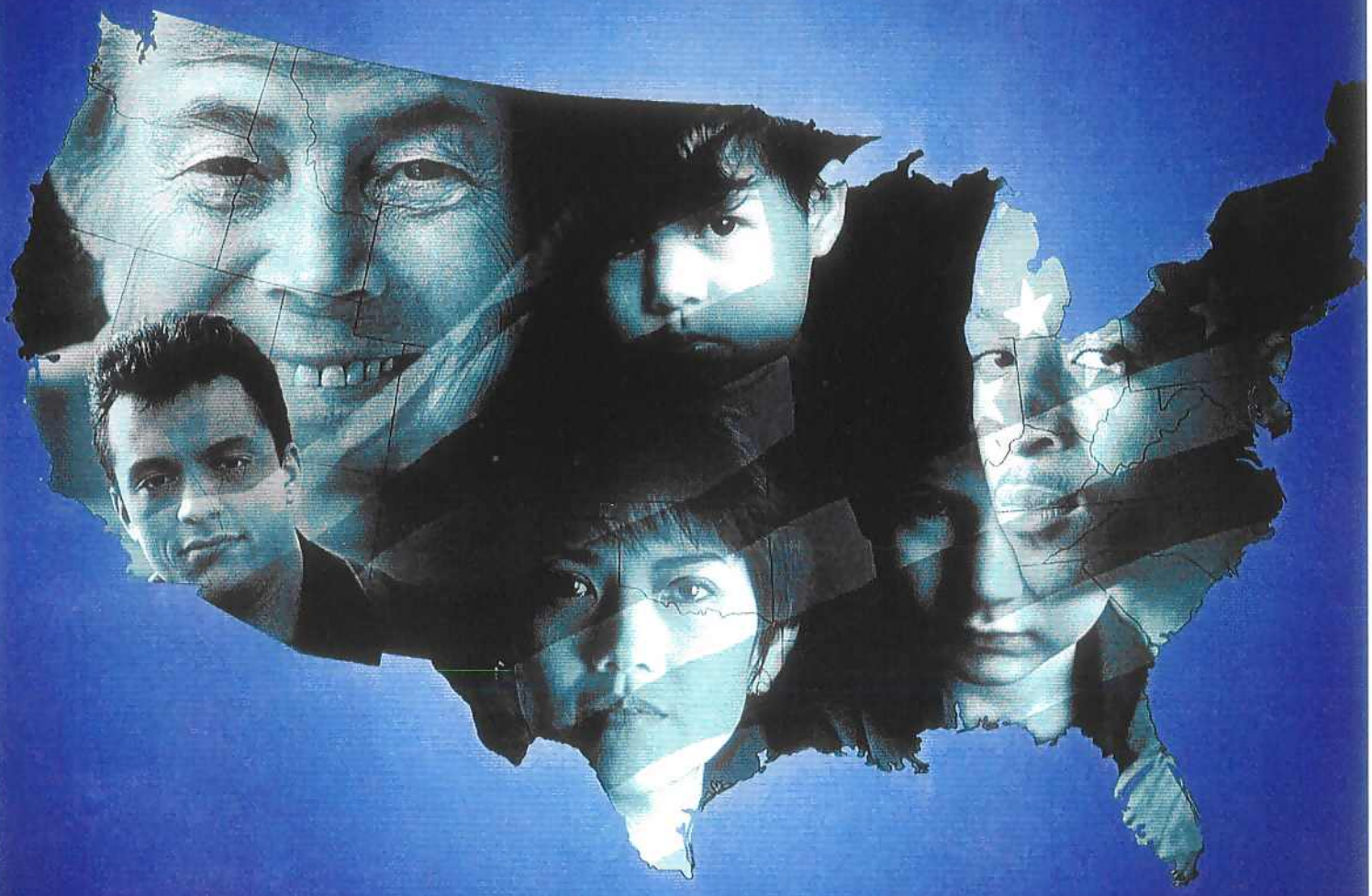
American Dream? America Reality!

A Report on Race, Ethnicity and the Law

in the United States

In Preparation for the Initial Country Review of the United States
by The United Nations Committee on the Elimination of Racial Discrimination



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Leadership Conference on Civil Rights

AMERICAN DREAM? AMERICAN REALITY!

A REPORT ON RACE, ETHNICITY AND THE LAW IN THE UNITED STATES

IN PREPARATION FOR THE INITIAL COUNTRY REVIEW OF THE UNITED STATES BY THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Leadership Conference on Civil Rights

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Leadership Conference on Civil Rights and the Lawyers' Committee for Civil Rights Under Law

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Leadership Conference on Civil Rights
Citizens Commission on Civil Rights
Lawyers' Committee for Civil Rights Under Law
American Association of People with Disabilities
Mexican American Legal Defense and Educational Fund
American Association of University Women
National Asian Pacific American Legal Consortium
National Association for the Advancement of Colored People
National Council of Churches
Justice For All
National Council of La Raza
National Congress of American Indians
Native American Rights Fund

Acknowledgments

Many people contributed in the coordinating, researching, and writing of this document. In particular, the Leadership Conference on Civil Rights ("LCCR") greatly appreciates the tremendous resources that White & Case LLP put into coordinating and drafting this Submission. This Submission would not have been possible without the support and talent of many members of their staff. Attorneys at White & Case LLP put in countless hours working with the Leadership Conference and the Lawyer's Committee for Civil Rights Under Law ("Lawyers' Committee") to frame the issues presented in this Submission as well as to research, gather data, and write the final Submission. LCCR is also grateful to members of the Lawyers' Committee's legal staff and interns who coordinated the production of the document, helped in the drafting, and added their expertise on many of the civil rights issues raised in the Submission. We are also tremendously appreciative of the substantive contributions that were made to various sections of the Submission by the National Asian Pacific American Legal Consortium, Mexican American Legal Defense and Educational Fund, International Human Rights Law Group, Indian Law Resource Center, and Native American Rights Fund. Additionally, we would also like to thank all the members of the civil rights community who contributed to and commented on this Submission. Your thoughts and suggestions have been invaluable. Finally, this would not have been possible without the dedication of many of the LCCR staff who worked on coordinating this Submission and assisted in the drafting of various sections of it.

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White & Case LLP is honored to have been asked by LCCR to coordinate and draft this Submission. White & Case LLP would like to thank the members of LCCR for providing us with this opportunity to contribute to the advancement of civil rights and would also like to thank the members of LCCR and the individuals at the Lawyers' Committee who contributed their time and expertise to helping us to frame issues and locate and gather data. White & Case LLP also appreciates the contributions made by those within and outside the Firm who assisted in the preparation of this Submission.

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Joint NGO Submission to the United Nations Committee on the Elimination of Racial Discrimination

United States, Initial Report, September 2000

We welcome the Initial Report of the United States of America ("Government Report") to the United Nations Committee on the Elimination of Racial Discrimination ("Committee"). The Government Report outlines past and existing legislative, judicial, administrative, and other measures through which the Government has given effect to its undertakings under the Convention on the Elimination of All Forms of Racial Discrimination ("Convention") in accordance with Article 9 thereof.

While the Government Report highlights various advances achieved to date and identifies obstacles to United States ("U.S.") compliance with the Convention, it does not fully address approaches for eliminating racial prejudice and stereotyping that continue to plague our society. Thus, while the Government has taken significant strides to eliminate *de jure* discrimination and has established certain remedial *structures*, it has failed to meet its obligation under the Convention to identify and eradicate the *de facto*, systemic discrimination that continues to exist in the U.S. and the stereotyping that often drives it. This Submission focuses on and offers recommendations relating to the following key areas of concern addressed in the Government Report:

- **U.S. Reservations to the Convention**
- **Environmental Racism**
- **Affirmative Action in the Areas of Education, Employment, and Contracting**
- **Hate Speech and the First Amendment and the Federal Response to Racially Motivated Hate Crimes**
- **Racially Disparate Treatment in the Criminal Justice System**
- **Indigenous Peoples**
- **Voting Rights and Electoral Reform**
- **Immigration and Migration**
- **Racial Discrimination in Housing**
- **Discrimination in Federal Employment**

The purpose of this joint non-governmental organization ("NGO") submission ("Submission") is to supplement the Government Report with additional information and provide an enhanced picture of how racism and discrimination continue to affect different communities in the United States.

Summary of Recommendations

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

Availability of Reliable and Accurate Statistics

1. It is internationally recognized that reliable, complete, and accurate statistics are necessary to monitor and enforce civil rights. The United Nations is developing policies to closely coordinate and monitor international data gathering through its entities and other specialized agencies.[1] In the field of civil rights, efforts are being made to develop a set of statistical indicators and to improve social statistics, including statistics relating to work, social integration, employment, housing, and criminal justice.[2] In recent years UN entities and other international organizations have begun to stress the importance of statistical information for reinforcing and monitoring social development and compliance with civil and human rights laws.[3] It remains clear that reliable data cannot be gathered without the active participation of state governments as well as regional and local authorities.[4]

   The global statistical system is founded on statistical work at the national level. Accordingly, it is the Government's responsibility to collect and provide extensive data relating to both the monitoring of violations and the enforcement of civil and human rights. This responsibility may also be inferred from the language of the major international conventions on human rights laws. "Each State Party . . . undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . . ." Because it is necessary to have sufficient information to advance human rights, the Government should develop reliable and efficient means of gathering data on human rights. These statistics should be compiled on an impartial basis by official statistical agencies with the cooperation of citizens, enterprises, and non-governmental organizations.[5] "The lack of statistics indicates a lack of will to promote human rights and discrimination or the intention to hide the miserable facts on the ground."[6]

U.S. Reservations to the Convention

2. The Commission should confirm with the Government that Reservation 1 is narrow and does not relieve federal and state governments of their obligation to implement Articles 4 and 7 using the constitutional means at their disposal.

3. Reservation 2 should be amended to state that the "United States accepts no obligation to regulate private conduct except as *permitted* by the Constitution" rather than "except as mandated by the Constitution and the laws of the United States."

4. The Government should amend Reservation 3 to bring its practice under the Convention into accord with its practice under the Vienna Convention by agreeing to the jurisdiction of the International Court of Justice in cases involving foreign nationals.

Environmental Racism

5. The Environmental Protection Agency ("EPA") must attend to the significant backlog of unresolved Title VI administrative complaints alleging racial discrimination in delegated environmental programs.

6. The Government should mandate that the EPA collect data on the demographic characteristics of communities burdened by environmental hazards as a result of existing and proposed waste facilities. This data should be shared with federal agencies, state, tribal, and local governments that implement delegated environmental programs, and the general public.

7. The Government should mandate that all environmental impact statements prepared by federal agencies under the National Environmental Policy Act ("NEPA") evaluate the proximity of any environmentally hazardous material site to minority or low-income neighborhoods.

8. The Government should mandate that the EPA consider discriminatory effects in its own permitting decisions and require the EPA to deny or condition a permit application when issuance of a permit would disproportionately expose a minority community to adverse environmental effects, including social, dignitary, and economic effects.

9. The Government should mandate that the EPA identify existing hazardous waste facilities. The EPA should periodically review all delegated state and local environmental programs to determine whether they comply with Title VI's implementing regulations.

10. The EPA should continue its financial assistance and outreach programs to affected communities. It should also remain committed to strengthening public participation in environmental decision making.

11. The Government should designate facilities in minority communities as "special priority facilities" and target "special priority facilities" for inspection, monitoring and, if necessary, enforcement and remedial measures. Include Native Tribes

Affirmative Action in the Areas of Education, Employment, and Contracting

12. The Government should recognize the Convention's "special measures" requirement as mandatory. The Government should take steps to identify and create affirmative action programs that are constitutionally permissible.

13. The Government should aggressively discourage state efforts, including California's Proposition 209, to end affirmative action programs in higher education, employment, and contracting.

14. The U.S. Department of Education and the U.S. Department of Justice must evaluate the effectiveness and fairness of existing affirmative action programs.

15. The Government 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 United States by federal, state, and local entities.

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

Hate Speech and the First Amendment and the Federal Response to Racially Motivated Hate Crimes

17. Federal and state governments as well as private organizations should make every effort to produce and disseminate messages of tolerance, both on-line and through traditional media outlets, to counteract the proliferation of racist, sexist, homophobic, and other constitutionally protected "hate speech."

18. Despite the U.S. Reservation to Article 4, the private mass media can play an important role in disseminating ideas that counter incitement to racial violence. The Government must take an active role by offering tax and licensing incentives to media outlets that combat racism and racial discrimination.

19. The Report takes insufficient notice of the promise of non-governmental suppression of racist, sexist, homophobic, and other types of hate speech. The Government should develop and further encourage the private development and distribution of filtering software that will selectively limit the content accessible from individual and networked computers. This technology may be voluntarily implemented in homes or anywhere that personal discretion permits the blocking of hate speech.

20. A complete statistical analysis of the nature and incidence of hate crimes is essential to formulate a targeted, effective response to hate crimes. The Government should condition its funding of local law enforcement agencies on proper training and reporting of all hate crimes to the U.S. Department of Justice, the FBI, or both.

21. The U.S. Department of Justice should produce and distribute a "Hate Crime Response Manual" for local police departments. This will encourage a uniform national response as well as heighten individual police officer's awareness of hate crimes. The federal government should also continue to facilitate training for localities on identifying, investigating, and prosecuting hate crimes.

22. The Government should coordinate with state governments and organizations to consider appropriate measures to expand coverage and close gaps in existing federal law by adopting more expansive federal hate crime legislation. This will create a net through which hate crimes cannot slip due to inadequate local laws and procedural inconsistencies.

23. Federal legislation should be adopted that simplifies the process by which federal agencies assist local police and prosecutors in investigating and prosecuting individuals who are responsible for hate crimes.

24. The Government should provide funding to local law enforcement agencies to enable them to provide training programs that instruct officers about how the "Hate Crimes Response Manual" should be implemented.

25. The Government should provide adequate funding to federal law enforcement agencies, such as the FBI's Hate Crime Unit and the Community Relations Service, to carry out anti-bias initiates and provide training and mediation services.

Racially Disparate Treatment in the Criminal Justice System

26. The Government should require the states to keep statistical information about all individuals passing through the criminal justice system. Such statistics should be organized according to the categories of stop, arrest, charging, prosecution, and sentencing and should focus on (i) the ethnicity/race of the defendant; (ii) the ethnicity/race of the victim; (iii) the income level of the defendant; (iv) the income level of the victim; and (v) the category of crime involved.

27. The Government should also require data gathering for federal law enforcement agencies and should conduct periodic reviews of such information to determine the extent of racial profiling.

28. The Government should exercise its authority under the Omnibus Crime Control and Safe Streets Act[7] and Title VI of the Civil Rights Act of 1964[8] to conduct additional investigations to determine whether federal, state, and local police officers are illegitimately using race as a factor in determining whether to stop, investigate, and arrest particular individuals.

29. The Government should develop training programs that instruct police officers and prosecutors about the dangers of racial stereotyping and how to conduct investigations without impermissibly considering a suspect's race.

30. The Government should work with the Federal Judicial Center and the National Center for State Courts to provide training for federal and state judges on eliminating racial bias.

31. The President should issue a federal moratorium on the death penalty until the apparent systemic bias can be addressed. The Government should also urge states to do the same.

32. The Government should conduct a study that evaluates the documented cases of innocent individuals who have been sentenced to death to prevent such mistakes from being made in the future.

33. The Government should enact laws that would entitle inmates to obtain confidential DNA testing if they believe the test will prove their innocence; if persons cannot afford such a test, the Government should provide the necessary funds.

34. In the U.S. Attorney's Manual ("Manual"), the Department of Justice sets forth procedures that a U.S. Attorney must follow when a defendant is charged with an offense punishable by death.[9] The Manual requires a U.S. Attorney to submit a report discussing the theory of liability, the facts and evidence, the defendant's background and criminal history, and the basis for federal prosecution.[10] The Government should add a provision to the Manual that requires a U.S. Attorney to submit a report when he or she charges an

African-American or other minority with a capital offense. This report should compare the defendant's case to cases involving similarly-situated white defendants and should explain the steps that the Attorney has taken to ensure that the defendant's race has not and will not be considered when determining what charges to file and whether to seek the death penalty. The Government should also encourage state governments to adopt similar procedures.

35. Congress should restore funding for the Post-Conviction Defenders Organizations to ensure that capital defendants receive adequate post-conviction representation.

Indigenous Peoples

36. Under the Convention, the Government must renounce the doctrines of plenary power, extinguishment, and treaty abrogation.

37. The Government should promote and develop laws and policies to ensure that autonomous, dignified, and culturally vital Indigenous tribes and nations will be provided with the opportunity to prosper within a principled legal framework. That new legal framework would guarantee racial equality, root out all notions of inferior and superior races, and strictly prohibit discrimination against Indigenous Peoples in the application of constitutional protections.

38. The core principle of a just and non-discriminatory relationship between the Government and Indigenous Peoples would be agreement and consent, particularly as manifested in treaties and other agreements, to establish racial justice for Indigenous Peoples of the United States.

Voting Rights

39. The Government should vigorously enforce the Voting Rights Act and other laws to protect and preserve the right to vote for all citizens and carefully monitor state compliance with voting rights laws.

40. The Government should commit more resources to enforcement of the Voting Rights Act's language assistance requirements by providing greater technical assistance. We recommend the employment of greater numbers of federal poll workers to provide necessary technical assistance and enforcement of the Voting Rights Act.

41. The Government should encourage private litigation against individuals and organizations threatening the rights of minority voters.

42. The Government should commit more resources to ensure that every citizen's right to vote is protected and preserved.

43. The Government should initiate lawsuits challenging state disenfranchisement laws that deny former felons the ability to vote in federal elections. The Government should also

pass legislation restoring federal voting rights to ex-offenders who have completed their sentences.

44. The Government should consider using its spending power to encourage states to repeal the most unfair aspects of felon disenfranchisement laws.

45. The Government should encourage efforts to register citizens to vote, including outreach to immigrants to encourage them to begin the naturalization process.

46. The Government is encouraged to comply with federal language assistance requirements by improving and investing in voting technology.

Immigration and Migration

47. Based on the statistical evidence developed in the Center For Human Rights report, the Government should conduct a broader investigation to establish whether the immigration laws are being enforced in a discriminatory manner on a systematic basis. It should be a priority of the Government to gather more complete and accurate statistics relating to race and the administration of U.S. immigration laws.

48. Based on the *Olsen* case, the Government should take steps to ensure that governmental officials exercise their discretion in a non-discriminatory manner. This would include the enactment of administrative regulations (i) prohibiting the practices outlined in *Olsen*; and (ii) mandating the reporting of any discriminatory activities like those described in *Olsen*.

49. The Government should monitor the enforcement of immigration policies to ensure that such policies are not administered in a discriminatory manner. Statistics should be gathered and published on a regular basis so that the Immigration and Naturalization Service and other federal agencies can be monitored for compliance with the Convention.

50. The Government should eliminate the harsh mandatory deportation and detention provisions enacted in 1996 to prevent the unfair effects of racial disparities in the criminal justice system from being repeated in the immigration context.

51. The Government should make special efforts to remove barriers that prevent minority groups from accessing public services.

52. The Government should to continue to invest resources into the enforcment, compliance and education of Executive Order 13166.

53. The Government should aggressivly discourage the passage of English only legislation. The aforementioned legislation seeks to abrogate the efforts of Executive Order 13166 and would serve to further disenfranchise Limited English Proficient ("LEP") persons.

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55. The Government should aggressively discourage the passage of language ordinance signs. The aforementioned legislation would serve to disenfranchise minority communities.

Federal Discrimination in Housing

56. The Government should reduce the rate of defaults in its home loan insurance programs by increasing oversight. Objectives of the increased oversight should include requiring applicants to meet stricter qualifications and monitoring of lenders' practices to eliminate discrimination, risky loans, and loans to speculators that do not intend to live in the houses.

57. When a borrower defaults on a U.S. Department of Housing and Urban Development ("HUD")-insured loan, HUD should ensure that such properties are quickly turned over, do not remain vacant for extended periods, and are secured and maintained during any unavoidable vacancy.

58. The Government must commit more resources to studying discrimination problems in housing markets and should conduct frequent studies to address problems before they become impossible to correct.

59. The Government should encourage private litigation against lenders and local housing authorities by providing more funding to fair housing organizations and educational outreach to the general public to ensure that persons with fair housing and lending complaints know their legal options.

60. When the Government has admitted past housing discrimination and such discrimination has not effectively been remedied, the Government should employ targeted affirmative measures to remedy past discrimination.

61. The Government should commit more resources to construct additional units of public housing and should direct that such housing not be concentrated in high-population density, low-income areas.

62. The Government should conduct a study to determine whether selectively privatizing public housing projects would allow a greater percentage of minorities to attain the benefits of home ownership.

63. The Government should provide greater support to community development corporations that understand the plights of the neighborhoods they serve and are able to provide immediate assistance to those in need.

64. The Government should meaningfully sanction those who receive federal funds, such as public housing authorities and municipalities, and provide them with incentives to create integrated housing opportunities.

65. The Government should provide funding to fair housing and other civil rights organizations to promote fair housing and address the tensions that often arise when individuals exercise their fair housing rights.

Discrimination in Federal Employment

66. The Office of Management and Budget should ensure that all federal agencies are working to eliminate racism and the remnants of past discrimination with consistent methodologies and principles in hiring and employment practices. The Government should design affirmative action programs to address minority employment in senior positions within the federal government.

67. The Government should be committed as a matter of policy to hiring minorities in positions of authority and management that allow them to design and implement policy.

68. The Government should recognize its role as the largest employer of African-Americans and as such, should pursue aggressive affirmative action programs aimed at retention, promotion, and employing individuals. The Government should also enforce its policy of not doing business with contractors that discriminate on the basis of race. In addition, as a service-purchaser from many private sector employers it should set an example for private industry in terms of fairness and non-discrimination.

69. The Government should recognize the need for increasing aggressive affirmative action efforts aimed at recruiting, retaining and promoting Hispanics who remain the only, under-represented group in federal government. The Government should also serve as a role model for the private sector in employment practices that promote fairness and non-discrimination for Hispanics employees.

Introduction

1. We welcome the U.S. Government's Report to the United Nations ("UN") Committee on the Elimination of Racial Discrimination ("Committee"). The Government Report outlines the legislative, judicial, administrative, and other measures giving effect to its undertakings under the Convention on the Elimination of All Forms of Racial Discrimination ("Convention") in accordance with Article 9 thereof. This is the first such Report filed by the Government.[11]

2. The purpose of this Submission is to supplement the Government Report and provide an enhanced picture of the persistence of racism and discrimination and describe how such racism and discrimination have affected different communities in the United States. This Submission offers recommendations for actions that will strengthen the Government's current strategy for fulfilling its obligations under the Convention. We hope that this will assist the Committee in evaluating the Government Report and in formulating its own recommendations.

3. The compilation of this Submission has been achieved through the joint efforts of race equality, civil rights,[12] human rights, and other NGOs. The fact that this Submission does not cover every area addressed by the Government Report does not mean that the subject areas not addressed are free from concerns about racial equality. Racism pervades all aspects of life in the United States. There were some issues raised in the Government's report that the NGOs found critically important to address in this Submission. These subjects, however, do not represent all of the areas in which minorities in the United States face discrimination, racism, and stereotyping. The organizations participating in this Submission are concerned with many, if not all, of the issues covered herein. The views expressed do not necessarily reflect all of the policies of each of the contributing organizations.

Summary of the State of Civil Rights in the United States

4. As the United States undergoes stark demographic changes, NGOs throughout the United States are working to bring about the nation's transition to a truly equal, multi-racial and multi-cultural democracy free of racism, sexism, and general intolerance. Overwhelming statistical and anecdotal evidence reveals, however, that much remains to be done before our society will be free of racism and discrimination. The changing national dynamics demand strategic approaches to effectuate the bedrock principles of equal justice for all. This fundamental value, articulated in the U.S. Declaration of Independence, the Bill of Rights, the Reconstruction Amendments to the Constitution, and the body of statutory and decisional law, continues to define the health of our society and serves as the barometer of our nation's moral integrity. 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. Although this Submission cites numerous examples of discrimination, it must be remembered that it is not exclusive to those areas as no part of U.S. society is untouched by discrimination and racial prejudice. This discrimination ranges from disparities in the prosecution and sentencing of

minorities, to disparities in pay and promotion, to unequal access to elementary and secondary educational opportunities, as well as higher and post-graduate educational opportunities. Minorities face prejudice, stereotypes and discrimination in everything they do. For countless minorities, every day is a struggle to overcome the impact of such discrimination.

5. With a few notable exceptions, such as in the area of environmental justice, there are statutes and regulations on the national level that prohibit and provide remedies for discrimination on the basis of race, color, gender, ethnicity, and national origin. 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. Because discrimination is so pervasive in U.S. society, these laws are not always sufficient and are not consistently and fairly implemented and enforced with the goal of ending the systemic discrimination present in employment, education, public accommodations, voting, housing, environmental and immigration policies, and the criminal and civil justice systems. On a state and local level, statutes and regulations that prohibit and provide remedies for discrimination are not uniform and vary considerably between state and local governments. Civil, human, and women's rights organizations, together with other NGOs, must urge aggressive civil rights enforcement by federal agencies, support for fair affirmative action programs, commitment to strong environmental justice policies, enactment of hate crimes legislation, depoliticization of the judicial nomination and confirmation process, a moratorium on the death penalty, an end to racial profiling, and other pro-civil rights positions for securing access to justice for all Americans. The NGOs must also encourage state and local governments to adopt statutes and regulations designed to combat discrimination and protect civil rights. State and local governments must also enforce existing laws that were adopted to eliminate discrimination and foster equal justice.

6. The partisan rancor and ideological divisions that have characterized the judicial nomination process threaten the independent judiciary and system of separation of powers that are fundamental to our constitutional system of governance. The politicization of the judicial branch destabilizes the integrity of the courts and threatens due process, especially with respect to minority views. The executive and legislative branches should end the use of ideological litmus tests on such issues as abortion, affirmative action, and capital punishment. Litmus tests have also delayed the filling of vacancies, which has led to emergencies throughout the federal judiciary. An unwillingness to diversify the bench has also added to judicial vacancies, which have created docket back logs and have denied access to justice to individuals with pressing civil rights and other claims.

7. Over the past several years, the United States has been marked by horrific incidents of hatred, including the recent murder of undocumented Mexican laborers in Long Island, New York; the grotesque racially motivated murder of an African-American man named James Byrd in Jasper, Texas; the murder of Matthew Shepherd in Laramie, Wyoming because of his sexual orientation; the anti-Semitic shooting at a day-care center and murder of Joseph Ileto in Los Angeles; drive-by shootings of Asian Pacific Americans, African-Americans, and Jews in Chicago; the attack on Alaskan Natives with a paintball

gun; and other crimes motivated by racial animus. Hate crimes language approved by both the U.S. House and Senate in 2000 presented the opportunity to protect millions of Americans from hate crimes motivated by race, color, religion, national origin, gender, disability, or sexual orientation. However, despite broad public and political support for the Hate Crimes Prevention Act, the bill languished in Congress for procedural reasons and ultimately did not become law.

8. Affirmative action remains under attack, threatening access to higher education for minorities and women and jeopardizing their advances in employment and public contracts. Voluntary affirmative action in employment, education, and contracting is now banned in California and Washington. In Florida, pro-affirmative action advocates achieved a major court victory against a misleading anti-affirmative action ballot initiative—the so-called "Florida Civil Rights Initiative." Another plan, the "One Florida Initiative," ordered by the Governor as an alternative to affirmative action, eliminates most race-conscious affirmative action programs and promises access to college only for qualifying students in the top 20% of high school graduates in Florida. Implementation of this plan has resulted in the elimination of affirmative action in both undergraduate and graduate education and will ultimately lead to a decrease in the number of minority students attending Florida's premier educational institutions. This change comes at a time when there is a low level of diversity in these institutions and when Florida is struggling with its rich history of segregation and discrimination. The civil rights community won federal court victories in several affirmative action cases. The U.S. Tenth Circuit Court of Appeals' *Adarand v. Pena* decision upheld an affirmative action program at the U.S. Department of Transportation. This program has been instrumental in providing business opportunities to disadvantaged businesses, including businesses owned by minorities and women. Three courts supported higher education admissions policies that included race as a factor: the U.S. Ninth Circuit Court of Appeal's decision affecting state institutions of higher education in Washington State; U.S. Federal District Court's decisions affecting the University of Michigan's law school; and the U.S. Fifth Circuit Court of Appeal's *Hopwood v. Texas* decision affecting state institutions of higher education in Texas. The Supreme Court will shortly review a case involving affirmative action in public contracts and is likely to review a higher education case within the next few years. Challenges to affirmative action make more urgent the need to develop a genuine understanding among the American public about the important role that government and private action play in overcoming discrimination.

9. Several major changes are needed in the United States criminal justice system to achieve a more equal society and to eliminate practices that have the most wide ranging and detrimental impact on minorities. Studies and surveys confirm the use of racial profiling by law enforcement agencies at every stage of the criminal justice process and also in consumer settings. These practices have had a profound effect on minority communities and serve to perpetuate racial bias in the criminal justice system. In addition, federal and academic studies have revealed that the death penalty is implemented in a manner that discriminates against African-Americans and other racial minorities and that a large percentage of people sentenced to death have not had the benefit of adequate and qualified legal counsel to ensure that their due process rights are protected. While the U.S.

Supreme Court has refused to review capital cases based on evidence of racial disparities, public debate has been reignited in light of the availability of DNA evidence. Across the United States, DNA evidence has been used to exonerate death row inmates and to prove police misconduct, prompting the Republican Governor of Illinois to issue a moratorium on the imposition of the death penalty. DNA legislation is pending in the U.S. Congress that would force states to make DNA evidence available in capital cases. Because an increasing body of evidence, including DNA evidence, has established that innocent persons have been sentenced to death and that the death penalty is administered in a discriminatory manner, the President should issue a moratorium on the death penalty.

10. Mounting evidence demonstrates that educational inequality within our public schools contributes to the disproportionate representation of African-Americans in prison. While African-Americans represent 13% of the U.S. population, they represent 66% of the prison population. Our nation is experiencing a national crisis as increasing numbers of children are impacted by the criminal justice system. As a result, as our society focuses increasingly on punishment rather than educational opportunities, the educational opportunities that children across the United States are receiving are vastly decreasing. Children in schools with severe educational inequities are passed off into the criminal justice system at alarming rates, preventing them from attending school and forcing them into the criminal justice system at increasingly early ages. These are issues of fundamental importance to minority populations throughout the United States. Additionally, there remain critical issues to resolve in educational settings, including financial disparities in the funding of schools, segregation of students, and racial isolation of students in schools throughout our nation.

Background on the Convention

11. On November 20, 1963, the General Assembly of the UN adopted the Declaration on the Elimination of All Forms of Racial Discrimination. In this landmark pronouncement, the international community affirmed "the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person." Two years later, the Declaration was embodied in an International Convention on the Elimination of All Forms of Racial Discrimination, and a Committee on the Elimination of Racial Discrimination was established to monitor the compliance of signatories with the Convention. The United States signed the Convention on September 28, 1966, but the Senate did not exercise its constitutional responsibility to debate the treaty until almost three decades later. The Senate finally ratified the Convention in 1994. On December 10, 1998, President Clinton issued Executive Order 13107, which, in general terms, calls upon federal agencies to respect and abide by the Convention and related human rights treaties.

12. Under the Committee's General Recommendations on implementation of the Convention, each state party is obligated to report to the Committee one year after ratification and every two years thereafter, detailing the extent to which it has complied with the terms of the Convention. The United States, having ratified the Convention in 1994, was

scheduled to submit its first report to the Committee in 1995. However, the Government Report on which this Submission comments is the first to be issued by the United States.

13. On three occasions, the American civil rights community has presented evidence to UN bodies on the subject of U.S. compliance with the Convention. On April 5, 2000, a delegation consisting of George Kendall, Associate Counsel to the NAACP Legal Defense and Education Fund; Charles Ogletree, Professor of Law at Harvard University; and William Moffitt, President of the National Association of Criminal Defense Lawyers, addressed the 56th Session of the UN Commission on Human Rights in Geneva, Switzerland. Mr. Kendall spoke about racial disparities in the imposition of capital punishment in the United States, while Mr. Ogletree and Mr. Moffitt addressed more comprehensively the subject of racial disparity in the American criminal justice system.

14. In early August 2000, a second delegation traveled to Geneva to present a "Call to Action" to the Committee and to the UN Sub-Commission on the Promotion and Protection of Human Rights. Representing the dozens of civil rights and human rights leaders who signed the Call to Action were Dr. Mary Frances Berry; Gerald R. Segal Professor of History at the University of Pennsylvania and Chair of the U.S. Civil Rights Commission; Julian Bond, Chair of the NAACP; and Wade Henderson, Executive Director of the Leadership Conference on Civil Rights.

15. On October 24, 2000, the UN High Commissioner met with representatives from several NGOs. This meeting gave the NGOs an opportunity to interact with the Commissioner and discuss issues relating to racial discrimination, both in the United States and in other countries, that they believed should be addressed at the World Conference.

16. In September 2000, the United States issued its first report to the Committee outlining past and current government efforts relating to the Convention. In doing so, the United States met its initial reporting obligation under the Convention. This Submission is a formal response by the NGOs to that Government Report.

17. The Government Report repeatedly states that the United States has generally complied with its obligations under the Convention because it has eliminated *de jure* discrimination and has passed numerous constitutional, statutory, and/or administrative provisions that prohibit racial discrimination and/or provide remedies for proven discrimination.

18. At the same time, the Government Report admits to continued and persistent discrimination in many areas of American life.[13] Furthermore, the Government Report acknowledges that a principal factor affecting U.S. implementation of the Convention is:

> the persistence of attitudes, policies and practices reflecting a legacy of segregation, ignorance, stereotyping, discrimination and disparities in opportunity and achievement.[14]

The Government Report, however, does not engage in a systematic examination of racial prejudice or stereotyping or delineate the affirmative steps the Government could, but has not yet taken, to address this issue, including increased enforcement efforts.

19. In addition, the Government Report asserts that one of the primary reasons for its failure to comply fully with the provisions of the Convention is that, under the federalist system that is embodied in the U.S. Constitution, the federal government's powers are limited.[15] This statement ignores the significant constitutional power of Congress. The Necessary and Proper Clause,[16] Commerce Clause,[17] and Spending Clause[18] authorize the federal government to adopt legislation aimed at eliminating racial discrimination. Congress can do so directly or by allocating federal money to states or private parties for a broad spectrum of activities.

20. Under the federalist system, the federal government must trace its actions to an affirmative grant of authority in the Constitution. The grant of authority need not be explicit, however, but can be implied. As the Supreme Court held in *McCulloch v. Maryland*,[19] 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.

21. The Commerce Clause provides the federal government with the power to "regulate Commerce . . . among the several states." Beginning in 1937 with the seminal case of *NLRB v. Jones & Laughlin Steel Corp.*,[20] 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. Between 1937 and 1995, the Supreme Court did not invalidate a single statute on the ground that Congress exceeded its authority under the Commerce Clause.

22. Under the Commerce Clause, the federal government has exercised its authority to adopt civil rights legislation on several occasions. For example, Congress adopted Title II of the Civil Rights Act of 1964, which prohibits discrimination in places of public accommodation; Title VI, which prohibits discrimination in education; and Title VII, which prohibits discrimination in employment. On two separate occasions, the Supreme Court held that the statute was constitutional even though it regulated "local" activities.[21] While the 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]

23. 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 this Clause, commonly referred to as 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 eliminating racial discrimination. For example, Title VI of 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]

24. The Government Report also lists the statutes that Congress has adopted with the goal of eliminating racial discrimination.[27] 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 turn, whether a statute is enforced by an agency is often dependent upon whether the Administration in power makes enforcement of these statutes a priority, including the request for appropriations at a necessary and proper level.

Key Areas of Concern

In response to the Government Report, this Submission outlines eight key areas of concern for the Committee to consider:

- **Reservations to the Convention**

The United States has entered three reservations purporting to limit its international obligations under the Convention. The reservations are overly broad and seek to diminish the reach of the Convention. Reservation 1, while properly recognizing that the constitutional protections of free speech and association must be preserved, fails to acknowledge that there are constitutional measures available for opposing racial hate speech and hate crimes. Reservation 2 is overly broad and should be amended to limit the Government's obligation to regulate private discriminatory conduct to measures that U.S. law *permits*. Reservation 3, which denies the International Court of Justice jurisdiction over the United States absent its specific consent in any individual case, should be amended to allow the Court compulsory jurisdiction in cases involving non-citizens, bringing U.S. practice in conformity with its practice under the Vienna Convention on Consular Relations.

- **Environmental Racism**

Studies demonstrate that low-income and minority communities bear a disproportionate share of adverse environmental burdens, including living near toxic factories and commercially hazardous waste facilities. The Government must carry out its obligation to ensure that delegated state and local environmental programs comply with the non-discrimination provisions of Title VI of the Civil Rights Act of 1964. The Government also needs to address significant gaps in existing law. To eliminate racial discrimination in environmental policy-making and enforcement, the Government must move beyond statements of policy and towards implementing laws and regulations. Without the force of law, the discriminatory siting of environmentally hazardous waste facilities, unequal environmental enforcement, and ineffective remedies, which lie at the root of this problem, will continue.

- **Discrimination in Federal Employment and Affirmative Action in the Areas of Education, Employment and Contracting**

  Currently, federal minority employees are under-represented in positions that provide higher pay and greater responsibility, earn less than their white counterparts, and are often the victims of racial discrimination and harassment. The Government should implement affirmative action programs that target retention, managerial training, promotion, and mentoring to increase the number of minorities in positions that provide higher pay and policy-making responsibilities to remedy the past and current discrimination in federal employment practices.

  The inequality of educational and employment opportunities for minorities throughout the United States is an example of the negative and continuing effects of racial discrimination and highlights the obligation on the part of the Government to undertake "special measures" by aggressively promoting affirmative action programs. The Government, using constitutional limitations as its justification, has inadequately fulfilled its obligation to create special measures. However, affirmative action programs are permitted under the U.S. Constitution and are broadly used throughout the United States. In fact, the U.S. Department of Transportation's affirmative action program for small and disadvantaged businesses in the awarding of federal contracts has been upheld. Affirmative action programs have also been upheld in educational settings. Studies have found that diverse student bodies improve the education of both minority and non-minority students. However, a few state governments and state institutions of higher learning have prohibited affirmative action measures. The Government should take efforts to encourage and facilitate affirmative action programs in state education, employment, and contracting and should impress upon state governments their obligation under the Convention to take "special measures" to remedy the effects of racial discrimination in other areas of society, especially in schools and businesses.

- **Hate Speech and the First Amendment and Federal Response to Racially Motivated Hate Crimes**

  Hate speech is protected by the First Amendment, but its most odious and dangerous manifestations *may* be constitutionally proscribed. Vigorous educational efforts and private Internet screening, both of which are constitutional, can help combat the dissemination of hateful speech. To this end, the Government must encourage the development of sophisticated Internet screening technology. The link between hate speech and hate crime is not well understood and establishing a causal nexus may lead to more significant governmental proscription of the worst forms of hate speech.

  Hate crimes, though targeted at individuals, are really an attack on an entire community. In 1999 alone there were 7,876 reported incidents. While the United States has enacted some laws that enhance penalties for those who perpetrate hate crimes, current federal hate crimes laws are inadequate to address fully the problem. The Government must pass federal hate crimes legislation that expands current laws and allows for federal assistance to state and local authorities to investigate and prosecute hate crimes. In addition,

governmental reporting and recording efforts must be redoubled in order to fully understand and combat the incidence of hate crimes.

- **Racial Disparate Treatment in the Criminal Justice System**

  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 more often than whites and that they are more likely to be prosecuted, receive harsher sentences, and be sentenced to death. At times, racial disparate treatment by authorities has placed African-Americans and other racial minorities in physical danger. While the Government has taken some steps to eliminate racial disparate treatment and discrimination, additional and immediate steps 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 systematic bias in death penalty cases.

- **Indigenous Peoples**

  Indigenous Peoples in the United States suffer from the effects of discrimination in terms of income, educational opportunities, rate of victimization, and unemployment. Moreover, discrimination against Indigenous Peoples has been sanctioned by the laws of the United States and continues to be supported by both the courts and Congress. As the U.S. Supreme Court has stated, Indian tribes are inferior and dependent groups who are to be treated as "wards of the nation." This policy serves as the basis for Congress's exercise of its plenary power over Indian affairs, which has three particularly disturbing manifestations, including (i) the power to interfere with the internal affairs of Indigenous Peoples; (ii) the ability to appropriate the tribes' traditional homeland and extinguish their aboriginal title without providing them with compensation; and (iii) the blanket authority to abrogate treaties entered into between the federal government and individual tribes.

- **Voting Rights and Electoral Reform**

  The right to vote is considered to be a fundamental right under state, federal, and international law and is protected by federal statutory law. In spite of these facts, minorities continue to be deprived of their right to vote due to inadequate, error-prone, and ineffective voting machines, acts of intimidation, and ex-felon disenfranchisement. Under the Voting Rights Act of 1965, the Government has the authority to remedy discriminatory practices in the electoral system. While the Government has made some efforts to exercise its authority under the Voting Rights Act, it efforts are far from sufficient. Recent events, including the controversy surrounding the November 2000 General Election, have established that the Government needs to take additional steps to ensure that minorities are not deprived of their fundamental right to vote.

- **Immigration and Migration**

  While sovereign states have the authority to regulate their own borders pursuant to international, federal, and state law, such relation must be consistent with its obligations under international law, including the Convention. Strong anecdotal evidence suggests that the Government has and continues to implement U.S. immigration laws in a discriminatory manner against Latin American, Asian and African immigrants. For example, studies have established that immigrants from African countries are detained for greater periods of time pending asylum hearings and that only 6% of the refugees that were admitted to the United States in the 1990s were from Africa even though ethnic and political crises escalated during that time period. Moreover, the U.S. Supreme Court has held that Border Patrol officers may consider an individual's race when determining whether to stop and interrogate such individual.

- **Racial Discrimination in Housing**

  Racial discrimination remains an unfortunate obstacle facing minority Americans seeking housing. During the home buying or rental process, minority Americans are shown fewer (and inferior) homes than whites, are steered toward predominantly minority neighborhoods, and are twice as likely to be rejected for financing as whites. In the public housing arena, *de facto* segregation is widespread and continues to be one of the leading factors inhibiting the economic and social progress of low-income, minority Americans. The racial segregation that continues to exist in housing limits educational and employment opportunities, thereby rendering the escape from poverty more difficult. Although the Government has begun to acknowledge its deficiencies in helping minority Americans to find adequate housing, it needs to take further and immediate steps to ensure that racism does not deprive minority Americans of the opportunity to live in integrated communities and fulfill the American dream of home ownership. The Government must promote fairness and equity in the lending process so that minority Americans do not face discrimination because of their race; it must conduct studies on housing in the United States on a more frequent basis, which would enable it to address problems before they become more serious; and it must commit more resources toward the construction of more units of public housing as an initial step towards guaranteeing that every American who seeks housing can secure it.

U.S. Reservations to the Convention

25. When the United States ratified the Convention, it assumed an international legal obligation to comply with the Convention's provisions, including through congressional legislation if needed.[28] The United States attempted to limit that obligation by entering three reservations to the Convention. The Convention permits the United States to withdraw a reservation at any time by notifying the UN Secretary-General.[29]

26. Within the United States, ratified treaties (and accompanying reservations) rank equally with federal law as the supreme law of the land.[30] In case of conflict, they supersede inconsistent state law and are themselves superseded only by the Constitution.[31] Should a federal law conflict with a treaty, the more recent of the two prevails.[32] Whenever possible, however, U.S. courts will interpret federal law to avoid conflicts with treaties.[33]

Reservation 1: Freedom of Expression

27. Reservation 1 provides that the Government accepts no obligation, particularly under Articles 4 and 7 of the Convention, to restrict individual freedom of expression and association "to the extent they are protected by the Constitution and laws of the United States."[34] The Government intended Reservation 1 "to make clear that the United States cannot . . . accept obligations . . . inconsistent with its own constitutional protections for free speech, expression, and association."[35]

28. The NGOs understand the concerns of the Government. As discussed in the hate speech section of this submission, however, this reservation does not prevent the Government from regulating speech, expression, or association that incite crime or violence. In addition, this reservation would not prevent the United States from (i) gathering information regarding hate speech; (ii) promoting educational and other programming designed to combat such speech; or (iii) promoting technologies that would enable those in the United States who choose to filter out hate speech broadcast across the Internet to do so.

Reservation 2: Private Conduct

29. Reservation 2 states that the Government accepts no obligation under Articles 2(1), 2(1)(c), 2(1)(d), 3, and 5 to "enact legislation or take other measures . . . with respect to private conduct except as mandated by the Constitution and laws of the United States." The Government explained that this reservation was necessary because "the Convention may be viewed as imposing a requirement on a State Party to take action to prohibit and punish purely private conduct of a nature generally held to lie beyond the proper scope of governmental regulation under current U.S. law."[36] The Government stated that this concern stems from (i) the "breadth" of the definition of "racial discrimination" under Article 1(1); (ii) the obligation imposed on States Parties to bring an end to all racial discrimination "by any persons, group or organization"; and (iii) the requirements of subparagraphs 2(1)(c) and (d), as well as Articles 3 and 5.

30. In addition, in various places, the Government Report asserts that one of the principal limits on U.S. compliance with the Convention is that under the federalist system embodied in the U.S. Constitution, the federal Government's powers are limited.[37]

31. In enacting this reservation, however, the Government failed to state a precise concern or basis. Thus, Reservation 2 is also overly broad because it limits U.S. compliance to those situations in which action is already "mandated" by the U.S. Constitution or federal law. As such, the Government limits its obligation to comply with the Convention to those situations in which U.S. law already requires compliance.[38]

32. Under international law, a reservation that is incompatible with a treaty's object and purpose is invalid.[39] One of the purposes of the Convention was to constrain parties to harmonize their laws with the Convention. It is incompatible with that purpose for the United States *ex ante* to refuse any obligation to alter its laws. If Reservation 2 frustrates the Convention's purpose concerning private conduct, it is invalid.[40]

33. Moreover, the argument that the United States is somehow released from its obligations under the Convention because it is procedurally incapable of regulating certain conduct due to the U.S. federal system, has been roundly rejected by the International Court of Justice (ICJ) in the recently decided *LaGrand Case (Germany v. United States)*.[41] There, the ICJ rejected the U.S. argument that a domestic procedural default rule—which requires claims seeking individual remedies in criminal proceedings to be asserted at an early stage—could not violate the Convention. The ICJ held that because the rule had interfered with the right of the foreign defendants to obtain the consular assistance which the Vienna Convention afforded them, it violated the Convention—this in spite of the fact that the procedural default rule is connected to the division of labor between federal and state criminal jurisdiction in the United States.

34. In addition, Reservation 2 ignores the broad reach and remedial power of the Government. The powers of the federal government are quite broad. For example, the Necessary and Proper Clause of the U.S. Constitution grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested" in the federal government. This Clause empowers Congress to implement a treaty through appropriate legislation, even if that legislation would have otherwise fallen outside of Congress's enumerated powers.[42] In addition, Congress may use its spending power to encourage state or private action by the availability or provision of federal funds.[43]

35. Reservation 2 (and the accompanying Understanding) is overly broad and contrary to the purposes of the Convention. It should be amended to provide that "the United States accepts no obligation to regulate private conduct except as *permitted* by the Constitution." This would accomplish the Government's stated objective of harmonizing the Convention's requirements with constitutional guarantees, while advancing the purpose of the Convention by obliging the Government, like other parties, to harmonize its statutes with the Convention.

Reservation 3: International Court of Justice

36. The Government has conditioned its acceptance of the Convention by not recognizing the jurisdiction of the International Court of Justice absent the specific consent of the United States in any individual case.[44] The Government justified this reservation by stating that it is "[i]n accordance with its long-standing policy" and "identical to those [reservations] recently taken upon ratification of other treaties."[45]

37. The Convention prohibits discrimination against citizens and non-citizens based on race. With respect to non-citizens, the 1963 Vienna Convention On Consular Relations requires law-enforcement officials to inform foreign nationals arrested within U.S. borders that they may contact the consulates of their home countries for assistance.[46] Pursuant to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, to which the United States is a signatory, "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."[47] Thus, under this Optional Protocol to the Vienna Convention, the Government has consented to the jurisdiction of the International Court of Justice regarding claims arising from the failure of its law-enforcement officials to inform non-citizens of their rights under the Vienna Convention.[48]

Conclusion

38. In a State Department Memorandum, the U.S. Department of State expressed the hope that ratification of the Convention would advance U.S. foreign policy by "underscor[ing] our national commitment to the international promotion" of human rights and racial equality. "Even more importantly, U.S. ratification would enhance our ability to take effective steps within the international community to . . . combat the increasingly destructive discrimination which occurs against minorities around the world."[49]

39. These lofty goals stand in sharp contrast to the reservations. As discussed above, it appears that these reservations were adopted by the Government to enable it to ratify the Convention without having to comply with it.[50]

40. 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. Criticism by the Government of other states' human rights records may appear arrogant, if not hypocritical, given the Government's reluctance to live up to its obligations under the Convention. This in turn undermines the Government's standing to intervene against ethnic conflict worldwide. Perhaps more seriously, the Government practice weakens the multilateral convention as an instrument for safeguarding human rights. Were every party to enter reservations exempting itself from having to harmonize domestic law with human rights conventions, as the United States has done in some respects, the conventions would be meaningless.[51] As such, the U.S. approach to ratification impedes its promotion of human rights abroad.

Recommendations

- The Commission should confirm with the Government that Reservation 1 is narrow and does not relieve federal and state governments of their obligation to implement Articles 4 and 7 using the constitutional means at their disposal.

- The Government should amend Reservation 2 to state that the "United States accepts no obligation to regulate private conduct except as *permitted* by the Constitution" rather than "except as mandated by the Constitution and the laws of the United States."

- The Government should amend Reservation 3 to bring its practice under the Convention into accord with its practice under the Vienna Convention by agreeing to the jurisdiction of the International Court of Justice in cases involving foreign nationals.

Article 2(1)(c)
Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

Environmental Racism

41. Environmental justice embraces the view that the imposition of disproportionate environmental burdens on minority, indigenous, and economically disadvantaged populations is unfair and should not occur. At its foundation, environmental justice is based on effective environmental laws establishing, at a minimum, health-based environmental standards designed to protect all people from environmental harms. Once these laws are in place, environmental justice requires that they be implemented and enforced in a manner that avoids disproportionate effects.

42. Unfortunately, environmental justice does not fully exist in the United States. Instead environmental racism is a key concern for African-Americans and members of other minority communities in the United States. As the Government acknowledges, "low-income and minority communities frequently bear a disproportionate share of adverse environmental burdens."[52] Not only are America's minority communities disproportionately exposed to hazardous substances, they receive disproportionately less environmental protection in terms of enforcement and remedial measures. The Government Report fails to describe fully the extent of these burdens, the lack of response by federal, state, and local governments, and the inadequate statutory and regulatory framework to provide protection against future exposure and remedies for past discriminatory practices.

43. Environmental racism is prevalent in the United States. Decades of research have documented environmental inequalities based on race and ethnicity across America's rural and urban communities. Whether it is discriminatory siting, unequal enforcement, or ineffective remedies, America's communities of color are targeted with more contamination and afforded less protection. This type of discrimination, prevalent yet often rationalized, represents one of the most challenging civil rights issues facing the United States in the 21st century.

44. Environmental racism is now at the forefront of the national civil rights agenda. But Americans had to protest against environmental inequities for nearly two decades before the Government took notice. Only after being faced with mounting research documenting environmental inequities did the Government acknowledge environmental racism as a national civil rights issue. This acknowledgment occurred in 1994 when President William J. Clinton issued an Executive Order on Environmental Justice, officially memorializing the issue as national policy.[53] While this Executive Order was an instrumental victory for civil rights, it was only a partial victory. In federal law, environmental justice exists only in policy, without the force of law, and is absent from any governmental mandate.

Without such a mandate, the discriminatory siting, unequal enforcement, and ineffective remedies, all of which lie at the root of this problem, will continue.

Discriminatory Siting of Environmentally Hazardous Waste Facilities

45. Substantial evidence confirms that environmentally hazardous waste facilities have been sited in a manner that results in minority and low-income communities hosting a disproportionate share of such facilities. This discriminatory siting is often the result of action at the local and state levels. At the local level, authorities that issue zoning permits often discriminate by allowing such facilities to locate in minority neighborhoods. State governments, which have been delegated authority under federal law, often do not closely scrutinize applications for permission to release toxic waste under federal and state law because the facilities are often located disproportionately in poor and minority neighborhoods.

46. In 1994, the Center for Policy Alternatives, the National Association for the Advancement of Colored People, and the United Church of Christ Commission for Racial Justice analyzed 530 commercial hazardous waste facilities using 1990 census data updated to 1993.[54] The study found that African-Americans were 47% more likely than whites to live near a commercial hazardous waste facility in 1993.[55] In addition, it found that the percentage of minorities living in ZIP codes with commercial hazardous waste facilities increased from 25% in 1980 to almost 31% in 1993.[56]

47. Professor Vicki Been of New York University School of Law recently conducted a study that was funded by the Environmental Protection Agency ("EPA") to determine whether siting processes, market dynamics, or some combination of the two were responsible for the disproportionate exposure to environmental hazards revealed by prior studies.[57] She examined 544 communities that in 1994 hosted active commercial hazardous waste treatment, storage, and disposal facilities.[58] With regard to African-Americans, the study revealed that the percentage of African-Americans in a tract in 1990 is a significant predictor of whether that tract hosts a facility.[59] With regard to Hispanics, the study demonstrated not only that the percentage of Hispanics present in a tract in 1990 affected the probability that the tract would host a facility, but also that the percentage of Hispanics at the beginning of a decade increased the probability that the tract would be selected to host a facility in that decade.[60] In addition, the study provided little support for the theory that market dynamics following the introduction of a waste facility into a neighborhood might lead it to become poorer and increasingly populated by racial and ethnic minorities.[61]

48. An investigation by the Dallas Morning News, published in October 2000, found that some 870,000 federally subsidized apartments are located within one mile of factories that reported emissions of toxic air pollution to the EPA.[62] The study found a racial divide: Half of all families in mostly minority developments live within a mile of toxic factories, compared with one-third of the families in mostly white projects.[63]

49. Only a handful of states have implemented substantive measures to combat environmental racism. Arkansas, for example, has enacted legislation designed "to prevent communities from becoming involuntary hosts to a proliferation of high impact solid waste management facilities."[64] This legislation creates a rebuttable presumption against permitting the construction or operation of a "high impact solid waste management facility" within twelve miles of an existing "high impact solid waste management facility."[65] A polluter can rebut the presumption by showing that no other suitable site exists in the region because of geographical constraints or that the host community has accepted the siting in return for certain incentives.[66] Most state laws merely call for information gathering or the creation of a task force to study environmental injustice but create no further obligations.[67]

Case Studies: Inequities in the Location of Environmental Hazards

City of Chester, Pennsylvania

The City of Chester has 42,000 low income residents, 65% of which are African-Americans. The population of Delaware County outside of Chester is 500,000, 92% of which are middle to high income whites. From 1987 to 1995, the Pennsylvania Department of Environmental Protection ("PADEP") granted five waste permits for sites in the City of Chester that totaled 2,143,000 tons of waste per year. In that same time period, PADEP granted just two waste permits totaling 1,400 tons of waste per year for the rest of Delaware County—a disparity of 1,500 to 1, even though the population of Delaware County outside of Chester is twelve times greater than the City of Chester.

Many of the sites in the City of Chester have been located in close proximity to low income, minority residential neighborhoods. In addition, a clustering of waste treatment facilities has been permitted within 100 feet of over 200 Chester homes.

In 1996, the non-profit organization Chester Residents Concerned for Quality Living brought a lawsuit against PADEP, alleging racially discriminatory effects of its permitting practices in violation of Title VI of the Civil Rights Act of 1964 and the EPA's Title VI implementing regulations.[68] The district court dismissed the complaint, ruling, in part, that a private right of action was not available to the plaintiffs under the EPA's Title VI implementing regulations.[69] In December 1997, the Third Circuit reversed, concluding that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964."[70] In June 1998, the Supreme Court granted *certiorari*, but then dismissed the case and vacated the opinion as moot when the permit was abandoned by Soil Remediation Services, Inc.[71]

King and Queen County, Virginia

In *R.I.S.E., Inc. v. Kay*, a not-for-profit corporation primarily comprised of residents of King and Queen County, Virginia, brought a lawsuit under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, alleging that the Board of Supervisors of King and Queen County maintained a pattern and practice of racial discrimination in locating and zoning landfills.[72] The federal district court concluded that the plaintiffs had shown a "historical placement of

landfills in predominantly [African-American] communities," but held that the plaintiffs had not proven the requisite discriminatory intent.[73]

In reaching its conclusion that the plaintiffs had shown a racially disproportionate impact, the court conducted a demographic analysis of the landfills located in King and Queen County.[74] The court found that 64% of the population living within a half-mile radius of the proposed landfill site was comprised of African-Americans and that the three other landfills in the county were located in or near predominantly African-American neighborhoods: 100% of the population living within a one mile radius of the Mascott landfill was African-American at the time the landfill was sited. An estimated 95% of the population living in the immediate area surrounding the Dahlgren landfill was African-American at the time the landfill was sited. An estimated 100% of the residents living within a half-mile radius of the Owenton landfill were African-American at the time the landfill was sited.[75]

Forest Grove and Center Springs, Louisiana

In *In re Louisiana Energy Services, L.P.*, the Nuclear Regulatory Commission ("NRC") reversed a staff licensing decision on the ground that NRC staff failed to thoroughly consider whether racial discrimination influenced the site selection process.[76] NRC noted that the siting process at issue culminated in a chosen site with an African-American population of 97.1% within a one mile radius of the site, which is the site with the greatest percentage of African-American residents of all seventy-eight examined sites.[77] According to NRC, this statistical evidence "very strongly suggests" that racial considerations played a part in the site selection process.[78]

Discriminatory Toxic Chemical Clean-Up Efforts

50. In the area of enforcement, federal and state governments often fail to adequately enforce laws pertaining to operating facilities because these facilities are located in poor and minority neighborhoods. However, even when federal and state government do enforce such laws, they often do not seek appropriate penalties or fail to seek adequate clean-up. For abandoned waste sites, the failings of federal and state officials are similar, as they often fail to seek clean-up or seek inadequate clean-up in poor and minority neighborhoods and are unwilling to pay to relocate residents.

51. Substantial evidence also confirms that racial discrimination exists in environmental enforcement actions. In 1992, the *National Law Journal* reported a finding of race-based disparities in the EPA's enforcement of environmental laws.[79] The report found that the average fine that polluters were required to pay under the Resource Conservation and Recovery Act in predominantly white communities was $335,566, compared to $55,318 in minority neighborhoods.[80] It also found that abandoned hazardous waste sites in minority areas took 20% longer to be placed on the national priority action list than those in white areas.[81] In more than half of the ten regions that administer EPA programs across the United States, action on cleanup at Superfund sites, which are sites that have been designated as hazardous waste sites under the EPA, began from 12% to 42% later at minority sites, which are sites that have been designated as hazardous waste sites under

the EPA than at white sites.[82] At minority sites, the EPA chose "containment," the capping or walling off of a hazardous waste site, 7% more frequently than permanent "treatment," the cleanup method preferred under the law, to eliminate the waste or rid it of its toxins.[83] The report concluded that "[t]here is a racial divide in the way the U.S. government . . . punishes polluters. White communities see . . . stiffer penalties than communities where [African-Americans], Hispanics and other minorities live. This unequal protection often occurs whether the community is wealthy or poor."[84]

Case Study: Discriminatory Enforcement of Environmental Laws

Washington Park Housing Project, Virginia

The Washington Park area was declared an EPA "Superfund" site in 1990 as a result of high levels of lead contamination. In 1994, when the EPA selected the final cleanup remedy for the site, only private landowners were relocated. Residents of the Washington Park Housing Project, which is 95% African-American, were left at the site.

Residents of the Washington Park Housing Project brought a lawsuit in federal district court challenging the EPA's actions under the Fifth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution under 42 U.S.C. § 1983.[85] The court denied the EPA's motion to dismiss the complaint, ruling that the plaintiffs had sufficiently alleged standing to bring a claim against the EPA for discriminatory action in its selection of the overall cleanup remedy for the site.[86]

Thereafter, the court approved a consent decree that ordered federal and local officials to relocate all 160 families living in the Washington Park Housing Project.[87]

Ineffective Remedies

52. We commend the Government for their efforts to address racial discrimination in environmental policy-making and enforcement. We welcome the issuance of Executive Order 12898 by President Clinton, the issuance by the White House Council on Environmental Quality ("CEQ") of guidance to federal agencies on addressing environmental justice concerns under the National Environmental Policy Act ("NEPA"), and the establishment of a formal advisory council by the EPA.[88] We also welcome the EPA's financial assistance programs,[89] its outreach to affected communities, and its efforts to strengthen public participation in environmental decision-making.[90] However, we urge the Government to move beyond policy statements towards implementing substantive measures to prevent or eliminate racial discrimination in environmental programs and enforcement.

53. The EPA needs to carry out its obligation to ensure that all delegated state and local environmental programs that receive federal funding comply with Title VI of the Civil Rights Act of 1964 ("Title VI"), which prohibits discrimination "under any program or activity receiving Federal financial assistance."[91] Since 1993, the EPA has received approximately 100 Title VI administrative complaints alleging racial discrimination in delegated environmental programs.[92] Of that number, the EPA has rejected or dismissed

forty-seven on procedural or jurisdictional grounds, accepted twenty-one for investigation, and taken no action on the remaining thirty-five complaints.[93]

54. In February 1998, the EPA issued Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Interim Guidance"). The Interim Guidance was heavily criticized, leading the U.S. House of Representatives to prohibit the EPA from using any "funds 'to implement or administer the interim guidance'" for complaints submitted after October 21, 1998.[94] In June 2000, the EPA published Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Revised Guidance") for public comments. The Revised Guidance contains a more detailed explanation of the various steps that the EPA follows in its investigation of allegations of discriminatory effects from a permit decision. Concern remains, however, that the EPA is limiting its Title VI investigations to health effects and is failing to consider other environmental effects, including social, dignitary, and economic effects. In the *Select Steel* decision, the only complaint that the EPA has decided on the merits to date, the EPA issued a final ruling that the permit at issue did not violate its Title VI implementing regulations because it required the applicant to meet all applicable air emission regulations and all applicable ambient air quality standards.[95] The EPA declined to even reach the question of "disparate impact."[96] The result in *Select Steel* is contrary to the Convention's mandate that the United States rescind any regulation that has the *effect* of creating or perpetuating racial discrimination. It is also, in our view, contrary to the scope and reach of Title VI.

55. The EPA's neglect of its Title VI obligations is particularly troubling given that it is uncertain whether private plaintiffs can maintain an action in court under Title VI's implementing regulations promulgated by federal administrative agencies. At least one court has held that a private right of action was not available to plaintiffs to enforce these regulations.[97]

56. The EPA's neglect of its Title VI obligations is particularly troubling given that the U.S. Supreme Court has recently precluded private citizens from bringing such enforcement actions for discriminatory effects under Title VI's implementing regulations promulgated by federal administrative agencies. However, the law is not yet settled as to whether such private causes of action can be brought under § 1983.[98]

57. As the Government had acknowledged, "most environmental laws do not expressly address potential impacts on low income and minority communities."[99] NEPA, for example, requires federal agencies to analyze environmental and related social, cultural, and economic impacts of their actions, but does not expressly require them to consider disproportionate impacts on minority or low-income communities.[100] We therefore urge the Government to mandate that all environmental impact statements prepared by federal agencies under NEPA consider disproportionate impacts on minority or low-income communities.

Recommendations

- The EPA must attend to the significant backlog of unresolved Title VI administrative complaints alleging racial discrimination in delegated environmental programs.

- The Government should mandate that the EPA collect data on the demographic characteristics of communities burdened by environmental hazards as a result of existing and proposed waste facilities. This data should be shared with federal agencies, state, tribal, and local governments and the general public.

- The Government should mandate that all environmental impact statements prepared by federal agencies under NEPA evaluate the proximity of any environmentally hazardous material site to minority or low-income neighborhoods.

- The Government should mandate that the EPA consider discriminatory effects in its own permitting decisions and require the EPA to deny or condition a permit application when issuance of a permit would disproportionately expose a minority community to adverse environmental effects, including social, dignitary, and economic effects.

- The Government should mandate that the EPA identify existing hazardous waste facilities. The EPA should periodically review all delegated state and local environmental programs to determine whether they comply with Title VI's implementing regulations.

- The EPA should continue its financial assistance programs and its outreach to affected communities. It should also remain committed to strengthening public participation in environmental decision making.

- The Government should designate facilities in minority communities as "special priority facilities" and target "special priority facilities" for inspection, monitoring, and, if necessary, enforcement and remedial measures.

Article 2.2

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Affirmative Action in the Areas of Employment, Education, and Contracting

Use of Special Measures

58. The Convention provides that to attain equal development for all citizens, States "shall" take "special measures" to ensure that groups that have experienced the negative effects of racial discrimination are effectively integrated into the community.[101] The Government Report establishes the need for special measures in the United States by detailing significant instances of past discrimination. Moreover, existing disparities demonstrate that residual effects of discrimination remain.[102] One area highlighted by the Government is the area of hiring and employment practices for minorities and the over-representation of minorities in the lower economic classes.[103] The Government is therefore obligated to adopt "special measures" to remedy past and existing racial discrimination in this area.

59. Prior to the adoption of the Convention, the Government took some "special measures" to remedy past and present-day discrimination against minority groups. President John F. Kennedy established the idea of "special measures" when he issued Executive Order 10925, which used the term "affirmative action" to refer to measures designed to achieve non-discrimination in employment.[104] Four years later, President Lyndon Johnson signed Executive Order 11246, requiring federal contractors to take affirmative action to ensure equality of employment opportunity without regard to race, religion, and national origin.[105] Other "special measures" include the U.S. Department of Transportation's Disadvantaged Business Enterprise Program, which requires affirmative action in federal contracting, and President Clinton's Executive Order 13171, which is an initiative to increase the number of Hispanic employees employed by the federal government.

60. Notwithstanding its stated commitment to racial equality, however, the Government does not recognize the "special measures" requirement of Articles 1(4) and 2(2) of the Convention as requiring the United States to adopt race-based affirmative action programs.[106] The Government seems to view such measures as optional even though the Convention uses the word "shall."

61. The Government has disclaimed its obligation to create special measures because under limited circumstances race conscious measures violate the U.S. Constitution.[107] The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any

person within its jurisdiction the equal protection of the laws,"[108] and the Fifth Amendment imposes the equal protection obligations upon the federal government.[109] It must be recognized that these constitutional provisions are the foundations of policies and programs that promote non-discrimination and equal opportunity. The Government has and continues to implement affirmative action programs consistent with these constitutional provisions.

62. Affirmative action programs are permitted under the U.S. Constitution. To protect the interests of all citizens, the U.S. Supreme Court has ruled that government affirmative action programs should be evaluated under the strict scrutiny standard.[110] Strict scrutiny requires that affirmative action programs be evaluated to determine whether there is a compelling government interest that justifies the program's use of race and whether that use is narrowly tailored to meet this interest.[111] Notwithstanding this onerous test, many affirmative action plans of various types have been upheld and continue to provide affirmative steps to eradicate past and present-day discrimination.

63. Strict scrutiny is a very high standard. To withstand this scrutiny, courts generally require that affirmative action programs be linked to racial discrimination. Courts have also stated that a public employer (such as the Government) must have "convincing evidence" of prior discrimination, which is more than mere societal discrimination, in its employment practices before it can implement affirmative action programs.[112] Thus, although affirmative action programs continue to be legally viable, the number of challenges is increasing. The result has been that some government officials are reluctant to implement or continue aggressive affirmative action programs. Additionally, either because of the legal challenges to certain programs or because they feel emboldened by the views of certain constituencies, some government officials have discouraged the use of affirmative action programs to overcome the lingering effects of past discrimination, notwithstanding the obligations of the Convention.

64. The constitutional limitations on affirmative action programs do not mean that the Government is relieved of its obligation under Art. 2(2) of the Convention to take special measures to "ensure the adequate development and protection of certain racial groups." Instead, the Government is obligated to harmonize federal law and programs with its obligations under both the Constitution and the Convention.[113]

65. Specifically, the Convention obligates the Government to create programs that implement "special measures" and satisfy strict scrutiny. For example, given the educational inequities that minorities face in our society and the compelling need for diversity in institutions of higher education, programs that consider race as one factor in admissions to undergraduate or graduate school have been upheld. Additionally, programs that promote outreach, recruitment, retention, and mentoring in employment would provide a fair and reasonable means to address ongoing discrimination.

Employment and Contracting

66. The Government should more aggressively structure affirmative action programs by modeling such programs after those that have withstood legal challenge. For example, in its effort to rectify the affects of racial discrimination in federal contracting, the Government has created statutory programs, such as the Department of Transportation's Disadvantaged Business Enterprise Program, which requires affirmative action in federal contracting.[114] The federal government implements affirmative action through contracting and procurement programs.[115] These programs require "good faith" efforts by prime contractors to get bids from small or disadvantaged businesses. The programs target minorities through statutorily prescribed rebuttable presumptions that individuals from certain racial and ethnic groups are socially disadvantaged.[116]

67. In addition, Executive Order 11246 (as amended by Executive Order 11375 and 12086) prohibits racial discrimination in employment by federal contractors.[117] The regulations promulgated under the Executive Order require all employers whose government contracts exceed $10,000 to implement affirmative action plans.[118] The obligations of the Order also apply to subcontractors and vendors with whom such an employer does business.[119] The affirmative action plans must include analysis of utilization of minorities in the major job categories,[120] goals and timetables for increasing minority representation,[121] a description of internal auditing to ensure the plan's success,[122] and a commitment to use employment tests that conform with the Uniform Guidelines on Employee Selection,[123] which are designed to provide the federal government with a framework for employment selection procedures that comply with federal anti-discrimination laws.[124] The Office of Federal Contract Compliance Programs ("OFFCP") and the U.S. Department of Labor are responsible for enforcement of the Executive Order.[125]

68. Because political actors in the executive and legislative branches are responsible for the implementation and enforcement of affirmative action programs, such programs are not fundamentally guaranteed to continue. Whether affirmative action programs that are in place will continue to exist, and whether new affirmative action programs will be created and implemented are subject to the agendas of the individuals who hold various political offices. To make the advances cited in the Government Report, President Clinton assumed a proactive role in achieving diversity and providing equal opportunities throughout the federal government and the educational system. An example of this approach is evidenced in former President Clinton's Executive Order 13171, which called for an initiative to increase the number of Hispanic employees within the federal government and the creation of an inter-agency task force to ensure that the executive branch has a uniform policy regarding diversity within the federal government.[126]

69. Currently, it is unclear how the new Administration will respond to and enforce affirmative action programs and policies. During his campaign, President Bush stated that he supported "affirmative access" rather than affirmative action.[127] At this point it is unclear what the administration's support of "affirmative access" will mean in that some members of the Bush administration are supporters of affirmative action programs and others are

opponents. Furthermore, John Ashcroft, the new U.S. Attorney General, stated that he supports the affirmative access programs currently used in California, Texas, and Florida–states where some, if not all, affirmative action programs have been banned.[128] While a U.S. Senator, Attorney General Ashcroft was a principal opponent of affirmative action. He co-sponsored the Civil Rights Act of 1997,[129] with the goal of ending affirmative action and sought legislation to eliminate the U.S. Department of Transportation's disadvantaged business enterprise program.[130] This is particularly troubling because as Attorney General, Ashcroft is responsible for defending the legality of many of the Government's affirmative action programs relating to education, employment, and contracting. Additionally, the selection and appointment of Elaine Chao, a long-standing opponent of affirmative action, as Secretary of Labor also indicates the likely opposition of the Bush Administration's Labor Department, which is significant because the Department of Labor administers numerous federal affirmative action programs. The Bush Administration's stance on affirmative action is critical because the Supreme Court will hear an affirmative action case in its next term and is likely to hear an education case within the next two years.[131] It is unclear what the new Bush Administration's approach will be to promoting affirmative action and diversity, which creates an uncertain fate for programs promoting affirmative action and diversity in the United States.

Case Study: Oakland Firefighters

Prior to a court order requiring the Oakland Fire Department to implement an affirmative action program in the 1970s to bring minorities into its ranks, there were no Asian-American firefighters in Oakland, California. The first Asian-American was hired in 1972, and by 1980 there were 5 Asian-American firefighters in Oakland, California. These numbers stand in strong contrast to the percentage of Asian-Americans residing in both Oakland County and neighboring Alameda County during the same time period. By the 1990's, the number increased to 22. As one firefighter put it "[i]t took over 20 years, even with affirmative action to bring the number of Asians up to 5% of Oakland's firefighters."[132]

Education

70. As acknowledged in the Government Report, in spite of advances made over the past thirty years, tremendous race disparities remain in educational attainment and achievement in the United States.[133] For example, the gap between minority and white high school graduation rates has persisted. In 1992, the dropout rate was 25.4% for Native Americans, 18.3% for Hispanics, and 14.5% for African-Americans, as compared to the 9.4% dropout rate for whites.[134] In addition, the difference in rates of college completion between both Latinos and whites and African-Americans and whites has actually grown.[135] The continued failure of states to provide equal access to educational opportunity regardless of race at the primary and secondary level exacerbates the difficulties that minorities face in higher education admissions and, once admitted, in completing work on a degree. The persistence of educational inequalities thus demonstrates the continuing need for affirmative action programs.

71. The inequities in education are evidenced by lawsuits complaining of segregated school systems and the inequitable distribution of educational resources to school districts. The U.S. Supreme Court officially recognized in 1954 that segregated schools provide separate and unequal education in *Brown v. Board of Education.* Prior to that time, however, racially segregated schools were permitted in the United States.[136] History and present times demonstrate that schools segregated by race are also generally segregated by income, leading to schools with concentrations of both minority and impoverished students.[137] Recently, the Connecticut Supreme Court ruled that the condition of racial and ethnic segregation in the Hartford, Connecticut metropolitan area deprives schoolchildren of the fundamental right under the state constitution to an equal educational opportunity.[138] The court held that minority and poor children were receiving an inequitably low distribution of the state's educational resources because housing patterns continue to concentrate poor and minority residents in the inner cities and the city lacks the educational resources to provide those students with basic educational supplies and opportunities.[139] The combination of schools segregated by poverty, race, and ethnicity usually leads to "lower levels of educational performance on virtually all outcomes."[140]

72. Throughout the United States students do not have equal access to educational opportunities. Several lawsuits point to this reality and make clear the necessity and continued importance of affirmative action for achieving equal educational opportunity. In May of 2000, a coalition of civil rights groups filed a lawsuit, *Williams v. California,* charging that California is failing to provide poor and minority students with the bare essentials necessary for education, and in doing so, has violated state and federal requirements that equal access to public education be provided without regard to race, color, or national origin.[141] The conditions cited in the lawsuit include schools that lack materials and basic resources such as labs, textbooks, computers, music and art classes, and guidance counselors; schools that provide inadequate instruction with as few as 13% of teachers with full teaching credentials, chronic teacher vacancies, heavy reliance on substitute teachers in place of permanent teachers, and no homework assignments due to lack of materials. Additionally, the plaintiffs complain of massive overcrowding such as classes without enough seats and desks where students sit on counters, cramped makeshift classrooms and multi-track schedules that force students to take key exams before completing the full course of study; and degraded facilities including extremely hot or cold classrooms due to broken or nonexistent air conditioning and heating systems, filthy toilets that do not flush and are locked, broken windows, walls and ceilings, vermin infestation, leaky roofs and mold.[142] These substandard conditions have a discriminatory impact in that the worst of the conditions tend to be concentrated in schools populated by California's non-white, non-English speaking, poor children.[143]

73. In *Davis v. California,* filed on July 27, 1999, a group of public high school students, charged that they were being denied access to advanced placement courses.[144] The advanced placement program was developed over forty years ago and allows qualified and motivated high school students to take college-level courses.[145] Completion of advanced placement courses provides students with an extra point in the University of California system's[146] calculation of their grade point average ("GPA"). This allows advanced

placement students to earn a GPA above a 4.0 "perfect score."[147] In 1998, for example, the University of California-Berkley rejected 8,000 applicants whose GPAs were 4.0 or higher, admitting students with higher GPAs due to their enrollment in advanced placement courses.[148] Students enrolled in lower-income, predominantly African-American and Hispanic schools are provided less access to advanced placement courses than their white peers in that their schools do not offer sufficient advanced placement programs to enroll all qualified and interested students.[149] For example, Beverly Hills High School, whose student body is 76.6% white, offers fourteen advanced placement subjects and forty-five advanced placement courses, while Arvin High School, where 93.2% of the student body is African-American and Hispanic and of a lower income, offers only two advanced placement courses.[150] Thus, the Government is failing to provide equal educational access to poor and minority students at the primary and secondary level. The result is that these students are not adequately prepared to compete with their white peers at the college level or during the admission process. Additionally, many young minority students are denied equal educational opportunites because they do not have an adequate grasp of the English language, which is necessary to complete in higher education.

74. The United States can implement constitutional affirmative action measures in education. In *Regents of the University of California v. Bakke*, the U.S. Supreme Court held that race can be used as a factor in admissions because "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher learning."[151] In fact, universities across the country have shown a commitment to using affirmative action because they believe that race used as one factor can achieve diversity, which is an important goal.[152] In addition, the federal government had, and does have, the power and duty to prevent discrimination and promote equal educational opportunities for minorities. In particular, Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance.[153] The federal government enforces this statute by requiring all federal agencies that provided grants of assistance to enforce the Title VI regulation.[154] Thus, the federal government has great potential to promote diversity in education because a large number of institutions of higher learning are required to comply with Title VI.

75. Convincing evidence of the benefits that flow from a diverse student body demonstrates that students receive a better education in a diverse educational environment and are better prepared to participate in a democratic and pluralistic society. Studies have also shown that diversity in higher education serves to break patterns of "racial segregation and separation historically rooted in our national life."[155] Diversity is associated with "increased satisfaction in most areas of the college experience and an increased commitment to promoting racial understanding and participation in cultural activities, leadership, and citizenship."[156] The educational achievement of students also increases in a diverse educational environment in that students who experience more racial and ethnic diversity in the classroom show greater "engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."[157] Over 360 institutions represented by the Association of American Law Schools assert that they have learned through their "extensive experience in the educational realm

that the quality of education for all students is greatly enhanced when student bodies include persons of diverse backgrounds, interests, and experiences, including racial and ethnic make-ups" and that the reduction of affirmative action programs "would significantly undermine their ability to provide the highest quality of academic experience and to prepare their students to effectively contribute to society after graduation."[158]

76. The success of affirmative action programs in opening doors to minorities in higher education has been well documented, in part due to the publication of a comprehensive study based on a database of 80,000 college undergraduates who enrolled in twenty-eight selective universities in 1951, 1976 (by which time most selective universities had instituted various recruitment and race-sensitive policies considering race as a factor in admissions decisions), and 1989.[159] In brief, the authors demonstrated that among those students who would not have been admitted to the universities they attended had admissions policies been race neutral, the vast majority have attained marked success, whether viewed in terms of financial or professional achievement, community involvement, or personal satisfaction. Thus, society as a whole has benefited from the contributions that these individuals have made. In addition, the integration and interaction of students across racial and ethnic lines has helped to foster greater tolerance among the races.[160]

77. Given that affirmative action programs are both constitutional and required by the Convention, it is regrettable that the trend in some states has been to eliminate or in some cases prohibit affirmative action measures. For example, in California a voter-approved initiative, Proposition 209, bans all forms of affirmative action in public employment, public education, or public contracting.[161] Proposition 209 is overly broad in its scope and does not allow the State of California to pursue affirmative action programs in education that are needed, constitutional, and required of the United States by the Convention. Another example is in Florida, where the state's Governor ended affirmative action in higher education and replaced it with a program that does not promote diversity and under which race or gender can never be used as factors to achieve diversity or increase educational opportunity.

Case Study: Impact of Affirmative Action on Minority Enrollment

In two states that have eliminated affirmative action in university admissions programs, the number of minority applicants offered admission to state-supported universities has decreased dramatically. In 1998, following the passage of Proposition 209, the University of California at Berkeley announced that 66% fewer African-American undergraduate applicants and 55% fewer Latino undergraduate applicants were offered admission.[162] Enrollment at the Boalt Hall School of Law at Berkeley plummeted in one year from an average of twenty-four African-American students admitted to only one.[163] These decreases occurred notwithstanding increases in both the number of minority applications and the strength of minority applicants' academic credentials.[164] The State of Washington, encouraged by the passage of Proposition 209, passed its own anti-affirmative action measure, Initiative 200. Undergraduate applications to the University of Washington from African-American students subsequently decreased by 18%,[165] and of the 3,667 admitted students in 1999, only thirty-seven, barely 1%, were African-American.[166]

78. The decrease in the number of minorities admitted and attending public universities in California in the absence of affirmative action demonstrates the continuing effects of discrimination on that state's education system. Such evidence of inequality in education as a result of racial discrimination triggers the Article 2(2) requirement for "special measures."

Case Study: Minority Doctors in Short Supply

Ending affirmative action in education will exacerbate the problem of minority access to medical care by making it more difficult for minority group members to gain admission to colleges and medical schools. The Government Report admits that minorities are far more likely than whites to live in communities that are under-served by doctors. The Government Report adds that "Black physicians are five times more likely than other doctors to treat Black patients, and Hispanic doctors are 2.5 times more likely than other doctors to treat Hispanic patients. Minority doctors are also more likely to treat Medicaid or uninsured patients than white doctors from the same area."[167]

Recommendations

- The Government should recognize the Convention's "special measures" requirement as mandatory. The Government should take steps to identify and create affirmative action programs that are constitutionally permissible.

- The Government should aggressively discourage state efforts to end affirmative action programs in higher education, employment, and contracting, such as California's Proposition 209, to end affirmative action programs in higher education, employment, and contracting.

- The U.S. Department of Education and the U.S. Department of Justice must conduct appropriate reviews of the effectiveness and fairness of existing affirmative action programs.

- The Government 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 United States by federal, state, and local entities.

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

Article 4

States parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this convention, inter alia:

Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

Hate Speech and the First Amendment

79. Our society is far from ridding itself of racism. Unfortunately, some Americans still choose to embrace racist or hateful theories. As one commentator stated, "We're not there yet. We still see evidence of a biting bigotry and intolerance in ugly words and awful violence, in burned churches and bombed buildings."[168] The freedom to choose such theories or sentiments and express them in verbal or written expressions is protected by the U.S. Constitution. Accordingly, the United States issued a Reservation to Article 4 of the Convention and the corresponding provisions of Article 7.

80. The NGOs acknowledge that the Government has sought to abide by its obligations under the Convention by not using the First Amendment to shield from regulation the most virulent forms of hate speech or other activities motivated by racism. Thus, the most harmful speech enjoys limited or no First Amendment protection.[169] As such, by distinguishing between the abstract racial animus that animates a hate crime and the violent act itself, the Government draws ever closer to the ambit of Article 4.

Hate Speech and the Internet

81. Hateful propaganda litters the Internet. The Ku Klux Klan, neo-Nazi groups, openly fascist organizations, Holocaust revisionists, a panoply of homophobes, eugenicists, anti-immigrationists, and the like all have a home on-line. There are an estimated 400 to 1,200 hate oriented websites on the Internet that facilitate universal access to hateful theories and propaganda.[170] The Southern Poverty Law Center documented over 250 hate sites in 1999, a 60% increase from 1997.[171] Websites also specifically target children by including materials that are designed to attract children. Furthermore, in some cases, hate groups have posted their messages on seemingly innocuous websites.

82. Freedom of speech, which is guaranteed by the First Amendment to the U.S. Constitution, does not prevent the Government from (i) supporting technologies that allow individuals to avoid hate speech or (ii) developing educational and other programs advocating tolerance and/or attacking racial hatred and prejudice.

83. A French court recently ordered a panel of experts to examine the feasibility of international content filtering for Internet Service Providers ("ISPs").[172] In that case, the purpose of the filter was to make it impossible for people in France to gain access to a U.S. website where Nazi paraphernalia was sold. Such sales are legal in the United States, but are illegal in France. Already, many filtering technologies exist that can block objectionable content from individual computers or networks of computers.[173] Although Yahoo refused to comply with the French order, "in what it called an unrelated development, Yahoo said it would begin to search out and remove hateful and violent material from its sites."[174]

Case Studies: Hate Speech in the Newspaper

"Hunting" Ad Targetting Native Americans

The *Sicangu Sun Times* ran a derogatory "hunting" notice in its October 15, 1999 edition. The notice was made to look like an official hunting and fishing season announcement from the State of South Dakota. The notice, which was a proclamation about "Indian Hunting Season" featured information on the number of Indians to be "trapped," the approved methods of hunting, and the limit on the number that a "hunter" could kill. The notice also advocated murder and used stereotypes associated with American Indians to describe them, including calling them "Worthless Red Bastards, Prairie Niggers and F--- Indians."

This shocking and racist content prompted Senator Ben Nighthorse Campbell to denounce on the Senate floor those who placed the ad, the newspaper, and others including internet sites that have displayed similar hate-filled messages.[175]

Case Studies: Hate Speech on the Internet

Omnibus Portals to Other Hate Sites

The Stormfront website compiles racist writings under easy to browse headings such as "White Nationalist Issues," "Affirmative Action and anti-White bias," "Immigration in America," "Racial Differences," "Revisionism," "National Socialism," and "Zionism and Judaism." The following is found under "Racial Differences." "Negro culture is not merely DIFFERENT from White culture; it is a LESS ADVANCED culture and, by practically any standard, INFERIOR . . . Negro culture inferiority is the consequence of the physical inadequacy of the Negro brain in dealing with abstract concepts . . . . His verbal ability and his ability to imitate allow him, when properly motivated, to assume much of the outward appearance of 'equality.' 'In a decade of special college-admission quotas for Blacks, many thousands of Blacks have obtained college diplomas—but only in those disciplines in which a glib tongue and a good memory suffice. There have been virtually no Black graduates in the physical sciences and very few in engineering.'"[176]

The Ku Klux Klan ("KKK")

Typical of the many KKK websites, which use charged rhetoric to color public perception, the White Camelia Knights of the Ku Klux Klan proclaim that "[t]he Federal Government promotes the destruction of our [white] race through its many programs. They require that businesses [sic] hire based on race rather than qualifications, they call this Affirmative Action. The Government supports mass Non-White integration. When the hordes of Third Worlders that enter our country can not work, they go on Welfare. The Welfare Program allows the White people to pay for the Non-White people of the Country to eat and live, while at the same time causing the White people to lack in necessary funds to have children of their own. Our race, through the Government's power, now has the lowest birth rate. White Men and Women can not have children because they pay 'mandatory child support' in the name of TAXES. Our Government promotes Race-Mixing through integration. Our Children are forced to go to school with every race under the sun. They are being taught that the races are equal. When did race-relations become part of educational curriculum? Our Children are being brainwashed all in the name of 'Humanity'"[177]

Hate Speech Targeted at Immigrants

84. Hate groups have seized on new data from the 2000 Census, particularly results from the state of California showing that non-Hispanic whites no longer comprise a majority of California's population, to incite fear and hatred of immigrants. "The Census proves we are being invaded. This is not a rehearsal. This is the real thing," states an e-mail circulated by American Patrol, a California-based anti-immigrant organization with 8,000 supporters. Growing diversity in the United States, coupled with a slowing economy, is being exploited by white supremacist orgainzations to fuel animosity and encourage supporters to fight what they see as a "takeover" by non-whites. According to the *Citizens Informer,* published by the white supremacist Council of Conservative Citizens, "The brute fact is that unrestricted immigration has allowed the American Southwest to be invaded by aliens who may well in the near future. . .break the nation apart."

Case Study: Online Anti-Immigrant Rhetoric

Hate groups are continuing to make heavy use of the Internet to stir up anti-immigrant sentiment and even to encourage violence. "This is a precise situation that can start a race war," wrote a New Jersey member of the neo-Nazi National Alliance, in a listserv posting. "All it takes is for bodies to show up, and for the Mexicans in L.A. to start reprisals against whites in California. Many wars have started over a single shot. I seriously urge any lone-wolf to leave a few bodies in the desert to get things warmed up." Even lawful immigrants are targeted in the most hateful, degrading terms imaginable. The Florida Chapter of the Council of Conservative Citizens' web site posted a picture of an asylum seeker alongside the statement: "THIS WORTHLESS, DIRT POOR, HATIAN LEACH [sic] and her 3 BRATS have ABSOLUTELY NO RIGHT to be in this COUNTRY. . .!!!!!!!!!"

Recommendations

- Federal and state governments and private organizations should make every effort to produce and disseminate messages of tolerance, both on-line and through traditional media outlets, to counteract the proliferation of racist, sexist, homophobic, and other constitutionall protected "hate speech."

- Despite the U.S. Reservation to Article 4, the private mass media can play an important role in disseminating ideas that counter incitement to racial violence. The Government must take an active role by offering tax and licensing incentives to media outlets that combat racism and racial discrimination.

- The Report takes insufficient notice of the promise of non-governmental suppression of hate speech. The Government should develop and further encourage the private development and distribution of filtering software that can selectively limit the content accessible from individual and networked computers. This technology may be voluntarily implemented in homes or anywhere that personal discretion permits the blocking of hate speech.

Article 5

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice.

(b) The right to security of persons and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.

The Congressional Response to Hate Crimes

85. A hate crime occurs when the perpetrator of the crime intentionally seeks out an individual because of that person's identity. Hate crimes target not only an individual, but an entire community or category of people. Hate crimes are motivated by hatred of a particular group, where the victim represents the group to the perpetrator. Unlike a random act of violence, a hate crime is an intentionally violent act visited on an individual because of the person's identity, and one of its goals is to terrorize the entire community.

86. In 1999, 7,876 hate crimes were reported to the FBI, over half of which were motivated by racial hatred—the most common motivation for a hate crime. Racial hatred was also the most common motive of hate crimes in 1998, 1997, and 1996.[178] Of the remaining hate crimes, 1,411 incidents were attributed to religious hatred, 1,317 to homophobia, 829 to ethnic or national origin, and nineteen to hatred of disabilities. Five reported hate crimes were attributed to a combination of biases.[179] Of the reported hate crimes, 66.5% were crimes against people, with intimidation being the most frequent of all hate crimes accounting for 35.1% of the total.[180] Vandalism and destruction of property accounted for the remaining 28.5% of the reported crimes.[181] Although murder accounts for only seventeen of the hate crimes in 1999, Michael Lieberman, Washington Counsel for the Anti-Defamation League noted, "Murder is already treated very seriously and met with a very aggressive response . . . there are 7,859 other crimes in this [FBI] report that weren't murder, but still had a deep, deep impact on the victims and their communities."[182]

Case Studies: Violence Motivated by Racial Hatred

July 1998, Jasper, Texas

James Byrd, an African-American man, was chained by his ankles to the back of a pick-up truck and dragged for more than two miles until his body was torn to pieces. The three men convicted of Byrd's murder are self-proclaimed white supremacists. Recently, two African-American men also became the targets of possible copycat crimes in Illinois and Louisiana.

August 10, 1999, Los Angeles, California

A former security guard for a white supremacist organization, Buford O. Furrow, wounded five individuals, including young children, at a Los Angeles Jewish Community Center and later killed a Filipino American postal worker, Joseph Ileto. The prosecutor alleges that Furrow killed his victims to "instill fear in nonwhites living in the United States." Furrow described Ileto as a "chink or spick" and a "target of opportunity."[183] The federal statute was applied in this case because the U.S. Attorney charged with enforcement was willing to pursue the hate crimes charged, which is not always the case.

April 28, 2000, Pittsburgh, Pennsylvania

Richard Scott Baumhammers, a thirty-four-year-old white man who resents non-Europeans and hated immigrants, was charged with murder and hate crimes in a shooting rampage targeting minorities that left five dead and one critically wounded. The first victim was a Jewish mother, Anita Gordon, whom Baumhammers shot a half-dozen times before setting her house on fire. From there, the perpetrator allegedly shot and killed two Asian-Americans, Thao Quoc Pham and Ji-Ye Sun at a Chinese restaurant; an African-American, Garry Lee, at a karate school; and a man from India, Anil Thakurt, who was killed at an Indian grocery store. Also shot at the Indian grocery store was Shandeep Patel who was hospitalized in critical condition. Baumhammers also shot up two synagogues and painted the word "Jew" and two swastikas on one of those buildings. Baumhammers was convicted and sentenced to death.

February 2001, Anchorage, Alaska

Police officers seized a videotape showing three white males in a car attacking Alaskan Natives with a paintball gun. The males assaulted the Alaskan Natives with marble-sized, frozen paintballs at close range. As they appeared to target Alaskan Natives, they laughed and urged "Shoot him! Shoot him!" The youths enticed certain victims to the car they were driving and then shot them directly in the face.

The youths cannot be charged with a hate crime because Alaska law does not recognize hate crimes but according to the state Assistant Attorney General a judge may consider hate crime elements and seek the maximum sentence allowed.[184]

87. Unlike the "pure speech" addressed above, *acts* motivated by hate and racial discrimination are within Congress's legislative ambit. Congress has begun to address hate crimes through federal hate crimes legislation, which was first-enacted over thirty years ago as civil rights legislation to protect civil rights marchers and those engaged in federally protected activities.[185] In doing so, the federal government and many states have taken meaningful steps to respond effectively to continuing episodes of violence fueled by racial bigotry and hatred. The Government Report details forty-four pieces of federal legislation in addition to the Thirteenth, Fourteenth, and Fifteenth Amendments that prohibit discrimination based on all or some of the following: race, color, national origin, sex, religion, disability, or age.[186] For example, the Violent Crime and Law Enforcement

Act enacted provisions from the Hate Crimes Sentencing Act.[187] The Act mandated that the U.S. Sentencing Commission formulate a sentencing enhancement of "not less than three offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes."[188] The Sentencing Commission implemented the three-level sentencing guidelines in November 1995.

88. The 1990 Hate Crimes Statistics Act requires the U.S. Justice Department to collect data on crimes that "manifest prejudice based on race, religion, sexual orientation, or ethnicity."[189] In 1994, Congress expanded the Act's coverage to collect data on crimes motivated by "disability."[190] After passage of the 1990 Hate Crimes Statistics Act, the Attorney General designated the FBI's Uniform Crime Reporting ("UCR") Program to collect the data on hate crimes. The UCR has developed and implemented a voluntary data collection system for local law enforcement agencies to collect data on hate crimes based on race, religion, disability, sexual orientation, and ethnicity/national origin.

89. The Church Arsons Prevention Act[191] was enacted in reaction to a spate of racially motivated church burnings that recently terrorized the country. Between January 1, 1995 and August 18, 1998, the U.S. Department of Justice and the U.S. Treasury Department have investigated 658 suspicious fires, bombings, and attempted bombings.[192] The Act doubles the maximum possible prison term for church arson and extends the statute of limitations from five to seven years.[193]

90. In spite of these hate crimes laws, gaps still remain in federal and state law, and state and local police lack the resources, experience, and legal authority to investigate and prosecute hate crimes. As a result, Congress proposed the Hate Crimes Prevention Act to increase hate crimes protection, but resistance to this legislation has been fierce. Much of the resistance is motivated by persons opposed to the expansion of coverage for different groups who are the targets of hate crimes and increased federal involvement in local law enforcement matters.

91. Existing state laws do not always adequately protect against crimes. One-fifth of the states do not protect against crimes motivated by race.[194] The Anti-Defamation League reports that eight states did not have hate crime laws as of July 26, 1999.[195] This remains the case today. Twenty-two states have laws that exclude protection for sexual orientation.[196] Twenty-two states also extend protection to those with mental and physical disabilities or handicaps.[197] Twenty-one states and the District of Columbia have enacted laws that include protection for sexual orientation.[198] Twenty states' laws encompass crimes motivated by gender.[199]

92. State and local police often need assistance to identify and prosecute hate crimes, including the assistance of NGOs in collecting data. A pamphlet, *Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention*, produced by the International Association of Chiefs of Police ("IACP") is an example of non-legislative attempts to provide assistance. The pamphlet addressed the differing definitions of a "hate crime" and applied the definition developed at the 1998 IACP Summit on Hate Crime in America: "A hate crime is a criminal offense committed against persons, property or

society that is motivated, in whole or in part, by an offender's bias against an individual's or a groups race, religion, ethnic/national origin, gender, age, disability or sexual orientation." The pamphlet guides police through responding to, handling, investigating, and reporting a possible bias crime.

Reporting Inadequacies

93. Current methods of reporting hate crimes do not reveal the true breadth of the problem. The Statistics Act makes the reporting of hate crimes by state and local jurisdictions voluntary, resulting in no participation by many jurisdictions each year. For example, a 1999 murder of a gay man in Alabama because of his identity, was not reported by Alabama as they did not report any hate crimes in 1999.[200] Of the 100 most populous cities in the United States, eight did not participate in the reporting of hate crime data for 1999. Because of this, although 12,122 law enforcement agencies in forty-eight states and the District of Columbia reported bias-motivated criminal incidents to the FBI in 1999,[201] the data gathered is far from complete. The FBI cannot effectively compile accurate statistics to support this study if localities do not provide the information that the U.S. Department of Justice is required to collect under the UCR. In fact, the FBI's UCR Program indicates "a disconnect between what line officers believe are hate crimes and what is reported to the FBI."[202]

94. Additionally, although nearly 12,000 advocacy and human rights agencies presently participate in the UCR Program, 83% of all agencies "participate" only by reporting that zero hate crimes occurred in their jurisdictions during 1998.[203]

95. The FBI alluded to the reasons for the incomplete and inaccurate picture in its most recent Hate Crime Report, noting that "fifteen states had ten or fewer agencies submitting incidents of bias crime. Additionally, one other state did not participate entirely. Almost one third . . . of all states reported fifty or fewer incidents for the entire state."[204]

96. FBI analyst Jim Nolan, who trains officers to identify and track hate crimes, claims that nearly a decade after passage of the 1990 Hate Crimes Statistics Act, "[w]e don't know if hate crimes are up or down."[205] This is not only because of the failure to develop a baseline for what constitutes a hate crime, inaccuracies in reporting, or failure to report hate crimes by law enforcement and other agencies, but also because many hate crimes go unreported by the victim due to fear and stigmatization, especially in immigrant and gay communities.

97. The inadequacy of reporting may be the reason why reported incidents of hate crimes have remained consistent over the past decade. In 1992 there were 7,466 reported incidents; in 1996 there were 8,759 reported incidents; and in 1998 there were 7,755 reported incidents.[206] In 1998, 56% of the reported incidents were racially motivated, 18% religiously motivated, and 16% motivated by sexual orientation.[207]

Case Studies: Crimes That Local Law Enforcement Failed to Classify as Hate Crimes

November 18, 1997, Denver, Colorado

Self-proclaimed Nazi Nathan Thill had a few drinks at a local strip bar and then approached thirty-eight year old Senegalese immigrant Oumar Dia and asked him "[d]o you know you are a nigger?" and "[a]re you ready to die?" When Dia responded politely, Thill shot and killed him.[208] Even in cases such as this, Colorado senior crime information specialist Jeannie Ryland said that "[i]t's the Police Department's call" whether or not it's a hate crime.[209]

February 1999, Lawrence, Kansas

A swastika was burned onto the door of a dormitory room of an Asian Pacific American student at the University of Kansas. Although the swastika symbol is widely recognized as a threat of bias-motivated violence, the Department of Student Housing at the University quickly classified it as an isolated incident of vandalism, and the Public Safety Office did not want to consider it a hate crime.[210]

Recommendations

- A complete statistical analysis of the nature and incidence of hate crimes is essential to formulate a targeted, effective response to hate crimes. The Government should condition its funding of local law enforcement agencies on proper training and reporting of all hate crimes to the U.S. Department of Justice, the FBI, or both.

- The U.S. Department of Justice should produce and distribute a "Hate Crime Response Manual" for local police departments. This will encourage a uniform national response as well as heighten police officers' individual awareness of hate crimes. The federal government should also continue to facilitate training for localities on identifying, investigating, and prosecuting hate crimes.

- The Government should coordinate with state governments and organizations to consider appropriate measures to expand coverage and close gaps in existing federal law by adopting more expansive federal hate crime legislation. This will create a net through which hate crimes cannot slip due to inadequate local laws and procedural inconsistencies.

- Federal legislation should be adopted that simplifies the process by which federal agencies assist local police and prosecutors in investigating and prosecuting individuals who are responsible for hate crimes.

- The Government should provide funding to local law enforcement agencies to enable them to provide training programs that instruct officers about how the "Hate Crimes Response Manual" should be implemented.

- The Government should provide adequate funding to federal law enforcement agencies, such as the FBI's Hate Crime Unit and the Community Relations Service, to carry out anti-bias initiatives and provide training and mediation services.

Disparate Treatment in the Criminal Justice System

98. Disparate treatment of individuals because of race or ethnicity pervades official government actions in the American criminal justice system.[211] This includes the practice of racial profiling where race is used to identify individuals who are likely criminal suspects.[212] Because of the great racial disparities present at every stage of the process—from arrest to sentencing—African-Americans and other racial minorities are either disproportionately targeted or receive harsher treatment.[213] Racial disparate treatment of suspects not only impacts racial minorities; it also affects society as a whole by imposing costs on innocent persons, perpetuating and reinforcing stereotypes, creating situations that can lead to physical confrontations, and contributing to racial tensions.[214]

99. In its Report, the Government acknowledges that disparate treatment exists in the criminal justice system and admits that the presence of racial disparities and discrimination violates the Convention.[215] For example, the Government Report states that "the perception of unequal treatment in the criminal justice system is . . . in many respects . . . supported by data"[216] and acknowledges that "[t]he incarceration rate for [African-Americas] is 7.66 times that for whites and approximately four times their proportion in society at large."[217]

Arrest and Investigation

100. Police officers, whether federal, state, county or local, exercise a substantial amount of discretion when they determine whose behavior is suspicious and warrants further investigation.[218] Unfortunately, police officers often exercise this discretion in a manner that disproportionately affects minorities.[219] As Charles Ogletree, a Harvard Law School Professor and African-American, commented, "If I'm dressed in a knit cap and hooded jacket, I'm probable cause."[220] For example, a recent study concluded that African-American drivers comprised approximately 73% of the drivers that were stopped on the New Jersey Turnpike even though African-Americans accounted for only 14% of the drivers.[221]

101. The U.S. Supreme Court contributed to this problem when it held that police officers could use traffic stops to investigate suspicious individuals or activities, even if the offense they were investigating did not have anything to do with the offense for which the individual was stopped.[222] As one commentator noted, "[A]s long as the officer or the police department does not come straight out and say that race was a reason for a stop, the stop can always be accomplished based on some other reason—a pretext. Police are therefore free to use blackness as a surrogate indicator or proxy for criminal propensity."[223] Some police departments even encourage their officers to use race as a surrogate. For example, officials in New Jersey have suggested that the federal government encouraged police departments to consider race as part of its war on drugs, even suggesting that Latinos and West Indians "warranted extra scrutiny."[224] Additionally, police target and more closely monitor what are perceived as "high crime" areas—particularly low-income, minority areas.