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Human Rights Within the United States: The Erosion of Confidence

By
Natasha Fain*

I. PREFACE

This article explores the Bush administration's human rights enforcement within the United States. First, the United States is widely criticized for failing to ratify international human rights treaties and for ineffective enforcement of the few treaties the United States has ratified. For instance, the Treaty Committee for the Convention on the Elimination of all Forms of Racial Discrimination (CERD) expressed deep concern over the persistence of racial discrimination and inequalities in the United States.¹ Second, our multilateral partners believe U.S. capital punishment practices fall below international human rights standards. The European Union regularly condemns U.S. death penalty practices, particularly regarding juveniles and the mentally retarded.² Third, following September 11, 2001, the international community is alarmed by the erosion of domestic legal protections for noncitizen detainees. The Bush administration has amended federal criminal procedure and immigration laws to authorize racial and religious profiling, secret detentions and immigration hearings, and prolonged arbitrary detention.³

The traditional U.S. response to criticism of its domestic human rights practices is increasingly illegitimate. While acknowledging issues which merit continuing concern, the United States is generally proud of its human rights record.⁴ The U.S. justification for refusing to adopt international human rights law rests on the belief that U.S. law provides adequate human rights protection.⁵ Since September 11, the U.S. tendency to believe in its own ability to do what is right in human rights will be viewed with greater suspicion from abroad.

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1. Concluding Observations of the Comm. on the Elimination of Racial Discrimination U.S., U.N. GAOR 56th Sess., Supp. No. 18, ¶¶ 380-407, U.N. Doc. A/56/18 (2001).

2. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 310 (2002).

3. Juan E. Mendez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U. L.J. 377, 383-385 (2002).

4. U.S. Delegation Briefing to the Press, 57th Sess. of the U.N. Commission on Hum. Rts., available at <http://www.state.gov/drl/rls/rm/2001/1656pf.htm> (Mar. 21, 2001).

5. See Jack Goldsmith, *International Human Rights Law and The United States Double Standard*, 1 GREEN BAG 2d 365, 372 (1998).

II. INTERNATIONAL HUMAN RIGHTS TREATIES: A CONTENTIOUS HISTORY

Given its historical leadership in the drafting of the Universal Declaration of Human Rights (UDHR), the U.S. record of ratifying and implementing international human rights treaties domestically is comparatively modest.⁶ This section provides a brief history of U.S. policy regarding human rights treaties, details our current treaty ratifications, and discusses recent developments under the current Bush administration. The section next examines why the United States ratifies so few treaties, and how the United States responds to criticism of its treaty policy.

In 1947, The United Nations Economic and Social Council (ECOSOC) established a Commission on Human Rights ("the Commission") charged with submitting proposals on an international bill of rights. Eleanor Roosevelt was an original member of the Commission, as a representative of the United States. The Commission adopted a draft declaration in 1948, which the General Assembly adopted that same year as the UDHR.⁷ The Commission next focused on drafting two principle treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸ As the Cold War took hold, however, the United States adopted a more qualified approach to the universal human rights movement.

Senate Foreign Relation Committee hearings on the human rights provisions of the U.N. Charter revealed early congressional opposition to interference with U.S. domestic affairs in areas including racial discrimination, labor and religion.⁹ Congress considered various proposals for constitutional amendments to limit executive power over treaties during the "Bricker Amendment" debate lasting from 1952-1957.¹⁰ The Eisenhower administration was able to defeat the proposed constitutional amendments through vigorous lobbying. Such lobbying included Eisenhower's commitment not to adhere to human rights treaties.¹¹ The United States effectively withdrew from participating in human rights treaties in the early 1950s.¹² Secretary of State John Foster Dulles's 1953 letter to Mrs. Oswald B. Lord, the U.S. representative on the Commission stated, "The United States has reached the conclusion that we should not at this time become a party to any multilateral treaty such as those contemplated in the draft Covenants on Human Rights, and that we should now work toward the objectives of the Declaration by other means."¹³

6. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT LAW, POLITICS, MORALS 750 (Henry J. Steiner & Philip Alston, eds., 1996).

7. *Id.* at 121.

8. *Id.* at 120.

9. *Id.* at 751-53.

10. The "Bricker Amendment" was a proposal for constitutional amendments that would reduce executive power and correspondingly increase congressional power over treaties. *Id.* at 753.

11. *Id.*

12. *Id.* at 751.

13. *Id.* at 754.

In the several years following the U.S. withdrawal from participation in the ICCPR and the ICESCR, the United States nevertheless ratified several human rights treaties, including the Slavery Convention, the Protocol Relating to the Status of Refugees, the Convention on the Political Rights of Women, and the four Geneva Conventions on the laws of war.¹⁴ Thereafter, no president sought Senate consent for human rights treaties until President Carter. In 1977, President Carter signed five human rights treaties and submitted them to the Senate for ratification. These were the ICCPR, the ICESCR, the CERD, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the American Convention on Human Rights.¹⁵ The Carter administration proposed that the Senate adopt various reservations, understandings, and declarations (RUDs) as part of its consent as a solution to perceived discrepancies between the treaties and U.S. law and the problem of whether such human rights conventions were self-executing.¹⁶ The Senate debated but did not vote on the treaties, as political support for ratification was sorely lacking.¹⁷

In 1991, the first Bush administration also urged Senate ratification of the ICCPR, with amended proposals for RUDs.¹⁸ Although the ICCPR was broadly consistent with the Constitution, there was concern that, upon ratification, the United States would have to make legislative and policy changes to comply with the treaty.¹⁹ The Senate ratified the ICCPR in 1992, subject to a number of RUDs.²⁰ U.S. reservations included the following notable exceptions to the treaty: (1) that Article 20 did not require implementation measures restricting U.S. free speech and association rights; (2) that the United States retained the right to impose capital punishment on persons below eighteen years of age; (3) that the United States was bound by Article 7 only to the extent that "cruel, inhuman or degrading treatment or punishment" means the punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments of the Constitution; and (4) that the United States reserved the right, in exceptional circumstances, to treat juveniles as adults.²¹ The United States further declared that the ICCPR provisions were not self-executing.²² State parties to the ICCPR objected to the

14. *Id.*

15. Andrew A. Reding, International Human Rights Treaties: Their Origins, Purpose, And Significance To The United States, Opening Statement, Congressional Seminar, *International Treaties on Human Rights: Time to Ratify*, sponsored by Rep. John J. LaFalce (NY) and Sen. Paul Wellstone (MN), at <http://www.worldpolicy.org/americas/treaties/cng-9307.html> (July 21, 1993).

16. A self-executing treaty implies that the ratifying state incorporates the treaty within its domestic legal order automatically upon ratification. STEINER, *supra* note 6, at 755, 758.

17. *Id.* at 758.

18. *Id.*

19. *Id.* at 755.

20. Int'l Covenant on Civ. and Political Rts, Oct. 5, 1977, 999 U.N.T.S. 171 (Ratified June 8, 1992) [hereinafter ICCPR].

21. Article 20 is a "Prohibition of Propaganda Relating to War or Racial, National, or Religious Hatred." Reservations to the ICCPR reproduced in U.N. Multilateral Treaties Deposited with the Secretary General at 192, U.N.Doc. ST/LEG/SER.E/20, U.N. Sales No. E.02.V.4 (2002).

22. *Id.*

U.S. reservations, particularly regarding the Article 6 prohibition on imposing the death penalty for crimes by persons below eighteen years of age.²³

In contrast to its predecessors, the Clinton administration provided significant support for human rights treaties. In 1994, the United States ratified the CERD and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), subject to various RUDs.²⁴ The United States similarly declared the CERD was not self-executing and reserved protections against implementation restricting U.S. free speech and association rights. Notably, the United States also made a reservation rejecting any obligation under the Convention to broadly regulate private conduct except as required by U.S. law.²⁵ With regard to the CAT, the United States attached a reciprocity reservation for accepting and processing communications regarding failure to fulfill obligations under the Convention.²⁶ In 1993, Secretary of State Warren Christopher announced the Clinton administration's intent to ratify the ICESCR and CEDAW. The Republican success in gaining control of both houses of Congress in the 1994 elections precluded such ratifications when presented to the Senate in 1996.²⁷ President Clinton also signed the Convention on the Rights of the Child (CRC) in 1995 and two Optional Protocols to the CRC in 2000.²⁸

The Clinton administration also demonstrated support for the international human rights legal regime by fulfilling treaty reporting requirements and establishing a new bureaucratic structure designed to strengthen U.S. compliance with treaty obligations.²⁹ The Clinton administration submitted the first reports to the treaty committees of ratified human rights conventions.³⁰ President Clinton issued an important executive order on December 10, 1998 in commemoration of the fiftieth anniversary of the UDHR.³¹ Executive Order 13107 reaffirmed U.S. commitment to fulfilling its obligations under the ICCPR, the CAT, and the CERD. The order highlighted the responsibility of the federal

23. STEINER, *supra* note 6, at 773.

24. Reservations to the Convention for the Elimination of all Forms of Racial Discrimination [hereinafter CERD] and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment [hereinafter CAT] reproduced in U.N. Multilateral Treaties Deposited With the Secretary General at 154, 283 U.N.Doc. ST/LEG/SER.E/20, U.N. Sales No. E.02.V.4 (2002).

25. STEINER, *supra* note 6, at 778, citing 140 Cong. Rec. S 7643, (103 Cong. 2nd Sess.) (June 1974).

26. The U.S. would accept and process communications only from a State Party and only if the Party accepted the competence of the CAT to hear communications regarding failure to fulfill Convention obligations.

27. Koh, *supra* note 2, at 308.

28. These were the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3 (Signed Feb. 16, 1995). See Colum Lynch, *President Signs U.N. Pacts for Children*, WASH. POST, July 6, 2000, at A15.

29. Lawyers Committee for Human Rights, *In The National Interest 2001: Human Rights Policies For The Bush Administration* (Enhancing U.S. Compliance with Human Rights Treaties), available at <http://www.lchr.org/ITNI/> (submitted to Pres. Bush July 31, 2001).

30. The United States submitted and defended the first U.S. report to the ICCPR in 1995; the first reports under the CAT in 1999 and under the CERD in 2000. Koh, *supra* note 2, at 344.

31. Law. Comm. for Hum. Rts., *supra* note 29.

government's domestic policy agencies to maintain awareness of U.S. international human rights obligations and implement any such obligations that fall under the purview of their particular agency.³² To facilitate such agency implementation, the Interagency Working Group on Human Rights Treaties was established to provide guidance, oversight and coordination with respect to questions concerning implementation of human rights obligations.³³

III.

WHY SO FEW RATIFICATIONS?: EXTERNAL CRITIQUE AND THE U.S. RESPONSE

A. *External Critique of U.S. Record on Human Rights Treaties*

While the United States willingly leads international crusades on behalf of human rights, it remains hypersensitive to external review of its own domestic practices.³⁴ Critics of the U.S. record on human rights treaties state that "in the cathedral of human rights, the U.S. is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of the system."³⁵

One manifestation of the U.S. "flying buttress" policy is the set of reservations, understandings and declarations (RUDs) it attaches to treaty ratifications. RUDs are attacked as a thinly veiled effort to ensure that human rights treaties "effect virtually no change in domestic law."³⁶ For example, the scope and severity of the RUDs the United States attached to its ratification of the ICCPR in 1992 far exceeded any other ICCPR signatory.³⁷ As discussed above, the international signatories to this treaty opposed the U.S. RUDs. The ICCPR overseeing treaty body, the Human Rights Committee ("the Committee"), strongly criticized the U.S. ratification limitations in its first meeting with the United States and in its official comments on the U.S. reports in 1995.³⁸ The Committee stated that the non-self-execution declaration was at odds with the purpose of the ICCPR, suggesting it would only apply if U.S. domestic laws already existed to implement the Covenant's provisions.³⁹ The Committee's official comments highlighted the U.S. failure to educate the judiciary about the

32. See Koh, *supra* note 2, at 344, citing Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998). See also Law. Comm. for Hum. Rts., *supra* note 29.

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

34. RICHARD A. FALK, HUMAN RIGHTS: HORIZONS THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD, 57 (2000).

35. Koh, *supra* note 2, at 308 (citing Professor Louis Henkin).

36. Law. Comm. for Hum. Rts., *supra* note 29, at 115.

37. Margaret Thomas, *Rogue States within American Borders: Remediating State Noncompliance with the International Covenant on Civil and Political Rights*, 90 CAL. L. REV. 165, 176 (2002).

38. *Id.* at 177.

39. *Id.*

Covenant's obligations and the paucity of information in the U.S. report regarding implementation at the local and state level.⁴⁰

One critic warns that other nations are increasingly frustrated with U.S. domestic human rights practices which damage U.S. credibility in foreign human rights policy.

[T]he rest of the world increasingly considers it hypocritical for the United States to lecture other nations about their adherence to universal standards while refusing to accept those standards to guide its own performance. In recent years, this glaring inconsistency has become an important limitation on the effectiveness of U.S. human rights initiatives.⁴¹

The critical argument is that U.S. engagement with the human rights law process is important to its multilateral partners and that the United States will incur political costs by opting out of the process. Proponents of this view are concerned that the Bush administration has neglected to fill posts in missions to multilateral bodies and failed to present a clear policy toward intergovernmental human rights bodies.⁴²

B. *Defense of U.S. Record on Human Rights Treaties*

Defenses of U.S. policy share a common justification for why the United States ratifies so few treaties and attaches limiting RUDs to the treaties it has ratified. This justification is that the United States assumes that its domestic laws adequately protect human rights.⁴³ Both the executive and the legislative branches have articulated this assumption, and the judiciary has followed suit.⁴⁴ Several examples illustrate how the three branches of government articulate this assumption. The Senate Foreign Relations Committee reviewing the ICCPR believed that the Covenant's rights were already protected by the Constitution and other domestic laws. President Carter claimed that ICCPR Article 14 (regarding juveniles) could be interpreted as consistent with U.S. law. In *Penry v. Lynaugh*, the Supreme Court explicitly rejected the notion that international sentencing practices are compelling authority in deciding whether capital punishment of the mentally retarded is cruel and unusual.⁴⁵

Defenses of U.S. policy differ, however, in their appraisal of U.S. willingness to implement human rights treaties. Commentators also differ in the global significance they attach to the U.S. record on human rights treaties. Harold Koh argues that the U.S. approach is more honest than other countries that ratify treaties without intending to give them full compliance. Under this view, the United States only ratifies those treaties that it is willing and able to implement. Moreover, the United States independently enforces human rights standards of

40. *Id.* at 178 (citing comments of the Hum. Rts. Comm., U.N. GAOR, Hum. Rts. Comm., 53rd Sess., U.N. Doc. CCPR/C/79/Add.50 (1995)).

41. Mendez, *supra* note 3, at 389-90.

42. *Id.* at 390.

43. See Thomas, *supra* note 37, at 179; Koh, *supra* note 2, at 307-09; Goldsmith *supra* note 5, at 371, 373.

44. Thomas, *supra* note 37. See also Goldsmith, *supra* note 5, at 368, 369.

45. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

treaties it has not ratified. Accordingly, the “flying buttress” characterization is a global misconception.⁴⁶ The implication of this position is that the United States is diligently protecting human rights domestically and should work to clarify the “flying buttress” global misconception.

In contrast to Harold Koh, Jack Goldsmith argues that the United States holds legitimate principles of resistance to international human rights treaties.⁴⁷ Under this view, human rights law is designed for nations with domestic institutions that do not generate adequate human rights protections.⁴⁸ Goldsmith claims that there is general satisfaction with domestic human rights protections and longstanding suspicion of international processes.⁴⁹ Charges that U.S. domestic practices violate international law are deemed exaggerated.⁵⁰ Moreover, Goldsmith asserts that U.S. power in the international system provides the United States with immunity from external attempts to stigmatize it for noncompliance with international human rights law.⁵¹

The assumption that U.S. domestic law adequately protects human rights is an enduring characteristic of U.S. human rights policy. The remaining sections illustrate the current pervasiveness of this assumption in all three branches of government. They also highlight recent developments that expose the weakness of this assumption.

IV.

THE BUSH ADMINISTRATION: JANUARY 2001–DECEMBER 2002

A. *The Bush Administration’s Policy on Domestic Human Rights Enforcement*

In March 2001, the Bush administration’s delegation to the U.N. Commission on Human Rights stated the administration’s policy regarding domestic implementation. Ambassador Tahir-Kheli stated that the United States sets “positive examples” by its “behavior and . . . its beliefs” and that there is an obvious distinction between the U.S. record on human rights and nations that perpetrate “enormous” human rights violations.⁵² Ambassador Moose conceded that “there are [domestic] human rights issues that merit our continuing focus, concern, attention and effort.”⁵³ Moose stated, however, that the administration shows its cooperation with the U.N. Human Rights Commission by submitting reports in response to concerns. In addition, the administration welcomes the scrutiny of other countries and intergovernmental organizations.⁵⁴

46. Koh, *supra* note 2, at 308.

47. See Goldsmith, *supra* note 5, at 367.

48. *Id.* at 372.

49. *Id.* at 371.

50. *Id.*

51. *Id.* at 372.

52. See U.S. Delegation Briefing to the Press, 57th Sess. of the U.N. Comm’n. on Hum. Rts., *supra* note 4.

53. *Id.*

54. *Id.* Note that the U.S. State Department implements human rights policy through its Bureau of Democracy, Human Rights and Labor (DRL). The DRL includes the Office of Promotion of

B. *The Bush Administration's Record on Human Rights Treaties*

In response to a question regarding the administration's perceived unilateralism in the area of international treaties, Ari Fleisher stated "[t]he United States will continue to work, under President Bush, well with our allies and partners around the world. But the President will not shirk from his duties to protect the American people from any international agreements that the President does not think are in America's interest." He further asserted that "the President will be proud to stand tall and strong to represent America in a world that doesn't always see things the American way."⁵⁵ One implication of these statements is that the administration will not promote international human rights treaties that it perceives as inconsistent with its own human rights policy objectives and with America's interest.

The Bush administration has not taken any action on unsigned human rights treaties such as the Optional Protocols to the ICCPR or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family. President Bush has likewise not endorsed ratification of any signed human rights treaties before the Senate. Treaties the United States signed but has not yet ratified include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC). Regarding ratified treaties, the Bush administration has not yet submitted treaty mandated reports due for the CAT in November 2001 and for the ICCPR overdue since September 1998. A report will be due for the CERD Treaty Committee in November 2003.⁵⁶ In August 2001, the administration made its first appearance before a human rights treaty committee. It presented and responded to questioning regarding the first U.S. report mandated by the CERD to the Committee on the Elimination of Racial Discrimination. As stated above, the Clinton administration originally submitted that report to the CERD Treaty Committee.⁵⁷

The Senate has taken a proactive role in attempting to ratify the CEDAW. In February 2002, the Bush administration exhibited initial support for the CEDAW, stating the Convention was "generally desirable and should be approved."⁵⁸ Five months later, in July 2002, the Bush administration retracted its support, calling the treaty "vague."⁵⁹ Secretary of State Powell wrote the Senate Foreign Relations Committee to say that, although the administration supports

Human Rights and Democracy, Office of Multilateral Affairs, and Country Reports and Asylum Affairs. See U.S. Dept. of St. at <http://www.state.gov>.

55. Press Briefing by Ari Fleischer, Office of the Press Secretary, July 27, 2001.

56. U.N. Hum. Rts. Website, Treaty Bodies Database, Ratification, U.S., available at <http://www.unhchr.ch> (last visited Apr. 14, 2003).

57. Elizabeth Olson, *U.S. Report Notes Strides in Fighting Racism*, CHATTANOOGA TIMES, Aug. 7, 2001, at A5.

58. Lisa Hoffman, *U.S. Retreats on U.N. Pact Backing Women's Rights*, SCRIPPS HOWARD NEWS SERVICE, July 22, 2002, available at LEXIS, News Library; See Karen DeYoung, *Senate Panel to Defy Bush, Vote on Women's Treaty*, WASH. POST, July 18, 2002, at A21.

59. Hoffman, *supra* note 58.

the CEDAW general goal of eradicating discrimination, “the administration now feels its vagueness and complexity require a review by the Justice Department.”⁶⁰ Conservatives lobbied President Bush against CEDAW, calling it “anti-family” and “a ‘radical’ feminist manifesto.”⁶¹ The Democratic-controlled Senate Foreign Relations committee approved the CEDAW on July 30, 2002, over the objections of the Bush administration.⁶² In October 2002 members of Congress, including Joseph Biden (D-Del) and Barbara Boxer (D-Calif), joined more than 170 organizations in hosting an event to support ratification of the CEDAW. Ratification by the full Senate faces an uphill battle, however, especially given the Republican majority gained in the November 2002 elections.⁶³

C. *Domestic Human Rights Developments: January 2001–December 2002*

The Bush administration’s domestic human rights policy is characterized by increased unilateralism. The administration’s unilateral policy is infused with the assumption that the American way of protecting human rights is adequate. Our multilateral partners censured the Bush administration early on for its perceived disregard of international organizations.⁶⁴ In May 2001, the United States lost its seat on the U.N. Human Rights Commission for the first time since 1947.⁶⁵ In April 2002, the United States regained its seat after “behind the scenes” negotiation among Western countries that culminated in Italy and Spain dropping their candidacies, thereby allowing the U.S. to run on an uncontested slate.⁶⁶

The U.S. record on the issues of racial discrimination and capital punishment continues to inspire international criticism. Notably, a recent Supreme Court decision outlawing executions of the mentally retarded may signal that the Court is paying greater attention to the international consensus against U.S. capital punishment practices than ever before. The administration’s unilateral policies following the September 11 terrorist attacks have presented a new source of concern for domestic human rights enforcement. Congress likewise passed legislation granting the executive unprecedented detention powers which pose serious risks to detainees’ human rights and fall below international standards of criminal law. The judiciary has largely deferred to the political branches’ national security policies. The judiciary has not evaluated the human rights implications of national security policies in light of U.S. obligations under ratified international human rights treaties and customary international law.

60. See De Young, *supra* note 58.

61. *Id.* See *The Radical Agenda of CEDAW*, (Statement to the Congress) (statement of Sen. Helms), available at <http://helms.senate.gov/Speeches/CEDAW/cedaw.html> (March 8, 2002).

62. *Senate Panel OKs Treaty on Women*, CHI. TRIB., July 31, 2002, at 16 zone N.

63. *Id.*

64. *Americans Recover Seats on Rights Panel*, N.Y. TIMES, Apr. 30, 2002, at A10.

65. Foreign commentators suggest that this vote off the U.N. Hum. Rts. Comm’n. reflected a “growing frustration with the attitude of the U.S. towards world bodies and treaties.” Andy Ho, *Compromise on Human Rights a Big Step for US*, STRAITS TIMES (Singapore), May 17, 2001, at 24. See Alison Bond, *U.S. Funding of the United Nations: Arrears Payments as an Indicator of Multilateralism*, 21 BERKELEY J. INT’L L. 703 (2003) (discussing the Hum. Rts. Comm’n).

66. *Americans Recover Seats on Rights Panel*, *supra* note 64.

The remainder of this paper analyzes three important domestic human rights developments. The first development is the Committee on the Elimination of Racial Discrimination's consideration of the U.S. report and that Committee's resulting conclusions and recommendations. The second and most significant development is the Bush administration's change in law and executive policy in the areas of immigration and detention in response to the September 11 terrorist attacks. The third development is the U.S. Supreme Court decision prohibiting capital punishment of the mentally retarded.

There is an appreciable tension between the U.S. assumption that the American way of protecting human rights is adequate and the international consensus against American human rights practices. The first development reveals the challenges the United States faces in eradicating racial discrimination to the satisfaction of an international monitoring body. The second development signals an alarming erosion of domestic human rights protections. The third development evinces a hopeful convergence of U.S. capital punishment practices with international human rights standards.

D. The CERD Treaty Committee Recommendations to the U.S. Report

The Committee on the Elimination of Racial Discrimination ("the Committee") considered the first U.S. report submitted in accordance with its obligations under the CERD on August 22, 2001.⁶⁷ This is an example of the United States engaging the international human rights legal regime. The United States submitted its record on domestic racial discrimination to formal multilateral scrutiny. The State Department prepared the U.S. report, beginning under the Clinton administration in 1997. In August 2001, Michael E. Parmly, the State Department's Human Rights Director, and Ralph Boyd Jr., Director of the Civil Rights Division of the Justice Department, responded to the Committee's questions regarding the U.S. report.⁶⁸

The Committee critiqued the persistence of racial discrimination and inequalities in the United States. Examples included the Native Indian population's continued problems in the areas of land rights and poverty, a high proportion of African Americans subject to capital punishment, unequal educational opportunities, especially for black, Latino and Native American pupils, and unequal health care for minority and disadvantaged women. The Committee also expressed concern over discrimination in private conduct exempted from regulation. The Committee found that federal and state civil rights agencies were insufficiently funded.⁶⁹

The Committee also found that the United States interpreted the CERD narrowly, to the benefit of its own domestic law and at the expense of CERD implementation. It expressed concern over the judiciary's restrictive treaty interpretation which favored U.S. federal law. There was a notable discrepancy

67. U.N. Comm. on the Elimination of Racial Discrimination, 59th Sess., 1475th mtg., U.N. Doc CERD/C/SR.1475 (2001).

68. Olson, *supra* note 57.

69. U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 67.

between narrow U.S. law on discrimination and the CERD's broader understanding of discrimination. In addition, the U.S. reservation to Article 4 prohibiting racist speech was incompatible with the Convention because of the connection between "hate speech" and "hate crime." The Committee disagreed with the U.S. position that the Constitution's First Amendment curtailed the government's ability to restrict advocacy of racist ideas. Rather, it argued the exercise of the First Amendment right of free speech carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas.⁷⁰

The Committee issued a number of recommendations to the United States., including (1) take measures to ensure consistent application of the Convention at all levels of government; (2) reconsider its reservation to Article 4 prohibiting racist speech; (3) review legislation so as to criminally sanction the largest possible sphere of private conduct which is discriminatory on racial or ethnic grounds; (4) pay attention to legislation and practice that is discriminatory in effect; (5) implement immediate and effective measures to ensure the appropriate training of the police force to combat racial discrimination and to criminally prosecute racially motivated violence; and (6) guarantee the right to equal treatment before the courts. Given the disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in states like Alabama, Florida, Georgia, Louisiana, Mississippi and Texas, the United States should ensure that no death penalty is imposed as a result of racial bias or due to the economically, socially and educationally disadvantaged position of the convicted persons.⁷¹

At the time of this writing, there were no statements from the administration released in response to the Committee's recommendations. The administration has repeatedly stated, however, that it is committed to combating racism. These statements are present in the administration's comments to the CERD Committee and other U.N. Human Rights monitors. In March 2001, the U.S. delegation to the U.N. Commission on Human Rights stated that the United States "will continue to work towards an environment that offers equality of opportunity in terms of economic development, education, and health. To this effect, President Bush has made it one of his administration's highest priorities to ensure that, as he has said, 'no child is left behind.'"⁷² In August 2001, Boyd highlighted the U.S. achievements in the "century-old struggle of the U.S. against racism and bigotry." Boyd also told the Committee that "the Bush administration was committed to stepping up antidiscrimination efforts, including eliminating racial profiling, enforcing fair-housing and disability laws and ensuring voting rights reform."⁷³ Regarding the U.S. refusal to curb racist speech,

70. *Id.*

71. *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. GAOR, 56th Sess., Supp. No. 18, ¶¶ 380-407, U.N. Doc A/56/18 (2001).

72. U.S. Delegation Briefing to the Press, 57th Sess. of the U.N. Comm'n. on Hum. Rts., *supra* note 4.

73. *Id.* See Lorne W. Craner, Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor; Ralph F. Boyd, Jr., Assistant Attorney General, *Reply of the United*

Boyd defended the U.S. position by claiming "the right to speech is deeply rooted in America. The right to speak freely, even views repugnant to others, is virtually an article of faith."⁷⁴ In contrast to the administration, twelve human rights groups that testified at the Committee hearings claimed the U.S. report ignored the persistence of racial discrimination in the United States and failed to set forth concrete plans to address such problems.⁷⁵

E. Erosion of Domestic Protections for Detainees Post September 11, 2001

The Bush administration's response to the September 11 terrorist attacks presents serious implications for domestic human rights protections. The administration's stated priority since September 11 is national security.⁷⁶ Congress likewise passed the USA Patriot Act in a spirit of bipartisan national unity.⁷⁷ The Justice Department's implementation of its national security agenda is widely critiqued both domestically and abroad. Noncitizens have disproportionately borne the burden of our national security agenda. Arab and Muslim residents were singled out for detention or questioning. Refugees approved for resettlement in the United States were indefinitely delayed.⁷⁸ The Bush administration is resisting Congressional oversight and judicial review of its practices. In this climate of secrecy and erosion of domestic legal protections, international human rights law is of paramount importance. The United States will have greater difficulty in persuading other countries that it provides adequate human rights protections, especially for noncitizens. This section examines the Justice Department's pattern of arbitrary detention, discrimination, and secrecy. It also considers domestic and multilateral opposition to these policies and the administration's response to such criticism.

1. Arbitrary Detention

a. Department of Justice Policy

Civil libertarians and human rights activists within the United States (hereinafter "Domestic critics") accuse the administration of arbitrarily detaining Arab and Muslim resident noncitizens as part of its antiterrorism investigation. The practice of arbitrary detention violates the ICCPR. In early November, 2001 the Department of Justice (DOJ) reported that 1,182 individuals had been

States to Questions from the UN Committee on the Elimination of Racial Discrimination, available at <http://www.state.gov/g/drl/rls/rm/2001/4486.htm> (Aug. 6, 2001).

74. *Id.*

75. *Id.*; *United Nations: Powell to Skip Racism Summit; Other Development*, WORLD NEWS DIGEST, Aug. 27, 2001, at 658B1.

76. Attorney General John Ashcroft, Remarks at the U.S. Attorneys Conference in N.Y. City, at <http://www.usdoj.gov/ag/speeches/2002/100102agremarkstousattorneysconference.htm> (Oct. 1, 2002).

77. The USA PATRIOT ACT was signed into law on Oct. 26, 2001. Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

78. Although 70,000 refugees were admitted for the fiscal year that ended Sept. 30, 2002, only 27,000 were allowed in. Increased security checks have delayed many refugees' departure indefinitely. *Hatch, Kennedy Seek to Loosen Refugee Limits*, SALT LAKE TRIB., Oct. 5, 2002, at B3.

detained in the course of the post September 11 investigation. Seven hundred fifty-two of these persons were held on immigration charges and 129 were held on criminal charges.⁷⁹ Of the 718 “special interest” detainees held on immigration violations, 317 were held without charge for more than forty-eight hours, thirty-six were held for twenty-eight days or more without charge, thirteen were held for more than forty days without charge, and nine were held for more than fifty days without charge. One Saudi Arabian detainee was held for 119 days without charge.⁸⁰ Even after final deportation orders were issued, noncitizens remained in detention for weeks or months until the DOJ decided to deport them.⁸¹

While, “[t]he investigation into the September 11 attacks constituted a search for criminal suspects . . . the primary legal regime under which this investigation has been conducted is not the United States criminal code, but rather the immigration enforcement system.”⁸² The DOJ took individuals into custody as “suspected terrorists,” arrested them for routine immigration offenses and then detained them while investigating whether the person associated with or had information about a terrorist organization.⁸³ Federal Bureau of Investigation (FBI) and Immigration and Naturalization Service (INS) agents questioned detainees on criminal matters as well as their immigration status.⁸⁴ Almost all of the post-September 11 immigration detainees, called “special interest” detainees, were deported or released on bond after the DOJ found no linkages to terrorist activities or groups.⁸⁵

Congress passed the USA PATRIOT Act (“the Patriot Act”) on October 26, 2001. The Patriot Act granted the Attorney General the power to detain a noncitizen certified as a suspected terrorist for a maximum of seven days (previously the limit was twenty-four hours) before requiring the individual be charged with a crime or initiating immigration procedures against that person.⁸⁶ The Patriot Act, however, provides greater safeguards for noncitizens than envisioned by the Attorney General, who asked for indefinite detention powers.⁸⁷ Other safeguards include judicial review of the substantive basis of the certification and congressional oversight of the Attorney General’s use of the new detention power every six months.⁸⁸

79. The DOJ declined to release further information regarding prisoners detained after Nov., 2001. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11*, 15 (2002) available at www.lchr.org.

80. *Id.* at 18 (citing statistics made available in response to litigation under the Freedom of Information Act led by the Center for National Security Studies), available at <http://www.cnss.gwu.edu/>.

81. *Id.*

82. *Id.* at 16.

83. See *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, 14 HUM. RTS. WATCH 4G (Aug. 2002), at 9.

84. *Id.* at 34.

85. *Id.* at 10.

86. *Id.* at 17.

87. Mendez, *supra* note 3, at 383.

88. *Id.*

b. *Domestic Critique*

Domestic critics assert that by detaining persons for immigration offenses despite the criminal nature of the investigation, the DOJ circumvented the protections of the criminal law. These include the right to a lawyer at government expense and the right to a speedy trial.⁸⁹ Detainees charged with immigration violations are supposed to be informed of their right to counsel at their own expense and provided with resources available for *pro bono* representation. In practice, detainees report great obstacles to obtaining legal representation.⁹⁰ Moreover, the Attorney General authorizes the government to breach attorney client privilege and listen in on a detainee's communications with attorneys if such monitoring is "necessary to deter future acts of violence or terrorism."⁹¹

Domestic critics also claim the Attorney General has circumvented Congressional authority. The Attorney General has not invoked the powers of the Patriot Act to detain suspected terrorists. Instead, the Attorney General has utilized the regulatory power of the INS to provide the indefinite detention power that he unsuccessfully sought from Congress. Historically, INS detention of an alien on an allegation of an immigration violation was the exception. Aliens in removal proceedings were not detained pending administrative resolution unless they presented "a danger to the community or a flight risk."⁹² On September 20, 2001, the DOJ published an interim regulation authorizing detention without charges for forty-eight hours or "an additional reasonable time" in the event of an "emergency or other extraordinary circumstance."⁹³ On October 29, 2001, the DOJ issued the "automatic stay rule." This regulation provided the Executive Office for Immigration Review authority to suspend, at the request of the INS, an immigration judge's decision releasing a detainee on bond if removal proceedings for the alien are pending or if bond was set at \$10 thousand or more.⁹⁴ Previously, the INS could only request a stay of an immigration judge's bond decision if the alien was convicted of certain aggravated felonies.⁹⁵ Critics allege that this regulation has facilitated prolonged detention of individuals charged with routine immigration violations.⁹⁶

President Bush's designation of Jose Padilla, a U.S. citizen accused of plotting to detonate a "dirty bomb," as "an enemy combatant" spurred allegations of illegal detention of a U.S. citizen.⁹⁷ The administration placed Padilla under the custody of the Defense Department without charges and denied him access to

89. LAW. COMM. FOR HUM. RTS., *supra* note 79, at 15.

90. *Id.* at 19.

91. Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15,014, 15017 (OMB Thurs., Mar. 28, 2002).

92. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 964-965 (2002).

93. 8 C.F.R. §287.3.

94. Review of Custody Determinations, 66 Fed. Reg. 54909 (2001) (to be codified at 8 C.F.R. pt.3).

95. LAW. COMM. FOR HUM. RTS., *supra* note 79, at 18.

96. *Id.* at 18, 59.

97. Patricia Hurtado, *Speaking up for Suspect: 'Dirty Bomb' Detainee's Lawyers Want to See Client, Document*, NEWSDAY (Queens Edition), Oct. 30, 2002, at A24.

legal counsel.⁹⁸ Padilla's attorneys assailed Bush's decision as "an unprecedented expansion of executive authority . . . [that] cannot be condoned as an exercise of the President's military power in the interest of national security."⁹⁹ On December 4, 2002, the U.S. District Court for the Southern District of New York held that President Bush has the legal authority to designate an American citizen captured on U.S. soil as an unlawful combatant and to detain him without trial for the duration of war. Padilla was granted a limited right to counsel for his petition for writ of habeas corpus in which the court would review his unlawful combatant status. The court promised to apply a highly deferential standard of review to the facts the government presented to support detaining Padilla as an unlawful combatant.¹⁰⁰

c. *International Critique*

Prolonged arbitrary detention violates internationally recognized standards.¹⁰¹ Preventive detention, detaining someone prior to obtaining evidence of a crime committed, also violates international principles.¹⁰² In particular, the ICCPR prohibits arbitrary arrest or detention.¹⁰³ As a party to the ICCPR, the United States is bound by that obligation.¹⁰⁴ Richard Goldstone, former prosecutor at the war crimes tribunals for the former Yugoslavia and Rwanda, criticized the administration's justification for indefinitely detaining Padilla as an "enemy combatant" by analogy to detention of Nazi saboteurs as "grossly improper."¹⁰⁵

As discussed above, noncitizen residents in the U.S. have been particularly vulnerable to INS detention without the protections of the criminal justice system. They are, however, entitled to the protection of international human rights standards, which "apply not only to citizens but also to all persons under the State's jurisdiction, and no one is more under a State's jurisdiction than when he or she is a prisoner of that State."¹⁰⁶ The Inter-American Commission on Human Rights adopted precautionary measures on September 28, 2002 and urged the United States to protect the fundamental rights of detainees who have been ordered deported or granted voluntary departure and are kept in detention

98. *Id.*

99. Benjamin Weiser, *Threats and Responses: The Courts; Bomb Suspect's Lawyers Decry Detention*, N.Y. TIMES, Sept. 27, 2002, at A20.

100. *Padilla v. Bush*, No. 02 Civ. 4445 (MBM), 2002 U.S. Dist. LEXIS 23086 (S.D.N.Y. 2002).

101. Mendez, *supra* note 3, at 383-84.

102. LAW. COMM. FOR HUM. RTS., *supra* note 79, at 14.

103. Int'l. Conv. on Civ. and Political Rts., *supra* note 20.

104. The Human Rights Clinic at Columbia Univ. requested the Working Group on Arbitrary Detention of the U.N. Hum. Rts. Comm'n. to review U.S. practices. LAW. COMM. FOR HUM. RTS., *supra* note 79, at 14.

105. Joshua Rozenberg, *Don't Let Sept 11 Destroy Civil Liberties, Former War Crimes Prosecutor Richard Goldstone Believes Detention Without Trial is a Tactic Too Far in America's Fight Against Terrorism*, DAILY TELEGRAPH (London), June 20, 2002, at 17.

106. Mendez, *supra* note 3, at 383.

beyond the time allowed to effectuate their removal.¹⁰⁷ International critique of post-September 11 policies has focused mainly on U.S. detention of foreigners held in Guantanamo Bay and the prospect of military tribunals.¹⁰⁸ Such critique conveys general dissatisfaction with a U.S. detention policy that forecloses meaningful judicial review. On November 6, 2002, the British Court of Appeals dismissed an appeal to compel the British Secretary of State to intervene on behalf of Feroz Abassi, a British citizen detained in Guantanamo Bay, but nevertheless critiqued U.S. detention policies. The court stated, "what appears to be objectionable is that Abassi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal."¹⁰⁹ U.S. district courts have generally deferred to the administration and ruled that they lack jurisdiction to hear appeals of the Guantanamo detainees. Critic Richard Goldstone is incredulous, stating, "I have difficulty in understanding how the actions of the American army can be beyond the reach of any American court."¹¹⁰ Exceptionally, a Court of Appeals granted two Australian terror suspects' motion for a speedy hearing on the legality of their detention on September 27, 2002.¹¹¹

d. The Bush Administration's Response

The Bush administration broadly justifies its detention policies on national security grounds. The administration vociferously protests allegations that it violates detainees' civil liberties.¹¹² The administration is not, however, directly responding to human rights critics by defending its detention policy under international human rights law. Rather, the administration defends its actions under U.S. law and through rhetoric regarding the unprecedented challenge of the terrorist threat. The Attorney General recently stated, "Our actions are firmly rooted in the Constitution, secure in historical and judicial precedent, and consistent with the laws passed by the Congress."¹¹³ INS officials also claimed, "[we] have strictly enforced the law but not exceeded it."¹¹⁴ With regard to international critique of foreign citizens held in Guantanamo Bay, Pierre-Richard Prosper, U.S. ambassador-at-large for war crimes issues, similarly presented a national security defense of U.S. detention policies. He asserted that the detainees "are committed to acts of violence," admit "[their] stated purpose is to

107. Human Rights Watch World Report 2003, *United States—Post-September 11 Detainees*, available at <http://www.hrw.org/wr2k3/us.html>.

108. See K. Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 *BERKELEY J. INT'L L.* 662 (2003).

109. On the Application of Abbasi and Another v. Secretary of State for Foreign and Commonwealth Affairs and Another, 2002 EWCA Civ 1598, Court Of Appeal, Civil Division, November 6, 2002 at 66.

110. Rozenberg, *supra* note 105.

111. Michael McKenna, *Win for Hicks in US Court*, Herald Sun (Melbourne), Sept. 28, 2002 at 16.

112. Ashcroft, *supra* note 76.

113. *Id.*

114. David G. Savage, *Critics Say Terror Probe Bends Immigration Laws; Rights: With Few Results from the INS' Hard Line Tactics Against Suspects, Critics Voice Outrage on Policy of Covert Hearings and Deportation*, L.A. TIMES, Sept. 10, 2002, at 17.

kill Americans and westerners” and as such continue to pose a threat to the United States.¹¹⁵ In responding to a question regarding how he felt about the U.S. “decision to detain suspected criminals indefinitely without trial” he defended the U.S. right to “detain enemy combatants until the end of a conflict.”¹¹⁶

The Attorney General’s rhetoric arguably portrays his critics as naïve. They “seem to think that business-as-usual—doing what was done before, and nothing more—would keep America safe from terrorists.”¹¹⁷ The Attorney General reduces his critics’ concerns to an appeal for “caution and complacency,” which he warns is tantamount to “a capitulation before the terrorists.”¹¹⁸ An INS spokesman likewise claims that it cannot “afford to sit back and wait for people to commit a terrorist act” but instead will “utilize all the authorities of the U.S. government to intercept and disrupt and deter individuals who may be linked to terrorist organizations.”¹¹⁹

2. Discrimination

Domestic critics claim the administration targets detainees for arrest because of their gender, religion, ethnicity and national origin.¹²⁰ This policy violates the CERD prohibition of racial discrimination. The DOJ questioned over 5,000 aliens of Arab and Islamic origins as part of its terrorist investigation.¹²¹ Almost all of the “special interest” detainees whose nationalities the DOJ revealed in January 2002 came from South Asia, the Middle East and North Africa. The largest group of detainees hailed from Pakistan, followed by Egypt, and Turkey.¹²² In February 2002, the Attorney General instituted the “Absconder Apprehension Initiative,” designed to locate and deport people who have remained in the country despite a final order of deportation. This program prioritizes absconders from particular Arab and Muslim countries.¹²³ A DOJ regulation finalized in August 2002 called the “Entry-Exit Registration System” began tracking entry and exit of visitors to the United States from Iraq, Iran, Libya, Sudan and Syria and other nonimmigrant aliens the State Department determine pose an elevated national security risk.¹²⁴ Since September 2002, visitors from roughly 150 countries were required to register upon entry. Men sixteen and older from twenty-five countries (all except North Korea have large Muslim populations) who arrived in the United States before September 30, 2002 are required to register at INS offices. As of January 19, 2003, almost 24,000 men had registered. INS detained 1,169 of these men (164 remained in

115. Joshua Rozenberg, *Britons held by US in Cuba ‘are hard-core al-Qa-eda’*, DAILY TELEGRAPH, Sept. 21, 2002, at 20.

116. *Id.*

117. Ashcroft, *supra* note 76.

118. *Id.*

119. Savage, *supra* note 114.

120. LAW. COMM. FOR HUM. RTS., *supra* note 79, at 15.

121. *Id.*

122. See HUM. RTS. WATCH, *supra* note 83.

123. LAW. COMM. FOR HUM. RTS., *supra* note 79, at 23.

124. *Id.*

custody), initiated deportation proceedings against 2,477 and arrested three suspected terrorists.¹²⁵

While initial profiling in the days after September 11 may be defensible given the extraordinary circumstances the country faced, persistent racial discrimination is unacceptable. The United States pledged to eliminate racial profiling before the Committee to Eliminate Racial Discrimination in August 2001. Assistant Attorney General Ralph F. Boyd stated, "The Bush Administration . . . is committed to eliminating racial profiling practices. Both the President and the Attorney General have declared emphatically that racial profiling is wrong and must be ended . . . the Attorney General has undertaken a comprehensive racial profiling initiative designed to do precisely that."¹²⁶ In October 2002, Canada released an advisory to its citizens regarding discriminatory treatment of persons born in Iran, Iraq, Libya, Sudan and Syria upon entering and exiting the United States.¹²⁷ Canada warned its citizens against the U.S. entry-exit program. Canada critiqued the program as "chastis[ing] the rights of freedom," "contrary to American and Canadian principles" and "against Canadian laws governing non-discrimination."¹²⁸ As discussed above, the Bush administration justifies its investigative, arrest and detention policies on the basis of national security interests and denies trampling anyone's rights.¹²⁹ It has not offered any separate justification for racial profiling nor has it analyzed its policy in light of U.S. obligations under the CERD.

3. *Secrecy*

The U.S. refusal to open its acts to public scrutiny is casting aspersions on the legality of detentions and raising human rights concerns over mistreatment of detainees. Secrecy infringes upon the public's First Amendment right to access information about the government.¹³⁰ "Secret detentions are antithetical to fundamental principles of international human rights protecting persons from enforced disappearances."¹³¹ Since September 11, the DOJ has refused to release the names of detainees taken into custody on immigration violations or held as "material witnesses." This encompasses most of the detainees. As of September 21, 2001, Chief Immigration Judge Michael Creppy issued a directive requiring "special interest" cases closed to the public.¹³² This shut the pub-

125. Patrick J. McDonnell, *24,000 Register with INS*, L.A. TIMES, Jan. 19, 2003, at A6.

126. *Reply of the U.S. to Questions from the U.N. Comm. on the Elimination of Racial Discrimination*, *supra* note 73.

127. Elise Labott, *Canada issued a travel advisory this week urging Canadian citizens born in Iran, Iraq, Libya, Sudan and Syria to consider avoiding travel to the United States*, CNN, at <http://edition.cnn.com/2002/TRAVEL/10/30/canada.us.travel/> (Oct. 30, 2002).

128. *Id.*

129. See Kim Barker, *Federal Tactics Criticized in Roundup of 1,100; FBI Defends Detention Policy, But Some Courts Aren't Convinced*, CHI. TRIB., Sept. 11, 2002, at 16.

130. *Detroit Free Press v. Ashcroft*, No. 02-1437, 2002 U.S. App. LEXIS 17646, at **6, **52, *91 (6th Cir. 2002).

131. HUM. RTS. WATCH, *supra* note 83, at 18, citing The Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), Art. 10(2).

132. See *Detroit Free Press*, *supra* note 130, at **6.

lic out of immigration proceedings. Such secrecy also engenders fears among Middle Eastern and South Asian communities in the United States.¹³³

a. Domestic Critique

Various coalitions within U.S. civil society are seeking to end the secrecy of detentions and immigration proceedings through Freedom of Information Act (FOIA) requests and litigation.¹³⁴ In an effort to contest secret detentions, domestic coalitions' legal argument is that the American press and public have a First Amendment right of access to deportation proceedings that the Creppy Directive violates by applying a blanket prohibition on access. The Sixth Circuit and the Third Circuit both took up the issue of whether the First Amendment confers a right of access to deportation hearings upon the press and the public. The Sixth Circuit held there is a First Amendment right of access to deportation hearings and that the Creppy directive impermissibly infringes on that right.¹³⁵ The Third Circuit disagreed, finding the government's "mosaic theory" of national security compelling.¹³⁶

b. The Bush Administration's Defense

The Attorney General's response to criticism regarding secret detention and deportation proceedings is that the government "cannot risk damaging the security of the United States by publicizing the names of those detained in our investigation."¹³⁷ According to the administration's mosaic theory, open deportation hearings would threaten national security through the release of "information which, when assimilated with other information the United States may or may not have in hand, allows a terrorist organization to build a picture of the investigation."¹³⁸ The DOJ has responded to the Sixth Circuit decision with a new regulation that attempts to ensure secret hearings through the granting of protective orders on a case-by-case basis.¹³⁹ The DOJ has also resisted district court orders to release names of detainees and to open deportation proceedings through the filing of numerous appeals. On September 26, 2002, however, the DOJ announced it would comply with U.S. District Judge Nancy G. Edmunds of Michigan's order to release Rabih Haddad, or give him a new detention hearing in public.¹⁴⁰ Haddad is a Lebanese national that is being detained on allegations that his Chicago-based Muslim charity organization financed terrorism. Haddad convinced Judge Edmunds that his first closed bond hearing violated his Fifth

133. HUM. RTS. WATCH, *supra* note 82, at 17.

134. See Detroit Free Press, *supra* note 130; New Jersey Media Group, Inc. v. Ashcroft, No. 02-2524, 2002 WL 31246589 (3d Cir. 2002).

135. Detroit Free Press, *supra* note 130, at *73-74.

136. See New Jersey Media Group, *supra* note 134.

137. *Sept. 11 Detainee Testifies at Public Hearing*, WASH. POST, Oct. 2, 2002, at A6.

138. Declaration of Dale L. Watson, Detroit Free Press, *supra* note 130.

139. LAW. COMM. FOR HUM. RTS., *supra* note 79, at 21.

140. Steve Fainaru, *Detainee to Get Open Immigration Hearing; Justice Department Still Plans Appeal for Ruling for Muslim Activist Held 9 Months*, WASH. POST, Sept. 26, 2002, at A13.

Amendment right to due process.¹⁴¹ On October 1, 2002, Haddad testified in a milestone open immigration hearing.¹⁴²

F. U.S. Convergence with the International System—Capital Punishment

1. U.S. Unilateral Capital Punishment Policy

In March 2001, Assistant Secretary Parmly described the Bush administration's position on capital punishment during a press briefing of the U.S. delegation to the 57th Session of the U.N. Commission on Human Rights. Parmly stated that the death penalty was not in violation of international norms if it is applied in a fair and balanced way with due process. He further claimed that polls consistently show that the majority of Americans are in favor of the death penalty.¹⁴³

The administration vigorously defends its position on capital punishment of juveniles. In May, 2002 the United States opposed a European initiative at the United Nations Child Summit to ban capital punishment for all child criminals under age 18.¹⁴⁴ In ratifying the ICCPR in 1992 under the first Bush administration, the United States attached a reservation to Article 6(5) exempting it from the Convention's prohibition on juvenile (under eighteen-years-old) executions.¹⁴⁵ Eleven countries formally objected to the U.S. reservation. The UN Human Rights Committee held that the U.S. reservation violates the object and purpose of the treaty and should be withdrawn. That Committee has consistently appealed to the United States to not impose the death penalty for crimes committed by persons below eighteen years of age.¹⁴⁶ In 1989, the United Nations called on states to eliminate the death penalty for people with mental retardation.¹⁴⁷ One month after that U.N. Resolution, the U.S. Supreme Court upheld the constitutionality of executing a mentally retarded person in *Penry v. Lynaugh*.¹⁴⁸

2. Multilateral Critique

The United States has stood apart from the global community in its capital punishment practices, particularly of juveniles and the mentally retarded. The death penalty is "an increasingly sharp wedge in U.S. relations with its leading European Allies."¹⁴⁹ The U.S. go it alone attitude on capital punishment, even

141. *Id.*

142. *Sept. 11 Detainee Testifies at Public Hearing*, *supra* note 137.

143. U.S. Delegation Briefing to the Press, 57th Sess., U.N. Comm'n. on Hum. Rts., *supra* note 4.

144. George Archibald, *U.S., Europe Clash at Child Summit*, WASH. TIMES, May 9, 2002, at A1.

145. Reservations to the ICCPR, *supra* note 20.

146. Amnesty International, *United States of America Indecent and Internationally Illegal: The Death Penalty Against Child Offenders*, 95 (2002) (AI Index: AMR 51/143/2002).

147. *Id.* at 1, citing E.S.C.Res. 1989/64 (adopted May 24, 1989).

148. *Id.* See *Penry*, *supra* note 45.

149. David R. Sands, *Death Penalty Drives EU, U.S. apart; Protests may reflect 'uneasiness' about Bush's stance on other issues*, The Washington Times (Final Edition), June 29, 2001 at A16.

with respect to foreign inmates, prompted rebuke from the International Court of Justice in June 2001.¹⁵⁰ In August 2002, Mexican President Vicente Fox canceled a visit to President Bush's Texas ranch as "an unequivocal signal of rejection of the execution" of a Mexican national.¹⁵¹ Nine distinguished former diplomats recently filed a Supreme Court amicus brief in support of abolishing executions of mentally retarded inmates. They argued this practice creates diplomatic friction between America and her allies, greatly tarnishes America's image as a human rights leader and harms broader foreign policy interest.¹⁵² Extradition of terrorism suspects to the United States is frustrated by a European Convention ban on extradition if suspects face the death penalty.¹⁵³

The next section discusses the Supreme Court's recent decision in *Atkins v. Virginia*,¹⁵⁴ where the Court considered international human rights norms in its "evolving standards of decency" inquiry. This decision presents a potential growing edge for multilateralism and domestic human rights enforcement within U.S. Eighth Amendment jurisprudence.

3. *The Supreme Court Prohibits Execution of the Mentally Retarded*

On June 20, 2002, the Supreme Court ruled that execution of mentally retarded persons is prohibited under the Constitution as cruel and unusual punishment.¹⁵⁵ In *Atkins v. Virginia*, a six-justice majority held that the execution of mentally retarded persons serves no legitimate purpose and that a national consensus for banning the practice had emerged.¹⁵⁶ The Court thereby overruled its 1989 decision in *Penry v. Lynaugh*. *Penry's* upholding of capital punishment for the mentally retarded was based on the absence of a national consensus against the practice at that time.¹⁵⁷ In 1989, only two states prohibited execution of the mentally retarded. Presently, eighteen states and the federal government have all enacted laws banning this practice.¹⁵⁸

The *Atkins* Court examined whether a national consensus had emerged among "the American public, legislators, scholars and judges . . . over the ques-

150. On June 28, 2001, the International Court of Justice held that the United States violated the rights of two German brothers executed in Arizona in 1999 because it had failed to inform German consular officers of their arrest and conviction as they were obligated to under the Vienna Convention on Consular Protection. The United States did not deny the violation, apologized and promised better compliance. Marlise Simons, *World Court Finds U.S. Violated Consular Rights of 2 Germans*, N.Y. TIMES, June 28, 2001, at A10.

151. Javier Suarez Medina was similarly not informed of his right to seek counsel from the Mexican Consulate. William Walker, *Angry Fox Snubs Bush Over Mexican Execution*, TORONTO STAR, Aug. 16, 2002, at A2.

152. Koh, *supra* note 2, at 311, citing Brief of Amici Curiae Diplomats Morton Abramowitz et al., *McCarver v. North Carolina*, 548 S. E. 2d 522 (N.C. 2001), cert. granted, 121 S. Ct. 1401 (2001) (No. 00-8727), cert. dismissed, 122 S. Ct. 22 (2001).

153. "The European Convention on Human Rights bans signatories from extraditing suspects to countries with capital punishment." Human Rights Watch, *supra* note 106.

154. *Atkins v. Virginia*, 122 S. Ct. at 2249 (2002).

155. Jim Lobe, *U.S. Supreme Court Bans Executions for Mentally Retarded*, INTER PRESS SERVICE, June 20, 2002.

156. *Id.*

157. See *Penry*, *supra* note 45.

158. Lobe, *supra* note 153.

tion whether the death penalty should ever be imposed on a mentally retarded criminal.”¹⁵⁹ The practice would qualify as an excessive sanction under the Eighth Amendment if the “evolving standards of decency” defined it as such.¹⁶⁰ The Court found widespread state legislative policy prohibiting executions of the mentally retarded. Those states that did not adopt a legislative prohibition still rarely executed mentally retarded offenders. In light of these developments, the Court held that a national consensus had developed against the practice.¹⁶¹

To what extent was the Court’s holding influenced by international consensus against executing the mentally retarded? Admittedly, the Court took pains to show that it did not rest its decision on international human rights norms. The Court stated, however, that, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”¹⁶² The Court characterized the world community consensus as additional evidence. The Court also evaluated amicus briefs from the American Psychological Association, representatives of religious communities, and polling data. In analyzing the weight of such additional evidence, the Court clarified that, while “these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”¹⁶³ In sum, the Court acknowledged the relevance of international capital punishment practice to the Eighth Amendment “evolving standards of decency” inquiry. *Atkins* gave international human rights norms far greater weight than the Court’s prior death penalty decisions. For example, in *Stanford v. Kentucky* decided in 1989, the Court wrote, “We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici that the sentencing practices of other countries are relevant.”¹⁶⁴ In contrast, the *Atkins* Court’s holding embraces the notion that international sentencing practices are relevant.

Human rights and death-penalty abolition groups were encouraged by the *Atkins* decision. William Shultz, executive director of Amnesty International USA, stated “the Supreme Court has finally ushered the United States into the civilized nations when it comes to such executions.”¹⁶⁵ Amnesty International believes that under the *Atkins* Court’s national standards of decency analysis, imposition of the death penalty on juvenile offenders should also be abolished.¹⁶⁶ The United States has executed eighteen children since 1989 while Amnesty International has documented a total of fourteen children executed in the rest of the world during the same time period.¹⁶⁷

159. *Atkins*, *supra* note 154.

160. *Id.* at 2246-47.

161. *Id.* at 2249.

162. *Id.*

163. *Id.*

164. *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989).

165. Lobe, *supra* note 155.

166. See Amnesty International, *supra* note 146.

167. *Id.* at 2-3.

The Supreme Court has not signaled that it will prohibit capital punishment of juvenile offenders. In *Atkins*, the Court distinguished execution of juvenile offenders over age fifteen as an area where a national consensus has not significantly developed since its decision upholding the practice in 1989. "Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty."¹⁶⁸ In *In re Stanford*, decided in October 2002, the Supreme Court denied a petitioner's application for an original writ of habeas corpus asking the Court to hold that his execution would be unconstitutional because he was under the age of eighteen when he committed his offense.¹⁶⁹ The majority of the Court is thus far unwilling to apply the *Atkins* reasoning to prohibit execution of juvenile offenders under the age of eighteen. The hope among human rights advocates is that the Court will eventually address the tension between U.S. capital punishment practices and international human rights norms in juvenile death penalty cases.

V. CONCLUSION

International human rights law rejects the sacrifice of fundamental freedoms in the name of national security. Governments tend to prize national security concerns over long term civil liberties necessary for a democratic community.¹⁷⁰ The existence of national security concerns does not warrant suspending or abandoning human rights.¹⁷¹ As seen from our discussion of the Committee on the Elimination of Racial Discrimination, U.S. domestic civil rights law arguably provides less protection against discrimination than the CERD. Ratification of the CERD meant an obligation to implement the protections of that Convention, including those provisions not present in U.S. law. The Bush administration has continued an historic pattern of resistance to changing U.S. law in accordance with U.S. obligations under human rights treaties. In the wake of September 11, civil liberties are under attack and domestic human rights protections are eroding. The Patriot Act formally expanded governmental power of search, surveillance and detention. DOJ administrative practice has made even greater incursions into individual liberties. U.S. capital punishment of children below the age of eighteen and the mentally retarded has left the United States outside an international consensus against these practices. The Supreme Court's decision in *Atkins* brings the United States somewhat closer to that consensus. Moreover, it sets a precedent for considering the global standards of decency for cruel and unusual punishment as relevant to our own national inquiry.

168. *Atkins*, *supra* note 154.

169. *In re Stanford*, No. 01-10009, 2002 U.S. LEXIS 8056 (2002).

170. Thomas I. Emerson, *National Security and Civil Liberties*, 9 YALE J. WORLD PUB. ORD. 78, 80 (1982).

171. *Id.* at 82.

The United States traditionally maintains that the Constitution adequately protects human rights at home. The Constitution's due process protections apply to both citizens and noncitizens.¹⁷² The DOJ used its regulatory authority over immigration, however, to circumvent these Constitutional protections. The Bush administration has not adequately protected human rights at home. Moreover, all Americans have not equally sacrificed liberty for national security. The United States selectively sacrificed the rights of noncitizens.¹⁷³ In this climate of rolling-back domestic human rights protections, the U.S. claim that it does not need to engage the international human rights legal regime to protect human rights at home is increasingly untenable.

172. Detroit Free Press, *supra* note 130, at *18.

173. Cole, *supra* note 92.