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

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[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

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[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

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[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

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[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

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[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

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[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).