



July 11, 2006

Department of Defense  
FOIA Office  
1155 Defense Pentagon  
Washington, DC 20301-1155  
Fax: (703) 696-4506

**VIA FACSIMILE AND U.S. CERTIFIED MAIL**

**RE: FOIA Request related to U.S. non-refoulement obligations**

Dear FOIA Officer:

This is a request filed by American Civil Liberties Union (“ACLU”) and the Human Rights Clinic of Columbia Law School (the “Clinic”) pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). This FOIA request seeks documents related to U.S. non-refoulement obligations in various contexts identified below.<sup>1</sup> It also seeks expedited processing and a fee waiver, and is simultaneously being filed with the Departments of Homeland Security, Justice, and State, and the Central Intelligence Agency (“CIA”).

**A. BACKGROUND**

In 1994, the U.S. ratified the Convention Against Torture (“CAT”), Article 3(1) of which provides that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>2</sup> This “non-refoulement” obligation is absolute, and applies without exception. In fulfillment of this obligation, Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), which states that “[i]t shall be the policy of the United States not to expel, extradite,

<sup>1</sup> Specific categories of requested documents are identified in the numbered paragraphs in Section B below.

<sup>2</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art.3(1), S. Treaty Doc. No. 100-20 (1998), 1465 U.N.T.S. 85.

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UNION FOUNDATION  
LEGAL DEPARTMENT  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
F/212.549.2651  
WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
NADINE STROSSEN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

or otherwise effect the involuntary removal of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”<sup>3</sup>

The U.S. has taken the position that it can meet its non-refoulement obligations by obtaining diplomatic assurances from destination countries that transferred individuals will not be tortured there. For example, in the removal context, regulations state that once assurances to this effect have been obtained, an alien’s claim for CAT relief shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.<sup>4</sup> Indeed, in its second periodic report to the Committee Against Torture, the U.S. specifically acknowledges that it both removes and extradites individuals to foreign countries after receiving such assurances.<sup>5</sup> The same report further acknowledges that the Department of Defense, in consultation with the Department of State, transfers detainees such as those held at Guantanamo Bay after receiving assurances that the foreign government concerned will treat the detainee humanely.<sup>6</sup> U.S. officials have stated that the CIA transfers detainees to foreign countries for interrogation after the receiving country provides assurances that the detainees will be treated humanely.<sup>7</sup>

High-ranking officials have, however, recognized the limited capacity of the U.S. to enforce diplomatic assurances. Attorney General Alberto Gonzales recently admitted with respect to assurances obtained by the State Department and the CIA from foreign countries: “We can’t fully control what that country might do . . . If you’re asking me ‘Does a country always comply?’ I don’t have an answer to that.”<sup>8</sup> CIA Director Porter

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<sup>3</sup> Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681 (1999) (codified as Note to 8 U.S.C. § 1231). Regulations in the removal and extradition context enacted pursuant to FARRA further implement the non-refoulement obligation. *See, e.g.*, 8 C.F.R. §§ 208.16 (c), 208.17, 208.18 (regulations relating to removal); 8 C.F.R. § 235.8(b)(4) (regulations relating to expedited removal); 22 C.F.R. §§ 95.2, 95.3 (regulations relating to extradition).

<sup>4</sup> *See* 8 C.F.R. § 208.18(c).

<sup>5</sup> Second Periodic Report of the USA to the Committee against Torture at ¶¶ 30, 33, 43, UN Doc. CAT/C/48/Add.3, 29 June 2005, *available at* <http://www.state.gov/g/drl/rls/45738.htm>.

<sup>6</sup> *Id.*, Annex 1, p 57-58; Tab 1 to Annex 1; *see also* Declarations of Matthew Waxman and Pierre Prosper, Update to Annex One of the Second Periodic Report of the U.S. of America to the Committee Against Torture, Tab.1, *available at* <http://www.state.gov/g/drl/rls/55712.htm>.

<sup>7</sup> *See* Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. Times, Mar. 6, 2005 at 11.

<sup>8</sup> Mark Sherman, *Gonzales: No Guarantees Captives Aren’t Tortured*, Associated Press, March 8, 2005.

Goss similarly acknowledged to Congress, “of course, once [transferred individuals are] out of our control, there’s only so much we can do.”<sup>9</sup>

As documented by human rights groups, diplomatic assurances are inadequate safeguards against torture and ill-treatment, and numerous individuals transferred on the basis of these assurances have credibly alleged that they were tortured on return.<sup>10</sup> The United Nations Special Rapporteur Against Torture has warned that diplomatic assurances are not an adequate safeguard against torture, and has urged governments to refrain from seeking these assurances in order to circumvent their non-refoulement obligations.<sup>11</sup> The potential for torture of individuals transferred pursuant to diplomatic assurances has also been the subject of extraordinary media attention.<sup>12</sup>

Requesters file this FOIA request to monitor U.S. compliance with its non-refoulement obligations and to ensure that individuals transferred from U.S. custody are not being tortured in foreign countries or being denied due process. Requesters seek the release of agency records as described in the numbered paragraphs below.

## **B. RECORDS REQUESTED**

The requesters seek information generated since Oct. 21, 1998 relating to diplomatic assurances in the context of (i) removal from the U.S.; (ii) extradition; (iii) transfer from U.S. custody in Guantanamo Bay Naval Base; and (iv) all other transfers from the U.S. or from U.S. custody.

### **I. Records related to removal from the U.S.**

1. All records relating to the legality of removing individuals to foreign countries on the basis of diplomatic assurances that they will not be tortured there.
2. All records concerning policies, procedures, or guidelines governing diplomatic assurances in the removal context, including but not

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<sup>9</sup> Dana Priest, *CIA's Assurances On Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges*, Wash. Post, Mar. 17, 2005 at A1.

<sup>10</sup> See Human Rights Watch, *Still At Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005, at 4, 5, 33, available at <http://hrw.org/reports/2005/eca0405/>.

<sup>11</sup> See United Nations Press Release, *Diplomatic Assurances Not an Adequate Safeguard for Deportees, UN Special Rapporteur Against Torture Warns*, Aug. 23, 2005, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A54333D23E8CB81C1257065007323C7?opendocument>.

<sup>12</sup> See Section E, FN 14 *infra*.

limited to records relating to (i) the circumstances (including countries) for which such assurances should be obtained; (ii) the necessity and reliability of such assurances; (iii) the terms and content of such assurances; (iv) legal representation for the transferee subject to such assurances; (v) notice and the opportunity for the transferee to contest such assurances; (vi) monitoring and ensuring compliance with diplomatic assurances; and (vii) consequences of deviations from such policies, procedures or guidelines.

3. All records related to individuals who were granted withholding or deferral of removal in the U.S. and were subsequently removed or extradited to any country. This includes individuals whose withholding or deferral of removal was terminated subsequent to a motion to reopen or pursuant to 8 C.F.R. § 208.17(d).
4. All statistics indicating (i) the number of cases in which diplomatic assurances were proposed or considered for individuals subject to expedited removal under 8 U.S.C. §§ 1225 (b) and 1225(c) (i.e., INA §§ 235(b) and 235(c)); (ii) the number of cases in which diplomatic assurances were proposed or considered in the context of individuals removed pursuant to other immigration law provisions; (iii) the destination country for each of these cases; and (iv) the disposition for each of these cases.
5. All records relating to cases in which specific diplomatic assurances were proposed, considered or obtained in the removal context including but not limited to records concerning: (i) communications between the offices of the Secretary of State, Attorney General and/or the Department of Homeland Security concerning such assurances; (ii) circumstances (including countries) for which these assurances were considered, proposed or obtained; (iii) the necessity and reliability of such assurances; (iv) the terms and content of such assurances; and (v) legal representation for the transferee subject to such assurances.
6. All records related to notice of diplomatic assurances provided to transferees in specific cases in the removal context, or to their lawyers, including but not limited to records concerning: (i) the timing, form, and content of notice provided; and (ii) the transferee's opportunity to respond to or contest such assurances.
7. All records related to the treatment of specific transferees following their removal to a foreign country subject to diplomatic assurances,

including but not limited to records concerning: (i) monitoring of compliance with diplomatic assurances; (ii) actual or alleged torture or other cruel, inhuman or degrading treatment or punishment of any individual removed subject to diplomatic assurances; (iii) consequences of a foreign government's failure to comply with diplomatic assurances; or (iv) access by non-governmental organizations, humanitarian organizations, and attorneys to these transferees.

## **II. Records related to extradition**

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8. All records relating to the legality of extraditing individuals to foreign countries on the basis of diplomatic assurances that they will not be tortured there.
9. All records concerning policies, procedures, or guidelines governing diplomatic assurances in the extradition context, including but not limited to records relating to (i) the circumstances (including countries) for which such assurances should be obtained; (ii) the necessity and reliability of such assurances; (iii) the terms and content of such assurances; (iv) legal representation for the transferee subject to such assurances; (v) notice and the opportunity for the transferee to contest such assurances; and (vi) monitoring and ensuring compliance with diplomatic assurances; (vii) consequences of deviations from such policies, procedures or guidelines.
10. All statistics indicating the (i) number of cases in which diplomatic assurances were proposed or considered in the extradition context; (ii) the destination country for each of these cases; and (iii) the disposition for each of these cases.
11. All records relating to cases in which specific diplomatic assurances were proposed, considered, or obtained in the extradition context; including but not limited to: (i) circumstances (including countries) for which these assurances were considered, proposed or obtained; (ii) the necessity and reliability of such assurances; (iii) the terms and content of such assurances; and (iv) legal representation for the transferee subject to such assurances.
12. All records related to notice of diplomatic assurances provided to transferees in specific cases in the extradition context, including but not limited to: (i) timing, form and content of notice provided; and (ii) opportunities to respond to or contest such assurances.

13. All records related to the treatment of specific transferees following their extradition to a foreign country subject to diplomatic assurances, including but not limited to records concerning: (i) monitoring of compliance with diplomatic assurances; (ii) actual or alleged torture or other cruel, inhuman or degrading treatment or punishment of any individual removed subject to diplomatic assurances; (iii) consequences of a foreign government's failure to comply with diplomatic assurances; or (iv) access by non-governmental organizations, humanitarian organizations, and attorneys to these transferees.

### **III. Records related to transfers from U.S. Custody in Guantanamo Bay Naval Base**

14. All records relating to the legality of transferring individuals held in U.S. custody at Guantanamo Bay Naval Base ("Guantanamo detainees") to foreign countries on the basis of diplomatic assurances that they will not be tortured there.
15. All records concerning policies, procedures, or guidelines governing diplomatic assurances in the context of transferring Guantanamo detainees to foreign countries, including but not limited to records relating to (i) the circumstances (including countries) for which such assurances should be obtained; (ii) the necessity and reliability of such assurances; (iii) the terms and content of such assurances; (iv) legal representation for the transferee subject to such assurances; (v) notice and the opportunity for the transferee to contest such assurances; (vi) monitoring and ensuring compliance with diplomatic assurances; and (vii) consequences of deviations from such policies, procedures or guidelines.
16. All statistics indicating the (i) number of cases in which diplomatic assurances were proposed or considered in transferring Guantanamo detainees to foreign countries; (ii) the destination country for each of these cases; and (iii) the disposition for each of these cases.
17. All records relating to cases in which specific diplomatic assurances were proposed, considered, or obtained in transferring Guantanamo detainees to foreign countries including but not limited to: (i) circumstances (including countries) for which these assurances were considered, proposed or obtained; (ii) the necessity and reliability of such assurances; (iii) the terms and content of such

assurances; and (iv) legal representation for the transferee subject to such assurances.

18. All records related to notice of diplomatic assurances provided to Guantanamo detainees, including but not limited to: (i) timing, form and content of notice provided; and (ii) opportunities to respond to or contest such assurances.
19. All records related to the treatment of specific Guantanamo Bay detainees following their transfer to a foreign country subject to diplomatic assurances, including but not limited to records concerning: (i) monitoring of compliance with diplomatic assurances; (ii) actual or alleged torture or other cruel, inhuman or degrading treatment or punishment of any individual removed subject to diplomatic assurances; (iii) consequences of a foreign government's failure to comply with diplomatic assurances; or (iv) access by non-governmental organizations, humanitarian organizations, and attorneys to these transferees.

#### **IV. Records related to other transfers from the U.S. or from U.S. custody abroad**

20. All records relating to the legality of transferring individuals from the U.S. or from U.S. custody abroad to foreign countries, in contexts other than those described in sections I, II and III above, on the basis of diplomatic assurances that they will not be tortured there. Please include documents that specify what these other contexts are.
21. All records concerning policies, procedures, or guidelines governing diplomatic assurances in contexts other than those described in sections I, II and III above, including but not limited to records relating to (i) the circumstances (including countries) for which such assurances should be obtained; (ii) the necessity and reliability of such assurances; (iii) the terms and content of such assurances; (iv) legal representation for the transferee subject to such assurances; (v) notice and the opportunity for the transferee to contest such assurances; (vi) monitoring and ensuring compliance with diplomatic assurances; and (vii) consequences of deviations from such policies, procedures or guidelines.
22. All statistics indicating the (i) number of cases in which diplomatic assurances were proposed or considered in contexts other than those described in sections I, II and III above; (ii) the destination country

for each of these cases; and (iii) the disposition for each of these cases.

23. All records relating to cases in which specific diplomatic assurances were proposed, considered, or obtained in contexts other than those described in sections I, II and III above, including but not limited to: (i) circumstances (including countries) for which these assurances were considered, proposed or obtained; (ii) the necessity and reliability of such assurances; (iii) the terms and content of such assurances; and (iv) legal representation for the transferee subject to such assurances.
24. All records related to notice of diplomatic assurances provided in contexts other than those described in sections I, II and III above, including but not limited to: (i) timing, form and content of notice provided; and (ii) opportunities to respond to or contest such assurances.
25. All records related to the treatment of specific transferees in contexts other than those described in sections I, II and III above, following their return to a foreign country subject to diplomatic assurances, including but not limited to records concerning: (i) monitoring of compliance with diplomatic assurances; (ii) actual or alleged torture or other cruel, inhuman or degrading treatment or punishment of any individual removed subject to diplomatic assurances; (iii) consequences of a foreign government's failure to comply with diplomatic assurances; or (iv) access by non-governmental organizations, humanitarian organizations, and attorneys to these transferees.

### **C. THE REQUESTERS**

The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the U.S. It is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU is specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution.

Furthermore, the ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. This material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or



for a nominal fee through its public education department. The ACLU also disseminates information through its heavily subscribed website, [www.aclu.org](http://www.aclu.org). Finally, the ACLU publishes an electronic newsletter, which is distributed to subscribers by e-mail. Accordingly, it is a “representative of the news media,” 32 C.F.R. § 286.28(e)(7)(i), and is also an entity that “actively gather[s] news ... [and] that is organized and operated to publish or broadcast news to the public.” 32 C.F.R. § 286.28(e)(7)(i).

The Clinic is an official program at the Columbia Law School, composed of students and directed by a clinical professor, who engage in research and advocacy on human rights practices. It therefore qualifies as an educational institution under since it is organized under the auspices of “an institution of professional education,” and “operates a program . . . of scholarly research.” 32 C.F.R. § 286.28(e)(4).

#### **D. FEE WAIVER**

We request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the “public interest” because it “is likely to contribute significantly to the public understanding” of the U.S. government’s activities relating to its non-refoulement obligations and the “activities of the Department of Defense.” 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.28(d)(1). Furthermore, the records are not sought for “commercial use,” and “disclosure of the information is not primarily in the commercial interest of the requesters.” 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.28(d)(1); *see* Section C *supra*. Rather, the above-referenced records are so requested to inform the public regarding the government’s compliance with its non-refoulement obligations, and to ensure that individuals transferred from U.S. custody to foreign countries are not being tortured there. Moreover, both Requesters are noncommercial institutions - the ACLU is a “representative of the news media” and the Clinic is an “educational institution.” 5 U.S.C. § 552(a)(4)(A)(ii); *see* Section C *supra*. On account of these factors, the ACLU has not been charged fees associated with responding to FOIA requests on numerous occasions.<sup>13</sup>

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<sup>13</sup> The following are recent examples of requests for which agencies did not charge the ACLU fees associated with responding to a FOIA request: (1) The Department of State did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in April 2005; (2) The National Institute of Standards and Technology did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in April 2005; (3) The Office of Science and Technology Policy in the Executive Office of the President did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2003; (4) The Federal Bureau of Investigation did not charge the ACLU fees associated with a

Accordingly, Requesters are entitled to a fee waiver for this FOIA request.

### **E. EXPEDITED PROCESSING**

We seek expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. As demonstrated in Section A above, there is a “compelling need” for expedited processing of records sought by Requesters. 5 U.S.C. § 552(a)(6)(E)(i)(1); 32 C.F.R. § 286.4(d)(3). The lack of expedited disclosure of records related to these obligations could “reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” 5 U.S.C. § 552(a)(6)(E)(v)(1); 32 C.F.R. § 286.4(d)(3)(i). Furthermore, there is a risk of “imminent loss of substantial due process rights and humanitarian need” if these records are not disclosed on an expedited schedule. 32 C.F.R. § 286.4(d)(3)(iv). Moreover, the information “has a particular value that will be lost if not disseminated quickly.” 32 C.F.R. § 286.4(d)(3)(ii)(A), and this information is related to “a breaking news story of general public interest,”<sup>14</sup> and is not

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FOIA request submitted by the ACLU in August 2002; (5) The Office of Intelligence Policy and Review did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; and (6) The Office of Information and Privacy in the Department of Justice did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

<sup>14</sup> See e.g., *CLA “Directly Responsible” for Abduction, Detention, and Extraordinary Rendition in Europe*, *Say MEPs*, U.S. Fed. News, June 13, 2006; *Court Halts Deportation, Says Torture a Possibility*, Kitchener-Waterloo Rec., June 2, 2006, Jeff Sallot, *Terrorist Suspect Poses Dilemma for Ottawa*, *Globe & Mail*, May 25, 2006 at A7; *Amnesty Blasts US, UK’s Double Standards Over Human Rights*, *Hindustan Times*, May 24, 2006; Colum Lynch, *U.N. Panel Urges Closure of Guantanamo Prison*, *Wash. Post*, May 20, 2006 at A4; Carol J. Williams, *U.S. to Free 16 Saudi Terrorism Suspects*, *L.A. Times*, May 18, 2006 at 11; Tom Wright, *U.S. Denies Ignoring Charges of Torture; ‘Record has Improved,’ Official Asserts*, *Int’l Herald Trib.*, May 9, 2006; *No Guidelines on Empty “No Torture” Promises*, *U.S. Fed. News*, Apr. 4, 2006; Vikram Dodd, *Lebanon Agrees to Take Back Terror Suspects from Britain*, *Guardian*, Dec. 24, 2005 at 7; Louise Arimatsu, *Outsourcing Torture*, *World Today*, Nov. 1, 2005 at 16; Dan Isaacs, *U.S. Suspects ‘Face Torture Overseas,’* *BBC News*, Jun. 14, 2005, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4088746.stm>; Danielle Knight, *Outsourcing a Real Nasty Job*, *U.S. News & World Report*, May 23, 2005 at 34; *Rep. Markey Asks State Department: “Where are Diplomatic Assurances We Received from Syria?”* *U.S. Fed. News*, April 26, 2005; Human Rights Watch, *“Diplomatic Assurances” Allowing Torture*, April 15, 2005, available at [http://hrw.org/english/docs/2005/04/15/eu10479\\_txt.htm](http://hrw.org/english/docs/2005/04/15/eu10479_txt.htm); Priest, *supra* note 9; Douglas Jehl et al., *Pentagon Seeks to Shift Inmates from Cuba Base*, *N.Y. Times*, Mar. 11, 2005 at A6; Michael Scheuer, Editorial, *A Fine Rendition*, *N.Y. Times*, Mar. 11, 2005 at A23; Editorial, *Torture by Proxy*, *N.Y. Times*, Mar. 8, 2005 at A22; Jehl & Johnston, *supra* note 7; Jane Mayer, *Outsourcing Torture*, *The New Yorker*, Feb. 14, 2005, available at

sought for “historical interest,” “litigation” or a “broadcast deadline unrelated to the news breaking nature of the information.”  
32 C.F.R. § 286.4(d)(3)(ii)(A).

Requesters are therefore entitled to expedited processing of this request.

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Thank you for your consideration of this application. We will expect your determination within twenty (20) calendar days, in accordance with 32 C.F.R § 286.4(d)(1).

Please respond to Amrit Singh, Staff Counsel, American Civil Liberties Union Foundation, 125 Broad Street, 18th Floor, New York, NY 10004, telephone (212) 549-2609. Thank you for your prompt attention to this matter.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

PETER ROSENBLUM  
Clinical Professor in Human Rights  
Columbia Law School  
435 West 116th Street  
New York, NY 10027  
Tel: (212) 854-5709  
Fax: (212) 854-7946

  
AMRIT SINGH  
Staff Counsel  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 549-2609  
Fax: (212) 549-2654

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[http://www.newyorker.com/printables/fact/050214fa\\_fact6](http://www.newyorker.com/printables/fact/050214fa_fact6); Nat Hentoff, *Legislation Would Tell World U.S. Supports Torture; Would You Trust the Word of Syria, Jordan, Morocco or Egypt?*, Chi. Sun-Times at 16, Oct. 23, 2004.