

A Critical Assessment Of The U.S. Commitment To Civil And Political Rights—

TOWARD SECURING EQUALITY AND JUSTICE FOR ALL

**IN PREPARATION FOR THE SECOND/THIRD COUNTRY REVIEW OF THE UNITED STATES
BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE**



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Toward Securing Equality And Justice For All
In Preparation For The Second/Third Country Review Of The United States
By The United Nations Human Rights Committee
Lawyers' Committee for Civil Rights Under Law

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EXECUTIVE SUMMARY OF RECOMMENDATIONS

1. The Lawyers' Committee for Civil Rights Under Law welcomes the United States Government's Second and Third Periodic Report (the "U.S. Report") to the United Nations Human Rights Committee (the "Human Rights Committee"). The U.S. Report outlines the legislative, judicial, administrative, and other measures giving effect to the United States' obligations under the International Convention on Civil and Political Rights ("ICCPR" or the "Covenant") in accordance with Article 40 thereof.¹

2. While the U.S. Report highlights various advances achieved to date and identifies some obstacles to U.S. compliance with the Covenant, the Report does not fully address approaches for eliminating civil rights violations that continue to plague U.S. society. Thus, while the Government has taken some steps to eliminate *de jure* civil rights violations and has established certain remedial structures, it has failed to address and eradicate some of the Covenant breaches that continue to exist in the United States, particularly in the area of minority rights. This Submission focuses on and offers recommendations relating to the following key areas of concern addressed in the U.S. Report: reporting obligations; information from the states; U.S. Reservations, Understandings and Declarations; domestic enforcement mechanisms; training of federal and state judiciaries and the reliance on international and foreign law; the enforcement of civil rights laws; affirmative action in the areas of education, employment and contracting; racially disparate treatment in the criminal justice system; the right to vote; and discrimination.

3. The purpose of this Submission is to supplement the U.S. Report with additional information, to provide an insight into denials of civil rights in the United States and to describe how such civil rights violations have affected different communities in the United States.² This Submission also offers recommendations for actions to strengthen the Government's current strategy for fulfilling its obligations under the ICCPR. We hope that this Submission will assist the Committee in evaluating the U.S. Report and in formulating its own recommendations for the U.S. Government.

¹ ICCPR, art. 40, *opened for signature* Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316, *available at* <http://www.ohchr.org/english/law/ccpr.htm>.

² The term "civil rights" in this context encompasses civil rights, political rights, human rights, and women's rights.

4. This Submission does not cover every area addressed by the U.S. Report, and rather focuses on a few key provisions of the ICCPR, namely Articles 2 and 3 (relating to equal protection of rights in the Covenant and equal rights of men and women), Article 25 (guaranteeing access to the political system) and Article 26 (addressing equality before the law).³ These subjects, however, do not represent all the areas in which the Lawyers' Committee has concerns about civil rights in the United States. We respectfully ask the Committee to reference the submissions of other non-governmental organizations ("NGOs") on the U.S. Report, which focus on issues under the ICCPR not covered in this Submission.

5. The following is a summary of recommendations from the main body of this Submission.

6. General Recommendations Relating To U.S. Compliance With The ICCPR

- The Government should endeavor to meet its reporting obligations to the Committee in a full and timely manner, and should establish internal mechanisms to facilitate the preparation of reports.
- The Government should collect information from the states on their actions or inactions in implementing the ICCPR and should ensure that this information is relayed to the Committee in the United States regular reports. The Government should also take appropriate action to encourage and ensure that states comply with the ICCPR.
- The Government should reconsider and withdraw any Reservations, Understandings, and Declarations that are not required by the U.S. Constitution or otherwise raise tensions with the object and purpose of the ICCPR.
- The Government should adopt measures to provide greater enforcement of the ICCPR, including: (1) withdrawing Declaration 1, which states that the Covenant is non-self-executing; (2) adopting implementing legislation for the Covenant; and (3) acceding to the First Optional Protocol, allowing individuals to bring complaints directly to the Committee.
- The Government should increase training of its federal and state judiciaries on the ICCPR and should encourage consideration of both international and foreign law in court decisions in appropriate circumstances.

³ This Submission also briefly addresses ICCPR Articles 6 and 7 relating, respectively, to right to life, and freedom from torture or cruel, inhuman or degrading treatment or punishment.

- The Government should increase enforcement of civil rights laws and should adopt further civil rights legislation where necessary and appropriate.

7. **Recommendations Relating To ICCPR Article 2 And Affirmative Action**

- The Government should be more supportive of affirmative action programs in education, contracting, and employment, and should develop and implement systems to monitor the effectiveness and fairness of affirmative action programs in education, employment, and contracting that are currently being implemented throughout the U.S. by federal, state, and local entities.
- The Government should build on the courts' application of the "strict scrutiny" standard in cases involving race, to develop means beyond judicial precedent for combating racial discrimination.
- The Government should do more to end discriminatory educational practices such as discriminatory tracking programs, the disproportionate placement of minority students in special education and "dead end" courses, and the biased administration of student discipline.
- The U.S. Department of Justice (the "DOJ") should recognize alarming trends of re-segregation in schools and recommit itself to promoting desegregation.
- The Government should acknowledge the essential role of affirmative action programs in ending racial discrimination in education, recognize the precedential value of decisions like *Grutter v. Bollinger*, and secure the future of these programs and their vital goals.
- The Government should aggressively discourage state efforts to end affirmative action programs in higher education, employment, and contracting.
- The Government should use its federal funding powers as a tool to encourage state and federal agency compliance with affirmative action programs.
- The DOJ should enforce Title VII and Title IX of the Civil Rights Act of 1964, with a view to ending inequalities at workplaces in the United States.
- The DOJ should file more systemic employment discrimination cases on behalf of African Americans.
- The U.S. Department of Labor should retain the Equal Opportunity Survey, a vital tool for detecting and preventing employment discrimination by federal contractors.
- The Government should ensure the continued implementation of affirmative action programs targeted at private contractors, with a view to ending the

discrimination in contracting that still plagues minority- and women-owned businesses.

8. Recommendations Relating To ICCPR Article 3 And Gender Discrimination

- The Government should more vigorously enforce civil rights laws to ensure true equal opportunity for men and women in the workforce.
- All branches of the Government should adopt the position of the EEOC and recognize minority women as a protected class, based both on their status as women and minorities.
- The Department of Labor should end the dilution of enforcement tools such as the Equal Opportunity Survey, in order to correctly track gender discrimination in the workplace.
- The Government should adopt and enforce the Equal Employment Opportunity Commission's standard for establishing unlawful retaliation under Title VII of the Civil Rights Act of 1964 of any action which would be "reasonably likely to deter" the filing of a charge of discrimination is unlawful.

9. Recommendations Relating To ICCPR Articles 6 And 7, Right To Life, And Prohibition Against Torture Or Inhuman, Cruel Or Degrading Treatment

- The Government should keep demographic statistics on individuals passing through the criminal justice system, investigate reported incidents of racial discrimination by law enforcement personnel, develop training programs that inform police officers and prosecutors about the dangers of racial profiling, and call for a moratorium on the death penalty pending a Government evaluation of the apparent systemic bias in death penalty cases.

10. Recommendations Relating To ICCPR Article 25 And The Right To Vote

- The Government should vigorously enforce the Voting Rights Act and other pertinent laws to ensure that the right to vote is enjoyed by all citizens. Additionally, the Federal Government must meticulously monitor state compliance with all voting rights laws.
- The Government should actively support the reauthorization of the non-permanent provisions of the Voting Rights Act.
- The Government should acknowledge the serious problems in the administration of the 2000 and 2004 Presidential elections, and take affirmative steps to guarantee the rights of every American citizen to vote, such as expanding the resources to aid the states in purchasing and developing adequate voting machines.

- The Government should introduce legislation to allow unimpeded access at all stages of the election process to international observers invited by the U.S. Government.
- The Government should develop and implement a program to better document and track reports of election problems in the time leading up to the next presidential election.
- The Government should commit adequate resources to train polling officials at local polling stations to respond to foreseeable voting problems and to ensure every citizen's right to vote. The Government should also take steps to prevent the voting problems and voter intimidation reported in the last Presidential elections through the deployment of an adequate number of federal officials to oversee voting at each polling site.
- The Government should prepare for large voter-turnout in the next Presidential election in 2008 by monitoring the staffing of polling sites in each state, and by assisting the states in recruiting volunteer staffers.
- The Government should oversee the maintenance of state voter registration lists to ensure that fewer eligible voters are erroneously purged from the lists.
- The Government should implement, or aid states in implementing, an education campaign for newly released prisoners to inform them of the restoration of their right to vote.
- The Government should pursue and support litigation challenging state disenfranchisement laws that deny ex-felony offenders the right to vote in federal elections. The Federal Government should also propose and support legislation requiring the restoration of voting rights to former felons who have completed their sentences and parole period.
- The Government should, through its spending power, promote the repeal of the provisions of state disenfranchisement laws that deny a felon offender the right to vote for life.
- The Government should make every effort to encourage the adoption of the Count Every Vote Act.

11. Recommendation Relating To Article 26 And Discrimination

- The Government should acknowledge the lack of remedies available to victims of discrimination, and provide sufficient judicial and administrative avenues through which such victims can seek compensation.

I. BACKGROUND ON THE ICCPR AND ITS IMPLEMENTATION IN THE UNITED STATES

12. The ICCPR is founded in the Universal Declaration of Human Rights,⁴ which was adopted by the United Nations General Assembly on December 10, 1948. Intended to define the phrase “human rights” as used in the U.N. Charter and to provide a moral obligation to protect those rights, the Declaration did not impose any legal obligations.⁵ The General Assembly then asked the U.N. Human Rights Commission to draft a convention with binding effect and including an enforcement mechanism.⁶ However, the Cold War and ideological differences between East and West prevented the Human Rights Commission from finalizing a text until 1966, when it referred the ICCPR to the General Assembly, which in turn adopted the Covenant on December 16, 1966.⁷

13. The United States signed the ICCPR on October 5, 1977, but the Senate did not exercise its constitutional responsibility to debate the treaty for another fifteen years. The Senate finally gave its advice and consent to ratification of the ICCPR in 1992, and the Covenant went into effect for the U.S. on June 8, 1992.⁸ Although the United States has not adopted legislation to implement the ICCPR, President Clinton issued an executive order on December 10, 1998, which, in general terms, calls upon federal agencies to respect and abide by the ICCPR and related human rights treaties.⁹

14. Under Article 40 of the ICCPR, each state party is obligated to report to the Human Rights Committee within one year after ratification of the Covenant.¹⁰ The United States

⁴ G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), *available at* <http://www.un.org/Overview/rights.html>.

⁵ See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, at XVII (N.P. Engel 1993); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 317-19 (1996).

⁶ Nowak, *supra* note 5 at XIX-XX.

⁷ Nowak, *supra* note 5 at XX-XXI. The ICCPR’s first Optional Protocol and the International Covenant on Economic, Social, and Cultural Rights were also referred to and adopted by the General Assembly at the same time. *Id.*

⁸ ICCPR, Ratifications and Reservations, *available at* http://www.ohchr.org/english/countries/ratification/4_1.htm.

⁹ Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

¹⁰ ICCPR, art. 40(1)(a) (“The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned.”).

submitted its initial report on July 29, 1994,¹¹ a year later than required. After the initial report, States parties are required to submit additional reports to the Committee every four years regarding the State's compliance with and domestic implementation of the ICCPR.¹² The United States missed the deadline for its Second Report, and instead produced its Second Report together with its Third Report, in October 2005. As noted above, this Submission is a formal response by the Lawyers' Committee to that October 2005 U.S. Report.

15. The U.S. Report repeatedly states that the United States has generally complied with its obligations under the Covenant because it has eliminated *de jure* civil rights violations and has numerous constitutional, statutory and/or administrative provisions that protect civil rights and/or provide remedies for civil rights violations. However, the U.S. Report does not address the numerous ways in which U.S. citizens' civil rights are violated in practice, particularly in relation to minority groups, and the lack of meaningful remedies for such violations.

16. The U.S. Government cannot claim that its powers in relation to civil rights are limited. Admittedly, because of the United States' federalist system, the federal Government must trace its actions relating to the ICCPR to an affirmative grant of authority in the Constitution. However, under the Necessary and Proper Clause,¹³ this grant of authority need not be explicit, but can be implied, and the U.S. Supreme Court has held that the federal Government has the implied authority to act when its actions are rationally related to one of the powers explicitly listed in the Constitution, and when its actions do not conflict with specific constitutional prohibitions.¹⁴ In *Missouri v. Holland*, the Supreme Court extended this logic to

¹¹ Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of States Parties Due in 1993, Addendum, United States of America*, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) ("U.S. Initial Report").

¹² ICCPR, art. 40(1)(b) (after the initial report, reports are due "whenever the Committee so requests."). The Committee requests reports every four years. Human Rights Committee, *Monitoring Civil and Political Rights*, available at <http://www.ohchr.org/english/bodies/hrc/index.htm>.

¹³ U.S. CONST. art. I, § 8, cl. 18.

¹⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (upholding legislation establishing the Second Bank of the United States; "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

the treaty power and allowed Congress to enact legislation to enforce a treaty under the Necessary and Proper Clause.¹⁵

17. Thus, the Necessary and Proper Clause, the Commerce Clause,¹⁶ and the Spending Clause¹⁷ all authorize the federal Government to adopt legislation aimed at guaranteeing Covenant rights. Congress can do so directly or by allocating federal money to states or private parties for a broad spectrum of activities.

18. The Commerce Clause provides the federal Government with the power to “regulate Commerce . . . among the several states.”¹⁸ Beginning in 1937 with the seminal case of *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court began giving deference to congressional decisions by upholding statutes adopted under the Commerce Clause if the regulated activity substantially affected interstate commerce.¹⁹ Between 1937 and 1995, the Supreme Court did not invalidate a single statute on the ground that Congress had exceeded its authority under the Commerce Clause.

19. Pursuant to the Commerce Clause, the federal Government has exercised its authority to adopt civil rights legislation on several occasions. For example, Congress adopted the Civil Rights Act of 1964, prohibiting, among other things, discrimination in places of public accommodation, education, and employment.²⁰ On two separate occasions, the Supreme Court held that the statute was constitutional even though it regulated “local” activities.²¹ Although the

¹⁵ 252 U.S. 416, 432-34 (1920).

¹⁶ U.S. CONST. art. I, § 8, cl. 3.

¹⁷ U.S. CONST. art. I, § 8, cl. 1.

¹⁸ U.S. CONST. art. I, § 8, cl. 3.

¹⁹ 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”); *see also Perez v. United States*, 402 U.S. 146 (1971) (holding portion of Consumer Credit Protection Act prohibiting loan sharking); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding application of Civil Rights Act of 1964 to private racial discrimination at restaurants receiving substantial portion of food from out of state); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding public accommodations provisions of Civil Rights Act of 1964); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, as applied to an individual farmer growing wheat for his own consumption, as such growth would, in the aggregate, affect interstate price of wheat).

²⁰ Pub. L. No. 88-352, 78 Stat. 241 (1964).

²¹ *Katzenbach*, 379 U.S. 294; *Heart of Atlanta Motel*, 379 U.S. 241.

Court has recently begun to interpret the Commerce Clause in a more restrictive manner,²² under this more restrictive approach Congress can still regulate any activity that is “commercial” or that has an obvious connection to interstate commerce.²³

20. The Constitution also gives the federal Government the authority to “pay the Debts and provide for the common defense and general welfare of the United States.”²⁴ Under the Spending Clause, Congress may allocate federal money to the states under specified conditions if they are designed to promote the general welfare.²⁵ This grant of authority to Congress is significant, and Congress has exercised its authority under the Spending Clause to adopt legislation aimed at protecting civil and political rights. For example, Title VI of the Civil Rights Act of 1964 prohibits any program that receives federal funding from excluding individuals from participation based upon their race, color, ethnicity, or national origin.²⁶

21. The U.S. Report also lists the statutes that Congress has adopted to protect Covenant rights. Statutes, however, can only accomplish their intended purpose if the executive branch agencies charged with enforcement ensure that the statute’s provisions are enforced in practice. In turn, whether a statute is enforced by an agency is often dependent upon whether the Administration in power makes enforcement of those statutes a priority, including the request for appropriations at a necessary and proper level. This Submission identifies areas for improvement in this regard.

²² See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Commerce Clause did not authorize Congress to enact civil remedy under the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Commerce Clause did not authorize Congress to prohibit possession of a firearm within school zones).

²³ See *Morrison*, 529 U.S. at 609-10; *Lopez*, 514 U.S. at 558-59 (“[W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”) (internal citations omitted).

²⁴ U.S. CONST. art. I, § 8, cl. 1.

²⁵ *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987) (upholding provision in federal statute that denied portion of highway funding to states that did not adopt a minimum drinking age of 21). See also *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding spending provisions in Social Security Act); *United States v. Butler*, 297 U.S. 1, 64-67 (1936) (upholding Agricultural Adjustment Act of 1933).

²⁶ §§ 601-605 Pub. L. No. 88-352, 78 Stat. 241 (1964); see also *Lau v. Nichols*, 414 U.S. 563 (1974) (finding violation of the Civil Rights Act where San Francisco school district did not provide Chinese students with an opportunity to learn English).

II. SUMMARY OF THE STATE OF CIVIL RIGHTS IN THE U.S., AND KEY AREAS OF CONCERN

22. As the United States undergoes stark demographic changes, NGOs throughout the U.S. work to facilitate the nation's transition to a truly equal, multi-racial and multi-cultural democracy free of racism, sexism, and general intolerance. However, overwhelming statistical and anecdotal evidence reveals that much remains to be done before U.S. society will be truly free of discrimination and other civil rights violations. The changing national dynamics require strategic and comprehensive approaches to effectuate the fundamental principle of equal justice for all. This essential value, articulated in the U.S. Declaration of Independence, the Bill of Rights, the Reconstruction Amendments, and U.S. statutory and case law, continues to define the health of our society, to serve as the barometer of our nation's moral integrity, and to act as a basic pre-requisite for a functioning vibrant liberal democracy. Ensuring equal protection of the laws and securing equal opportunity for all—regardless of race, gender, national origin, disability, age, religion, or sexual orientation—are the hallmarks of a just and civil society.

23. There are numerous federal statutes and regulations that prohibit and provide remedies for discrimination on the basis of race, color, gender, ethnicity, and national origin. Other statutes protect important political rights such as the right to vote. However, the priorities of the executive and legislative branches at any particular time, as well as the current trends in judicial philosophy, can have a major impact on the manner in which these statutes and regulations are enforced in practice. Because discrimination and civil rights violations are unfortunately pervasive in U.S. society, the existing network of laws is not always sufficient and indeed these laws are not consistently and fairly implemented and enforced with the goal of ending systemic discrimination in employment, education, public accommodations, voting, housing, environmental and immigration policies, and the criminal and civil justice systems.

24. The Lawyers' Committee's key concerns, as addressed in detail in this Submission, are listed below.

25. **Irregular reporting by the United States** (Section IIIA below): Although the United States issued its initial report to the Committee in a reasonably timely manner, it took eleven years to produce its second and third combined reports. Reports are usually due every

four years.²⁷ Regular reporting by the United States is necessary to set an example for all other States Parties to the ICCPR and to strengthen implementation of the Covenant in the United States itself.

26. Lack of information from the federal Government regarding action or inaction by state governments (Section IIIB): On a state and local level, statutes and regulations that protect civil rights are not uniform and vary considerably between state and local governments. The federal Government insufficiently regulates state and local civil rights, and also does not provide sufficient information to the Committee regarding implementation of the Covenant at the state and local level. U.S. Understanding 5 to the Covenant notes that the federal Government will implement the Covenant to the extent that it can, and that it will take appropriate measures to ensure implementation of the Covenant by the states. Unfortunately, the U.S. Report contains minimal information on state action or inaction to comply with the United States' obligations under the Covenant. Without further information about state action or inaction, it is difficult to assess in any comprehensive way U.S. compliance with the ICCPR.

27. U.S. Reservations to the ICCPR (Section IIIC): When the U.S. ratified the ICCPR, it attached more reservations, understandings, and declarations to it than any other State Party. With the exception of Reservation 1, which relates to ICCPR Article 20 and free speech, none of the reservations were or are required by the U.S. Constitution. The excessive number of reservations suggests an unwillingness on the part of the U.S. to accept the modern multilateral human rights regime.

28. Domestic implementation of the ICCPR (Section IIID): The United States declared at the time of accession to the ICCPR that the Covenant would not be self-executing under U.S. law, meaning that the ICCPR had no independent impact upon domestic law unless implementing legislation was passed. No such legislation has been passed or considered since ratification of the ICCPR in 1992. While many of the rights guaranteed by the ICCPR are already protected under U.S. law, there exists no private cause of action to challenge governmental conduct that violates the ICCPR but does not violate U.S. law. In addition, the

²⁷ Human Rights Committee, *Monitoring Civil and Political Rights*, available at <http://www.ohchr.org/english/bodies/hrc/index.htm>.

U.S. Government has failed to implement fully existing U.S. domestic law, making many of the rights similarly guaranteed by the ICCPR elusive at best, and illusory at worst.

29. **Increased training of the judiciary regarding the ICCPR, and the use of foreign law and international law** (Section III E): The U.S. Government should implement a judicial education program relating to the ICCPR, and should encourage the federal and state judiciaries to consider, where appropriate, both foreign law and international law in U.S. courts as non-binding yet informative sources in the course of reaching their decisions.

30. **The general lack of enforcement of civil rights laws by the U.S. Department of Justice** (Section III F): The U.S. Department of Justice (“DOJ”) is charged with enforcement of federal civil rights laws including the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Americans with Disabilities Act of 1991. These laws cover various protections also afforded by the ICCPR, including Articles 2, 3, 7 and 25, as discussed further in this Submission. During the majority of President George W. Bush’s tenure as President, the DOJ Civil Rights Division has politicized the enforcement of civil rights laws in unprecedented ways resulting in a negative impact on fair and even civil rights enforcement.

31. **Affirmative action** (Section IV): The equal protection of racial and ethnic minorities in the United States is at risk because of the failure of the Government to aggressively enforce civil rights legislation and because of recent declines in affirmative action programs that provide redress for past systemic discrimination. In 2003, the U.S. Government went so far as to submit an amicus brief to the Supreme Court arguing that race-conscious admissions policies were not a compelling state interest, effectively arguing that the Court should prohibit all affirmative-action programs in higher education. This governmental hostility threatens the continued viability of affirmative action programs in the United States, threatens access to higher education for minorities and women, and jeopardizes the advances of these groups in employment and public contracts. Voluntary affirmative action in employment, education, and contracting is now banned in California, Washington, and Florida. Although the Supreme Court in 2003 upheld affirmative action in a limited form in *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court suggested that such programs would be permissible only for another twenty-five years or so. More worrying, the U.S. Government actually intervened in these two cases to

argue that the Court should invalidate all use of affirmative action in higher education. These continued challenges to affirmative action demonstrate the need to develop a genuine understanding among the American public, and even within the U.S. Government, about the important role that government and private action play in overcoming discrimination against minorities and women.

32. In terms of educational opportunities, the U.S. must take active steps to end discriminatory educational practices such as discriminatory tracking programs, the disproportionate placement of minority students in special education and “dead end” courses, and the biased administration of student discipline. The Lawyers’ Committee is also concerned that recent judicial decisions have put affirmative action programs in education at risk. The Lawyers’ Committee further finds it alarming that the DOJ appears to have abandoned efforts to promote desegregation in schools despite an undeniable trend of re-segregation.

33. Inequalities also continue to plague workplaces in the United States, and the DOJ’s continuing refusal to aggressively enforce Title VII and Title IX of the Civil Rights Act of 1964 has hampered efforts to remedy the situation. For example, in recent years the DOJ filed few systemic employment discrimination cases on behalf of African Americans. Indeed, in March 2006, the DOJ actually threatened one American university with litigation over its fellowship program because it allegedly discriminated against white graduate fellows. The DOJ also waived federal contractors’ affirmative action obligations in the wake of Hurricane Katrina. The Department of Labor has advocated abolishing a vital tool intended to prevent and detect employment discrimination by federal contractors—the Equal Opportunity Survey.

34. Affirmative action programs targeted at private contractors have also come under fire in the U.S. The Lawyers’ Committee believes that these programs must continue to be implemented. Research suggests that minority- and women-owned businesses continue to suffer from discrimination in contracting.

35. **Gender discrimination** (Section V): Gender discrimination remains a significant problem in the United States, despite the existence of comprehensive legislation on the matter. Sex discrimination charges filed with the Equal Employment Opportunity Commission have actually increased since 1992, particularly changes filed by or relating to minority women.

Despite this increase in discrimination, the Department of Labor has failed to implement fully, and has actually proposed to eliminate, the Equal Opportunity Survey, a vital tool for the prevention and detection of employment discrimination. Governmental inaction has made further progress in this important area difficult at best. Furthermore, in order to ensure that the spirit of Title VII is preserved in law, the Lawyers' Committee urges the U.S. Government to adopt and enforce a meaningful definition of retaliation under Title VII. Such a standard would follow from judicial precedent on Title IX in *Jackson v. Birmingham Board of Education*, where the U.S. Supreme Court recognized the importance of effective enforcement activities in relation to gender equality.

36. **Racially disparate treatment and discrimination in the criminal justice system** (Section VI): Racially disparate treatment and discrimination pervade the U.S. criminal justice system. Minorities are detained and searched more often than whites and are more likely to be prosecuted, receive harsher sentences, and be sentenced to death.

37. **The right to vote and access to the political system** (Section VII): Access to the political process is often limited for minorities, compounding all of the other discrimination against minorities because it removes or impedes access to the democratic check and balance of elections. Thus, a member of a minority group who is dissatisfied with their political representation is prevented or impeded from exercising their right to vote for a new representative, and the cycle of discrimination continues. There have been substantial irregularities in the past two presidential elections that raise serious doubts about the ability of individuals, especially minorities, to participate in the U.S. political system. At the same time, enforcement of the Voting Rights Act has been in decline, with the U.S. Government declining to act even when action is unanimously supported by the Department of Justice Civil Rights Division, and despite the increase in the number of voting rights complaints. The broad extent of felon disfranchisement laws is also troubling, especially when considered in light of biases in the criminal justice system and the disproportionate impact on minorities of these biases.

38. **The high threshold of “discrimination” set by U.S. courts** (Section VIII): The requirement in U.S. courts that victims of discrimination prove what the discriminator was thinking or feeling at the time of the discriminatory act violates the spirit and purpose of the Fifth

and Fourteenth Amendments to the U.S. Constitution and renders empty the United States' claim that U.S. law provides extensive avenues for seeking redress for discrimination. Consequently, the United States has failed to guarantee equal and effective protection against discrimination by failing to provide sufficient avenues through which victims of discrimination effectively may seek compensation.

* * *

39. Simply stated, the United States has failed to comply fully with its obligations under the ICCPR. Although U.S. domestic law does much to protect civil rights, there are many instances in which it fails to meet international standards, and where discrimination against minorities and women persists. The Lawyers' Committee hopes that this Submission will provide an impetus for the United States to live up to its international obligations under the ICCPR.

III. GENERAL ISSUES RELATING TO U.S. COMPLIANCE WITH THE ICCPR

A. The Need For Regular Reporting By The United States

40. Under Article 40 of the ICCPR, each State is obliged to produce reports every four years to the Human Rights Committee regarding the State's compliance with and domestic implementation of the ICCPR.²⁸ After reasonably timely production of its Initial Report in 1994, the United States missed the deadline for its Second Report, and instead produced its Second Report together with its Third Report, in October 2005.

41. While the Lawyers' Committee appreciates the amount of time, resources and energy required to prepare reports to the Human Rights Committee, the Government must meet the reporting timetable established by the Committee. Thus, the next report from the United States will be due in 2010. As one of the strongest liberal democracies in the world, regular reporting by the United States to the Committee will set a positive example for all other States Parties to the ICCPR and will generally strengthen the reporting system and thus the ICCPR itself.

²⁸ ICCPR, art. 40(1)(b); Human Rights Committee, *Monitoring Civil and Political Rights*, available at <http://www.ohchr.org/english/bodies/hrc/index.htm>.

B. The Need For Information From The Federal Government Regarding Action Or Inaction By State Governments, And For Action By The Federal Government Regarding State Implementation Of The ICCPR

42. Compliance with the ICCPR is not simply a matter of federal action or inaction. The United States, a confederation of 50 states, apparently accepts that state governments are also obliged to comply with the ICCPR, as U.S. Understanding 5 sets out the relative responsibilities of federal and state governments in the implementation of the ICCPR.²⁹ Understanding 5 asserts that the federal, state and local governments will implement the Covenant to the extent each exercises legislative and judicial jurisdiction over the relevant provision therein.³⁰ It further states that, to the extent a matter falls within the jurisdiction of a state or local government, the federal Government will take “measures appropriate to the Federal system” in order to allow the relevant state or local government, in turn, to take “appropriate measures” toward fulfillment of the Covenant.³¹ The United States also advised the Human Rights Committee in 1995 that Understanding 5 was “not a reservation and...not intended to affect the international obligations of the United States.”³²

43. In 1995, in response to the United States’ Initial Report on its compliance with the ICCPR, the Human Rights Committee expressed its regret that the Initial Report “contained few references to the implementation of Covenant rights at the state level.”³³ The Committee also noted that under the federal system, “the states of the union retain extensive jurisdiction over the application of criminal and family law in particular. This factor, coupled with the absence of formal mechanisms between the federal and state levels to ensure appropriate implementation of the Covenant rights by legislative or other measures may lead to a somewhat unsatisfactory

²⁹ ICCPR, Declarations and Reservations, United States of America, Understanding 5 (June 8, 1992), *available at* http://www.ohchr.org/english/countries/ratification/4_1.htm (“That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.”). This Understanding is also discussed below in Section IIIC.

³⁰ *Id.*

³¹ *Id.*

³² Human Rights Committee, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, United States of America*, ¶277, U.N. Doc. A/50/40 (Oct. 3, 1995) (“1995 Human Rights Committee Observations”).

³³ 1995 Human Rights Committee Observations, ¶ 267.

application of the Covenant throughout the country.”³⁴ In this context, the Lawyers’ Committee also notes Article 27 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”), which provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”³⁵ Thus, the United States is not at liberty to simply disregard or ignore the effect of state and local governments on that issue.

44. Despite the 1995 Human Rights Committee comments, and despite the federal Government’s clear responsibility to monitor and report state action regarding the ICCPR, the latest U.S. Report contains minimal information regarding action or inaction on the part of the states. The Lawyers’ Committee believes that the Human Rights Committee should again note the United States’ deficiency on this front, and should urge the U.S. federal Government to submit additional information regarding the states’ implementation of, and compliance with, the ICCPR.

45. Reliable, complete and accurate statistics are necessary to monitor and enforce civil rights, but reliable data cannot be gathered without the active participation of federal and state governments, as well as regional and local authorities. The Government must collect, compile and provide extensive data relating both to the monitoring of violations of the ICCPR (and domestic civil rights laws) and the enforcement of civil and human rights. This information should be compiled on an impartial basis by official statistical agencies with the cooperation of citizens, enterprises and NGOs.

46. The Lawyers’ Committee also urges the United States to withdraw Understanding 5 for three reasons. First, it is confusing because other States Parties may misinterpret it to suggest that the Covenant only applies to the federal organs of the United States. Second, Understanding 5 is unnecessary because the ICCPR does not alter the relationship between the federal Government and the states. Indeed, a treaty could be declared unconstitutional if it attempted to federalize matters reserved to the states.³⁶ ICCPR Article 2(2) sufficiently

³⁴ 1995 Human Rights Committee Observations, ¶ 271.

³⁵ Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (“Vienna Convention”).

³⁶ Although the Supreme Court held in *Missouri v. Holland*, 252 U.S. 416 (1920), that the treaty-making power grants authority to Congress to enact legislation that would otherwise be prohibited by principles of federalism such as the Tenth Amendment, there likely remain some state matters which the treaty power cannot touch. *See* LOUIS

addresses this concern by proclaiming that each State Party must give effect to the Covenant “in accordance with its constitutional processes.”³⁷ The International Court of Justice noted in the *LaGrand Case* that the United States’ ability to prevent Walter LaGrand’s execution at the last minute was limited by its federal structure.³⁸ Third, Understanding 5 is unnecessary because, to the extent that a state law contradicts a treaty provision (such as an Article of the ICCPR), the treaty provision will preempt the state law.³⁹ As such, there is no reason to fear that an unwilling state could interfere with U.S. compliance with the ICCPR, as inconsistent state action could be enjoined by the federal courts or trumped by the federal legislature. As Understanding 5 is unnecessary and can only lead to confusion, the Lawyers’ Committee recommends its withdrawal.

47. The Lawyers’ Committee also recommends that the federal Government take full advantage of its significant constitutional power to adopt legislation aimed at guaranteeing Covenant rights, as discussed in Section E below, to encourage, or if necessary, force individual states within the union to implement fully the ICCPR.

C. The Inappropriately Broad Scope Of The U.S. Reservations, Understandings And Declarations

48. When the United States ratified the ICCPR in 1992, it assumed an international obligation to comply with the Covenant’s provisions, even through congressional legislation if necessary.⁴⁰ However, the United States has attempted to limit its obligations under the Covenant by conditioning its ratification of the ICCPR on an extensive list of reservations,

HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 189-94 (2d ed. 1996). It is doubtful, for instance, that a treaty could force states to appoint, rather than elect, judges, as this goes to the heart of state sovereignty.

³⁷ ICCPR, art. 2(2).

³⁸ *LaGrand Case (Germany v. U.S.)*, 2001 I.C.J. 466, 506-07 (June 27), 40 I.L.M. 1069 (2001) (“*LaGrand Case*”).

³⁹ See *Holland*, 252 U.S. at 432-34; *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁴⁰ This obligation follows from the doctrine of *pacta sunt servanda*, “perhaps the most important principle of international law.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 & cmt. a; *id.* § nn. 2, 7 (1987) (“RESTATEMENT (THIRD)”). This principle is also expressed in Article 26 of the 1969 Vienna Convention on the Law of Treaties (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”). Although the United States is not a party to the Vienna Convention, the provisions of the treaty are widely considered to represent customary international law. See U.S. Report (2005), Annex I n.4 (“Although the United States has not ratified the Vienna Convention [on the Law of Treaties], the United States generally recognizes the Convention as an authoritative guide to principles of treaty interpretation.”).

understandings and declarations (“RUDs”).⁴¹ Indeed, the U.S. has attached more RUDs to the Covenant than any other State Party.⁴²

49. With the exception of one reservation (Reservation 1), which relates to ICCPR Article 20 and free speech, none of the U.S. RUDs is required in order to prevent a violation of the U.S. Constitution (the “Constitution”). The Lawyers’ Committee urges the U.S. Government to remove or alter these RUDs to effectuate the object and purpose of the ICCPR.⁴³ At best, these RUDs are unnecessary and cause confusion about the U.S. Government’s obligations under the Covenant. At worst, the extensiveness of these RUDs portrays the U.S. as a reluctant participant in the modern multilateral human rights regime, and suggests an unwillingness to uphold the object and purpose of the Covenant, as well as a desire to limit the Government’s international obligations to those which already exist under U.S. domestic law.

50. To eliminate ambiguity relating to the ICCPR, to demonstrate its genuine commitment to human rights, and to adhere in good faith to the Covenant’s provisions, the U.S. Government should withdraw those RUDs which are superfluous or which restrict its treaty obligations to those protections already afforded under U.S. domestic law. Indeed, the international human rights regime would be meaningless if each signatory were to agree to be bound by the Covenant only to the extent of its current domestic legal obligations.

1. Status Of Treaties In U.S. Domestic Law

51. The U.S. Government enjoys vast discretion to enter into international treaties; rarely will treaties, duly ratified, violate the Constitution. A properly ratified treaty ranks equally with federal law as the supreme law of the land.⁴⁴ As noted above, in case of conflict, a treaty supersedes inconsistent state law and is itself superseded by only the Constitution. Should a

⁴¹ Article 2 of the Vienna Convention defines a reservation as a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

⁴² ICCPR Ratifications and Reservations, *available at* http://www.ohchr.org/english/countries/ratification/4_1.htm.

⁴³ Under Article 19 of the Vienna Convention, entering a reservation to a treaty is permissible unless the reservation is (i) prohibited by the treaty or (ii) incompatible with the object and purpose of the treaty.

⁴⁴ U.S. CONST., art. VI, cl. 2.

federal law conflict with a treaty, the more recent of the two prevails.⁴⁵ Whenever possible, however, U.S. courts will construe a federal law so that it does not violate the country's treaty commitments.⁴⁶

2. The Inappropriate Breadth Of The U.S. RUDs To The ICCPR⁴⁷

52. In a 1992 letter to the U.S. Senate Foreign Relations Committee, President George H.W. Bush expressed the hope that ratification of the ICCPR “would underscore our natural commitment to fostering democratic values through international law” as well as “strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world.”⁴⁸

53. These statements stand in sharp contrast to the U.S. Government's decision to condition its ratification of the Covenant on a wide array of RUDs. In at least two cases, the RUDs confer lesser protection than the U.S. Constitution. Reservation 2 reserves the right to execute any individual who committed a crime under the age of eighteen, while contemporaneous interpretation of the Constitution had barred executions of those under sixteen when the crime was committed.⁴⁹ Understanding 1 states that the United States may make

⁴⁵ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no supreme efficacy is given to either over the other. When the two related to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.”).

⁴⁶ See *Weinberger v. Rossi*, 456 U.S. 25, 33 (1982); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT (THIRD) § 114, §114 cmt. a. Under the *Charming Betsy* doctrine, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction” exists. 6 U.S. (2 Cranch) 64, 118 (1804). In other words, a subsequent federal statute will not abrogate a prior treaty, “unless the Congressional intent to override that obligation is clear and manifest.” DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 165 (Foundation Press 2001).

⁴⁷ This section only examines the U.S. RUDs which relate to the ICCPR provisions of particular interest to the Lawyers' Committee, and the subject of discussion in this Submission, namely ICCPR Articles 2, 3, 6, 7, 25, and 26. However, the general conclusions about the overly broad nature of the U.S. RUDs apply to most if not all, of the U.S. RUDs, even those not specifically discussed herein.

⁴⁸ *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, S. Exec. Doc. No. 102-23, 31 I.L.M. 645, 660 (1992).

⁴⁹ See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (finding it unconstitutional under the Eighth Amendment to execute an individual who was fifteen-years old when he committed the offense). This ruling has since been extended to include anyone whose crime was committed under the age of eighteen. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

distinctions on the basis of race, color, sex, religion, political or other opinion, national origin, and birth status when the distinctions are rationally related to a legitimate governmental objective. However, these categories are all subject to some form of heightened scrutiny under the U.S. Constitution.⁵⁰ In both of these cases, the United States has apparently reserved the right to do things that are already prohibited by domestic law. Furthermore, Declaration 1, which states that Articles 1 to 27 of the Covenant are non-self-executing under U.S. law, deprives individuals of a meaningful means of challenging conduct that might violate the ICCPR (*see D. infra*). These RUDs substantially undermine the legal effect of the Covenant under U.S. law, and they appear to serve one purpose: to allow the United States to reap the benefits of ratification of the Covenant, while ensuring that the U.S. does not need to comply with the obligations imposed by the Covenant.

54. This approach advances neither foreign nor domestic policy. Resistance to international norms tarnishes the image of the United States as a champion of human rights. U.S. criticism of the human rights records of other nations may appear arrogant, if not hypocritical, given its own reluctance to abide by the Covenant's obligations. Perhaps more seriously, however, the U.S. practice of attaching such extensive RUDs weakens the ICCPR as a multilateral instrument for safeguarding human rights. Were every party to enter reservations exempting itself from the need to harmonize domestic law with human rights conventions, as the United States has done, the conventions would be meaningless.⁵¹

55. The U.S. must review the RUDs discussed throughout this Submission in connection with the ICCPR Article to which they pertain, and re-evaluate the benefits of unreserved compliance with the Covenant. The Lawyers' Committee is confident that this reconsideration will convince the U.S. Government that the withdrawal of these RUDs is in the best interests of the country and of the international community.

⁵⁰ See U.S. Report, ¶¶ 28-32.

⁵¹ See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 343 (1995).

D. The Need For Stronger Domestic Mechanisms For Enforcement Of The ICCPR

56. Article 2(3) of the Covenant requires States Parties to ensure that: (1) any person whose ICCPR rights are violated has an effective remedy; (2) any person claiming such a remedy has her right determined by competent authorities; and (3) competent authorities enforce such remedies when granted.⁵² Although U.S. civil rights laws are among the best in the world and are in most cases in compliance with the Covenant, there is currently no way to seek relief where the Covenant establishes a standard higher than U.S. law. For example, the U.S. Constitution allows states to deny the vote for life to individuals who have “participat[ed] in rebellion, or other crime”⁵³ which may violate Article 25’s guarantee of the right of every citizen to vote.⁵⁴ In addition, Article 3 requires States Parties to “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the . . . Covenant,”⁵⁵ a requirement that cannot be met if the individual is denied the opportunity to raise claims under the ICCPR. In such situations, the United States has not provided individuals with any forum in which they may be heard, in violation of Article 2(3).

57. This situation creates the impression, whether justified or not, that the United States intended to obligate itself to nothing more than it was already required to do under its own domestic law. In addition, Article 2(3) of the Covenant specifically requires that each State Party ensure an “effective remedy” for individuals whose Covenant rights have been violated and “that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities.”

58. There are three separate yet overlapping ways that the U.S. should strengthen mechanisms for enforcement of the Covenant to comply with ICCPR Article 2(3): (i) declare the ICCPR to be self-executing (Section 1 below); (ii) implement enabling legislation for the

⁵² ICCPR, art. 2(3) (“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”).

⁵³ U.S. CONST. amend. XIV, § 2.

⁵⁴ ICCPR, art. 25.

⁵⁵ ICCPR, art. 3.

Covenant (Section 2); and (iii) ratify the First Optional Protocol, allowing individual complaints to be brought to the Human Rights Committee (Section 3).

59. The U.S. Government's reluctance to commit unconditionally to the Covenant's provisions engenders confusion and cynicism among the other States Parties. Other countries may justifiably question the credibility of the United States not only as a leader in the development of human rights law, but also as a willing participant in such a legal regime.

60. While the U.S. Government fears that making the Covenant self-executing (or enacting enabling legislation to allow individuals to bring actions based on the ICCPR) will open the "floodgates" of litigation, it is doubtful that this would occur. The Covenant would most likely be cited as an alternative cause of action in suits that would be filed anyway (probably on constitutional grounds). Moreover, neither the ICCPR nor international law requires that a State Party follow a particular procedure in granting access to the courts,⁵⁶ thus allowing the United States to impose the same procedural limitations on actions under the Covenant that it imposes on actions under domestic law. As such, there would be no "flood of litigation," and the only new burden imposed upon U.S. courts would be interpreting the Covenant.

61. For these reasons, the United States is urged to withdraw Declaration 1, to adopt implementing legislation that grants individuals the right to challenge governmental conduct under the Covenant, and to ratify the First Optional Protocol.

1. The U.S. Should Declare The ICCPR To Be Self-Executing

62. When the United States ratified the ICCPR, it attached Declaration 1 stating that the Covenant's central provisions are not self-executing under U.S. domestic law.⁵⁷ To be given effect by U.S. courts, a treaty must be either self-executing or statutorily implemented into U.S. law.⁵⁸ Declaration 1 is an overt attempt by the Government to limit the effectiveness of the

⁵⁶ See, e.g., *LaGrand Case*, 2001 I.C.J. 466, 497 (holding that procedural default rule did not *per se* violate the Vienna Convention on Consular Relations, but that application of that rule to deny any access at all to a tribunal did violate the Convention).

⁵⁷ ICCPR, Declarations and Reservations, United States of America, Declaration 1, available at http://www.ohchr.org/english/countries/ratification/4_1.htm ("That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.")

⁵⁸ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 198-204 (2d ed. 1996).

Covenant under U.S. law, and to reserve the U.S. Government's right to apply selectively the ICCPR's provisions.

63. Even though classified as a "declaration", Declaration 1 clearly is a reservation, as that term is understood under international law, as it excludes or at least modifies the ICCPR's legal effect under U.S. law.⁵⁹ Therefore, the validity of this declaration should be assessed by inquiring whether it is compatible with the object and purpose of the Covenant, and Declaration 1 violates the ICCPR's object and purpose by negating remedies that would otherwise be available for the breach of the treaty. By declaring the Covenant non-self-executing, the United States is failing to comply in good faith with its treaty obligations.⁶⁰

64. Nations traditionally have adopted two basic approaches to the impact of international law on their domestic legal systems. Under the first approach, known as monism, "international law and State law are concomitant aspects of the one system – law in general."⁶¹ In contrast, under the second approach, labeled dualism, international law is treated as substantively different from domestic law and must be enacted separately into the domestic law of the state to have effect on the domestic plane.⁶² Generally speaking, monism is more prevalent in civil law jurisdictions, while various forms of dualism are more often encountered in common law jurisdictions.⁶³

65. Like many other countries, the United States has adopted a hybrid approach, relying on aspects of both the monist and dualist views. The U.S. Constitution declares treaties to be "the Supreme Law of the Land," in line (*i.e.*, on an equal footing) with the Constitution and federal statutes (except that subsequent conflicting statutes prevail over an earlier treaty).⁶⁴ In *Foster and Elam v. Neilson*, the U.S. Supreme Court interpreted this clause to mean that a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it

⁵⁹ See *supra* Section C.

⁶⁰ The execution of a treaty "in good faith" is a fundamental principle of treaty law. Vienna Convention, art. 26 ("[E]very treaty in force is binding upon the parties to it and must be performed by them *in good faith*.").

⁶¹ I.A. SHEARER, STARKE'S INTERNATIONAL LAW 64 (11th ed. 1994).

⁶² *Id.*

⁶³ BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED CASEBOOK 232 (3d ed. 1997).

⁶⁴ U.S. CONST. art. VI, cl. 2.

operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.”⁶⁵ While a treaty will ordinarily be enforceable in court on its own terms (be “self-executing”), provided those terms are unambiguous and certain, treaty provisions that are merely promises to do something are not (they are “non-self-executing”).

66. Irrespective of whether a treaty is self-executing or non-self-executing, it remains binding on the United States on the international plane and the political organs of government are obligated to act to implement the treaty.⁶⁶ Thus, while a ruling by a court or a statement by the executive that a treaty is non-self-executing does not affect the United States’ international law obligations, it does prevent the enforcement of those obligations in a domestic court.

67. Courts consider the self-executing nature of a treaty to be a question of the treaty’s interpretation. As such, courts defer to the intention of the treaty framers and to any statement issued by the President or views expressed by the U.S. Senate.⁶⁷ U.S. courts will generally look to the intent of the parties signing the treaty.⁶⁸ By explicitly declaring Articles 1 through 27 of the Covenant to be non-self-executing, the intent is clear: the treaty is inoperable and ineffective under U.S. domestic law without the support of implementing legislation. Although the U.S. Supreme Court has not ruled on the question of the self-executing nature of the Covenant, it would very likely defer to Declaration 1. Thus, the U.S. Court of Appeals for the Second Circuit noted in a recent case that, because the Covenant “was ratified [by the United States] with numerous reservations” and “with the declaration that the ICCPR is not self-

⁶⁵ 27 U.S. (2 Pet.) 253, 314 (1829).

⁶⁶ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 198-204 (2d ed. 1996). It is established case law that, whenever possible, U.S. must interpret federal law to avoid conflicts with treaties. *See Weinberger v. Rossi*, 456 U.S. 25, 33 (1982); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *RESTATEMENT (THIRD)* § 114, § 114 cmt. a.

⁶⁷ *RESTATEMENT (THIRD)* § 326.

⁶⁸ Factors considered in determining such intent include whether: the treaty contemplates further legislative action by the U.S. Congress; the rights and duties under a treaty are specific enough, thereby rendering implementing legislation unnecessary; the non-U.S. signatories provide private causes of action under the treaty; and, most easily for purposes of interpretation, whether the Government explicitly declares the treaty to be non-self-executing. BEDERMAN, *supra* note 46, at 163.

executing,” it “[a]ccordingly ... does not create a private cause of action in United States courts.”⁶⁹

68. Although the Covenant is technically binding on the United States notwithstanding the fact that its provisions may be non-self-executing in nature, the lack of enforcement mechanisms to ensure compliance with its requirements is cause for great concern. Because no implementing legislation has been enacted, U.S. courts cannot base decisions directly on the Covenant (though courts do sometimes refer to international law when determining norms under the U.S. Constitution),⁷⁰ and they cannot rely on the Covenant as an authoritative source of law.⁷¹ Declaration 1 effectively prohibits private causes of action under the Covenant, a move which puts the U.S. in direct violation of one of the treaty’s fundamental undertakings, being the provision of remedies for breaches of the ICCPR.⁷²

2. The Need For Enabling Legislation

69. Enabling legislation for the ICCPR is necessary insofar as the Covenant’s scope is broader than the existing statutes, and as a sign of the U.S.’s commitment to the rights guaranteed by the ICCPR. Enabling legislation would be consistent with the existing strong statutory regime for the protection of human rights in the U.S., which includes the Alien Tort Claims Act,⁷³ and the Torture Victims Relief Act.⁷⁴

⁶⁹ *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 n.35 (2nd Cir. 2003).

⁷⁰ Although the United States’ claim in 1995 that “courts could refer to the Covenant and take guidance from it even though it was not self-executing,” Human Rights Committee, 53d Sess., 1405th mtg. at 4, U.N. Doc. CCPR/C/SR.1405 (Apr. 24, 1995), is technically correct, judges cannot base their decisions solely on the Covenant itself, but rather may use the Covenant to help interpret domestic law. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005) (citing international treatment of executing juveniles, but noting “the overwhelming weight of international opinion against the juvenile death penalty The opinion of the world community, while not controlling our outcome, does provides respected and significant confirmation for our own conclusion” that the penalty is disproportionate punishment for offenders under 18); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing European Court of Human Rights decision in *Dudgeon v. United Kingdom* when determining that protection of homosexual rights was not insubstantial in western civilization, a key consideration in finding the Texas statute unconstitutional). There may be cases, however, where domestic law has been set at a level lower than the level set by the Covenant. In those instances, the ability of courts to consider the Covenant becomes meaningless.

⁷¹ *See also* Section III E *infra*, discussing the use of foreign and international law in U.S. courts.

⁷² This undertaking is also considered a norm of customary international law. *See* M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States*, 42 DEPAUL L. REV. 1169, 1181 n.43 (1993) (“Furthermore, customary international law requires providing ‘access to courts.’”).

⁷³ Ch. 646, 62 Stat. 869 (1948) (codified as amended at 28 U.S.C. § 1350 (2000)).

⁷⁴ Pub. L. No. 105-320, 112 Stat. 3016 (1998) (codified as amended at 22 U.S.C. § 2152 (2000)).

3. The Need For The United States To Ratify The First Optional Protocol, Allowing Individual Complaints To Be Brought To The Human Rights Committee

70. The United States' non-ratification of the First Optional Protocol deprives individuals of the ability to challenge treatment before the HRC, which is assigned primary responsibility in ensuring the enforcement of the Covenant. While other States Parties may complain of United States' conduct under Article 41, this procedure does not sufficiently protect the rights of individuals, who should have some opportunity to raise claims under the Covenant without the intercession of another State Party.

71. Although the United States ratified the ICCPR in 1992, it did not at that time and has not yet ratified the Covenant's First Optional Protocol (the "Protocol"), which allows individuals subject to the jurisdiction of a State Party to bring allegations of ICCPR violations to the HRC.⁷⁵ Adoption of the Protocol would demonstrate that the United States intends to comply fully with its obligations under the Covenant, and accordingly, the Lawyers' Committee urges its ratification.

72. If, as the United States claims, it is already in full compliance with the ICCPR, adoption of the Protocol would only serve to verify this. If, however, the United States is not in full compliance with the ICCPR, the Protocol procedure would assist the U.S. Government in identifying which aspects of domestic law need to be updated to protect fully the rights of individuals within the United States and it would provide individuals with a needed forum to raise such concerns.

73. Contrary to fears that international tribunals or organs would intervene in the domestic affairs of the United States, the Protocol specifically bars the Human Rights Committee from considering a matter until an individual has exhausted all domestic remedies, with a limited

⁷⁵ Optional Protocol to the International Covenant on Civil and Political Rights, art. 1, *opened for signature* Dec. 16, 1966, G.A. Res. 2200 (XXI), *available at* <http://www.ohchr.org/english/law/ccpr-one.htm> ("First Optional Protocol") ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.").

exception when domestic remedies are unreasonably prolonged.⁷⁶ The Human Rights Committee would thus not have jurisdiction until after a matter had been fully litigated in U.S. courts applying U.S. law.

74. Ratification of the Protocol would demonstrate to the rest of the world that the United States intends to comply fully with the promises it has made to the international community. Without any enforcement mechanisms, the United States' promises in the ICCPR appear to many to be hollow words. Ratification of the Protocol would reassure the world that the United States is committed fully to the protection and maintenance of human rights and that it is willing to do whatever is necessary to ensure that human rights are respected both in the U.S. and abroad. Such a statement would have effect far beyond the United States' borders, as it would also serve as a message to other States that human rights abuses will not be tolerated. With the United States consistently at the forefront of promoting human rights, it will be more difficult for other States to continue their own abuses.

E. The Need For Increased Training Of The Judiciary Regarding The ICCPR, And The Need For Consideration Of Foreign Law And International Law In U.S. Courts

75. The HRC noted in 1995 that the issue of judicial education relating to the ICCPR needed to be addressed, and recommended that information about the Covenant should be provided to the judiciary.⁷⁷ The United States did not address this issue in its Second and Third Report.

76. Although the ICCPR is non-self-executing, as discussed above, issues relating to the fundamental rights protected by the ICCPR occasionally arise in U.S. courts, albeit on a different juridical basis.⁷⁸ For example, the prohibition on discrimination in ICCPR Articles 2, 3 and 26 is also found in the Equal Protection Clause of the Fourteenth Amendment of the U.S.

⁷⁶ First Optional Protocol, art. 5(2)(b) (“The Committee shall not consider any communication from an individual unless it has ascertained that . . . [t]he individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.”).

⁷⁷ 1995 Human Rights Committee Observations, ¶ 280 (“The Committee regrets that members of the judiciary at the federal, state and local levels have not been fully made aware of the obligations undertaken by the State party under the Covenant, and that judicial continuing education programmes do not include knowledge of the Covenant and discussion on its implementation. Whether or not courts of the United States eventually declare the Covenant to be non-self-executing, information about its provisions should be provided to the judiciary.”)

⁷⁸ For example, in the context of cases relating to the *Alien Tort Statute* and the *Victims of Torture Act*.

Constitution, which bars discrimination on the basis of race, sex, religion or national origin.⁷⁹ On these occasions, the Government should encourage U.S. judges at the federal and state level to refer to foreign law and when applicable, international law, as non-binding yet informative sources to consider in the course of reaching their decisions.

77. In this context, “foreign law” means the judicial and institutional decisions and legislation of other countries. “International law” means treaties, customary international law, and general principles of law recognized by civilized nations, as well as the secondary sources of judicial decisions (such as those of the International Court of Justice) and academic commentary.⁸⁰ Under the U.S. Constitution, as discussed above, treaties are part of the “Supreme law of the land”, and thus must be applied by all U.S. courts.⁸¹ However, the use of foreign law and international law (excluding treaties) in U.S. courts remains both rare and controversial.⁸² Between 1990 and January 2003, the U.S. Supreme Court referred to modern case law from Britain or Canada in only 21 decisions.⁸³ By contrast, the Canadian Supreme Court cited U.S. decisions 230 times in the year 1990 alone.⁸⁴ Lower level U.S. courts show a similar reluctance to refer to foreign precedents. Between 1990 and 2003, all 13 federal U.S. courts of appeal published several thousand opinions, yet only 43 decisions cited modern British precedent.⁸⁵

⁷⁹ As set forth in the Fourteenth Amendment of the U.S. Constitution, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 2.

⁸⁰ Statute of the International Court of Justice, art. 38, 59 Stat. 1031, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>.

⁸¹ U.S. CONST. art. VI, cl. 2.

⁸² See, e.g., *Discussion Between US Supreme Court Justices Antonin Scalia and Stephen Breyer on the Constitutional Relevance Of Foreign Court Decisions*, American University, Washington College of Law (Jan. 13, 2006) (transcript available at <http://www.american.edu/media>); Diarmuid F. O’Scannlain, *What Role Should Foreign Practice And Precedent Play In The Interpretation Of Domestic Law?* 80 NOTRE DAME L. REV. 1893 (2005) (“O’Scannlain Article”); Justice Stephen Breyer, *Keynote Address*, 97 Am. Soc’y Int’l Proc. 265 (2003) (“Breyer Address”). Justice Antonin Scalia, *Keynote Address Foreign Legal Authority in the Federal Courts*, 98 Am. Soc’y Int’l Proc. 305 (2004) (“Scalia Address”). Justice Sandra Day O’Connor, *Keynote Address*, 96 Am. Soc’y Int’l Proc. 348 (2002).

⁸³ O’Scannlain Article, *supra* note 82.

⁸⁴ *Id.*

⁸⁵ *Id.*

78. As Justice Ginsburg of the U.S. Supreme Court has recently stated, in supporting the use of foreign law as a reference tool for the interpretation of the U.S. Constitution: “if U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights.”⁸⁶ Similarly, Justice Breyer has commented on the “globalization” of human rights, the “even-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights, the embodiment of that consensus in legal documents such as national constitutions and international treaties, and the related decision to enlist independent judiciaries as instruments to help make that protection effective in practice.”⁸⁷

79. Whenever relevant, U.S. courts should refer to foreign law both in the interpretation of the U.S. Constitution and in the interpretation of a treaty such as the ICCPR, not as determinative precedent, but as relevant jurisprudence for courts to consider. As Justice Scalia has acknowledged, “[w]hen federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single agreed upon regime governing the actions of all the signatories, will be frustrated.”⁸⁸

80. Recent, and welcome, examples of the U.S. Supreme Court referring to international practice, norms, foreign court decisions, foreign law, and international law include:

- *Roper v. Simmons*,⁸⁹ holding unconstitutional the execution of persons under the age of 18 when they committed capital crimes, acknowledging “the overwhelming weight of international opinion against the juvenile death penalty”. Justice Kennedy stated that the opinion of the world community provides “respected and significant confirmation of our own conclusions. It does not lessen our fidelity to the Constitution [to recognize] the express affirmation of certain fundamental rights by

⁸⁶ Justice Ruth Bader Ginsburg, “*Decent Respect to the Opinions of [Human]kind*”: *The Value of a Comparative Perspective in Constitutional Adjudication* (Apr. 1, 2005) (transcript available at <http://www.asil.org/events/AM05/ginsburg050401.html>) (“Ginsburg Transcript”).

⁸⁷ Breyer Address at 266.

⁸⁸ Scalia Address at 305.

⁸⁹ 543 U.S. 551, 578 (2005).

other nations and peoples. . . . [That affirmation] underscores the centrality of those same rights within our own heritage of freedom.”

- *Lawrence v. Texas*,⁹⁰ where a majority overruled the Supreme Court’s 1986 decision in *Bowers v. Hardwick*, and declared unconstitutional a Texas statute prohibiting two adult persons of the same sex from engaging, voluntarily, in intimate sexual conduct, noting that “the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.” The majority cited the 1981 European Court of Human Rights (“ECHR”) decision in *Dudgeon v. UK* and later ECHR decisions affirming the protected right of homosexual adults to engage in intimate, consensual conduct.
- *Atkins v Virginia*,⁹¹ where a 6-3 majority held unconstitutional the execution of a mentally retarded offender, noting that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is universally disapproved”.

81. The use of foreign law is expressly mandated by the new Chapter 15 of the U.S. Bankruptcy Code, which states that: “[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”⁹² A similar clause should be included in any ICCPR enabling legislation enacted by the U.S. Government.⁹³

⁹⁰ 539 U.S. 574, 573 (2003).

⁹¹ 536 U.S. 304 (2002).

⁹² 11 U.S.C. § 1508.

⁹³ The Lawyers’ Committee also expresses its concern regarding the resolution introduced to the U.S. Senate by Senator John Cornyn, a Republican member of the Senate Judiciary Committee, declaring that judicial decisions regarding the U.S. Constitution should not be influenced by foreign law. S. Res. 92, 109th Cong. (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:sr92is.txt.pdf. The operative portion of the bill reads: “Resolved, That it is the sense of the Senate that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.” The stated purpose of this resolution is to discourage the use of foreign precedent in deciding constitutional issues, unless the foreign decision cited to the original meaning of the United States Constitution. A substantially identical resolution was introduced into the House of Representatives by Republican Representative Tom Feeney from Florida. H.R. Res. 97, 109th

82. In this context, the Lawyers' Committee notes with appreciation the judicial outreach efforts of the American Society of International Law ("ASIL"), a private association of American and foreign international lawyers. Since the inception of its Judicial Outreach Program in 1999, ASIL has conducted more than 20 educational programs through the U.S. federal judicial circuits. In addition, ASIL has delivered copies of "*International Law: A Handbook for Judges*" to courts in all 50 U.S. states and several U.S. territories.⁹⁴ These ASIL programs deserve the full support of the U.S. Government.

83. The U.S. Government should include compulsory foreign law and international law components in the training of federal and state judges.⁹⁵ The Lawyers' Committee is not alone in advocating such practices: the American Bar Association has also recommended that "special measures are taken to distribute [materials related to the ICCPR] within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers...."⁹⁶

84. To be clear, the Lawyers' Committee is not advocating the use of foreign or international law as binding precedents in United States courts, but rather merely the use of such materials as an additional tool to be available to individual judges in determining legal issues under the U.S. Constitution, state or federal statutes, or common law.

Cong. (2005) available at

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:hr97ih.txt.pdf.

Senator Cornyn's resolution has been referred to the Senate Judiciary Committee for further study, S. Res. 92, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.res.00092>. Representative Feeney's resolution was forwarded to the House Judiciary Committee by the Subcommittee on the Constitution on September 29, 2005, by a vote of 8-3. H.R. Res. 97, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.res.00097>. As Justice Ginsburg of the United States Supreme Court recently noted, the "sizable support" for these resolutions in the Senate and the Congress is "disquieting". Ginsburg Transcript, at 3-4. This resolution could potentially impact on court constitutional decisions relating to *inter alia*, the death penalty and torture, and inhuman or degrading treatment and thus could impact U.S. court jurisprudence relating to the rights protected by ICCPR Articles 6 and 7. The adoption of this resolution would send the wrong message to the international community regarding the United States' respect for foreign law and international law. The adoption of this resolution would also be inconsistent with Article 2(3) of the ICCPR, which requires States Party to provide an effective remedy for violation of the Convention and a proper forum where such claims can be heard. U.S. courts will be incapable of providing such a forum if they are expressly forbidden from even considering the Covenant when ruling on domestic law. The House and Senate should not pass these resolutions, and if associated legislation is passed, President Bush should exercise his veto powers if needed to overturn it.

⁹⁴ ASIL 2005 Annual Report at 6.

⁹⁵ *Eg.*, Justice O'Connor, Chairperson, ASIL Advisory Group at 348 (2002).

⁹⁶ American Bar Association Central European and Eurasian Law Initiative, *International Covenant on Civil and Political Rights (ICCPR): Legal Implementation Index* 50 (2003), available at http://www.abanet.org/ceeli/special_projects/iccpr/home.html.

F. General Lack of Enforcement of Civil Rights Laws By The U.S. DOJ

85. Various protections afforded by the ICCPR, including Articles 2, 3, 7 and 25, also are covered by U.S. federal civil rights laws such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Americans with Disabilities Act of 1991.⁹⁷ During the majority of President George W. Bush's tenure as President, the Civil Rights Division of the U.S. Department of Justice ("DOJ"), which is charged with enforcement of such laws, has politicized the enforcement of civil rights laws in unprecedented ways. This stance has had a negative impact on fair and even civil rights enforcement.

86. Since January 20, 2001, the Voting Section of the Civil Rights Division has brought no cases under the Voting Rights Act on behalf of African Americans. During the same period, the DOJ took the unusual and unprecedented step of bringing the first ever voting rights lawsuit on behalf of white citizens in Mississippi⁹⁸, where historically some of the most egregious discrimination against African Americans has occurred.

87. Similarly, there has been only one pattern and practice employment discrimination case brought on behalf of African Americans since the beginning of the Bush Administration, while during the same period there were two such cases brought on behalf of whites. In 2003, the Civil Rights Division chose to file charges in approximately 90% of the immigration cases presented, yet prosecuted only 5% of civil rights cases brought to its attention.⁹⁹ In 2004, the DOJ filed just six amicus curiae briefs in the Court of Appeals, down more than 66% from 1999.¹⁰⁰ Criminal prosecutions for civil rights violations declined from 83 in 2000 to 51 in 2003.¹⁰¹

88. The Bush Administration's reticence to enforce civil rights laws can also be seen in its response to the 2003 Texas redistricting plan. When the plan was submitted to the DOJ's

⁹⁷ For a complete description of the Division's enforcement authority, see <http://www.usdoj.gov/crt/>.

⁹⁸ *U.S. v. Ike Brown and Noxubee County, MS*, No. 4:05cv33TSL-AGN (S.D. Miss. filed Feb. 17, 2005).

⁹⁹ Transactional Records Access Clearinghouse, Syracuse Univ., *Civil Rights Enforcement by Bush Administration Lags* (2004), available at <http://trac.syr.edu/tracereports/civright/106/>.

¹⁰⁰ See William Yeoman, *An Uncivil Division*, LEGAL AFFAIRS MAGAZINE (Sept./Oct. 2005), available at <http://www.legalaffairs.org/issues/September-October-2005/index.msp>.

¹⁰¹ See Letter to the Judiciary Committee on the Nomination of Wan Kim for Assistant Attorney General, Civil Rights Division, (Oct. 5, 2005) (on file at the Lawyers' Committee office).

Voting Section for preclearance under § 5 of the Voting Rights Act,¹⁰² the Section's legal staff unanimously recommended against preclearing because the plan reduced by two the number of minority influence electoral districts.¹⁰³ However, the Bush Administration officials in control of the DOJ overruled their decision and allowed the Texas plan to stand.¹⁰⁴ Whether the redistricting plan was approved for purely partisan reasons or because of a legitimate change of policy on the Voting Rights Act, the result was the same: the U.S. Government has become less protective of minority civil and political rights than it has been in the past.

89. The DOJ's apparent policy of uneven and politicized enforcement of civil rights has had a disproportionately negative impact on racial minorities because by nature most of such reported civil rights abuses are perpetrated on those populations. Civil rights are meaningless without a fair and aggressive enforcement mechanism. To fulfill its international obligations under the ICCPR, the U.S. should revisit its civil rights enforcement policy and empower the Civil Rights Division to enforce the civil rights laws already on the books. Failure to fairly and fully enforce civil rights laws effectively usurps Congress' attempt to protect citizens from discrimination and abuse, and undermines United States' compliance with the ICCPR.

G. Lawyers' Committee Recommendations

90. The Government should endeavor to meet its reporting obligations to the Human Rights Committee in a full and timely manner, and should establish internal mechanisms to facilitate the preparation of reports.

91. The Government should collect information from the states on their actions or inactions in implementing the ICCPR and should ensure that this information is relayed to the Human Rights Committee in the U.S.'s regular reports. The Government should also take appropriate action to encourage and ensure that states comply with the ICCPR.

¹⁰² Pub. L. 89-110, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973 (2000)).

¹⁰³ Tim Mellett et al., *Section 5 Recommendation Memorandum* at 4 (Dec. 12, 2003) available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>.

¹⁰⁴ Charles Paul Hoffman, *The Gerrymander and the Commission: Drawing Electoral Districts in the United States and Canada*, 31 MAN. L. J. 331, 344 (2006).

92. The Government should reconsider and withdraw any Reservations, Understandings, and Declarations that are not required by the U.S. Constitution or otherwise raise tensions with the object and purpose of the ICCPR.

93. The Government should adopt measures to allow greater enforcement of the ICCPR, including: (1) withdrawing Declaration 1, which states that the Covenant is non-self-executing; (2) adopting implementing legislation for the Covenant; and (3) acceding to the First Optional Protocol, allowing individuals to bring complaints directly to the Human Rights Committee.

94. The Government should increase training of its federal and state judiciaries on the ICCPR and should encourage consideration of both international and foreign law in court decisions in appropriate circumstances.

95. The Government should increase enforcement of civil rights laws and should adopt further civil rights legislation where necessary and appropriate.

IV. ARTICLE 2: EQUAL PROTECTION OF RIGHTS IN THE COVENANT

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*
 - (a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
 - (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
 - (c) *To ensure that the competent authorities shall enforce such remedies when granted.*

A. The Scope Of ICCPR Article 2, And Focus of Submission

96. Article 2 of the ICCPR guarantees the enjoyment of the rights enumerated in the Covenant to all individuals within the United States without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁰⁵ This Submission focuses on affirmative action, and does not discuss homeland security or religion in the context of Article 2.

97. In 1995, the Human Rights Committee suggested that, in order to fulfill its obligations under Article 2, the United States Government should “increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action.”¹⁰⁶ The progress by the U.S. federal Government on this front has been mixed at best. Affirmative action programs have been upheld by the U.S. Supreme Court in the contexts of education, employment and contracting. However, anti-discrimination laws are increasingly being wielded against affirmative action programs, which is particularly ironic as such

¹⁰⁵ U.S. Report, ¶¶ 26-59 (2005).

¹⁰⁶ 1995 Human Rights Committee Observations , ¶ 295.

affirmative action programs were designed to remedy the effects of institutionalized racial discrimination. Moreover, popular hostility towards affirmative action programs is increasing, and states are also undermining the protections of Article 2. Since the late 1990s, California and Washington have enacted legislation banning affirmative action.¹⁰⁷ In 1998, Washington voters passed, by a margin of 59 percent, an initiative prohibiting preferential treatment on account of race or sex, in areas of public education, and public contracting. However, Washington Initiative 200, unlike California’s Proposition 209, is not an amendment to the state constitution. It is a statute, and thus is subject to repeal by ordinary legislation.¹⁰⁸ In November 2006, Michigan voters are expected to consider the same question.¹⁰⁹ In Florida, Governor John Ellis “Jeb” Bush’s “One Florida Initiative” bans the use of affirmative action programs in government contracting, employment, and education.¹¹⁰

98. Thus, the U.S. federal Government, particularly through the Department of Justice Civil Rights Division, the Department of Education, Office for Civil Rights, and the Department of Labor, needs to be more supportive of its affirmative action aspirations if it truly wishes to achieve integration and equal protection of rights for all individuals in the United States.

B. ICCPR Article 2 And The Equal Protection Clause In The U.S. Constitution

99. Article 2 must be read against the backdrop of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which bars discrimination on the basis of race, sex, religion or national origin.¹¹¹

100. The United States generally adheres to Article 2, subject to the understandings that: (i) Articles 2(1) and 26 are broader than what is currently permitted under U.S. federal law—specifically, certain distinctions among individuals are permitted if they are rationally

¹⁰⁷ California Proposition 209. Codified at CAL. CONST. art. I, § 31(a) (approved Nov. 5, 1996). Washington Initiative 200. Wash. Rev. Code § 49.60.400 (2004).

¹⁰⁸ See WASH. REV. CODE § 49.60.400; Jim Chen, *DeFunis Defunct; Race-based Law School Admissions*, Constitutional Commentary, Mar. 22, 1999, n. 80.

¹⁰⁹ See One Florida Initiative, available at <http://www.dca.state.fl.us/oneflorida/index.cfm>.

¹¹⁰ See Michigan Civil Rights Initiative, available at <http://www.michigancivilrights.org>.

¹¹¹ As set forth in the Fourteenth Amendment of the U.S. Constitution, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 2.

related to a legitimate governmental objective as discussed *infra*; and (ii) Article 4(1), which bans discrimination in times of public emergency, does not render illegal distinctions that may have a disproportionate effect upon persons of a particular status.¹¹²

101. Under the U.S. doctrine of equal protection, the Government must treat persons who are “similarly situated” on an equal basis, but can treat persons in different situations or classes in different ways with respect to a permissible purpose. Legislative classifications are presumed valid if they bear some reasonable relation to a legitimate governmental purpose.¹¹³ The most obvious example of this rule being applied in practice is in relation to governmental economic. Both state and federal governments are able to apply different rules to different types of economic activities, and the courts will review such regulations under a very deferential standard.¹¹⁴ Similarly, the way in which a state government chooses to allocate its financial resources among categories of needy people will be reviewed under a very deferential standard.¹¹⁵

102. On the other hand, certain distinctions or classifications have been recognized by U.S. courts as inherently invidious and therefore have been subjected to more exacting scrutiny and judged against more stringent requirements. For example, classifications on the basis of

¹¹² According to the U.S. Understanding 1, “[T]he Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based ‘solely’ on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.” ICCPR, Ratifications and Reservations, available at http://www.ohchr.org/english/countries/ratification/4_1.htm.

¹¹³ See *FCC v. Beach Communication, Inc.*, 508 U.S. 307 (1993) (distinction in Cable Communications Policy Act had rational basis and was constitutional); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) (“Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”).

¹¹⁴ See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (with respect to Oklahoma regulation concerning visual care “[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds”).

¹¹⁵ See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (“In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’”) (citation omitted).

racial distinctions are automatically “suspect” and must be justified as necessary to a compelling governmental purpose and as narrowly tailored to achieving a valid compelling government interest.¹¹⁶

103. A recent example of this close judicial scrutiny is the 2005 Supreme Court decision in *Johnson v. California*.¹¹⁷ Petitioner, a prison inmate, sued the California Department of Corrections (“CDC”), alleging that the CDC’s unwritten policy of segregating new and transferred prisoners by race violated his constitutional right to equal protection of the laws. The CDC contended that the policy was necessary to prevent violence caused by racial prison gangs and was thus reasonably related to legitimate penological interests. The Supreme Court held that the policy was subject to strict judicial scrutiny since it was based on a racial classification, and thus the classification was required to be narrowly tailored to further compelling CDC interests. The Court found that compromising the inmate’s equal protection rights was not necessarily needed for proper prison administration. The CDC’s discretion and expertise in the unique area of managing daily prison operations did not warrant deference to the CDC’s use of race as a means of controlling prison violence. Accordingly, the Court found in favor of the petitioner and remanded his case to the Ninth Circuit for strict scrutiny of the CDC’s policy.¹¹⁸

104. The Lawyers’ Committee applauds this and similar decisions by U.S. courts striking down legislation which violates the Equal Protection clause of the U.S. Constitution and ICCPR Article 2. However, the Lawyers’ Committee is concerned about certain recent developments relating to affirmative action and education, employment and contracting, as discussed further below. The Lawyers’ Committee is particularly concerned about the federal Government’s retreat from its role in promoting equal employment opportunity and affirmative action. The Department of Justice and the Department of Labor have demonstrated outright

¹¹⁶ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (“Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”); *Korematsu v. United States*, 323 U.S. 214, 216 (1994) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.”); *Brown v. Board of Education*, 347 U.S. 483 (1954) (separate educational facilities based on racial classifications violate Equal Protection Clause); *McLaughlin v. Florida*, 379 U.S. 184 (1961) (statute prohibiting interracial cohabitation violate Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1 (1967) (ban on interracial marriages violate Equal Protection Clause).

¹¹⁷ 125 S. Ct. 1141 (2005).

¹¹⁸ *Id.* at 1152.

hostility toward enforcing worker protections for women and minorities. The “trickle-down effect” from the federal Government’s lack of leadership in this area has generated state-level efforts to ban affirmative action, as in the California and Washington enactments and the Florida executive order.

C. Affirmative Action And Education

105. Please refer to the “Statement of the Lawyers’ Committee for Civil Rights Under Law Before the United Nations Human Rights Committee Concerning the International Covenant on Civil and Political Rights,” submitted in March 2006.

106. The Lawyers’ Committee recommends that the United States Government, through such agencies as the U.S. Department of Education and its Office for Civil Rights, the U.S. Department of Justice and U.S. Civil Rights Commission, use race conscious affirmative action measures to reduce the history of discrimination, segregation and more recent re-segregation, that results in unequal educational opportunities for racial and language minorities in K-12 grade schools and in institutions of higher learning.¹¹⁹

107. The Lawyers’ Committee also recommends that the federal government, specifically the United States Congress, use its spending power to require states to implement programs that reduce the academic achievement gap that exists amongst minority and economically disadvantaged students. In particular, the Lawyers’ Committee recommends that the United States Congress provide states with block grant funding and guidelines to implement early childhood development programs such as mandatory universal pre-kindergarten classes.

108. The Lawyers’ Committee also recommends that the United States Congress increase the amount of funding given to states to comply with the federal No Child Left Behind Act (“NCLB” or “Act”) in order to ensure that states have the means necessary to achieve the Act’s stated goal of reducing the academic achievement gap for minority and poor students.

¹¹⁹ See David Weissbrodt, Christian Shafer, & Deena Anders, Issues for the Human Rights Committee to Consider with Regard to Continued De Facto Racial Segregation of Public Schools in the United States and Articles 26 & 27, International Covenant on Civil and Political Rights (Mar. 2006) (unpublished report, on file with University of Minnesota Human Rights Center).

D. Affirmative Action And Employment

109. This discussion of the federal Government's failure to enforce laws prohibiting employment discrimination and to defend appropriate affirmative action measures is intended to supplement the statement previously submitted by the Lawyers' Committee for Civil Rights, submitted herewith as Appendix 1.

1. Major Inequalities Still Exist In The U.S. Employment Sector

110. Statistics on employment trends indicate that there is still a tremendous need for meaningful affirmative action measures and enforcement of existing laws. According to data compiled by the National Asian and Pacific Legal Consortium, although Caucasian men comprise only 48% of the college-educated workforce, they hold over 90% of the top jobs in news media, 96% of CEO positions, 86% of law firm partnerships, and 85% of tenured college faculty positions.¹²⁰

2. The U.S. Framework For Affirmative Action And Employment

111. Affirmative action in both public and private employment in the U.S. is rooted in Executive Order 11246 ("EO 11246") and Title VII of the Civil Rights Act of 1964 ("Title VII"). EO 11246 requires certain private employers who contract with the federal Government to adopt affirmative action plans, including placement goals and timetables to give preference to women and minorities. Title VII prohibits employment discrimination on the basis of race, sex, national origin, color, and religion and applies to all public and private employers with fifteen or more employees. While there is no affirmative statutory duty for private employers to adopt affirmative action plans, courts may "order such affirmative action as may be appropriate" in cases where there are findings of discrimination.¹²¹

112. The Equal Employment Opportunity Commission ("EEOC") is the U.S. government body charged with enforcing the provisions of Title VII as to private employers, and the DOJ's Civil Rights Division performs this role as to state and local governments. Under the

¹²⁰ See Civil Rights 101, available at http://civilrights.org/research_center/civilrights101/affirmaction.html (last visited May 10, 2006).

¹²¹ 42 U.S.C. § 2000e-5(g)(1) (2005).

EEOC's guidelines, federal agencies are required to develop affirmative action plans for all employees and job applicants.

113. These laws are critical and formidable tools for combating racism in the workplace, but the federal agencies charged with enforcing them must take a leadership role lest the laws and the concept of affirmative action have no meaning. Unfortunately, the federal Government recently has failed in protecting these rights, basically “ask[ing] us to take on faith that employment discrimination does not happen, because there is a law against it.”¹²²

3. The U.S. Failure To Enforce Equal Employment Opportunity Laws

114. Examples of the federal Government's failures to enforce equal employment opportunity laws and defend affirmative action measures are numerous. In recent years, the DOJ has filed very few systemic employment discrimination cases on behalf of African American class members. In 2002, the DOJ proposed that the City of Buffalo's Police Department be permitted to use a discriminatory, invalid test, despite the City's failure to comply with a court order to create a non-discriminatory test over a span of twenty-four years. The DOJ also argued that race-conscious remedies were unconstitutional, including the hiring of seven African American police officers, who should have been hired by the City pursuant to the district court's previous orders to make up the “‘shortfall’ in the appointment of black candidates.” The district court denied the DOJ's request to dismiss the case, and also rejected the DOJ's arguments that race-conscious relief violated the Constitution.¹²³

115. In March 2006, the DOJ threatened a small university, Southern Illinois University (“SIU”), with litigation, alleging that its graduate fellowship programs for women and minorities discriminated against white graduate fellows.¹²⁴ The fellowships at issue at SIU are aimed at increasing minority enrollment in graduate programs in which minorities are underrepresented. Just under 8 percent of SIU's 5,500 graduate students are Black or Hispanic. According to the University's spokesperson, the programs have helped to improve the school's diversity and are similar to those at other schools nationwide. Rather than recognizing the need

¹²² Michael L. Foreman, *Hire the Rainbow*, LEGAL TIMES at 2 (Apr. 19, 2004).

¹²³ See *United States v. City of Buffalo*, No. 73-CV-414, at 7 (W.D.N.Y. 2001).

¹²⁴ See Tyler Lewis, *DOJ Threatens Lawsuit Over Southern Illinois University's Affirmative Action Program* (Dec. 9, 2005) available at http://www.civilrights.org/tools/printer_friendly/cfm?id=38586.

to improve the school's diversity, Brad Scholzman, an Assistant Attorney General at the time, suggested that the fellowship program constituted "brazen discrimination" and "was outright racist."¹²⁵ The DOJ's attack on these SIU programs marks the first time ever that the federal Government has challenged a graduate fellowship program under Title VII for discriminating against whites, and is further evidence of a disturbing trend in the U.S. away from affirmative action. The Lawyers' Committee urges the DOJ to dedicate its limited resources to fulfilling its historic mission of combating systemic discrimination against minorities and women.

116. The DOJ should vigorously enforce Title VII of the Civil Rights Act of 1964 and defend appropriate race-conscious affirmative action measures.

117. The U.S. Department of Labor has also retreated from its enforcement of affirmative action programs.¹²⁶ After Hurricane Katrina devastated the Gulf Coast in August 2005, the Department's Office of Federal Contract Compliance Programs ("OFCCP") waived federal contractors' obligations to prepare affirmative action plans. In light of the inequities that were exposed in the aftermath of Hurricane Katrina, it was astonishing that these important worker protections would be waived in such a time of crisis. The waiver of affirmative action requirements likely harmed the very communities that were most in need. After an outcry from the civil rights community and the general public, these important worker protections were ultimately reinstated.¹²⁷

118. The Lawyers' Committee urges the Department of Labor to vigorously enforce the protections under Executive Order 11246 for employees of federal contractors.

119. More recently, the Department of Labor has proposed to eliminate a vital tool intended to prevent and detect employment discrimination by federal contractors—the Equal Opportunity Survey ("EO Survey"). The EO Survey was designed to detect employment discrimination against women and persons of color, by collecting personnel data regarding

¹²⁵ *Agencies Continue Systemic Case Emphasis, DOJ Official Blasts 'Minority-Only' Programs*, BNA Affirmative Action Compliance Manual (Mar. 31, 2006).

¹²⁶ See, e.g., Diane E. Lewis, *Labor Leaders to Protect Plights of La. Workers: Many Workers Lost Jobs, Protections in Wake of Katrina*, THE BOSTON GLOBE (Apr. 11, 2006).

¹²⁷ See, e.g., *id.*; *Day One of Building Trade Conference Brings Calls for American Jobs and Worker's Rights* (Apr. 18, 2006) available at <http://www.forrelease.com/D20050418/nem037.P2.04182005125756.04363.html>.

applicants, incumbents, hires, promotions, and terminations, and compensation data by sex and race. The form was a groundbreaking achievement because, for the first time, it required contractors to submit data on their pay practices—information that could then be used by OFCCP when deciding which companies to review. The EO Survey was intended to identify likely violators, and thus enable OFCCP to target its limited resources for enforcement efforts more efficiently. It was also intended to help employers identify potential problems in their workplaces and take proactive steps to address those problems. Regrettably, OFCCP has proposed to eliminate the EO Survey, citing studies that purportedly demonstrate the survey is not an effective means of predicting which contractors are likely to flout compliance.¹²⁸ Along with a broad coalition of advocacy organizations, the Lawyers' Committee has urged the Department of Labor to retain the EO Survey.

120. The OFCCP is uniquely responsible for enforcing Executive Order 11246. These obligations affect a broad segment of the U.S. workforce, as more than one-fifth of the civilian labor force work for federal contractors. The EO Survey is a straightforward data collection instrument that requires nonconstruction federal contractors to provide basic information about their workforce. OFCCP then can use that information in determining which contractors merit closer scrutiny for possible violations. The EO Survey took years to implement and was also intended to help employers identify potential problems in their workplaces and take proactive steps to address those problems.

121. To date, OFCCP has failed to make adequate use of the EO Survey to enforce civil rights laws. Due to limited resources, OFCCP conducts annual compliance reviews on only 5% of the 100,000 federal contractor establishments nationwide. When the EO Survey was implemented in 2000, the intent was to send it out to 50,000 contractors each year. OFCCP ignored the first round of surveys that went out to half of all contractors in 2000. OFCCP did not send out any surveys in 2001. From 2002-2004, a token number of surveys went out, but they were not reviewed for compliance purposes. When over half of the contractors who received the EO Survey refused to respond, OFCCP did nothing to enforce the law or to require their

¹²⁸ See Bill Baue, *Bush Administration Proposes Axing Equal Opportunity Survey* (Apr. 6, 2006), available at <http://www.socialfunds.com/news/print.cgi?sfArticleId=1974>. For further information about the Department of Labor's proposal to eliminate the EO Survey, refer to the discussion of Gender Discrimination in Employment under Part IV, *infra*.

meaningful compliance. In 2005, OFCCP again failed to send out the EO Survey. The Bush Administration has never used the information obtained through the Survey for its intended purpose. The number of violations found by OFCCP has decreased, as has the number of cases closed with a conciliation agreement, which is used to resolve material violations.

122. OFCCP claims that the EO Survey is not effective in encouraging greater self-evaluation by contractors, but it provides no credible support for this allegation. Nor has OFCCP taken any steps to improve the EO Survey. The agency also claims that the EO Survey does not effectively identify employers who are likely to engage in systemic discrimination. However, this conclusion is based on a skewed analysis, since OFCCP never followed up with the contractors that refused to complete the survey. Indeed, these contractors were likely the employers with the highest propensity to be discriminators. Ultimately, the elimination of the EO Survey will further undermine OFCCP's enforcement efforts. The Lawyers' Committee urges the U.S. Government to maintain the EO Survey as an essential tool to protect the legal rights of women and minorities in the workplace.

123. The EEOC also has limited the tools at its disposal to vigorously enforce Title VII. The EEOC recently altered the EEO-1 form, which gathers information about the demographics of employers' workforces. The EEOC created a "two or more races" category. Without more specific race data, this information is meaningless for enforcement purposes. Combining a diverse set of individuals into the "two more races" category undermines efforts to ascertain accurate workforce demographics, which is essential for civil rights monitoring and enforcement. Similarly, the EEOC altered the EEO-1 form to stop collecting race data for workers who identify themselves within the ethnicity of "Hispanic." A broad coalition of civil rights organizations, including the Lawyers' Committee, opposed these changes, which are indicative of a broader trend of the U.S. federal Government to divert resources away from vigorous enforcement of civil rights laws in the workplace.

E. Affirmative Action And Contracting

124. The Lawyers' Committee respectfully refers the Human Rights Committee to the written statement submitted during the 86th Session of the Committee held in March 2006.¹²⁹

125. The Lawyers' Committee reiterates that the United States must continue to implement affirmative action contracting programs in order to remedy past and ongoing inequities against disadvantaged businesses, thus bringing it into compliance with the ICCPR. A recent study conducted by the National Bureau of Economic Research¹³⁰ concluded that there is considerable evidence of discrimination against minority- and women-owned businesses in construction, which prompted U.S. Congress and many local governments to enact race conscious affirmative action programs. Although these race conscious affirmative action programs work, they continue to be challenged in the courts and have been dismantled or severely weakened by the Government and its agencies. Therefore, it is imperative that such programs are carefully designed to survive judicial scrutiny. Moreover, if the United States wishes to commit to the goal of affirmative action, it should spend more time, money and resources to ensure that these remedial programs are implemented, enforced and defended in their respective jurisdictions and upheld in the courts.

F. Lawyers' Committee Recommendations

126. The Government should be more supportive of affirmative action programs in education, contracting, and employment, and should develop and implement systems to monitor the effectiveness and fairness of affirmative action programs in education, employment, and contracting that are currently being implemented throughout the U.S. by federal, state, and local entities.

127. The Government should build on courts' application of the "strict scrutiny" standard in cases involving race, to develop means beyond judicial precedent for combating racial discrimination.

¹²⁹ See Appendix #.

¹³⁰ David G. Blanchflower & Jon Wainwright, *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*, (National Bureau of Economic Research, Working Paper No. 11793, Nov. 2005).

128. The Government should do more to end discriminatory educational practices such as discriminatory tracking programs, the disproportionate placement of minority students in special education and “dead end” courses, and the biased administration of student discipline.

129. The Government should acknowledge the essential role of affirmative action programs in ending racial discrimination in education, recognize that decisions like *Grutter* and *Gratz* put such programs at risk, and secure the future of these programs and their vital goals.

130. The Government should aggressively discourage state efforts to end affirmative action programs in higher education, employment, and contracting.

131. The Government should use its federal funding powers as a tool to encourage state and federal agency compliance with affirmative action programs.

132. The U.S. Department of Justice (the “DOJ”) should recognize alarming trends of re-segregation in schools and recommit itself to promoting desegregation.

133. The DOJ should enforce Title VII and Title IX of the Civil Rights Act of 1964, with a view to ending inequalities at workplaces in the United States.

134. The DOJ should file more systemic employment discrimination cases on behalf of African Americans.

135. The U.S. Department of Labor should retain the Equal Opportunity Survey, a vital tool for detecting and preventing employment discrimination by federal contractors.

136. The Government should ensure the continued implementation of affirmative action programs targeted at private contractors, with a view to ending the discrimination in contracting that still plagues minority- and women-owned businesses.

V. ARTICLE 3: EQUAL RIGHT OF MEN AND WOMEN TO ENJOYMENT OF ICCPR RIGHTS

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

A. The Scope of ICCPR Article 3, And Focus Of Submission

137. In the gender area, the Lawyers' Committee focuses primarily on issues of discrimination in employment. Thus, this Shadow Report addresses the issue of gender discrimination and employment in the context of Article 3.

138. The rights enumerated in the ICCPR are guaranteed equally to men and women in the United States through Article 3, and also through the Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments of the U.S. Constitution.¹³¹ These provisions prohibit both the federal Government and the states from arbitrarily or irrationally discriminating on the basis of gender.

139. Additionally, several civil rights statutes address discrimination in educational and professional opportunities for women. For example, Title IX bans gender discrimination in educational institutions that receive federal funding, and Title VII of the U.S. Civil Rights Act of 1964 prohibits gender discrimination in employment. Moreover, Executive Order 11246 requires federal contractors to ensure nondiscrimination in their workforces and to take affirmative action to correct workforce disparities. The active enforcement of these laws, including anti-retaliation provisions, is essential to remove professional barriers for women in education and in the workplace.

140. The federal Government must more vigorously enforce civil rights laws to ensure true equal opportunity for men and women in the workforce. It must maximize the use of existing tools to identify discrimination in the work place, and not eliminate or dilute their effectiveness.

¹³¹ See U.S. Report, ¶¶ 60-88 (2005).

B. The Prevalence of Gender Discrimination in the Workplace

141. Gender discrimination in the workplace is a continuing problem in the United States. Sex discrimination charges filed with the Equal Employment Opportunity Commission (“EEOC”) increased 12% between 1992 and 2003. In 2005 alone, the EEOC received 23,094 charges of sex-based discrimination. The EEOC resolved over 23,000 sex discrimination charges in 2005 and recovered \$91.3 million for victims of gender bias.¹³²

142. Often, minority women are the targets of such discrimination in the workplace. In 2004, the National Partnership of Women and Families (“NPWF”) published its analysis of previously unpublished data on discrimination charges filed with the EEOC between 1992 and 2003.¹³³ Claims by Hispanic women increased by 68%; claims by African American women increased by 20%; claims by American Indian/Alaskan Native women increased by 44%; and claims by Asian/Pacific Islander women increased by 83%. Operating at the intersection of gender and race discrimination, minority women are particularly vulnerable targets in the workplace.

143. The EEOC Compliance Manual recognizes that “Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex).”¹³⁴ The Lawyers’ Committee urges the U.S. federal and state governments to adopt the position of the EEOC and to acknowledge minority women as a protected class, instead of artificially separating race discrimination from gender discrimination.

C. The U.S. Government’s Dilution of Enforcement Tools Used to Address Discrimination in the Workplace

144. The disturbing reports of gender discrimination in the workplace call for more aggressive enforcement of the federal laws prohibiting sex discrimination. Unfortunately, the

¹³² See Equal Employment Opportunity Commission, *Sex-Based Discrimination*, available at <http://www.eeoc.gov/types/sex.html>.

¹³³ See National Partnership for Women and Families, *Gender Bias: Women File More Claims of Pregnancy Discrimination, Harassment and Gender Bias Than a Decade Ago* (2004), available at http://www.greaterdiversity.com/career_resources/articles_CR_2004/7-16c31.htm.

¹³⁴ Office of Legal Counsel, Title VII/ADEA/EPA Division of the EEOC, EEOC COMPLIANCE MANUAL, SECTION 15: RACE AND COLOR DISCRIMINATION at 15-8 (2006).

U.S. Government is decreasing efforts to enforce these civil rights laws. In recent years, the U.S. Government has eliminated or diluted essential tools for enforcement.

145. The dramatic increase in the reports of discrimination in the workplace between 1992 and 2003 “paint a disturbing picture” and led the NPWF to conclude that “enforcement of anti-discrimination laws [is] not nearly adequate.”¹³⁵ The Lawyers’ Committee agrees with this assessment, and urges the implementation of the following measures to counter gender discrimination: (i) more vigorous enforcement of employment discrimination laws by federal agencies; (ii) legislative and investigative strategies to tackle compound discrimination; (iii) comprehensive research and analysis to better understand discrimination statistics; and (iv) public education aimed at employers and employees.¹³⁶

146. However, instead of maintaining or increasing efforts to combat employment discrimination, the U.S. Government has diverted resources away from vigorous enforcement of employment discrimination laws.

147. As discussed above, in January 2006, the Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) proposed the elimination of a vital tool intended to prevent and detect employment discrimination—the Equal Opportunity Survey (the “EO Survey”).¹³⁷ One important goal of the EO Survey is to identify potential pay discrimination in the workplace. Pay discrimination disproportionately affects women, who filed 970 charges of compensation discrimination with the EEOC in Fiscal Year 2005.¹³⁸ The elimination of the EO Survey would greatly impair OFCCP’s enforcement capabilities and eliminate a useful tool for identifying gender discrimination in the workplace.

148. In recent years, OFCCP has also rejected the “DuBray” approach or “pay grade theory” for investigating potential cases of systemic compensation discrimination.¹³⁹ The “pay grade theory” refers to analyzing average pay received by members of particular groups (e.g.

¹³⁵ *See id.*

¹³⁶ The Lawyers’ Committee adopts the suggestions of NPWF.

¹³⁷ *See Baue, supra* note 123.

¹³⁸ *See* Equal Employment Opportunity Commission, *Equal Pay Act* (2006), *available at* <http://www.eeoc.gov/types/epa.html>.

¹³⁹ *See generally* 69 Fed. Reg. at 67, 246-67, 249.

men and women) who work in jobs that the employer has grouped for the purpose of establishing minimum and maximum salaries. This type of analysis invites further investigation if, for example, women within a pay grade earn on average less than men within the same grade.¹⁴⁰ This change limited the probative tools available to the U.S. Government to reveal unlawful pay disparities in the workplace. By limiting its use of pay grade information in the investigatory stage, the OFCCP is less able to uncover both gender- and race-based discriminatory pay practices. The result is an unduly narrow approach to proving systemic compensation discrimination. The Lawyers' Committee urges the U.S. Government to re-adopt the pay grade theory for identifying systemic compensation discrimination.

149. The U.S. Government must begin expanding—not limiting—the tools at its disposal to detect workplace violations of civil rights law.

D. The Need to Adopt a Broad Retaliation Standard

150. In addition to more vigorous enforcement of civil rights laws, the Lawyers' Committee urges the U.S. Government to adopt and enforce a meaningful definition of “retaliation” under Title VII. “Retaliation” is generally understood to refer to actions taken by an employer who is the subject of a discrimination complaint against the employee(s) who filed that complaint. Proper enforcement of Title VII hinges upon the ability of individuals to complain of violations of the law without fear of retaliation. The U.S. Government must protect the rights of women (and minorities) to complain about discrimination in the workplace. The Lawyers' Committee urges the Government to recognize claims of retaliation under Title VII where the complained of activity is reasonably likely to deter a plaintiff from engaging in protected activity. This is exactly the standard the EEOC has enforced for years, but when this issue recently came before the U.S. Supreme Court, the U.S. Department of Justice rejected this standard in favor of a more employer-sympathetic one. In 2006, the Lawyers' Committee

¹⁴⁰ Letter from the American Association of People With Disabilities et al. to Joseph DuBray, Jr., Director, Div. on Policy, Planning and Program Dev., Dep't of Labor (Jan. 19, 2005), *available at* <http://www.aapd-dc.org/policies/OFCCPstate.html#1>.

submitted an *amicus curiae* brief to the U.S. Supreme Court urging the Court to adopt the EEOC standard.¹⁴¹

151. Title VII jurisprudence ought to follow the example of *Jackson v. Birmingham Board of Education*,¹⁴² which recognized the importance of effective enforcement activities in relation to gender equality. Roderick Jackson, a high school physical education teacher, sued the Birmingham Board of Education when he lost his job after complaining that the girls' basketball team did not receive equal treatment. Writing for the 5-4 majority, Justice Sandra Day O'Connor reasoned: "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel."¹⁴³ In rendering its decision, the Supreme Court added much-needed teeth to the Title IX statute and encouraged potential whistleblowers to report civil rights violations. The Lawyers' Committee applauds the decision of the Supreme Court in *Jackson* and urges the Government to afford similar protections to putative whistleblowers in the workplace who dare to come forward.

E. Lawyers' Committee Recommendations

152. The Government should more vigorously enforce civil rights laws to ensure true equal opportunity for men and women in the workforce.

153. All branches of the Government should adopt the position of the EEOC and recognize minority women as a protected class, based both on their status as women and minorities.

154. The Department of Labor should end the dilution of enforcement tools such as the Equal Opportunity Survey, in order to correctly track gender discrimination in the workplace.

155. The Government should adopt and enforce a meaningful definition of retaliation under Title VII of the Civil Rights Act of 1964, in order to ensure that the spirit of Title VII is preserved in law.

¹⁴¹ *Burlington Northern & Santa Fe Railway Co. v. White*, 05-259, on appeal from *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789 (6th Cir. 2004).

¹⁴² 544 U.S. 167 (2005).

¹⁴³ *Id.* at 180.

VI. ARTICLE 6: RIGHT TO LIFE AND ARTICLE 7: FREEDOM FROM TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 6

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

2. *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.*

3. *When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*

4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*

5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*

6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

Article 7

No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

A. The Lawyers' Committee's Concerns with ICCPR Articles 6 and 7

156. Racial disparate treatment and discrimination pervade the American criminal justice system. Studies have shown that African Americans and other racial minorities are detained and searched by police officers more often than whites and that they are more likely to be prosecuted, receive harsher sentences, and be sentenced to death.¹⁴⁴ At times, racial disparate

¹⁴⁴ Bureau of Justice Statistics, *Contacts Between The Police And The Public: Findings From The 2002 National Survey 2005*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf>; *Leadership Conf. on Civil Rights Leadership Conf. Educ. Fund, Justice on Trial: Racial Disparities in the American Criminal Justice System* 17-19 (2000); Amnesty Int'l, *Abolish the Death Penalty: The Federal Death Penalty is Arbitrary and Overreaching*, <http://www.amnestyusa.org/abolish/factsheets/arbitrary.html>; Death Penalty Info. Ctr., *Racial Disparities in Federal Death Penalty Prosecutions: 1988-1994* (1994), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=528>; Prison Activist Resource Center, *African-Americans and the Criminal Injustice System* (2003), available at

treatment by authorities has placed African Americans and other racial minorities in physical danger. While the U.S. Government has taken some steps toward eliminating racial disparate treatment and discrimination, additional and immediate measures are required to reform the criminal justice system. Specifically, the Government should keep demographic statistics on individuals passing through the criminal justice system, investigate reported incidents of racial discrimination by law enforcement personnel, develop training programs that instruct police officers and prosecutors about the dangers of racial profiling, and call for a moratorium on the death penalty pending a Government evaluation of the apparent systemic bias in death penalty cases.

157. The Lawyers' Committee expresses deep concern that racial minorities do not benefit from the rights guaranteed to them by the U.S. Government throughout all processes of the criminal justice system. We wish to refer the Human Rights Committee to the shadow reports by: (1) the American Civil Liberties Union,¹⁴⁵ (2) the National Association of Criminal Defense Lawyers, (3) attorney Andrea Ritchie, and (4) the Sentencing Project, Human Rights Watch, the Open Society Institute, Prison Reform International, the American Friends Service Committee and the Center for International Human Rights on general issues regarding domestic criminal justice, which will discuss racial profiling and racial disparities as they relate to the rights guaranteed by Articles 6 and 7 of the ICCPR.

<http://www.prisonactivist.org/factsheets/racism.pdf>; National Urban League, *The State of Black America: Prescriptions for Change* (2005), available at <http://www.civilrights.org/issues/affirmative/details.cfm?id=33633>.

¹⁴⁵ See also American Civil Liberties Union, *Race and the Death Penalty* (Feb. 26, 2003), available at <http://www.aclu.org/capital/unequal/10389pub20030226.html>.

VII. ARTICLE 25: ACCESS TO THE POLITICAL SYSTEM

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) To have access, on general terms of equality, to public service in his country.*

A. The Scope of ICCPR Article 25, And Focus Of Submission

158. Under federal, state, and international law, the rights of citizens to vote is one of the basic principles of electoral democracy. Nevertheless, racial discrimination and exclusion remain significant obstacles in the U.S. political system. Although advances have been made, equal participation is far from reality. Discrimination against minority voters is evidenced by lawsuits and studies concerning, among other things, inadequate and unequal election administration, voter intimidation aimed at minority voters, and felony disenfranchisement laws that disparately impact racial minorities.

159. The Government Report fails to acknowledge that more aggressive enforcement of the Voting Rights Act of 1965 (“VRA”), and other laws that protect the right to vote, is desperately needed. The U.S. Department of Justice is responsible for enforcing the VRA and is authorized to bring proceedings on behalf of the Government to remedy racial discrimination in the electoral process.¹⁴⁶ The Government’s effort to prevent and remedy widespread and serious racial discrimination has been insufficient as demonstrated by its recent enforcement record. In effect, private individuals and organizations are forced to carry the heavy burden of bringing complex and expensive litigation to protect minority voting.

160. Minority voters in the United States do not have equal access to the ballot. In the November 2000 General Election, evidence of discrimination and inequalities demonstrate a pattern of disenfranchisement of large numbers of minority voters. Despite the reporting of these

¹⁴⁶ 28 C.F.R. § 0.51.

problems, the Government did little to rectify them and similar problems arose in the November 2004 General Election.

161. This section of the Submission focuses on the problems and irregularities in the last two U.S. federal elections, and suggests ways that the U.S. Government may address voter disenfranchisement issues. This section also discusses how irregularities in the last two federal elections disproportionately impacted minority communities and disenfranchised qualified voters, and notes the U.S. Government's failure to enforce minority voting rights.

B. U.S. RUDs Affecting ICCPR Article 25, And U.S. Constitutional and Statutory Provisions

162. The United States has no reservations, declarations or understandings specifically addressed to ICCPR Article 25. However, Understanding 1 is relevant insofar as it states that:

The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of any other status – as those terms are used in article 2, paragraph 1 and article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate government objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination based on religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.¹⁴⁷

163. The U.S. Supreme Court has found that U.S. citizens possess a fundamental right to vote under the Fourteenth Amendment of the U.S. Constitution.¹⁴⁸ In addition, voting rights are protected through federal legislation such as the Voting Rights Act of 1965¹⁴⁹ and the National Voter Registration Act of 1993.¹⁵⁰

¹⁴⁷ Understanding 5 and Declaration 1, discussed above, are also relevant to ICCPR Article 25.

¹⁴⁸ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

¹⁴⁹ 42 U.S.C. 1973 et seq.

¹⁵⁰ 42 U.S.C. 1973gg-1.

C. Denial of the Right to Vote During the 2000 Presidential Election

164. Although a U.S. Department of Justice (“DOJ”) report¹⁵¹ concluded that no violations of voting rights had occurred in the 2000 Presidential election, non-partisan studies cite many instances where individuals were denied their right to vote.¹⁵² These problems disproportionately affected African Americans and other minority groups.

1. Nation-wide Problems With the 2000 Election

165. There were many troubling problems nationwide in the 2000 Presidential election. Nationwide, two million ballots (2% of the overall number) cast for president were not counted because they were unmarked, spoiled, or ambiguous.¹⁵³ A CalTech/MIT study estimates that only 0.5% of voters did not intend to cast a vote for president. Thus, 1.5%, or 1.5 million voters, believed they had voted for president, but their votes were not counted.¹⁵⁴

166. In addition to votes not counted because of unmarked, spoiled, or ambiguous ballots, an additional 1.5 to 3 million votes were lost due to problems with the voting registration process, such as registered voters not appearing on registered voting lists.¹⁵⁵ In the 2000 election, 7.4% of people who did not vote said they did not vote because of registration problems. Problems with polling places, such as issues with registered voters not appearing on registration lists, inadequate assistance for voters who could not speak or read English, and the high rate of spoiled ballots, led to the loss of between 500,000 to 1.2 million votes and 2.8% of voters who did not vote failed to do so because of problems with polling places.¹⁵⁶ The 2000 election also witnessed problems with registered voters not appearing on registration lists.¹⁵⁷

¹⁵¹ U.S. Report, ¶ 398 (2005). (The DOJ investigation into the 2000 election found no “violations of federal voting rights...that affected the outcome of the election.”).

¹⁵² See, e.g. CalTech/MIT, *Voting: What is and What Could Be* 6 (July 2001), available at <http://www.vote.caltech.edu/reports/2001report.htm> (“What is What Could Be Report”); U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election* (2001), available at <http://www.usccr.gov/pubs/vote2000/report/main.htm> (“Voting Irregularities Report”).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ What is What Could Be Report at 9. In contrast, after the 1996 presidential election, only 1.2% of voters who did not vote gave that response. *Id.*

¹⁵⁷ *Id.* at 27.

There was no recourse for these individuals, who had no opportunity to appeal the poll workers' decisions to prevent them from voting.¹⁵⁸

167. The U.S. Report also failed to acknowledge that voting was not equally accessible to all voters, particularly voters with special needs. There were also many problems with accessibility to polls for the disabled in the 2000 election. Some precincts lacked the equipment to help voters with visual impairments read their ballots. There are two million blind people in the United States who require assistance to vote.¹⁵⁹ In many polling locations, there were no wheelchair ramps; persons in wheelchairs were forced to negotiate steps.¹⁶⁰ Individuals with disabilities were summarily turned away in some precincts and there were similar barriers for those not proficient in English. Additionally, voters who do not speak English or are illiterate cannot vote without assistance.¹⁶¹ In many areas, including Florida, Spanish-speaking voters failed to receive bilingual assistance or bilingual ballots.¹⁶²

2. Problems at The Polls And Voting Irregularities In Florida In 2000

168. In 2000, disenfranchised voters in Florida were disproportionately African American, being almost ten times more likely than non-black voters to have their ballots rejected.¹⁶³ In a USCCR hearing on voting discrepancies in Florida during the 2000 election, the majority of citizens testifying that they had encountered registration problems and were denied the opportunity to vote were African American.¹⁶⁴ Similarly, the CalTech/MIT study on the 2000 Presidential election found that of the eligible voters denied the right to vote in Florida, African Americans, people with disabilities and those requiring language assistance were disproportionately affected.¹⁶⁵

¹⁵⁸ Voting Irregularities Report, Chap. 1 at *1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, Executive Summary at *5.

¹⁶¹ *Id.*

¹⁶² *Id.* at *6.

¹⁶³ *Id.*

¹⁶⁴ *Id.*, Chap. 1 at *1-5.

¹⁶⁵ *See generally* Voting Irregularities Report.

169. The CalTech/MIT study of the 2000 election concluded that the racial discrepancy was not due to other factors such as differences in education or literacy.¹⁶⁶ In fact, Florida Governor Jeb Bush’s Select Task Force on Election Procedures, Standards and Technology found that error rates for the rejection figures caused by uneducated, uninformed, or disinterested voters were less than 1%.¹⁶⁷

170. In response to the disenfranchisement of thousands of minority voters in the 2000 election, a coalition of nonprofit organizations led by the Lawyers’ Committee filed a lawsuit in federal district court against Florida state officials and the Supervisors of Elections in several Florida counties.¹⁶⁸ Brought on behalf of the NAACP and individual Black voters who were denied their right to vote or whose votes were less likely to be counted, the complaint alleges that the state of Florida violated Black voters’ constitutional and statutory rights by using less reliable voting systems in areas with large Black populations, by mishandling voter registrations and purges of voter rolls, and by placing voters on an inactive list that prevents those individuals from casting a ballot without telephone contact with the Supervisor of Elections office—a near impossible task because of jammed telephone lines on election day. Plaintiffs sought the implementation of statewide uniform voting systems and standards, uniform polling place procedures, a Voters’ Bill of Rights, which will be posted at all polling locations on election day, and a more accurate and reliable system for removing voters’ names from registration rolls to ensure that all eligible voters have access to the ballot on election day. The case was eventually settled.

D. Denial of the Right to Vote During the 2004 Presidential Election

171. The U.S. Report maintains that the 2004 presidential election was conducted “successfully with minimal problems.”¹⁶⁹ However, numerous independent agencies reported extensive irregularities resulting in voter disenfranchisement during the election season, particularly in relation to minority voters.

¹⁶⁶ *Id.*

¹⁶⁷ The Governor’s Select Task Force on Election Procedures, Standards and Technology, *Revitalizing Democracy in Florida* 36 (Mar. 1, 2001).

¹⁶⁸ *NAACP v. Harris*, No. 01-0120 (S.D. Fla.), filed January 10, 2001.

¹⁶⁹ U.S. Report, ¶ 402 (2005).

1. The Multitude Of Problems

172. Inadequately trained poll workers, inequitably applied identification requirements, ineffective and insufficient numbers of voting machines, unreliable voter registration lists, and the lack of language assistance all disproportionately worked against minority voters on Election Day 2004.

173. The U.S. Report conceded that the final report of the 2004 election by the Organization for Security and Cooperation (“OSCE”) cited issues such as “inconsistencies among election standards, possible conflicts of interest arising from the way in which the election officials are appointed, allegations of electoral fraud and voter suppression in the pre-election period, limited access to observers in some jurisdictions, and long lines on election day.”¹⁷⁰ Though the OSCE monitored the election at the request of the United States, it was granted access to polling stations in relatively few jurisdictions, which hampered its ability to observe the election.¹⁷¹

174. Voters faced concerted and organized disenfranchisement efforts by partisan groups before the election, prompting advocacy groups to launch numerous lawsuits and ballot protection efforts prior to the election to protect the rights of voters to go to the polls. The largest of these efforts was Election Protection, a nonpartisan coalition of more than 100 groups led by the Lawyers’ Committee, People for the American Way Foundation, and the National Coalition on Black Civil Participation. Lawyers working with Election Protection defeated attempts by county election officials to impose inappropriate identification barriers on new registrants, many of whom were Hispanic.¹⁷² Election Protection advocates also helped ameliorate the effect of tens of thousands of targeted voter challenges in Ohio and Georgia, often aimed directly at minorities.¹⁷³

¹⁷⁰ U.S. Report, ¶ 406 (2005).

¹⁷¹ Office for Democratic Institutions and Human Rights, *United States of America: 2 November 2004 Elections, OSCE/ODIHR Election Observation Mission Final Report* 3, 21 (Mar. 31, 2005), available at http://www.osce.org/documents/odihr/2004/11/3779_en.pdf.20.

¹⁷² Election Protection 2004, *Shattering The Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, People for the American Way, NAACP, Lawyers Committee for Civil Rights Under Law 3-4, available at <http://verifiedvoting.org/downloads/ElectionProtectionCoalitionShatteringtheMyth.pdf>. (Dec. 2004) (“Shattering the Myth Report”).

¹⁷³ *Id.*

175. Voters also faced government ineptitude in the distribution of absentee ballots in time to have votes counted in the election. In Broward County, Florida, some 15,000 voters did not receive requested absentee ballots in the mail. The county resent some ballots, but other voters were completely disenfranchised.¹⁷⁴

176. The surge in voter turnout blamed for the long lines on Election Day 2004 could have easily been predicted by the great increase in voter registration after the controversy surrounding the 2000 Election. Despite the obvious risk of long lines at polls, resources were not properly allocated. For example, voting officials at one Ohio precinct reported receiving half the number of voting machines in 2004 compared to the number of machines that were available in 2000.¹⁷⁵ Long lines effectively disenfranchised voters who could not wait for several hours to vote due to work or family care issues. The long lines disenfranchised even some of those with the tenacity to brave them. After standing in lines for hours, voters in Franklin County, Ohio, were reportedly sent home when the polls closed at 7:30 p.m.¹⁷⁶ Responsible resource allocation would have helped alleviate the long lines.

177. Lack of adequate polling-station staffing also contributed to the long lines on Election Day. A report commissioned by the U.S. Government to study the 2004 election indicates that staffing problems were most acute in largely African American jurisdictions, which reported the highest percentage of inadequate staffing at 16.9% per polling place, versus 6.0% in predominately white jurisdictions.¹⁷⁷

178. The U.S. Report also failed to acknowledge the widely reported voter suppression and intimidation directed at poor and minority voters in 2004. For example, voters in Polk and Palm Beach Counties, Florida, reported telephone calls telling them to vote on November 3rd rather than November 2nd.¹⁷⁸ In Duval County, Florida, a group told voters they had until

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Id.* at 10.

¹⁷⁶ *Id.* at 23.

¹⁷⁷ Election Data Services, Inc., *Final Report of the 2004 Election Day Survey: Submitted to the U.S. Election Assistance Commission*, at 12-7 (Sep. 27, 2005), available at http://www.eac.gov/election_survey_2004/toc.htm (“Election Data Services Report”).

¹⁷⁸ *Shattering the Myth Report* at 17.

November 18th to vote.¹⁷⁹ A polling place in Philadelphia County, Pennsylvania, had a large SUV with men purportedly from the District Attorney’s office idling outside and “staring down” voters. When confronted, the men admitted they were Republican attorneys from Tennessee.¹⁸⁰ An apparently armed man in a tee shirt emblazoned with “US Constitution Enforcer” confronted voters in Pima County, Arizona, asked them if they were citizens and filmed their response.¹⁸¹

179. Several voters reported also being turned away on Election Day because they did not appear on the voter list. One young voter reported being turned away from his polling place because he wore a “Vote Or Die” tee shirt. Voters in several counties reported that requested absentee ballots were never delivered and they were not allowed to vote at their polling place because they had requested an absentee ballot. Three to five percent of callers reported incidents of voter suppression or intimidation: for example, mailings telling voters that Democrats and Republicans were to vote on different days and the presence of police cars with their lights on parked outside of polling places. Voters reported inconsistent or unreasonable demands for identification resulting in the disenfranchisement of qualified voters. Despite the requirement that all states allow voters who could not be located on the list to fill out a provisional ballot, 4-5% of complaints concerned problems with provisional ballots.¹⁸²

180. Election Day 2004 in Ohio saw the culmination of years of electoral dysfunction, causing the League of Women Voters of Ohio and numerous individual citizens to file a lawsuit in 2005 alleging that the voting process systematically and unconstitutionally impaired voting rights. That lawsuit, which is being litigated by the Lawyers’ Committee, other public interest groups and two of the nation’s preeminent law firms, is now pending in federal court.¹⁸³

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 26.

¹⁸¹ *Id.* at 30.

¹⁸² Common Cause, *Report From The Voters: A First Look at 2004 Election Data/Common Cause Agenda For Reform*, 2 (Dec. 2004), available at <http://verifiedvoting.org/downloads/CommonCauseReporttotheVoters.pdf> (“Common Cause Report”).

¹⁸³ *League of Women Voters of Ohio, et al. v. Kenneth Blackwell, et al.*, Case No. 3:05CV7309 (N.D. OH filed July 28, 2005).

2. The DOJ's Inadequate Complaint Reporting Mechanism, And The Election Protection Coalition's Hotlines

181. The problems identified above were compounded by the DOJ's inadequate complaint reporting mechanism. The Civil Rights Division of the DOJ reported that on Election Day 2004, it had only 50 dedicated phone lines to handle election complaints.¹⁸⁴ While this was an increase from less than 5 in previous elections, 50 phone lines is inadequate to handle a nation-wide election with more than 177 million registered voters.¹⁸⁵

182. According to the DOJ, those 50 dedicated lines received 1,088 calls, along with 134 e-mail complaints on Election Day 2004. Of the complaints reportedly received by the DOJ, approximately 600 were referred to attorneys, and 130 were designated for further follow-up. Only twelve DOJ investigations resulted from Election Day complaints.¹⁸⁶ Twenty-two pre-election investigations remain open, along with matters referred to the Criminal Division's Public Integrity Section for investigation.¹⁸⁷

183. The DOJ failed to establish an adequate internal system equipped to document and track reports of election problems.

184. Partly to compensate for the inadequacy of the Government's complaint reporting mechanism, the Election Protection Coalition established a nation-wide voter information and assistance hotline—1-800-OUR-Vote—chronicle and archive voter complaints. This hotline received more than 200,000 calls (over 100,000 on Election Day alone).¹⁸⁸ Another hotline established for the same purpose, 1-866-MYVOTE1, reported that it received 96,783 calls on Election Day, and more than 110,00 calls in the week prior to, and the days immediately following, the election.¹⁸⁹ These call estimates reveal a significantly higher level of voter concern and frustration on Election Day than that conveyed by the U.S. Report.

¹⁸⁴ R. Alexander Acosta, Asst. Att'y Gen. for the Civil Rights Division, Department of Justice *Prepared Statement Submitted to the House Committee on the Judiciary, Subcommittee on the Constitution* at 17 (Apr. 5, 2005), available at www.usdoj.gov/crt/speeches/acosta_2005_oversight.pdf ("DOJ Report").

¹⁸⁵ Election Data Services Report at 3.

¹⁸⁶ DOJ Report at 17-18.

¹⁸⁷ *Id.* at 18.

¹⁸⁸ Shattering the Myth Report at 6; OSCE Final Report at 20.

¹⁸⁹ Common Cause Report at 2.

185. Of the roughly 400,000 calls received by the two voter hotlines discussed above, more than 40,000 distinct complaints were recorded by the Election Incident Reporting System (EIRS) database. EIRS recorded more than 10,000 incidents of registration problems.¹⁹⁰

E. Felony Disenfranchisement

186. The U.S. Report begins its discussion of ICCPR Article 25 by explaining that suffrage requirements are primarily determined by state law.¹⁹¹ While the U.S. Report admits that “most states deny voting rights to persons who have been convicted of certain serious crimes,” it claims that “[i]n most states, this disability is terminated by the end of a term of incarceration or by the granting of pardon or restoration of rights.” Ultimately, the U.S. Report touts progress on this issue in a number of individual states and mentions the 2001 recommendation of the National Commission on Federal Election Reform that “all states restore voting rights to citizens who have fully served their sentences.”¹⁹²

187. Although the Government’s acknowledgment of the felony disenfranchisement issue is commendable, the Report does not address the disparate impact of this issue on African American males.¹⁹³ Of the more than four million U.S. citizens affected by felony disenfranchisement, approximately 1.4 million are African American men. Racial inequalities in the criminal justice system (as discussed briefly above in the context of ICCPR Articles 6 & 7) exclude an estimated 13% of African American men from political life in the United States by denying them the right to vote. The United States disenfranchisement laws are the “most restrictive” laws in the world.¹⁹⁴

188. Florida, America’s leading disenfranchiser, does not allow convicted felons to re-enter the voting community, even after the citizen has satisfied any penal punishment and parole period, unless such rights are restored by discretionary executive clemency. Over 800,000

¹⁹⁰ Shattering the Myth Report at 6-7. EIRS also recorded thousands of complaints concerning provisional ballots, absentee ballots, voting system errors, and voter suppression and intimidation tactics.

¹⁹¹ U.S. Report, ¶ 397 (2005).

¹⁹² *Id.*

¹⁹³ See, e.g., Leadership Conference on Civil Rights & Lawyers’ Comm. for Civil Rights Under Law, *American Dream? American Reality! A Report on Race, Ethnicity and the Law in the United States*, 65-66 (2001).

¹⁹⁴ Gonzaga University Center for Law and Justice, *Report on the Racial Impacts of Felon Disenfranchisement Policies in the United States* 6 (April 2001) (“Gonzaga Report”).

citizens in Florida have permanently lost the right to vote because of a criminal conviction—and approximately three-quarters of these individuals have fully completed their sentences.¹⁹⁵ In 2000, a coalition of civil rights groups brought a class action lawsuit on behalf of the thousands of African Americans in Florida who are barred from voting, but the district court granted judgment in favor of the Government, and the Supreme Court denied certiorari.¹⁹⁶

189. During the 2000 election, Florida’s “purge list” of purported felons had many errors.¹⁹⁷ African American voters were placed on the purge list more often than Hispanic or white voters and had a higher chance of being placed on the list incorrectly. For example, in Miami-Dade County, although only 20.4% of the population was African American, more than 65% of the people on the purge list were African American.¹⁹⁸ As detailed in a lawsuit brought by the Lawyers’ Committee and other civil rights groups, Florida provided its counties with inaccurate lists of felons who were then disqualified from voting in non-uniform and inaccurate voter purges.¹⁹⁹ The Lawyers’ Committee asserted that, to protect African Americans’ voting rights, the government officials “should have provided clear instructions to their subordinates on list maintenance strategies that would protect eligible voters from being erroneously purged from the voter registration rolls.”²⁰⁰ The defendants settled this matter before trial.

190. Due to recent changes in state laws, extensive grassroots efforts, and the force of widespread public opinion,²⁰¹ progress has been made towards the re-enfranchisement of ex-felons. However, African Americans remain disproportionately burdened by these laws. A 2004 study of the Sentencing Rights Project notes “the prevalence of disenfranchisement nationally and its particularly corrosive impact on citizenship and democratic rights in the African American community.”²⁰²

¹⁹⁵ The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2005), available at <http://www.sentencingproject.org/pdfs/1046.pdf> (“Sentencing Project Report”).

¹⁹⁶ *Thomas Johnson, et al. v. Jeb Bush, et al.*, 126 S. Ct. 650 (2005).

¹⁹⁷ Voting Irregularities Report, Executive Summary at *4-5.

¹⁹⁸ *Id.*, Executive Summary at *5.

¹⁹⁹ *NAACP et al. v. Harris, et al.*, Case No. 01-0120-CIV (S.D. Fla.).

²⁰⁰ *Id.*

²⁰¹ 80% of the public supports restoration of voting rights for ex-felons who have completed their sentences, and 64% and 62 percent respectively support the right of probationers and parolees to vote.

²⁰² Sentencing Project Report at 1.

191. In states that do not permanently disenfranchise felony convicts, many citizens who once lost the right to vote have since regained it by serving their sentences and completing parole. These citizens often remain constructively barred from political life by ignorance of their eligibility to vote.²⁰³ The U.S. should implement an education campaign for newly released prisoners to overcome these problems.

192. A misinformed electorate is only part of the problem that leads to *de facto* disenfranchisement of newly eligible ex-convicts. Confusion among election officials often leads officials to demand documentation that the law does not require.²⁰⁴ Local officials thus may deny access to citizens who fail to meet non-existent standards.²⁰⁵

193. The racially disparate impact of felon disenfranchisement contradicts the principles contained in the Covenant. Specifically, ICCPR Article 25 protects the right and opportunity for people to vote, without distinction as to race, color, national or ethnic origin. United States felon disenfranchisement laws are precisely the type of laws prohibited by ICCPR Article 25 and the U.S. Government must modify or abolish these laws to ensure compliance with the Covenant.

F. The U.S. Government's Failure To Enforce Minority Voting Rights

194. The U.S. Report maintains that the country's political system is open to all citizens without distinction.²⁰⁶ While arguably true in theory, in practice, too many African Americans and other minority citizens are unable to participate fully in the electoral process for the reasons outlined above in this submission. This impeded participation, and the accompanying discrimination and marginalization, is compounded by the failure of the DOJ to enforce voting rights consistently.

²⁰³ See generally, Jennifer Gonnerman, *The Ripple Effect: Confusion Over Felon Voting Bans Keeps Even the Eligible from the Polls*, VILLAGE VOICE (Oct. 12, 2004) (“[t]he number of people who cannot vote because they have a felony conviction has been growing steadily over the last three decades as the nation’s prison population has ballooned.... But the true number of people who are effectively disenfranchised is much greater, since many people who’ve been convicted of a felony haven’t registered to vote because they mistakenly believe they’ve been stripped of this right.”).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ U.S. Report, ¶ 397 (2005).

195. Under Section 2 of the VRA, the DOJ may sue in federal court to challenge discriminatory voting conditions.²⁰⁷ The Attorney General assigned enforcement of the VRA to the Voting Section of the Civil Rights Division of the DOJ.²⁰⁸

196. During the Administration of President George W. Bush, the DOJ has made limited use of its mandate to uphold civil rights in general, and in particular the voting rights of African Americans. While the number of annual civil rights complaints to the DOJ remains constant, the number of civil rights cases filed by the DOJ has greatly decreased.²⁰⁹ Significantly, since 2001, the DOJ has not filed a single case on behalf of African American or Native American voters under Section 2.

197. The devastation caused by Hurricane Katrina in September 2005 has created a displacement of citizens from the Gulf Coast unlike anything in modern United States history. Hundreds of thousands of New Orleans residents remain displaced. One of the many problems created by Hurricane Katrina relates to voting. The recent elections in Orleans Parish are an example of the failure of the U.S. government to take action or to ensure that the State of Louisiana took measures to protect the voting rights of citizens displaced by Hurricane Katrina. The victims of this failure have been black voters: in the 2006 Orleans Parish mayoral primary election, there was a substantial decrease in the turnout of black voters compared to the last mayoral primary election in 2002, whereas white turnout remained similar.

198. The United States government has demonstrated that it can provide extraordinary and necessary resources to enable individuals to exercise their right to vote when it so chooses. For example, for the 2005 Iraqi election, the United States government offered \$40 million of “financial support for the implementation and logistics of the election.”²¹⁰ The United States also enabled Iraqi citizens residing in the United States to vote in Iraqi elections by means of satellite voting. In another example, the Federal Emergency Management Agency (“FEMA”) reimbursed

²⁰⁷ Voting Rights Act of 1965 § 2, 42 U.S.C. 1973 (2005).

²⁰⁸ *The Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Bradley J. Schlozman, Acting Assistant Att’y Gen. of the United States), *citing* 28 C. F. R. § 51.3.

²⁰⁹ Transactional Records Access Clearinghouse, Syracuse Univ., *Civil Rights Enforcement by Bush Administration Lags* (2004), available at <http://trac.syr.edu/tracreports/civright/106/>.

²¹⁰ U.S. Department of State, “*Iraqi Elections, January 30, 2005*,” (Jan. 25, 2005), available at <http://www.state.gov/documents/organization/41314.pdf>.

New York City \$7.9 million and Nassau County (located on New York State's Long Island) another \$1 million, to pay for the entire cost of rerunning elections that were suspended as a result the September 11, 2001 terrorist attack.²¹¹

199. In contrast to the examples noted above, the United States government has chosen to offer little assistance relating to the costs of elections to jurisdictions affected by Katrina. Louisiana Secretary of State Al Ater requested \$3-\$4 million in assistance, much of which would be used for outreach of displaced voters. FEMA denied most of this request and announced plans only to reimburse local governments for the cost of destroyed voting machines.²¹² Moreover, unlike Iraqi citizens living in the United States, displaced citizens of Orleans Parish were not able to vote in locations outside of Louisiana because the Louisiana General Assembly refused to pass legislation permitting it. Though Secretary of State Ater at one point publicly supported out-of-state satellite voting, the state defended against a legal challenge providing for out-of-state satellite voting.²¹³ The lack of out-of-state satellite voting had a much greater impact on African-Americans. An analysis by a professor from Brown University estimates that the percentage of whites who were displaced by the hurricane but have returned home is an estimated 67%; the percentage of African-Americans who were displaced and returned home is less than 40%.²¹⁴ Though absentee voting was available for many displaced voters, there were not adequate resources to notify voters of the availability of these satellite polling stations.

200. The following table compares voter participation in the February 2002 Orleans Parish mayoral primary and the April 2006 Orleans Parish mayoral primary by race.²¹⁵

²¹¹ Federal Emergency Management Agency, *FEMA To Reimburse New York City For Cancelled And Rescheduled 9/11 Primarily (sic) Elections* (Sept. 6, 2002), available at <http://www.fema.gov/news/newsrelease.fema?id=5518>; Federal Emergency Management Agency, *FEMA Obligates \$33.5 Million To New York State For Agencies Involved In Response And Recovery Effort* (Nov. 8, 2002), available at <http://www.fema.gov/news/newsrelease.fema?id=3558>.

²¹² John Hill, *Entire State to Fund New Orleans Election*, THE DAILY ADVERTISER (Apr. 17, 2006), available at <http://theadvertiser.com/apps/pbcs.dll/article?AID=/20060417/NEWS01/604170306&theme=LEGISLATURE>.

²¹³ Robert Travis Scott, *Senate Committee to Hear Satellite-voting Bill Today*, THE TIMES-PICAYUNE (Mar. 29, 2006), available at <http://www.nola.com/news/t-p/index.ssf?/base/news-3/1143617888106940.xml>.

²¹⁴ John R. Brown, *Population Displacement and Post-Katrina Politics: The New Orleans Primary* (May 10, 2006), available at <http://www.s4.brown.edu/katrina/report2.pdf>.

²¹⁵ Louisiana Secretary of State, *Post Election Statistics For Election Of 04/22/06 In Orleans*, available at http://sos.louisiana.gov/stats/Post_Election_Statistics/Parish/2006_0422_par.txt.

Race	Registered voters 2002	Registered voters 2006	Change in Reg. Voters	Voter Turnout 2002	Voter Turnout 2006	Change in Voter Turnout	% Voter Turnout 2002	% Voter Turnout 2006	Change in % Voter Turnout
All	295,050	298,512	3,462	134,973	109,979	- 24,994	45.7	36.8	- 8.9
White	94,087	90,919	- 3,168	47,256	46,061	- 1,195	50.2	50.7	0.5
Black	184,798	188,316	3,518	83,164	58,474	- 24,690	45.0	31.1	-13.9
Other	16,165	19,287	3,122	4,553	5,444	891	28.2	28.2	0

As these numbers show, even though there were more black registered voters in 2006 than in 2002, almost 25,000 fewer black voters turned out in 2006 whereas the number of white voters was almost the same. The impact of the failure of the United States government and Louisiana state government to adequately enable displaced voters to participate was borne almost entirely by black voters. The elections in Orleans Parish appear to violate the obligations under Article 25 of the ICCPR that every citizen is able to participate in public life without unreasonable restrictions.

201. In 1995, the Human Rights Committee noted that, “despite the existence of laws outlawing discrimination, there persist within society discriminatory attitudes and prejudices based on race or gender. Furthermore, the effects of past discriminations have not yet been fully eradicated. This makes it difficult to ensure the full enjoyment of the rights provided for under the Covenant to everyone within [U.S.] jurisdiction.”²¹⁶

202. Eleven years later, these comments remain generally true (as discussed above in the context of ICCPR Articles 2 &3), and are particularly apt in the context of the United States’ failure to enforce minority voting rights.

G. The Government Should Pass The Count Every Vote Act

203. In the U.S. Report, the Government cited the Help America Vote Act (“HAVA”), passed by Congress in 2002, as a sign of progress toward reforming the voting system with “minimum federal election administration standards.”²¹⁷ The U.S. Government implied in its Report that HAVA would correct the errors of the 2000 and 2004 elections. While HAVA is a commendable starting point, it does not make any substantial changes to the U.S. election

²¹⁶ 1995 Human Rights Committee Observations, ¶ 270.

²¹⁷ U.S. Report, ¶ 399 (2005).

system, and in particular it does not address the racial disparity in spoiled ballots, the registration process, the way polling locations are conducted, or felony disenfranchisement. To address these issues, the United States must pass the Count Every Vote Act²¹⁸ (“CEVA”), which would mandate new standards for federal elections, including but not limited to, requiring voter-verified paper record for electronic voting machines, improving security standards, providing notice requirements to voters purged from the registration list, requiring election officials to register voters who made non-material errors in their voter registration form, allowing provisional ballots to be counted for certain offices if the voter cast the ballot in the right county but not in the right polling place, permitting persons with felony convictions to vote if they have served the terms of their sentence, and providing increased absentee ballot and early voting opportunities.²¹⁹ Congress has not acted on the CEVA.

H. Lawyers’ Committee Recommendations

204. The Government should vigorously enforce the Voting Rights Act and other pertinent laws to ensure that the right to vote is enjoyed by all citizens. Additionally, the Federal Government must meticulously monitor state compliance with all voting rights laws.

205. The Government should acknowledge the serious problems in the administration of the 2000 and 2004 Presidential elections, and take affirmative steps to guarantee the rights of every American citizen to vote, such as by passing the CEVA.

206. The Government should introduce legislation to allow unimpeded access at all stages of the election process to international observers invited by the U.S. Government as well as non-partisan observers.

207. The Government should develop and implement a program to better document and track reports of election problems in the time leading up to the next presidential election.

208. The Government should commit adequate resources to train polling officials at local polling stations to respond to foreseeable voting problems and to ensure every citizen’s right to vote. The Government should also take steps to prevent the voting problems and voter

²¹⁸ Count Every Vote Act of 2005 (“CEVA”), S. 450, 109th Cong. (2005).

²¹⁹ *Id.*

intimidation reported in the last Presidential elections through the deployment of an adequate number of federal officials to oversee voting at each polling site.

209. The Government should prepare for large voter-turnout in the next Presidential election in 2008 by monitoring the staffing of polling sites in each state, and by assisting the states in recruiting volunteer staffers.

210. The Government should oversee the maintenance of state voter registration lists to ensure that fewer eligible voters are erroneously purged from the lists.

211. The Government should implement, or aid states in implementing, an education campaign for newly released prisoners to inform them of the restoration of their right to vote.

VIII. ARTICLE 26: PROHIBITION OF DISCRIMINATION, AND EQUALITY BEFORE THE LAW

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A. The Scope Of ICCPR Article 26, And Focus Of Submission

212. Under the Fifth and Fourteenth Amendments of the United States Constitution, all persons in the United States are formally equal before the law and therefore entitled to equal protection of the law.²²⁰ As discussed above in the context of Articles 2 and 3, the Lawyers' Committee has a number of concerns about the legal standards U.S. courts have developed for evaluating distinctions under the equality standard.²²¹

²²⁰ The Fourteenth Amendment's Equal Protection Clause applies to state and local government agencies and actors, as well as private individuals acting at the direction of a state or local government agency. U.S. CONST. amend. XIV, § 1 ("nor shall any State...deny to any person within its jurisdiction the equal protection of the laws"). In 1954, the U.S. Supreme Court held that the Fifth Amendment's Due Process Clause requires the federal government to also provide equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954); U.S. CONST. amend. V ("No person shall...be deprived of life, liberty, or property without due process of law"). In constitutional discrimination cases, the standard applied by courts is the same whether operating under the Fourteenth or the Fifth Amendment.

²²¹ Submission ¶¶ 96-155.

213. An additional concern, arising in the context of Article 26, is the evidentiary standard a victim of discrimination must meet before constitutional provisions proscribing discrimination are triggered under U.S. law. The Fourteenth Amendment to the U.S. Constitution is one of three amendments known as the “Reconstruction Amendments” passed by the U.S. Congress in the 1860s, after the United States’ history of slavery finally came to an end.²²² The purpose of the amendments was to remedy the harms caused by centuries of treating African Americans inhumanely and to ensure them full personhood, citizenship, and equal protection of the laws.²²³

214. The United States explained in its Initial Report to the Human Rights Committee that U.S. courts have developed a number of judicial tests for evaluating distinctions made among groups of persons and that the level of scrutiny a court will apply to a discriminatory act varies according to the right infringed or the group discriminated against.²²⁴ The United States further explained that “[t]he right of individuals to challenge governmental actions in court, and the power of the judiciary to invalidate those actions that fail to meet the constitutional standards, provides an effective method for ensuring equal protection of the law in practice,”²²⁵ and 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.”²²⁶

215. However, the United States’ report on the status of equal protection law in the U.S. contains a glaring omission: the impossibly high standard that a victim of discrimination must meet before any legal remedy will be made available under the U.S. Constitution. The standard results from a 1976 Supreme Court decision, which held that under the Fourteenth

²²² U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; The three amendments are referred to as the “Reconstruction Amendments,” or, alternatively, the “Civil War Amendments,” because they were drafted by Congress following the Civil War and they all addressed questions regarding the legal and political status of African Americans.

²²³ *Slaughter-House Cases*, 83 U.S. 36 (1873); *See also Butler v. Perry*, 240 U.S. 328 (1916) (stating that the Thirteenth Amendment was intended to cover those forms of compulsory labor akin to African slavery); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (“it needs no emphasis here that the Civil War Amendments were designed to protect the civil rights” of Blacks).

²²⁴ U.S. Initial Report, ¶¶ 80-84, 820-822; *see also* Submission, ¶¶ 99, 138, 163, *supra*, for a discussion of the protections afforded by the Constitution’s equal protection jurisprudence under the Fifth and Fourteenth Amendments to the U.S. Constitution.

²²⁵ U.S. Initial Report, ¶ 77.

²²⁶ U.S. (Second and Third) Report, ¶ 59.

Amendment’s Equal Protection clause, a victim of discrimination must prove that a government actor or agency acted with the “intent” to discriminate.²²⁷ That is, the victim must prove to the court what the discriminating person or agency was thinking or feeling at the time of the discriminatory act, regardless of the harmful impact of that act upon the victim or the group to which the victim belongs. If a victim of discrimination is unable to prove that the defendant acted with discriminatory intent, the “exacting scrutiny” applied by courts to “inherently invidious” distinctions or classifications will not be applied,²²⁸ and no remedy will be made available.

216. This standard—known as the “intent standard”—not only regresses Equal Protection law to pre-Civil Rights era days,²²⁹ but it also is based upon an unrealistic and outdated understanding of human behavior and modern-day discrimination. Recent studies have established that “unconscious bias”—a phenomenon in which people hold unconscious or socially programmed perceptions of others based upon such traits as a person’s skin color or ethnicity—plays a large role in discriminatory treatment of individuals, which remains pervasive in U.S. society.²³⁰ Because these biases are subconscious, most discriminators do not consciously

²²⁷ *Washington v. Davis*, 426 U.S. 229 (1976).

²²⁸ U.S. Initial Report, ¶ 81.

²²⁹ Beginning in the late 1800s and continuing throughout the first half of the 20th century, a series of “Jim Crow” laws were enacted in the United States. These laws mandated segregation of African Americans from the white population in everything from housing to education to public facilities. Because the Supreme Court narrowly interpreted the Fourteenth Amendment, these laws were found to pass constitutional muster. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Gradually, the Supreme Court began invalidating the Jim Crow laws under an expanded reading of the Constitution’s Fourteenth Amendment. In the most famous of these cases, the Court declared that segregated schooling – followed under the previously sanctioned “separate but equal” doctrine – violated the Equal Protection clause of the Fourteenth Amendment and was unconstitutional. *Brown v. Board of Education*, 347 U.S. 483 (1954). Ten years later, the U.S. Congress passed the Civil Rights Act of 1964 (“CRA”). Included in the provisions of the statute was Title VII, which prohibits discrimination in the hiring, promotion, or firing of employees by private employers. Pub. L. No. 88-352; 42 U.S.C. §2000 et seq. The federal courts held that to prove discrimination, a plaintiff bringing suit under the CRA must demonstrate only that an employer’s policy or practices negatively impacted a disproportionate number of a protected group. This is known as the “disparate impact” or “effects” test. In 1976, however, the Supreme Court held that the Constitution provides protection only when a victim of discrimination can also prove discriminatory “intent” on the defendant’s part. *Washington v. Davis*, 426 U.S. 229 (1976).

²³⁰ Among the more telling research results come from Anthony Greenwald and Bryan Nosek’s Implicit Association Test (“IAT”), which tests individuals’ cognitive structures and implicit (unconscious) biases. Brian A. Nosek, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101 (2002), available at <https://implicit.harvard.edu/implicit> (reporting the results from IAT tests, which demonstrate among whites a much larger implicit preference than explicit preference for their own group). Also see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that subtle, or unconscious, forms of bias represent today’s most prevalent type of discrimination.); John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial*

acknowledge that they are responding to them. Accordingly, such discriminators are not found to be acting with the “intent” to discriminate under current U.S. law, and victims of their discrimination are denied relief under the Constitution (and under ICCPR Article 26).

217. The requirement that victims of discrimination prove what the discriminator was thinking or feeling at the time of the discriminatory act violates the spirit and purpose of the Fifth and Fourteenth Amendments and renders empty the United States’ claim that U.S. law provides extensive avenues for seeking redress for discrimination. Consequently, the United States has failed to guarantee equal and effective protection against discrimination by failing to provide sufficient avenues through which victims of discrimination may seek compensation. The Human Rights Committee should demand that the United States acknowledge the lack of remedies available in the U.S. legal system and require the U.S. to fully comply with the provisions of Article 26.

B. Lawyers’ Committee Recommendations

218. The Government should acknowledge the lack of remedies available to victims of discrimination, and provide sufficient judicial and administrative avenues through which such victims can seek compensation.

Interaction, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002) (discussing how implicit and explicit racial attitudes and assumptions predict behavior); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004) (compilation of research demonstrating biased behavior in employment situations); Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AMER. SOC. REV. 355 (2005) (demonstrating that employers who say and/or believe they are non-biased, as demonstrated through their responses to research surveys, actually engage in highly discriminatory hiring practices when choosing between white and Black applicants in a real-world setting).