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AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

Human Rights at Home:

A Domestic Policy Blueprint for the New Administration

Catherine Powell

October 2008

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Human Rights at Home: A Domestic Policy Blueprint for the New Administration

Catherine Powell*

> Let the word go forth from this time and place, to friend and foe alike, [that we are] unwilling to witness or permit the slow undoing of those human rights to which this Nation has always been committed, and to which we are committed today *at home* and around the world.
>
> John F. Kennedy[1]

> [The United States is] still a beacon, still a magnet for all who must have freedom, for all the pilgrims from all the lost places who are hurtling through the darkness, toward home.
>
> Ronald Reagan[2]

EXECUTIVE SUMMARY

As a new Administration takes office in January 2009, it will have an opportunity to reaffirm and strengthen the longstanding commitment of the United States to human rights at home and abroad. This commitment is one that has been expressed throughout U.S. history, by leaders from both parties. In reality, however, when the idea of human rights is discussed in the United States today, more often than not the focus is on the promotion of human rights abroad and not at home. Indeed, human rights has come to be seen as a purely international concern, even though it is fundamentally the responsibility of each nation to guarantee basic rights for its own people, as a matter of domestic policy.

Reaffirming and implementing the U.S. commitment to human rights *at home* is critical for two reasons. First, human rights principles are at the core of America's founding values, and Americans (as well as others within our borders or in U.S. custody), no less than others around the world, are entitled to the full benefit of these basic guarantees. That can hardly be open to debate. The second reason is perhaps less obvious, but equally compelling. When the United States fails to practice at home what it preaches to others, it loses credibility and undermines its ability to play an effective leadership role in the world. Leading through the power of our example rather than through the example of our power[3] is particularly critical now, at a juncture when the United States needs to cultivate international cooperation to address pressing issues – such as the current economic downturn – that have global dimensions. Perhaps not surprisingly, then, an overwhelming majority of Americans strongly embrace the notion of human rights: that

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* Associate Professor of Law, Fordham Law School. The author is grateful for the wisdom and advice offered by the Blueprint Advisory Group, whose members are listed in Appendix A, and for superb research assistance from Alexandra Scuro. The observations and conclusions set forth in this Blueprint, however, are those of the author alone.

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is, the idea that every person has basic rights regardless of whether or not the government recognizes those rights.[4]

This Blueprint therefore suggests ways in which the new Administration can take concrete steps to ensure that human rights principles are considered and implemented within the process of U.S. domestic policymaking. It does not address in any detail the substance of particular policies in areas such as equality, health care, or the prohibition on torture;[5] rather, it identifies and evaluates mechanisms by which human rights principles can be integrated into policymaking in all areas of U.S. domestic policy where they are relevant.

BACKGROUND

The United States was founded on the human rights principle expressed in the American Declaration of Independence: that we all have certain basic, unalienable rights simply by virtue of our humanity. Declaring rights to be inherent, not based on the generosity of the state, was transformative. Two hundred years later, the United States can point to a tradition of promoting human rights in principle, if not always in practice. The United States was a leader in ending the atrocities of World War II and in developing international institutions and instruments aimed at securing peace in the world and human rights for all people. The Universal Declaration of Human Rights, which celebrates its sixtieth anniversary this year, was inspired in part by Franklin D. Roosevelt's Four Freedoms speech and drafted in part by Eleanor Roosevelt, the first President of the U.N. Human Rights Commission. Just as the New Deal redefined the concept of "security" at home to include economic security for all Americans, so too these post-war international regimes redefined the notion of "security" internationally to include human security.[6]

Indeed, for Americans, recognition that the gross human rights violations of the Holocaust were intertwined with Nazi aggression underscored the inextricable link between our principles and our national interests. A robust human rights policy supports the rule of law, democratic institutions, accountability mechanisms for serious abuses, a humane global economy, and U.S. global leadership in reducing violence, instability, and refugee flows.[7] Oftentimes, in fact, principled policy directly serves U.S. national interests because it allows us to demand reciprocal treatment of our citizens abroad, as in the case of humane treatment of detainees captured in war. Beyond the concern for reciprocity, the strong bipartisan commitment to human rights that has developed over the last several decades emerges from an understanding that ensuring the enjoyment of human rights at home and around the world serves not only America's deeply held values but also its national interests.

Even so, there remains a gap between the human rights ideals that the United States professes and its actual domestic practice, resulting in both a gap in credibility and a weakening of U.S. moral authority to lead by example. Human rights include the right to be free from torture or cruel, inhuman or degrading treatment, and yet the United States has committed such acts in the name of counterterrorism efforts. Human rights include the rights to emergency shelter, food, and water, as well as security of person, and yet the United States failed to adequately guarantee these rights in the aftermath of Hurricane Katrina. Human rights include

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the right to equality of opportunity, and yet inequalities persist in access to housing, education, jobs, and health care. Human rights include the right to equality in the application of law enforcement measures, and yet there are gross racial disparities in the application of the death penalty, and racial and ethnic profiling has been used unfairly to target African Americans, Latinos, and those who appear Arab, Muslim, South Asian, or immigrant (whether through traffic stops, airport screening, or immigration raids). Human rights include the right to equal pay and gender equality, and yet a pay gap persists between female and male workers. Certainly, the journey to fully realizing human rights is a work-in-progress, but to make progress, we must work – through smart, principled policies that advance the ability of the United States to live up to its own highest ideals.

Thus, January 2009 should mark the beginning of a transition from a society that has condoned torture, cruel interrogation, and inhumane treatment of detained terrorism suspects to a society that deems such conduct unacceptable – not only by other nations, but by our own. We should make the transition from a society that has tolerated little or no access to health care for certain individuals to a society that recognizes access to health care for all as a basic right. We should make the transition from a society of structural inequality to one in which not only the very highest glass ceilings are broken, but also in which sticky floors and broken ladders to opportunity are repaired. Marking the transition in this way is both principled and in America's self-interest.

RECOMMENDATIONS

To advance American values and interests more effectively, this Blueprint makes a series of short-term and long-term recommendations for the new Administration. Briefly summarized, they are as follows.

Actions During the First 100 Days

- *The President should issue an Executive Order to reconstitute and revitalize an Interagency Working Group on Human Rights which will serve as a coordinating body among federal agencies and departments for the promotion and respect of human rights and the implementation of human rights obligations in U.S. domestic policy*. Such a working group was created by Executive Order 13107 issued by President Bill Clinton on Human Rights Day in December 1998, but it was effectively disbanded during the administration of President George W. Bush. While it was nominally replaced by a new policy coordination committee, the program of action laid out in the Executive Order was never implemented. The next President should issue a new Executive Order modeled on E.O. 13107, but containing an expanded list of relevant agencies as well as other refinements to ensure the success of the new Working Group**.** A proposed Executive Order with these revisions is attached to this Blueprint as Appendix B (with the proposed amendments to E.O. 13107 indicated).

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- *To underscore the new President's commitment to leadership on human rights, he should speak out forcefully, early in his tenure, in support of human rights principles both abroad and at home*. The occasion could be the Inaugural Address, the first State of the Union Address, or a separate, high-profile speech devoted to this topic. To demonstrate the seriousness of his commitment, the address should be accompanied by concrete action – such as issuance of the Executive Order described above.

- *From the outset of his Administration, the new President should ensure that human rights principles are incorporated into the mainstream of U.S. policymaking*. He can do this by, for example, ensuring that individuals with a demonstrated commitment to human rights are selected for key appointments in the Department of Justice, Department of State, Department of Defense, Department of Homeland Security, National Security Council, and elsewhere, and by ensuring that the people in high-level positions in his Administration share a broad vision of the role of human rights in U.S. policy.

- *The new Administration should also seize opportunities for action on specific treaty obligations early on.* For example, there will be an opportunity for action in early 2009 in connection with the International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention). In early 2008, the U.S. reported on its record under the Race Convention to the U.N. Committee that monitors the Convention. On March 5, 2008, the Committee issued its Concluding Observations on that report, requesting additional information from the U.S. on steps taken to address racial profiling, life sentences without parole for juveniles, Katrina recovery, and other matters. The U.S. will need to report back to the committee in early 2009, and this provides an opportunity for the new Administration to demonstrate its commitment to the Race Convention with a timely and complete report.

Beyond the First 100 Days

- *The new Administration should build and support two distinct types of human rights institutions: an implementation body and a monitoring body*.

  - Implementation Body. Following issuance of an Executive Order revitalizing the Interagency Working Group on Human Rights (as outlined above), the Working Group should become an effective focal point for *implementing* human rights domestically. With high-level leadership in the White House, the Working Group should play a proactive role, crossing the domestic-international divide by ensuring that U.S. international human rights responsibilities are implemented and coordinated among all relevant executive branch agencies and departments.

  - Monitoring Body. In addition to establishing an effective implementation body, the new Administration should work toward the creation of a human rights *monitoring* body that would be established and financed by the government but would operate as an independent, nonpartisan entity. This new body should take the form of a national human rights commission, which would provide expertise

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and oversight to ensure human rights progress in the United States. The new Administration should support legislation to establish such a body, which could be created by restructuring and strengthening the existing U.S. Commission on Civil Rights, and converting it into an effective U.S. Commission on Civil and *Human* Rights. The Commission should be empowered to: issue reports and recommendations to the executive branch and Congress; contribute to the reports the United States submits to international bodies; develop programs for teaching and training on human rights issues; and conduct investigations and hearings into human rights complaints. The new Administration should support legislation to establish such a body.

- *The Administration should support the ratification, accompanied by fully adequate implementing legislation, of important human rights treaties to which the United States is not yet a party, as well as legislation to implement ratified treaties.* The new Administration should support ratification and full implementation of (in alphabetical order): the American Convention on Human Rights; the Convention on Disappearances; the Convention on the Elimination of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child; the Convention on Rights of Persons with Disabilities; the International Convention for the Protection of All Persons from Enforced Disappearances; International Covenant on Economic, Social and Cultural Rights; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and the Optional Protocol to the Convention against Torture. In addition, the new President should work with Congress to develop legislation to implement the treaties that have already been ratified. The United States has declared many of these treaties non-self-executing. Thus, implementing legislation is needed to effectuate rights guaranteed by the Race Convention (to address the persistence of discrimination) as well as rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR) (which, among things, includes the rights of prisoners as well as suspects detained in the course of U.S. counterterrorism efforts).

- *The new Administration should undertake periodic review of reservations, understandings, and declarations (RUDs) that the United States has adopted in ratifying treaties, and should take steps to withdraw those that are unnecessary and harmful.* The United States has attached numerous RUDs to human rights treaties upon ratification, which often limit the impact of a treaty. Over time, the only RUDs that should be retained are those that are strictly required because of irreconcilable differences between U.S. constitutional law and treaty law.

- *The Administration should take steps to support the judicial branch in its efforts to recognize and honor human rights principles.* The new President should nominate judges who will follow the rule of law, which includes recognition that ratified treaties and customary international law are the law of the land. Additionally, the Administration should support judicial human rights education and support the role of courts in providing full and appropriate hearings on allegations of human rights violations.

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By adopting these recommendations, the new Administration will embrace our American roots as architects of the first rights revolution and strengthen the leadership position of the United States in the world as chief promoter of human rights.

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Human Rights at Home: A Domestic Policy Blueprint for the New Administration

This Blueprint is organized into two parts. Part I outlines the gap between the promise and practice of human rights in the United States and offers a set of overarching principles that should guide the new Administration in closing this gap. Part II provides specific policy recommendations for the next Administration aimed at reaffirming America's founding commitment to human rights and enhancing U.S. credibility and leadership around the world.

I. Closing the Gap Between Promise and Practice: Principles To Guide the New Administration

While the promise of human rights is at the core of what binds us together as Americans[8] and as an international community,[9] this promise has not been fully realized in this country. We embrace human rights principles as central to our national identity and interests, but our actual practice falls short of our founding ideals. Each time our nation has taken steps to close this gap, the nation has grown stronger – formed a more perfect union. As every schoolchild knows, while the American Declaration of Independence declared that "all men are created equal," the tragedy of slavery, disenfranchisement of women, and exclusion of others from the social contract created an enormous credibility gap, paving the way for the U.S. civil war and eventual constitutional amendments to enfranchise these groups. Additionally, America's waging war against Nazi racism while permitting segregation and lynchings at home created a double standard that fueled civil rights advocates in the fight for comprehensive national civil rights legislation. Even today, this nation, which launched the ongoing experiment with democratic self-governance and constitutionally-entrenched rights, is too often unwilling to apply at home the set of universal standards it promotes abroad (and even abroad, only selectively), resulting in a steady devaluation of human rights and loss of U.S. credibility. For example, while the Administration of President George W. Bush criticized ousted Iraqi President Saddam Hussein's use of torture, it has also condoned torture by its own officials.[10] Too often, "in the cathedral of human rights, the United States 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 that system."[11]

Today, the gap between U.S. human rights principles and practice stems in part from the fact that U.S. engagement with international human rights has been largely through its foreign policy, not its domestic policy. In fact, primary responsibility for handling U.S. reports to human rights treaty bodies has fallen to the State Department, whose purview is foreign policy. Engagement with international human rights bodies in order to securing compliance by *other* sovereign states, while limiting the domestic reach and relevance of international standards, is at odds with the principal aim of the international human rights regime. The fundamental thrust of this regime is to harness governments to adopt laws and policies that better protect individuals subject to their *own* jurisdiction.[12] By participating in the international human rights regime as a means to criticize other states, yet not as a means to scrutinize its own domestic record, the United States signals that its embrace of human rights is partial and selective.[13]

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To close the gap between principle and practice – and the damaging credibility gap it produces – the new Administration should be attentive to the fundamental principles set forth below, which undergird the specific recommendations offered in Part II of this Blueprint.

A. Recognize That Respect for Human Rights Begins at Home

Each nation is under an obligation to take positive steps to implement and monitor human rights domestically.[14] International support for human rights is supposed to be *secondary* to domestic mechanisms that ensure a nation's support for international human rights; human rights law conceives of governance arrangements at the level closest to affected individuals, who themselves participate in decision-making.[15] International protection, then, is intended to support and strengthen – not replace – the domestic framework of protection. Yet the U.S. government at times turns this framework on its head. Instead of finding ways to harness local control for positive good, the United States occasionally uses the notion of federalism to duck its human rights responsibilities. A classic example is consular access for foreign nationals on death row under the Vienna Convention on Consular Relations (Vienna Consular Convention). In a series of cases before the International Court of Justice, the United States had pointed to federalism, arguing that because criminal justice falls in part to state and local government, there was little the federal government could do without inappropriately meddling in state criminal procedure. More recently, in a case involving Mexican foreign nationals, the Bush Administration adopted a completely different strategy. The Administration recognized that by trying to coax the state of Texas to respect the Vienna Consular Convention rights of the Mexicans prisoners, it could improve U.S. standing in the international community – especially with our trade partner and ally, Mexico.[16]

The next Administration should make clear its commitment to human rights at home and take responsibility for establishing mechanisms to ensure respect for human rights in U.S. policy. To do this, the Administration must *mainstream* human rights into the government infrastructure. This will require the President himself to demonstrate, by word and deed, his commitment to human rights, and it will require that officials appointed to key positions in the Departments of Justice, State, Defense, and Homeland Security (among others), as well as the National Security Council, starting at the very top, are individuals who have a demonstrated commitment to, and experience in, human rights.

B. Engage Partners

While the first line of defense for human rights is at the domestic level, as indicated above, the human rights regime embraces a conception of governance that allows for partnerships among local, state, federal and international legal protection regimes as well as between government and civil society. Such cooperation and dialogue are aimed at ensuring that human rights find "genuine expression in meaningful, appropriate, context-specific ways" within local communities,[17] while also allowing for national and, in turn, international protection to address human rights violations that otherwise go unaddressed. Thus, while localized decision-making is central to the realization of human rights, this impulse envisions layers of support, not wholesale devolution to local decision-makers.[18] Moreover, interested individuals, communities

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and nongovernmental organizations should be engaged in the process of considering and discussing the content of rights, establishing benchmarks toward respecting human rights, assessing and reassessing progress and setbacks in rights, and identifying problems and developing solutions toward realizing rights.[19] Creating structures and processes that enable the new Administration to form partnerships with international bodies on the one hand, and with state and local governments and civil society on the other, is critical to strengthening the domestic protection of rights and cultivating the long-term sustainability of human rights at each level of government.

C. Acknowledge the Interdependence of Rights

One of the bedrock principles of the human rights framework is the interdependence of rights. Eschewing debates over whether the United States has achieved more progress in racial justice or gender justice, for example, a human rights perspective views all forms of justice and all forms of rights as inter-related. Therefore, just as the struggle for racial equality has been a key engine fueling gains in women's equality, so too the movement for gender equality has broadened the constituency and support for racial justice (going back to the abolition movement). Likewise, rights in one area, such as the right to health care, depend on rights in other areas, such as the right to equality. With home foreclosures, we have seen how the right to vote (and therefore to political empowerment) depends on the right to housing, since registering to vote may depend on providing proof of residence.[20] Similarly, Hurricane Katrina exposed the stark connections between race and poverty. The right to food (and the component rights to be free of hunger, malnutrition, and famine) is dependent on rights to free speech, a free press, and an open political system – all of which help prevent shortages caused by poor economic choices and policies.[21] A stronger embrace of human rights ideals and practices could assist in the development of strategies that seek to address the inter-related nature of many of our social justice problems.[22]

D. Recognize the Duties to Respect and Ensure Rights

Government must both respect and ensure rights. "Respecting" rights involves not violating rights. "Ensuring" rights entails more affirmative obligations.

At a primary level, government must *respect* rights. For the individual, this essentially involves the right "to be left alone" (i.e., the right not to be tortured, the right not to be discriminated against, or the right not to have anyone block or destroy your food or water supply). Congress has adopted implementing legislation to advance the duty to respect U.S. international human rights in areas such as refugee protection and torture. An example of this is the Refugee Act of 1980,[23] which prohibits the government from sending individuals to countries where they are likely to face persecution, as a way of implementing U.S. obligations under the Protocol Relating to the Status of Refugees. Another example is the Federal Torture Statute,[24] which Congress passed in 1994 to prohibit torture committed by U.S. officials, as a way of implementing U.S. obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).[25] Even where the United States has not adopted legislation specifically implementing human rights treaty obligations, U.S.

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domestic constitutional law and statutory law frequently mirror these international standards. In some areas, however, such as in race and gender discrimination, the scope of rights protected under U.S. law is not as broad as it is under international law. For example, while international human rights law protects against measures that have the purpose *or* effect of discriminating, U.S. constitutional law only reaches purposeful or overt discrimination, not discriminatory effects of measures that may appear neutral on their face. Some U.S. civil rights statutes address discriminatory effect, but only in a few limited areas.

At a secondary level, government must *ensure* rights, which requires taking more affirmative steps. Ensuring rights involves protecting rights; investigating and punishing rights violations; and promoting and fulfilling rights. To *protect* rights, governments should adopt prophylactic measures to prevent rights violations before they occur, for example in training government officials in international standards. It is to this end that the State Department is training state and local law enforcement on requirements under the Vienna Consular Convention that arrested or detained foreign nationals be informed of their right to consult with their consulate.

To *punish* rights violations, government should provide judicial or other remedies to investigate and punish violators and to secure compensation for victims. While Congress has adopted only a few implementing statutes creating remedies directly pursuant to treaties,[26] once again, U.S. domestic law frequently does provide remedies that can be used to punish rights violations. However, in some cases, the United States has limited available remedies. For example, in the case of the rights of prisoners, the Prison Litigation Reform Act (PLRA) requires proof of a physical injury to secure monetary damages for mental or emotional injury suffered while in custody (among other limitations).[27] Thus, under the PLRA, a woman prisoner who is sexually abused by a prison guard may not be able to secure monetary damages.[28] This result stands in tension with Article 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR), which states that an "effective remedy" must be available to all persons whose rights therein have been violated, and with Article 14 of the Torture Convention, which requires that torture victims be able to obtain redress, including "adequate compensation[.]"[29]

To *promote* rights, government should educate the public and its own officials about human rights. Many U.S. government agencies have training centers, and these should be encouraged to include human rights education. Further, human rights education should be included in U.S. public schools. Some programs, such as Street Law, have developed human rights curricula and materials and could work with the Department of Education in adapting these materials so that schools across the country could have the option of integrating them into their curricula.

Finally, *fulfilling* rights emerges in the context of government responsibility to address basic needs, such as health care, when individuals do not have the resources to address these needs for themselves. Proposals to provide universal health care that have emerged during the course of the 2008 election season have helped shape public understanding of health care as a public good and ultimately as a basic right, rather than as a commodity that can be left entirely to the market.[30] In fact, a majority of Americans believe that access to health care should be

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considered to be a human right, as should fair pay for workers to meet basic needs for food and housing.[31]

II. Specific Recommendations for the Next Administration

Informed by the broad principles discussed above, the following concrete recommendations for a new Administration are aimed at reaffirming America's founding commitment to human rights and enhancing U.S. credibility and leadership around the world.

A. Mainstream Human Rights Into U.S. Domestic Policymaking

The new Administration should build concern for human rights into the fabric of U.S. domestic policymaking.

From the outset of the new Administration, the new President should ensure that human rights principles are incorporated into the mainstream of domestic policymaking, including in the existing infrastructure of government. He should, for example, appoint officials who have demonstrated a commitment to human rights to the leadership of the National Security Council as well the Departments of Justice, State, Defense, Homeland Security, and elsewhere. In the Justice Department, this would include, at a minimum, the Attorney General and Deputy Attorney General, leaders of the Office of Legal Counsel, the Office of Legal Policy, the Civil Rights Division, and the Solicitor General. At the State Department, it would include, at a minimum, the Secretary of State, the Deputy Secretary of State, the Under Secretary for Democracy and Global Affairs, as well as the leaders of the Office of the Legal Advisor, the Bureau of Legislative Affairs, and the Bureau of Democracy, Human Rights, and Labor. These officials, as well as the components of government they lead, should treat human rights principles as directly relevant to the missions of their agencies.

In addition, each agency with a role to play in incorporating human rights into its work should offer human rights education and training opportunities for its own personnel. Such training could also be undertaken for relevant personnel in the legislative and judicial branches, and for counterparts in all branches at the state and local levels. Where appropriate, the new Administration could provide training materials or resources. A good example of this is the State Department's current work with state and local law enforcement on the Vienna Consular Convention rights of arrested and detained foreign nationals. The State Department has produced educational materials and conducted trainings for state and local law enforcement on international obligations. Where particular governmental entities do not have sufficient capacity to support in-house training, the reconstituted Interagency Working Group on Human Rights or U.S. Commission on Civil and Human Rights, discussed below, should provide assistance. At a minimum, the Working Group or Commission could identify nongovernmental organizations or universities that provide could such training.[32]

Finally, since the United States will be called upon to prepare a comprehensive report on U.S. human rights practice in 2010 under the Universal Periodic Review process of the U.N. Human Rights Council, the Administration should conduct a comprehensive review, much like

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the country reports prepared by the State Department each year with respect to every other country in the world. The Universal Periodic Review process, which began in 2008, involves Human Rights Council review of each country's record in fulfilling human rights obligations and commitments. For the United States, this will entail preparation of a national report (not exceeding 20 pages) that should be submitted six weeks prior to the session in which the specific review will take place. (The United States is currently scheduled for the last session of 2010). Governments are encouraged to prepare their reports through a broad consultation process, involving all relevant stakeholders, including nongovernmental organizations (NGOs). The Universal Periodic Review procedure and preparation of a national report reviewing human rights in the United States necessarily will entail a process of self-examination, one that should help to ensure that human rights principles play a central role in U.S. policymaking.

B. Establish and Strengthen Domestic Human Rights Institutions

A new Administration should build and maintain two distinct types of domestic human rights institutions: an implementation body and a monitoring body.[33]

The United States needs two distinct types of entities to support it in its efforts to respect and ensure human rights: an implementation body and a monitoring body.[34] The implementation body should be an executive branch, interagency mechanism that operates *on behalf of the U.S. government* to coordinate implementation of U.S. international human rights obligations and, in accordance with treaty requirements, reports periodically to international treaty bodies. By contrast, a monitoring body, while established and funded by government, should be structured as *an independent, nonpartisan entity* that supports the government and helps ensure that its obligations are fully implemented. By providing oversight as well as education, outreach and technical assistance, the monitoring body would ensure progress by monitoring, assisting, and facilitating respect for human rights at the federal, state, and local levels. Its functions should include (among other things) nonpartisan research, fact finding, hearings, investigations, support for human rights education and training, policy recommendations, and liaising with federal, state, and local officials responsible for protecting human rights.

There may be some overlap in the activities of the implementation and monitoring bodies, but their functions are quite distinct. While the implementation body is responsible for affirmatively implementing U.S. obligations (and occasionally defending against allegations of human rights violations) *on behalf of* the government, the monitoring body is an *independent* national human rights institution that performs an oversight function, even while it plays a supportive role for government. The monitoring body should have a stable mandate that remains unaffected by transitions from one administration to another, to foster its independent, non-partisan nature and the continuity of its ongoing work.[35] Beyond its oversight and government-support role, the value added by the monitoring body is its ability to serve as a nonpartisan, broker that undertakes investigations into allegations of particular human rights violations by government actors.

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1. Implementation Body

Within the first 100 days in office, the new President should issue an Executive Order updating and strengthening Executive Order 13107 to reconstitute and bolster the Interagency Working Group on Human Rights.

The Constitution provides the President with the authority and duty to "take care" to ensure that laws are executed faithfully.[36] This requirement includes enforcement of treaties, which, along with the U.S. Constitution and federal statutes, are "supreme Law of The Land."[37] An effective Interagency Working Group on Human Rights should be established as the executive branch focal point for ensuring that U.S. international human rights responsibilities, under treaties and other sources of international law, are implemented and coordinated among all relevant executive agencies and departments. This Interagency Working Group should provide proactive leadership to ensure attention to human rights concerns. It can cross the divide between agencies focused on domestic and international policy, prevent human rights concerns from falling between the cracks of various departments and agencies, and eliminate duplication of effort. It can also prevent any single office from monopolizing domestic human rights policy without transparency or safeguards – as occurred in the Bush Administration, when the Justice Department's Office of Legal Counsel monopolized policy relating to detention and interrogation.[38]

To establish an effective Interagency Working Group, the new President should issue an Executive Order. It should follow the outlines of Executive Order 13107, which President Clinton signed in 1998,[39] yet be updated and strengthened in several respects. E.O. 13107 contains almost all the elements of a model human rights implementation mechanism, and thus provides a useful starting point for action by a new Administration. Before turning to specific recommendations for revising E.O. 13107, however, some background is in order on that Executive Order and the Working Group it created.

History of Interagency Working Group on Human Rights. After the ratification of two key human rights treaties during his tenure,[40] President Clinton issued Executive Order 13107 on Human Rights Day, December 10, 1998. That Order created the Interagency Working Group on Human Rights Treaties, coordinated by the National Security Council (NSC).[41] Shortly after George W. Bush became President, he issued a National Security Presidential Directive 1 (February 13, 2001), by which a newly created Policy Coordination Committee on Democracy, Human Rights, and International Operations nominally assumed the duties of the Interagency Working Group on Human Rights Treaties. "As a practical matter, however, the Bush Administration does not appear to have implemented the program of action contemplated in the executive order."[42] Instead, international treaty body reports have been coordinated largely within the Office of Legal Adviser in the State Department, with assistance from the NSC and outside consultants, involving other executive agencies as needed.[43]

Mandate of the Working Group. Executive Order 13107 created a strong mandate, stating: "It shall be the policy and practice of the Government…fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the

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[ICCPR], the [Torture Convention], and the [Race Convention], and other relevant treaties … to which the United States is now or may become a party in the future[.]"[44] E.O. 13107 further provided that all executive departments and agencies were to "maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully."[45] The mandate was not merely rhetorical; rather, it required concrete steps such as:

- Appointment of a single contact officer responsible for coordinating implementation of the treaties within areas of each agency's jurisdiction;[46] and

- Creation of the Working Group, chaired by the Assistant to the President for National Security Affairs, with participants at the Assistant Secretary level from the Department of State, the Department of Justice, the Department of Labor, the Department of Defense, the Joint Chiefs of Staff, and other agencies as the chair deemed appropriate (with principal members able to designate alternates to attend meetings in their stead).[47]

Functions of the Interagency Working Group included:[48]

- Coordinating the interagency review of proposed ratification of human rights treaties;

- Coordinating treaty compliance reports (which the United States is required to submit to the respective international body for each treaty it is a party to, typically every five years);

- Coordinating responses by the United States to human rights complaints submitted to the United Nations, the Organization of American States, and other international organizations (and coordinating other tasks in connection with these bodies or their special rapporteurs);

- Developing effective mechanisms to ensure that legislation proposed by either the Administration or Congress is reviewed for conformity with international human rights obligations;

- Developing recommended proposals and mechanisms for improving the monitoring of actions by the various States, Commonwealths, and territories and, where appropriate, of Native Americans and federally recognized Indian tribes;

- Developing plans for public outreach and education programs;

- Coordinating and directing annual review of RUDs to human rights treaties, to consider modification of any RUDs; and

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- Coordinating and directing annual review of all non-trivial complaints or allegations of inconsistency with or breach of international human rights obligations, to determine whether any modifications to U.S. practice or law are in order.

Track Record of the Working Group. According to interviews with former officials involved in the Working Group, even though the Working Group's mandate was not fully implemented, it started an important internal process of education within government. The fact that it was coordinated by the National Security Council was important: this gave the Working Group the authority and weight of the White House, which meant that other agencies felt compelled to be represented at its meetings and that it was able to take a strong lead in interagency coordination. Initially, as might be expected, there was a learning curve. On the one hand, domestic agencies struggled to determine how these international responsibilities fell within their domestic purview; on the other hand, the NSC struggled to determine whom to reach out to in the domestic agencies. But eventually agencies began to coordinate, for example, the collection of data and other information for the first report the United States submitted to the treaty body that oversees the Race Convention. Preparing treaty reports became the Working Group's primary function, however, and it never fully embraced the other educational and policy review functions outlined in the Executive Order. Moreover, once the Working Group's functions were transferred to the Policy Coordination Committee on Democracy, Human Rights, and International Operations during President Bush's reorganization of the NSC, this interagency coordination fell into disuse.

NGO Input into the Interagency Process. NGOs have an important role to play in the process of reporting to international treaty bodies with respect to U.S. obligations under human rights treaties. Increasingly, NGOs have become directly involved in educating the treaty bodies on domestic human rights matters. Thus, the concluding observations and recommendations issued by treaty bodies (following consideration of the government's reports) are often influenced by NGO "shadow" reports submitted alongside the official government report.[49] At the same time, it is useful for NGOs to have input into what the United States itself says to the treaty bodies, since NGOs often have access to information that federal government officials may not have. Thus, during the Clinton Administration, the Interagency Working Group met with NGOs to get input before submitting reports to treaty bodies. A reinvigorated interagency process could benefit from NGO input in treaty report preparation work as well as in the other previously underdeveloped aspects of the interagency mandate.

Proposals for the Future of the Working Group. Given the unrealized potential of the interagency mechanism to date, the new Administration should reconstitute and strengthen it to enable it to carry out the full range of activities envisioned under its original mandate. A return to the Working Group's formalized (as opposed to ad hoc) interagency process would lead to more effective and efficient coordination of domestic human rights policy and help ensure that tasks will not fall between the cracks. Since authority already exists under Executive Order 13107, resuming the Working Group's work would not necessarily require reauthorization. At the same time, there are ways in which the interagency process can be improved. Following is a summary of recommended modifications, which are reflected in the proposed Executive Order

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attached as Appendix B. To accomplish these changes, the new President should issue a new Executive Order replacing E.O. 13107.

- Expand the List of Participating Agencies. In updating the Executive Order, the list of agencies that participate in the Working Group should be expanded, with an eye toward ensuring inclusion of all federal agencies with a significant role to play in human rights implementation. An expanded list of agencies is included in the proposed draft of the new Executive Order in new language amending Section 4(b) of E.O. 13107. In addition to including new entities, such as the Department of Homeland Security, the updated list includes a fuller range of domestic agencies, including the Department of Housing and Urban Development, the Department of Health and Human Services, and the Department of Education. While the importance of a given agency may vary with the treaty in question, the NSC should be able to call upon all relevant agencies to participate where needed in order to ensure full implementation of human rights treaties. Section 4(b) of the proposed new Executive Order continues the practice of requiring representatives at the Assistant Secretary level and encouraging involvement by more senior officials, such as department deputies, as needed, under Section 2, which specifies that "[t]he head of each agency shall designate a single senior level contact officer who will be responsible for overall coordination of the implementation of this order across all areas of the agency's responsibilities."

- Retain NSC in Convening Role, But Improve Outreach to Domestic Agencies. Several advisors consulted in the preparation of this Blueprint recommended that the NSC continue to be the designated convener and chair the Working Group, as under E.O. 13107, because the NSC, as a White House entity, carries weight and influence with other agencies. Thus, these advisors recommended that the Senior Director at the NSC responsible for overseeing human rights (currently the Senior Director for Democracy, Human Rights, and International Organizations) convene and chair the Working Group. At the same time, advisors stressed the need for the NSC to improve outreach to domestic agencies and departments. In order to accomplish this, the revised Executive Order appended to this Blueprint provides for the creation of sub-groups where appropriate, under Section 4(d), designed in part to better target and engage domestic agencies. The sub-groups will allow for more focused work on more discrete topics of interest to particular domestic agencies. In addition to cultivating a deeper sense of ownership of the work by the domestic agencies, the sub-groups would facilitate greater and more efficient coverage of the various anticipated functions of the Working Group.

- Follow Up on Treaty Bodies. In addition to coordinating the preparation of reports to treaty bodies, the Working Group should oversee follow up work with treaty bodies. For example, the Working Group should gather information from relevant agencies so that the United States can report immediately on steps taken pursuant to the Concluding Observations of the Committee on the Elimination of Racial Discrimination on the U.S. report. The Committee monitors the

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International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention). In the Concluding Observations it issued in 2008, the Committee requested that the United States provide additional information on steps taken to address issues including racial profiling, juvenile life in prison without parole, Katrina recovery, the situation of the western Shoshone indigenous peoples, the failure of the government to promote awareness of the Race Convention, and the federal government's lack of outreach to state and local governments regarding their efforts to conform their laws and practices with the Convention. The new Administration will need to report back to the Committee in early 2009 when the Committee next convenes. The Working Group should coordinate and oversee this process on behalf of the government.

- Coordinate with State and Local Governments. Consistent with Section 4(c)(v) of E.O. 13107, which calls for "improving the monitoring of the actions by the various States" and other subnational entities, the Working Group should solicit the involvement of state and local human rights commissions to engage them in the treaty reporting process. The Working Group should also communicate the findings of international bodies to state and local human rights commissions and other relevant actors at the state and local level. In addition, the Working Group should support the work of state and local human rights commissions and other subnational entities through a program that provides grants (along with technical assistance) in response to proposals from states and localities. State and local government entities should be encouraged to submit these proposals in partnership with nonprofits to improve outreach to civil society in strengthening the fabric of domestic human rights protections. The new Administration could create an office to oversee these grants and technical assistance, similar to the Justice Department's Office on Violence Against Women. Another possible model is the Department of Housing and Urban Development, which provides grants to state human rights commissions through its Fair Housing Initiatives Program to conduct fair housing education and outreach.

- Use Technology to Increase Transparency with Civil Society. The Working Group should create an open and transparent process for treaty reporting, perhaps coordinated by permanent staffers (as is done for the State Department's human rights reports on other countries). A database for tracking compliance with various treaty obligations should be continually updated and open to NGOs and the general public. Mechanisms should be created to allow other branches of government and civil society to review U.S. treaty reports before the reports are submitted to international bodies.

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- Coordinate Human Rights Impact Studies of Pending Legislation, Budgets, and Regulations. The Working Group should coordinate a plan to conduct human rights impact studies of pending legislation, as well as pending budgets, appropriations, and regulations, to ensure conformity with international human rights obligations. The Working Group may solicit executive branch departments and agencies to conduct their own human rights impact studies.[50] The federal budget and major federal legislation have been evaluated for their impacts on the environment and on families, and this evaluation could usefully be extended to human rights.[51] Other models to consider include the City of San Francisco, which has undertaken human rights audits of its city agencies.[52] Additionally, the new Administration could draw on the comparative experience of countries like Britain and New Zealand, each of which assesses pending legislation for its impact on human rights.[53]

- Coordinate with NGOs. The Working Group should explore opportunities to recast the relationship between government and civil society as a partnership in achieving domestic human rights. A possible model includes the interagency process created to track down human rights abusers, organized by the Justice Department's Office of Special Investigation.[54] This office meets periodically with NGOs, whose input is seen as meaningful because they can assist in identifying war criminals for deportation or prosecution.

- Include Customary International Law Within the Scope of Mandate. While the main focus of the Working Group is human rights treaties, under the new Executive Order, its mandate would be broadened slightly to include customary international law. Thus, the word "Treaties," which was included in the title of the Working Group created by E.O. 13107, would be dropped from the name of the reconstituted Working Group. Customary international law, developed through the practice of governments and followed by them from a sense of legal obligation, is somewhat analogous to our domestic common law tradition, which dates back to British colonial times. There is a core body of customary international law norms that is widely agreed upon. It includes the prohibitions on governments practicing, encouraging, or condoning, as a matter of state policy: torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; the murder or causing the disappearance of individuals; systematic racial discrimination; genocide; and slavery or slave trade.[55] For the most part, the conduct that customary international law prohibits is already prohibited by treaties the United States has ratified and/or by U.S. domestic law. Customary international law is important, however, in those rare cases where the conduct is *not* already regulated by treaty or under domestic law. For example, the Bush Administration has adopted the view that neither the Torture Convention nor its implementing legislation, the Federal Torture Statute, prohibits coercive interrogation techniques used by the CIA.[56] Customary international law fills the gap.

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- Coordinate Periodic Review of U.S. Record. Finally, as noted above in Part IIA, since the United States will be called upon to prepare a comprehensive report on U.S. human rights practice in 2010 under the Universal Periodic Review process of the U.N. Human Rights Council, the Administration should institute a periodic human rights review of the United States and prepare periodic reports, much like the annual country reports prepared by the State Department with respect to every other country in the world. The Working Group could help coordinate the preparation of these reports.

2. Monitoring Body

The next Administration should support the establishment of an independent, nonpartisan national human rights commission. This could be accomplished by restructuring and strengthening the U.S. Commission on Civil Rights to convert it into an effective U.S. Commission on Civil and Human Rights.

The new Administration should support the establishment of an independent body to monitor human rights in the United States, which could be done by restructuring and revitalizing the U.S. Civil Rights Commission as a U.S. Commission on Civil and *Human* Rights.

Why a *Human* Rights Commission? The U.S. Commission on Civil Rights, established in 1957, was once the "conscience of the nation" as the United States transitioned to a post-Jim Crow era. So, too, a U.S. Commission on Civil and *Human* Rights could perform a significant role in re-establishing the United States' leadership role in human rights. The United States emerged from the Civil War with the Reconstruction and Freedman's Bureau. It emerged from the Great Depression with the New Deal and its institutions; from World War II with FDR's Four Freedoms and the United Nations. And it emerged from the civil rights revolution of the1950s and 1960s with major civil rights legislation, the establishment of the Civil Rights Division at the U.S. Department of Justice, and the U.S. Civil Rights Commission. In each instance, the protection of human rights and human dignity were cornerstones for securing U.S. national interests, whether in terms of human security, economic security, or national and global security. Similarly, our current transitional moment calls for a renewed commitment to our founding principles concerning respect for basic human rights and human dignity. A U.S. Commission on Civil and *Human* Rights would provide a new model of governance to support that commitment.

Before outlining the status, composition, mandate, and method of operation of the proposed Commission, it is useful first to compare and contrast alternative approaches to human rights monitoring that are employed in different parts of the world, and then to explain why the commission model seems most appropriate for the United States.

The possible models. Internationally, national human rights monitoring bodies vary with respect to their legal basis and jurisdiction, functions and powers, and structure and composition. These institutions can be grouped into four basic models: the human rights commission, the advisory committee, the ombudsman, and the human rights institute.[57] While

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the advisory committee and the human rights institute models described below are attractive for countries that already have an effective monitoring agency, in the absence of effective monitoring, a human rights commission or ombudsman model is more suitable. Ultimately, this Blueprint purposes the human rights commission model for the United States.

The **human rights commission model** is predominant in Commonwealth countries, such as Australia (1981), Canada (1977), New Zealand (1977) and the United Kingdom (1976). The commission model is often characterized by a quasi-judicial investigatory authority with jurisdiction over public and private sectors. As with the U.S. Commission on Civil Rights, the jurisdiction of these early commissions was limited to the implementation of anti-discrimination or equality legislation. In the 1990s, several Commonwealth countries broadened the mandate of these commissions to more general human rights mandates going beyond enforcement of traditional anti-discrimination laws. Human rights commissions are typically comprised of technocratic "experts" or, alternatively, have a more pluralistic composition that brings together various sectors of society.

Like human rights commissions, the **human rights ombudsman model** is characterized by investigative powers and authority to monitor human rights and may engage in educational activities as well. But it differs from the commission model in that the ombudsman is generally a single individual appointed by the legislature and typically only investigates the activities of the public sector, and often solely the executive branch. This model flourished in Latin American and Central and Eastern European as states in these regions began to strengthen their human rights structures in the 1980s and 1990s. The human rights ombudsman model actually combines features of the classic ombudsman and human rights commission models, and is thus often referred to as a hybrid approach. The classic Scandinavian ombudsman traditionally focused on monitoring the conduct of public administration for legality and fairness. Moving beyond this traditional role, the human rights ombudsman has been given an explicit mandate over promotion and program of human rights and has taken on some of the activities undertaken by human rights commissions.

The **advisory committee model** is typified by the National Consultative Commission of Human Rights of France. This model emphasizes consultation more than investigation and monitoring and is oriented toward creating bridges between civil society and the government. In contrast with the quasi-judicial watchdog role of the human rights commission model, the emphasis of the French model is on assisting the government with expert advice, such as through the provision of human rights research. But the composition and representation of advisory committees and human rights commissions are similar in that both are multi-member bodies with pluralistic representation, frequently including NGO representatives, academics and other human rights experts, along with some form of governmental representation.

Similar to the advisory committee model, the **human rights institute model** emphasizes human rights education, information, research and documentation rather than investigation. Yet, in terms of the composition, the work is usually carried out by professionals with multi-disciplinary expertise in different fields, supervised by a governing board. This model may be appropriate for states that already have in place a well functioning human rights culture and an

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effective monitoring entity, such as an ombudsman. As of 2006, the Danish Institute for Human Rights was the only accredited example of this model. Much of its research and work are geared toward benefiting other countries.

Of all of these models, the national human rights commission model is best-suited to the United States. It builds on the U.S. tradition of independent, nonpartisan commissions, exemplified by the U.S. Civil Rights Commission (as originally set up) as well as the many human rights commissions at the state and local levels throughout the United States.[58] In addition, a commission could serve as a nonpartisan broker in conducting inquiries into allegations of particular human rights violations by government actors. For example, an independent commission could examine allegations of human rights violations related to the government's response to Hurricane Katrina or to the terrorist attacks of September 11, 2001. An administration may be perceived as having a partisan stake in the outcome in ways that an independent commission would not. Moreover, short of conducting such inquiries, a commission could provide technical expertise to other investigations conducted by, for example, Congress, a presidential commission, or a special prosecutor. The proposed U.S. Commission on Civil and Human Rights thus should be understood as a complement (not an alternative) to proposals that may be offered by others for accountability structures related, for example, to the Bush Administration's counterterrorism measures.

So what would the newly constituted U.S. Commission on Civil and Human Rights look like, and how would it function? Here are the basic outlines.

Status and Composition. The new U.S. Commission on Civil and Human Rights should be established and financed by government, but administered with a degree of independence from the political branches and political parties, so that it can play an effective oversight role. The Commission would derive its mandate and authority from a statute (specifying its composition, sphere of competence, and methods of operation)[59] such that the mandate is stable and remains relatively unaffected by transitions from one administration to another. Establishing the Commission as independent and providing it with adequate funding would facilitate its ability to have its own staff and capacity to perform its work in an impartial manner without external interference.[60] The official act creating the institution should safeguard the independence of the Commission's personnel by establishing an impartial appointment procedure.[61] The Commissioners themselves should be nominated by the President and confirmed by the Senate (in contrast to the current process for appointment of members of the Civil Rights Commission), and should be selected with the goal of ensuring highly qualified leadership, broad bipartisan consensus, accountability, and professionalization of the Commission's work.[62]

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Mandate. The mandate for U.S. Commission on Civil and Human Rights should be broad. The Commission should be authorized to perform a wide array of activities,[63] including the following.[64]

- To support the executive branch and/or Congress generally, the Commission should be authorized to issue opinions, recommendations, proposals and reports related to:
  - Whether any current or proposed legislative or administrative provision conforms with international human rights obligations, as well as any recommendation of new legislation, the amendment of legislation in force, or the adoption or amendment of administrative measures;
  - Human rights in the United States, whether generally, in a particular part of the country, or related to a particular issue;
  - Best practices in monitoring achievements and shortcomings in human rights;
  - Human rights training of government officials; and
  - Ratification of unratified instruments, and implementation of ratified treaties.
- To support the government in its reports to international and regional organizations, the Commission should be empowered to:
  - Contribute to the reports the that United States submits to U.N. bodies, to entities affiliated with the Organization of American States, or to other appropriate international or regional institutions;[65]
  - Where appropriate, submit its own reports (such as a "shadow" or alternative to the government's report) to U.N. bodies, to entities affiliated with the Organization of American States, or to other appropriate international or regional institutions, with due respect for the Commission's independence; and
  - Cooperate with any organization of the U.N. system, regional system, or national system of other countries that are competent in the areas of the protection and promotion of human rights.
- To support civil society, the Commission should be authorized to:
  - Assist in the formulation of programs for teaching and researching human rights;

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- Support the development of curricular material for human rights education in schools, universities and professional circles;

- Publicize human rights and efforts to combat all forms of discrimination, by increasing public awareness, especially through information, education, training, and by making use of all press organs; and

- Investigate, hold hearings and consider complaints, and settle such complaints where appropriate, for example, through conciliation.

Methods of Operation. The U.S. Commission on Civil and Human Rights should be able to: consider any questions falling within its competence, whether or not they are submitted by the government; hear any person and obtain any information and any documents necessary for assessing situations falling within its competence; hold public hearings; publicize its opinions and recommendations and otherwise address public opinion directly or through the media; meet on a regular basis with all its members; establish working groups from among its members as needed, and establish local or regional units to assist it in its functions; and maintain consultation with the other bodies responsible for human rights.

Moreover, in light of the significant role played by NGOs in expanding and effectuating the work of human rights commissions, the U.S. Commission on Civil and Human Rights should cultivate relationships with NGOs devoted to: human rights; economic and social development; ending discrimination; protecting particularly vulnerable groups; and working in other specialized areas.[66] This should be part of an effort by the Commission to develop partnerships with civil society to identify human rights problems and to develop and implement solutions.[67]

In developing the structure of the new Commission, the new Administration might draw on the comparative experience of other countries, as well as the experiences of state and local human rights commissions in the United States that have played a role in monitoring international human rights requirements. The new Administration should evaluate how to avoid the partisan gridlock that has sometimes characterized the U.S. Civil Rights Commission, strengthen its independence, and reconceive its mandate from civil rights to civil and *human* rights.

C. Ratify and Implement Human Rights Treaties

The new President should support ratification of important human rights treaties, accompanied by fully adequate implementing legislation, and work with Congress to develop legislation to implement and strengthen the treaties that already have been ratified.

Although the United States has ratified a number of major human rights treaties, other significant treaties remain unratified. The main human rights treaties the United States has ratified include the International Covenant on Civil and Political Rights (ICCPR); the Race Convention; the Convention on the Prevention and Punishment of the Crime of Genocide; the

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Torture Convention; Protocol to the Refugee Convention; and the Child Soldiers Protocol (Protocol to the Convention on the Rights of the Child).[68] The new President should also submit for consideration to the Senate several outstanding major human rights treaties that the United States has signed but not ratified, as well as fully adequate implementing legislation. These treaties, which would impact a range of domestic human rights, include (in alphabetical order) the American Convention on Human Rights; the Convention on the Elimination of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child; the Convention on Rights of Persons with Disabilities; the International Convention for the Protection of all Persons from Enforced Disappearances; International Covenant on Economic, Social and Cultural Rights; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and the Optional Protocol to the Convention against Torture.[69] The United States is only one of two U.N. member states (the other being Somalia) that has not ratified the Convention on the Rights of the Child. Moreover, the United States could be an even more forceful promoter of women's rights overseas if it were to ratify CEDAW and participate in the treaty body overseeing CEDAW. Importantly, CEDAW guarantees *paid* parental leave and equal pay, two top policy priorities for American working families.

Additionally, a new President should work with Congress to develop and adopt implementing legislation that would more fully effectuate treaties that already have been ratified. Consistent with the obligation to *protect* rights (discussed above in Part I), most human rights treaties require that the parties to the treaty adopt legislation to give effect to the rights therein.[70] While many treaties are automatically enforceable or "self-executing," the United States has frequently conditioned ratification on declarations specifying human rights treaties "non-self-executing." Once declared non-self-executing, a treaty arguably requires implementing legislation to be enforceable. The over-reliance on attaching non-self-execution declarations to treaties upon ratification is controversial. In fact, the practice has been called "anti-constitutional," or against the spirit of the Constitution.[71] In the 1950s, segregationist Senator John Bricker tried to amend the Constitution to make it more difficult to enforce human rights treaties, which he feared were a backdoor approach to passing anti-lynching and other civil rights legislation. While the Bricker Amendment efforts were unsuccessful, we in effect live with the "ghost of Senator Bricker" because the burdensome reservations, understandings, and declarations attached to treaties at the time of ratification mimic what Senator Bricker sought to achieve by constitutional amendment.[72] Implementing legislation could help to address the burden posed by non-self-execution declarations by creating enforcement mechanisms, such as judicial remedies, for human rights obligations.

While Congress has passed legislation to implement certain rights (as discussed in Part I above concerning refugee protection and torture), Congress has yet to enact implementing legislation to more fully enforce the Race Convention and the ICCPR. Such implementing legislation would be important for the ICCPR to effectuate a range of rights, including, for example, those affecting prisoners and suspects, such as those detained in the course of U.S. counterterrorism efforts.[73]

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Implementing legislation would also enable the United States to reach more fully all the forms of discrimination the Race Convention addresses. The Race Convention sweeps more broadly than the Constitution's Equal Protection Clause, which has been interpreted to prohibit only intentional (or purposeful) discrimination. In contrast, the text of the Race Convention prohibits discrimination that "has the purpose *or effect* of nullifying or impairing . . . human rights[.]"[74] While some U.S. civil rights statutes do reach facially neutral conduct with a discriminatory impact, these statutes only apply in particular contexts and have been narrowly interpreted by courts. Thus, U.S. domestic law does not adequately address measures that have a discriminatory impact in the absence of a showing of discriminatory intent (i.e., "smoking gun" evidence of explicit discrimination). Yet discrimination today is deeply structural and institutional (that is, built into the structure of institutions, as in the case of university admissions preferences for alumni children, which predominantly benefit white children). Further, discriminatory conduct is often subtle and intertwined with other barriers, such as poverty, gender, disability, ethnicity, nationality, and religion. In addition to emphasizing the interdependence of rights as well as the economic dimension of inequality, the Race Convention reflects a broader conception of equality that better embraces those most in need of the law's protection.

The need for treaty implementation at the domestic level in the United States was also made starkly apparent by the Supreme Court's decision in *Medellín v. Texas*.[75] In *Medellín*, the Court rejected the enforceability of an International Court of Justice (ICJ) opinion regarding the rights of Mexican nationals on death row in the United States. The ICJ had ruled that the United States had violated the Vienna Convention on Consular Relations by failing to inform 51 named Mexican nationals in state prison in Texas of their rights under that Convention. The Vienna Consular Convention provides that arrested and detained foreign nationals be informed of the right to consult their consulate. To remedy the failure to inform, the ICJ found that the Mexican nationals were entitled to "review and reconsideration" of their state court convictions and sentences. In rejecting the ICJ judgment as a binding obligation, the Court rebuffed the argument that a number of international instruments – the Vienna Consular Convention Optional Protocol, U.N. Charter, and ICJ Statute – gave the ICJ judgment binding effect in the domestic courts of the United States, without further action by the political branches.

In the aftermath of *Medellín*, it is critical that the Administration work with Congress to take the necessary steps to reassure other countries who are parties to treaties the U.S. has signed and ratified that the United States remains committed to honoring its treaty commitments. The American Bar Association and the American Society of International Law have developed a joint task force that will study and make recommendations concerning U.S. treaty practice in the wake of *Medellín.* These recommendations will likely provide an excellent roadmap for the new Administration.

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D. Review and Withdraw Harmful Reservations, Understandings and Declarations

The new Administration should periodically review all reservations, understandings, and declarations (RUDs) that were attached to treaties at the time of ratification and take steps to withdraw RUDs limiting the impact of human rights treaties, where appropriate.

Upon ratifying human rights treaties, the United States typically attaches burdensome RUDs that limit the scope of its international obligations, such that these obligations are brought into line with existing domestic law (rather than the reverse). These RUDs have been extensively criticized both domestically and internationally, including by international human rights treaty bodies.

Reservations are unilateral statements that purport "to exclude or modify the legal effect" of a treaty provision in their application to the reserving state.[76] In some instances, the United States attaches a reservation that may be constitutionally compelled, because a particular treaty provision conflicts with the Supreme Court's interpretation of the U.S. Constitution. Such is the case with the First Amendment-based reservations related to the provisions in the ICCPR and the Race Convention on hate speech. However, other reservations, those that are not constitutionally mandated, should be removed. For example, the United States should withdraw its reservation to the ICCPR prohibition on treating juveniles as adults in the criminal justice system, since the U.S. Constitution does not compel government to treat juveniles as adults.[77] Also, reservations which seek to limit the reach of a treaty obligation to the narrower scope of a right provided under the U.S. Constitution are not constitutionally compelled. For example, the United States has attached reservations to the ICCPR and Torture Convention, in both cases limiting the core prohibition on "cruel, inhuman or degrading treatment or punishment" to the more narrow constitutional prohibition on cruel *and* unusual punishment (that is, as it has been interpreted by the Supreme Court).[78]

Unlike reservations, understandings do not seek to exclude or modify the legal effect of a treaty provision. Typically, an understanding seeks to advance an interpretation of a particular provision that reflects the accepted view of the provision internationally. However, the United States typically attaches uniquely American understandings, related to federalism, that impede implementation of human rights treaties. Each time it ratifies a human rights treaty, the United States declares that it "understands" that treaty ratification would not, in effect, alter the balance of authority between the federal and state government. While such a statement appears benign on its face, far from being constitutionally required, such understandings are in fact in tension with the Constitution's Supremacy Clause, which states that treaties are supreme law of the land, along with the Constitution and federal statutes.[79] Despite the problematic nature of these understandings as a matter of law, as a symbolic matter, federalism "understandings" create a chilling effect on the federal government's ability to respect its treaty obligations in the face of recalcitrant state and local governments in matters traditionally falling in part within the realm of state and local authority, such as criminal justice matters.[80]

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Unlike reservations and understandings, which express views externally to the other treaty parties, a declaration relates to the internal, domestic operation of a treaty. Declarations can also be damaging, for example, where the United States has declared a human rights treaty it has ratified non-self-executing, in an effort to preclude enforcement of these treaties in U.S. courts. Specifically, the United States has declared the substantive guarantees of the ICCPR, the Torture Convention, and the Race Convention all to be non-self-executing.

The incoming Administration should review all RUDs, with an eye toward withdrawing any unnecessary and harmful RUDs. Over time, the only reservations that should be retained are those that are strictly required because of irreconcilable differences between U.S. constitutional law and treaty law, particularly where U.S. law provides an arguably higher level of protection, such in the area of the First Amendment concerning free speech.[81] In other cases, rather than restricting and distorting the scope of international obligations to conform to domestic law, the United States should adopt implementing legislation that would make our laws consistent with treaty obligations (as discussed above). Where this is not possible, existing RUDs should be reviewed periodically, to assess whether they can be eventually modified or withdrawn. In fact, the President can withdraw understandings and declarations on his own, since treaty interpretation is under his purview. The original Executive Order creating the Interagency Working Group on Human Rights Treaties in 1998 states that RUDs should be reviewed annually. To the extent RUDs are attached to newly ratified treaties, when implementing legislation is adopted, sunset clauses should be established to create a concrete mechanism to phase out or, at least, revisit the necessity of each RUD.

E. Ensure That the Judicial Branch Recognizes and Honors Human Rights Principles

The new President should nominate judges who will follow the rule of law, which includes recognition that ratified treaties and customary international law are the law of the land. Additionally, the Administration should support judicial human rights education and support the role of courts in providing full and appropriate hearings on allegations of human rights violations.

Recognizing the critical role of the courts in the protection of human rights, the President should nominate judges who recognize that, like the U.S. Constitution and federal statutes, ratified treaties are the "supreme Law of The Land" under the Supremacy Clause of the U.S. Constitution. Judicial nominees should also have an appreciation for the fact that customary international law is the law of the land.[82] In addition, the new Administration should support ongoing judicial education in human rights, perhaps through the new U.S. Commission on Civil and Human Rights, the Federal Judicial Center, or nongovernmental entities such as the Aspen Institute (which provides human rights education to judges). Further, the Administration should ensure that individuals have recourse to courts in the United States in order to vindicate their human rights. For example, the new Administration should support robust access to the courts for counterterrorism detainees pursuant to the right of habeas corpus as confirmed by the Supreme Court (over the opposition of the Bush Administration) in *Boumediene v. Bush*.[83]

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CONCLUSION

As we prepare for the ritual of transition from one presidential administration to the next, the idea of creating new forms of governance to affirm the human rights principles on which this great nation was built seems both a very old idea and a new idea whose time has come. Human rights at home is an old idea, because it is at the foundation of our national identity. Human rights at home is a new idea, because we Americans typically refer to human rights when discussing events outside the United States, while we use the discourse of constitutional rights to refer to our own situation. And yet, our Constitution is a manifestation of human rights. Both notions – human rights and constitutional rights – recognize that fundamental rights come not from the generosity of government, but from our inherent humanity.

Nearly a half-century ago, Eleanor Roosevelt said:

> Where, after all, do universal rights begin? In small places, close to home . . . . Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[84]

The President who takes office in 2009 will have the opportunity to strengthen this commitment to human rights, both abroad and right here at home.

NOTES

[1] President John F. Kennedy, Inaugural Address (Jan. 20, 1961) (emphasis added) (noting "the same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God").
[2] President Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989) (describing America as a "shining city on a hill").
[3] William Jefferson Clinton, Speech at Democratic National Convention (Aug. 27, 2008).
[4] The Opportunity Agenda, Human Rights in the U.S.: Findings from a National Survey, *in* Human Rights in the U.S.: Opinion and Research with Advocates, Journalists, and the General Public 3 (Aug. 2007), *available at* http://www.opportunityagenda.org/atf/cf/{2ACB2581-1559-47D6-8973-70CD23C286CB}/HUMAN%20RIGHTS%20REPORT.PDF (noting that in a recent random survey of adults in the United States, 80% agree with this notion of human rights).
[5] For substantive proposals, see, e.g., Human Rights Watch, *Human Rights Agenda for the New Administration* (2008); Human Rights First, *How to End Torture and Cruel Treatment: Blueprint for the Next Administration* (2008); and *A Progressive Blueprint Overview: National Security and Civil Rights*, *Restoring the Rule of Law: Hearing Before the Subomm. on the Constitution*, 110th Cong. (2008) (statement of Harold Hongju Koh, Dean, Yale Law School), *video available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=3550.
[6] ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS 8 (2005).
[7] HUMAN RIGHTS FIRST, IN THE NATIONAL INTEREST (2001).
[8] George Shultz, U.S. Dept. of State, *Current Policy*, No. 589, June 24, 1984; No. 629, Oct. 25, 1984 ("[H]uman rights are at the core of our foreign policy because they are central to our conception of ourselves").
[9] U.N. Charter art. 1, para. 3 (recognizing the promotion and respect for human rights to be one of the primary purposes of the United Nations).
[10] *See* Harold Hongju Koh, *Can the President Be Torturer-in-Chief?*, 81 IND. L.J. 1145 (2006) (documenting both).

[11] Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002) (attributing the statement to Louis Henkin).
[12] See, for example, Article 2 of the International Covenant on Civil and Political Rights, (ICCPR), which provides a core obligation for "[t]he State Party to the present Covenant to undertake[] to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant[.]" International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).
[13] *See* Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 Yale J. Int'l Law 1, 8 (forthcoming 2009) (manuscript on file with author) [hereinafter Melish, *Paradox to Subsidiarity*].
[14] *See*, *e.g.*, ICCPR art. 2(2) ("each State Party to the present Covenant undertakes to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant"); *see also* ICCPR art. 2(3) ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights … are violated shall have an effective remedy").
[15] *See* Melish, *Paradox to Subsidiarity*, *supra* note 13, at 10 and 12.
[16] *Compare*, on the one hand, the U.S. position in Breard v. Greene, 523 U.S. 371 (1998) (per curiam) (while the U.S. Secretary of State wrote a letter to the Governor of Virginia urging that Virginia stay the execution, the Departments of State and Justice filed an amicus brief urging the Supreme Court to deny the death row prisoner's petition, stating "our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States") *and* the U.S. position in The LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 497 (Judgment of June 27) (LaGrand) (noting the Arizona state's criminal procedural default rule prevented U.S. courts from "attaching any legal significance" to the treaty violation) *with*, on the other hand, the U.S. position in Medellín v. Texas, 128 S. Ct. 1346 (2008) (after defending a Texas criminal procedural default rule as a bar to Mexico's challenge in the ICJ on behalf of 51 Mexican death row prisoners, the Bush Administration reversed course in the Supreme Court, issuing a President's Memorandum determining that the states must provide review and reconsideration of the claims of the 51 Mexican nationals without regard to state procedural default rules).
[17] Melish, *Paradox to Subsidiarity*, *supra* note 13, at 10. *See also id*. at 13 (calling for "locally-relevant" expressions of human rights, not "cookie-cutter transplants determined and imposed by international experts"); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000) (arguing that genuine domestic incorporation of international law involves more than "a conveyor belt that delivers international law to the people"); and Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 450 U. PENN. L.R. 245, 250 (2001) (supporting "'dialogic federalism' because it is based on the assumption that dialogue among various levels of government is critical to meaningful implementation of international human rights law in the United States").
[18] *See* Melish, *Paradox to Subsidiarity*, *supra* note 13, at 11.
[19] *Id.* at 14-15.
[20] Ian Urbina, *Some Fear Foreclosures Mean Loss of Vote*, N.Y. TIMES, Sept. 25, 2008, at A18.
[21] Amartya Sen, *The Right Not To Be Hungry*, *in* THE RIGHT TO FOOD (Philip Alston & K Tomasevski eds., 1984).
[22] *See*, *e.g.*, Convention on the Elimination of All Forms of Racial Discrimination (CERD) General Comment 25 (on gender-related dimensions of racial discrimination) (2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/76a293e49a88bd23802568bd00538d83?Opendocument; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), preamble, para. 10 ("Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination … is essential to the full enjoyment of the rights of men and women"); CEDAW Gen. Recommendation 25, para. 5 (on temporary special measures, recognizing that "women have suffered, and continue to suffer from *various forms of discrimination* because they are women") (2004) (emphasis added), *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf.
[23] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).
[24] Federal Torture Statute, 18 U.S.C. 2340 (1994).
[25] However, President Bush vetoed legislation that would have closed a loophole which the White House claims exempts CIA interrogations of terror suspects from the ban on torture. Steven Lee Myers, *Veto of Bill on C.I.A. Tactics Affirms Bush's Legacy*, N.Y. TIMES (Mar. 9, 2008).
[26] For example, the Federal Torture Statute establishes a federal remedy that makes violators liable for fines and imprisonment. Similarly, the War Crimes Act, passed in 1996, addresses the need for protection by establishing a

federal remedy that makes war crimes violators liable for fines and imprisonment. *See* War Crimes Act, 18 U.S.C. § 2441 (1996). The War Crimes Act was passed to implement U.S. obligations under the Geneva Conventions, which require criminal penalties for grave breaches of the Conventions. While this statute was weakened by the Military Commissions Act of 2006, it still makes certain categories of war crimes prosecutable offenses, including torture.

[27] Prison Litig. Reform Act, 42 U.S.C. § 1997e(4)(e) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury").

[28] For further discussion, *see* Human Rights Watch, Statement on Proposed Revisions to the Prison Litig. Reform Act, Hearing in the House Judiciary Subcomm. (Nov. 8, 2007), *available at* http://hrw.org/english/docs/2007/11/07/usdom17277_txt.htm.

[29] The restrictions in PLRA have been criticized by human rights groups. *See*, *e.g.*, Human Rights Watch, Statement on Proposed Revisions to the Prison Litig. Reform Act, Hearing in the House Judiciary Subcomm. (Nov. 8, 2007), *available at* http://hrw.org/english/docs/2007/11/07/usdom17277_txt.htm.

[30] NESRI & NHeLP, *Pursuing A New Vision For Health Care: A Human Rights Assessment of the Presidential Candidates' Proposals* (Jan. 2008). In fact, one candidate has stated that he believes that "every American has the *right* to affordable, comprehensive, and portable health coverage." *Barack Obama's Plan for a Healthy America: Lowering Health Care Costs and Ensuring Affordable, High-Quality Health Care for All*, *available at* http://www.obama08-wa.com/files/Blog_Obama_Health_Plan.pdf, at 3 (2007) (emphasis added); *see* also Barack Obama, Second McCain-Obama Presidential Debate (Oct. 7, 2008) (in responding to Tom Brokaw's question – "Is health care in America a privilege, a right, or a responsibility?" – Obama stated that health care is "a right for every American.") (*transcript available at* http://www.debates.org/pages/trans2008c.html). The other candidate has also pledged "access to better health care, at lower cost, for every American." McCain-Palin on Health Care (2008), http://www.johnmccain.com/downloads/issues/healthcare.pdf.

[31] The Opportunity Agenda, Human Rights in the U.S.: Findings from a National Survey, *in* Human Rights in the U.S.: Opinion and Research with Advocates, Journalists, and the General Public 4 (Aug. 2007), *available at* http://www.opportunityagenda.org/atf/cf/{2ACB2581-1559-47D6-8973-70CD23C286CB}/HUMAN%20RIGHTS%20REPORT.PDF (noting that in a recent random survey of adults in the United States, 72% believe access to health care should be considered a human right; 68% believe fair pay for workers to meet basic needs for food and housing should be considered a human right).

[32] Three examples are the Aspen Institute's Justice and Society Program (federal judges training), the Columbia University collaboration with the U.N. Institute for Training and Research (training staff from foreign government missions to the U.N.), and Fordham University's Leitner Center for International Law and Justice (training Ghanaian judges and police officials).

[33] This discussion summarizes and expands on recommendations by Tara Melish. *See* Melish, *Paradox to Subsidiarity*, *supra* note 13, at 78-84.

[34] Human rights treaties and treaty bodies are increasingly recognizing the importance of these two distinct types of supervisory arrangements. *See*, *e.g.*, International Convention on the Rights and Dignity of Persons with Disabilities art. 33, G.A. Res. A/61/611 (Dec. 13, 2006) (recognizing the need for state parties to establish both national *implementation* mechanisms and national *monitoring* mechanisms).

[35] The monitoring body could be established in accordance with the Principles relating to the Status of National Human Rights Institutions (the "Paris Principles"), which outline minimum standards of independence for national human rights institutions and were endorsed by the U.N. General Assembly. Paris Principles, National Institutions for the Promotion and Protection of Human Rights, Annex, G.A. Res 48/134 (Dec. 20, 1993).

[36] U.S. CONST. art II, § 3.

[37] *Id*. art. VI.

[38] No one department or office is necessarily immune from the parochialism of its particular mandate or agenda. While in recent years the State Department has fought for greater compliance with international law (for example with Geneva Convention rights for detainees), during the Reagan Administration, the State Department eliminated inclusion of economic rights from its annual country reports on human rights.

[39] Exec. Order No. 13,107, §1, 63 Fed. Reg. 68,991 (1998), 38 ILM 493 (1999).

[40] The Torture Convention and Race Convention were both ratified in 1994. The ICCPR was ratified a few months before Clinton came to office, in 1992.

[41] Exec. Order No. 13,107, *supra* note 39.

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[42] Eric P. Schwartz, *Building Human Rights into the Government Infrastructure*, *in* THE FUTURE OF HUMAN RIGHTS: U.S. POLICY FOR A NEW ERA 233 (William F. Schulz ed., 2008).
[43] *See* Melish, *Paradox to Subsidiarity*, *supra* note 13, at 23.
[44] Exec. Order No. 13,107, *supra* note 39, §1(a).
[45] *Id*., §2.
[46] *Id*.
[47] *Id*. § 4.
[48] *Id*. §4 (c).
[49] In fact, NGO influence on the treaty reporting process has come under attack by the Heritage Foundation. *See*, *e.g.*, Steven Groves, *The Inequities of the U.N. Committee on the Elimination of Racial Discrimination* (Aug. 7, 2008), *available at* http://www.heritage.org/Research/InternationalOrganizations/bg2168.cfm.
[50] *See* Catherine Albisa, Martha F. Davis & Cynthia Soohoo, *Restoring Government Leadership on Human Rights at Home*, *in* MANDATE FOR CHANGE: POLICIES AND LEADERSHIP FOR 2009 AND BEYOND 406, __ (offering this recommendation) (Lexington Books, forthcoming 2009) (draft on file with author).
[51]The new Administration could look to environmental impact statements and family impact statements as possible models, in light of the federal government experience in these areas. Environmental impact statements have been undertaken pursuant to the National Environmental Policies Act, and family impact statements have been undertaken pursuant to Executive Order 12,606.
[52] Albisa, Davis & Soohoo, *Restoring Government Leadership on Human Rights at Home*, at 3.
[53] *Id*.
[54] The Justice Department's Office of Special Investigation was initially established to hunt Nazis and now functions to track down persons who have come to the United States from abroad and are suspected of having committed war crimes or other international offenses.
[55] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702.
[56] Steven Lee Myers, *Veto of Bill on C.I.A. Tactics Affirms Bush's Legacy*, N.Y. TIMES (Mar. 9, 2008).
[57] Much of the information regarding these four models draws from ANNA-ELINA POHJOLAINEN, THE EVOLUTION OF NATIONAL HUMAN RIGHTS INSTITUTIONS: THE ROLE OF THE UNITED NATIONS 16 (2006), *available at* http://www.nhri.net/nationaldatalist.asp (listing national human rights institutions that have been accredited by the International Coordinating Committee of National Human Rights Institutions). These institutions have proliferated throughout every region of the world.
[58] *See* Shubhankar Dam, *Lessons from National Human Rights Institutions Around the World for State and Local Human Rights Commissions in the United States*, *in* Executive Session Papers: Human Rights Commissions and Criminal Justice, 5-6 (Aug. 2007), *available at* http://www.hrccj.org/pdfs/nhri.pdf.
[59] Paris Principles, *supra* note 35, Competence and responsibilities, para. 2; Composition and guarantees of independence and pluralism, para. 2.
[60] POHJOLAINEN, THE EVOLUTION OF NATIONAL HUMAN RIGHTS INSTITUTIONS, at 6.
[61] Paris Principles, *supra* note 35, Composition and guarantees of independence and pluralism, para. 3.
[62] While the original appointment process for appointment to the U.S. Civil Rights Commission was presidential appointment and Senate confirmation, under the current practice, four members are appointed by the President and four members are appointed by Congress (two by the minority party leaders and two by majority party leaders of each House of Congress). Even though not more than four members may be of the same political party at any one time, the practice of certain commissioners identifying as "independent" has at times obscured underlying party loyalties. Because the structure of the current appointments process is more likely to make commissioners feel beholden to the individuals who appointed them, the Commission is more politicized now than when appointments were made by presidential appointment and Senate confirmation.
[63] *See* Paris Principles, *supra* note 35, Composition and guarantees of independence and pluralism, para. 2 (stating that a national human rights institution "shall be given as broad a mandate as possible"); POHJOLAINEN, THE EVOLUTION OF NATIONAL HUMAN RIGHTS INSTITUTIONS, at 7 (noting that, rather than creation of several specialized bodies undertaking a limited set of activities, "this requirement has been interpreted to refer both to the widest possible selection of responsibilities or tasks and for the largest possible legal basis for the work of the institution, ranging from the rights protected in the constitution to human rights protected in various international human rights instruments").

[64] The following list reflects responsibilities identified in the Paris Principles, *supra* note 35, Competence and responsibilities, para. 3.
[65] In addition to treaty bodies, this might include the new U.N. Human Rights Council, in its Universal Periodic Review process.
[66] Paris Principles, *supra* note 35, Methods of operation, para. g.
[67] *See* Melish, *Paradox to Subsidiarity*, *supra* note 13, at 14.
[68] The United States has also ratified other types of treaties that contain important human rights protections, such as the Geneva Conventions (which contain protections for combatants and civilians during armed conflicts) and the Vienna Convention on Consular Relations (which requires that countries give detained foreign nationals consular access).
[69] The United States should also become a party to the International Criminal Court Statute (which primarily addresses U.S. conduct overseas). A new Administration might also consider, where appropriate, submitting certain human rights treaties to both houses of Congress as congressional-executive agreements, which do not require additional implementing legislation because they operate in effect as ordinary legislation. For a persuasive analysis of this proposal, *see* Oona A. Hathaway, *Treaties' End: The Past, Present and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).
[70] *See* ICCPR art. 2(2) ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant"); CERD art. 2 ("Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization"); Convention Against Torture art. 2 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"); and *id.* art. 4 ("Each State Party shall ensure that all acts of torture are offences under its criminal law").
[71] Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM J. INT'L L. 341, 349 (1995).
[72] *See generally id.*
[73] Of particular significance for the post-9/11 detainees, such as those detained in Guantanamo, are the following provisions in the ICCPR: art. 9 ("No one shall be subjected to arbitrary arrest or detention"); art. 10 ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"); art. 14 (1) ("everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"); art. 14 (1) ("All persons shall be equal before the courts and tribunals"); art. 14 (2) ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"); and art. 14 (3)(c) (everyone shall be entitled "[t]o be tried without undue delay").
[74] The Race Convention art. 1 (emphasis added).
[75] Medellín v. Texas, 128 S. Ct. 1346 (2008).
[76] RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 313 cmt. a.
[77] In fact, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court struck down the juvenile death penalty as unconstitutional, citing the international trend away from this practice.
[78] The United States has submitted the following reservation for the ICCPR:

> That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

See U.S. RUDs, U.N. Treaty Collection, Declarations and Reservations (as of Feb. 5, 2002) (discussing declarations and reservations made upon ratification, accession or succession), *available at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm. The United States has submitted the following reservation for the Torture Convention:

> [T]he United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

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See U.S. RUDs, Office of the High Commissioner for Human Rights, Declarations and Reservations (As of Apr. 23, 2004) (discussing declarations and reservations made upon ratification, accession or succession), *available at* http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm.

[79] *See* U.S. Const. art. VI (declaring that ratified treaties are "supreme Law of the Land" along with the Constitution and federal statutes). Moreover, in a landmark case, the Supreme Court held that Congress has authority to regulate areas traditionally relegated to state and local law when Congress acts pursuant to a treaty and the federal government's treaty power (in that case, in the context of bird migration treaty between the United States and Canada), even where Congress would not have had authority to regulate in the absence of the treaty because of federalism concerns implicated by such regulation. Missouri v. Holland, 252 U.S. 416 (1920) (rejecting the state of Missouri's Tenth Amendment challenge to U.S. enforcement of the Migratory Bird Treaty Act).

[80] Consider, for example, the position Texas took in the *Medellín* litigation concerning the Vienna Convention on Consular Relations in which Texas resisted compliance with the ICJ's interpretation of the rights of a Mexican national on death row. *See* Medellín v. Texas, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

[81] Even here, a new Administration should be mindful of the competing demands of free speech and the equality concerns reflected in the hate speech provisions of the ICCPR and Race Convention (discussed above).

[82] Paquete Habana, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law").

[83] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[84] Eleanor Roosevelt, Address at a United Nations Ceremony in New York (Mar. 27, 1958), *in* PETER MEYER, THE INTERNATIONAL BILL OF HUMAN RIGHTS: A BRIEF HISTORY, *available at* http://paulwilliams.com/globalrights/history.html (citation omitted).

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Appendix A: Blueprint Advisory Group Members

NAME	AFFILIATION (*FOR IDENTIFICATION PURPOSES ONLY*)	TITLE
Cathy Albisa	National Economic and Social Rights Initiative	Executive Director
Debo Adegbile	NAACP Legal Defense and Educational Fund, Inc.	Director of Litigation
Diane Marie Amann	University of California, Davis, School of Law (Martin Luther King, Jr. Hall)	Professor of Law
Ajamu Baraka	U.S. Human Rights Network	Executive Director
Ann Beeson	Open Society Institute	Director of U.S. Programs
Marcia Johnson- Blanco	Lawyers' Committee for Civil Rights Under Law	Senior Counsel, Voting Rights Project
Carolyn Patty Blum	International Center for Transitional Justice (ICTJ)	Senior Consultant
John C. Brittain	Lawyers' Committee for Civil Rights Under Law	Chief Counsel and Senior Deputy Director
Sarah H. Cleveland	Columbia Law School	Louis Henkin Professor of Human and Constitutional Rights; Co-Director, Human Rights Institute
Tanya E. Coke	Public Interest Projects	Program Manger: US Human Rights Fund
Larry Cox	Amnesty International USA	Executive Director
Lorne W. Craner	International Republican Institute	President
Lisa A. Crooms	Howard University School of Law	Professor and Director, Constitutional Law Center
Jamil Dakwar	ACLU	Director of Human Rights Program
Christopher Edley, Jr.	UC Berkeley Boalt Hall School of Law	The Honorable William H. Orrick Jr. Distinguished Chair and Dean
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Appendix B: Draft Executive Order

[Proposed amendments to Executive Order 13107 are indicated.]

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release ~~December 10, 1998~~MONTH __, 2009

EXECUTIVE ORDER ~~13107~~ _____

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IMPLEMENTATION OF HUMAN RIGHTS ~~TREATIES~~

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), ~~and~~ the Convention on the Prevention and Punishment of the Crime of Genocide, other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, and customary international law, it is hereby ordered as follows:

Section 1. Implementation of Human Rights Obligations. (a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under customary international law and the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

(b) It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including, inter alia, those of the United Nations, the International Labor Organization, and the Organization of American States.

Sec. 2. Responsibility of Executive Departments and Agencies. (a) All executive departments and agencies (as defined in 5 U.S.C. 101-105, including boards and commissions, and hereinafter referred to collectively as "agency" or "agencies") shall maintain a current awareness of United States international human rights obligations that are relevant to their

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functions and shall perform such functions so as to respect and implement those obligations fully. The head of each agency shall designate a single senior level contact officer who will be responsible for overall coordination of the implementation of this order across all areas of the agency's responsibilities that are relevant to this order. Under this order, all such agencies shall retain their established institutional roles in the implementation, interpretation, and enforcement of Federal law and policy.

(b) The heads of agencies shall have lead responsibility, in coordination with other appropriate agencies, for questions concerning implementation of human rights obligations that fall within their respective operating and program responsibilities and authorities or, to the extent that matters do not fall within the operating and program responsibilities and authorities of any agency, that most closely relate to their general areas of concern.

Sec. 3. Human Rights Inquiries and Complaints. Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its areas of responsibility or, if the matter does not fall within its areas of responsibility, referring it to the appropriate agency for response.

Sec. 4. Interagency Working Group on Human Rights ~~Treaties~~. (a) There is hereby established an Interagency Working Group on Human Rights ~~Treaties~~ for the purpose of providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters.

(b) The designee of the Assistant to the President for National Security Affairs shall chair the Interagency Working Group, which shall consist of appropriate policy and legal representatives at the Assistant Secretary level from the Department of State (including representatives from the Bureau of Democracy, Human Rights, and Labor; the Office of the Legal Advisor; and the Bureau of Legislative Affairs), the Department of Justice (including representatives from the Civil Rights Division; the Office of Legal Counsel; the Office of Legal Policy; and the Office of Legislative Affairs), the Department of Labor, the Department of Defense, the Joint Chiefs of Staff, the Domestic Policy Council, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of Health and Human Services, the Department of Education, and other agencies as the chair deems appropriate. The principal members may designate alternates to attend meetings in their stead.

(c) The principal functions of the Interagency Working Group shall include:

(i) coordinating the interagency review of any significant issues concerning the implementation of this order and analysis and recommendations in connection with pursuing the ratification of human rights treaties, as such questions may from time to time arise;

(ii) coordinating the preparation of reports that are to be submitted by the United States in fulfillment of treaty obligations;

(iii) coordinating the responses of the United States Government to

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complaints against it concerning alleged human rights violations submitted to the United Nations, the Organization of American States, and other international organizations;

(iv) developing effective mechanisms to ensure that legislation proposed by the Administration is reviewed for conformity with international human rights obligations and that these obligations are taken into account in reviewing legislation under consideration by the Congress as well;

(v) developing recommended proposals and mechanisms for improving the monitoring of the actions by the various States, Commonwealths, and territories of the United States and, where appropriate, of Native Americans and Federally recognized Indian tribes, including the review of State, Commonwealth, and territorial laws for their conformity with relevant treaties and customary international law, the provision of relevant information for reports and other monitoring purposes, and the promotion of effective remedial mechanisms;

(vi) developing plans for public outreach and education concerning the provisions of the ICCPR, CAT, CERD, and other relevant treaties, and human rights-related provisions of domestic law;

(vii) coordinating and directing an annual review of United States reservations, declarations, and understandings to human rights treaties, and matters as to which there have been non-trivial complaints or allegations of inconsistency with or breach of international human rights obligations, in order to determine whether there should be consideration of any modification of relevant reservations, declarations, and understandings to human rights treaties, or United States practices or laws. The results and recommendations of this review shall be reviewed by the head of each participating agency;

(viii) making such other recommendations as it shall deem appropriate to the President, through the Assistant to the President for National Security Affairs, concerning United States adherence to or implementation of human rights ~~treaties~~ and related matters; and

(ix) coordinating such other significant tasks in connection with human rights ~~treaties~~ or international human rights institutions, including the Inter-American Commission on Human Rights and the Special Rapporteurs and complaints procedures established by the United Nations Human Rights Commission.

(d) To effectuate the overall purpose of the Interagency Working Group and the achievement of each of its principal functions identified in Section 4(c), subgroups may be created and chaired by appropriate representatives from relevant departments, offices, and other government entities.

(e~~d~~) The work of the Interagency Working Group shall not supplant the work of other interagency entities, including the President's Committee on the International Labor Organization, that address international human rights issues.

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Sec. 5. Cooperation Within and Among Participating Executive Departments and Agencies. (a) Each agency shall establish an internal coordinating mechanism for the purpose of carrying out its responsibilities under this order, including coordination of the agency's participation in the Interagency Working Group.

(b) All agencies shall cooperate with each other in carrying out the provisions of this order. The Interagency Working Group shall facilitate such cooperative measures.

Sec. 6. Judicial Review, Scope, and Administration. (a) Nothing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(b) This order does not supersede Federal statutes and does not impose any justiciable obligations on the executive branch.

(c) The term "treaty obligations" shall mean treaty obligations as approved by the Senate pursuant to Article II, section 2, clause 2 of the United States Constitution.

(d) To the maximum extent practicable and subject to the availability of appropriations, agencies shall carry out the provisions of this order.

~~WILLIAM J. CLINTON~~SIGNATURE

THE WHITE HOUSE,
~~December 10, 1998~~MONTH __, 2009.

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