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

June 2006

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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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.

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[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.

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

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[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

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.

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[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.unhchr.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=.

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

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[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

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[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%20eeoc.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

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[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.

"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.

1. 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

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[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, Anjuli Verma, Deborah Small, Patricia Allard, Kirsten Levingston) [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]

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[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

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[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

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[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.unhchr.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.quno.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

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[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/cmw/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.NJ. 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

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[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]

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[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

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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]

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[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

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[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

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[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://fl1.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

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[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

[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

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[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 electro-shock 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]

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[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

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[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]

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[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

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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

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[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 reinstitute 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

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[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

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[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

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[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]

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[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"

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[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] Pizzaro Report at 15.
[227] Pizzaro Report at 17.
[228] Pizzaro Report at 16.
[229] Pizzaro 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/20224lgl20050919.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]

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[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.

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[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 censors 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.

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[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 deports 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.unhchr.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

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[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

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[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

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[291] The National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 25 (Summer 2005), *available a*t 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 & Childrens' 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

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[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

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[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

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[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

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[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 that 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

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[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

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[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

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[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.

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[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.

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[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.