ghost detainee.” *Id.* at 67.

³¹⁶ *Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq: Before the S. Armed Services Comm.*, 108th Cong. (Sept. 9, 2004) (statement of General Paul J. Kern) [hereinafter *General Kern Statement*].

³¹⁷ *Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq: Before the S. Armed Services Comm.*, 108th Cong. (Sept. 9, 2004) (statement of General George R. Fay).

³¹⁸ *General Kern Statement* (General Kern noted “[i]t’s a very difficult question for us to answer, Mr. Chairman, because we don’t have the documentation. What you see in our report is during the interviews of people reporting to us what happened without documentation.”).

³¹⁹ *Enduring Abuse*, annex B70-71, Sworn Statement of Counterintelligence Agent of June 4, 2004.

³²⁰ Major General George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 53-54 (2004).

³²¹ The 9/11 Commission relied “heavily on information obtained from captured al Qaeda members,” but was not allowed direct access to them. Instead, Commission members were instructed to submit their questions for use by third parties during interrogation sessions. The commission was “authorized” to identify ten alleged al-Qaeda detainees “whose custody had been confirmed officially by the U.S. government. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 146 (2004), available at <http://www-9-11commission.gov/report/911Report.pdf>.

³²² Parliamentary Assembly Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States*, AS/Jur (2006) 03 rev (Jan. 22, 2006) available at http://assembly.coe.int/committeedocs/2006/20060124_jdoc032006_e.pdf.

2001, some to transfer terror suspects.³²³ Incidents of terror suspects being handed over to U.S. agents did not appear to be isolated, and suspects were often transported around Europe on the same planes, suggesting a pattern of operations. The same agents also often appeared on these flights.

In December 2005, the *Washington Post* reported that President Bush, shortly after September 11, 2001, authorized the largest CIA covert operation known by its initials GST.³²⁴ GST includes programs that authorized the CIA to capture al-Qaeda suspects with help from foreign intelligence services, to maintain secret prisons abroad, to use interrogation techniques that violate international law, and to maintain aircraft to move detainees around the globe. An earlier *Washington Post* Article, citing current and former U.S. intelligence officials and foreign sources, reported that approximately two dozen suspected terrorists were sent by the CIA to secret prison facilities, known as “black sites,” in Afghanistan, Eastern Europe, Thailand, and Guantánamo.³²⁵ The centers in Thailand and Guantánamo reportedly closed in 2003 and 2004 respectively.³²⁶ Following this news report, the CIA reportedly transferred detainees from Europe to secret CIA prisons located elsewhere.³²⁷

A Pentagon review of Department of Defense interrogation operations acknowledged that “the CIA has independent operations in Afghanistan.”³²⁸ A reported CIA detention facility known as the Salt Pit, an abandoned brick factory north of Kabul, has been the site of the death of an Afghan detainee who was allegedly stripped, chained to the floor, assaulted, and left in a cell overnight without blankets. He died of hypothermia.³²⁹

Despite all these reports of ghost detainees and secret detention centers, the CIA is invoking an unusual common-law “state secrets” privilege to squelch a lawsuit brought by the ACLU in April 2006 and thereby obstruct efforts to uncover more precise information about these prisons or to explicitly acknowledge that the CIA does in fact operate these prisons. Our lawsuit concerns the secret detention of German citizen Khaled El-Masri, and it seeks compensation for his unlawful detention and torture.³³⁰ Mr. El-Masri was abducted while on holiday with his family, and detained from December 31, 2003 through May 28, 2004 in Macedonia and Afghanistan where

³²³ *EU:1,000 CIA flights since 2001*, AP, available at

<http://www.cnn.com/2006/WORLD/europe/04/26/eu.ciaflights.ap/index.html>.

³²⁴ Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005.

³²⁵ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

³²⁶ *Id.*

³²⁷ Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1.

³²⁸ Dep’t of Defense, *Department of Defense Briefing on Detention Operations and Interrogation Techniques* (Mar. 10, 2005), available at <http://www.pentagon.mil/transcripts/2005/tr20050310-2262.html>; see also James R. Schlesinger, et al., *Final Report of the Independent Panel to Review DoD Detention Operations* 70 (Aug. 2004) [hereinafter *Schlesinger Report*], <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>. (noting that the CIA conducted interrogations in Department of Defense facilities in Iraq and were “allowed to operated under different rules.”).

³²⁹ Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, Mar. 3, 2005, at A1. The Salt Pit has reportedly been shut down, with the CIA using another facility. The death in custody was referred for investigation but no one has been charged yet. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

³³⁰ Complaint, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf.

he was held in the “Salt Pit” prison referenced above. The gruesome facts of his detention and brutal treatment are chronicled in a declaration by El-Masri.³³¹

In response to the lawsuit, which raises substantial allegations of unlawful abduction, arbitrary detention and torture, the CIA made a successful motion to dismiss the suit on the ground that further legal proceedings may expose state secrets and jeopardize national security. However, the rendition of Mr. El-Masri to detention and interrogation in Afghanistan by agents of the U.S. represents the most widely known example of a publicly acknowledged program. High-level government officials have publicly discussed the rendition program, and Mr. El-Masri’s allegations have been the subject of widespread media reports in the world’s leading newspapers and news programs, many of them based on the accounts of government officials.³³² The ACLU is planning to appeal the case.

The U.S. government’s “state secrets” tactic to get rid of lawsuits in which it says that any discussion of a lawsuit’s accusations would endanger national security short circuits judicial scrutiny and public debate of central controversies in the post-9/11 era.³³³ As Congressman Christopher Shays put it, “If the very people you're suing are the ones who get to use the state secrets privilege, it's a stacked deck.”³³⁴

c. *Secret Proceedings*

The Justice Department has sought, and usually succeeded in securing, court orders sealing all records and closing the courtroom doors in virtually all post-September 11 “material witness” proceedings. The courtrooms and documents have been inaccessible to families of the witnesses, the media, the general public, and even frequently the witnesses themselves. Of the seventy witnesses the ACLU and Human Rights Watch identified and disclosed in a 2005 report, there are no judicial arrest records available for sixty-two, and records in three of the remaining cases have been unsealed only because of government misconduct.³³⁵ The other five open records were available because the witness was held for a trial or the district court issued partially redacted or full opinions on the material witness proceedings. Material witness proceedings in post-September 11 counterterrorism investigations have rarely even appeared on the public docket. There were and continue to be no public records of most material witness arrests, even in the form of “John Doe” records. The Justice Department has rebuffed Congress; repeated

³³¹ Brief for Plaintiff, Statement of Khaled El-Masri, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), available at <http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html>.

³³² The state secrets privilege, which the United States here invokes to extinguish altogether Mr. El-Masri’s right of redress is, however an evidentiary privilege and not an immunity doctrine. We show that its purpose is to block disclosure in litigation of information that will damage national security, and it is rare and drastic for its invocation to result in dismissal of an action. The U.S. Government contends it can neither confirm nor deny the allegations concerning its clandestine program. But, as we show in our papers, it has done both, repeatedly – confirming the existence and parameters of the rendition program and denying that the program is an instrument of coercive interrogation. Only in seeking to dismiss the lawsuit does it insist that it can neither confirm nor deny the latter.

³³³ Scott Shane, “*Invoking Secrets Privileges Becomes a More Popular Legal Tactic by U.S.*”, New York Times (Jun. 4, 2006).

³³⁴ *Id.*

³³⁵ *Witness to Abuse* at 62.

requests for information about material witness arrests, refusing to disclose the names, numbers, and details of these arrests.³³⁶

Such secrecy is inconsistent with longstanding principles of criminal justice and government accountability as well as with U.S. criminal justice history. Recognizing that public scrutiny is a crucial protection against government abuse, international human rights and U.S. constitutional law call for public hearings when a court or tribunal is determining an individual's freedom.³³⁷ Public hearings protect the rights of detainees and guard them against abusive or arbitrary proceedings. They also serve the public's right to know what its government is up to and its interest in restraining possible abuses of government or executive power.³³⁸

Since September 11, the Justice Department has proceeded against material witnesses and others caught up in the investigation behind closed courtroom doors. As Human Rights Watch documented in "Presumption of Guilt," and the ACLU set forth in a brief to the Supreme Court, post-September 11, the government arrested more than one thousand Muslim, Arab, and South Asian non-citizens of "special interest" in secret and closed the immigration proceedings against them, arguing that national security required the need for secrecy.³³⁹ In the case of the material witnesses, the Justice Department has claimed that national security as well as grand jury rules required secrecy.³⁴⁰

Justice Department officials buttressed their grand jury argument for secrecy with claims that secrecy was also required to protect national security. In refusing to disclose the details of material witness arrests to Congress, the Justice Department has reasoned that "disclosing such specific information would be detrimental to the war on terror and the investigation of the September 11 attacks."³⁴¹

The insistence on total secrecy when a witness has been arrested in connection with a grand jury proceeding is a major departure from the federal government's past practice. For example, the

³³⁶ *Witness to Abuse*. The government also refused to disclose the names of material witnesses, where they were being held, dates of arrest and detained, nature of charges filed, and names of attorneys representing witnesses in response to a Freedom of Information Act request by the Center for National Security Studies. American Civil Liberties Union and 21 other organizations. Pet. For Cert., *Center for National Security Studies v. United States Dept. of Justice*, No. 03-742 (filed Sept. 30, 2003).

³³⁷ Public hearings and records also enhance public confidence in the proceedings. "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. ... The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 268-70 (1948) (internal citations omitted).

³³⁸ As one court stated in deciding whether to unseal the records of a bail proceeding: "The decision to hold a person presumed innocent of any crime without bail is one of major importance to the administration of justice... Openness of the proceedings will help to ensure this important decision is properly reached and enhance public confidence in the process and result." *Seattle Times Co. v. U. S. Dist. Court for Western Dist. of Washington*, 845 F.2d 1513, 1517 (9th Cir. 1988) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1983)).

³³⁹ Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf>.

³⁴⁰ Pet. For Cert., *North Jersey Media Group, Inc. v. Ashcroft*, No. 02-1289 (filed Mar. 3, 2003).

³⁴¹ *Witness to Abuse* at 64.

government did not close the detention hearing for Terry Lynn Nichols, who was arrested as a material witness in connection with the grand jury investigation of the 1996 Oklahoma City bombing. In fact, the U.S. Attorney read the material witness warrant in open court.³⁴² In addition, the material witness arrest of Nichols, a well as of Abraham Abdallah Ahmed, who was mistakenly arrested in connection with the Oklahoma City bombing, was publicly docketed and discussed at length in court opinions.³⁴³

It is not clear why the courts have tended to give such short shrift to the principle of public proceedings in the post-September 11 material witness cases. Grand jury jurisprudence does not support the argument that all material witness records be sealed. Grand jury rules only require secrecy for material witness records that pertain to “matter[s] occurring before a grand jury.”³⁴⁴ Courts have traditionally interpreted this rule narrowly to cover only documents that reveal “the essence of what takes place in the grand jury room.”³⁴⁵ Much of the information contained in the government’s applications to arrest material witnesses has had nothing to do with the grand jury room because the witness had not yet testified and, indeed, in a number of cases a grand jury had not yet even been convened when the witness was arrested. In addition, records and evidence concerning a witness’s potential flight risk are not necessarily relevant to “matters occurring” before a grand jury. Moreover, courts are required to balance arguments for secrecy against the right to a presumptively public detention hearing.³⁴⁶

Although a few courts have rejected the government’s position, most courts have acquiesced to the government’s insistence that all records and information pertaining to the material witness arrest be kept under seal.³⁴⁷ Courts have repeatedly rebuffed news organizations’ attempts to

³⁴² *Witness to Abuse* citing Pam Belluck, “Affidavit Describes Bomb Suspect’s Warning,” N.Y. TIMES, Apr. 27, 1995.

³⁴³ *Witness to Abuse* citing the following: Docket, *United States v. Nichols*, Mag. No. 95-06036 (D. Kan., filed April 22, 1995); Steven Franklin “U.S. Widening Bombing Probe, 2nd Suspect Sought,” CHI. TRIB., Apr. 23, 1995; Sharon Cohen, *Bomb Suspect Told Friend ‘Something Big Going to Happen,’ Prosecutor Says*, ASSOCIATED PRESS, Apr. 26, 1995; *In re Material Witness Warrant Nichols*, 77 F. 3d 1277, (10th Cir. 1996); *United States v. McVeigh*, 940 F. Supp. 1541, 1562 (D. Colo. 1996).

³⁴⁴ Fed.R.Crim.P. 6(e)(6). The rule provides that records related to grand jury proceedings documents “must be kept under seal to the extent and as long as necessary to prevent unauthorized disclosure of a matter occurring before a grand jury.”

³⁴⁵ *In re Grand Jury Subpoena (under Seal)*, 920 F.2d 235, 242-43 (4th Cir. 1990) (internal quotations omitted).

³⁴⁶ *In re Application of the U.S. for Material Witness Warrant*, 214 F. Supp. 2d 356, 364 (S.D.N.Y. 2002).

³⁴⁷ See, e.g., *In re Grand Jury Material Witness Detention*, 271 F.Supp. 2d 1266, 1268 (D.Or. 2003). The U.S. District Court in Oregon closed the detention hearing of material witness Maher Mofeid Hawash but issued a redacted decision resolving Hawash’s challenges to his detention because “the specific, sealed grand jury investigation to which Hawash’s testimony relates will not be hindered by disclosing his identity, his arrest as a material witness or his detention status.” The court further observed that “[t]o withhold that information could create [a] public perception that an unindicted member of the community has been arrested and secretly imprisoned by the government.” In addition, the court was careful to ensure key aspects of its decision to detain Hawash were public, finding these facts unrelated to grand jury matters. See also *In re Application of U.S. for Material Witness Warrant*, 214 F. Supp. 2d 356, 364 (S.D.N.Y. 2002) (internal case citations omitted). In considering whether to release the material witness records of Abdallah Higazy, Judge Rakoff of the Southern District of New York held that when the principles of protecting grand jury secrecy collide with principles of public criminal proceedings, courts should weight in favor of disclosing material witness records because “no free society can long tolerate secret arrests.” According to the court, given the importance of the “public’s right to know and assess why someone is being jailed... sealing of matters relating to the arrest and detention must be limited to keeping secret only what is strictly necessary to prevent disclosure of what is occurring before the grand jury itself.”

confirm whether witnesses were jailed, much less allow them to cover federal court proceedings that are usually open.³⁴⁸ As one reporter who attempted to cover the detention of U.S. citizen James Ujaama commented:

It just made it extremely frustrating, really, impossible to write anything intelligent about what was happening to this [material witness] and why. To be in a situation where people who are holding a citizen in custody cannot even acknowledge that they are holding that person is frankly scary. I've been a reporter for 22 years, and I've never seen anything like that.³⁴⁹

One case, known only as “MKB,” went all the way up to the Supreme Court without a docket number, public records, or even a legal opinion made public.³⁵⁰ The lower court decisions were under seal. The Supreme Court refused to hear the case, in a one-line order denying the petition for certiorari.³⁵¹

Randy Hamud, who represented material witnesses Osama Awadallah, Mohdar Abdullah, and Yazeed al-Salmi in their material witness hearings in the Southern District of New York, believes the court worked under different rules in the closed proceedings.

Things go on behind those doors that would never happen in open court.

The government didn't show me the warrant or evidence. It's crazy what happens behind closed doors. The judge threw the local counsel out of the courtroom — Abdeen Jabaraul Jabarah. It's in the transcript. ...It was troublesome because I was appearing from out of state and Jabarah was the in-state counsel.

You do not get justice behind closed doors. A judge would never do that in a hearing. I was in a twilight zone.

I pointed out clearly how Awadallah was being beaten up and that there were bruises on his body. I told the judge he was beaten and the judge just said, “He looked fine to me.”³⁵²

G. Right To Privacy (Article 17)

The U.S. government has seriously eroded the right to privacy by expanding its surveillance of ordinary Americans in name of protecting national security. The National Security Agency is conducting massive wiretapping and datamining of phone calls and emails, and the FBI is spying

³⁴⁸ Brett Zongker, “‘ Hamas Suspects’ Case to Be Heard in Closed Session,” ASSOCIATED PRESS, Aug. 27, 2004 (reporting on decision to close detention hearing of Ismael Selim Elbarasse).

³⁴⁹ Jennifer LaFleur, *Material Witness Label keeps Detainees in, Media out*, THE NEWS MEDIA AND THE LAW, Fall 2002.

³⁵⁰ The public first learned about the case through an investigative reporter who saw the case briefly appear on the docket. Dan Christensen, *Secrecy Appealed, Detained after Terror Attacks, Algerian-born Broward Man Asks U.S. Supreme Court to Review Sealing of His Case*, DAILY BUS. REV., Sept. 25, 2003.

³⁵¹ *M.K.B. v. Warden*, 540 U.S. 1213, cert. denied (Feb. 23, 2004).

³⁵² Telephone interview with Randy Hamud in San Diego, California (Aug. 16, 2004)

on peaceful political and religious groups and demanding personal records without court approval or probable cause.

1. *Unlawful and Unauthorized Domestic Wiretapping Programs*

On December 16, 2005, *The New York Times* reported that President Bush signed a presidential order in 2002 authorizing the NSA to monitor the international (and sometimes domestic) telephone calls and e-mail messages of people inside the U.S. without a warrant.³⁵³ Then, in its most egregious abuse of power to date, in May 2006, *USA Today* revealed that the NSA has been collecting call information about millions of American residents and businesses served by 3 telephone companies.³⁵⁴ The NSA spying program violates fundamental free speech and privacy rights guaranteed by the ICCPR and the U.S. Constitution. The program also violates a law known as the Foreign Intelligence Surveillance Act, which was passed in 1978 to guard against executive surveillance abuses that had threatened our democracy in the past.

Electronic eavesdropping and data mining and tracking pose a particularly grave threat to privacy because of the potential for abuse. Eavesdropping, with its broad, intrusive sweep is dangerously similar to a general search – a fishing expedition. Under the NSA spying programs, no neutral judge determines whether there is probable cause for the surveillance or limits its scope and duration. Executive officers, on a whim, can listen in on the most personal and intimate of our conversations, for months or even years, in one case, and in the other, collect the largest database ever assembled in the world.

The NSA spying programs also threaten the right to free expression, which is closely linked to the right to privacy. Unrestricted power to search and to seize has been used throughout history by totalitarian rulers to stifle liberty of expression and suppress dissent. Knowledge that the government is listening to phone calls often has a demonstrable chilling effect on freedom of speech and association. It should come as no surprise, then, that the illegal NSA spying programs have already caused Americans to cease having certain conversations. The programs are disrupting the ability of American journalists to talk to sources overseas, of human rights advocates to communicate with pro-democracy activists in the Middle East, and of attorneys to locate witnesses and interview family members and clients accused of terrorism-related crimes.

In January 2006, the ACLU with its Michigan affiliate filed a suit representing a group of these prominent journalists, scholars and attorneys in a lawsuit challenging the first NSA domestic spying program made public, now pending in Detroit, Michigan. We argue that the program violates their First Amendment free speech and associational rights, their Fourth Amendment privacy rights, and the separation of powers doctrine, and have asked the court to declare the program illegal and order its immediate and permanent halt.³⁵⁵ Due to the nature of their occupational duties, the plaintiffs have a well-founded fear that their telephone and Internet communications will trigger NSA surveillance. Knowledge of the domestic surveillance program has already chilled their ability to communicate and work effectively. We also argue that since the NSA does not request court warrants before conducting domestic surveillance, the

³⁵³ James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

³⁵⁴ Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006 at A1.

³⁵⁵ Complaint, *ACLU v. NSA*, No. 06-10204, ¶ 3 (E.D. Mich., filed Jan. 17, 2006).

program operates in violation of Title III, which requires that certain procedures be followed and a criminal warrant obtained prior to any domestic wiretapping by the government, the President has exceeded the limits of executive authority by authorizing the program.³⁵⁶ The Justice Department has moved to dismiss the lawsuit based on the draconian state secrets privilege.

2. *Government Data Collection*

The ACLU has released a public education report on the government's ability to monitor Americans' private lives by tapping into the growing amount of consumer data being collected by the private sector.³⁵⁷ In it, we discuss the Privacy Act of 1974, which restricts the ability of law enforcement agencies to maintain profiles on individuals who are not suspected or involved in any wrongdoing. However, private companies, such as the telephone companies in the second NSA Program revealed to date, are not subject to the law and are being pressured to voluntarily provide information about citizens to the government. The government is either buying the data from these companies or compelling them to transfer private data it could not collect itself.

The ACLU was also concerned by the government's institution of the Multistate Anti-Terrorism Information Exchange or MATRIX program, invasive, overbroad and sloppy government data collection effort. Documents we obtained through Freedom of Information Act requests revealed that this program compiles personal information from numerous public and private sources, with no safeguards to ensure accuracy or security of data, and that the Department of Homeland Security had been deeply involved in this state-operated effort to spy on citizens. The ACLU pressured participating states to leave the program, and in April 2005 the program finally ceased operations.

In 2004, the Combined Federal Campaign (CFC), the workplace giving program for federal employees, suddenly began requiring that participating charities check their employees and expenditures against government watch lists for "terrorist activities" This was deeply problematic as the list included such vague appellations as "Ahmed the Tall" and no further identifying information. We withdrew from CFC participation and in November 2004 filed suit with 12 other national non-profits. New regulations posted in the *Federal Register* in November 2005 drop the list-checking requirements.

3. *FBI Surveillance Of Political & Religious Groups*

In December 2004, along with several ACLU affiliates, we filed requests under the Freedom of Information Act (open government records requests, "FOIA") representing over 70 political and

³⁵⁶ *Id.* ¶¶ 22-27.

³⁵⁷ ACLU, *The Surveillance-Industrial Complex: How the American Government is Conscripting Businesses and Individuals in the Construction of a Surveillance Society* (Aug. 2004), available at http://www.aclu.org/FilesPDFs/surveillance_report.pdf.

religious groups to obtain their FBI files.³⁵⁸ The ACLU also filed a request to obtain information about the role of Federal Bureau of Investigation-led Joint Terrorism Task Forces (JTTFs) in surveillance of such groups.³⁵⁹ In May 2005, we sued in response to the U.S. government's refusal to grant or deny expedited processing of our request for these files.³⁶⁰ We have since received some documents but are challenging redactions within some of them and are continuing to litigate for the others. Documents received concerning JTTFs reveal that while they are supposed to investigate terrorism, they have repeatedly targeted and collected extensive information on peaceful organizations such as Food Not Bombs that have no connection to terrorism.³⁶¹

The ACLU and its Georgia affiliate recently released new evidence that the FBI is using counterterrorism resources to spy on peaceful faith- and conscience-based advocacy groups, in particular, the School of the Americas Watch (SOA Watch) and its multinational faith-based network. The documents come to the ACLU as a result of its campaign to expose domestic spying by the FBI and other government agencies through Freedom of Information Act requests in 20 states on behalf of more than 150 organizations and individuals. Founded by Bourgeois in 1990, SOA Watch conducts research on the U.S. Army School of the Americas (now renamed the Western Hemisphere Institute for Security Cooperation) in Georgia. Each year the school trains hundreds of soldiers from Latin America, funded entirely by U.S. taxpayers. SOA Watch sponsors an annual vigil to call for the closure of the facility. Last year 19,000 people from around the country poured into Georgia to take part. The documents show that FBI surveillance of these peaceful protests and acts of civil disobedience, once classified as "Routine" after 2001 became "Priority" and subject to "Counterterrorism" monitoring. One memo dated October 2003 explicitly states that "The leaders of the SOA Watch have taken strides to impart upon the protest participants that the protest should be a peaceful event."

In February 2006, we also filed FOIA requests together with affiliates including Northern California and Georgia, to learn who is being spied upon by the Pentagon. According to news reports, the Pentagon is collecting information in a secret database on peace groups and law abiding Americans who have attended anti-war protests.³⁶² After the Northern California affiliate filed a lawsuit, a judge ordered the Department of Defense to requiring expedited

³⁵⁸ FOIA request from ACLU on behalf of American-Arab Anti-Discrimination Committee, *et al.* to FBI, *et al.* (Dec. 2, 2004), available at http://www.aclu.org/FilesPDFs/foia_orgs.pdf; Press Release, ACLU, ACLU Launches Nationwide Effort to Expose Illegal FBI Spying on Political and Religious Groups (Dec. 2, 2004), available at <http://www.aclu.org/safefree/general/18713prs20041202.html>; Press Release, ACLU, FBI Spy Files Project List (Dec. 2, 2004), available at <http://www.aclu.org/safefree/resources/18706res20041202.html>. In May 2005, several ACLU affiliates filed similar FOIA requests. We have now filed FOIA requests in over 20 states on behalf of more than 150 organizations and individuals in order to discover FBI surveillance of political, environmental, anti-war and faith-based groups. ACLU, FBI/JTTF Spying, <http://www.aclu.org/safefree/spyfiles/24011res20060131.html#state>.

³⁵⁹ FOIA request from ACLU to FBI, *re: National Joint Terrorism Task Force* (Dec. 2, 2004), available at http://www.aclu.org/FilesPDFs/foia_jttf.pdf.

³⁶⁰ *ACLU v. FBI*, No. 1:05-cv-1004 (D.D.C. filed May 18, 2005).

³⁶¹ To view documents obtained through FOIA, see www.aclu.org/spyfiles.

³⁶² Lisa Myers, Douglas Pasternak, Rich Gardella, *Is the Pentagon spying on Americans?*, MSNBC, Dec. 14, 2005, available at <http://www.msnbc.msn.com/id/10454316/>.

processing of their FOIA request.³⁶³ The rest of us were denied expedited processing and hope to file our lawsuits in the near future.

In a glaring example of the misuse of its law enforcement powers, a local policeman and a detective with the Homeland Security Division of DeKalb County arrested two young vegans, Caitlin Childs and Christopher Freeman following their lawful protest against animal cruelty outside a Honey Baked Ham store. Childs and Freeman noticed they were being photographed by a man in an unmarked car, who they later discovered was a detective with the Homeland Security division. They wrote the model and license plate number of his car. After Childs and Freeman left in their own car, they were followed and pulled over by the detective and a police officer. When Childs refused to hand over the note with the detective's vehicle information, both she and Freeman were handcuffed and searched by a male officer (in spite of Ms. Childs request to be searched by a female officer), then arrested and charged with misconduct. In September, 2005, our Georgia affiliate filed a complaint on behalf of Childs and Freeman for false imprisonment, false arrest, and harassment.³⁶⁴

4. *Reauthorization Of the Patriot Act*

The U.S. Congress passed the USA Patriot Act, Pub. L. 107-56, 115 Stat. 272 (2001), only 45 days after the September 11 attacks, with little or no debate in either house of Congress. The ACLU believes there are significant flaws in the Act, flaws that threaten the fundamental rights of people within the U.S. We highlighted our concerns in our September 2005 submission to the committee.³⁶⁵

There was broad opposition to renewal of the Patriot Act across the country and the political spectrum. More than 400 communities (cities, towns, counties and eight states) passed resolutions seeking reforms of the Patriot Act. These communities range from the conservative state of Montana to the progressive state of Hawaii; and from cities as large as New York to small towns like Elko, Nevada.³⁶⁶ Nevertheless, on March 9, 2006, after months of debate, Congress passed and President Bush signed a law reauthorizing several provisions of the Patriot Act that would otherwise have expired. Unfortunately, the reauthorization statute retains the vast majority of flaws of the original Patriot Act.³⁶⁷

We focus here on two surveillance provisions of the Patriot Act that, even after revisions were made, continue to seriously threaten free speech and privacy rights guaranteed by Article 17 and the U.S. Constitution.

³⁶³ Order Granting Plaintiffs' Motion for Summary Judgment, No. C 06-01698 WHA (N.D. Cal. filed Mar. 7, 2006), available at <http://www.aclunc.org/police/060525-order.pdf>.

³⁶⁴ Complaint, *Childs v. DeKalb County*, No. 1:05-cv-02463-JTC (N.D. Ga. filed Sept. 22, 2005), available at <http://www.aclu.org/FilesPDFs/aclu%20complaint%20in%20childs%20v.%20dekalb%20county.pdf>.

³⁶⁵ ACLU, *Report in Response to Request for Request for Information on Counter-Terrorism Measures Adopted by the United States Following the Events of September 11, 2001* 12-15 (Sept. 2, 2005) (submitted to the U.N. Human Rights Committee), available at <http://www.aclu.org/FilesPDFs/acluhrcsubmissionsept2.pdf>

³⁶⁶ For a full list of these resolutions, see <http://www.bordc.org/resources/Alphalist.pdf>.

³⁶⁷ USA Patriot Improvement and Reauthorization Act, PL 109-177, 120 Stat 192 (2006); Associated Press, *Bush signs Patriot Act renewal*, NEWSDAY, Mar. 10, 2006, at A25.

The first is Section 505, also known as the National Security Letter (NSL) provision, which authorizes the FBI to demand certain kinds of personal records from Internet Service Providers and other businesses without court approval, and which prevents or gags businesses from telling their clients or anyone else about the demand for records.

- Although there is no longer an indefinite gag imposed on NSL recipients, the ability of recipients to challenge the gag order is still extremely limited. The gag remains in place if a high-level political appointee simply certifies that national security or diplomatic relations would otherwise be harmed; courts must consider that certification “conclusive” unless there is “bad faith.” After the initial certification, recipients are not allowed to challenge the gag order again for a year. To illustrate the stark over breadth of the gag provision, Patriot Act gag orders prohibited two National Security Letter recipients – an organization that maintains library records and an Internet Service Provider – from participating in the recent debate over the Patriot Act.
- Even under the revised NSL provision, customers will never learn their personal records were turned over to the government unless the NSL recipient challenges the gag order and wins – an extremely unlikely outcome given the obstacles described above.
- Under the revised NSL provision, penalties are even more coercive and more punitive. Any employee – from the mail clerk to the CEO of a company – who intentionally discloses a demand for records can go to jail for 5 years for merely disclosing that he has received a demand for records.
- In the only significant improvement from the original, the revised NSL provision clarifies that any business that receives an order for records has the right to consult with a lawyer.

The second provision we discuss here is Section 215, a provision that authorizes the FBI to go to a secret court and get an order demanding records or “any tangible thing,” which could include anything from library and university records to medical files or even diaries in your home. Like the NSL provision, Section 215 orders gag recipients from telling anyone about the demand.

- The revisions to the gag provision under Section 215 are identical to those made to the NSL provision, and are equally flawed.
- Although the standard for authorizing Section 215 orders was improved slightly, it is still heavily stacked in favor of the government, requiring the government to assert only “reasonable grounds” to believe that the demand is relevant to a terrorism investigation.
- Although the revised Section 215 provision now authorizes businesses to challenge the orders, which is a slight improvement over the prior law, court review is little more than a rubberstamping process, as a court must uphold the Section 215 order unless it is “unlawful.” Recipients are also limited in their ability to challenge Section 215 orders because they are required to litigate in a secret court in Washington D.C., rather than in

courts in their home states, and can only retain counsel with security clearance. This final new provision was clearly designed to prevent recipients from retaining pro bono counsel at organizations like the ACLU.³⁶⁸

The ACLU will continue to pursue lawsuits challenging the constitutionality of Section 215 and the NSL provisions.

Section 505/NSL: We brought two challenges to NSLs, issued for Internet Service Providers' records and library records, respectively, the first in 2004 and the second in 2005, on grounds that they involved violations of the First and Fourth Amendments to the U.S. Constitution.³⁶⁹ The federal district court declared the NSL provision unconstitutional in our Internet records case.³⁷⁰ However, following changes to the provision made during Patriot Act reauthorization, the decision was vacated and remanded by the appeals court.³⁷¹ In our library records case, we won an order from the district court judge allowing our clients to publicly acknowledge receiving an NSL without fear of prosecution.³⁷² Though the government appealed the decision, they recently agreed to lift the gag and allow our clients, Library Connection, to speak.³⁷³ It is worth noting that according to news reports, the government issues over 30,000 NSLs a year.³⁷⁴

Section 215: Together with our Michigan Affiliate, we filed suit in July 2003 on behalf of 6 advocacy and community groups nationwide whose members believe they are targets of investigation based on their ethnicity, religion, and political association, challenging Section 215 on grounds that it violated plaintiffs' Constitutional First, Fourth and Fifth Amendment rights. The government moved to dismiss arguing we had no expectation of privacy in records turned over to third parties, but the judge has not yet ruled on the motion.³⁷⁵ Section 215 has been used 35 times, as at March 30, 2005.³⁷⁶

5. REAL ID Act

In addition to placing restrictions on federal courts' habeas review powers (discussed under Article 2 above), and on their ability to temporarily stay immigrants' deportation pending appeal of a negative determination, the REAL ID Act also has far reaching privacy implications that violate Article 17, Article 12 of the Universal Declaration of Human Rights which also provides a right to privacy, and the U.S. Constitution and privacy laws.

³⁶⁸ One additional provision in the Patriot Act reauthorization law bears noting: The new law adds additional death penalties to federal crimes linked to terrorism. USA Patriot Improvement and Reauthorization Act, Title II, 120 Stat. at 230-32.

³⁶⁹ *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004); *Doe v. Gonzales*, No. 3:05cv1256 (D. Conn. filed Aug. 9, 2005).

³⁷⁰ *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004)

³⁷¹ *Doe v. Gonzales*, Nos. 05-0570-CV, 05-4896-CV, 2006 WL 1409351 (2d. Cir. 2006).

³⁷² *Doe v. Gonzales*, 386 F.Supp.2d 66 (D. Conn. 2005).

³⁷³ Press Release, ACLU, Librarians Speak Out for First Time After Being Gagged by Patriot Act (May 30, 2006), available at <http://www.aclu.org/natsec/gen/25702prs20060530.html>.

³⁷⁴ Barton Gellman, *The FBI's Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A01.

³⁷⁵ *Muslim Community Association of Ann Arbor v. Ashcroft*, No. 03-72913 (E.D. Mich. filed July 30, 2003).

³⁷⁶ USA PATRIOT ACT: A Review for the Purpose of Reauthorization: Hearing Before House Committee on the Judiciary, 109th Cong. 34 (2005) (statement of Attorney General Alberto Gonzales), available at <http://judiciary.house.gov/media/pdfs/printers/109th/20390.pdf>.

The REAL ID Act requires states to overhaul their drivers' licenses by 2008 or have their citizens barred from using those licenses for federal purposes such as boarding airplanes. If implemented, this program would turn licenses into national identity cards and impose new burdens on taxpayers, citizens, immigrants and state governments. The Act was slipped through Congress in a "must-pass" Iraq War/Tsunami relief supplemental appropriations bill, without time for consideration of its sweeping implications.

The ACLU has launched a campaign to force the change or repeal of this Act, initially by raising awareness about the Act, and the nearly impossible and costly implementation requirements that fall on the states.³⁷⁷ States have expressed serious concerns in this regard. Most relevant here, in setting complex federal standards for all drivers' licenses, and compelling states to scan all passports and visas and share the massive database of information created, it does so *without* privacy protections. This collected information will include social security numbers, phone numbers, residence addresses, and in some cases, medical history (on vision, needed medication and more).³⁷⁸ Thus, sensitive personal information will be vulnerable not only to data brokers but to identity thieves.³⁷⁹

6. *Airline Profiling-Related Privacy Violations*

Even before 9/11, in cases of airport searches, customs agents apparently conducting routine "pat downs" have conducted needlessly invasive (and racially-targeted) searches. We filed suit in 2000 on behalf of Yvette Bradley, a young African-American advertising executive subjected to a humiliating physical search that was supposed to be nothing more than a routine "pat down."³⁸⁰ Statistics show that black women were 9 times more likely than white women to be x-rayed after being frisked or patted down, yet black women were less than half as likely to be found carrying contraband as white women.³⁸¹ Ms. Bradley was led to a room and instructed to place her hands on the wall while an office ran her hands and fingers over every area of her body including her breasts and all parts of her vagina. The search produced nothing. Although Customs officials publicly stated they were taking steps to end racial profiling, a federal trial court granted the Customs Service's request to dismiss the case in November 2001. A federal appeals court affirmed.³⁸²

H. **Freedom Of Thought, Conscience & Religion (Article 18)**

The First Amendment of the Constitution of the U.S. provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This provision is the single most important legal source in the U.S. governing human rights related to religion or

³⁷⁷ For more information, see www.reálnightmare.org.

³⁷⁸ Noah S. Leavitt, *The REAL ID Act: How it Violates U.S. Treaty Obligations, Insults International Law, Undermines Our Security, and Betrays Eleanor Roosevelt's Legacy*, FINDLAW, May 9, 2005, <http://writ.news.findlaw.com/leavitt/20050509.html>.

³⁷⁹ ACLU, *The Motor Vehicle Administrators Survey on Real ID – An ACLU Whitepaper* (2006), available at <http://www.reálnightmare.org/about/89/>; ACLU, *Real Burdens* (2005), available at <http://www.reálnightmare.org/about/3/>.

³⁸⁰ *Bradley v. United States*, 164 F.Supp.2d 437 (D.N.J. 2001).

³⁸¹ U.S. Gen. Accounting Office, *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results 2* (Mar. 2000), available at <http://www.gao.gov/new.items/gg00038.pdf>.

³⁸² *Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002).

belief. In addition, Article VI of the Constitution prohibits “religious tests” for public offices. Although not all provisions of the Constitution originally applied to all state institutions (federal, state, and local), all state entities must now comply with the Constitution’s requirements. U.S. courts play an active role in interpreting and applying the federal Constitution’s religion provisions, and the U.S. Supreme Court frequently makes decisions regarding them.

In addition, each of the 50 states has its own constitutional provisions regarding religion. In a general way the state constitutions provide similar protections to those of the federal Constitution, although some states have additional restrictions that prohibit the government from interfering with religion or promoting religion.

Although legal issues pertaining to religion are governed primarily by the federal Constitution, there are in addition several federal statutes that have been enacted that pertain directly to religion and religious freedom, particularly the federal “Religious Freedom Restoration Act of 1993” and the “Religious Land Use and Institutionalized Person Act.” Many states have adopted comparable laws.

The U.S. is becoming increasingly pluralistic with regard to religion. Throughout the country there is a wide variety of religious groups, including numerous Protestant denominations, Roman Catholic, Jewish, Orthodox Christian, Muslim, Mormon (Church of Jesus Christ of Latter-day Saints), Native American, Eastern, and many other types. For the most part, on a nationwide basis, there is a wide tolerance for a variety of religious practices. Although Christian Protestantism constitutes the largest religious tendency, in only two states (Rhode Island and Utah) does a single religious denomination constitute a majority. Nevertheless, in many local communities, single religious denominations frequently constitute a preponderant majority and in such communities the social life for believers in other religions and for non-believers can be very difficult.

Indeed, American society, which is predominantly religious, discriminates socially and politically against those who do not believe in religion. Although the laws do not on their face discriminate against non-believers, society does. For practical purposes, there are virtually no declared atheists or agnostics who hold high political office in the U.S. In only very rare instances would a candidate for a public office declare himself or herself to be a non-believer. Presidents and political officials frequently make statements suggesting that non-believers cannot be loyal and valued American citizens.

1. Discrimination In Favor Of Religion

On occasion, government resources in the United States are used to promote religious activity and to discriminate on the basis of religion. Although court decisions and government regulations officially prohibit the use of taxpayer funds for sectarian activity, state enforcement of these rules is often inadequate. As a result, tax dollars periodically have been used to underwrite religious indoctrination. In addition, the U.S. government is continuing a campaign to allow taxpayer funds to support religious discrimination in employment. President Bush’s “faith-based initiative” seeks to grant religious social service providers – who have long provided admirable and essential services to America’s communities – the ability to use

government funds to support discriminatory hiring practices. Under this policy, those working in taxpayer-funded social service programs could be denied jobs solely because of their faith.

2. *Traditional Practices Generally Allowed*

Nevertheless, traditional religious practices and ceremonies, including prayer, sermons, singing, mass, and meditation, are freely allowed to all religious groups and they provoke little or no controversy. Some unusual ceremonial practices that have evoked controversy include the use of (otherwise) illegal drugs (e.g. hoasca or peyote) and snake handling. In 2006, the U.S. Supreme Court held – in a decision that was overwhelmingly supported by religious and human rights groups in the U.S. – that the federal “Religious Freedom Restoration Act” permitted a particular religious group to use the ceremonial drug hoasca, even though the possession or use of the drug was otherwise prohibited by federal law. Although Native Americans generally have been permitted to worship on federal lands, they have not succeeded in preventing the use by others of federal lands that they believe to be sacred.

3. *Use Of Private or Public Land For Religious Practice*

There are many disputes in the U.S. regarding religions where individuals or sometimes communities oppose the use of private land for religious buildings. Although there are many different controversies that arise, the two most common are: first, community opposition because of the particular religious character of the group, and second, community opposition to new religious buildings because of their perceived interference with the character of the surrounding community. With regard to the first type, individuals and communities may oppose groups that are considered to be unusual or different, including particularly Muslims and Hare Krishnas. In some cases the opposition will be expressed in blatantly discriminatory fashion; in other cases the motivation behind the opposition will be hidden. For the second type, the opposition will focus on issues such as whether the new building is aesthetically consistent with other buildings and the effect of the new building on traffic and the parking of automobiles. It is very common for those who wish to establish new religious buildings to characterize opponents as discriminating against them on the basis of their religious beliefs, while the opponents themselves will argue that they are simply trying to preserve the character of the community. Such disputes are highly fact-intensive and very frequently highly emotional.

As one example, the ACLU of Georgia recently filed suit on behalf of the Tabernacle Community Baptist Church after the city of East Point denied a zoning permit necessary prior to establishing its house of worship. The town denied the permit on the basis of a city ordinance prohibiting churches from occupying structures that had previously been used for commercial purposes. Because the ordinance would allow a secular entity to purchase the building but not a religious group, the lawsuit charges that the ordinance violates the U.S. and Georgia Constitutions.³⁸³ The ACLU also said the ordinance violates the Religious Land Use and Institutionalized Persons Act of 2000, a federal statute that protects religious freedom in the land-use and prison contexts.

³⁸³ See Complaint, *Tabernacle Community Baptist Church v. City of East Point*(N.D. Ga. Filed Apr.19, 2006), available at <http://www.acluga.org/press.releases/0604/Complaint20060419.pdf>.

For practical purposes religious groups are permitted to use public parks and conduct public parades on the same terms and with the same limitations as other groups. Public officials can impose neutral “time, place, and manner” limitations on the use of public property, but they cannot make content- or ideology- based decisions to permit or exclude.

An issue that provokes a significant amount of controversy in many communities in the U.S. is the display of religious symbols and messages on public property. Some government officials, often working in conjunction with religious groups, will promote the use of government property for erecting “Ten Commandments” monuments or religious symbols, such as Christian crosses, crèches, and menorahs. Though the display of these religious messages on privately owned property (such as houses, churches, and synagogues) is permissible, controversies result when they are displayed on government property. In 2005, the U.S. Supreme Court handed down two decisions regarding Ten Commandments monuments on public property. In one, *McCreary v. ACLU et al.*, the Court said that the monument was impermissible because it was erected for the particular purpose of promoting religion; in the other, *Van Orden v. Perry*, the Court held that the monument had been in existence for a long time and was only one of many displays that referenced historical and culture traditions.

4. *Religion & Schools*

State schools (“public schools”) in the U.S. may not promote religion. School-sponsored prayer ceremonies, promoting religious beliefs, and school-sponsored Bible reading and similar activities are officially prohibited, although many schools in the U.S. – particularly in areas where a single religion predominates – continue to do so in spite of the law. The U.S. Constitution forbids sectarian religious education at public schools, though it is permissible to teach about religion. Through the federal “Equal Access Law” religious groups have been permitted to use state school facilities during non-school hours on an equal basis with other civic and educational groups. Thus if a school allows its buildings to be used after hours, it may neither favor a religious use of the facilities nor prohibit a religious use.

In state schools, children are permitted to wear religious garb, including headscarves, turbans, kirpans (with some restrictions), crosses, hands of Fatima, etc. In cases where school officials have attempted to restrict the right of students to wear such garb, the U.S. Department of Justice and human rights organizations typically intervene to protect the rights of students. There are more restrictions on the rights of teachers to wear religious garb, and the law is less clear. In any case, teachers are prohibited from proselytizing students.

The U.S. Constitution permits private religious schools to operate freely provided that they comply with minimum state educational standards. Although there is virtually no controversy in the U.S. regarding the right of such religious schools to operate, there is a significant controversy over the extent to which state funds can be used, directly or indirectly, to subsidize the operation of the private schools. The most recent decisions of the Supreme Court suggest that the state may provide funding in the form of “vouchers,” provided that the vouchers are distributed to the parents of children and that the parents then voluntarily choose to give the vouchers to the private religious schools. The movement in the law has been towards allowing such “indirect” forms of subsidies to religious schools.

5. *Discrimination Against Muslims*

The most serious infringement on religious freedom in the U.S. involves Muslims. Although U.S. laws on their face do not discriminate against Muslims and although Muslims have relative freedom to operate mosques and religious schools in the U.S., there are many social and law – enforcement constraints that disproportionately affect Muslims both individually and as a group. There are widespread and meritorious complaints by Muslims that they are disproportionately subjected to security screening at airports and at border crossings. Several Muslim charities have been closed down by the U.S. government on the grounds of preventing terrorism without the government having provided explanations or evidence for their actions. Through the use of secret evidence and non-transparent procedures, the Department of the Treasury and the Department of Justice have not only closed down Muslim charities, but they have done so in such a way as to intimidate Muslims generally about their right to give to charities and their possible criminal liability for inadvertent acts. There are recurring and meritorious allegations that law enforcement officials are disproportionately targeting Muslims in investigations and wiretapping. The accuracy of such allegations is generally difficult to prove because of the secretive nature of such investigations.

Muslims also are disproportionately incarcerated in clandestine prisons operated by the U.S. military and intelligence services, including most notoriously in Guantánamo Bay, Cuba, but also in undisclosed facilities elsewhere in the world. The refusal of U.S. officials to allow open inspections of these facilities, the refusal to disclose the names of many who are incarcerated, the denial of access to counsel, the failure to charge with a crime or release detained persons, the failure to provide a fair hearing to determine the accuracy of allegations, and the use of abusive procedures including torture, are clear and reprehensible violations of human rights by the U.S. government.

A new study has found that Arab Americans fear the intrusion of federal policies and practices even more than individual acts of hate or violence.³⁸⁴

6. *Most Acts Of Violence Target Muslims and Jews*

Acts of vandalism, violence, and discrimination often occur against people on the basis of their religion or ethnic identity, but the two principal groups most victimized by such acts are Muslims and Jews. It is extremely difficult to evaluate the motivations for such acts because of under-reporting (and perhaps sometimes over-reporting) of the incidents themselves, but also because it is not always clear whether the acts were prompted by youthful and indiscriminate vandalism or whether such acts specifically and maliciously targeted people because of their religious or ethnic identity. A Christian shop owner may attribute a break-in simply to a criminal, whereas a Jewish shop owner might attribute a comparable break-in to anti-Semitism. Nevertheless, while accurate statistics can be difficult to ascertain, there is a serious and apparently growing problem in the U.S. The U.S. Department of Justice (including the Federal Bureau of Investigation) as well as religious communities themselves attempt to collect statistics. In 2004, the FBI reported that of the approximately 9,500 hate crimes documented in the U.S. for the reporting year,

³⁸⁴ *Law Enforcement & Arab American Community Relations After September 11, 2001: Engagement in a Time of Uncertainty*, Vera Institute of Justice (June 2006).

approximately 54% of those attributed to a single bias were on the basis of race (particularly against Blacks). Approximately 17% of single-bias crimes were on the basis of religion, where 68% were committed against Jews and 13% against Muslims. The Anti-Defamation League reported in 2005 that the number of anti-Semitic incidents against Jews had reached a nine-year high. Statistics suggest that the number of hate crimes committed against Muslims rose dramatically following the incidents of 11 September 2001. The FBI reported that Anti-Islamic religion incidents increased by more than 1600 % over 2000 volumes, rising to a reported 481 incidents involving 554 victims in 2001.³⁸⁵

I. Freedom Of Expression & Right Of Peaceful Assembly (Articles 19 & 21)

“The holding of political opinions [may not be] used by public authorities as a reason to discriminate against a person, or even as a ground to restrict a person’s freedom.”³⁸⁶ Since 9/11, however, the U.S. government has used various vastly overbroad means and mechanisms to clamp down on free expression, and to chill associational rights.

1. Censorship At the Borders

As it did in the Cold War when it abused immigration laws to exclude prominent artists and intellectuals who were no danger to national security, the U.S. government is again denying visas to foreign scholars whose political views it disfavors. Using an “ideological exclusion” provision of the Patriot Act,³⁸⁷ the government is preventing U.S. citizens and residents from hearing speech protected by the First Amendment to the U.S. Constitution, and being fully informed about matters of academic and political importance. Together with groups representing academia, religion and literature, the ACLU filed suit on behalf of a Swiss scholar, Tariq Ramadan, widely regarded as a leading Muslim scholar.³⁸⁸ The government revoked Mr. Ramadan’s visa under the cited provision and prevented him from assuming a tenured teaching position at a well-known university. In March 2005, we also filed a Freedom of Information Act request seeking to learn more about the government’s use of the provision and the practice itself,³⁸⁹ and followed up in November 2005 with a lawsuit to enforce the request.³⁹⁰ In April 2006, the government responded that it had not decided Ramadan was inadmissible to the U.S. under that provision of the Patriot Act, but is nonetheless still keeping his visa application in limbo.

³⁸⁵ Federal Bureau of Investigation Uniform Crime Reporting Program, *Hate Crime Statistics* (2001), available at <http://www.fbi.gov/ucr/OIhate.pdf>

³⁸⁶ Commentary, General Comment 10(19), *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* at 234 (Geneva, 1997).

³⁸⁷ 8 U.S.C. § 1182(a)(3)(B)(i)(VII).

³⁸⁸ Complaint, *American Academy of Religion, et al. v. Chertoff and Rice*, No. 1:05CV00588 (S.D.N.Y. filed Jan. 25, 2006), available at <http://www.aclu.org/pdfs/complaint012506.pdf>

³⁸⁹ Letter from the ACLU to U.S. Dep’t of State, et al. (Mar. 16, 2005), available at <http://www.aclu.org/FilesPDFs/foia%20letter%20ideological%20exclusion.pdf>

³⁹⁰ Complaint, *ACLU v. Dep’t of State et al.*, No. 1:05cv9509 (S.D.N.Y. filed Nov. 10, 2005), available at http://www.aclu.org/images/general/asset_upload_file448_21800.pdf

2. *Criminalization Of Dissent*

As also discussed above, the U.S. government has become focused on gathering intelligence information that is not connected to specific criminal activity, which runs the risk of – and has – chilled lawful dissent.

Since September 11, the FBI has increased authority to monitor political events and political activity. The FBI has authorized the creation of a national Joint Terrorism Task Force (JTTF) as well as over 100 state and local JTTFs to work full-time with them to collect information about what has turned out to be non-terrorist activity. The JTTFs are made up of state and local law enforcement officers working with officers of the FBI and the Bureau of Immigration and Customs Enforcement.

ACLU Freedom of Information Act requests filed in 20 states on behalf of over 150 organizations and individuals produced documents that revealed monitoring and infiltration by the FBI and local law enforcement of political, animal rights, environmental, anti-war and faith-based groups. Thus, in the name of terrorism, the FBI labels peaceful protest groups potential “terrorists,” uses confidential informants to infiltrate political and protest groups, and monitors advocacy groups’ activities, unjustifiably treating constitutionally-protected dissent as though it were terrorism.³⁹¹

One document revealed that the FBI was particularly interested in Food Not Bombs, which opposes the government’s prioritization of war and military programs over social programs.³⁹² Food Not Bombs provides free vegetarian meals twice weekly in Denver, Colorado’s public parks. The JTTFs also sent police officers in SWAT gear to the home of a young Denver activist and demanded to know if she planned to commit crimes at the forthcoming Republican and Democratic Conventions.³⁹³ These are hardly examples of legitimate investigation of reasonably suspected criminal activity.

3. *Restrictive Interpretation Of Freedom Of Information Act Requests*

As explained in Article 14 above, the Freedom of Information Act (FOIA) was passed nearly 40 years ago to give the American people a statutory right to access information freely about their government.

Before FOIA was enacted, the burden was on individual citizens to establish a right to examine these records. With the passage of FOIA, the burden of persuasion shifted from the individual to the government. Federal agencies were required to disclose any documents that had been requested unless they fell within nine limited statutory exemptions.³⁹⁴ Furthermore, any decision

³⁹¹ See generally ACLU, *The Government is Spying On Us*, <http://www.aclu.org/spyfiles/index122305.html>

³⁹² Press Release, ACLU of Colorado, *New documents confirm: FBI’s Joint Terrorism Task Force targets peaceful activists for harassment, political surveillance* (May 18, 2005), available at http://www.aclu-co.org/news/pressrelease/release_JTTF051805.htm

³⁹³ *Id.*

³⁹⁴ 5 U.S.C. Section 552(b).

to withhold a document could be challenged in federal court.³⁹⁵ Over the years, FOIA has been increasingly used as a tool to ensure government accountability.

The U.S. government has, recently, taken a highly restrictive interpretation of FOIA. On October 12, 2001, former Attorney General John Ashcroft sent a memorandum to the heads of all federal departments and agencies setting out a new policy on FOIA requests.³⁹⁶ The policy announced in that memorandum encourages the presumptive refusal of requests, through a restrictive interpretation of FOIA.

Most significantly, the memorandum changes the standard under which the government will defend an agency's refusal to produce information pursuant to a FOIA request, whenever that denial is challenged in court. Previously, the Department of Justice would only defend an agency's refusal to release information when it could be argued that releasing the information would result in "foreseeable harm." Under the new standard, however, the Justice Department will defend an agency's refusal to comply with a FOIA request so long as the decision rested on a "sound legal basis," a much lower standard.

Furthermore, the memorandum actively encourages federal agencies to fully consider all potential reasons for non-disclosure in making decisions under FOIA. Although acknowledging the importance of government accountability, the memorandum emphasizes that the government is equally concerned by other factors, including national security considerations, effective law enforcement, and the protection of sensitive business information. One of the most troubling aspects of the new FOIA policy, however, is that it covers all government information, most of which has absolutely no connection to national security or law enforcement. By encouraging agencies to "consider the value" of keeping agency communications confidential and ensuring that in virtually all circumstances the government would oppose claims made by individual citizens, then-Attorney General Ashcroft effectively reversed FOIA's presumption that citizens have a right to access government information. He established a policy by which government information will presumptively remain secret, setting the clock back nearly 40 years.³⁹⁷

Two areas of FOIA inquiry have been completely stalled by the government: those concerning the government's unlawful rendition of detainees to countries known to use torture, and those concerning FBI surveillance of Muslim and Arab Americans, including interrogating them concerning their beliefs, practices, associations and political views, which have been taking place at their homes, offices and even their mosques.³⁹⁸ We requested documents that would shed light on the rendition program and the treatment of detainees in CIA custody and control in

³⁹⁵ As a result of FOIA, every federal agency now has a designated FOIA officer to respond to the public's right to access information.

³⁹⁶ Memorandum from John Ashcroft, U.S. Attorney General, to Heads of All Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.usdoj.gov/04foia/011012.htm>

³⁹⁷ Human Rights First, *US Law & Security, A Year of Loss* (Sept. 2005), available at http://www.humanrightsfirst.org/us_law/loss/loss_ch1.htm

³⁹⁸ Complaint, *ACLU of Northern California v. DOJ and FBI*, No. 3:04cv04447(N.D. Cal. filed Oct. 21, 2004), available at <http://www.aclunc.org/911/041021-foia.pdf>

October 2003, and then followed by litigation.³⁹⁹ To date, the CIA has yet to release documents on these issues, claiming a blanket exemption from production of such documents on national security grounds. This secrecy surrounding the CIA's practices makes it difficult to determine who is currently being held at "black sites" though reports suggest there are at least 100 people at these sites.⁴⁰⁰

J. Freedom Of Association (Article 22, & Articles 17, 18 and 19)

1. Government Practices Chill Association Of Arabs, Muslims and South Asians

Article 22 declares that "Everyone shall have the right to freedom of association with others ... " Yet, because of the U.S. government's overbroad and unlawful monitoring and surveillance policies, and infiltration of groups without any suspicion of criminal activity, particularly of Muslims, Arabs and South Asians, these groups are now fearful of congregating. Some of their members have been inexplicably deported from their midst. One story is illustrative here.

Nazih Hasan is the President of the Muslim Community Association of Ann Arbor (MCA), a non-profit, membership-based organization that serves the religious and educational needs of Muslims in and around Ann Arbor, Michigan.⁴⁰¹ He is a lawful permanent resident of the U.S. Because of the relationship between MCA, its members and leaders, and persons and organizations investigated, questioned, detained, or arrested since September 11th, they believe that the FBI and the National Security Agency are using expanded surveillance powers to wiretap and obtain records about MCA members. The mosque leadership has been quite vocal in its criticism of the wide net that has been cast over the Muslim community and is concerned that their political activities are likely to result in MCA members becoming the focus of additional investigations when they have done nothing wrong and have merely spoken out when they have disagreed with government actions.

For example, MCA members formed the Free Rabih Haddad committee. Rabih Haddad was an active member of MCA and a volunteer teacher at MCA's Michigan Islamic Academy. In December 2001, Mr. Haddad was arrested on immigration charges. Though never accused of threatening or harming anyone, Mr. Haddad was denied bond and held in solitary confinement for months with almost no access to his family or the outside world. Mr. Haddad was ultimately imprisoned for approximately 19 months and deported to Lebanon in July 2003. He was never charged with any crime. MCA's files include the names of the members involved in the Free Rabih Haddad Committee, as well as many others. That information includes telephone numbers, e-mails, home and business addresses and national origin and citizenship status, which if released would greatly compromise their privacy and free speech rights. Their ability to keep these records confidential allows MCA members and students to be protected from the

³⁹⁹ Letter from ACLU to Freedom of Information Officer (Oct. 7, 2003), *available at* <http://www.aclu.org/torturefoia/legaldocuments/nnACLUFOIArequest.pdf>; Amended Complaint, *ACLU, et al. v. Dep't of Defense et al.*, No. 04-CV-4151 (S.D.N.Y. filed July 6, 2004), *available at* <http://www.aclu.org/torturefoia/legaldocuments/hhACLUAmendedComplaint.pdf>

⁴⁰⁰ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>

⁴⁰¹ This and the following facts are excerpted from the Statement of Nazih Hassan, President, Muslim Community Association of Ann Arbor in *Muslim Community Association of Ann Arbor et al. v. John Ashcroft and Robert Mueller* (July 30, 2003), *available at* <http://www.aclu.org/safefree/general/16819prs20030730.html>

possibility that the government will target them for exercising their First Amendment rights, including their right to free association, free speech and freedom of religion.

When conducting counter-terrorism and counter-intelligence investigations, the Department of Justice operates under guidelines approved by the Attorney General. The purpose of investigative guidelines is to ensure that intrusive investigative techniques are used to monitor terrorists, spies, and foreign agents, not political or religious organizations engaged in lawful dissent. These guidelines recognize that such techniques, which are left largely unregulated by the Fourth Amendment, pose a risk to First Amendment freedom of association.

As we have shown, these guidelines have recently been weakened with respect to domestic terrorism investigations, permitting greater surveillance of lawful groups rather than terrorism organizations. Major parts of guidelines for foreign intelligence and terrorism investigations remain classified, so it is impossible to judge whether they achieve their stated purposes.

The Supreme Court has recognized a “vital relationship between freedom to associate and privacy in one’s associations.”⁴⁰² Where individuals participate in unpopular political or religious organizations, members of those organizations fear – often with good reason – “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *Id.* Routine, intrusive government investigations of lawful, but unpopular, political organizations would clearly pose a serious risk to the First Amendment because their members would fear that such information, if leaked, could be used against them.

K. Rights Of the Child (Article 24 (& Articles 2 & 26: Non-Discrimination In the Enjoyment Of Rights))

“Every child shall have without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor ...”⁴⁰³ This right is an individual right *in addition* to a child’s rights to all the civil rights enunciated in the Covenant. Yet, the most vulnerable children are provided unequal education based on race and juvenile detention centers are warehouses of problem children rather than centers of rehabilitation.

1. Juvenile Detention

Juvenile detention centers in states across the country are rife with issues including minority overrepresentation, inadequate attention to the unique issues of girls in detention, safety, mental health programming, and rehabilitation services. Young offenders deserve a fair chance to put their lives back on positive tracks. For this to be possible, juvenile detention facilities must be converted from warehouses of problem children to centers of genuine rehabilitation.

a. Disproportionate Minority Confinement In Massachusetts

In 1988, Congress amended the Juvenile Justice & Delinquency Prevention Act of 1974 to require that states address the disproportionate representation of minority youth in their juvenile

⁴⁰² *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

⁴⁰³ ICCPR art. 24, ¶ 1.

justice systems.⁴⁰⁴ Yet, the Commonwealth of Massachusetts has not taken any steps to reduce the overrepresentation of youth of color in its pre-trial detention facilities. In 1993, youth of color represented approximately 17% of the Commonwealth's juvenile population, 29% of youth arrested, 59% of youth arraigned, and 57% of juveniles committed to secure facilities.⁴⁰⁵ In 2002, youth of color represented 23% of the juvenile population, 25% of youth arrested and 63% of juveniles committed to secure facilities (arraignment statistics were not available).⁴⁰⁶ In addition, these facilities are overcrowded and children are not provided with necessary services. In 2003, the ACLU investigated the overrepresentation issues and issued a report making recommendations for improvement, and although the state did acknowledge that youth of color are overrepresented at almost every stage of its juvenile justice system, it has yet to adequately identify the scope of the problem or to determine its causes.

b. *Girls In New York Juvenile Detention Facilities*

During the past decade, juvenile justice systems throughout the country saw an increase in the numbers of girls being detained.⁴⁰⁷ Although they represented only 19% of detained youth in 2001, more girls are entering detention and have significant needs that differ in both degree and kind from those of the boys for whom detention systems have historically been designed.⁴⁰⁸ There is also evidence that the process differs for boys and girls resulting in the inappropriate detention of girls.⁴⁰⁹

These national trends are studied at a local level in a forthcoming report by the ACLU and Human Rights Watch. The report documents rights violations suffered by girls confined in New York's juvenile prisons.⁴¹⁰ In New York, incarcerated girls report excessive use of physical force by staff in response to minor rules violations, often resulting in injuries to girls.⁴¹¹ We have also received reports of sexual contact by staff, sexual profanity, and the observation of girls in a state of undress by male staff. Verbal and other psychological abuse also takes place. Incarcerated girls report excessive security measures such as frequent strip searches and the gratuitous use of mechanical restraints during transport. Girls recount how facilities staff sometimes disclose medical and other private information to other residents. Discrimination and harassment against lesbian and gender nonconforming girls also takes place. Physical and

⁴⁰⁴ Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. 93-415, 42 U.S.C. 5601 *et seq.*), as amended (1992), § 223(a)(23).

⁴⁰⁵ ACLU, *Disproportionate Minority Confinement in Massachusetts, Failures in Assessing and Addressing the Overrepresentation of Minorities in the Juvenile Justice System 1* (May 2003), available at http://www.aclu.org/FilesPDFs/dmc_report.pdf

⁴⁰⁶ *Id.*

⁴⁰⁷ Francine T. Sherman, *Pathways to Juvenile Detention Reform, Detention Reform and Girls, Challenges & Solutions 10-15* (2005) available at http://lists.aecf.org/publications/data/jdai_pathways_girls.pdf

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ ACLU & Human Rights Watch, *Conditions of Confinement for Girls in New York State* (working title) (forthcoming).

⁴¹¹ Human Rights Watch has received these accounts from letters from incarcerated girls, in-person interviews with formerly confined girls, and agency documents over the course of approximately seven months of research.

mental health care provided to confined girls is sometimes inadequate.⁴¹² Education and vocational training are haphazard and in some respects inferior to that offered to boys.⁴¹³

c. New Mexico Overhaul Of State Juvenile Justice System

The ACLU of New Mexico and the San Francisco-based Youth Law Center settled a lawsuit against the New Mexico Children Youth and Families Department (CYFD) in February 2006 that arose out of the need for sweeping improvements in security, mental health programming, and rehabilitation services in juvenile detention facilities across the state. The settlement will affect over 500 youth who are now on probation or housed in juvenile facilities run by CYFD. Additionally, it calls for improved security in all CYFD facilities including the installation of security cameras, increased ratios of staff to youth in all living units, and elimination of the practice of isolating youth from programs and the general population as a means of ensuring safety. The settlement further mandates the closure of a troubled New Mexico boy's facility and transfer of the 107 youth housed there to other facilities.

CYFD also plans to develop comprehensive behavioral health screenings and treatment programs for facility-based and community-based behavioral health services adequately staffed by psychiatrists and other mental health professionals. In addition, the settlement requires that female youth be granted comparable access to services and programs as male youth and the creation of procedures to ensure that youth are located in the most appropriate settings in CYFD facilities. The creation of an office that will independently monitor the compliance with CYFD policies and investigate all serious internal grievances will also be established. Going forward, CYFD will try to place children in facilities that allow them to keep in touch with their families and communities while providing behavioral health services and other programming in the least restrictive setting possible.

2. Education

a. "School To Prison Pipeline:" South Dakota

The "school to prison pipeline," a disturbing national trend gaining increased momentum in recent years, presents one of the most significant barriers to ensuring educational equality and opportunity to children of color today. This "pipeline" refers to the increasingly widespread practice of funneling children, primarily children of color, out of public schools and into the juvenile and criminal justice systems. Children caught in the pipeline tend to be those who already are the most vulnerable, including children with learning disabilities or histories of poverty, abuse or neglect. Rather than addressing the needs of these children through additional educational services, their issues are responded to through isolation and punishment. Several policy trends in the public education and juvenile justice systems are responsible for this nationwide epidemic.

⁴¹² For example, girls report that their reports of physical illness are sometimes ignored, or the response delayed, and that staff is sometimes reluctant to permit girls to consult outside service providers for persistent health problems. Outside mental health care providers and delinquency attorneys confirm that girls do not receive adequate care.

⁴¹³ For example, classes comprise girls of varying educational levels, girls are frequently educationally under challenged, and vocational programs offered to girls are limited to cooking, hairdressing, and clerical work.

First, the trend toward “zero-tolerance” policies criminalizing minor instances of school misconduct plays a vital role in pushing our children out of public schools. These zero-tolerance policies result in children being suspended, expelled, and too often arrested for relatively minor disciplinary infractions such as schoolyard fights or temper tantrums. School misconduct today is increasingly handled today through resort to the police, rather than through parents, teachers and school administrators. The application of discipline is often racially discriminatory, with minority students being disciplined and referred to the juvenile justice system at significantly higher rates than their white peers. Too often, these children are arrested and sent directly to juvenile detention facilities for school code violations, or in other cases, sent to “alternative” schools for children with behavioral problems.

Second, schools increasingly ignore and bypass due process protections for children, particularly those with special needs and learning disabilities, in expelling these children from public schools and placing them in alternative schools and detention facilities. Children often receive deficient legal representation, or none at all, to aid them in challenging charges resulting from school code violations. Many of the alternative schools or juvenile detention facilities in which they serve sentences provide few, if any, educational services.

Third, various policy initiatives, including the federal No Child Left Behind Act (NCLB), place an undue emphasis on ‘high stakes testing’, creating incentives for schools to push out low performing students in order to boost their overall test scores and avoid facing federal penalties. In an attempt to avoid NCLB Act-related penalties, some school districts fail to report graduation rates that accurately account for students who dropped out or were channeled into the juvenile justice system. These practices distort the reality that large numbers of minority children are being undereducated and displaced from the public education system.

In rural South Dakota, which has a significant Native American population, the ACLU has spent the past several years documenting and advocating on behalf of Native American children caught in the school to prison pipeline. The school district in the town of Winner, where approximately one-fifth of the student body is Native American, exemplifies many of the most damaging national trends.⁴¹⁴ The middle and high schools there disproportionately punish Native American students for alleged misconduct. Native American students are three times more likely than Caucasian students to be suspended and more than ten times more likely to be arrested for school misconduct. A disturbing proportion of these children have learning disabilities, sometimes severe. During any given school year, more than one third of the Native American students will be suspended, and roughly one in every seven Native children will be arrested for violating a school disciplinary rule. Native children who defend themselves against racial harassment by Caucasian children are routinely arrested. They are referred to law enforcement officials for drawing Native American symbols in their notebooks. Children as young as 11, including those with cognitive disabilities, are arrested for pulling a fire alarm.

Rather than addressing school misconduct through internal channels, school administrators rely on law enforcement to handle these incidents. Further, school administrators effectively act as

⁴¹⁴ During the 2003-04 school year, Native American students constituted 23.2% of the population of the Winner school district, 21.9% the prior year, and 22.4% the year before that. *See* Letter from ACLU to Angela M. Bennett, Regional Director, Office of Civil Rights, U.S. Dep’t of Educ. at 3 n.11, 12 (June 23, 2005) (hereinafter “Admin. Compl.”).

agents of law enforcement, coercing confessions from children, determining which child shall be arrested and which charges shall be filed against the child, and assisting in the prosecution of the child in juvenile or criminal court.

This disparate discipline of Native American students, including those with disabilities, is in violation of the Covenant, the Fourteenth Amendment to the U.S. Constitution, Title VI of the Civil Rights Act of 1964, Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. In effect, it deprives Native American students of equal access to education benefits and opportunities by maintaining an educational environment hostile to Native Americans.

In an unrelated case also filed by the ACLU, a federal trial court acknowledged the discrimination in the area, concluding “there is a long and extensive history of discrimination against Indians” in the region and “[t]he effects of this history are ongoing” including in Winner schools.⁴¹⁵

Not dealing with these problems in Winner encourages other school districts to engage in the same illegal activities with the same impunity. It makes the federal government complicit in creating an underclass from which Native Americans will never emerge. Less than 2/3 of Native Americans aged 18-24 have graduated from high school, and less than 1 in 10 Native Americans over the age of 25 have completed 4 years of college.⁴¹⁶ They score lower than any other group in basic levels of reading, math and history and account for 3% of all dropouts nationwide despite accounting for only 1% of students.⁴¹⁷

Despite efforts dating to the mid-1990’s, neither the ACLU nor the Tribe itself has made any real progress pursuing administrative remedies with the U.S. Department of Education or working with the school district to address these problems. Consequently, we filed a lawsuit in federal court to remedy the schools’ policy of coercing confessions from students to be used in their prosecution in juvenile and criminal court, violating the federal Constitutional rights against self-incrimination and to be free from arbitrary and abusive government practices.⁴¹⁸ The suit also seeks to eliminate the discriminatory discipline of Native American students and the racially hostile environment in the schools.

L. Right To Vote & Political Participation (Article 25)

The U.S. maintains in its Report that “[t]he U.S. political system is open to all adult citizens without distinction as to gender, race, color, ethnicity, wealth or property.”⁴¹⁹ While the government professes to equally enforce all laws, the hollowness of this claim becomes readily apparent when one reflects upon the millions of voters who continue to be disfranchised in large part because of their race, ethnicity or economic condition. The elections of 2000 and 2004

⁴¹⁵ *Shirt v. Hazeltine*, 336 F. Supp.2d 976, ¶¶ 1029-30, 1034 (D.S.D. 2004).

⁴¹⁶ U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 8-9 (July 2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>

⁴¹⁷ *Id.* at 86.

⁴¹⁸ Complaint, *Antoine et al., v. Winner School District 59-2 et al.*, available at 222.aclu.org/racialjustice/edu/2477211g120060328.html.

⁴¹⁹ U.S. Report, ¶ 397.

exposed to the international community the inherent flaws in the U.S.' electoral system. The U.S. has repeatedly failed to protect the voting rights of marginalized communities and has turned a blind eye to state actions that make it more difficult for people to participate in the political process. The U.S. markets itself as a model democratic society, yet the benefits of democracy continue to elude millions of Americans. While there is much that the U.S. can do to improve its election process, we highlight here three major areas that deserve the Committee's special attention.

1. *Felony Disfranchisement*

There are 5.3 million people in the U.S. who are prohibited from voting because of a felony conviction. In its Report, the U.S. asserts that several states have enacted policy changes that lower barriers to voting for ex-felons. However, the U.S. fails to mention that, despite these policy changes, 48 states still bar individuals with a felony record from voting either in prison or while under community supervision such as parole and probation. In fact, Virginia and Kentucky – two of the states that the U.S. favorably mentions – and Florida, disfranchise ex-felons for life regardless of the nature of their crime or the fact that they have completed all of the terms and conditions of their sentence. In Florida alone, an estimated 600,000 people with past felony convictions were unable to vote in the 2000 and 2004 presidential elections.

The U.S. government's policies are far out of step with those of other democracies. Almost half of European countries allow *all* incarcerated people to vote while others disqualify only a small number of prisoners from the polls. (Almost all of the countries that disqualify all inmates are in Eastern Europe.) In most countries where disfranchisement does exist, the policy is both more narrowly targeted and more visible in its application than in the U.S. Much treaty and customary international law supports either the abolition of criminal disfranchisement law, or considerably narrower restrictions than those employed by most American states. All non-U.S. constitutional courts that have evaluated disfranchisement law have found the automatic, blanket disqualification of prisoners to violate basic democratic principles. In countries where courts have called for enfranchisement of inmates, the legislative and executive branches have complied without significant resistance. Where prisoners are allowed to vote, they do so either in the correctional facilities themselves – with no threat to security – or by some version of absentee ballot, in their town of previous residence, in all cases with government entities facilitating the voting. In no country do prisoners vote in a manner that allows them to shape the politics of the prison locality.⁴²⁰

The U.S. Supreme Court has held that “the exclusion of felons from the vote has an affirmative sanction in [Section 2] of the Fourteenth Amendment.”⁴²¹ Although felon disfranchisement laws disparately impact African-Americans and Latinos, courts have frequently rejected claims based on racial discrimination and equal protection.⁴²²

⁴²⁰ ACLU, *Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and other Democracies* (May 2006) (prepared by Laleh Ispahani), available at <http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>

⁴²¹ *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, § 2671 (1974).

⁴²² See e.g. *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996); *NAACP v. Harvey*, 381 N.J. Super. 155, 885 A.2d 445 (N.J. Super. Ct. App. Div. 2005).

Each state has created its own system for restoring voting rights to ex-offenders, but most of these restoration processes are cumbersome and leave too much discretion in the hands of state administrators.⁴²³ For example, the Governor of Kentucky requires applicants to submit a written statement explaining why they want to regain their voting rights and three letters of reference. In Florida, applicants are asked questions about their personal lives and their habits, such as whether they drink alcohol. It is completely inappropriate for states to base their decision on whether to restore a person's voting rights on character tests.

Furthermore, the ACLU and other organizations have surveyed county election officials in several states and found that a significant number of those officials do not know or understand their own state's process for restoring voting rights. Thus, even in states where a person with a prior felony conviction automatically regains their right to vote, the ignorance of election officials is causing the unlawful denial of voting rights to millions of people. For greater detail on this point, please see the report to the Committee of the Lawyers Committee for Civil Rights Under Law, Global Rights and The Sentencing Project of May 31, 2006.

2. *Renewal Of the National Voting Rights Act*

Congress enacted the Voting Rights Act (VRA) in 1965 to prohibit discrimination in voting.⁴²⁴ The Act contains permanent provisions that apply nationwide, and temporary provisions that only affect certain jurisdictions. One of the temporary provisions is Section 5, which requires the covered jurisdictions to seek federal clearance before implementing any changes in voting practices or procedures. Since 1982, when Congress last renewed and amended the Act, the Department of Justice has objected to more than 1,000 proposed state and local voting changes.⁴²⁵ The VRA has also helped to increase minority voter registration and office holding.⁴²⁶ Thus, the VRA has been instrumental in protecting the voting rights of millions of people.

Legislation has been introduced – HR 9 and S 2703 – in Congress to renew the expiring provisions of the VRA and strengthen the Act to make the law more consistent with Congressional intent. This legislation enjoys broad bi-partisan support and should be passed without any weakening amendments and signed into law by the President. There are signs that the Department of Justice has already started decreasing its own enforcement of Section 5. Published articles have reported that high ranking officials in the U.S. Department of Justice have been rejecting the recommendations of career civil rights attorneys and analysts,

⁴²³ See The Sentencing Project, *Barred for Life: Voting Rights Restoration in Permanent Disfranchisement States* (Feb. 2005) (prepared by Marc Mauer and Tushar Kansal), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>

⁴²⁴ 42 U.S.C. § 1973, *et seq.*

⁴²⁵ McDonald and Levitas, *The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union* (Mar. 2006), available at <http://www.votingrights.org/resources/downloads/ACLU%20Voting%20Report%20Final.pdf>

⁴²⁶ The current racial make-up of Congress is as follows: <1% American Indian; 1% Asian; <1% Asian Indian; 5% Hispanic; 8% African American; and 86% Caucasian. See Congressional Directory, *Demographics by Ethnicity* (2006), available at <http://www.congress.org/congressorg/directory/demographics.tt?catid=ethnic>

consequently approving voting changes in cases where the adverse impact of such changes on minorities is clear.⁴²⁷

3. *Restrictions On Voter Access*

Congress has delegated to the states and local governments the responsibility for administering federal and state elections. However, in an attempt to make the voting process more efficient, effective, and inclusive, Congress passed both the National Voter Registration Act (NVRA) in 1993,⁴²⁸ and the Help America Vote Act in 2002.⁴²⁹

The NVRA requires most states to keep their voter registration lists accurate and current, and provides citizens with alternate means of registering to vote. Unfortunately, several states have blatantly ignored some of the most basic NVRA requirements, and the NVRA remains under enforced. In addition, several states such as Alabama, Colorado, Georgia, Montana, North Dakota, South Dakota, and Tennessee have actually become more stringent in their voting requirements. In 2005, for example, the Georgia legislature passed the most restrictive voter identification bill in the nation. The bill required that, to vote in person, a voter would have to present one of six government-issued photo identifications at the polls, and it prohibited the use of previously acceptable forms of identification such as bank statements and utility bills. The bill did not apply to people who vote through absentee ballots. People who did not have the required forms of ID – especially minorities, the elderly, the disabled, and the poor – would have to purchase one for \$25. Although the bill’s proponents argued that such a law would preserve the integrity of the voting process, Georgia had already made voter fraud a crime and there was no evidence of fraudulent in person voting.

The ACLU, in coalition with other organizations, legally challenged the photo ID law and, on October 18, 2005, a federal court enjoined its use on the grounds that it mostly likely violated equal protection laws and illegally required people to pay a fee before being able to vote.⁴³⁰ Undeterred, the Georgia legislature passed a new photo ID bill, but the new version is also seriously flawed.⁴³¹ Congress passed the NVRA to increase voter access to the ballot, and states’ passage of restrictive voter identification laws runs counter to the intent of the NVRA.

Congress enacted HAVA in response to many of the problems highlighted during the 2000 election. Through HAVA the federal government has (1) created a clearinghouse for election administration information, (2) funded state projects aimed at improving election administration and replacing outdated voting systems, and (3) developed minimum standards for states to follow in several key areas of election administration. Although well-intentioned, HAVA has done little to resolve the problems associated with state election systems and, in some cases, has actually created more difficulties. States have had four years in which to comply with HAVA, but most still have inaccurate statewide voter registration databases, are improperly purging people from

⁴²⁷ Dan Eggen, *Politics Alleged in Voting Cases*, WASH. POST, Jan. 23, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/22/AR2006012200984.html>

⁴²⁸ 42 U.S.C. § 1973gg, *et seq.* (1993).

⁴²⁹ Pub. L. No. 107-252, 116 Stat. 1666 (2002).

⁴³⁰ *Common Cause/Georgia v. Billups*, Civ. No. 4:05-CV-0201-HLM (N.D. Ga. filed Sept. 19, 2005).

⁴³¹ The federal court in *Common Cause/Georgia v. Billups* is reviewing the challenges to the new revised bill as part of the ongoing lawsuit.

the voter rolls, and their voting equipment remains unreliable. Furthermore, HAVA allows states to use their discretion when deciding the means by which to implement many of the Act's provisions even though several states have said that some of the areas of implementation remain ambiguous or vague.

The ACLU further notes that Congress has made no attempt to expand the right to vote in presidential elections to American territories such as Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. In addition, Congress has taken no steps to provide the District of Columbia with a voting delegate in the House of Representatives or for representation in the Senate.

4. *The Election Of State Court Judges*

According to a report that the American Judicature Society prepared, there are 8 states that have partisan elections; 13 states that have non-partisan elections; 17 states that have appointment with retention elections; and 12 states that have appointment with no reelection.⁴³²

M. **Equality Before the Law (Article 26)**⁴³³

Article 26's non-discrimination principle is not limited to the rights provided for in the Covenant, and concerns discrimination that persists in law *and* fact arising out of the practices of public or private actors.⁴³⁴ This principle of equality may require states parties to take *affirmative* action to diminish or eliminate conditions, which cause or help perpetuate discrimination.⁴³⁵ As evidenced by the images that flashed across the world in the wake of Hurricane Katrina, African-American communities and other communities of color across Louisiana and Mississippi not only bore the brunt of some of the worst physical damage from the hurricane, but continue to receive fewer resources in the short-term relief and long term rebuilding efforts, even as compared to similarly situated (i.e., comparably damaged) higher income white communities. Many victims were not provided with basic human rights such as adequate shelter, medical care, food and clean water in the storm's aftermath. The disparate treatment of minorities is also evidenced by the persistence of racial profiling, a practice law enforcement officials use to target individuals for suspicion of crime based on race, ethnicity, religion or national origin. While profiling practices were traditionally aimed primarily at blacks, but also at other minorities, after the tragic events of September 11, the focus on Arabs, Muslims and South Asians has intensified. Selective prosecution of the drug laws and the use of

⁴³² American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (Jan. 2004), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf>; Larry Berkson, *Judicial Selection in the United States: a special report*, available at http://www.ajs.org/js/berkson_2005.pdf; See generally http://www.ajs.org/selection/sel_stateselect.asp.

⁴³³ The ACLU has a very active Lesbian, Gay, Bisexual, Transgender Project, and although that project's work is not included within this shadow report, we refer you to the ACLU website to learn the full range of their work, which includes relationships, parenting, schools & youth, discrimination, transgender issues, criminal justice, free speech and marriage, at <http://www.aclu.org/lgbt/index.html>. We note that a group of U.S. NGOs has submitted a shadow report on some LGBT issues to the Committee.

⁴³⁴ U.N. Human Rights Committee, *General Comment No. 18: Non-Discrimination* ¶¶ 9, 12 (Oct. 11, 1989), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

⁴³⁵ *Id.* ¶ 10.

mandatory minimum sentences in sentencing also persist in many parts of the U.S., and their brunt disproportionately continues to be borne by minorities.

1. *Hurricane Katrina*

Hurricane Katrina and the floods that followed destroyed lives, families and homes. The official death toll neared 1,333 with 3,200 still unaccounted for.⁴³⁶ Half a million have been displaced. Hundreds of thousands of homes were destroyed. The crisis was exacerbated by a severe lack of communication between government and community, which in turn led to weeks of chaos as families struggled to identify basic necessities such as food, shelter, water, ice and fuel. Children's education was also seriously affected. The people 'left behind' in the evacuation – and now, reconstruction – of New Orleans and the Gulf Coast after Katrina are the same people left behind in the rebuilding of New Orleans – the poor, the sick, the elderly, the disabled and children, mostly African-American. The ACLU has been investigating the failure of the U.S. government to meet its humanitarian and human rights obligations to the victims of Hurricane Katrina. Working closely with the ACLU of Mississippi and the ACLU of Louisiana, the ACLU has conducted fact-finding trips to the affected areas and is now developing know-your-rights materials and related advocacy on criminal justice issues, information for displaced families, education issues, privacy issues, and workers' rights.

a. *Unequal Distribution Of Relief Services*

Just days after the storm washed ashore, donated food, clothing and cleaning supplies began to amass in parking lots of affluent, white neighborhoods. It took weeks for the Federal Emergency Management Agency and private relief agencies to establish a presence in poor and African-American neighborhoods.⁴³⁷

The storm displaced thousands, especially in New Orleans. The immediate devastation of Katrina displaced rich and poor alike throughout Louisiana, Mississippi and Alabama. With 700,000 people in the Gulf Region acutely affected by the hurricane, 50% of those displaced were from New Orleans and a disproportionate number of those affected were poor and African-American.⁴³⁸ The displaced are now contending with a lack of available housing preventing their return, and the disparate treatment of owners and renters (the majority of those displaced). If the housing problems faced by these groups are left unaddressed, the storm and the government's response could permanently displace 80 % of the African-American population, compared to a 50 % loss of the white population.⁴³⁹

⁴³⁶ Response of the U.S.A. to the Additional Questions Posed by the Committee Against Torture During the Final Session Of the Presentation of the Second Periodic Report (May 8, 2006) available at <http://geneva.usmission.gov/Press2006/051206CAT.pdf>; Institute for Southern Studies, *The Mardi Gras Index: The State of New Orleans by Numbers Six Months After Hurricane* (Feb. 28, 2006) (hereinafter "Mardi Gras Index"), available at <http://www.reconstructionwatch.org/MardiGrasReport6.pdf>

⁴³⁷ ACLU, The Mississippi Workers' Center for Human Rights, and The American Friends Service Committee, *Documentation Project* (Sept. 2005).

⁴³⁸ *Mardi Gras Index* at 7.

⁴³⁹ *Id.*

b. *Inadequacy Of Temporary Shelters*

In Mississippi, where many displaced storm survivors are temporarily resident, the state's largest shelter, a coliseum in the capital Jackson, closed just weeks after the storm in order to prepare for a previously scheduled event and the state fair. State officials and American Red Cross issued statements saying that everyone in the shelter would have adequate housing and that there was an abundance of available shelters. In interviews we conducted, many survivors were confused about the exact date that the shelter would close and families had registered their children for school in Jackson with the understanding that buses would pick them up and drop them off at the coliseum. Some of these families were told that they had to leave the coliseum by noon on the same day that their children were going to be dropped off at the coliseum at 3:00 p.m. While this matter was ultimately resolved, other shelter-related issues remained: some families were told that there was shelter space for them but that they would have to split up. Several shelters would only take women and children, and some church shelters would only accept men who could work on building and ground projects during the day in exchange for shelter.

c. *Internally Displaced School Children*

Internally displaced families are also experiencing difficulties with their children in public schools. Displaced children from Louisiana are estimated to number more than 125,000.⁴⁴⁰ (In New Orleans, only 17% of public schools have reopened.)⁴⁴¹ Nearly one in four school-age children is either not enrolled in school or misses 10 days of class every month.⁴⁴² Most who do attend school in their temporary host communities find the classrooms overcrowded, the staff exhausted and stress levels unbearably high.⁴⁴³ In addition, due to prejudice and stereotypes of black New Orleanians, in Mississippi, displaced students are discriminated against in the areas of placement, special education services, disciplinary procedures and criminal due process.⁴⁴⁴ In January, the mayor of Jackson, Mississippi's capital, ordered the police department to arrest children who had missed several days of school and were on a school district truancy list. Many students were detained over one weekend in a youth detention center with no access to their families, counsel or clergy. To address this issue, the ACLU of Mississippi embarked on a human rights documentation project and advocacy effort on behalf of internally displaced children in the state of Mississippi who are being tracked into the school to prison pipeline.

In addition, the ACLU of Mississippi represented 3 displaced students who got into a fight at school with other children in a school disciplinary hearing. Without a full investigation, the school expelled the boys for the remainder of the school year even though the usual punishment is a 10-day suspension. Two of the 3 students had special education needs.

⁴⁴⁰ Irwin Redlener, *Orphans of the Storm*, N.Y. TIMES, May 9, 2006, at A27 (hereinafter "*Orphans of the Storm*"), available at <http://www.nytimes.com/2006/05/09/opinion/09redlener.html?ex=1304827200&en=e8c14ef1074d59fd&ei=5088&partner=rssnyt&emc=rss>

⁴⁴¹ *Mardi Gras Index* at 16.

⁴⁴² *Orphans of the Storm*.

⁴⁴³ *Orphans of the Storm*.

⁴⁴⁴ Telephone Interview with Nsombi Lambright, Executive Director, ACLU of Mississippi, in Jackson, Miss. (May 2006).

These displaced students are expected to behave normally, even in the face of teasing and isolation, and despite the fact that they (and their families) have received no counseling or mental health services to address their trauma. Instead, government officials and law enforcement have implemented police-state practices that have criminalized victims instead of providing them with the necessary tools and services to rebuild their lives.

d. Abandonment Of Prisoners and Lack Of Counsel

With the highest incarceration rate in the country, Louisiana has long had a troubled criminal justice system. Although Louisiana's population is 35% African-American, 72% of the state's prison population is African-American.⁴⁴⁵ Orleans Parish prison is the eighth largest jail in the country and houses recent arrestees, federal inmates, state inmates, immigrant detainees and juveniles.⁴⁴⁶ More than 6000 prisoners were left behind in New Orleans when the city was evacuated; a decision was made not to evacuate the jail. This decision resulted in many inmates being stranded behind locked cell doors in chest deep water.⁴⁴⁷

The overwhelming majority of those inmates were black: 5,693 or 89.3% of the prison population (610 or 9.6% of the prison population were white).⁴⁴⁸ Among them were 1,884 *unsentenced* prisoners.⁴⁴⁹ As the storm hit the city, first the phones went dead and the prison went into 'lockdown' mode. Soon it lost all power supply, waters began to rise in the buildings, and prison deputies abandoned their posts. The prisoners remained in lockdown as the floodwaters rose. For days there was no food, water or medicine. Violence broke out between panicked prisoners who then attempted to escape the terrible conditions.⁴⁵⁰

Juvenile detainees were also heavily affected. At the two youth centers in the same New Orleans facility, 95% or more of the juveniles were African-American.⁴⁵¹ Over 100 teenagers in detention during the hurricane endured horrific conditions. They stood by for hours in filthy floodwater, with nothing to eat and drink for three to five days, forced to consume the water as a result. After their rescue, these juveniles were housed with adult inmates.⁴⁵²

Additionally, as of as late as 6 months after the storm, some 4,500 Orleans Parish prisoners had not seen an attorney, some since before Katrina hit, while many never had formal charges entered against them and were never given access to a telephone or attorney. Another 2,100 people filed wrongful imprisonment petitions, many having been held for over 6 months without seeing a lawyer or, in some cases, without ever having charges filed against them.⁴⁵³

⁴⁴⁵ Jordan Flaherty & Tamika Middleton, *Imprisoned in New Orleans*, ColorLines (Spring 2006) at 20.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Mardi Gras Index* at 21.

⁴⁴⁸ Louisiana Capital Assistance Center, *An Analysis of Data Provided by the Orleans Criminal Sheriff's Office*, (Aug. 29, 2005).

⁴⁴⁹ *Id.*

⁴⁵⁰ ACLU National Prison Project & Partners, *Report on Hurricane Katrina* (forthcoming).

⁴⁵¹ *Id.*

⁴⁵² Adam Nossiter, *Teenage Prisoners Describe Hurricane Horrors*, N.Y. TIMES, May 9, 2006 at A15, available at <http://www.nytimes.com/2006/05/10/us/10prison.html?ex=1304913600&en=16a851833a84f092&ei=5088&partner=rssnyt&emc=rss>

⁴⁵³ *Mardi Gras Index* at 21.

2. *Racial Profiling*

A recent U.S. Bureau of Justice Statistics report shows that profiling by law enforcement officials persists in the U.S. with African-American drivers searched, subjected to force or threats thereof, and issued tickets at higher rates than white drivers.⁴⁵⁴ Especially after September 11, South Asian, Muslim and Arab Americans became the subject of heightened and widespread ethnic and religious profiling. Although we focus below on profiling of drivers and air travelers, undocumented workers, shoppers and voters are also routinely profiled.⁴⁵⁵

One particularly prevalent racial profiling practice is police stopping principally black drivers to search their vehicles for contraband without any basis for suspicion. The Fourth Amendment to the U.S. Constitution guarantees the right to be free from unreasonable searches, but law enforcement practices force people into giving up their rights at traffic stops through intimidation.

a. *Texas Minorities Searched At Higher Rates*

We recently documented that in Texas, many law enforcement agencies continue to search vehicles, ostensibly based on driver consent, inconsistently and inappropriately.⁴⁵⁶ These so-called ‘consent searches’ failed to uncover contraband in most instances and are more likely to target minorities.⁴⁵⁷ Approximately two out of three Texas police departments still use race as a factor in conducting consent searches, and African-Americans and Latinos continue to be searched more frequently than whites: 71% of law enforcement agencies ‘consent searched’ African – Americans more frequently than whites, and 62% ‘consent searched’ Latinos more frequently than whites.⁴⁵⁸ Statewide, 2.3% of all Texas drivers (103,705) were subjected to consent searches at traffic stops in 2004.⁴⁵⁹ Since consent searches rarely uncover wrongdoing and are more likely to target minorities, police management, community leaders, and policy makers should more closely examine officers’ overall routines and encourage more efficient, bias-free, and cost-effective use of their time by limiting consent searches.⁴⁶⁰

b. *Rhode Island Police Departments Violate State Profiling Law*

Minority drivers in Rhode Island are more than twice as likely as whites to be searched by police, but white drivers are still more likely than racial minorities to be found with contraband

⁴⁵⁴ U.S. Bureau of Justice Statistics, *Contacts between Police and Public: Findings from the 2002 National Survey* (Apr. 2005).

⁴⁵⁵ For documented examples, See ACLU, *More on Racial Profiling* (Nov. 23, 2005), <http://www.aclu.org/racialjustice/racialprofiling/21741res20051123.html>

⁴⁵⁶ Press Release, ACLU, ACLU of Texas Criticizes Continued Use of Race, Over-Use of Consent Searches in Traffic Stops (Feb. 17, 2006), available at <http://www.aclu.org/crimjustice/bias/24229prs20060217.html>; See also Texas Criminal Justice Foundation, *Searching for Consent: An Analysis of Racial Profiling in Texas* (Feb. 2006), available at www.criminaljusticecoalition.org/end_racial_profiling

⁴⁵⁷ See generally *Id.*

⁴⁵⁸ Texas Criminal Justice Foundation, *Searching for Consent: An Analysis of Racial Profiling in Texas 2* (Feb. 2006), available at www.criminaljusticecoalition.org/end_racial_profiling

⁴⁵⁹ *Id.* at 3.

⁴⁶⁰ *Id.* at 5.

when searched.⁴⁶¹ The Rhode Island legislature passed a law to combat this practice in 2004, but as a study conducted in 2005 evidences, police departments are not complying with it.⁴⁶² Of the ten police departments that conducted the most stops and/or searches in the 2005 study, four showed an increase over 2001-2002 in the proportion of searches conducted on minority drivers compared to white drivers. Police department supervisory personnel are generally failing to comply with a statutory obligation to review traffic stop documentation to ensure that they are being filled out completely by officers, as well as one to review traffic stop information on a regular basis in an effort to respond to any racial disparities highlighted by data.

c. Post 9/11 Profiling Of South Asian, Muslim and Arab Citizens

Since the events of September 11, 2001, our nation has witnessed an alarming rise in incidents of discrimination against Arab and Muslim Americans and against persons perceived to be Arab or Muslim. In response to this disturbing trend, President Bush, in his first address to Congress following the attacks, felt compelled to declare that “no one should be singled out for unfair treatment or unkind words because of their background or religious faith.” Then-Attorney General Ashcroft was equally adamant in proclaiming, just days after the attacks, that “we must not descend to the level of those who perpetrated Tuesday’s violence by targeting individuals based on their race, their religion, [or] their national origin.”

i. Air Travel

Nevertheless, egregious and blatant targeting occurs, with air travel a context in which it is prevalent. Federal law expressly provides that a domestic or foreign air carrier “may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex or ancestry.”⁴⁶³ Yet, because air carriers are violating this law, the ACLU has brought suit in numerous cases.

In *Bayaa v. United Air Lines*, filed in 2002, the plaintiff Assem Bayaa, an American citizen of Arab descent, was kicked off a flight for which he had purchased a valid ticket simply because, he was told, members of the crew did not “feel comfortable” having him on board.⁴⁶⁴ United Airlines, by its conduct during and after Mr. Bayaa’s removal from his scheduled flight, has effectively conceded that its actions were not based on legitimate security considerations: following Mr. Bayaa’s removal from the plane, he was never once questioned or searched by security personnel, his checked luggage was not removed from the plane before it took off, and he was promptly offered a boarding pass for the next flight. We sued to ensure that Mr. Bayaa is never again subjected to such unlawful and humiliating treatment by United Airlines.⁴⁶⁵

⁴⁶¹ The Rhode Island Affiliate, American Civil Liberties Union, *The Persistence of Racial Profiling in Rhode Island: An Analysis and Recommendations* 3 (May 2005), available at <http://www.aclu.org/FilesPDFs/ri%20racial%20profiling%20report.pdf>

⁴⁶² *Id.* See also, Press Release, ACLU, *Police Departments Not Abiding by 2004 Law Against Racial Profiling, ACLU Reports Finds* (May 3, 2005), available at <http://www.riaclu.org/friendly/20050503pf.html>.

⁴⁶³ 49USC § 40127.

⁴⁶⁴ Complaint ¶¶ 15-23, *Bayaa v. United Airlines, Inc.*, No. 2:02CV04368 (C.D. Cal. filed June 4, 2002), available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/aclu/bayaaual60402cmp.pdf>.

⁴⁶⁵ See generally *Id.* He is joined in the suit by the American-Arab Anti-Discrimination Committee, which seeks similar relief on behalf of its members and constituents.

In *Chowdhury v. Northwest Airlines*, filed in 2002, the ACLU of Northern California filed a discrimination suit against Northwest when they refused to let Mr. Chowdhury board a plane in October 2001.⁴⁶⁶ The parties are currently litigating the federal Transportation Safety Agency's authority to designate aviation information as "sensitive security information," and whether that information can be withheld from plaintiffs during the lawsuit. Mr. Chowdhury is an American born citizen whose parents emigrated from Bangladesh. He was educated in the U.S. and was working as an investment banker and had several friends killed in the 9/11 attacks. He was asked to deplane on a return trip from San Francisco because the pilot said his name matched that of someone on a "watch list." After being delayed for several hours, Mr. Chowdhury was allowed to board a different flight. It happened to him again about a month later when he was traveling home to see his family at Thanksgiving. Once again, he was told that his name matched someone's on a watch list. Chowdhury is as common a name in Bangladesh as Smith is in the U.S. When Mr. Chowdhury asked how he could get himself off the watch list, he was not given any response. Now, Mr. Chowdhury's entire family is afraid to fly fearing that they will be subjected to discriminatory treatment because of their name.⁴⁶⁷

In *Dasrath et al. v. Continental Airlines*, also filed in 2002, we alleged that Continental Airlines had discriminated against men ejected from their flights based on prejudice when removed from a flight from Newark, New Jersey to Tampa, Florida on December 31, 2001. Dasrath and Cureg, who did not know one another, were both flying to Tampa to be with family for New Year's Eve. While the flight awaited take-off, Cureg, who is from the Philippines, spoke with his mathematics professor, an Indian man who happened to be on the same flight. Dasrath, an American citizen originally from South America, sat in his assigned seat one row behind them and did not converse with them. A female passenger walked up the aisle to first class on a few occasions and stared at the three men. She then summoned the pilot and told him "three brown-skinned men are behaving suspiciously." The pilot failed to give the men an opportunity to respond to this allegation. Instead, he left the cabin area. Thereafter, a flight supervisor came aboard the plane and asked Dasrath, Cureg and Cureg's professor to leave the plane. After their removal, the flight supervisor explained that the pilot said that a passenger was uncomfortable with their presence. Dasrath, Cureg, and Cureg's professor were placed on a later flight, which flew to Orlando, Florida, as there were no more flights to Tampa. The men were placed on the later flight without any additional security checks. They arrived at their respective destinations several hours later than originally scheduled. The case is now in trial.

ii. *Border Re-Entry*

American citizens were detained for over 6 hours at the Niagara Falls border while trying to re-enter the U.S. after having attended a conference on Islam in Toronto.⁴⁶⁸ Nearly 40 people were detained, fingerprinted and photographed. With the ACLU's New York affiliate and the Council

⁴⁶⁶ Complaint ¶¶ 9-39, *Chowdhury v. Northwest Airlines Corp. and Northwest Airlines, Inc.*, No. 3:02CV02665 (N.D. Cal. filed June 4, 2002), available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/aclu/chwdhrynwa60402cmp.pdf>

⁴⁶⁷ Katie Corrigan, Legislative Counsel, ACLU Washington National Office, Testimony on Air Passenger Profiling Before the Aviation Subcommittee of the House of Representatives Committee on Transportation and Infrastructure (Feb. 27, 2002), available at <http://www.aclu.org/racialjustice/racialprofiling/15793leg20020227.html>

⁴⁶⁸ Complaint ¶ 2, *Tabbaa, et al. v. Chertoff, et al.*, (E.D.N.Y. filed Apr. 20, 2005), available at http://www.nyclu.org/pdfs/tabbaa_v_chertoff_complaint.pdf.

on American Islamic Relations, we brought suit, and in it sought documents from the government concerning how border agents responded to intelligence related to terrorist threats in this instance, as well as their general response procedures. The judge denied the ACLU's effort to prevent profiling at this year's conference and granted the Department of Justice's pre-trial request to rule in its favor. The ACLU recently appealed the decision.

d. Racial Profiling and the War On Drugs: Selective Enforcement of Drug Laws

The "War on Drugs" has been touted as a tool to combat violence, abuse and addiction associated with the sale and use of drugs. However, as we will show, this "war" does not serve the public's interest when administered in an inefficient and racially selective manner. In such circumstances, the war on drugs can marginalize communities of color, destroy trust in the justice system, weaken the position of law enforcement, undermine public safety, divert resources from what otherwise would be effective anti-drug strategies and perpetuate racist and culturally insensitive stereotypes.

1. Tulia and Hearne, Texas

In 1999, in Tulia, Texas, the civil rights of the small African-American community were grossly violated during a mass arrest of 40 innocent black residents, constituting approximately 10% of that community, followed by their investigation and prosecution.⁴⁶⁹ Almost all of the arrestees came from Tulia's tiny black community; the others were either whites or Latinos dating blacks. Dozens of children were left parentless and had to be raised by other family members. The arrests in Tulia were a miscarriage of justice and a blatant, racially motivated act of police and prosecutorial misconduct. In addition to the troubling issue of race, the federal agent involved did not record through audio or video surveillance any of the alleged transactions, and no second officer was available to corroborate his reports.

In a similar incident in 2000, 15 African-American residents of Hearne, Texas, were indicted on drug charges after being rounded up in a series of unlawful paramilitary drug "sweeps."⁴⁷⁰ They spent upwards of 3 months in jail. The arrests were based on nothing more than the word of an informant who had no history of reliability and who was himself facing serious criminal charges. One man was arrested at the funeral of his 18-month-old daughter and held for a month before charges were dropped. Others were able to show through time cards and witnesses that they were at work during the time they were accused of participating in drug deals. We filed (and prevailed in) a class action lawsuit against the regional narcotics task force and its agents, as well as the city, county, and former prosecutor (who also once led that task force) charging racial discrimination in the undercover drug bust.

⁴⁶⁹ In response, the ACLU of Texas and the NAACP of Texas filed a Civil Rights Complaint with the U.S. Department of Justice charging racial discrimination and prosecutorial misconduct.

⁴⁷⁰ Second Amended Complaint, *Kelly, et al. v. Paschall, et al.*, No. Civ. 02-A-02-CA 702 JN (W.D. Tex. filed May 15, 2003), available at <http://www.aclu.org/drugpolicy/racialjustice/107921g120030513.html#attach>

2. *Operation Meth Merchant, Georgia*

Immigrant communities of South Asian descent in northwest Georgia are the latest victims of racial profiling in investigation and prosecution of the War on Drugs. A new initiative called “Operation Meth Merchant” has led to the apprehension of 49 individuals – 44 of whom are South Asian – for the supposed deliberate sale of ingredients used to produce methamphetamine.⁴⁷¹ However, as in Tulia, Texas, where innocent individuals were targeted based on race, evidence shows that the victims of the operation were specifically targeted based on ethnicity, immigration status and/or English proficiency.⁴⁷²

Between December of 2003 and May of 2005, Georgia state and federal law enforcement officers conducted Operation Meth Merchant, which involved sending at least 16 Confidential Informants (“CIs”) to dozens of retailers that were operated by South Asians. On June 2, 2005, the Court unsealed 24 indictments, involving 24 businesses (23 of which were South Asian-owned) and 49 individuals (44 of whom are immigrants from India).⁴⁷³ The indictments allege that all of the defendants sold general household ingredients that can be used for the production of methamphetamine with reasonable cause to believe that these ingredients would be used by others to make the drug. Given that South Asians are less than 2% of the population in the affected area and only 19.3% of the stores in the relevant area are owned or managed by persons of South Asian descent, this racial group was *over 95 times more likely to be targeted* by law enforcement than similarly situated white merchants. Moreover, law enforcement officers ignored numerous active leads that they had received regarding identical sales by non – South Asian merchants and deliberately targeted South Asian retailers by repeatedly directing CI’s to perform controlled buys almost exclusively at South Asian stores, even after being confronted by the objection of at least one CI. Through this process, the South Asian workers’ lack of English proficiency was exploited, as many of the workers were unable to understand the drug-related terminology used by the CI’s while making purchases.

This impermissibly selective investigation violated defendants’ rights to equal protection of the laws. The ACLU motion to dismiss certain of these indictments was filed in April 2006 and is pending.

These race-based sweeps and unwarranted detentions of innocent citizens violate Article 26, and the U.S. Constitution’s protections against discrimination on the basis of race, unreasonable searches and seizures, and the deprivation of liberty without the due process of law. As immigrant non-citizens, if convicted, even after they serve their criminal convictions, most of these South Asian workers face extended civil detention and eventual deportation back to India. This civil detention will take place in jails far away from their families and children.

⁴⁷¹ Motion to Dismiss, *U.S.A. v. Patel, et al.*, Nos. 4:05-CR-27, 33, 38 (consolidated) (N.D. Ga. Apr. 5, 2006), available at http://www.aclu.org/images/asset_upload_file768_24908.pdf.

⁴⁷² *Id.*

⁴⁷³ Crim. Indic. Nos. 4:04-CR-018 through 4:05-CR-041; See Order, Docket No. 67 [4:05-CR-38-HLM]; Order, Docket No. 75 [4:05-CR-33-HLM]; Order, Docket No. 71 [4:05-CR-38-HLM] (denying Defendants’ initial Motion to Dismiss for Selective Prosecution on the basis that Defendants had not provided enough evidence to satisfy their burden).

3. *Limitations On Judicial Sentencing Discretion*

Mandatory minimum penalties are predetermined by the U.S. Congress and automatically imposed for certain crimes, the great majority for offenses involving drugs or weapons. In 2006, the bipartisan, independent U.S. Sentencing Commission released a report finding that federal mandatory minimum penalties are applied in a discriminatory fashion and lead to increased arbitrariness in federal sentencing.

The American Bar Association's Kennedy Commission similarly found that American policymakers' embrace of determinate sentencing practices, including mandatory minimum sentences, elimination or reduction of parole, and increases in base penalties "produced a steady, dramatic, and unprecedented increase in the population of the nation's prisons and jails" and the resulting reduction of judicial discretion drastically increased racial disparities in the criminal justice system.⁴⁷⁴ Although Congress intended to reduce the disparities and arbitrariness of the federal sentencing system, the report concluded that mandatory minimums actually added to these problems.

Federal and state drug laws and policies over the past 20 years have had a devastating and disparate effect on African-American and Hispanic women. In 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men.⁴⁷⁵ African-American women's incarceration rates for all crimes, largely driven by drug convictions, increased by 800% since 1986, compared to an increase of 400% for women of all races for the same period.⁴⁷⁶ As discussed in Article 3 above, mandatory sentencing laws prohibit judges from considering the many reasons women are involved or remain silent about a partner or family member's drug activity such as domestic violence and financial dependency. Sentencing policies, such as mandatory minimums often subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.⁴⁷⁷

4. *Crack Versus Powder Cocaine*

In 1986, Congress enacted the Anti-Drug Abuse Act that differentiated between two forms of cocaine — powder and crack, and singled out crack cocaine for dramatically harsher punishment. In 1988, Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine. In what has become known as the 100:1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five-and ten-year mandatory minimum sentences. This sentencing scheme has had an enormous racially discriminatory impact, largely because of federal law enforcement's focus on inner city

⁴⁷⁴ American Bar Association, *Justice Kennedy Commission Reports with Recommendations to the ABA House of Delegates* 16 (Aug. 2004), available at http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf.

⁴⁷⁵ U.S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* 30th ed. (2002), available at <http://www.albany.edu/sourcebook/archive.html>

⁴⁷⁶ ACLU, Break the Chains: Communities of Color and the War on Drugs, & The Brennan Center at NYU School of Law, *Caught in the Net: The Impact of Drug Policies on Women and Families* 16 (Mar. 15, 2005), available at http://www.aclu.org/images/asset_upload_file743_23513.pdf.

⁴⁷⁷ *Id.* at 4.

communities, resulting in blacks being disproportionately impacted by the facially neutral, yet unreasonably harsh crack penalties. In 1995, the U.S. Sentencing Commission transmitted to Congress recommendations that would equalize the penalties between crack and powder cocaine possession and distribution.

Although these recommendations were widely endorsed by a multitude of groups, including the American Bar Association, they were nevertheless rejected. For 20 years now, the 100:1 ratio has punished low-level crack cocaine offenders, many with no previous criminal history, more severely than their wholesale drug suppliers who provide the powdered cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration. The average sentence for a crack cocaine offense in 2003 (123 months) was three and a half years longer than the average sentence for an offense involving the powder form of the drug (81 months). Over 80 % of individuals prosecuted by the U.S. government under the crack cocaine mandatory minimum laws are African-American despite the fact that only one third of crack cocaine users are African-American. Despite the enormous cost to taxpayers and society, the crack-powder ratio has resulted in no appreciable impact on the cocaine trade. Results such as these are surely not what Congress intended to stem the tide of crack cocaine abuse.

e. Three Strikes Laws

“Three strikes” laws generally prescribe that felons found guilty of a third serious crime be locked up for 25 years to life. California’s law, which went into effect in March 1994, may be the most sweeping. Although the first two “strikes” accrue for serious felonies, the crime that triggers the life sentence can be any felony. Nearly 75% of second and third strikes within California are for non-violent offenses. Furthermore, the law doubles sentences for a second strike, requires that these extended sentences be served in prison (rather than in jail or on probation), and limits “good time” earned during prison to 20 % of the sentence given (rather than 50 %, as under the previous law). Such laws are ultimately ineffective in dealing with crime and may in fact serve to perpetuate cycles of crime and violence.

Restricting or removing judicial discretion sentencing limits the ability of judges to properly deliver justice in accordance with the circumstances of each case and given the highly politicized nature of law and order issues, politicians will often support mandatory sentencing laws so as to appear “tough on crime,” while failing to implement or support programs which may be more effective in stopping crime.

f. Legislation To Eliminate Racial Profiling

Although the ACLU and others succeeded in efforts to get the Senate and House to introduce legislation to combat profiling, the End Racial Profiling Act of 2005, that legislation has not been passed by Congress. Among other things, the bill would ban all racial profiling and would require federal law enforcement agencies to cease profiling, track investigations, provide a complaint procedure and discipline law breaking officials.⁴⁷⁸

⁴⁷⁸ Racial Profiling Act of 2004, H.R. 3847, 108th Cong. (2004); End Racial Profiling Act of 2004, S. 2132, 108th Cong. (2004).

N. Protection Of Minority Rights (Article 27)

States Parties to the ICCPR are bound to take “necessary steps” to effectuate rights guaranteed by the treaty.⁴⁷⁹ “All persons are equal before the law” and States Parties “shall ... guarantee to all persons equal and effective protection against discrimination on any ground such as race ...” Moreover, the ICCPR has been construed – by the United Nations Human Rights Committee and the U.S. Senate – to squarely permit affirmative action. Indeed, the Human Rights Committee has indicated that affirmative action may be “require[d]” when States Parties’ failure to take such affirmative steps would perpetuate discrimination.⁴⁸⁰ Thus, carefully crafted race-based affirmative action programs to ensure equal enjoyment of rights by all racial groups are plainly permissible, and in some circumstances may be required, under the ICCPR.

I. Attacks On Remedial Affirmative Action Programs

Affirmative action is one of the most successful policies designed to close the gap between American ideals of equal opportunity and the stubborn realities of structural racism, sexism and institutional exclusion. The debate over affirmative action carries with it enormous implications for the lives of women and people of color, since such programs have created opportunities too long denied them.

Despite its role in providing opportunity to countless individuals across scores of American institutions, affirmative action has suffered severe “reputational harms” from the concerted efforts of highly-funded and well-organized detractors.

Opponents of affirmative action have attacked these policies in the federal courts with increasing frequency. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), in the context of the University of Michigan’s law school, the U.S. Supreme Court narrowly reaffirmed that universities may take race into consideration as one factor among many when selecting incoming students and endorsed the view that student body diversity is a compelling state interest that can justify using race in university admissions. A recent analysis of affirmative action in U.S. law schools found that ending affirmative action would leave many Latinos and African-Americans behind. The brief opens by saying, “there are roughly 80,000 Latino and African-American attorneys and judges in the U.S. compared with about 6,200 in 1970. Much of this remarkable thirteen-fold increase is due to the presence of affirmative action policies at law schools.”⁴⁸¹

Gratz v. Bollinger, 539 U.S. 244 (2003), involved a separate challenge to the undergraduate admissions program used at the University of Michigan, which differs from the program used at the law school. There, the U.S. Supreme Court held that the university’s use of race in this program was not narrowly tailored to achieve the university’s asserted interest in diversity.

⁴⁷⁹ ICCPR art. 2, ¶ 2.

⁴⁸⁰ *United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights*, 31 I.L.M. 645, 655 (May 1992) (earlier draft, adopted later by the Senate and President); *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 ¶ 10 (1994); U.N. Human Rights Committee, *General Comment No. 18: Non-Discrimination* ¶ 10 (Oct. 11, 1989), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

⁴⁸¹ The Tomas Rivera Policy Institute, *Does Affirmative Action Really Hurt Blacks & Latinos in U.S. Law Schools?* (Sept. 2005) (prepared by William C. Kidder), available at http://www.trpi.org/PDFs/affirm_action.pdf.

Foes of affirmative-action programs also attack the policy by financing referenda to repeal race-conscious programs in the states. Most recently, a well-funded conservative group from California has placed on Michigan's November 2006 ballot an amendment to the Michigan Constitution that would eliminate affirmative action and outreach programs involving state and local governments. The proposal is deceptively named the "Michigan Civil Rights Initiative." The ACLU is working with others to raise community awareness in Michigan of the danger of ending affirmative action and the need to preserve opportunities for equal citizenship for all people in this society.

O. Reservations, Declarations and Understandings Of the United States To the ICCPR

Despite the Committee's urging in its Concluding Observations of 1995, the U.S. government, in its latest report, refuses to reconsider in whole or part any of its reservations, understandings and declarations to the Covenant.⁴⁸² Specifically with respect to reservations, the Committee has stated they "should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations."⁴⁸³ In its Report, the U.S. government states simply that it is responding to the Committee's concerns...notwithstanding the continuing difference of view between the Committee and the U.S. concerning certain matters relating to the import and scope of provisions of the Covenant." The U.S. government's failure to reconsider its positions together with the grossly inadequate domestic implementation of the ICCPR renders significant protections therein meaningless.

Equally significant is the U.S.' continued "firmly held legal view on the territorial scope of application of the Covenant."⁴⁸⁴ On this theory, the government avoids the operation of the treaty on actions taken by the U.S. military and the CIA in territories under U.S. power or effective control such as Iraq, Afghanistan and Guantánamo Bay. This position is inconsistent with the terms and purpose of the ICCPR and violates core principles such as the absolute prohibition on torture and other cruel, inhuman or degrading treatment or punishment (Article 7). This position also contravenes basic legal principles such as the "good faith" interpretation standards of the Vienna Convention and customary international law.⁴⁸⁵

⁴⁸² U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 279, 292, U.N. Doc. No. CCPR/C/79/Add.50, A/50/40 (Oct. 3, 1995) [hereinafter *Concluding Observations concerning the United States*], available at <http://www.unhchr.ch/tbs/doc.nsf/0/b7d33f6b0f726283c12563f000512bd1?Opendocument>.

⁴⁸³ U.N. Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. Doc. No. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) [hereinafter *U.N. General Comment 24*], available at <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/69c55b086f72957ec12563ed004ecf7a?Opendocument>.

⁴⁸⁴ U.S. Dep't of State, *Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant on Civil & Political Rights § I, ¶ 3* (Oct. 2005) [hereinafter *U.S. Report*], available at <http://www.state.gov/g/drl/rls/55504.htm>.

⁴⁸⁵ See World Organization for Human Rights USA, *Torture, Arbitrary Detention, And Other Major Human Rights Abuses By the United States; U.S. Non-Compliance with the International Covenant on Civil and Political Rights in the Context of the "War on Terror"* 9-11 (Feb. 2006), available at <http://www.ohchr.org/english/bodies/hrc/docs/ngos/wofhr.pdf>.

1. *U.S. Reservations Concerning the Death Penalty, Cruel, Inhuman or Degrading Treatment, and Treatment Of Juveniles As Adults Violate International Law*

This Human Rights Committee, as the authoritative interpreter of the ICCPR, has stated that “Provisions in the Covenant that represent customary international law ... may not be the subject of reservations. Accordingly, a state may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons...”⁴⁸⁶ Yet, the U.S. continues to maintain reservations on the use of capital punishment, on its view of cruel, inhuman or degrading treatment or punishment as delimited by the U.S. Constitution, and on the treatment of juveniles as adults in certain cases.⁴⁸⁷ While we welcome the recent U.S. Supreme Court decision that found the execution of juveniles unconstitutional, to fully comply with its treaty obligations and customary international law, the U.S. should extend that ban to all executions.

Additionally, although the U.S. government denies the existence of any state of emergency and has not entered a derogation to the Covenant with respect to its military operations and presence in Iraq, Afghanistan and Guantánamo Bay, the U.S. is engaged in multiple de facto derogations of rights and obligations under the Covenant, including non-derogable prohibitions against torture, cruel, inhuman or degrading treatment, unlawful renditions, abduction and unacknowledged detentions, deprivation of life and other prohibitions that are absolute even in times of emergency, in clear violation of Article 4 of the Covenant.⁴⁸⁸ The government does refer to certain statutory grants of emergency powers, including Congress’s Joint Resolution authorizing the use of military force against Iraq.⁴⁸⁹ This resolution provides the President all powers “necessary and appropriate” to protect American citizens from terrorist acts by those who attacked the U.S. on September 11, 2001. The Administration’s broad and unsupported interpretation of the resolution exemplifies the government’s expanded view of executive power during wartime.

Article I, Section 8, of the U.S. Constitution grants Congress the power to declare war and to call forth the militia “to execute the laws of the union, suppress insurrections and repel invasions.” Nowhere in the Constitution is it written that the President has the authority to call forth the militia to preempt a perceived threat. And yet the resolution avers that the president “has authority *under the constitution* to take action in order to deter and prevent acts of international terrorism against the U.S., as Congress *recognized* in the Joint Resolution on authorization for use of military force” following the September 11 terrorist attack. In fact, Congress, exercising the authority granted to it under the Constitution, granted the President specific and limited authority to use force against the perpetrators of the September 11 attack. Nowhere was there an implied recognition of inherent authority under the Constitution to “deter and prevent” future acts of terrorism. The framers of the U.S. Constitution *did* foresee the frailty of human nature

⁴⁸⁶ U.N. General Comment 24 ¶ 8.

⁴⁸⁷ U.N. Human Rights Committee, *International Covenant on Civil and Political Rights Declarations and Reservations* (Dec. 16, 1966), available at http://www.ohchr.org/english/countries/ratification/4_1.htm.

⁴⁸⁸ U.N. Human Rights Committee, General Comment 29, States of Emergency, art. 4. U.N. Doc. CCPR/C/21Rev.1?ADD.11 (2001).

⁴⁸⁹ Authorization for Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224 (2001).

and the inherent danger of concentrating too much power in one individual. That is why the framers bestowed on Congress, not the President, the power to declare war.⁴⁹⁰

Recently, now retired U.S. Supreme Court Justice Sandra Day O'Connor wrote in the *Hamdi v. Rumsfeld* opinion for the Court that a "state of war is not a blank check for the President," sharply rejecting the President's assertions that he had unchecked unilateral authority to lock up indefinitely any person he declared an "enemy combatant" in the global "war on terrorism."⁴⁹¹

2. *U.S. Declaration Concerning Non-Self Execution Undermines Enforcement Of its Treaty Obligations*

The U.S. does not believe implementing legislation is necessary, arguing that domestic law provides for the same protections as those of the Covenant. In fact, the U.S. government rarely consults its treaty obligations in passing domestic legislation, and much national policy and legislation provides less protection than the Covenant except as it concerns freedom of speech and of religion and belief.

3. *U.S. Understanding Concerning its Federal Structure Does Not Relieve U.S. Of Obligation To Take Appropriate Measures To Meet Covenant Obligations*

In its Concluding Observations of 1995, the Committee noted with regret that members of the judiciary at the federal, state and local levels were not more aware of the Covenant's obligations.⁴⁹² In its 2005 Report, the U.S. government documents its efforts at implementation and publication of the treaty.⁴⁹³ The government's efforts to disseminate information about the treaty have been at best superficial: the Senate maintains a record of its consideration of the treaty; the treaty is published by the federal government; it may be obtained from the government and found in most libraries; it has been sent to the attorneys-general of the states and their constituent units with a request for further distribution; and, the fact of its ratification has been "brought to the attention of the state bar associations."⁴⁹⁴ These are not proactive efforts that ensure wide distribution and education of the Covenant's obligations, particularly not in the states, as the Committee had urged.⁴⁹⁵

The Committee had also recommended that appropriate inter-federal and state institutional mechanisms be established with a view to achieving full implementation of the Covenant.⁴⁹⁶ In this regard, to honor more fully the U.S.' obligations under the human rights treaties it had

⁴⁹⁰ As James Madison wrote in 1793, "In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war ... to the legislature, and not to the executive department... the trust and the temptation would be too great for any one man..." James Madison, *Letters of Helvidius*, No. 4, reprinted in THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner, ed., Univ. of Chicago Press, 1987), available at http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s15.html.

⁴⁹¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 587-588 (2004). On April 30, 2006, the *Boston Globe* reported that the President "has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution." Charlie Savage, *Bush Challenges Hundreds of Laws*, *Boston Globe* (Apr. 30, 2006).

⁴⁹² Concluding Observations Concerning the United States ¶ 280.

⁴⁹³ U.S. Report § II.

⁴⁹⁴ U.S. Report, "Updated core Document Forming Part of the Reports of the United States of America" ¶¶ 158-161.

⁴⁹⁵ Concluding Observations Concerning the United States ¶ 267.

⁴⁹⁶ Concluding Observations concerning the United States ¶ 293.

signed, President Clinton signed historic Executive Order 13107 on December 10, 1998, entitled “Implementation of Human Rights Treaties”, which created a human rights treaties inter-agency working group comprised of representatives from, *inter alia*, the U.S. Departments of State, Justice, Defense, and Labor, and directed that group to work together to ensure that U.S. obligations are fully implemented.⁴⁹⁷ That working group met regularly to fulfill its duties.⁴⁹⁸ President Bush abolished this system of interagency working groups and replaced it with the NSC Policy Coordinating Committee, which would take over those duties. There is no indication in the U.S. Report or elsewhere what this latter committee has accomplished.

4. *U.S. Government’s Continued Refusal To Give the Covenant Extraterritorial Effect Contravenes HRC and ICJ Mandates*

Since September 11, some of the most egregious violations of the Covenant have taken place overseas. Heavy extraterritorial U.S. military presence in Afghanistan and Iraq affects the rights of millions of non-U.S. citizens. Yet, the U.S. government contends that the Covenant does not apply to its military operations and presence in Afghanistan, Iraq and Guantánamo Bay, Cuba. In fact, the department of defense has invoked the U.S. position regarding the inapplicability of the Covenant on the extraterritorial level to circumvent human rights law in the “global war on terrorism.”⁴⁹⁹

5. *HRC’s “Effective Control” Mandate*

Although Article 2 refers to persons “within [a State Party’s] territory and subject to its jurisdiction,” the Human Rights Committee’s position on the scope of application of the Covenant is clear: in Comment 31 issued in 2004, the Committee stated that “a state party must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state party.”⁵⁰⁰ The Committee has expressed additional support for this position in both legal decisions⁵⁰¹ and

⁴⁹⁷ Exec. Order No. 13107, 63 Fed. Reg. 68991 (Dec. 10, 1998), available at

<http://www.fas.org/irp/offdocs/eo13107.htm>.

⁴⁹⁸ Harold Hongju Koh, U.S. Assistant Secretary of State for Democracy, Human Rights & Labor, Geneva, Switzerland, *Remarks to the U.N. Committee Against Torture* (May 10, 2000), available at <http://geneva.usmission.gov/press2000/0510torture1.html>

⁴⁹⁹ U.S. Department of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (March 6, 2003), at <http://www.ccr-ny.org/v2/reports/docs/pentagonreportmarch.pdf>

⁵⁰⁰ U.N. Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* ¶10 (May 26, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument).

⁵⁰¹ In *Burgos v. Uruguay*, the Committee stated: “it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.” *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, ¶ 12.3, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), available at <http://www1.umn.edu/humanrts/undocs/session36/12-52.htm>.

Concluding Observations concerning Israel that raised similar arguments.⁵⁰² The International Court Of Justice, in a 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, also concluded that the ICCPR extends to “acts done by a state in the exercise of jurisdiction outside its own territory.”⁵⁰³ U.S. Judge Buergethal – in a separate opinion – largely disagreed but not on the extraterritorial applicability of international human rights, particularly to an occupied territory. Judge Buergethal asserted that:

international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.

In February 2005, the U.N. Commission on Human Rights, accordingly, concluded that the particular status of Guantánamo Bay under the international lease agreement between the U.S. and Cuba and under U.S. law does not limit U.S. obligations to detainees under international human rights law.⁵⁰⁴ It is worth noting that the U.S. Supreme Court has held that the Guantánamo Naval Base is considered part of the territory of the U.S., by virtue of a lease agreement the U.S. has with Cuba. Accordingly, the U.S. government’s position that the ICCPR does not apply extraterritorially has no effect on its obligations under the Covenant with respect to military detainees held at Guantánamo Bay. Iraq and Afghanistan represent analogous scenarios to the extent that violations are committed in detention facilities under U.S. power or effective control.⁵⁰⁵

The U.S. in its annual State Department’s country reports on human rights practices holds other nations accountable for human rights violations it believes they have violated beyond their

⁵⁰² In its concluding observations regarding Israel’s second periodic ICCPR report, the HRC rejected Israel’s position that the Covenant did not apply extraterritorially to the West Bank and Gaza. The committee also stated it was reiterating its view that “the applicability of the regime of international humanitarian law during an armed conflict does not preclude application of the Covenant, including Article 4 ...Nor does [it] preclude accountability of States parties under Article 2, paragraph 1 for actions of their authorities outside their own territories...” UN. Human Rights Committee, *Concluding observations of the Human Rights Committee: Israel*, ¶11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?Opendocument).

⁵⁰³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. ¶ 111 (Advisory Opinion of July 9, 2004).

⁵⁰⁴ U.N. Commission on Human Rights, Working Group on Arbitrary Detention, *Situation of detainees at Guantánamo Bay* 8-9, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) [hereinafter *Situation of detainees at Guantánamo*], available at <http://www1.umn.edu/humanrts/guantanamo2006.html>.

⁵⁰⁵ For an academic commentary on the extraterritorial application of the ICCPR and other international human rights instruments, see, for example, Ralph Wilde, Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights, 26 Mich. J. Int’l L. 739-806. EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Cooman & Menno T. Kamminga eds., 2004).

territorial borders. For example, in its 1996 report on Iraq, the U.S. government continues to hold Iraq responsible for the failure to return a large number of Kuwaiti citizens and other foreign nationals detained during Iraq's occupation of Kuwait, as well as the rape of women during the Anfal campaign and the occupation.⁵⁰⁶ The U.S. government should hold itself to the same human rights standards it requires of other nations.

⁵⁰⁶ U.S. Department of State, Iraq Report on Human Rights Practices for 1996 (Jan. 30, 1997), at 5, 19.