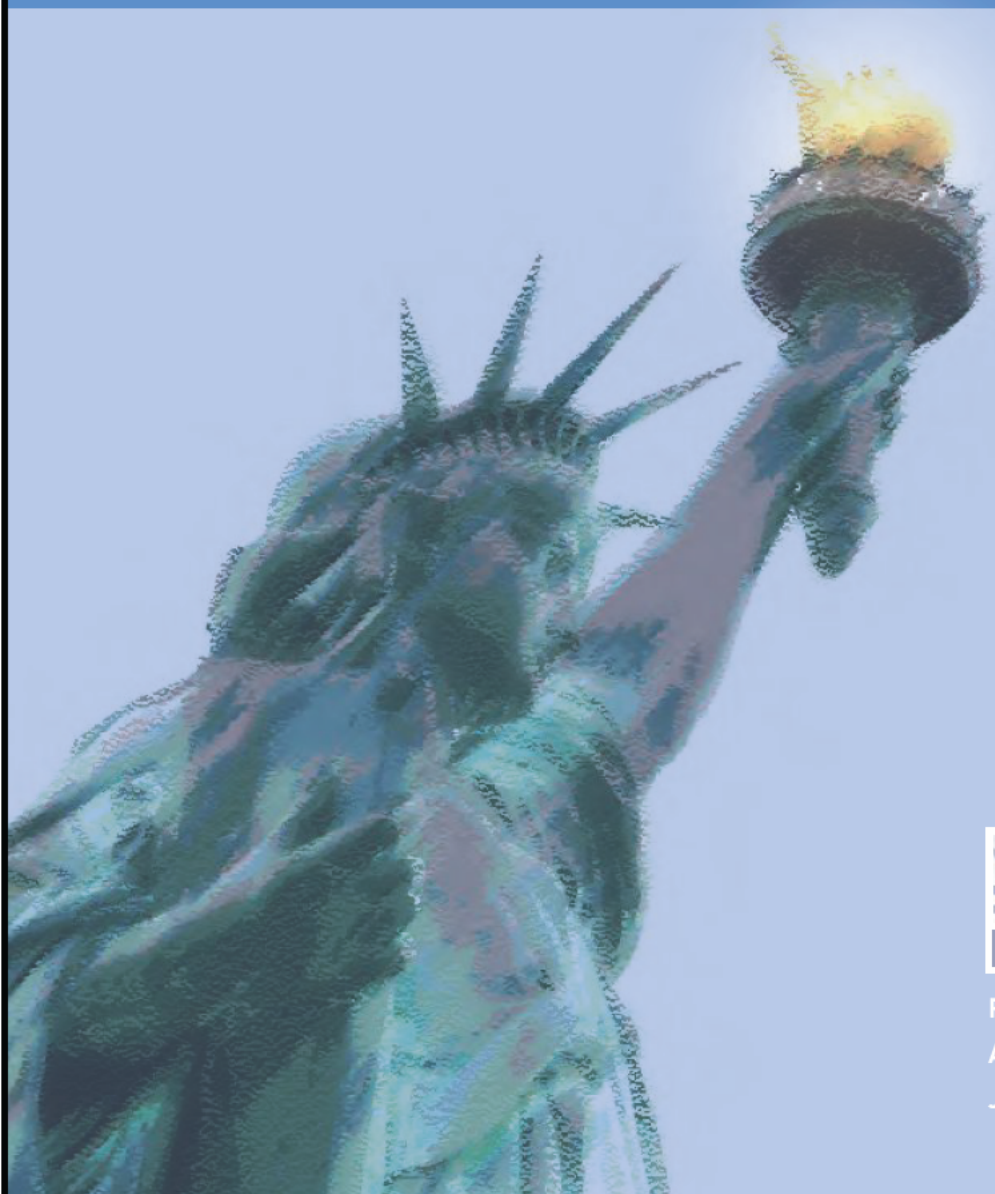


A Civil Liberties Agenda To Move Forward

Recommendations for the Second Term of President Barack Obama



Presented by the
American Civil Liberties Union
January 2013

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How this document is laid out

Supplemental Materials

For many of the recommendations, we have also provided Supplemental Materials such as reports, memos, testimony, news clippings, etc. The URL for the Supplemental Material is listed within each recommendation.

Recommended sample language for orders

For some items we have also included draft or sample presidential orders, directives, or statements. We have included the text of such language in the accompanying document.

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Introduction

In November 2008, in the wake of Sen. Barack Obama's historic victory founded on the promise of a new era of hope and change, the American Civil Liberties Union (ACLU) offered recommendations to the President-elect's transition team. We offered an agenda designed to help the President restore America's international reputation while advancing civil liberties and civil rights at home. Coming after the two term presidency of George W. Bush, President Obama vowed to reverse many of the Bush policies that abandoned the rule of law, thwarted equal justice, privacy and due process – values that suffered long decline in the years following the 9/11 attacks. In President Obama's first year alone, over one-third of our recommendations were implemented. On torture and abuse issues, the Obama administration carried out seven of our nine recommendations. Before the end of his first term, the president put into place several executive actions that strengthened civil liberties in other areas such as limitations on deportations of undocumented youth (DREAMers), open government, civil rights, freedom of speech, reproductive freedom, and protecting and expanding the rights of gays and lesbians.

In many other instances, the President's first term disappointed civil libertarians because of his inability or refusal to implement specific promises he made during the 2008 campaign. Guantanamo is still open, discredited military tribunals are used there, and racial profiling permeates federal law enforcement in the immigration, national security and criminal justice arenas. But one president cannot do it all. Wars, hurricanes, floods and impending financial disasters have a way of throwing off best laid plans. Nonetheless, the ACLU continues vigorously to hold this President and every president accountable to our core constitutional values through public pressure and direct advocacy. The more extraordinary accomplishments in President Obama's first term were generally supported by a noisy and vigorous constituency and those accomplishments were significant, coming in the midst of intense partisan rancor, in the drumbeat of hate-filled rhetoric, in the bellowing of those more concerned with electoral gain than an advancement of our country's ideals.

Now, President Obama has survived a mighty re-election battle marked by unprecedented state voter suppression laws, Hurricane Sandy, a wavering economy and an opposition party virtually united in its desire to thwart any law that can be construed as an Obama victory. If the President really wants to implement his 2012 mantra of "forward" in an inhospitable political environment, now is the time for executive action. We must provide equality and fairness to those who suffer deprivations under an abusive Department of Homeland Security-sanctioned immigration enforcement system. Our nation must once and for all close that dark symbol of

humanity's most sinister impulses located at Guantanamo. We must finally begin to restore the constitutional right of women to have a true choice whether or not to abort a pregnancy by stopping the erosion caused by government funding and religious litmus tests.

Those are just a few of the scores of recommendations we offer in this proposed Civil Liberties Agenda to Move Forward. We urge the President and members of his administration to consider these recommendations in establishing each agency's agenda for the coming term. In the immediate aftermath of the election, we urged President Obama to take three significant actions on or before the first day of his second term. We have organized this collection of recommendations to highlight those actions. We also offer the administration a short collection of recommendations that can be achieved in the first 100 days of the new term. Undertaking these near-term actions will signal President Obama's re-commitment to the principles of change that launched his electoral success in 2008. The rest of our recommendations are organized by federal agency and include suggestions for executive orders, policy directives, and regulatory changes. We urge agency heads to pursue these changes with single-minded dedication, knowing that these next four years are the ones that will determine President Obama's lasting legacy.

Part 1 – Day One

Day One: Close Guantanamo, Remove Abortion Restrictions, Stop Abusive Deportation Practices

President Obama, in his second term in office, can take three major actions to show his commitment to the principles of liberty, equality, and justice for all. It is our hope that he will take these actions on or before January 20, 2013.

Pledge to Take Specific Steps to Close Guantanamo

In 2008, candidate Obama promised to close Guantanamo. To the President's credit, his administration has refused to add to the number held in indefinite detention at Guantanamo, closed CIA secret prisons, and made diplomatic efforts to resettle some detainees.

Notwithstanding those efforts, 166 detainees remain behind bars – some having been formally adjudicated as entitled to release and all being held without appropriate judicial review.

Congress has imposed restrictions on the tools available to transfer detainees. The President should follow through on his public veto threat and refuse to sign any legislation extending or expanding statutory restrictions on the transfer of detainees from Guantanamo. Also, the President should order all relevant agencies immediately to initiate removal of any policy obstacles to the resettlement or repatriation of detainees.

Remove abortion restrictions from the President's budget

The President can and should use his bully pulpit and his yearly budget submission to push back against the restrictions on abortion that Congress imposes through the appropriations process. Current federal funding bills single out abortion and withhold coverage for most abortions under federal insurance programs. Holding back this coverage means that some women and families do not have a real opportunity to make this personal decision about whether to end a pregnancy. It also endangers women's health and adds to the stigma surrounding abortion. In addition, one appropriation measure provides broad immunities for hospitals and insurance companies that refuse to provide, cover, pay for, or even refer patients for abortion care. It is time to reverse the erosion of abortion rights. The President should strike all such restrictions from his next – and all succeeding - budget proposals, and indicate his commitment to working with Congress to fully repeal these restrictions

Stop abusive and discriminatory deportation practices

Notwithstanding the administration's laudable decision to challenge harmful state laws that mandate local immigration enforcement, the Department of Homeland Security (DHS) continues to expand programs that use local law enforcement to channel people into deportation proceedings. In those communities where local police engage in racial profiling

and unconstitutional arrests, such programs are complicit in these patterns and practices and undermine the administration's stated enforcement priorities. The President should terminate all DHS programs such as Secure Communities and 287(g) that foster racial profiling, harm community policing, and result in deportation of people who pose no threat to public safety. Moreover, he should direct his administration to stop subjecting immigration detainees to prolonged detention without constitutionally adequate bond hearings, and should adopt a uniform national policy that provides meaningful bond hearings whenever detention exceeds six months.

Part 2 – First 100 Days

While different from a new presidency, the achievements of the first 100 days of the second term of an administration offer a unique opportunity to put a stamp on the coming years of policy making. In addition to our Day One recommendations, we urge the Obama Administration to wipe away the polarization and recriminations of its first four years and brand itself by standing up for the Constitution and the ever present challenges to its guiding wisdom. With diligence and determination, the administration can achieve the following ten things in the first 100 days of the new term and earn the label of the ‘civil liberties presidency’.

- 1. End discrimination based on sexual orientation and gender identity in government Contracts.** Today there is no bar to discrimination based upon either sexual orientation or gender identity by federal contractors. Moreover, in 2002, President Bush amended Executive Order 11246 – which prohibits federal contractors from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin – to waive its prohibition on discrimination on the basis of religion by religious corporations. This was a step backwards for equal employment opportunities. Approximately 26 million workers, or about 22 percent of the U.S. civilian workforce, are employed by federal contractors. That is nearly 10 times as many people as are directly employed by the government, including postal workers. The President should issue an executive order making it a condition of all federal contracts and subcontracts that the contractor and subcontractor agree not to discriminate on the basis of sexual orientation or gender identity in any hiring, firing or terms and conditions of employment and rescind Section (4)(c) of Executive Order 13279. In addition, he should require the Department of Labor, Office of Federal Contract Compliance Programs, to begin the process immediately of issuing implementing regulations to carry out the order.
- 2. Ensure religion is not used to discriminate in government-funded programs.** Existing policies wrongly allow taxpayer-funded organizations to discriminate on the basis of religion in administering social service programs using public funds. Most troubling, religious organizations can discriminate on the basis of religion when hiring for their government-funded programs. No organization – religiously-affiliated or otherwise - should be allowed to discriminate when hiring for jobs funded by taxpayer dollars. In addition, there are inadequate protections for the religious liberty of beneficiaries of these publicly funded programs. Despite decades of practice to the contrary, our government is no longer committed to ensuring that no one is disqualified from government-funded jobs because of his or her religion. The President must restore this commitment by signing an executive order to end discrimination based on religion in hiring within these programs and rescinding regulations, guidance, an OLC opinion, and relevant executive orders that currently permit such discrimination. The President should also ensure that all federal agencies fully and faithfully implement the religious liberty protections in Executive Order 13559 (as informed by the Presidential Advisory Council on Faith-Based and Neighborhood Partnerships Report) that prohibit discrimination against those who seek government-funded social services.

- 3. Stop targeted killings.** The President should restore the Constitution and the rule of law to the use of lethal force by signing an executive order that directs the government to end any reliance on the 2001 congressional authorization for use of force in Afghanistan, once the United States combat operations in Afghanistan ends in 2014; prior to that time, to end any reliance on the 2001 authorization for use of force in Afghanistan as any claim of authority for the killing of persons away from any battlefield; and to refrain from the use of lethal force against suspects away from any battlefield, except in the extremely narrow circumstances permitted under the Constitution and international law, when it is a last resort to address a specific, concrete and imminent threat of deadly harm, and the risk of harm to others is minimal.
- 4. Stop warrantless GPS tracking by law enforcement.** Some law enforcement agencies across the country are conducting surveillance of citizens by tracking cell phones without probable cause and without judicial approval. Others are instructing officers to hide their cell phone surveillance practices from the courts. Despite the fact that some law enforcement agencies seek judicial approval to conduct such surveillance, the federal government needs to step in to assure Americans' privacy against warrantless intrusion. The Attorney General should order all federal law enforcement to interpret US v. Jones to require law enforcement agents to secure a warrant based upon probable cause before obtaining all types of geolocational information including through GPS or cell phone tracking, and the president should endorse the Geolocational Privacy and Surveillance Act ("GPS Act") in Congress.
- 5. Stop government surveillance of Americans' electronic communications.** The Department of Justice and the Director of National Intelligence should take measures to increase basic transparency about the FISA Amendments Act, Section 215 of the Patriot Act, and other post-9/11 collection programs. The President should direct the release of executive memoranda and FISA court opinions interpreting the FISA Amendments Act and Section 215 of the Patriot Act, including only those redactions necessary to protect legitimate secrets. The President should also direct the disclosure of a meaningful unclassified description of the targeting and minimization procedures used in collecting information under the FISA Amendments Act or Section 215 of the Patriot Act. The President should sign an executive order prohibiting the suspicionless, bulk collection of the communications of Americans or individuals in the U.S. and imposing strict use limitations and minimization procedures that prevent the collection, use, or dissemination of the information of such individuals.
- 6. Review and adjust unfair crack cocaine sentences.** In 2010, Congress passed the Fair Sentencing Act (FSA), reducing the 100-to-1 federal sentencing ratio between crack and powder cocaine to 18-to-1. Then in 2011, the U.S. Sentencing Commission amended its Sentencing Guidelines based on the FSA and unanimously agreed to make those changes retroactive. However, because of statutory mandatory minimum sentences, the Commission's retroactive amendment does not apply to all offenders who were

sentenced before the FSA was enacted in 2010. The President should establish a process so that people who were sentenced to crack offenses before the FSA could have their sentences reviewed to determine whether it is appropriate to resentence them based on the new 18 to 1 ratio. The President should use his constitutional pardon power to commute the sentences of crack cocaine offenders based on the 18 to 1 ratio and create a clemency board to review crack cocaine sentences that did not benefit from the FSA. This is but one small step the President can jumpstart to help phase out the failed 40 year “war on drugs,” an ineffective, costly and discriminatory government effort.

- 7. Bar racial profiling in federal law enforcement.** Racial profiling in law enforcement has been a problem at all levels of government for many years. In June 2003, the Justice Department issued guidelines purportedly designed to limit racial profiling in federal law enforcement. These guidelines, however, were not binding and contained wide loopholes. DOJ should issue updated guidelines barring federal law enforcement officials from using race, ethnicity, religion, national origin, or sex to any degree, except as factors in a specific suspect description. The President should also issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based on race, ethnicity, national origin, sex or religion and requiring federal agencies to collect data on hit rates for stops and searches disaggregated by group.
- 8. Repeal rules restricting communications between prisoners and attorneys.** After the September 11 attacks, the Department of Justice (DOJ) issued a rule that expanded the Bureau of Prisons’ (BOP) powers under the special administrative measures (SAMs) promulgated after the mid-1990’s bombings of the World Trade Center and the Murrah Federal Building in Oklahoma. The SAM regulations allow the attorney general unlimited and unreviewable discretion to strip any person in federal custody of the right to communicate confidentially with an attorney and apply to convicted individuals held by BOP as well others held by DOJ, such as those simply accused of crimes, material witnesses and immigration detainees. DOJ should repeal the regulation that directs BOP to facilitate the monitoring of communications between detainees and attorneys; repeal the SAMs that restrict communications by certain BOP prisoners; and end the authority of wardens and the attorney general to issue SAMs. Because SAMs also permit extreme social isolation of certain prisoners, BOP should conduct a mental health screening of all those currently subject to SAMs by competent mental health personnel and remove any individuals identified as seriously mentally ill to an institution that can provide appropriate mental health services.
- 9. End discriminatory school discipline policies.** Educational equality is seriously threatened by the “school-to-prison pipeline,” the current national trend where children are pushed out of our public schools and into the juvenile and criminal justice systems because of overreliance on racially discriminatory punitive school discipline policies. The increased use of suspensions, expulsions and arrests decreases academic

achievement and increases the likelihood that students will end up in jail cells rather than in college classrooms. The burden of this trend falls disproportionately on students of color and students with disabilities, who are punished more harshly and more frequently for the same infractions that other kids engage in. The Departments of Education and Justice should stop the school to prison pipeline by finalizing and issuing guidance to schools on the use of punitive school discipline policies. The Department of Education should devote resources to a detailed study on the impact of disproportionate punitive discipline and corporal punishment and use its full range of resources to encourage the elimination of the use of restraint and seclusion in public schools.

10. Close inhumane immigration detention facilities. The growth in immigration detention has continued unabated in spite of DHS's consistent failure to implement standards that adequately protect detainees from abuses ranging from sexual assault to inadequate medical and mental health care. Government documents reveal nearly 200 allegations of sexual abuse and assault at detention facilities across the country since 2007. Terrible detention conditions persist, including overuse of administrative segregation, absence of outdoor recreation, and denial of in-person family contact visits. DHS should shrink and overhaul its improperly jail-like immigration detention system, including an immediate shut-down of 10 of its worst immigration facilities, where detainees have been sexually abused and denied adequate medical care, food, and access to immigration counsel [Etowah, AL; Pinal, AZ; Lacy, CA; Baker, FL; Stewart, GA; Irwin, GA; Tri-County, IL; Hudson, NJ; Polk, TX; Houston Processing Center, TX]. The Department must also promptly implement full regulatory protections under the Prison Rape Elimination Act in all its facilities.

Part 3 – Second Term Recommendations

The White House

Issue Area: Reproductive rights

Remove Abortion Restrictions from the President's Budget

Background

Abortion is an important part of women's reproductive health care, and as affirmed by the 1973 U.S. Supreme Court case *Roe v Wade* and consistently upheld in subsequent cases, it is a legally and constitutionally protected medical practice. But bans on public funding for abortion services have severely restricted access to safe abortion care for women who depend on the government for their health care. The bans marginalize abortion care even though it is an integral part of women's health care. These policies inflict disproportionate harm on low-income women and women of color, many of whom already face significant barriers to receiving timely, high quality health. Moreover, with these bans, the government is selectively withholding health care benefits from women who seek to exercise their right of reproductive choice in a manner the government disfavors.

The bans cause real and significant harm. For example, as many as one in three low-income women who would have had an abortion if the procedure were covered by Medicaid are instead compelled to carry the pregnancy to term. More than twenty percent of women who wanted abortion care had to delay their abortions in order to raise the necessary funds. Women who have health coverage through the federal government should receive high quality and comprehensive services which include safe abortion care.

In 2009, President Obama submitted a fiscal year 2010 budget that removed the D.C. abortion rider from the Financial Services Appropriations bill. It was the only abortion rider the President struck from his budget. The House and Senate, after a vigorous debate in the normal course of the legislative process, affirmed that action. Unfortunately, in April 2011 during negotiations over the budget, Congress reinstated, without debate, the D.C. abortion ban in order to avert a government shutdown. The ban was subsequently included in the fiscal year 2012 omnibus spending bill that was passed in December 2011. President Obama has struck the D.C. abortion ban from fiscal year budgets 2010-2013, but has left all the other abortion ban riders in place in his budgets each year.

Recommendations

1. The President's budget should strike language restricting abortion funding for (i) Medicaid-eligible women and Medicare beneficiaries (the Hyde amendment); (ii) federal employees and their dependents (FEHB Program); (iii) residents of the District

of Columbia; (iv) Peace Corps volunteers; (v) Native American women; and (vi) women in federal prisons. The President should indicate that the Administration is committed to working with Congress to fully repeal these restrictions.

2. The budget should strike language known as the Weldon amendment, which states that “none of the funds made available in [the Departments of Labor, HHS and Education Appropriations bill] may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” Consolidated Appropriations Act, 2012, Pub. L. No. 112-74 § 507(d)(1), 125 Stat. 786, 1111.

Supplemental Material

- ACLU fact sheet, “Public Funding for Abortion,” July 2004:
<http://www.aclu.org/reproductive-freedom/public-funding-abortion>.
- National Network of Abortion Funds report, “Abortion Funding: A Matter of Justice,” 2005:
http://www.fundabortionnow.org/sites/default/files/national_network_of_abortion_funds_-_abortion_funding_a_matter_of_justice.pdf.

Issue Area: Reproductive rights

End Shackling of Pregnant Federal Prisoners

Background

Pregnant women who are incarcerated or detained in the United States are often subject to physical or mechanical restraints during transport, labor, and delivery and immediately after delivery, without regard to their individual circumstances. This practice violates international human rights treaties and standards, constitutes cruel and inhumane treatment, and can endanger the health of the woman and/or the fetus. Indeed, multiple federal courts have found this practice unconstitutional.

In 2007, the American College of Obstetricians and Gynecologists called for an end to this practice because “physical restraints have interfered with the ability of physicians to safely practice medicine by reducing their ability to assess and evaluate the physical condition of the mother and fetus, and have similarly made the labor and delivery process more difficult than it needs to be; thus, overall, putting the health and lives of the women and unborn children at risk.” The absence of physical restraints is essential so that medical staff can easily conduct any necessary emergency procedures. Following birth, it is critical for a woman to remain unshackled to prevent postpartum hemorrhage and other medical emergencies.

The shackling of pregnant women is entirely unnecessary, given that incarcerated women, particularly those who are pregnant or in labor, represent an extremely low security or flight risk. Most incarcerated women, in fact, are non-violent offenders. There have been no reported cases of pregnant women posing a security threat or flight risk in the 17 states that have outlawed the shackling of pregnant women.

The Federal Bureau of Prisons, the U.S. Marshals Service, and U.S. Immigration and Customs Enforcement took important first steps to limit the use of shackles on pregnant women prisoners, but more is left to be done. The federal government needs a unified policy that applies to all women in its custody, including women in military custody. This policy must prohibit the use of any belly chains or other restraints that constrict or compress the area of pregnancy once the woman is known to be pregnant. Such policy must also prohibit the shackling of pregnant women prisoners during the last trimester of pregnancy, transport, labor, delivery and post-partum recovery. Exceptions to this ban on shackling should only be allowed where the woman is a risk to herself or others or a flight risk and such risk must be documented in writing and the use of shackles approved by a managerial officer. On an annual basis, all federal agencies should be required to report—with appropriate redaction of the woman’s identity—any incidents where a woman in their custody is shackled.

Recommendations

1. Issue an executive order in the form provided below directing all federal departments and agencies responsible for the custody or control of pregnant prisoners and detainees to end the practice of shackling of pregnant women. The order should apply to all women, both adults and juveniles, in the custody or control of any federal agency, department or contractor, including those held by state or local governments by agreement or order of any federal authority.

Supplemental Material

- Sample Executive Order (see below)
- “Mothers forced to give birth in shackles,” *Politico*, May 8, 2008: <http://www.politico.com/news/stories/0508/10215.html>
- American Medical Association Resolution 203 on Shackling of Pregnant Women in Labor, adopted June 11, 2010: <http://www.ama-assn.org/assets/meeting/2010a/a10-ref-comm-b.pdf>
- ACLU Briefing Paper, The Shackling of Pregnant Women and Girls in U.S. Prisons, Jails and Youth Detention Centers (2012): http://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf
- Federal Bureau of Prisons, Program Statement 5538.05, Escorted Trips at 10, 13, October 6, 2008 (containing revised shackling policy for pregnant women prisoners): http://www.bop.gov/policy/progstat/5538_005.pdf
- U.S. Marshals Serv., Policy 9.1 (Restraining Devices) Sections (D)(3)(e), (h) (as amended in 2010): http://www.usmarshals.gov/foia/Directives-Policy/prisoner_ops/restraining_devices.pdf
- 2011 ICE Detention Standards, Section on Women’s Health: http://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf
- American College of Obstetricians and Gynecologists, Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females (November 2011): <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20121024T1422328658>
- Letter to the Honorable Julia L. Myers, Assistant Secretary of Homeland Security, from The Rebecca Project et al., July 16, 2008 (urging ICE to adopt policies precluding the use

of shackles on pregnant women detainees; expressing concern due to reported shackling incidents in ICE custody):

http://archive.episcopalchurch.org/eppn/107568_100367_ENG_HTM.htm

- Letter to Commissioner Willa Johnson, Commissioner Brent Rinehart, and Commissioner Ray Vaughn from Grace Chung Becker, Acting Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, July 31, 2008 (excerpt of CRIPA investigation of Oklahoma County Jail and Jail Annex detailing the shackling of a wheel-chair bound pregnant woman prisoner to a handrail for 10 hours while she miscarried her child): http://www.justice.gov/crt/about/spl/documents/OKCounty_Jail_findlet_073108.pdf
- “Prisons Often Shackle Pregnant Inmates in Labor,” *The New York Times*, March 2, 2006: <http://www.nytimes.com/2006/03/02/national/02shackles.html?pagewanted=all>
- Jane E. Allen, “Shackled: Women Behind Bars Deliver in Chains,” *ABC News Medical Unit*, October 29, 2010: <http://abcnews.go.com/Health/WomensHealth/pregnant-shackled-women-bars-deliver-chains/story?id=11933376>
- Amnesty International, Updated Report, “Not Part of my Sentence: Violations of the Human Rights of Women in Custody,” March 1999: <http://www.amnesty.org/en/library/asset/AMR51/001/1999/en/ab8c7840-e363-11dd-937f-a170d47c4a8d/amr510011999en.html>
- Rhode Island’s Healthy Pregnancies for Incarcerated Women Act: <http://webserver.rilin.state.ri.us/Statutes/TITLE42/42-56.3/INDEX.HTM>
- *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009) (en banc): http://www.aclu.org/files/pdfs/prison/nelsonvcms_decision.pdf

Sample Executive Order

By the authority vested in me as President by the Constitution and the laws of the United States of America, I, _____, President of the United States of America, find that the use of physical restraints on pregnant incarcerated women in the United States that constrict or compress the area of pregnancy once the woman is known to be pregnant should never be used due to the inherent, inevitable risks to the woman and her fetus. I further find that restraints during the last trimester of pregnancy, transport, labor, delivery and during post-partum recovery, without regard to the circumstances of each individual woman, violates international human rights treaties and standards, constitutes cruel and inhumane treatment, and can endanger the health of the woman and/or the fetus. Under extremely limited circumstances, the use of some form of restraints may be permissible if the woman poses a clear risk of harm to herself or others. When restraints are used in these cases they must be documented, written justification provided and approved by management officials, and all incidents of shackling reported publicly

on an annual basis in compliance with appropriate privacy protections for the women subject to shackling. I hereby order all federal departments and agencies responsible for the custody or control of prisoners to draft and implement policies consistent with this order. Such policies shall apply to all incarcerated women in the custody or control of any federal agency, department or contractor, including those held by state or local governments by agreement or order of any federal authority.

Issue Area: LGBT rights

Issue Area: Religious Freedom

End Discrimination in Federal Contracts

Background

Policies that allow individuals to be denied jobs or lose them over factors that are unrelated to job performance or ability are unjust. This is especially true for jobs funded by the government. In 1941, President Franklin D. Roosevelt ordered federal agencies to condition defense contracts on an agreement not to discriminate based on race, creed, color, or national origin. In 1963, President Kennedy reinforced the policy with a new executive order, and in 1965, President Johnson signed the current executive order, Executive Order 11246, covering nearly all federal contracts. And in 1998, President Clinton signed Executive Order 13087, which banned discrimination based on sexual orientation in federal employment.

Currently, however, there is no explicit bar to discrimination based upon either sexual orientation or gender identity by federal contractors. Moreover, in 2002, President Bush amended Executive Order 11246 to waive its prohibition on discrimination on the basis of religion by religious corporations—a step backwards for equal employment opportunities. Approximately 26 million workers, or about 22 percent of the U.S. civilian workforce, are employed by federal contractors. That is nearly 10 times as many people as are directly employed by the government, including postal workers. Hearings on the Office of Federal Contract Compliance Programs (OFCCP) before the Subcommittee on Employer-Employee Relations of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess. (1995) (statement of Deputy Assistant Secretary of Labor for Federal Contract Compliance Shirley J. Wilcher).

Expanding the non-discrimination requirements imposed on federal contractors to include sexual orientation and gender identity and restoring protections against religious discrimination do not require any additional statutory authority. The same procurement statutes and inherent constitutional executive power that provided authority for the prior executive orders on contractors can provide sufficient authority for a new executive order. The President's authority to issue those orders has been consistently upheld by the courts. The President should follow in the footsteps of Presidents Roosevelt, Kennedy, and Johnson in expanding the prohibition on discrimination in government.

Recommendations

1. The President should issue an executive order making it a condition of all federal contracts and subcontracts that contractors and subcontractors agree not to discriminate on the basis of sexual orientation or gender identity in any hiring, firing or terms and conditions of employment and rescind Section (4)(c) of Executive Order 13279.

2. The Department of Labor, Office of Federal Contract Compliance, should issue implementing regulations requiring all government contracts to contain an equal opportunity clause that forbids sexual orientation and gender identity discrimination by federal contractors and subcontractors and rescind any changes to implementing regulations that were made to comport with Executive Order 13279. As a model, the Administration can use current Executive Order 11246, which bans discrimination by contractors and subcontractors on the basis of race, religion, sex and national origin. Similarly, the Department of Labor can use 41 C.F.R. 60-1.4 as a model.

Supplemental Materials

- Executive Order 11246:
<http://www.archives.gov/federal-register/codification/executive-order/11246.html>
- Executive Order 13807:
<http://www.gpo.gov/fdsys/pkg/FR-1998-06-02/pdf/98-14689.pdf>
- Executive Order 13279:
<http://www.gpo.gov/fdsys/pkg/FR-2002-12-16/pdf/02-31831.pdf>
- 41 C.F.R. 60-1.4:
<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div5&view=text&node=41:1.2.3.1.1&idno=41#41:1.2.3.1.1.1.4>
- Hearings on the Office of Federal Contract Compliance Programs (OFCCP) before the Subcommittee on Employer-Employee Relations of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess. (1995) (statement of Deputy Assistant Secretary of Labor for Federal Contract Compliance Shirley J. Wilcher)
<http://usfweb2.usf.edu/eoa/home-page/aa-ofccp.htm>
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011:
<http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- News Article – “ACLU: Contractor Policy ‘Most Important Step’ Obama Can Take Now to Fight Anti-LGBT Job Bias”
<http://www.metroweekly.com/poliglot/2012/03/aclu-contractor-policy-most-im.html>
- ACLU Blog Post – “President Obama: LGBT Workers Can’t Wait”
<http://www.aclu.org/blog/lgbt-rights/president-obama-lgbt-workers-cant-wait>

Issue Area: HIV/AIDS

End Discrimination by the Federal Government and Federal Contractors Against People with HIV

Background

Federal law currently makes discrimination by federal agencies, contractors and subcontractors against people with disabilities illegal. However, individuals with HIV are still categorically excluded from a number of jobs with federal contractors, based on the terms of the federal contracts. Requiring HIV-positive people to sue on an individual basis to enforce their ability to work is a time-consuming, expensive and unnecessary process.

In July 2009, the Department of Justice issued guidelines informing state licensing boards and occupational training schools that it is a violation of the Americans with Disabilities Act (ADA) to bar people with HIV from professions such as barbering, massage therapy, and home healthcare assistance. In addition, in July 2010, the Administration released the first National AIDS Strategy, which, among other things, addressed the need to end the persistent stigma and discrimination that those living with HIV and AIDS often face. The National Strategy discussed the need to increase and strengthen enforcement of civil rights laws, such as the ADA, that protect those who are living with HIV and AIDS from discrimination.

Recommendations

1. The President should issue an executive order banning discrimination against people with HIV by the government, federal contractors and subcontractors. The order should provide that no federal agency categorically bars people with HIV from working under any federal contract, and requiring all agencies, contractors and subcontractors to individually assess whether a person living with HIV can perform the functions of the position or activity.
2. The Department of Labor, Office of Federal Contract Compliance, should issue regulations to implement the order. As a model, the President can use current Executive Order 11246, which bans discrimination by contractors and subcontractors on the basis of race, religion, sex and national origin, and the Department of Labor can use 41 CFR 60-1.4.

Supplemental Material

- U.S. Department of Justice, *Questions and Answers: The Americans with Disabilities Act and the Rights of Persons with HIV/AIDS to Obtain Occupational Training and State Licensing* (July 16, 2009): http://www.ada.gov/qahiv aids_license.pdf
- The White House, *National HIV/AIDS Strategy for the United States* (July 13, 2010): <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>

Issue Area: Religious freedom

Ensure Religion Is Not Used to Discriminate in Government-Funded Programs and Oppose Efforts to Create Discriminatory Exemptions

Background

Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Religious freedom includes two complementary protections: the right to religious belief and expression, and a guarantee that the government does not favor religion or particular faiths. Thus, we have the right to a government that neither promotes nor disparages religion. We have the absolute right to believe whatever we want about God, faith, and religion. And, we have the right to act on our religious beliefs—unless those actions threaten the rights, welfare, and well-being of others.

The right to religious practice deserves strong protection; however, religion cannot be a license to discriminate. When religiously identified organizations receive government funding to deliver social services, they cannot use that money to discriminate against the people they help or against the people they hire, or pick and choose which particular services they will deliver. The government cannot delegate to religiously identified organizations the right to use taxpayer funds to impose their beliefs on others. Religiously identified organizations cannot use taxpayer funds to pay for religious activities or pressure beneficiaries to subscribe to certain religious beliefs. Government-funded discrimination, in any guise, is antithetical to basic American values and to the Constitution.

Religion cannot be used as an excuse to discriminate against employees, customers, or patients. When an organization operates in the public sphere, it must play by the same rules every other institution does. Such organizations should not be given loopholes from laws that ensure equality in the workplace or guarantee access to public accommodations and health care, thus sanctioning discrimination in the name of religion. No American should be denied opportunities, vital services, or equal treatment.

Recommendation

1. Include provisions that prohibit discrimination in the name of religion against beneficiaries, employees, or services in government-funded social service programs and oppose efforts to create discriminatory exemptions in the name of religion in government contracts and grants, as well as in laws and regulations that guarantee equal opportunity and access to services.

Supplemental Material

- ACLU Briefing Paper, *Promoting Equality: An Analysis of the Contraceptive Coverage Rule*, October 2012: http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf
- ACLU of Massachusetts v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012): http://www.aclu.org/files/assets/usccb_decision.pdf.
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- Coalition Letter to President Obama Asking for Clarity on Federally Funded Employment Discrimination and Outlining Other Concerns, September 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-asking-clarity-federally-funded-employment>

Issue Area: Religious freedom

Withdraw Office of Legal Counsel Opinion that Permits Hiring Discrimination in Government-Funded Jobs

Background

When religiously identified organizations get government money to provide social services, they cannot discriminate on the basis of religion (or any other protected class) in these programs. When using their own funds, however, under Title VII of the Civil Rights Act of 1964 these organizations are permitted to choose their employees based on religion, but may not discriminate in employment on any other protected basis. The George W. Bush Administration, though, upended this established understanding of the law. By executive order and federal regulations, it permitted religiously identified organizations to refuse to hire people—because of their religion—for jobs in government-funded programs. These actions halted the federal government’s six-decade commitment to equal opportunity for all Americans who seek government-funded jobs, regardless of their religious beliefs.

Some social service programs, however, contain independent statutory provisions prohibiting discrimination on the basis of religion that could not be so easily undone. In order to get around these other civil rights laws, the Bush Administration developed and promoted the far-fetched assertion that the Religious Freedom Restoration Act (RFRA) provides religiously identified organizations a blanket exemption to prohibitions against hiring discrimination on the basis of religion. This flawed theory was memorialized an Office of Legal Counsel (OLC) opinion, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,” in 2007.

The OLC opinion wrongly permits RFRA to be used as a tool for overriding statutory protections against government-funded religious discrimination and creates a broad right to receive government grants without complying with applicable laws, regulations, and policies. Such laws, regulations, and policies function as conditions on the government grants awarded to these religiously identified organizations. Conditions on government funding normally would not trigger RFRA and thus, the Bush OLC opinion is both unprecedented and far-reaching.

One notable scholar commented that the OLC opinion is “perhaps the most unpersuasive OLC opinion [he’s] read. And that includes the famous John Yoo opinion, by the way” Another leading scholar stated that she believes OLC “erred in its analysis.” In 2009, nearly 60 organizations called for the Obama Administration to review and withdraw the opinion as a necessary step to fulfill President Obama’s campaign promise to end hiring discrimination in government-funded social service programs. *The New York Times* and *The Los Angeles Times* editorialized on the poorly reasoned opinion.

The OLC opinion, unfortunately, remains in effect. As a result, religiously identified organizations that want to use a religious litmus test when hiring people to provide

government-funded social services must simply self-certify that they have religious objections to civil rights laws otherwise prohibiting such discrimination. The Department of Justice has awarded grants to more than ten self-certifying organizations, yet does not seem to engage in any meaningful review or oversight of the organizations' self-certification.

The potential implications of this policy are wide-ranging. It places the interests of religiously identified organizations, which voluntarily seek government funding, above the right of individuals to a workplace free of religious discrimination—a qualified candidate for a job funded by the government could be told she will not be hired because she is the wrong religion. Moreover, because there seems to be no oversight, organizations that self-certify, and are therefore exempted from prohibitions on religious hiring discrimination, may wrongly think they have an absolute right to structure all aspects of their employer-employee relationships in accordance with their religious teachings—even when this would result in impermissible sex discrimination, such as paying women less than men, inquiring about employees' pregnancies, or refusing to interview transgender individuals. Self-certification may also invite these organizations to believe they are exempted from state and local nondiscrimination laws, which may include categories such as sexual orientation, gender identity, or marital status. They also may believe they can be exempted from other conditions on government money these organizations receive to provide social services on behalf of the government.

Recommendation

1. The Department of Justice Office of Legal Counsel should review and withdraw the 2007 OLC opinion that threatens core civil rights and religious freedom protections. DOJ and all other agencies should rescind all policies, procedures, and guidance that rely upon or implement this OLC opinion.

Supplemental Information

- Letter from 58 organizations calling for review and withdrawal of OLC opinion, September 2009: <http://www.aclu.org/religion-belief/coalition-letter-department-justice-urging-withdrawal-office-legal-counsel-memo-reli>
- *Los Angeles Times* editorial, October 2009: <http://articles.latimes.com/2009/oct/03/opinion/ed-faithbased3>
- *New York Times* editorial, October 2009: http://www.nytimes.com/2009/10/14/opinion/14wed4.html?_r=1&ref=opinion
- Blog regarding Freedom of Information Act request regarding exemptions granted to religiously identified organizations from statutory prohibitions on hiring discrimination: <http://www.aclu.org/religion-belief/aclu-foia-request-department-justice-office-justice-programs-regarding-hiring>

- Office of Legal Counsel, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,” June 2007: <http://www.justice.gov/olc/2007/worldvision.pdf>
- Remarks by Prof. Robert Tuttle at the Brookings Institution’s “Faith-Based and Neighborhood Partnerships in the Obama Era: Assessing the First Year and Looking Ahead,” Feb. 18, 2010 (p. 141):
http://www.brookings.edu/~media/events/2010/2/18%20community%20partnerships/20100218_faith_based
- Statement of Prof. Melissa Rogers, Director, Center for Religion and Public Affairs, Wake Forest University Divinity School) for the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties hearing on “Faith-Based Initiatives: Recommendations of the President’s Advisory Council on Faith-Based and Community Partnerships and Other Current Issues,” Nov. 18, 2010 (pp. 25-33):
http://judiciary.house.gov/hearings/printers/111th/111-156_62343.PDF

Issue Area: Women’s rights

Issue Area: Racial Justice

Provide Pay Equity for Workers

Background

Nearly 50 years after passage of the Equal Pay Act, women still make just 77 cents for every dollar earned by men, and the pay gap is even wider for women of color. Additionally, nearly half of American workplaces either discourage or prohibit employees from discussing pay practices, making it extremely difficult for women to learn they are being paid less than their male colleagues. Over time, the effectiveness of the Equal Pay Act has been weakened by loopholes, leaving women without the resources they need to combat pay discrimination effectively.

To implement President Obama’s pledge in his first term to crack down on violations of equal pay laws, the Administration created the National Equal Pay Task Force in January 2010, bringing together the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL), and the Office of Personnel Management (OPM). In July 2010, the Task Force has identified several persistent challenges for women seeking to achieve equal pay, made recommendations to address each challenge, and developed an action plan to implement those recommendations. Such recommendations include improved wage data collection, better coordination between agencies, educating employers and employees on their respective obligations and rights regarding equal pay, improved training for federal employees responsible for equal pay enforcement, strategic enforcement and litigation focused on wage discrimination, improving the federal government’s role as a model employer, and Administration support for passage of the Paycheck Fairness Act.

Recommendation

1. The President should issue an executive order protecting employees who work for federal contractors from retaliation for discussing their wages. In the absence of passage of the Paycheck Fairness Act, an executive order is needed as a stopgap measure to protect the 26 million people employed by federal contractors nationwide from pay discrimination.
2. The DOL’s Office of Federal Contract Compliance Programs (OFCCP) should finalize its compensation data collection tool, proposed in late 2011, and expand the tool to other types of employment practices in order to help detect other forms of discrimination in the work place. The tool is needed to replace OFCCP’s Equal Opportunity Survey, a vital tool discontinued under the Bush Administration, which ensured federal contractor and subcontractor compliance with non-discrimination requirements.

3. The Administration should fully implement the July 2010 action plan of its National Equal Pay Task Force, which includes recommendations on administrative action to help close the wage gap.
4. The Administration should prioritize bringing both class action and disparate impact cases relating to compensation, undertaking measures to strengthen systemic enforcement of laws prohibiting wage discrimination.

Supplemental Material

- Equal Pay Task Force Report, April 2012
http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf
- Equal Pay Task Force Recommendations and Action Plan, July 2010
http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf
- Huffington Post: We Can't Wait for Fair Pay, April 2012:
<http://www.aclu.org/blog/womens-rights/we-cant-wait-fair-pay>
- Huffington Post: It's Time to Stop the Catch-22, June 2012:
<http://www.huffingtonpost.com/deborah-j-vagins/the-paycheck-fairness-act-2-b-1568219.html>
- ACLU Letter to President Obama on Equal Pay Day 2012, April 2012:
http://www.aclu.org/files/assets/aclu_letter_to_president_obama_on_retaliation_executive_order_4_17_12_0.pdf
- ACLU Action Urging President Obama to Ban Retaliation in Federal Contracting:
<https://ssl.capwiz.com/aclu/issues/alert/?alertid=61183546>
- ACLU Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/aclu-comments-office-federal-contract-compliance-programs-proposed-data>
- PFA Coalition Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/paycheck-fairness-coalition-sign-comments-office-federal-contract>
- Employment Task Force Coalition Comments on Compensation Data Collection Tool, October 2011: <http://www.aclu.org/racial-justice-womens-rights/employment-task-force-sign-comments-office-federal-contract-compliance>

- ACLU Fact Sheet on Retaliation:
http://www.aclu.org/files/assets/aclu_factsheet_on_retaliation_eo_4_2012.pdf
- White House Report: Keeping America's Women Moving Forward:
http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf
- ACLU Letter to Senate in Support of Paycheck Fairness Act, May 2012:
<http://www.aclu.org/womens-rights/aclu-letter-senate-support-paycheck-fairness-act-s-3220>

Issue Area: Human rights

Accountability for Torture, Extraordinary Rendition, and Wrongful Detention

Background

Following 9/11, the U.S. government authorized and engaged in widespread and systematic torture, extraordinary rendition, and unlawful detention, including incommunicado detention in so-called CIA “black sites”. Hundreds of prisoners were tortured in U.S. custody — some even killed — as a result of interrogation policies authorized at the highest levels of the U.S. government. The U.S. government engaged in the illegal practice of extraordinary rendition, which involved abducting foreign nationals and transferring them to foreign countries for abusive interrogation without providing any due process or protections against torture. Over 800 men have been detained at Guantanamo and in the CIA black sites; the overwhelming majority were never charged with any crime. The United States has held thousands of detainees in Afghanistan — some for more than six years — without access to counsel or a meaningful opportunity to challenge their imprisonment.

While the ACLU and its partner organizations have secured and made publicly available thousands of records documenting torture, extraordinary rendition, and unlawful detention, the government still keeps many records secret. Our nation cannot properly reckon with these rights violations without a full record of them.

If the U.S. government is to restore its reputation for upholding the fundamental rights of humane treatment and due process, it must provide a remedy to victims of torture, extraordinary rendition, and wrongful detention and hold those responsible for such abuses to account. None of the individuals who have sought to challenge their treatment in U.S. custody or extraordinary rendition by the United States have been allowed their day in court. No victims or survivors of torture, rendition to torture, or wrongful detention have been compensated for their suffering. The lack of remedy persists despite the fact that Article Fourteen of the Convention Against Torture requires the United States to ensure “fair and adequate compensation” for torture victims. No senior officials who designed, authorized, or executed the torture of persons in U.S. custody or the transfer of persons to other countries where they were at risk of torture have faced criminal charges. The U.S. government has refused to cooperate with — and indeed has sought to obstruct — investigations by foreign governments into their own officials’ complicity with the United States’ extraordinary rendition, torture, and abuse of prisoners abroad. The continuing impunity and lack of remedy threaten to undermine the universally recognized and fundamental rights not to be tortured or arbitrarily detained, and send the dangerous signal to government officials that there will be no accountability for illegal conduct.

Recommendations

1. The President should take measures to provide non-judicial compensation to known victims and survivors who suffered torture, transfer to torture, or wrongful detention at the hands of U.S. officials and publicly recognize and apologize for the abuses that were committed.
2. The Department of Justice should cease opposing efforts by victims and survivors to pursue judicial remedies by allowing such cases to be litigated on their merits.
3. The President and relevant agencies should formally honor U.S. officials and soldiers who exposed the abuse of prisoners or who took personal or professional risks to oppose the adoption of interrogation policies that violated domestic and international law.
4. The State Department should support through diplomatic channels efforts by other countries to account for their role in the extraordinary rendition, torture, and abuse of prisoners by and at the behest of the United States abroad. The State Department should facilitate full cooperation by all arms of the federal government with any investigations by foreign governments and promote accountability for torture and abuse and transfer to torture and abuse.
5. The President should order the release of all additional government documents that detail the torture program, with minimal redactions to protect only legitimately classified information (and not merely embarrassing or illegal activity). The document release should include the Presidential directive of 9/17/2001 authorizing the CIA to establish the secret "black sites," where CIA torture occurred, and the 2,000 photographs of abuse in facilities throughout Iraq and Afghanistan that the Defense Department continues to suppress.
6. The State Department should respond to petitions filed against the U.S. before the Inter-American Commission on Human Rights on behalf of victims and survivors of torture and forced disappearance.
7. Declassify and release the investigative report by the Senate Select Intelligence Committee regarding the CIA's use of rendition and torture redacting only as necessary to protect legitimate secrets, and not protect the government from embarrassment or continue to conceal illegal activity.

Supplemental Material

- Executive Order 13491 -- Ensuring Lawful Interrogations:
http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations

- ACLU, The Torture Report (2009): <http://www.thetorturereport.org/>
- ACLU, Torture Database: http://www.thetorturedatabase.org/search/apachesolr_search
- ACLU Report, “Enduring Abuse,” Executive Summary, April 27, 2006: <http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive>
- ACLU, Bagram FOIA: <http://www.aclu.org/national-security/bagram-foia>
- ACLU, Accountability for Torture: <http://www.aclu.org/accountability/>

Issue Area: Human rights

Prevent Torture and Transfer to Torture

Background

No policy decision has done more damage to the rule of law and our nation's moral authority than the post-9/11 embrace of torture and rendition to torture. Government documents show that hundreds of prisoners were tortured in U.S. custody — some even killed — and that torture policies were developed at the highest levels of the U.S. government. The United States also abducted persons and transferred them either to U.S.-run detention facilities overseas or to the custody of foreign intelligence agencies where they were subjected to torture and other abuse, in some cases after the receiving government gave “diplomatic assurances” that the individuals would not be tortured.

President Obama rejected the torture legacy and has done much to restore the rule of law. On January 22, 2009, the President signed an executive order that categorically prohibited torture, reaffirmed the U.S. government's commitment to Common Article 3 of the Geneva Convention, invalidated the flawed legal guidance on torture prohibitions, and limited all interrogations, including those conducted by the CIA, to techniques authorized by the Army's field manual on interrogation. The Administration has also reportedly adopted recommendations aimed at improving the United States' transfer policies, including recommendations that the State Department have a role in evaluating any diplomatic assurances and that assurances include a monitoring mechanism.

Recommendations

To further restore U.S. moral authority and abide by the prohibition against torture:

1. The President must oppose any and all efforts to return to the use of the so-called “enhanced interrogation techniques.”
2. The President must direct the Homeland Security, State, or Defense Departments not to rely on “diplomatic assurances” to deport (pursuant to 8 C.F.R. § 208.18(c)) or otherwise transfer persons out of United States custody to any country where there is a likelihood of torture.
3. The Departments of Homeland Security and Defense and other relevant agencies must, at a minimum, provide meaningful administrative and judicial review whenever the United States seeks to deport or extradite an individual to a country where there is likelihood of torture, to ensure compliance with U.S. obligations under the UN Convention Against Torture. Such review must extend to the existence and sufficiency of diplomatic assurances.

4. The White House and Defense and State Departments should provide for greater transparency with respect to their policies and procedures related to interrogation and transfers, including by making public the Special Task Force on Interrogations and Transfer Policies recommendations and the subsequent Defense and State Department Inspector General reports.

Supplemental Material

- Executive Order 13491 -- Ensuring Lawful Interrogations:
http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations
- Department of Justice Report, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President, August 2009:
<http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>
- ACLU, The Torture Report, 2009: <http://www.thetorturereport.org/>
- ACLU, Torture Database:
http://www.thetorturedatabase.org/search/apachesolr_search
- ACLU Report, "Enduring Abuse," Executive Summary, April 2006:
<http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive>
- Unfinished Business: Turning the Obama Administration's Human Rights Promises into Policy: <http://www.aclu.org/human-rights/unfinished-business-turning-obama-administrations-human-rights-promises-policy>

Issue area: Human rights

End Human Trafficking and Forced Labor Facilitated by U.S. Government Contracts

Background

The President has demonstrated his commitment to ending the trafficking and forced labor of foreign workers hired under U.S. government contracts to work in support of U.S. military and diplomatic missions abroad and now must ensure this commitment is fulfilled. Recruited from impoverished villages in countries such as India, Nepal, and the Philippines, men and women—known as Third Country Nationals—are charged exorbitant recruitment fees, often deceived about the country to which they will be taken and how much they will be paid, and once in-country, often have no choice because of their financial circumstances but to live and work in unacceptable and unsafe conditions. These abuses amount to modern-day slavery—all on the U.S. taxpayers' dime.

Human trafficking and forced labor on government contracts is also part of contractor malfeasance that wastes tens of millions of U.S. tax dollars annually. The illicit recruitment fees that trafficked individuals pay, together with the salary cost-cutting techniques that contractors employ, go to enrich prime contractors, subcontractors, local recruiters, and others who profit from the exploitation of individuals wanting to work for government contractors or subcontractors.

On September 24, 2012, President Obama signed an executive order aimed at strengthening existing protections against human trafficking and forced labor in U.S. government contracts. The executive order is a significant step towards ending modern-day slavery facilitated by current government contracting processes.

Recommendations

To ensure that the executive order is implemented and to end profits based on government contracting processes that facilitate human trafficking and forced labor, the next administration must:

1. Ensure that the Federal Acquisition Regulatory Council issues regulations that effectively implement the executive order. These regulations should ensure that contractor employees are provided with written contracts in a language that they understand and that provide details of their conditions of employment, including payment of a fair wage, prior to leaving their home country; establish procedures to ensure that prime contractors are held accountable for the hiring practices of their subcontractors; and protect whistle blowers who report instances of contractor employee abuse from retaliation.
2. Improve oversight and monitoring of U.S. contractors' compliance with existing prohibitions on human trafficking and forced labor by ensuring that contracting agencies, including the State and Defense Departments and USAID (a) conduct regular audits and inspections of their contractors; and (b) implement formal mechanisms to

receive and process all credible reports of human trafficking, forced labor, and other abuses and ensure that such reports are investigated.

3. Improve accountability for human trafficking and labor-rights violations in government contracting processes by ensuring (a) the Justice Department initiates, thoroughly investigates, and where appropriate, prosecutes all U.S. contractors who are suspected of engaging in violations of contract employees' rights; and (b) contracting agencies impose stringent penalties on every contractor who engages in or fails to report such abuses.

Supplemental material

- Executive Order - Strengthening Protections Against Trafficking In Persons In Federal Contracts: <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>
- "Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors," joint ACLU-Yale Lowenstein International Human Rights Clinic report: http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf
- Documents Released Under FOIA on Military Contractor Human Trafficking: <http://www.aclu.org/human-rights/military-contractor-human-trafficking-documents-released-under-foia>

Issue Area: Human rights

Establish an Interagency Working Group to Address Human Rights Obligations

Background

Since 1992, the U.S. has ratified three major human rights treaties in addition to two optional protocols. Yet, there has been insufficient effort to ensure that U.S. domestic law, policy and practice comply with its human rights legal obligations. Focus on human rights implementation has, for the most part, been limited to the periodic reporting and review process by the Geneva-based committees monitoring treaty compliance. In 2010, the current Administration also committed to submitting to a Universal Periodic Review (UPR) at the United Nations Human Rights Council. The United States accepted a number of recommendations made during that UPR process and in March 2012, it announced a plan to implement the accepted recommendations.

The Administration also recently established an interagency Equality Working Group, with its first priority to improve implementation of the International Convention on the Elimination of All Forms of Racism (ICERD) and submitted its Fourth Periodic Report on its adherence to the International Covenant on Civil and Political Rights (ICCPR) and its First Periodic Report under the Optional Protocols to the Convention on the Rights of the Child. In 2009, the Administration took the important step of signing the U.N. Convention of the Rights of Persons with Disabilities and in May 2012 has sought Senate advice and consent for its ratification.

While these recent developments are welcome, they fall short of ensuring that the U.S. government is comprehensively adhering to its human rights obligations across the board and treating these commitments as the framers of the U.S. Constitution intended—as the supreme law of the land. To ensure full human rights compliance, the President needs to institutionalize a broader, comprehensive, proactive, and transparent interagency approach to implementation of U.S. human rights obligations.

Recommendations

To demonstrate the United States' commitment to fully implement its human rights obligations:

1. The President should order the creation of a formal interagency human rights structure, led by the National Security Council, which is transparent, comprehensive and accessible to civil society. The mechanism should be extended to all aspects of U.S. human rights compliance, not only UPR-related implementation; make clear its mandate, authorities, structure and activities; establish explicit civil society points of contact with each agency involved in the structure; and hold regular, periodic meetings with civil society members. The mechanism, which would best be established by an executive order expanding the authorities established in Executive Order 13107, should also ensure

effective collaboration and improved coordination between federal, state, local, and tribal governments on implementation and enforcement of human rights obligations.

2. Require the Department of Justice-led Equality Working Group to establish a clear, comprehensive plan of action to fully implement the ICERD domestically and improve the United States' compliance with the treaty.

Supplemental Material

- Unfinished Business: Turning the Obama Administration's Human Rights Promises into Policy: http://www.aclu.org/files/assets/unfinished_business_aclu_final.pdf
- Oral Statement by Jamil Dakwar, Human Rights Program Director, American Civil Liberties Union delivered to the UN Human Rights Council, March 21, 2012: https://www.aclu.org/files/assets/oral_statement_unhrc_upr_dakwar_final.pdf
- Statement by the Delegation of the U.S. at the 20th Session of the Human Rights Council, Geneva, Switzerland, July 3, 2012: <http://www.humanrights.gov/2012/07/03/open-and-free-expression-exposes-bigotry-and-hatred-to-the-forces-of-reason-and-criticism/>
- [U.S. Implementation Plan for the 2010 Universal Periodic Review, March 16, 2012.](#) Exec. Order 13107, 3 CFR 234 (1998): <http://www.gpo.gov/fdsys/pkg/CFR-1999-title3-vol1/pdf/CFR-1999-title3-vol1-eo13107.pdf>
- United Nations International Convention on the Elimination of All Forms of Racial Discrimination, adopted January 4, 1969: <http://www.state.gov/documents/organization/100294.pdf>
- ACLU and Rights Working Group Report: The Persistence of Racial and Ethnic Profiling in the United States, 2009: http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf
- ACLU Testimony before the U.S. Senate Committee on the Judiciary Subcommittee on Human Rights and the Law on Implementation of Human Rights Treaties, December 2009: http://www.aclu.org/files/assets/ACLU_Statement_on_HR_Treaty_Implementation_FIN_AL.pdf

Issue Area: National security

Fully Restore the Rule of Law to Detention Policy and Practices

Background

President Obama inherited the terrible legacy of indefinite detention without charge or trial of people picked up away from a battlefield and the use of military commissions at Guantanamo. The Obama Administration has taken some positive steps. It has refused to add to the number of persons held in indefinite detention at Guantanamo, closed the CIA secret prisons, secured some improvements to the military commission statute, and has made diligent diplomatic efforts to resettle or repatriate some detainees. Nevertheless, the Obama Administration also took harmful steps by renewing legal and political claims of authority to hold detainees without charge or trial, re-starting military commission prosecutions that continue to lack basic due process protections, and signing into law an indefinite detention statute and restrictions on transfers of Guantanamo detainees. It is beyond the time to end the Guantanamo legacy and fully restore the rule of law to detention.

Recommendations

The President should take the following actions:

1. Publicly state that he will veto any legislation extending the currently applicable statutory restrictions on the transfer of detainees from Guantanamo, and also order the removal of any policy obstacles to the resettlement or repatriation of detainees.
2. Order the closure of the prison at Guantanamo by charging in federal criminal court any detainees against whom there is evidence of criminal conduct that is untainted by torture, and transferring all other detainees to their home countries or to other countries where they will not be in danger of being tortured, abused, or imprisoned without charge or trial.
3. Order the end of the use of indefinite detention without charge or trial, and disclaim any authority for such indefinite detention, of detainees at Guantanamo and prisoners picked up away from a battlefield and brought to Bagram.
4. Order the Department of Defense to terminate the unconstitutional and untested military commissions, and transfer to the Department of Justice anyone who will be charged with a crime for trial in federal criminal court.
5. Order that the Department of Defense and Department of Justice shall not rely on the indefinite detention provisions in the National Defense Authorization Act for Fiscal Year 2012 ("NDAA") or any of the trial provisions of the Military Commissions Act of 2009, but instead should work for their repeal.

These steps will end the terrible legacy that President Obama inherited from his predecessor at Guantanamo, and fulfill the promise of restoring the rule of law to America's military detention practices.

Supplemental Materials

- ACLU Letter to Judiciary Committee Urging Jurisdiction over the NDAA
<http://www.aclu.org/national-security/aclu-letter-senate-urging-judiciary-committee-jurisdiction-over-national-defense>
- Coalition Letter to the House Urging Opposition to Blanket Ban on Guantanamo Detainee Transfers in Department of Defense Appropriations Act
<http://www.aclu.org/national-security/coalition-letter-house-urging-opposition-blanket-ban-guantanamo-detainee-transfers>
- ACLU Letter to the White House on GITMO Transfer Provisions in the NDAA
<http://www.aclu.org/national-security/aclu-letter-white-house-gitmo-transfer-provisions-ndaa>

Issue Area: National security

End Unlawful Use of Lethal Force

Background

The potential for a permanent state of war threatens fundamental constitutional protections and human rights, both at home and abroad---and strikes at the very heart of our national character. Despite an end to the Iraq war and the current drawing down of American combat troops in Afghanistan, the Obama Administration has expanded the scope of its use of lethal force far beyond any battlefield, and in violation of the Constitution and other binding law. The Obama Administration asserts that the 2001 congressional authorization for use of force in Afghanistan somehow provides authority for the use of lethal force far from any battlefield, as well as asserts that it has a right to kill, outside of an armed conflict, based on a theory of self-defense that goes far beyond any authority permitted by the Constitution and international law. These twin claims of unchecked presidential authority could lead to an unstoppable potential for a permanent state of worldwide war.

Recommendations

The President should restore the Constitution and the rule of law to the use of lethal force by signing an executive order that directs the government:

1. To end any reliance on the 2001 congressional authorization for use of force in Afghanistan, once the United States combat operations in Afghanistan ends in 2014.
2. During the interim period until the United States combat operations in Afghanistan ends, to end any reliance on the 2001 congressional authorization for use of force in Afghanistan as any claim of authority for the killing of persons away from any battlefield.
3. To comply with the law and refrain from the use of lethal force against suspects away from any battlefield, except in the extremely narrow circumstances permitted under the Constitution and international law, when it is a last resort to address a specific, concrete and imminent threat of deadly harm, and measures must be taken to prevent harm to others.

Issue Area: Free speech

Issue Area: Women’s rights

Stop Issuance of Patents on Genetic Material

Background

Currently, the United States Patent and Trademark Office (“USPTO”) issues patents that claim naturally occurring human DNA once it is isolated—or removed—from the cell. These gene patents can be asserted by the holder against individuals and entities—including researchers and clinicians engaged in basic scientific inquiry—that seek to examine the particular sequence of DNA covered by the claim. In practice, these patents allow for monopolies on the work that can be done on particular human genes, and can be used to preclude researchers and clinicians from performing genetic diagnostic testing, developing new genetic diagnostic tests or conducting pure genetic research.

These patents are unlawful and unconstitutional. They violate the Supreme Court’s long-standing precedent prohibiting patents on products and laws of nature. They also run afoul of the First Amendment, which protects freedom of scientific research and inquiry, and Article I, section 8, which authorizes Congress to issue patents that “promote the progress of science.” Patents that claim naturally occurring DNA sequences grant the patentee ultimate “control over a body of knowledge and pure information,” and thus violate these legal guarantees.

As a result, gene patents hinder scientific advancement and patients’ access to medical care. In the case of BRCA1 and BRCA2, two patented genes correlated with hereditary breast and ovarian cancer, the patent holder has been able to dictate the cost and type of testing that is offered, barred other laboratories from developing and providing confirmatory or more comprehensive testing, and refused to share genetic data with the scientific community. In litigation challenging the BRCA patents, the Justice Department filed two amicus briefs arguing that these patents are invalid. Yet, the USPTO has not reconsidered its policy that authorizes issuing gene patents.

Recommendations

1. The President should direct the Undersecretary of Commerce for Intellectual Property to adopt the findings of the Department of Health and Human Services Secretary’s Advisory Committee on Genetics, Health, and Society (“SACGHS”) in its April 2010 report on genetic diagnostic testing as its conclusions in the USPTO’s forthcoming report mandated by the America Invents Act, given SACGHS’ expertise on genetic testing.

2. The President, by executive order or otherwise, should direct the Secretary of Commerce and the Undersecretary of Commerce for Intellectual Property to halt immediately the issuance of patents that claim the isolated form of naturally occurring DNA.

Supplemental Material

- ACLU comments on USPTO's Genetic Testing Study:
http://www.uspto.gov/aia_implementation/gene-comment-aclu.pdf
- ACLU case material in challenge to BRCA gene patents – *Association for Molecular Pathology v. U.S. Patent & Trademark Office*: <http://www.aclu.org/free-speech-womens-rights/aclu-challenges-patents-breast-cancer-genes-0>

Issue Area: Free speech

Maintain Domestic Intellectual Property Standards in International Trade Agreements

Background

The United States is participating in multilateral negotiations with respect to two international trade agreements that could impose new and constitutionally suspect standards for intellectual property (“IP”) enforcement on the United States. Both sets of negotiations have been conducted by the Office of the United States Trade Representative (“USTR”) in secret, with access to drafts and other details about the negotiations afforded only to certain private corporations and trade associations. Additionally, although IP law should, constitutionally, be the province of Congress, the USTR has been relying on controversial legal grounds to keep Congress and members of the public in the dark.

Anti-Counterfeiting Trade Agreement (“ACTA”)

Negotiations for ACTA began in 2006 and finished in 2011. To date the United States, the European Union (and 22 of its member states), Australia, Canada, Japan, Morocco, New Zealand, Singapore and South Korea have all signed ACTA but none have formally ratified the agreement yet. ACTA would establish a new international body to enforce certain IP rules. Enforcement would be out of the hands of U.S. agencies and would not be subject to constitutional checks and balances against abuse.

Trans-Pacific Partnership (“TPP”)

The United States is currently engaged in negotiations for the Trans-Pacific Partnership (“TPP”) with nine countries, primarily in the Pacific Rim: Australia, Brunei, Canada, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam. The President is informally acting as if fast track authority still applies (despite the expiration of such authority in 2007) to conduct these negotiations behind closed doors and without sufficient congressional oversight. Like ACTA, details are being shared with interested for-profit entities, but not with members of the public.

In addition to concerns about overly punitive remedies for copyright enforcement, leaked documents show that TPP would require significant changes to existing U.S. patent enforcement. For instance, it would require the signatory countries to permit the patenting of diagnostic, therapeutic and surgical methods of treatment of humans or animals—all without explicit limits on enforcement. Current U.S. law does not permit the enforcement of such patents against certain healthcare providers.

Recommendations

1. The President should direct the USTR to either support removal of the IP chapter from the TPP, or stop negotiating TPP as if trade promotion authority continues to apply.

Further, the President and the USTR should ensure that material changes to U.S. IP laws are not enacted through truncated legislative procedures.

2. USTR should provide an opportunity for all interested parties to international agreements that would materially change domestic IP law, including civil society, to participate in the negotiation process through observing and reviewing draft documents and commenting on same.

Supplemental Material

- ACLU Blog, An International SOPA, June 2012: <http://www.aclu.org/blog/free-speech-national-security-technology-and-liberty/international-sopa>

Issue area: National security
Issue area: Privacy
Issue area: Free speech
Issue area: Religious freedom

Stop the Monitoring and Improper Recording of Information about Americans' First Amendment-Protected Activities

Background

Since 9/11, the government has engaged in widespread monitoring of people exercising their First Amendment rights, from activists participating in peaceful political protests to community members engaging in religious practices. It has conducted surveillance of, and collected intelligence about, Americans based on their race, religion, ethnicity, and national origin. These abuses are the result of post-9/11 regulations that swept away long-standing safeguards and allow the FBI to spy on innocent Americans and peaceful groups with little or no suspicion of wrongdoing, using intrusive techniques such as physical surveillance, commercial and law enforcement data base searches, FBI interviews, and informants. Law enforcement agencies have also improperly collected records about Americans' First Amendment-protected activity in violation of the Privacy Act, 5 U.S.C. § 552a, which specifically prohibits federal agencies from maintaining records describing how individuals exercise their First Amendment rights absent special, narrow circumstances.

Recommendations

1. The President should issue an executive order directing relevant agencies (e.g. Departments of Justice, Defense, and Homeland Security) to refrain from monitoring people engaged in political or religious activities unless there is reasonable suspicion that they have committed a criminal act or are taking preparatory actions to do so, and from collecting information regarding people's First Amendment-protected activities unless they are directly related to that criminal activity.
2. The Attorney General should repeal the 2008 Attorney General Guidelines regarding FBI investigations, and replace them with new guidelines that protect the rights and privacy of innocent persons. The new guidelines should:
 - Remove the "Assessment" authority.
 - Require an articulable factual basis for opening a Preliminary Investigation, shorten the time during which a Preliminary Investigation may remain open, and limit the investigative techniques that can be used during a Preliminary Investigation to ensure that the least intrusive means necessary are employed to quickly determine whether a full investigation should be opened.

- Prohibit the use of race, ethnicity, religion, national origin, or the exercise of First Amendment-protected activity as factors in making decisions to investigate persons or organizations, or to maintain or disseminate information about their First Amendment-protected beliefs and activities.
- Prohibit the reporting and keeping files on individuals engaging in peaceful political activities.
- Prohibit the misuse of federal law enforcement community outreach programs for intelligence gathering purposes.

Supplemental material

- Sample Attorney General Guidelines (see below)
- ACLU, Interested Persons Memo: Analysis of Changes to Attorney General Guidelines, June 2002: <http://www.aclu.org/national-security/interested-persons-memo-analysis-changes-attorney-general-guidelines>
- ACLU, Interested Persons Memo: Brief Analysis of Proposed Changes to Attorney General Guidelines, May 2002: <http://www.aclu.org/national-security/interested-persons-memo-brief-analysis-proposed-changes-attorney-general-guideline>
- ACLU Report, “History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement,” May 2007: http://www.aclu.org/images/asset_upload_file893_29902.pdf
- ACLU Report, “The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study on FBI Surveillance of Dr. Martin Luther King,” March 17, 2002: <http://www.aclu.org/national-security/dangers-domestic-spying-federal-law-enforcement-case-study-fbi-surveillance-dr-mar>
- ACLU Report, “No Real Threat The Pentagon’s Secret Database on Peaceful Protest,” January 2007: <http://www.aclu.org/national-security/no-real-threat-pentagons-secret-database-peaceful-protest>
- Coalition Letter on new FBI Guidelines, September 2008: <http://www.aclu.org/national-security/aclu-coalition-letter-senate-and-house-judiciary-committee-leadership>
- ACLU Letter to the inspector general asking him to investigate whether the FBI has been violating the current guidelines, September 2008: <http://www.aclu.org/national-security/aclu-asks-inspector-general-investigate-abuses-fbi-guidelines>

- ACLU Letter to Judiciary Leadership Urging an Inquiry into Reports of FBI Use of Racial Profiling, July 2008: <http://www.aclu.org/racial-justice/aclu-letter-judiciary-leadership-urging-inquiry-reports-fbi-use-racial-profiling>
- ACLU Comments on proposed amendments to 28 Code of Federal Regulations Part 23 (Criminal Intelligence Systems Operating Policies), August 2008: http://www.aclu.org/images/asset_upload_file347_36595.pdf
- Office of the Inspector General, U.S. Department of Justice, “A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups,” September 2010: <http://www.justice.gov/oig/special/s1009r.pdf>
- ACLU, Letter to Attorney General asking him to amend the Attorney General Guidelines, October 2011: http://www.aclu.org/files/assets/aclu_letter_to_ag_re_rm_102011_0.pdf
- ACLU EYE on the FBI: The FBI Is Engaged In Unconstitutional Racial Profiling and Racial “Mapping,” October 2012: <http://www.aclu.org/national-security/aclu-eye-fbi-fbi-engaged-unconstitutional-racial-profiling-and-racial-mapping>
- ACLU EYE on the FBI: The FBI is using the guise of “community outreach” to collect and store intelligence information on American’s political and religious beliefs, December 2011: <http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community>
- ACLU EYE on the FBI: The San Francisco FBI conducted a years-long Mosque Outreach program that collected and illegally stored intelligence about American Muslims’ First Amendment-protected religious beliefs and practices, March 2012: http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0_0.pdf
- ACLU, Letter to DOJ Inspector General on Privacy Act Violations and Improper Targeting April 2012: <http://www.aclu.org/national-security/aclu-letter-doj-inspector-general-fbi-privacy-act-violations-and-improper>

Recommended Language

Attorney General Guidelines

Executive Branch:

- 1) The President should direct the Attorney General to thoroughly review the Attorney General Guidelines and to amend them to make them consistent with the following principles:

- The FBI should be prohibited from initiating any investigative activity regarding a U.S. person absent credible information or allegation that such person is engaged or may engage in criminal activity, or is or may be acting as an agent of a foreign power. A preliminary investigation opened upon such information or allegation should be strictly limited in scope and duration, and should be directed toward quickly determining whether a full investigation, based on facts establishing reasonable suspicion, may be warranted.
 - Supervisory approval should be required for any level of investigation other than searches of public records and public websites, searches of FBI records, requests for information from other federal, state, local, or tribal law enforcement records, and questioning (but not tasking) previously developed sources.
 - In each investigation, the FBI should be required to employ the least intrusive means necessary to accomplish its investigative objectives. The FBI should consider the nature of the alleged activity and the strength of the evidence in determining what investigative techniques should be utilized. Intrusive techniques such as recruiting and tasking sources, law enforcement undercover activities, and investigative activities requiring court approval should only be authorized in full investigations, and only when less intrusive techniques would not accomplish the investigative objectives.
 - The FBI should be prohibited from collecting or maintaining information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an authorized criminal or national security investigation, and there are reasonable grounds to suspect the subject of the information is or may be involved in the conduct under investigation.
 - The FBI should be prohibited from using community outreach programs for intelligence gathering purposes.
- 2) The President should work with Congress to establish a statutory investigative charter for the FBI that limits the FBI's authority to conduct investigations without specific and articulable facts giving reason to believe that an individual or group is or may be engaged in criminal activities, is or may be acting as an agent of a foreign power.

Issue Area: Free speech

Require Disclosure of Certain Political Contributions by Federal Contract Bidders

Background

In 2011, the Obama Administration released a draft executive order that would have required entities seeking government contracts to disclose certain political contributions. In addition to direct contributions to candidates, the draft order would have required disclosure of contributions to third parties where the bidder anticipated that the money would be used for independent expenditures or electioneering communications.

The ACLU expressed conditional support for the order, and argued that, if narrowed, the disclosure of contributions that actually supported communications expressly advocating for or against a candidate could serve the interests of transparency and openness without unduly restricting political speech.

Specifically, the ACLU urged the Office of Management and Budget to amend the draft order to: (1) limit disclosure to contributions that support only “express advocacy” for or against a candidate; (2) ensure that the disclosure of contributions to third parties be limited to those instances where the third party actually used the funds to engage in express advocacy; (3) strictly limit the scope of the order to the federal contracting process (i.e., not science or technology grants to researchers and clinicians); (4) exempt individual officers and directors of covered entities from disclosure of individual contributions unless they meet the general individual contribution disclosure thresholds under current law; and (5) seal public release of disclosure information until after award of the contract (to prevent political considerations from influencing the agency’s decision).

Recommendation

1. The President should issue an executive order requiring disclosure of political contributions by entities bidding for federal contracts, where those contributions have been used to support communications that expressly support the election or defeat of a candidate for federal office. The order should limit disclosure in the five ways listed above.

Supplemental Material

- ACLU letter to the Office of Management and Budget expressing conditional support for the draft executive order, June 2011:
http://www.aclu.org/files/assets/eo_re_federal_contractors_disclosure_requirements.pdf

Issue Area: Free speech

Rescind Lobbying Restrictions that Harm the Right to Petition

Background

The Obama Administration has made lobbying reform one of its signature first-term initiatives. Early in the term, the Administration asked all federal agencies to bar registered lobbyists from all federal advisory panels (of which there are more than 1,000 sprinkled throughout government).

Likewise, in January 2009, the Administration adopted Executive Order 13,490, which severely limited the ability of registered lobbyists to secure employment with the government. The EO required appointees who had been registered lobbyists in the two years before their appointment to sign a contractually binding agreement prohibiting them from: participating in any matter on which they had lobbied; participating in any specific issue area in which the matter falls; or seeking and accepting employment with any executive branch agency that the individual had lobbied in the two years before their appointment. In practice, especially for registered lobbyists with multi-issue groups like the ACLU who appear before numerous government agencies in the regular course of their duties, the EO effectively barred appointment by the Administration.

The ACLU supports narrow restrictions on lobbying activities, and does believe the public has a substantial interest in knowing the identity of individuals who are actively expending resources to influence legislation. The act of "lobbying," however, is undoubtedly a basic exercise of the constitutional right to petition the government for redress of grievances, and often, also, the right to assemble. Restrictions on lobbyists must be narrowly tailored to further the significant public interest in transparency, but must, in no case, infringe on these rights.

The advisory committee and employment restrictions present constitutional concerns in two areas. First, they provide a disincentive for individuals to act as lobbyists, and thus chill First Amendment protected petition activity. Second, they effectively punish individuals for the exercise of their constitutional rights. Additionally, they implicate various good government interests by denying the government the benefit of the deep expertise many lobbyists possess (ACLU lobbyists, for instance, are effective solely because of their significant expertise in civil liberties and civil rights issues).

Recommendation

1. The President should immediately rescind Executive Order 13,490 and replace it with a more narrowly tailored order that removes the advisory board and employment restrictions, and replaces the post-employment restrictions with restrictions only on senior government officials (who present a special risk of unfair influence) lobbying their former agency.

Issue Area: Free speech

Stop Censoring Broadcast Content through Enforcement of the Indecency Laws

Background

In June 2012, the Supreme Court decided *Federal Communications Commission (“FCC”) v. Fox Television Stations (“Fox II”)*. The case involved a challenge to the FCC’s interpretation of the federal statute permitting “indecent” regulation on the airwaves, which, the FCC claimed, allowed it to punish “fleeting expletives” and momentary nudity. The Court narrowly ruled against the government, finding that the FCC failed to give broadcasters sufficient notice that isolated swear words or glimpses of nudity could be legally actionable. The Court did not, however, address the underlying constitutional challenge to the “fleeting expletives” policy, and left the FCC open to further revise the policy in light of “the public interest and applicable legal requirements.”

Section 1464, the indecency statute, is both outmoded and unconstitutional. Television viewers can simply subscribe to cable or log onto the internet to access material with far more than “fleeting expletives” or momentary nudity, rendering the “scarcity” rationale for regulating the broadcast media obsolete. Further, there are numerous cases of broadcasters self-censoring educational and public affairs material to avoid running afoul of section 1464. In just one instance, numerous CBS affiliates decided not to air an award-winning documentary about the 9/11 attacks because of concerns over expletives in real audio footage of firefighters responding to the disaster. This self-censoring demonstrates the clear constitutional infirmities in the statute, and the negative effects for free speech resulting from the FCC’s guidance on how the statute will be enforced.

Recommendations

1. The President should express his support for repeal of 18 U.S.C. § 1464.
2. The FCC should issue public guidance that it will abandon all future indecency enforcement actions. At the very least, it should return to its enforcement posture prior to the violation in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), where enforcement was exceedingly rare. As noted above, the “fleeting expletives” guidance at issue in the *Fox* cases provided little direction for broadcasters, resulting in the self-censorship of programming that simply cannot be considered “indecent” under any reasonable meaning of the word.

3. The FCC's Consumer Advisory Committee should adopt a recommendation to the FCC that it cease enforcing the indecency provision of § 1464.

Supplemental Material

- ACLU amicus brief in *Fox II*: http://www.aclu.org/files/assets/10-1293_bsac_american_civil_liberties_union.pdf

Issue Area: Free speech

Issue Area: Open government

Limit Overclassification

Background

Nearly every entity commissioned to study classification policy over the last sixty years, from the Coolidge Committee in 1956 through the Moynihan Commission in 1997, has reached the same conclusion: the federal government classifies far too much information, which damages national security and cripples government accountability and informed public debate. Despite the results of these studies, reform has proven elusive and government secrecy has run amok.

President Obama’s December 2009 Executive Order on classification (EO 13526) was a laudable attempt to address longstanding problems in classification policy. It incorporated many promising ideas generated through the Administration’s public outreach efforts, but it avoided a dramatic overhaul of classification policy such as that called for by the Moynihan Commission and others, and included a few provisions that actually increase secrecy. According to the Information Security Oversight Office (ISOO), the government made a record 92,191,934 classification decisions in 2011, an increase of more than 20% from 2010, and over ten times the number recorded in 2001.

Moreover, due to recent controversies over authorized and unauthorized “leaks” of classified information – many clearly in the public interest – both Congress and the Administration have advanced problematic solutions that focus primarily on increasing information security and retaliating against alleged leakers, rather than reducing unnecessary secrecy and reforming the broken classification system. And while declassification efforts have increased somewhat, the funds devoted to declassification made up less than half of 1 percent of the government’s more than \$11.36 billion in total classification costs reported in 2011.

Recommendations

1. Amend Executive Order 13526 to more strictly limit the types of information that may be classified and more narrowly define the terms used, such as “sources and methods,” so that only information that truly must remain protected for national security may be classified.
2. Amend EO 13526 to more strictly limit derivative classification, which has increased exponentially in the electronic environment. Require a timely review of derivatively classified information by original classification authorities to ensure information is properly classified.

3. Amend EO 13526 to reduce the time period for classifying materials in accord with recommendations of both the Moynihan Commission Report and ACLU.
4. Enforce section 1.7 of EO 13526, which prohibits the use of classification to conceal violations of the law or prevent embarrassment of any person, organization or agency;
5. Issue an Executive Order encouraging federal employees and contractors, particularly in the law enforcement and intelligence communities, to report waste, fraud, abuse and illegality, and prohibiting reprisals against such whistleblowers, and provide effective due process protections for employees who allege such retaliation.
6. Expand Administration declassification efforts by significantly increasing the percentage of security classification resources devoted to existing declassification programs.

Supplemental Material

- ACLU letter to the Senate on the intelligence authorization “anti-leaks” bill, August 2012: http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf
- ACLU Report, “Drastic Measures Required: Congress Needs to Overhaul U.S. Secrecy Laws and Increase Oversight of the Secret Security Establishment,” July 2011: http://www.aclu.org/files/assets/secrecyreport_20110727.pdf
- ACLU, Mike German, “Reducing Overclassification and Protecting the Public’s Right to Know,” May 2011: <http://blogs.archives.gov/transformingclassification/?p=214>

Issue Area: Privacy

Stop Involuntary Online Consumer Tracking

Background

Rapid technological advances and the lack of an updated privacy law have resulted in a system where Americans are routinely tracked as they surf the Internet. The result of this tracking – often performed by online marketers – is the collection and sharing of Americans’ personal information with a variety of entities including offline companies, employers and the government. As greater portions of our lives have moved online, unregulated data collection has become a growing threat to our civil liberties.

The Internet allows us to connect to one another and share information in ways we never before could have imagined. Many of the civil liberties benefits of the Internet – the ability to access provocative materials more readily, to associate with non-mainstream groups more easily, and to voice opinions more quickly and at lower cost– are enhanced by the assumption of practical anonymity. Similarly, consumers are largely unaware of the breadth of information collection and the various uses to which it is put.

In short, Americans assume that there is no central record of what they do and where they go online. However, in many instances that is no longer the case. Behavioral marketers are creating profiles of unprecedented breadth and depth that reveal personal aspects of people’s lives including their religious or political beliefs, medical information, and purchase and reading habits. Even as behavioral targeting continues to grow, its practitioners have already demonstrated a disturbing ability to track and monitor an individual’s actions online.

Technology is already moving to help. Browser manufacturers are creating technical mechanisms so that web surfers can indicate their preference not to be tracked and standard setting bodies are moving to describe precisely how that preference should be treated. If advertisers and other data collectors agree to honor this “Do Not Track” mechanism, it would set a solid foundation for beginning to protect personal information online.

Recommendation

1. The White House should author baseline privacy legislation for introduction in the 113th Congress including a “Do Not Track” standard. The Federal Trade Commission should aggressively use its regulatory powers to enforce this standard whether promulgated through legislation or self-regulatory agreement.

Supplemental Material

- ACLU Statement for Senate Commerce Committee Hearing on Consumer Privacy Online, July 2010: <http://www.aclu.org/technology-and-liberty/aclu-statement-record-senate-committee-commerce-science-and-technology-hearin>
- ACLU Comments to the Commerce Department in Support of a “Do Not Track” Option to Protect Online Privacy, January 2011: <http://www.aclu.org/technology-and-liberty/letter-federal-trade-commission-proposed-rules-update-coppa>
- ACLU Comments Regarding the FTC’s report on Online Privacy and “Do Not Track”, February 2011:
http://www.aclu.org/files/assets/Final_FTC_Comments_January_2011.pdf
- ACLU Testimony before the Senate Commerce Committee in favor of a “Do Not Track” list, March 2011: <http://www.aclu.org/technology-and-liberty/aclu-testimony-state-online-consumer-privacy-senate-commerce-science-and-tran>
- Coalition letter applauding FTC for updating privacy safeguards in COPPA, December 2011: <http://www.aclu.org/technology-and-liberty/letter-federal-trade-commission-proposed-rules-update-coppa>

Issue Area: Privacy

Empower and Enable the Privacy and Civil Liberties Oversight Board

Background

The Privacy and Civil Liberties Oversight Board (PCLOB) was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408 (2004), but was removed from the White House and made an independent agency in the executive branch with the passage of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, Title VIII, § 801 (2007). The Board's mandate is to monitor the impact of US government actions on civil liberties and privacy interests. It has five members who are appointed by the President and subject to confirmation by the Senate.

President Obama waited almost three years, until December 2011, to nominate members to fill this board. In August 2012 four members of the board (minus the chairman) were officially confirmed by the Senate. However under the statute the Chairman is the only full time board member and is responsible for hiring staff. Given this statutory requirement it is not clear that the PCLOB can function now, almost five years after it was reconstituted.

Recommendations

1. The President should promptly nominate a chairman of the PCLOB.
2. The President's first budget proposal should contain sufficient funds to bring the board into existence as an effective entity.
3. The Attorney General should create a mechanism for issuing subpoenas at the request of the Board. This can be done through the creation of a Memorandum of Understanding between the board and the Attorney General in which the Attorney General promises to enforce subpoenas issued by the board's request unless he or she certifies that such a subpoena would be unlawful.

Supplemental Material

- Coalition Letter to President Obama Urging Revitalization of the PCLOB, March 2010: <http://www.aclu.org/technology-and-liberty/coalition-letter-president-obama-urging-revitalization-privacy-and-civil-libe>
- ACLU Testimony for the Senate Homeland Security and Government Affairs' Subcommittee Hearing on Federal Privacy and Data Security, July 2012: <http://www.aclu.org/national-security-technology-and-liberty/testimony-senate-homeland-security-and-governmental-affairs>

- ACLU Report, Enforcing Privacy: Building American Institutions to Protect Privacy in the Face of New Technology and Government Powers:
http://www.aclu.org/files/assets/ACLU_Report_-_Enforcing_Privacy_2009.pdf
- The Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 352, 357-358 (codified at 5 USC 601 note and 42 USC 20002ee (2000)):
<http://www.gpo.gov/fdsys/pkg/PLAW-110publ53/content-detail.html>
- “Who’s Watching the Spies? The civil liberties board goes dark under Bush,” *Newsweek*, July 9, 2008: <http://www.thedailybeast.com/newsweek/2008/07/08/who-s-watching-the-spies.html>

Issue Area: National security

Issue Area: Privacy

Limit Cybersecurity Information Sharing

Background

Cybersecurity – the effort to protect the internet and the software and hardware it runs on from hackers, terrorists and spies – has become a national security priority for the federal government. Increasing cybersecurity information sharing among corporations and with the government is at the top of the list for policy makers. While some technical information reflecting cyber threats or attacks can be shared without impacting the privacy of everyday users, some recent proposals would gravely threaten innocent Americans’ civil liberties, empowering corporations that hold very sensitive personal information to decide when and whether to turn it over to the government, including to military agencies like the National Security Agency. Those agencies could then use the information for many purposes that have nothing to do with cybersecurity, including unrelated criminal prosecutions or national security investigations. At the time of the 2012 elections, the House and Senate had introduced competing legislative proposals, and President Obama had threatened to veto the House bill due in large part to its unnecessary and unwise privacy infringements. Executive orders were also reportedly being drafted to facilitate information sharing within existing law and short of statutory amendments.

Recommendations

1. The President should maintain his veto threat of information sharing legislation that would permit companies to share personal information liberally or empower military agencies to collect Americans’ cyber-related data or communications directly.
2. If the President issues any executive order or guidance, the document must narrowly define the information that can be shared, house domestic cybersecurity efforts in a civilian agency, require companies to remove unnecessary personally identifiable information from any information they share, limit the government’s use of cyber information to cyber purposes, and create a robust accountability and oversight mechanism for information sharing programs.

Supplemental Material

- ACLU Interested Persons Memo on Cybersecurity Information Sharing Legislation and Privacy Implications in 112th Congress:

http://www.aclu.org/files/assets/aclu_interested_persons_memo_re_cyber_leg_info_sharing_april_16_2012.pdf

- Updated ACLU Letter to the House Urging Opposition to Cyber Intelligence Sharing and Protection Act (CISPA):
http://www.aclu.org/files/assets/aclu_opposition_to_h_r_3523_cispa_-_white_house_sap_includes_veto_threat_-_4_26_12.pdf
- Comparison of Cybersecurity Information Sharing Legislation:
http://www.aclu.org/files/assets/aclu_cs_info_sharing_leg_chart_july_30_2012_long.pdf
- ACLU Government Cybersecurity Data Collection and Retention FOIA Request:
http://www.aclu.org/files/assets/government_cybersecurity_data_collection_and_retention_foia_0.pdf

Issue Area: Privacy

Suspend the Employment Verification (E-Verify) System

Background

The E-Verify system is a nationwide employment verification system. While currently mostly voluntary, Congress has been threatening to make it mandatory, despite the fact that it is plagued with errors and prevents innocent workers from gaining employment.

According to estimates of the E-Verify error rate drawn directly from the Department of Homeland Security's (DHS) own reports, at least 80,000 American workers lost out on a new job last year because of a mistake in the government database. If E-Verify becomes mandatory across the country, at least 1.2 million workers would have to go to DHS or to the Social Security Administration (SSA) to correct their records.

In addition, the system for correcting errors is a mess. Both the Department of Justice (DOJ) and DHS have said that employers often fail to notify workers about errors or remedies. When they do, employees have difficulty understanding the complicated error notification letters and there is no centralized forum for fixing records. Some workers actually have to write to many different federal agencies to request records and find errors. According to the Government Accounting Office (GAO), in 2009 the average response time for such requests was a staggering 104 days.

Because E-Verify contains personally identifying information, including photos, and will very soon contain drivers' license information it could easily become a de facto national identity system. E-Verify is internet-based and contains information on every American. It could expand to verify driver's licenses at airports or federal facilities and be combined with travel, financial, or watch list information. The errors and problems with E-Verify as an employment tool would then automatically become problems with travel and other fundamental freedoms.

E-Verify also has reliability problem in its core function: identifying non-work eligible individuals. According to a study funded by DHS undocumented workers actually get through the system 54% of the time.

While Congress mandated the creation of an electronic verification program in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, it did not include any details or direction as to the form that the program should take. Instead, it left that to the discretion of the executive branch. Therefore, the President has the power to declare that the e-Verify program is not a success in its current form, and to suspend it pending a reevaluation.

Recommendation

1. The President should order and DHS should act to suspend enrollment of new employers in the E-Verify program and suspend the rule requiring federal contractors to enroll in E-Verify until the program demonstrates sufficient database accuracy and enforcement of the MOU standards governing employer enrollment, and until the enactment of legislation:
 - providing statutorily guaranteed administrative and judicial processes to ensure that workers who are wrongly delayed or denied the right to work are provided a quick, fair and efficient means of getting back to work and being made financially whole; and
 - safeguarding against the use of E-Verify for any purpose beyond employment verification and barring the inclusion of additional information such as drivers' license photos in the system.

Supplemental Material

- ACLU statement from The House Judiciary Subcommittee on Immigration Policy and Enforcement hearing, E-Verify- Preserving Jobs for American Workers, February 2011: http://www.aclu.org/files/assets/statement_record_Mandatory_EEVS_Feb2011_final.pdf
- Letter from a broad coalition of organizations spanning the political spectrum opposing the Legal Workforce Act or any other mandatory E-Verify provision, June 2011: <http://www.aclu.org/immigrants-rights-technology-and-liberty/coalition-letter-house-urging-opposition-e-verify-and-any>
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-210, 110 Stat. 3009-659 (Sept. 30, 1996): <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html>

Issue Area: National security

Issue Area: Privacy

Provide Due Process Protections for Use of Watch Lists

Background

In the years following 9/11, there was a proliferation of watch lists, from the “terrorist watch list” used for travelers and visitors to this nation, to financial watch lists and reporting systems that impact the financial transactions of millions of ordinary Americans. These lists are bloated with the names of persons and groups that have no connection to terrorism and do not threaten aviation or national security, but are denied the due process right to challenge their inclusion and clear their names. Bloated watch lists are also bad for security because they waste screeners’ time and divert their energies from looking for true terrorist threats.

Recommendations

1. The President should issue an executive order
 - Requiring watch lists to be reviewed in their entirety within 3 months, with names limited to those for whom there is credible evidence of terrorist ties or activities; and
 - Providing persons on the No Fly List with notice and a meaningful opportunity to contest their inclusion through an adversarial proceeding.

Supplemental Material

- ACLU Informational Web Hub on Watch Lists: <http://www.aclu.org/technology-and-liberty/watch-lists>
- Government Accountability Office, “Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts,” May 2012: <http://www.gao.gov/products/GAO-12-476>
- [Latif v. Holder, ACLU Challenges U.S. Government No Fly List](#) Second Amended Complaint, Latif v. Holder, 10 Civ. 750 (D. Or.): http://www.aclu.org/files/assets/64_Second_Amended_Compalint_020411.PDF
- ACLU Statement from the Senate Homeland Security Committee hearing on watch lists, data retention, and two bills dealing with gun regulation and background checks, May 2010: http://www.aclu.org/files/assets/FINAL_Senate_HSGAC_Statement_on_Terrorist_Watch_Lists_and_Guns.pdf

Issue Area: National security

Issue Area: Privacy

Limit Foreign Intelligence Spying on Americans and Increase Transparency on Surveillance Programs

Background

Over the past ten years, the government's authority to conduct surveillance on Americans not suspected of any wrongdoing has grown exponentially. One of the most expansive and secretive authorities—the FISA Amendments Act of 2008—allows the government to conduct dragnet and suspicionless collection of Americans' international communications for foreign intelligence purposes without ever identifying its targets to a court. Section 215 of the Patriot Act, a similarly secretive and troubling surveillance authority, allows the Justice Department to obtain a court order for any tangible thing relevant to an investigation. According to several senators, the government has secretly interpreted Section 215 in a manner that diverges from its plain meaning and that would shock Americans.

Recommendations

1. The Department of Justice and the Director of National Intelligence should increase basic transparency about surveillance authorities included in the FISA Amendments Act, Section 215 of the Patriot Act, and other post-9/11 collection programs to ensure an informed public and congressional debate and accountability. In particular, these agencies should:
 - Release executive memoranda and FISA court opinions interpreting the FISA Amendments Act and Section 215 of the Patriot Act, including only those redactions necessary to protect legitimate secrets; and
 - Disclose (or provide a meaningful unclassified description of) the targeting and minimization procedures used by the government in collecting information under the FISA Amendments Act or Section 215 of the Patriot Act.
2. The President should issue an executive order
 - prohibiting the suspicionless, bulk collection of the communications or records of Americans or individuals in the U.S.;
 - imposing strict use limitations and minimization procedures that prevent the collection, use, or dissemination of information about Americans or individuals in the U.S.

Supplemental Material

- Why the FISA Amendments Act is Unconstitutional:
http://www.aclu.org/files/images/nsaspying/asset_upload_file578_35950.pdf
- Testimony of Jameel Jaffer, Deputy Director of the ACLU, before the House Committee on the Judiciary, Oversight Hearing on the FISA Amendments Act of 2008, May 2012:
https://www.aclu.org/files/assets/aclu_house_testimony_on_fisa_amendments_act.pdf
- ACLU Letter to the Senate Select Committee on Intelligence Requesting Public Oversight of and Amendment to the FISA Amendments Act of 2008, May 2012:
http://www.aclu.org/files/assets/aclu_ltr_to_ssci_opposing_extension_to_faa_-_5_22_12.pdf
- Coalition Letter to the House of Representatives Urging a 'NO' vote on H.R. 5949, a five year extension of the FISA Amendments Act, September 2012:
http://www.aclu.org/files/assets/for_webhub_-_coalition_letter_to_house_urgin_no_vote_on_faa_extension_09_11_12.pdf
- Report of the FISA Amendments Act of 2008, The Constitution Project, Liberty and Security Committee, September 2012:
http://constitutionproject.org/pdf/fisaamendmentsactreport_9612.pdf
- ACLU Letter to the Senate, Urging 'NO' vote on H.R. 6304, the FISA Amendments Act of 2008, June 2008:
http://www.aclu.org/files/images/general/asset_upload_file902_35782.pdf
- ACLU Resources on Amnesty v. Clapper: <http://www.aclu.org/national-security/amnesty-et-al-v-clapper>

Issue Area: Criminal Law Reform

Review Discriminatory Crack Cocaine Sentences

Background

In 2010, Congress passed the Fair Sentencing Act, reducing the 100-to-1 federal sentencing ratio between crack and powder cocaine to 18-to-1. Then in 2011, the U.S. Sentencing Commission amended its Sentencing Guidelines based on the FSA and unanimously agreed to make those changes retroactive. Because of statutory mandatory minimum sentences, the Commission's retroactive amendment does not apply to all offenders who were sentenced before the FSA was enacted in 2010. The President should establish a process to review the sentences of those who were sentenced to crack offenses before enactment of the FSA could have their sentences reviewed to determine whether it is warranted to resentence based on the new 18 to 1 ratio. When appropriate, we urge the President to use his constitutional pardon power to commute the sentences of crack cocaine offenders based on the 18 to 1 ratio.

Recommendations

1. The Administration should create a clemency board to review crack cocaine sentences that did not benefit from the Fair Sentencing Act's 18 to 1 ratio.

Supplemental Materials

- The United States Sentencing Commission Most Frequently Asked Questions the 2011 Retroactive Crack Cocaine Guideline Amendment:
http://www.ussc.gov/Meetings_and_Rulemaking/Materials_on_Federal_Cocaine_Offenses/FAQ/index.cfm
- Analysis of the Impact of the Fair Sentencing Act Amendment if Made Retroactive, May 20, 2011:
http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf

Issue Area: Racial justice

Issue Area: Criminal law reform

End Racial Profiling

Background

Racial profiling in law enforcement has been a problem at all levels of government for many years. In June 2003, the Department of Justice (DOJ) issued guidelines purportedly designed to limit racial profiling in federal law enforcement. These guidelines, however, were not binding and contained wide loopholes.

Recommendations

1. Issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based on race, ethnicity, national origin, sex or religion. Include in the order a mandate that federal agencies collect data on hit rates for stops and searches, and that such data be disaggregated by group.
2. DOJ should issue updated guidelines regarding the use of race by federal law enforcement agencies. The new guidelines should clarify that federal law enforcement officials may not use race, ethnicity, religion, national origin, or sex to any degree, except that officers may rely on these factors in a specific suspect description as they would any noticeable characteristic of a subject.

Supplemental Material

- ACLU Testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights on “Ending Racial Profiling in America”, April 17, 2012: <http://www.aclu.org/racial-justice/statement-anthony-d-romero-submitted-senate-judiciary-subcommittee-hearing-hearing>
- ACLU Letter in support of the End Racial Profiling Act, February 2, 2012: <http://www.aclu.org/racial-justice/aclu-letter-support-regarding-passage-end-racial-profiling-act>
- ACLU Testimony to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on “21st Century Law Enforcement: How Smart Policing Targets Criminal Behavior”, November 4, 2011: <http://www.aclu.org/racial-justice/written-statement-aclu-hearing-21st-century-law-enforcement-how-smart-policing>

Issue Area: Criminal law reform

Update and Support Research on Medicinal Value of Marijuana

Background

The treatment of medical marijuana in the United States has been punitive rather than recognizing the legitimate medical and humanitarian purposes to which the drug can be put. For example, despite a federal law mandating “adequate competition” in the production of Schedule I drugs, marijuana remains the only scheduled drug that the DEA prohibits from being produced by private laboratories for scientific research (LSD, heroin and cocaine, are all available to researchers). More than ten years ago, Lyle Craker (who was represented by the ACLU), the director of the Medicinal Plant Program at the University of Massachusetts, applied to the DEA for a license to produce marijuana for use by scientists in clinical trials to determine whether marijuana meets the FDA’s standards for medical safety and efficacy. In February 2007, following a multi-year administrative law hearing, a DEA Administrative Law Judge issued an opinion urging the DEA to grant Craker’s application. In 2009, the DEA’s final ruling rejecting the application of Prof. Craker for a license to cultivate research marijuana for use by scientists in FDA-approved research which reversed the 2007 agency opinion. In 2011, the ACLU called on DEA Administrator Michele Leonhart to reconsider her previous decision to deny Dr. Craker a license to grow marijuana for research purposes. The DEA has not responded to this request.

In addition, in March 1999 the Institute of Medicine published “Marijuana and Medicine: Assessing the Science Base” at the request of Office of National Drug Control Policy (ONDCP). The report’s conclusions were mixed, but it did recognize that “[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation.” Now, even though over one-third of states and the District of Columbia—as well as numerous medical professionals—recognize the medicinal value of marijuana, federal policy continues to take guidance from outdated information.

Recommendations

1. The DEA Administrator should grant applications for Schedule I licenses to produce research-grade medical marijuana for use in DEA- and FDA-approved studies, thereby approving the current recommendation of its own Administrative Law Judge.
2. ONDCP should commission an update to study the 1999 Institute of Medicine report on Medical Marijuana which examined the medicinal value of marijuana.

Supplemental Materials

- *Institute of Medicine, Marijuana and Medicine: Assessing the Science Base* 179 (J. Joy, S. Watson, & J. Benson eds.1999):
http://medicalmarijuana.procon.org/sourcefiles/IOM_Report.pdf

The White House: National Security Council

Issue Area: Free speech

Issue Area: Open government

Limit Overclassification

Background

Nearly every entity commissioned to study classification policy over the last sixty years, from the Coolidge Committee in 1956 through the Moynihan Commission in 1997, has reached the same conclusion: the federal government classifies far too much information, which damages national security and cripples government accountability and informed public debate. Despite the results of these studies, reform has proven elusive and government secrecy has run amok.

President Obama's December 2009 Executive Order on classification (EO 13526) was a laudable attempt to address longstanding problems in classification policy. It incorporated many promising ideas generated through the Administration's public outreach efforts, but it avoided a dramatic overhaul of classification policy such as that called for by the Moynihan Commission and others, and included a few provisions that actually increase secrecy. According to the Information Security Oversight Office (ISOO), the government made a record 92,191,934 classification decisions in 2011, an increase of more than 20% from 2010, and over ten times the number recorded in 2001.

Moreover, due to recent controversies over authorized and unauthorized "leaks" of classified information – many clearly in the public interest – both Congress and the Administration have advanced problematic solutions that focus primarily on increasing information security and retaliating against alleged leakers, rather than reducing unnecessary secrecy and reforming the broken classification system. And while declassification efforts have increased somewhat, the funds devoted to declassification made up less than half of 1 percent of the government's more than \$11.36 billion in total classification costs reported in 2011.

Recommendations

1. Amend Executive Order 13526 to more strictly limit the types of information that may be classified and more narrowly define the terms used, such as "sources and methods," so that only information that truly must remain protected for national security may be classified.
2. Amend EO 13526 to more strictly limit derivative classification, which has increased exponentially in the electronic environment. Require a timely review of derivatively

classified information by original classification authorities to ensure information is properly classified.

3. Amend EO 13526 to reduce the time period for classifying materials in accord with recommendations of both the Moynihan Commission Report and ACLU.
4. Enforce section 1.7 of EO 13526, which prohibits the use of classification to conceal violations of the law or prevent embarrassment of any person, organization or agency;
5. Issue an Executive Order encouraging federal employees and contractors, particularly in the law enforcement and intelligence communities, to report waste, fraud, abuse and illegality, and prohibiting reprisals against such whistleblowers, and provide effective due process protections for employees who allege such retaliation.
6. Expand Administration declassification efforts by significantly increasing the percentage of security classification resources devoted to existing declassification programs.

Supplemental Materials

- ACLU letter to the Senate on the intelligence authorization “anti-leaks” bill, August 2012: http://www.aclu.org/files/assets/8-15-12_-_aclu_on_s_3454_title_v_-_final.pdf
- ACLU Report, “Drastic Measures Required: Congress Needs to Overhaul U.S. Secrecy Laws and Increase Oversight of the Secret Security Establishment,” July 2011: http://www.aclu.org/files/assets/secrecyreport_20110727.pdf
- ACLU, Mike German, “Reducing Overclassification and Protecting the Public’s Right to Know,” May 2011: <http://blogs.archives.gov/transformingclassification/?p=214>

The White House: Office of Management and Budget

Issue Area: Reproductive rights

Remove Abortion Restrictions from the President's Budget

Background

Abortion is an important part of women's reproductive health care, and as affirmed by the 1973 U.S. Supreme Court case *Roe v Wade* and consistently upheld in subsequent cases, it is a legally and constitutionally protected medical practice. But bans on public funding for abortion services have severely restricted access to safe abortion care for women who depend on the government for their health care. The bans marginalize abortion care even though it is an integral part of women's health care. These policies inflict disproportionate harm on low-income women and women of color, many of whom already face significant barriers to receiving timely, high quality health. Moreover, with these bans, the government is selectively withholding health care benefits from women who seek to exercise their right of reproductive choice in a manner the government disfavors.

The bans cause real and significant harm. For example, as many as one in three low-income women who would have had an abortion if the procedure were covered by Medicaid are instead compelled to carry the pregnancy to term. More than twenty percent of women who wanted abortion care had to delay their abortions in order to raise the necessary funds. Women who have health coverage through the federal government should receive high quality and comprehensive services which include safe abortion care.

In 2009, President Obama submitted a fiscal year 2010 budget that removed the D.C. abortion rider from the Financial Services Appropriations bill. It was the only abortion rider the President struck from his budget. The House and Senate, after a vigorous debate in the normal course of the legislative process, affirmed that action. Unfortunately, in April 2011 during negotiations over the budget, Congress reinstated, without debate, the D.C. abortion ban in order to avert a government shutdown. The ban was subsequently included in the fiscal year 2012 omnibus spending bill that was passed in December 2011. President Obama has struck the D.C. abortion ban from fiscal year budgets 2010-2013, but has left all the other abortion ban riders in place in his budgets each year.

Recommendations

1. The President's budget should strike language restricting abortion funding for (i) Medicaid-eligible women and Medicare beneficiaries (the Hyde amendment); (ii) federal employees and their dependents (FEHB Program); (iii) residents of the District of Columbia; (iv) Peace Corps volunteers; (v) Native American women; and (vi) women in federal prisons. The President should indicate that the Administration is committed to working with Congress to fully repeal these restrictions.

2. The budget should strike language known as the Weldon amendment, which states that “none of the funds made available in [the Departments of Labor, HHS and Education Appropriations bill] may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” Consolidated Appropriations Act, 2012, Pub. L. No. 112-74 § 507(d)(1), 125 Stat. 786, 1111.

Supplemental Materials

- ACLU fact sheet, “Public Funding for Abortion,” July 2004:
<http://www.aclu.org/reproductive-freedom/public-funding-abortion>.
- National Network of Abortion Funds report, “Abortion Funding: A Matter of Justice,” 2005:
http://www.fundabortionnow.org/sites/default/files/national_network_of_abortion_funds_-_abortion_funding_a_matter_of_justice.pdf.

Government-Wide

Issue Area: Religious freedom

Restore Constitutional Protections in Government-Funded Social Service Programs

Background

The George W. Bush Administration engaged in consistent efforts to intertwine government and religion. His signature faith-based initiative, which provided direct governmental funding to religious groups that provide social services, was a central component of this effort. This placed the federal government in the unconstitutional position of directly funding houses of worship, underwriting religious proselytism with taxpayer dollars, and providing financial aid for religious discrimination and coercion.

At the beginning of the Bush Administration, Congress rejected Administration attempts to expand so-called “Charitable Choice” laws—which authorize taxpayer-funded religious discrimination in employment, threaten local anti-discrimination laws, and undermine critical religious-liberty protections for both houses of worship and beneficiaries of government programs—to nearly all federal social service programs. Instead, the Bush Administration, by executive order (including Executive Order 13279 signed December 12, 2002) and federal regulations, imposed “Charitable Choice” on nearly all federal social service programs. These orders and regulations permitted agencies to distribute taxpayer dollars to any church, place of worship, or other religious group with no clear standards or limitations consistent with the Constitution and retreated from a decades-long commitment to equal opportunity in employment in government-funded jobs.

On July 1, 2008, then-candidate Barack Obama announced he would continue promoting government partnerships with religious organizations to carry out social service programs. He asserted, however, that his Administration’s version of the faith-based initiative would abide by the Constitution and pledged that religious organizations receiving federal funds would not be able to use that money: to discriminate against the people they serve on the basis of religion, or proselytize them; for religious programming; or to discriminate on the basis of religion when hiring for government-funded social service programs. A campaign document stated that, if elected, Obama “would promptly reverse” Bush-era executive orders that permit such hiring discrimination.

Much work remains to be done to fulfill these vital promises. With regard to the hiring discrimination issue, neither of the executive orders signed by President Obama that addressed government partnerships with religious organizations (Executive Order 13498 signed February 9, 2009, and Executive Order 13559 signed November 22, 2010) ended the policies permitting discrimination and thus, did not restore the commitment to equal employment opportunity in government-funded jobs that began under President Roosevelt. Rather than making the promised change, Executive Order 13498 stated that the White House Office of Faith-based and

Neighborhood Partnerships could seek legal advice from the Justice Department about the relevant policies and the director of the faith-based office said that hiring discrimination would be reviewed on a “case-by-case” basis. Although Members of Congress and numerous organizations have asked for more information, the review process remains unclear.

With regard to the promised religious liberty protections for beneficiaries of social service programs, implementation has been slow, but progress is being made. Executive Order 13559 sets forth principles, required by the Constitution, for religious liberty protections within federally funded social service programs. The executive order also created an Interagency Working Group on Faith-based and Other Neighborhood Partnerships to make recommendations on how government agencies should implement the religious liberty protections. More than one year after it was due, the working group report was released on April 27, 2012. Though the promises made on the campaign trail and protections set forth in the executive order have not been fully implemented—and thus, beneficiaries’ religious liberty could be better protected, the Obama Administration continues to make progress toward that end. We hope that these important changes will be made in the near future.

Recommendations

1. The President should revise Executive Order 13279, as amended, and other executive orders to more clearly reflect standards and protections required by the Constitution for government-funded social service programs and faithfully implement these standards and protections through new regulations, guidance, and policies, including
 - Restoring and strengthening the fundamental, constitutionally mandated prohibition on direct government funding of houses of worship (while continuing to permit funding of social service organizations that are religiously affiliated, and therefore, able to segregate their government-funded nonreligious programs from their religious activities).
 - Explicitly prohibiting religious employment discrimination in government-funded programs and allow for enforcement of applicable state and local antidiscrimination laws.
2. Each named agency must fully and faithfully implement Executive Order 13559, which set forth principles required by the Constitution for religious liberty protections within federally funded social service programs, by issuing regulations, guidance documents, and policies that
 - Require that beneficiaries are informed of their rights and provide meaningful ways to enforce their rights, including:

- To participate in federally funded programs no matter their religious beliefs or lack thereof;
 - To participate in federally funded programs that are free of religious content;
 - To participate in federally funded programs without having to engage in worship, prayer, devotional readings, or inquiries into religious beliefs; and
 - To object to the religious character of a federally funded social service provider and be referred to other providers.
3. Ensure that no direct government funds are used to support any religious activity, programming, or materials.
 4. Provide for increased monitoring and oversight by funding agencies to ensure compliance with the Constitution and all applicable laws, regulations, policies, and other governing authorities.

Supplemental Materials

- Coalition Letter to the Department of Justice Urging the Withdrawal of an Office of Legal Counsel Memo on the Religious Freedom Restoration Act, September 2009: <http://www.aclu.org/religion-belief/coalition-letter-department-justice-urging-withdrawal-office-legal-counsel-memo-reli>
- Coalition Against Religious Discrimination, Letter to President Obama on Reform of the Faith-Based Office, February 2010: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-reform-faith-based-office>
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- Coalition Letter to President Obama Asking for Clarity on Federally Funded Employment Discrimination and Outlining Other Concerns, September 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-asking-clarity-federally-funded-employment>
- Coalition Against Religious Discrimination, Letters to Thirteen Faith-Based Offices regarding “Case-by-Case” Review of Hiring Discrimination, December 2011: <http://www.aclu.org/blog/content/looking-simple-answers-basic-questions-faith-based-hiring>

- Blog on Freedom of Information Act Request to Department of Justice regarding Exemptions Granted to Religious Organizations from Statutory Prohibitions on Hiring Discrimination, August 2012: <http://www.aclu.org/blog/lgbt-rights-religion-belief-womens-rights/obama-promised-stop-government-funded-discrimination>
- Coalition Against Religious Discrimination, Letters and Analysis sent to Fifteen Agencies regarding Implementation of Executive Order 13559, November 2012: http://www.aclu.org/files/assets/combined_agency_letters_and_working_group_report_analysis.pdf

Department of Commerce

Issue Area: Free speech

Issue Area: Women's rights

Stop Issuance of Patents on Genetic Material

Background

Currently, the United States Patent and Trademark Office (“USPTO”) issues patents that claim naturally occurring human DNA once it is isolated—or removed—from the cell. These gene patents can be asserted by the holder against individuals and entities—including researchers and clinicians engaged in basic scientific inquiry—that seek to examine the particular sequence of DNA covered by the claim. In practice, these patents allow for monopolies on the work that can be done on particular human genes, and can be used to preclude researchers and clinicians from performing genetic diagnostic testing, developing new genetic diagnostic tests or conducting pure genetic research.

These patents are unlawful and unconstitutional. They violate the Supreme Court’s long-standing precedent prohibiting patents on products and laws of nature. They also run afoul of the First Amendment, which protects freedom of scientific research and inquiry, and Article I, section 8, which authorizes Congress to issue patents that “promote the progress of science.” Patents that claim naturally occurring DNA sequences grant the patentee ultimate “control over a body of knowledge and pure information,” and thus violate these legal guarantees.

As a result, gene patents hinder scientific advancement and patients’ access to medical care. In the case of BRCA1 and BRCA2, two patented genes correlated with hereditary breast and ovarian cancer, the patent holder has been able to dictate the cost and type of testing that is offered, barred other laboratories from developing and providing confirmatory or more comprehensive testing, and refused to share genetic data with the scientific community. In litigation challenging the BRCA patents, the Justice Department filed two amicus briefs arguing that these patents are invalid. Yet, the USPTO has not reconsidered its policy that authorizes issuing gene patents.

Recommendations

1. The President should direct the Undersecretary of Commerce for Intellectual Property to adopt the findings of the Department of Health and Human Services Secretary’s Advisory Committee on Genetics, Health, and Society (“SACGHS”) in its April 2010 report on genetic diagnostic testing as its conclusions in the USPTO’s forthcoming report mandated by the America Invents Act, given SACGHS’ expertise on genetic testing.

2. The President, by executive order or otherwise, should direct the Secretary of Commerce and the Undersecretary of Commerce for Intellectual Property to halt immediately the issuance of patents that claim the isolated form of naturally occurring DNA.

Supplemental Materials

- ACLU comments on USPTO's Genetic Testing Study:
http://www.uspto.gov/aia_implementation/gene-comment-aclu.pdf
- ACLU case material in challenge to BRCA gene patents – *Association for Molecular Pathology v. U.S. Patent & Trademark Office*: <http://www.aclu.org/free-speech-womens-rights/aclu-challenges-patents-breast-cancer-genes-0>

Department of Defense

Issue Area: Human rights

Prevent Torture and Transfer to Torture

Background

No policy decision has done more damage to the rule of law and our nation's moral authority than the post-9/11 embrace of torture and rendition to torture. Government documents show that hundreds of prisoners were tortured in U.S. custody — some even killed — and that torture policies were developed at the highest levels of the U.S. government. The United States also abducted persons and transferred them either to U.S.-run detention facilities overseas or to the custody of foreign intelligence agencies where they were subjected to torture and other abuse, in some cases after the receiving government gave “diplomatic assurances” that the individuals would not be tortured.

President Obama rejected the torture legacy and has done much to restore the rule of law. On January 22, 2009, the President signed an executive order that categorically prohibited torture, reaffirmed the U.S. government's commitment to Common Article 3 of the Geneva Convention, invalidated the flawed legal guidance on torture prohibitions, and limited all interrogations, including those conducted by the CIA, to techniques authorized by the Army's field manual on interrogation. The Administration has also reportedly adopted recommendations aimed at improving the United States' transfer policies, including recommendations that the State Department have a role in evaluating any diplomatic assurances and that assurances include a monitoring mechanism.

Recommendations

To further restore U.S. moral authority and abide by the prohibition against torture:

1. The President must oppose any and all efforts to return to the use of the so-called “enhanced interrogation techniques.”
2. The President must direct the Homeland Security, State, or Defense Departments not to rely on “diplomatic assurances” to deport (pursuant to 8 C.F.R. § 208.18(c)) or otherwise transfer persons out of United States custody to any country where there is a likelihood of torture.
3. The Departments of Homeland Security and Defense and other relevant agencies must, at a minimum, provide meaningful administrative and judicial review whenever the United States seeks to deport or extradite an individual to a country where there is likelihood of torture, to ensure compliance with U.S. obligations under the UN

Convention Against Torture. Such review must extend to the existence and sufficiency of diplomatic assurances.

4. The White House and Defense and State Departments should provide for greater transparency with respect to their policies and procedures related to interrogation and transfers, including by making public the Special Task Force on Interrogations and Transfer Policies recommendations and the subsequent Defense and State Department Inspector General reports.

Supplemental Material

- Executive Order 13491 -- Ensuring Lawful Interrogations:
http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations
- Department of Justice Report, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President, August 2009:
<http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>
- ACLU, The Torture Report, 2009: <http://www.thetorturereport.org/>
- ACLU, Torture Database:
http://www.thetorturedatabase.org/search/apachesolr_search
- ACLU Report, "Enduring Abuse," Executive Summary, April 2006:
<http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive>
- Unfinished Business: Turning the Obama Administration's Human Rights Promises into Policy: <http://www.aclu.org/human-rights/unfinished-business-turning-obama-administrations-human-rights-promises-policy>

Issue Area: National security

Fully Restore the Rule of Law to Detention Policy and Practices

Background

President Obama inherited the terrible legacy of indefinite detention without charge or trial of people picked up away from a battlefield and the use of military commissions at Guantanamo. The Obama Administration has taken some positive steps. It has refused to add to the number of persons held in indefinite detention at Guantanamo, closed the CIA secret prisons, secured some improvements to the military commission statute, and has made diligent diplomatic efforts to resettle or repatriate some detainees. Nevertheless, the Obama Administration also took harmful steps by renewing legal and political claims of authority to hold detainees without charge or trial, re-starting military commission prosecutions that continue to lack basic due process protections, and signing into law an indefinite detention statute and restrictions on transfers of Guantanamo detainees. It is beyond the time to end the Guantanamo legacy and fully restore the rule of law to detention.

Recommendations

The President should take the following actions:

1. Publicly state that he will veto any legislation extending beyond the expiration date of March 27, 2013, the currently applicable statutory restrictions on the transfer of detainees from Guantanamo, and also order the removal of any policy obstacles to the resettlement or repatriation of detainees.
2. Order the closure of the prison at Guantanamo by charging in federal criminal court any detainees against whom there is evidence of criminal conduct that is untainted by torture, and transferring all other detainees to their home countries or to other countries where they will not be in danger of being tortured, abused, or imprisoned without charge or trial.
3. Order the end of the use of indefinite detention without charge or trial, and disclaim any authority for such indefinite detention, of detainees at Guantanamo and prisoners picked up away from a battlefield and brought to Bagram.
4. Order the Department of Defense to terminate the unconstitutional and untested military commissions, and transfer to the Department of Justice anyone who will be charged with a crime for trial in federal criminal court.
5. Order that the Department of Defense and Department of Justice shall not rely on the indefinite detention provisions in the National Defense Authorization Act for Fiscal Year

2012 (“NDAA”) or any of the trial provisions of the Military Commissions Act of 2009, but instead should work for their repeal.

These steps will end the terrible legacy that President Obama inherited from his predecessor at Guantanamo, and fulfill the promise of restoring the rule of law to America’s military detention practices.

Supplemental Materials

- ACLU Letter to Judiciary Committee Urging Jurisdiction over the NDAA
<http://www.aclu.org/national-security/aclu-letter-senate-urging-judiciary-committee-jurisdiction-over-national-defense>
- Coalition Letter to the House Urging Opposition to Blanket Ban on Guantanamo Detainee Transfers in Department of Defense Appropriations Act
<http://www.aclu.org/national-security/coalition-letter-house-urging-opposition-blanket-ban-guantanamo-detainee-transfers>
- ACLU Letter to the White House on GITMO Transfer Provisions in the NDAA
<http://www.aclu.org/national-security/aclu-letter-white-house-gitmo-transfer-provisions-ndaa>

Issue area: Human rights

End Human Trafficking and Forced Labor Facilitated by U.S. Government Contracts

Background

The President has demonstrated his commitment to ending the trafficking and forced labor of foreign workers hired under U.S. government contracts to work in support of U.S. military and diplomatic missions abroad and now must ensure this commitment is fulfilled. Recruited from impoverished villages in countries such as India, Nepal, and the Philippines, men and women—known as Third Country Nationals—are charged exorbitant recruitment fees, often deceived about the country to which they will be taken and how much they will be paid, and once in-country, often have no choice because of their financial circumstances but to live and work in unacceptable and unsafe conditions. These abuses amount to modern-day slavery—all on the U.S. taxpayers' dime.

Human trafficking and forced labor on government contracts is also part of contractor malfeasance that wastes tens of millions of U.S. tax dollars annually. The illicit recruitment fees that trafficked individuals pay, together with the salary cost-cutting techniques that contractors employ, go to enrich prime contractors, subcontractors, local recruiters, and others who profit from the exploitation of individuals wanting to work for government contractors or subcontractors.

On September 24, 2012, President Obama signed an executive order aimed at strengthening existing protections against human trafficking and forced labor in U.S. government contracts. The executive order is a significant step towards ending modern-day slavery facilitated by current government contracting processes.

Recommendations

To ensure that the executive order is implemented and to end profits based on government contracting processes that facilitate human trafficking and forced labor, the next administration must:

1. Ensure that the Federal Acquisition Regulatory Council issues regulations that effectively implement the executive order. These regulations should ensure that contractor employees are provided with written contracts in a language that they understand and that provide details of their conditions of employment, including payment of a fair wage, prior to leaving their home country; establish procedures to ensure that prime contractors are held accountable for the hiring practices of their subcontractors; and protect whistle blowers who report instances of contractor employee abuse from retaliation.
2. Improve oversight and monitoring of U.S. contractors' compliance with existing prohibitions on human trafficking and forced labor by ensuring that contracting agencies, including the State and Defense Departments and USAID (a) conduct regular audits and inspections of their contractors; and (b) implement formal mechanisms to

receive and process all credible reports of human trafficking, forced labor, and other abuses and ensure that such reports are investigated.

3. Improve accountability for human trafficking and labor-rights violations in government contracting processes by ensuring (a) the Justice Department initiates, thoroughly investigates, and where appropriate, prosecutes all U.S. contractors who are suspected of engaging in violations of contract employees' rights; and (b) contracting agencies impose stringent penalties on every contractor who engages in or fails to report such abuses.

Supplemental material

- Executive Order - Strengthening Protections Against Trafficking In Persons In Federal Contracts: <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>
- "Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors," joint ACLU-Yale Lowenstein International Human Rights Clinic report: http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf
- Documents Released Under FOIA on Military Contractor Human Trafficking: <http://www.aclu.org/human-rights/military-contractor-human-trafficking-documents-released-under-foia>

Issue Area: Disability rights

Increase Community Integration and Access for People with Disabilities

Background

People with disabilities are still far too often treated as second class citizens, shunned and segregated by physical barriers and social stereotypes. They are discriminated against in employment, schools, and housing, robbed of their personal autonomy, sometimes even hidden away and forgotten by the larger society.

In 1999, the Supreme Court ruled in *Olmstead vs. L.C. and E.W.* that states may not keep people with disabilities in institutions if they are able to live in the community and wish to do so. It recognized the integration mandate of the Americans with Disabilities Act and declared that unnecessary segregation of people with disabilities is a form of discrimination.

One of the structural impediments to the integration of people with disabilities in the community is that Medicaid funding has traditionally gone to institutional services and not community supports. The current funding mechanisms and CMS culture have been geared toward nursing homes. As a result, even well-intentioned moves toward stopping the segregation of people with disabilities may miss the goal of genuine integration.

The Obama Administration has made significant steps in the right direction towards furthering the community integration of people with disabilities. It has expanded a pilot program called “Money Follows the Person” (MFP) that uses Medicaid dollars to move people with disabilities from nursing homes back to the community, closer to family and friends. However, this has affected less than 1% of the nursing home population so far.

Further healthcare reforms provide both opportunities and dangers for people with significant disabilities. For example, some 27 states are planning to implement managed care programs for Medicaid and Medicare recipients. These programs have the potential to deliver healthcare more efficiently and effectively – but may also push people with disabilities into institutions. When states, such as New York and North Carolina, “carve out” nursing home care from the managed care program, it creates an incentive to move the sickest patients out of the managed care system and into an institution. Similarly, what CMS funds as a “community living option” must provide genuine independence and autonomy for people with disabilities.

Extreme delays in processing of Social Security benefits also frustrate integration of people with disabilities. The Social Security Administration (SSA) currently faces a massive backlog in processing of the Social Security disability benefits determination cases. Although the backlog has been reduced from an average of a 500 day wait to an average 347 day wait, it continues to leave hundreds of thousands of people who are in desperate need of assistance on long waiting lists to receive the benefits promised to them in law. The Administration has made a number of important efforts, including automatic eligibility for some disabilities; online applications, and

video hearings for remote locations, but these efforts have been counterbalanced by a 30% increase in disability claims and a decrease in SSA's budget

Further work is needed to ensure that people with disabilities are able to fully participate in the American dream.

Recommendations

1. CMS should increase incentives for states to implement MFP programs.
2. In implementing and approving managed care programs state by state, CMS should follow the guidelines proposed by the National Council on Disability, especially the provision not to approve any state program that "carves out" nursing homes from its long-term services and supports.
3. CMS should fund community living options that genuinely follow community living principles, and respect the autonomy and choices of people with disabilities. Specifically, in CMS' proposed rules for Medicaid Home and Community Based Services (HCBS), CMS should not fund any settings that isolate people with disabilities from the larger community, that do not allow choice of roommates or a private room, and that limit individuals' freedom of choice on daily living experiences.
4. SSA should resolve the Social Security disability benefits determination backlog thoroughly, expeditiously and fairly. In particular, SSA should undertake a complete review of the process for administering disability cases, and should seek additional funding as necessary to reduce the current backlog of benefits determination cases.
5. The Departments of Veterans Affairs (VA) and Defense (DOD) should implement the recommendations of the Veterans' Disability Benefits Commission (VDBC) and the Iraqi and Afghanistan Veterans' of America (IAVA). As documented by the VDBC, the Dole-Shalala Commission, and in myriad news reports, the DOD's and VA's treatment of wounded and disabled veterans has not lived up to our promises to them. The VA should advocate on behalf of beneficiaries, demanding more resources, and eliminating the backlog of 870,000 claims.
6. DOL and CMS should phase out "sheltered workshops" for people with disabilities in favor of mainstream, supported employment services. Under Section 14(c) of the Fair Labor Standards Act of 1938, certain entities are allowed to pay workers with disabilities less than the federal minimum wage. These "sheltered workshops" almost always segregate people with disabilities from non-disabled workers and pay significantly less than minimum wage. The workshops cost more than supported employment programs yet are less effective in moving people to productive employment.

Supplemental Material

- Analysis and Recommendations for the Implementation of Managed Care in Medicaid and Medicare Programs for People with Disabilities:
<http://www.ncd.gov/publications/2012/CMSFebruary272012/>
- Guiding Principles: Successfully Enrolling People with Disabilities in Managed Care Plans:
<http://www.ncd.gov/publications/2012/Feb272012/>
- ASAN Public Comment on Defining Home and Community Based Services:
<http://autisticadvocacy.org/2012/06/asan-public-comment-on-defining-hcbs-in-1915i/>
- Guide to the Updated ADA Standards: <http://www.access-board.gov/ada/guide.htm>
- ACLU Comments to Department of Justice: “Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,” January 2011:
http://www.aclu.org/files/assets/ACLU_Comments_for_Title_II_III_ADA_Regulations_-_2010_-_Equipment_FINAL.pdf
- “Honoring the Call to Duty: Veterans’ Disability Benefits in the 21st Century,” 2007:
<http://veterans.senate.gov/upload/VetDisBenefitComm9-27.pdf>
- Veterans’ Benefits Improvement Act of 2008: <http://www.gpo.gov/fdsys/pkg/PLAW-110publ389/pdf/PLAW-110publ389.pdf>
- U.S. Department of Veterans Affairs: “Claims Transformation.”:
<http://benefits.va.gov/transformation/>

Issue Area: Women’s rights

End the Combat Exclusion Policy

Background

Since 1994, the Department of Defense (DoD) has had a policy mandating that “women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.” The combat exclusion policy defines direct ground combat as “engaging an enemy on the ground with individual or crew-served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy...” The policy also allows services to restrict the assignment of women where units would be required to “collocate and remain with” combat units that are closed to women. In 2012, DoD announced changes to the policy, eliminating “collocation” as a basis for excluding women, and opening up some positions to women with ground combat units below the brigade level. The core of the combat exclusion policy remains in place.

The current version of the combat exclusion policy continues to bar women from thousands of positions within the military, harming their advancement within that powerful public institution. Entire occupational specialties are closed to women. Even specialties that are open limit certain assignments and units to women as a result of the combat exclusion policy. At the same time, modern warfare does not have a “front line” or a “well forward” part of the battlefield, and women have not only been in combat, but performed well, in both Iraq and Afghanistan. The combat exclusion policy is outdated and based on archaic ideas of both women and combat.

Recommendation

1. DoD should eliminate the combat exclusion policy and issue a replacement policy requiring the Services to create plans for safely and effectively opening schools, training programs, occupational specialties, and units and billets to women that are currently closed to them under the existing policy. Where relevant, DoD should also develop gender-neutral performance-based criteria for military positions.

Supplemental Material

- ACLU Blog, “Combat Exclusion for Women Should No Longer Be the Rule,” May 2012: <http://www.aclu.org/blog/womens-rights/combat-exclusion-women-should-no-longer-be-rule>
- ACLU Blog, “Women in Combat: The Marines Take An Important First Step, But More Is Needed to Ensure Full Equality,” April 2012: <http://www.aclu.org/blog/womens-rights/women-combat-marines-take-important-first-step-more-needed-ensure-full-equality>
- ACLU Blog, “DoD Comes Closer to Recognizing that Women Are Already Serving on the Front Lines,” February 2012: <http://www.aclu.org/blog/womens-rights/dod-comes-closer-recognizing-women-are-already-serving-front-lines>

Issue Area: LGBT rights

Add Sexual Orientation to the Military Equal Opportunity Program

Background

As part of the Department of Defense Military Equal Opportunity Program, Department of Defense Directive 1350.2 protects service members from discrimination based on race, color, religion, sex, or national origin. The directive states: “Unlawful discrimination against persons or groups based on race, color, religion, sex, or national origin is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment.” DoD 1350.2 ¶ 4.2.

Now that the military has fully implemented repeal of the “Don’t Ask, Don’t Tell” policy, members of the military can openly serve their country without having to lie about who they are or the people they love, but there are no military regulations to protect service members from harassment or discrimination from supervisors or peers based on sexual orientation.

Recommendation

1. The Department of Defense should add sexual orientation to the list of enumerated characteristics protected from discrimination under the Military Equal Opportunity Program. In particular, the third sentence of Department of Defense Directive 1350.2 ¶ 4.2 should be revised to provide that: “Unlawful discrimination against persons or groups based on race, color, religion, sex, sexual orientation, or national origin is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment”

Department of Education

Issue Area: Racial justice

Issue Area: Disability rights

Reform School Discipline Practices and End the School-to-Prison Pipeline

Background

Educational equality is seriously threatened by the “school-to-prison pipeline,” the current national trend where children are pushed out of our public schools and into the juvenile and criminal justice systems because of overreliance on racially discriminatory punitive school discipline policies. The increased use of suspensions, expulsions and arrests decreases academic achievement and increases the likelihood that students will end up in jail cells rather than in college classrooms.

The burden of this trend falls disproportionately on students of color and students with disabilities, who are punished more harshly and more frequently for the same infractions that other kids engage in. These students are also at greater risk for the physical injury, emotional harm, and long-term adverse educational outcomes that can result from the punitive discipline techniques to which they are subjected at a higher rate than their peers, such as corporal punishment and restraint and seclusion. Additionally, subjecting children with disabilities to corporal punishment and restraint and seclusion techniques sends the message that the punishment and segregation of students with disabilities is not only accepted, but endorsed, by adults.

Measures are needed to reverse these trends and instead promote positive behavior supports, in order to ensure that every student can receive a quality education in a healthy school environment.

Recommendations

1. **Issue Federal Guidance on Punitive School Discipline:**
Under the auspices of the Supportive School Discipline Initiative, a joint program of the Departments of Justice and Education aimed at supporting good discipline practices to foster safe and productive learning environments in all classrooms, the Administration must work to ensure that school discipline policies and practices comply with the nation’s civil rights laws, though guidance, public education, and research. As part of this Initiative, the agencies must act swiftly to finalize and issue guidance on the use of punitive school discipline policies and to support positive alternatives to these practices in schools around the country.

The guidance should:

- instruct schools on applying a disparate impact analysis to disciplinary disparities and addressing them through Title VI, the Rehabilitation Act, IDEA, and the ADA;
- examine the disproportionate impact in detail by focusing on high and disparate rates of punitive and exclusionary discipline based on race and disability;
- promote the implementation of positive behavior supports as alternatives to exclusionary practices and referrals to law enforcement;
- encourage strong enforcement of the laws banning corporal punishment and/or restraint and seclusion that are already in place in many states and voice support for a federal ban; and
- clarify for school officials and police (including school resource officers) that police should be responsible only for serious criminal law matters, not for matters that may be minor violations best handled by schools as discipline issues. Guidance should emphasize that law enforcement intervention (including arrest, citation, summons, etc.) ought to be a last resort. Guidance should also be provided to law enforcement agencies about the proper role of police and SROs in schools.

2. Bring Additional School Discipline Litigation:

The Departments of Justice and Education should strengthen efforts to investigate and litigate discriminatory school discipline practices and use all the tools at their disposal to challenge these practices. The agencies, as appropriate to their jurisdictions, should use Title VI and equal protection claims to address the racially disproportionate use of school discipline and use of law enforcement interventions in schools. They should also investigate the racially disproportionate use of arrests, citations and summonses against students of color and bring complaints where warranted.

The agencies should also investigate the disproportionate rates of discipline for students with disabilities, and consider using the Rehabilitation Act, IDEA, and the ADA to file complaints where necessary. They should also undertake independent actions and investigate complaints of the disproportionate disciplining of special education students, particularly when the disparity involves students of color or are for behavior associated with the student's special educational status.

3. Study the Impact of Disproportionate Punitive Discipline and Corporal Punishment:

The newly created White House Initiative on Educational Excellence for African Americans should devote resources to a detailed study on the impact of disproportionate punitive discipline, and the use of corporal punishment in particular. Nearly 60 years after *Brown v. Board of Education*, there are still major barriers to educational equality. African American students are disproportionately disciplined, less likely to graduate, and more likely to be incarcerated. They are more likely to have

inexperienced teachers, to face disproportionate referrals to special education, and to be misdiagnosed with learning disabilities.

4. Reduce the Use of “Restraint and Seclusion” in Schools:

The Department of Education should increase resources and personnel to reduce the use of restraint and seclusion in public schools, employing a “carrot and stick” approach – from adjustments in funding, to putting schools into receivership – in order to move school districts toward the goal of completely eliminating the use of restraint and seclusion in favor of positive behavioral supports.

5. Reduce Policing in Schools through Training and Funding:

New and reauthorized Department of Education programs should consider both punitive school discipline reforms and racial diversity as important factors in awarding federal funds. States and localities that receive federal grants should be required to develop non-punitive alternatives to exclusionary school discipline policies, including over-policing, and ensure appropriate training for school police and personnel in developmentally appropriate tactics. Both schools and police departments should understand that the overuse and/or the racially disproportionate use of law enforcement to respond to student misbehavior could lead to reductions in federal funds. Schools that receive school climate grants should be required to report on the use of law enforcement and their plans for reducing reliance on police as well as any racial disparities in arrests, citations, or tickets. Where the federal government identifies persistent overreliance or disparities, it should deny renewal grants until these problems are adequately addressed.

Supplemental Materials

- Department of Justice Press Release on Supportive School Discipline Initiative: <http://www.justice.gov/opa/pr/2011/July/11-ag-951.html>
- White House Initiative on Educational Excellence for African Americans, July 2012: <http://www.whitehouse.gov/the-press-office/2012/07/26/executive-order-white-house-initiative-educational-excellence-african-am>
- Press Release: ACLU Hails Obama Administration's Supportive School Discipline Initiative: <http://www.aclu.org/racial-justice/aclu-hails-obama-administrations-supportive-school-discipline-initiative>
- ACLU Letter on Keeping All Students Safe Act: http://www.aclu.org/files/assets/aclu_letter_for_senate_help_comm_hrg_s_2020_keeping_all_students_safe_act.pdf

- Press Release: House Of Representatives Holds Hearing On Corporal Punishment In Public Schools: <http://www.aclu.org/racial-justice/house-representatives-holds-hearing-corporal-punishment-public-schools>
- Dignity in Schools Campaign Coalition Sign-on Letter on Corporal Punishment and School Discipline: <http://www.aclu.org/racial-justice/dignity-school-campaign-coalition-sign-letter-corporal-punishment-and-school-discipli>
- A Violent Education: Corporal Punishment of Children in U.S. Public Schools: <http://www.aclu.org/human-rights-racial-justice/violent-education-corporal-punishment-children-us-public-schools>
- Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools: <http://www.aclu.org/human-rights/impairing-education-corporal-punishment-students-disabilities-us-public-schools>
- Huffington Post: Making School a Safe Place for All Students: http://www.huffingtonpost.com/deborah-j-vagins/corporal-punishment-in-schools_b_983041.html
- Huffington Post: An Arcane, Destructive -- and Still Legal – Practice: http://www.huffingtonpost.com/deborah-j-vagins/an-arcane-destructive_b_631417.html
- GAO Report on Restraint and Seclusion: <http://www.gao.gov/new.items/d09719t.pdf>
- U.S. Department of Education – Resource Document on Restraint and Seclusion: <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>

Issue Area: Racial justice

Issue Area: Disability rights

Strengthen School Discipline Data Collection Practices

Background

The Office of Civil Rights (OCR) in the Department of Education has taken a more proactive role in promoting equal opportunity in education during the Obama Administration. This includes OCR's reinstatement of the Civil Rights Data Collection (CRDC), an effort which began in 1968 and was discontinued under the Bush Administration. Under President Obama, OCR not only reinstated, but expanded the CRDC to include additional categories related to punitive discipline, such as multiple suspensions, referrals to law enforcement, and expulsions under zero tolerance policies, among others. When OCR released portions of Part Two of its 2009 CRDC, the numbers provided much-needed insight into the serious disparities in punishments for students of color and students with disabilities, which often result in those students being pushed out of school and into the criminal justice system.

We continue to await OCR's release of the 2009 CRDC projected state and national statistics relating to school discipline. This data is crucial because it projects a picture of the school discipline landscape for all schools—something that only data from an effort on the CRDC's scale can do.

For the 2011 CRDC, OCR took another important step forward by making the collection universal, collecting data from all schools, an improvement which should be continued in all future collections.

Recommendation

1. OCR should strengthen its data collection by expanding categories to collect all incidents of punitive school discipline, including corporal punishment and holding schools accountable for failing to report data. OCR should also release the 2009 state and national projections relating to school discipline, ensuring the projections account for any serious gaps that exist in the data due to schools' failure to report.
2. The CRDC should also be a permanent, annual, and universal collection from districts.

Supplemental Materials

- ACLU Letter to OCR on Data Reporting: <http://www.aclu.org/racial-justice/aclu-letter-ocr-regarding-recommendations-crdc>
- About the CRDC: <http://www2.ed.gov/about/offices/list/ocr/data.html?src=rt>

- ACLU Press Release: DOE Releases New Civil Rights Data Exposing Harsh Discipline Measures Used In Schools, March 2012: <http://www.aclu.org/racial-justice/doe-releases-new-civil-rights-data-exposing-harsh-discipline-measures-used-schools&reason=0>
- Huffington Post: "Counting On Us: Release of New Civil Rights Data Is the First Step in Helping Our Kids," March 2012: <http://www.huffingtonpost.com/deborah-j-vagins/counting-on-us-release-of-b-1333133.html>
- The New York Times: "Black Students Face More Discipline, Data Suggests," March 2012: http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html?_r=1
- ACLU Comments on CRDC to OMB: <http://www.aclu.org/racial-justice/aclu-comments-omb-department-education-s-proposed-changes-civil-rights-data-collectio>
- ACLU Comments on CRDC to DOE: http://www.aclu.org/files/assets/ACLU_Comments_for_OMB_on_Dept_of_Ed_OCR_Civil_Rights_Data_Collection_FINAL.pdf

Issue Area: LGBT rights

Issue Guidance to Schools to Clarify that Title IX Covers Gender Identity

Background

In October 2010, the Office of Civil Rights (OCR) within the Department of Education issued guidance to school districts that some forms of student misconduct falling under a school's anti-bullying policy could trigger responsibilities under one or more of the federal anti-discrimination laws enforced by OCR. The guidance made clear that Title IX protects all students, including students who are or are perceived to be LGBT, from sex discrimination.

In April 2012, the Equal Employment Opportunity Commission (EEOC) ruled in the case of *Macy v. Holder* that Title VII's ban on sex discrimination prohibits discrimination on the basis of an individual's gender identity. Gender identity-based sex discrimination is barred regardless of whether an employer discriminates because the employee has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the status of the employee's transition from one gender to the other (as was the case with former ACLU client Diane Schroer), or because the employer simply does not like that the employee identifies as transgender.

It is well-established that courts and federal agencies look to Title VII case law in interpreting other statutes that prohibit discrimination based on sex, including with respect to Title IX.

Recommendation

1. OCR should issue guidance clarifying that Title IX's sex discrimination ban – while also prohibiting discrimination based on a lack of conformity to gender stereotypes in areas such as appearance, mannerisms, interests, dating partners or other ways of expressing gender – specifically covers discrimination and harassment based on a student's actual or perceived gender identity and/or expression.

Supplemental Material

- Dear Colleague Letter: Harassment and Bullying from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (Oct. 26, 2010):
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.
- *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008):
http://www.aclu.org/files/pdfs/lgbt/schroer_decision.pdf

Issue Area: HIV/AIDS discrimination

Issue Area: Disability rights

Guidance to Schools on Federal Civil Rights Laws and Students Living with HIV

Background

In July 2010, the White House released the first-ever National HIV/AIDS Strategy for the United States, which stated a goal of reducing stigma and discrimination against people living with HIV.

In October 2010, the Office of Civil Rights (OCR) within the Department of Education issued guidance to school districts nationwide as a reminder that some forms of student misconduct falling under a school's anti-bullying policy could trigger responsibilities under one or more of the federal anti-discrimination laws enforced by OCR.

In June 2012, the Disability Rights Section of the Justice Department's Civil Rights Division published a Q&A explaining how the Americans with Disabilities Act (ADA) protects persons living with HIV/AIDS from discrimination. The Q&A made clear that public elementary and secondary schools have a legal obligation under the ADA to protect students from discrimination and harassment on the basis of actual or perceived HIV status.

Recommendation

1. Consistent with the National HIV/AIDS Strategy's recommendation to reduce stigma and discrimination against people living with HIV, OCR should issue specific guidance addressing HIV discrimination in schools, such as in the form of a "Dear Colleague Letter," reminding school districts that discrimination and harassment based on a student's (or applicant's) actual or perceived HIV status or the HIV status of his or her family or friends is a violation of Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA.

Supplemental Material

- The White House, *National HIV/AIDS Strategy for the United States* (July 13, 2010): <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>
- Dear Colleague Letter: Harassment and Bullying from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (Oct. 26, 2010): <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.
- U.S. Department of Justice, Civil Rights Division, Disability Rights Section, *Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS* (June 2012): http://www.ada.gov/aids/ada_q&a_aids.htm

Issue Area: Religious freedom

Issue Area: Free speech

Issue Guidance for Public Schools on the First Amendment

Background

Over the past decade, the Department of Education’s Office of Civil Rights (OCR) has issued insufficient and incomplete guidance for public schools on their obligations under the First Amendment. This is a complicated area of law—and thus merits detailed, comprehensive guidance in order to protect students’ rights.

In 2003, OCR issued two sets of guidance, one on free speech and one on religion in schools. The free speech guidance merely states that the Department of Education enforces civil rights protections for students consistent with the First Amendment. The religion in schools guidance, titled, “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,” focuses almost exclusively on what religious expression is permitted in public schools rather than comprehensively addressing the myriad issues surrounding religion in schools and schools’ constitutional obligations to protect both the right of free exercise for individuals of every faith and the right for students and their families to remain free from governmental coercion and promotion of religion.

In October 2010, OCR issued guidance outlining the legal requirements of state departments of education and local school districts under federal anti-discrimination laws in connection with bullying and other forms of student harassment. The letter provided much in the way of needed guidance, and was especially welcome in light of its express reminder that federal anti-discrimination laws may be used to target harassment based on actual or perceived sexual orientation, gender identity, or religion. The guidance, however, did not address the First Amendment considerations implicated by “pure speech” incidents (which represent a small minority of cases but should nonetheless rarely result in school discipline, let alone school liability), and merely linked to the aforementioned 2003 guidance.

In September 2011, the U.S. Commission on Civil Rights Issued a report, *Peer-to-Peer Violence & Bullying: Examining the Federal Response*, which said that OCR should consider issuing guidance “regarding the First Amendment implications of anti-bullying policies” with “concrete examples to clarify the guidance.”

Recommendation

1. The Department of Education should issue comprehensive guidance for public schools on their obligations under the First Amendment to include speech and religion, and how these obligations interact with anti-discrimination laws. This should include (a) more clearly drawing the line between the limited cases of constitutionally protected “pure speech” and unprotected bullying and harassment that can rightly present a violation of

federal anti-discrimination law if they go unchecked; (b) equal emphasis on permissible religious exercise by students and impermissible school promotion of religion; and (c) guidance on religion in schools outside of the context of religious expression, such as guidance on wearing religious clothing or jewelry, teaching about religion, and ensuring a sound science curriculum that does not advance religion.

Supplemental Material

- 2003 Free Speech Guidance:
<http://www2.ed.gov/about/offices/list/ocr/firstamend.html>
- 2003 Religion in Schools Guidance:
http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html
- 2010 Bullying and Harassment Guidance:
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>
- U.S. Commission on Civil Rights, *Peer-to-Peer Violence & Bullying: Examining the Federal Response* (Sept. 2011): <http://www.usccr.gov/pubs/2011statutory.pdf>
- Settlement in *Anderson v. Chesterfield County School District*:
<http://www.aclu.org/religion-belief/anderson-v-chesterfield-county-school-district-consent-decree>

Issue Area: Women’s Rights

End Discriminatory Single Sex Education Programs

Background

Congress passed Title IX in 1972 in response to widespread sex discrimination in schools. Title IX mandates, with narrow statutory exceptions, that no one shall “be excluded from participation in . . . any education program or activity receiving Federal financial assistance” on the basis of his or her sex. 20 U.S.C. A. § 1681(a). For over thirty years, ED regulations implementing Title IX had interpreted this statutory language to prohibit coeducational schools from segregating students by sex for classes or other activities in almost all circumstances, with very narrow exceptions for sex education and contact sports. 34 C.F.R. § 106.34 (2005).¹

In October 2006, however, ED revised its Title IX regulations to permit coeducational schools to offer sex-segregated classes more broadly. 34 C.F.R. § 106.34 (2007); *see also* 71 Fed. Reg. 62,530 (Oct. 25, 2006). In essence, the regulations allow a school to create sex-segregated classes or extracurricular activities either to provide “diverse” educational options to students or to address what the school has judged to be students’ particular educational needs. 34 C.F.R. § 106.34(b)(i).

The Department of Education considered the separate but equal standard and rejected it as asking too much of schools. The rule set out in the new regulations is separate but “substantially” equal.

If a single-sex school is a single-local educational agencies charter school, the regulations say that in many instances there is no obligation whatsoever to provide equal opportunities to the excluded sex. For example, if the only math and science high school in the community is an all-boys charter school, under the regulations no equivalent opportunity need be provided girls.

The regulations state that participation in a sex-segregated class must be completely voluntary and explain that participation is not completely voluntary unless a “substantially equal” coeducational class is offered in the same subject. *Id.* at § 106.34(b)(iii), (iv). ED has defended the regulations by asserting that any sex-segregated program would be optional. By its nature, however, sex segregation can never be truly voluntary; a girl cannot opt into the boys’ class, and a boy cannot opt into a girls’.

¹ Because Title IX includes an exception for admissions to elementary and secondary schools, 20 U.S.C.A. § 1681(a)(1) (2007), it has not most often been understood to prohibit single-sex *schools*, as opposed to classrooms, though the Equal Protection Clause limits school districts’ ability to create such programs. In addition, current Title IX regulations require that—with some important exceptions for charter schools, described above—if a district operates a single-sex school, it must provide a substantially equal educational opportunity to the excluded sex. 34 C.F.R. § 106.34(c).

Recommendation

1. The Department of Education should rescind the 2006 Title IX single-sex education regulations and revert to prior law. The restored ED regulations would then prohibit coeducational schools from segregating students by sex for classes or other activities in almost all circumstances, with very narrow exceptions for sex education and contact sports.
2. Pending full rescission, the Department should, at a minimum, immediately issue a Guidance clarifying the requirements of the 2006 regulation, and particularly, that programs premised upon the notion of innate brain and learning differences between boys and girls are impermissible under Title IX and the Constitution.

Supplemental Material

- ACLU Comments on Proposed Sex Segregation Regulations (April 23, 2004):
<http://www.aclu.org/womens-rights/aclu-letter-department-education-single-sex-proposed-regulations-comments>
- Report on Title IX at 40: Single-Sex Education, National Coalition for Women and Girls in Education (NCWGE) (2012): <http://www.ncwge.org/TitleIX40/Single-Sex.pdf>
- Memorandum from NCWGE requesting rescission of 2006 Regulations (December 23, 2009):
http://www.aclu.org/files/assets/2009_12_23_ncwge_single_sex_proposal_final.pdf
- Memorandum from NCWGE reiterating request and seeking guidance (July 19, 2011):
http://www.aclu.org/files/assets/ncwge_memo_on_single_sex_ed.7.19.11.pdf
- Excerpts from ACLU appellate brief in Doe v. Vermillion Parish lawsuit:
<http://www.aclu.org/files/assets/2010-5-28-DoeVermillionParish-Appeal.pdf>
- Amicus Brief of DOJ/ED in Vermillion Parish lawsuit:
http://www.justice.gov/crt/about/app/briefs/vermillion_brief.pdf
- Diane Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 Science 1706 (2011):
<http://www.feminist.org/education/pdfs/pseudoscienceofsinglesexschooling.pdf>

- Pedro Noguera, *Saving Black and Latino Boys*, Education Week (Feb. 3, 2012): http://www.edweek.org/ew/articles/2012/02/03/kappan_noguera.html

Recommended Language

**CODE OF FEDERAL REGULATIONS
TITLE 34--EDUCATION
SUBTITLE B--REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION
CHAPTER I--OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION
PART 106--NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR
ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE
SUBPART D--DISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR
ACTIVITIES PROHIBITED**

Current through July 1, 2005; 70 FR 38561

§ 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; [20 U.S.C. 1681, 1682](#))

Department of Health and Human Services

Issue Area: Reproductive rights

Ensure that Women Receive Seamless Insurance Coverage of Contraception

Background

Access to safe and effective contraception is a critical component of basic health care for women. Virtually all sexually active women use contraception over the course of their lives. Since 1965, when the U.S. Supreme Court first protected a woman's access to contraception, maternal and infant mortality rates have declined. Controlling pregnancy spacing affects birth outcomes such as low birth-weight and premature birth; pregnancy planning can also help women control a number of conditions that negatively impact their health, such as gestational diabetes and high blood pressure. Indeed, the Centers for Disease Control has hailed family planning as one of the ten greatest public health achievements of the last century.

Without access to contraception, women have more unplanned pregnancies. Access to contraception enables women to decide whether and when to become a parent. Contraception therefore furthers women's equality, allowing women to make educational and employment choices that benefit themselves and their families. It is imperative that the benefits of access to birth control reach all women.

High costs and lack of insurance coverage, however, have posed a substantial barrier to access and effective use of contraception. To remedy this, on August 1, 2011, the Department of Health and Human Services (HHS) issued interim final regulations implementing the Affordable Care Act's (ACA) Women's Health Amendment. The regulations provide that the women's preventive health services to be covered in all new plans without cost-sharing are those delineated in guidelines adopted by the Health Resources and Services Administration (HRSA); those guidelines include the full range of FDA-approved contraceptive methods. The regulation makes contraception more affordable and accessible for millions of women across the country. The regulation also included a "religious employer" exemption for core religious institutions – essentially houses of worship – as applied to contraceptive services. The regulation was made final on February 15, 2012.

On February 10, 2012, President Obama announced that in addition to the narrow exemption from the contraceptive coverage rule for houses of worship, HHS would promulgate new rules extending an accommodation to certain organizations with religious objections to contraception wherein the organization would not be required to contribute to insurance

coverage for contraception, but “women will still have access to free preventive care that includes contraceptive services – no matter where they work.” On March 15, 2012, HHS, along with the Departments of Treasury and Labor, issued an advance notice of proposed rulemaking, beginning the process of crafting this proposed accommodation.

Recommendation

1. In issuing a new rule, HHS must ensure that all employees receive no-cost-sharing coverage seamlessly. The February 15 final rule promotes women’s equality, public health, and true religious liberty and requires no further modification. The contraceptive coverage rule does not infringe on a core religious function. Provision of insurance coverage by organizations that operate in the public sphere and employ individuals with diverse backgrounds is a secular activity.

It is therefore all the more important that any accommodation crafted for a narrow set of non-profits with religious objections that do not qualify for the house-of-worship exemption must ensure seamless coverage for all employees equal in all respect to coverage without the accommodation. And in no circumstance should the religious employer *exemption* for core religious institutions be expanded. Anything else sacrifices women’s health, women’s equality, and true religious liberty – where no set of religious beliefs is privileged, imposed on others, or used as a license to discriminate.

Supplemental Material

- ACLU Briefing Paper, *Promoting Equality: An Analysis of the Contraceptive Coverage Rule*, October 2012: http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf
- Comments from the ACLU to the Department of Health and Human Services Regarding Certain Preventive Services Under the Affordable Care Act, CMS–9968–ANPRM, June 2012: http://www.aclu.org/files/assets/aclu_comments_cms-9968-anprm_6-19-12.pdf
- Editorial, *The Politics of Religion*, N.Y. TIMES, May 27, 2012: http://www.nytimes.com/2012/05/28/opinion/the-politics-of-religion.html?_r=0
- Editorial, *The Freedom to Choose Birth Control*, N.Y. TIMES, February 10, 2012: <http://www.nytimes.com/2012/02/11/opinion/the-freedom-to-choose-birth-control.html>

- Editorial, *Battling Over Birth Control*, N.Y. TIMES, November 24, 2011:
<http://www.nytimes.com/2011/11/25/opinion/battling-over-birth-control.html>
- Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing* 14 GUTTMACHER POLICY REVIEW 7 (2011):
<http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.pdf>
- Centers for Disease Control, 10 Great Public Health Achievements in the 20th Century: 1900 to 1999, MMWR (1999): <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf>

Issue Area: Reproductive rights

Enhance Access to Emergency Contraceptives

Background

Access to emergency contraception (EC) is crucial in preventing unintended pregnancy and reducing the need for abortion care for women who have experienced contraceptive failure, who have been raped, or who have had unprotected intercourse. Also known as the “morning-after pill,” EC is a concentrated dose of the birth control pills that millions of women take every day. Timing is critical for EC to be effective: It is most effective the sooner it is taken and must be taken within several days of unprotected intercourse or contraception failure. Despite EC’s effectiveness in preventing unintended pregnancies, government policies continue to hinder women’s access to this important reproductive health service. This arises in three areas.

The first concerns over-the-counter access. In 2009, a federal court had directed the FDA to reconsider its previous decision, under the Bush Administration, to limit over-the-counter access to emergency contraception to 18 year olds. The court also ordered the FDA to make over-the-counter access to emergency contraception immediately (within 30 days) available to 17 year olds, finding the FDA’s justification for denying over-the-counter access to 17 year olds “lacks all credibility” and was based on “fanciful and wholly unsubstantiated ‘enforcement’ concerns.” On December 7, 2011, Secretary Sebelius overruled the Food and Drug Administration’s decision to lift age restrictions on over-the-counter sale of emergency contraception, precluding women under 17 from accessing emergency contraception without a prescription, and thereby requiring women 17 and older to be subject to ID restrictions at the pharmacy counter. Emergency contraception is safe for use by women of all ages. Restricting its availability without a prescription to women over the age of 17 was a decision that has no basis in science. That decision endangers the health of teenage women who may otherwise be faced with an unplanned pregnancy or abortion.

Second, in 2004, the Department of Justice issued sexual assault protocols that fail to mention emergency contraception or to recommend that it be offered to victims of sexual assault. Because of the narrow window in which emergency contraception is effective, the Protocol should explicitly state that treatment of sexual assault victims must include routine counseling about and offering of emergency contraception.

Third, although the Indian Health Service (IHS) clinical manual states that “all FDA-approved contraceptive devices should be available” to its patients, reports indicate that emergency contraception is frequently unavailable at IHS facilities. For some Native American women, however, the next closest commercial pharmacy may be hundreds of miles away and transportation costs may be insurmountable, making timely access to emergency contraception difficult, if not impossible for too many women. Even at those IHS facilities where emergency contraception is available, it is often unavailable over-the-counter—despite FDA guidelines, creating further delay by forcing women to make an appointment with a health care provider in

order to obtain emergency contraception. The failure to adequately stock and offer emergency contraception is particularly concerning given the government's own statistics show that Native American women experience sexual assault at especially high rates.

Recommendations

1. The Department of Health and Human Services (HHS) should lift the age restriction on over-the-counter access, ensuring that FDA policy is based on sound science, not politics.
2. The Department of Justice should modify the sexual assault protocols issued by the agency in 2004 to include the routine offering of pregnancy prophylaxis (or "emergency contraception") to sexual assault victims who are at risk of pregnancy from rape.
3. The IHS Director should instruct regional directors and facilities to make emergency contraception available without a prescription and without having to see a doctor to any woman age 17 or over who requests it.

Supplemental Material

- Emergency Contraception, Women's Health Policy Facts, The Henry J. Kaiser Family Foundation (August 2010): <http://www.kff.org/womenshealth/upload/3344-04.pdf>
- FDA Regulations: <http://www.fda.gov/drugs/drugsafety/postmarketdrugsafetyinformationforpatientsandproviders/ucm109775.htm>
- Statement from FDA Commissioner Margaret Hamburg, M.D. on Plan B One-Step (Dec. 7, 2011): <http://www.fda.gov/NewsEvents/Newsroom/ucm282805.htm>
- "Medical Groups Denounce HHS Decision on Access to Emergency Contraception," The American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the Society of Adolescent Health and Medicine (December 7, 2011): <http://www.acog.org/~media/News%20Releases/20111207Release.pdf>
- American Academy of Pediatrics policy statement on Emergency Contraception, *Pediatrics* (Vol. 116 No. 4), October 2005: <http://ec.princeton.edu/news/aap-ecstatement.pdf>
- Provision of Emergency Contraception to Adolescents: Position Paper of the Society for Adolescent Medicine, *Journal of Adolescent Health* (Vol. 31, No. 1), July 2004: http://www.adolescenthealth.org/AM/Template.cfm?Section=Position_Papers&Template=/CM/ContentDisplay.cfm&ContentID=1472

- Robert Steinbrook, "Science, Politics, and Over-the-Counter Emergency Contraception," *Journal of American Medicine Association* (Jan. 25, 2012):
http://tmedweb.tulane.edu/portal/files/open-access/fim-1/ethics/session-5/2_JAMA-2012-Steinbrook-365-6_22182592.pdf
- Obama Lets Politics Trump Science in Plan B Fight:
<http://www.thedailybeast.com/articles/2012/04/06/obama-lets-politics-trump-science-in-plan-b-fight.html>
- "Emergency Contraception Over-the-Counter: The Importance of Expanding Access for Teens," Reproductive Health Technologies Project (September 2011):
http://www.rhttp.org/contraception/emergency/documents/Teen1pagerFinal9.27.11_000.pdf
- Coalition letter, Re: Failure to include information about emergency contraception in National Protocol for Sexual Assault Medical Forensic Examinations, January 6, 2005:
<http://www.aclu.org/reproductive-freedom/coalition-letter-department-justice-regarding-emergency-contraception-protocol>
- ACLU Reproductive Freedom Project Briefing Paper, "Preventing Pregnancy after Rape: Emergency Care Facilities Put Women at Risk," December 2004:
http://www.aclu.org/files/FilesPDFs/rfp_ec.pdf
- "Committee Opinion: Sexual Assault," American College of Obstetricians and Gynecologists (August 2011):
<http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co499.pdf?dmc=1&ts=20120304T1502100085>
- Abstract: Felicia H. Stewart and James Trussell, "Prevention of Pregnancy Resulting from Rape: A Neglected Preventive Health Measure," *19 Am. J. Preventive Med.* 228, 229 (2000): [http://www.ajpmonline.org/article/S0749-3797\(00\)00243-9/abstract](http://www.ajpmonline.org/article/S0749-3797(00)00243-9/abstract).
- "A Survey of the Availability of Plan B and Emergency Contraceptives within Indian Health Service Roundtable Report on the Accessibility of Plan B as an Over the Counter (OTC) within Indian Health Service," Native America Women's Health Education Resources Center (February 2012):
<http://www.nativeshop.org/images/stories/media/pdfs/Plan-B-Report.pdf>
- "Native Americans Struggle with High Rate of Rape," *New York Times* (May 22, 2012):
<http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?pagewanted=all&r=0>

Issue Area: Reproductive freedom

Ensure that Hospitals Comply with All Federal Laws Protecting Patients' Health, Informed Consent, and Access to Reproductive Health Care

Background

Sadly, there are many conditions that occur during pregnancy that can necessitate terminating a pregnancy to save a woman's life or protect her health. Yet, across the country, religiously affiliated hospitals inappropriately and unlawfully deny pregnant women emergency medical care and the information they need to make decisions about their own health care.

For example, the Ethical and Religious Directives ("Directives") issued by the U.S. Conference of Catholic Bishops direct hospitals to limit and withhold care, denying life and health-saving abortions. As a result, many pregnant women who need emergency services in these hospitals (often the only hospital in a particular community) may not receive medically indicated care – despite the fact that we have laws intended to protect patients' health and their access to appropriate medical treatment and information.

The Emergency Medical Treatment and Active Labor Act ("EMTALA") requires any hospital that receives Medicare funds and operates an emergency department to stabilize any individual determined to have an emergency medical condition, and prohibits a covered hospital from transferring any individual with an emergency medical condition who has not been stabilized. EMTALA defines "to stabilize" as "to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely." 42 U.S.C. § 1395dd(e)(3)(A). Similarly, hospitals have obligations under the Conditions of Participation of Medicare and Medicaid ("COP"). COP regulations require hospitals that participate in Medicare and Medicaid to inform patients of their rights in advance of furnishing or discontinuing care, and give patients the right to participate in the development of their plan of care. Patients have the right to make informed decisions regarding their care, and to request or refuse treatment.

When appropriate and necessary care is withheld from women, the consequences can be fatal. In October 2012, Savita Halappanavar entered an Irish hospital mid-miscarriage, but due to religious restrictions the hospital refused to provide the medically appropriate treatment – an abortion – until the fetal heartbeat stopped. This is the same restriction applied by U.S. hospitals that choose to follow the Directives. As a result of the delay, Savita died from septicemia, a blood infection that resulted from the prolonged exposure of her cervix. As documented by the American Journal of Public Health, women's health and lives are similarly unnecessarily put at risk here when hospitals place ideology above their patients' needs.

Recommendation

1. The Centers for Medicare & Medicaid Services (“CMS”) should issue a statement clarifying hospitals’ obligations under EMTALA and COP to provide life and health-saving abortions, and to inform their pregnant patients, and their families, of treatment options that could protect their health and lives. This guidance document should clarify that such obligations apply regardless of a hospital’s religious affiliation.
2. CMS should investigate complaints of alleged violations promptly, and take all necessary corrective action where violations are found.

Supplemental Material

- Douglas Dalby, *Hospital Death in Ireland Renews Fight Over Abortion*, N.Y. TIMES, November 14, 2012: <http://www.nytimes.com/2012/11/15/world/europe/hospital-death-in-ireland-renews-fight-over-abortion.html>
- Lori R. Freedman, et al., *When There’s a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. OF PUBLIC HEALTH 1774 (Oct. 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636458/>.
- Letter from Laura W. Murphy, Director, ACLU Washington Legislative Office, to Marilyn Tavenner, Acting Administrator, Centers for Medicare and Medicaid Services (July 1, 2010), http://www.aclu.org/files/assets/Letter_to_CMS_Final_PDF.pdf.
- Letter from Laura W. Murphy, Director, ACLU Washington Legislative Office, to Donald Berwick, Administrator, Centers for Medicare and Medicaid Services (Dec. 22, 2010), http://www.aclu.org/files/assets/EMTALA-ACLU_CMS_Follow_Up_Letter-St_Joseph-12-22-2010_FINAL.pdf.

Issue Area: Reproductive rights

Ensure Access to Reproductive Health Care for Unaccompanied Immigrant Minors and Refugee Minors and Adults

Background

The Department of Health and Human Services' Administration for Children and Families, through the Office of Refugee Resettlement ("ORR"), is responsible for providing day-to-day care for two populations. ORR helps minors who come to this country on their own until such time as they are either deported to their home country or unified with family in the United States. ORR also helps refugees – both minors and adults – who are identified by the U.S. government in their home countries, and are brought to the U.S. to rebuild their lives. ORR has failed to meet the reproductive health care needs of either population, in part because ORR contracts with religious entities that refuse to provide referrals to this type of health care.

For unaccompanied immigrant minors, ORR contracts with two social service agencies. One is the United States Conference of Catholic Bishops ("USCCB"). USCCB subcontracts with its affiliates, Catholic Charities, to provide housing, clothing, education, and medical care to unaccompanied immigrant minors. USCCB explicitly prohibits its affiliates from referring for or facilitating access to abortion or contraception. It is not uncommon for these teens to face sexual abuse, including rape, during their journey to the U.S. Moreover, because these teens often do not speak English or have any resources of their own (and are sometimes even confined) it is unlikely that they will be able to access medical services without help from their social workers, who are employed by Catholic Charities, through the contract with ORR.

USCCB's refusal to provide contraception referrals is directly contrary to the settlement agreement in *Flores v. Meese*, 85-CV-4544-RJK. That settlement dictates terms for ORR's treatment of unaccompanied immigrant minors, and specifically states that unaccompanied minor programs "shall provide or arrange for" family planning services.

ORR also has a policy that requires its contractors to inform ORR if a minor is seeking an abortion. This is an inappropriate intrusion on the minor's privacy, and may amount to an unconstitutional veto power over the teen's abortion if ORR does not approve the medical procedure.

For refugee minors and adult women, ORR also contracts with religious entities to provide immediate care upon entry into the U.S., which includes a health screening. If a woman or female teen decides to have an abortion, or would like to use birth control, some religious contractors refuse to facilitate access to those services, despite the fact that Refugee Medical

Assistance and Medicaid will pay for contraception and, in some limited circumstances, abortion care.

Allowing contractors to refuse to provide access to the full range of reproductive health care raises serious legal concerns. As noted above, ORR is in violation of the *Flores* settlement agreement. Furthermore, a federal district court recently ruled that it is unconstitutional for the federal government to allow a religious contractor to impose its religious beliefs on a vulnerable population – in that case trafficking victims – to determine which services the clients can receive with a federal grant. See *ACLU of Massachusetts v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass 2012). Moreover, the Administration for Children and Families’ (“ACF”) policy statement on faith-based partnerships makes clear that federal grantees “must ensure that their overall program provides all of the required services.” Therefore, by allowing religious grantees to refuse to provide access to reproductive health services, ORR is acting contrary to ACF’s own policy.

ORR’s gaps in ensuring access to reproductive health care for the vulnerable populations in its care is also directly at odds with Immigration Customs and Enforcement’s (“ICE”) policy for adult women who come to the U.S. without documentation. Contrary to ORR, ICE has adopted a policy with the goal of ensuring that women have access to the full range of reproductive health care needs.

Recommendations

1. ORR should adopt and implement a policy clarifying that unaccompanied minors and refugees, both teens and adults, have access to the full range of reproductive health services, similar to ICE’s policy (see link below), no matter which type of organization ORR contracts with to provide services.
2. ORR should repeal its policy requiring heightened involvement for abortion care. Specifically, ORR should adopt and implement a policy for both unaccompanied immigrant minors and refugee minors and adults clarifying that all populations receive access to:
 - the full range of family planning care, including access to birth control
 - pregnancy testing
 - comprehensive counseling (including nondirective – or impartial – counseling about contraception and, if pregnant, options for carrying the pregnancy to term, having an abortion, or placing the child for adoption)
 - pre- and post-natal care
 - abortion care

- emergency contraception, particularly after a minor or woman may have suffered a sexual assault

Supplemental Materials

- ICE Policy on Women’s Medical Care: http://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf
- *ACLU of Massachusetts v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass 2012): <http://www.aclu.org/reproductive-freedom/aclu-massachusetts-v-kathleen-sebelius-et-al-order>
- *Flores v. Meese* settlement agreement (Exhibit 1, Paragraph A(2)): <http://centerforhumanrights.org/children/Document.2004-06-18.8124043749>
- Administration for Children and Families’ Faith-Based Partnership Policy: <http://www.acf.hhs.gov/initiatives-priorities/faith-based-partnerships>
- No Choice for Immigrants: Catholic Bishops and HHS Trample Reproductive Rights of Teens in Federal Custody, *In These Times* (Dec. 29, 2008): http://www.inthesetimes.com/article/4115/no_choice_for_immigrants
- Bush Administration Blocks Medical Services For Immigrant Teens In U.S. Care (ACLU): <http://www.aclu.org/reproductive-freedom/bush-administration-blocks-medical-services-immigrant-teens-us-care>
- Alone, Vulnerable, and Without Access to Vital Reproductive Health Care (ACLU): <http://www.aclu.org/blog/reproductive-freedom/alone-vulnerable-and-without-access-vital-reproductive-health-care>
- Access Denied, *Texas Observer* (Feb. 19, 2009): <http://www.texasobserver.org/archives/item/15571-2963-access-denied>

Issue Area: Gender discrimination

Ensure that Medicaid Covers Men Diagnosed with Breast Cancer to the Same Extent as Women

Background

Tragically, breast cancer affects both women and men. The American Cancer Society estimates that in 2011, approximately 2,140 new cases of invasive breast cancer will be diagnosed in men, and about 450 men will die of the disease. And yet, current policy does not guarantee Medicaid coverage for men diagnosed with breast cancer to the same extent as women.

The Breast and Cervical Cancer Prevention and Treatment Act of 2000 (“Treatment Act of 2000”) allows states to provide Medicaid benefits to individuals diagnosed with breast and cervical cancer, who otherwise would not qualify for Medicaid, if specific requirements are satisfied. The individual must be uninsured, under the age of 65, and must “have been screened for breast and cervical cancer under the Centers for Disease Control and Prevention breast and cervical cancer early detection program” Title XV of the Public Service Act, in turn, funds the state screening programs for the prevention and control of breast and cervical cancer, and explicitly restricts screening to women. This screening program was established pursuant to a 1990 law, the Breast and Cervical Cancer Mortality Prevention Act of 1990 (“Prevention Act of 1990”).

Because only women are screened through the National Breast and Cervical Cancer Early Detection Program, the Centers for Medicare and Medicaid Services (“CMS”) within the Department of Health and Human Services (HHS) had previously instructed state Medicaid agencies that men are categorically excluded from coverage under the Treatment Act of 2000, even if they meet all other criteria. However, the government, as a matter of law, cannot deny life-saving treatment to male breast cancer patients based only on their sex. The Treatment Act of 2000 violates both the equal protection guarantee of the Fifth Amendment of the U.S. Constitution and the antidiscrimination provision of the Patient Protection and Affordable Care Act of 2010 (“ACA”).

In February, 2012 CMS told the South Carolina Post and Courier that it “is working together with other agencies within the Department of Health and Human Services to develop the best policy that complies with statutory and other legal requirements,” and that its “aim is to work to provide coverage for breast cancer treatment for men and women with Medicaid if they need it.”

Recommendation

1. HHS and CMS should take the next step of issuing guidance to state Medicaid agencies, obligating them to extend Medicaid benefits to men who are diagnosed with breast cancer and otherwise meet the age and insurance criteria of the Treatment Act of 2000. Interpreting the Treatment Act of 2000 to allow for coverage of men diagnosed with breast cancer, and who otherwise meet the Treatment Act's insurance and age criteria, best reconciles the Treatment Act with CMS' obligations under the U.S. Constitution and the ACA.

Supplemental Material

- Letter from the ACLU to the Centers for Medicare and Medicaid Services, February 2012:
http://www.aclu.org/files/assets/male_breast_cancer_letter_to_cms_2.2.12_final.pdf
- Renee Dudley, *Cancer Policy in Limbo*, POST AND COURIER, February 2012:
<http://www.postandcourier.com/article/20120214/ARCHIVES/302149876?print>
- American Cancer Society, *Breast Cancer in Men*, last modified June 2012:
<http://www.cancer.org/acs/groups/cid/documents/webcontent/003091-pdf.pdf>

Issue Area: LGBT rights

Cover Treatment of Gender Identity Disorder in Federal Employees' Health Benefits Plans and Under Medicare and Medicaid

Background

Gender Identity Disorder (“GID”) is recognized by the medical and mental health professions as a serious medical condition.² According to the accepted standards of care for the treatment of GID, hormone therapy and/or sex reassignment surgeries to make the body congruent with the individual’s gender identity, as well as mental health care, are medically necessary treatments for many people with this condition.³ These treatments are not experimental. Decades of clinical experience and medical research have proven them to be effective and essential to the well-being of patients.⁴ Without the necessary treatment, GID can cause severe psychological distress, dysfunction, debilitating depression and a higher probability of suicide.⁵ The major national medical and mental health professional groups have issued policy statements recognizing the medical necessity of such treatments and opposing the exclusion of gender transition-related health care (including hormone therapy and surgeries) from medical insurance coverage.⁶

Despite this medical consensus, two health insurance programs operated by the federal government exclude coverage of gender transition-related health care to treat GID. The Federal Employee Health Benefits Plans exclude coverage of “services, drugs, or supplies related to sex transformations.” The Centers for Medicare and Medicaid Services excludes “[t]ranssexual surgery, also known as sex reassignment surgery or intersex surgery” from

² See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 576-82 (4th Edition, Text Revision 2000); American Medical Association House of Delegates, *Removing Barriers to Care for Transgender Patients* (April 14, 2008) (“AMA Statement”), available at http://www.ama-assn.org/ama1/pub/upload/mm/16/a08_hod_resolutions.pdf.

³ World Professional Association for Transgender Health (“WPATH”), *Standards of Care for Gender Identity Disorders* (7th Ed., July 2012), available at <http://www.wpath.org/documents/SOC%20V7%2003-17-12.pdf>; American Psychological Association Policy Statement: *Transgender, Gender Identity, and Gender Expression Non-discrimination* (Aug. 2008) (“APA Statement”), available at <http://www.apa.org/about/policy/transgender.aspx>) (recognizing the WPATH standards of care as the established standards for treatment of GID); AMA Statement (same).

⁴ WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (2008) (“WPATH Clarification”), at 3, available at <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>

⁵ WPATH Clarification; AMA Statement.

⁶ See AMA Statement; APA Statement; WPATH Clarification.

Medicare coverage.⁷ While hormone therapy is included in Medicare Part D prescription drug plan formularies, some individuals may be denied coverage for hormones that are not consistent with the gender marker appearing in their records.⁸

In addition, individuals insured by Medicaid cannot get coverage for gender transition-related care in a majority of the states. Almost half of the states explicitly exclude such care from coverage under Medicaid.⁹ These exclusions bar hormone therapy, surgical procedures and sometimes even mental health care. Many additional states exclude coverage for transition-related care by incorrectly deeming such treatment to be experimental or cosmetic.¹⁰

Recommendations

1. The Office of Personnel Management should require that all Federal Employees Health Benefits Plans provide coverage for medically necessary care for Gender Identity Disorder, including gender transition-related care.
2. The Department of Health and Human Services' Centers for Medicare and Medicaid Services should rescind the National Coverage Determination ("NCD") excluding gender transition-related surgery from Medicare coverage and issue an NCD allowing Medicare coverage for medically necessary care for Gender Identity Disorder, including gender transition-related care.
3. The Department of Health and Human Services should enact a federal regulation to prohibit State Medicaid plans from excluding coverage of medically necessary treatment for Gender Identity Disorder, including gender transition-related health care. One way to do this is to add the following provision to 42 C.F.R. Part 440, Subpart B:

440.280 Proscriptions against certain exclusions

A State plan may not exclude any medically necessary services based on the fact that the services are for the treatment of Gender Identity Disorder (also known as gender dysphoria), including gender transition-related care.

⁷ Centers for Medicare and Medicaid Services, National Coverage Determination 140.3, available at <http://www.cms.gov/medicare-coverage-database/details/ncd-details.aspx?NCDId=83&ncdver=1&bc=AgAAQAAAAAAAA&>.

⁸ See National Center for Transgender Equality, Medicare Benefits and Transgender People, August 2011, available at http://transequality.org/Resources/MedicareBenefitsAndTransPeople_Aug2011_FINAL.pdf.

⁹ See Gehi and Arkles, "Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Care for Transgender People," *Sexuality Research & Social Policy*, Dec. 2007, vol. 4, No. 4, available at <http://srlp.org/files/SRLPmedicaidarticle.pdf>.

¹⁰ *Id.*

Supplemental Materials

See footnotes cited in Background section.

Issue Area: LGBT rights

End Discrimination Against Sexual Minorities in Adoption and Foster Care

Background

Congress enacted the Adoption and Safe Families Act of 1997 in part to “provide a greater sense of urgency to find every child a safe, permanent home.” But Congress found in 2003 that despite substantial progress in promoting adoptions, 126,000 children are still eligible for adoption. PL 108-154, Dec. 2, 2003, 117 Stat 1879. For parentless children, it is critical to remove remaining barriers to finding permanent families. One of those barriers is the exclusion of adoption and foster applicants based on discrimination by placement personnel, and, in some states, laws or policies that bar some LGBT prospective parents from consideration.

In April 2011, the Administration for Children and Families within the Department of Health and Human Services (HHS) issued an information memorandum (IM) to encourage child welfare agencies, foster and adoptive parents and others who work with young people in foster care to ensure that children, in this case those who are LGBT or questioning, are supported while they are in foster care. Among the recommendations in the IM is a suggestion for agencies to develop mechanisms to recruit, train, and provide ongoing support to families, including LGBT individuals and families, who are able to provide a safe, loving family placement for young people who are LGBT or questioning and are involved with the child welfare system.

Recommendations

1. HHS should amend federal regulations to prevent states that receive federal funding for foster care maintenance payments and adoption assistance from excluding prospective adoptive and foster parents because of sexual orientation, gender identity, or marital status, no matter which type of organizations states contract with to carry out services with the funding.

In particular, 45 CFR Part 1355 – the general provisions concerning the Administration on Children, Youth and Families, Foster Care Maintenance Payments, Adoption Assistance, and Child and Family Services – should be amended to add the following provision:

Using all qualified adoptive and foster resources.

No adoption or foster placement may be delayed or denied based on a prospective adoptive or foster parent’s sexual orientation, gender identity or expression, or marital status where such characteristic is unrelated to the individual placement needs of a particular child.

Supplemental Material

- Information Memorandum from the Administration for Children and Families on Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care (April 6, 2011): <http://www.acf.hhs.gov/programs/cb/resource/im1103>

Issue Area: Reproductive rights

Issue Area: LGBT rights

Stop Use of Federal Funds for Medically Inaccurate ‘Abstinence-only’ Sex Education Programs and Remove Such Programs from HHS’ List of Evidence-based Programs.

Background

Starting in FY 2010 and continuing in FY 2011 and FY 2013, the Administration's budget zeroed out funding for abstinence-only-until-marriage school sex education programs, after more than \$1.5 billion in federal and state funding had been spent on these ineffective programs. These programs promoted a skewed and unrealistic view of family planning and offered content that was medically inaccurate and biased against LGBT individuals. The President also spearheaded the creation of two critically important programs to promote the health and well-being of the nation's youth. One is the Teen Pregnancy Prevention Initiative, which funds evidence-based teen pregnancy prevention interventions. The other is the Personal Responsibility Education Program, which provides states with funding to implement sex education programs that educate young people about waiting to have sex, contraception, and adult preparation subjects, such as healthy relationships and communication and decision-making skills.

To help state and local partners identify effective programs, HHS maintains a List of Evidence-Based Teen Pregnancy Prevention Programs. In spring 2012, HHS included Heritage Keepers Abstinence Education on its list of evidence-based programs despite the fact that Heritage Keepers is an abstinence-only-until-marriage program with questionable evidence of effectiveness and problematic content. The program promotes gender stereotypes and ignores the health needs of LGBT youth; promotes heterosexual marriage as the only acceptable family structure; withholds life-saving information from sexually active youth, including information about sexually transmitted infections, the health benefits of contraception and condoms; and, uses fear-based messages to shame sexually experienced youth and youth living in “nontraditional” households.

The FY 2012 budget adopted by Congress included five million in funding for abstinence-only-until-marriage programs, despite the preponderance of studies showing such programs are ineffective and, like the Heritage Keepers program, promote gender stereotypes, are insensitive to and ignore the health needs of LGBT youth, and include medically inaccurate information.

Recommendation

1. Remove the Heritage Keepers Abstinence Education program from the list of HHS-endorsed programs. Review the list of evidence-based teen pregnancy prevention programs and remove programs that promote gender stereotypes, fail to address the needs of LGBT youth, include medically inaccurate information, or have been shown to be ineffective.

Supplemental Material

- U.S. Department of Health and Human Services, Office of Adolescent Health, List of Evidence Based Teen Pregnancy Prevention Programs:
<http://www.hhs.gov/ash/oah/oah-initiatives/tpp/programs.html>
- Heritage Keepers Abstinence Education: <http://www.hhs.gov/ash/oah/oah-initiatives/tpp/programs/heritage-keepers-v2.pdf>
- Coalition Letter to U.S. Department of Health and Human Services Re Heritage Keepers Abstinence Education, April 2012:
http://www.aclu.org/files/assets/heritage_keepers_letter-sex_ed_coalition.pdf

Issue Area: Religious freedom

Ensure Religion Is Not Used to Discriminate in Government-Funded Programs and Oppose Efforts to Create Discriminatory Exemptions

Background

Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Religious freedom includes two complementary protections: the right to religious belief and expression, and a guarantee that the government does not favor religion or particular faiths. Thus, we have the right to a government that neither promotes nor disparages religion. We have the absolute right to believe whatever we want about God, faith, and religion. And, we have the right to act on our religious beliefs—unless those actions threaten the rights, welfare, and well-being of others.

The right to religious practice deserves strong protection; however, religion cannot be a license to discriminate. When religiously identified organizations receive government funding to deliver social services, they cannot use that money to discriminate against the people they help or against the people they hire, or pick and choose which particular services they will deliver. The government cannot delegate to religiously identified organizations the right to use taxpayer funds to impose their beliefs on others. Religiously identified organizations cannot use taxpayer funds to pay for religious activities or pressure beneficiaries to subscribe to certain religious beliefs. Government-funded discrimination, in any guise, is antithetical to basic American values and to the Constitution.

Religion cannot be used as an excuse to discriminate against employees, customers, or patients. When an organization operates in the public sphere, it must play by the same rules every other institution does. Such organizations should not be given loopholes from laws that ensure equality in the workplace or guarantee access to public accommodations and health care, thus sanctioning discrimination in the name of religion. No American should be denied opportunities, vital services, or equal treatment.

Recommendation

1. Include provisions that prohibit discrimination in the name of religion against beneficiaries, employees, or services in government-funded social service programs and oppose efforts to create discriminatory exemptions in the name of religion in government contracts and grants, as well as in laws and regulations that guarantee equal opportunity and access to services.

Supplemental Material

- ACLU Briefing Paper, *Promoting Equality: An Analysis of the Contraceptive Coverage Rule*, October 2012: http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf
- ACLU of Massachusetts v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012): http://www.aclu.org/files/assets/usccb_decision.pdf.
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- Coalition Letter to President Obama Asking for Clarity on Federally Funded Employment Discrimination and Outlining Other Concerns, September 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-asking-clarity-federally-funded-employment>

Issue Area: Disability rights

Increase Community Integration and Access for People with Disabilities

Background

People with disabilities are still far too often treated as second class citizens, shunned and segregated by physical barriers and social stereotypes. They are discriminated against in employment, schools, and housing, robbed of their personal autonomy, sometimes even hidden away and forgotten by the larger society.

In 1999, the Supreme Court ruled in *Olmstead vs. L.C. and E.W.* that states may not keep people with disabilities in institutions if they are able to live in the community and wish to do so. It recognized the integration mandate of the Americans with Disabilities Act and declared that unnecessary segregation of people with disabilities is a form of discrimination.

One of the structural impediments to the integration of people with disabilities in the community is that Medicaid funding has traditionally gone to institutional services and not community supports. The current funding mechanisms and CMS culture have been geared toward nursing homes. As a result, even well-intentioned moves toward stopping the segregation of people with disabilities may miss the goal of genuine integration.

The Obama Administration has made significant steps in the right direction towards furthering the community integration of people with disabilities. It has expanded a pilot program called “Money Follows the Person” (MFP) that uses Medicaid dollars to move people with disabilities from nursing homes back to the community, closer to family and friends. However, this has affected less than 1% of the nursing home population so far.

Further healthcare reforms provide both opportunities and dangers for people with significant disabilities. For example, some 27 states are planning to implement managed care programs for Medicaid and Medicare recipients. These programs have the potential to deliver healthcare more efficiently and effectively – but may also push people with disabilities into institutions. When states, such as New York and North Carolina, “carve out” nursing home care from the managed care program, it creates an incentive to move the sickest patients out of the managed care system and into an institution. Similarly, what CMS funds as a “community living option” must provide genuine independence and autonomy for people with disabilities.

Extreme delays in processing of Social Security benefits also frustrate integration of people with disabilities. The Social Security Administration (SSA) currently faces a massive backlog in processing of the Social Security disability benefits determination cases. Although the backlog has been reduced from an average of a 500 day wait to an average 347 day wait, it continues to leave hundreds of thousands of people who are in desperate need of assistance on long waiting lists to receive the benefits promised to them in law. The Administration has made a number of important efforts, including automatic eligibility for some disabilities; online applications, and

video hearings for remote locations, but these efforts have been counterbalanced by a 30% increase in disability claims and a decrease in SSA's budget

Further work is needed to ensure that people with disabilities are able to fully participate in the American dream.

Recommendations

1. CMS should increase incentives for states to implement MFP programs.
2. In implementing and approving managed care programs state by state, CMS should follow the guidelines proposed by the National Council on Disability, especially the provision not to approve any state program that "carves out" nursing homes from its long-term services and supports.
3. CMS should fund community living options that genuinely follow community living principles, and respect the autonomy and choices of people with disabilities. Specifically, in CMS' proposed rules for Medicaid Home and Community Based Services (HCBS), CMS should not fund any settings that isolate people with disabilities from the larger community, that do not allow choice of roommates or a private room, and that limit individuals' freedom of choice on daily living experiences.
4. SSA should resolve the Social Security disability benefits determination backlog thoroughly, expeditiously and fairly. In particular, SSA should undertake a complete review of the process for administering disability cases, and should seek additional funding as necessary to reduce the current backlog of benefits determination cases.
5. The Departments of Veterans Affairs (VA) and Defense (DOD) should implement the recommendations of the Veterans' Disability Benefits Commission (VDBC) and the Iraqi and Afghanistan Veterans' of America (IAVA). As documented by the VDBC, the Dole-Shalala Commission, and in myriad news reports, the DOD's and VA's treatment of wounded and disabled veterans has not lived up to our promises to them. The VA should advocate on behalf of beneficiaries, demanding more resources, and eliminating the backlog of 870,000 claims.
6. DOL and CMS should phase out "sheltered workshops" for people with disabilities in favor of mainstream, supported employment services. Under Section 14(c) of the Fair Labor Standards Act of 1938, certain entities are allowed to pay workers with disabilities less than the federal minimum wage. These "sheltered workshops" almost always segregate people with disabilities from non-disabled workers and pay significantly less than minimum wage. The workshops cost more than supported employment programs yet are less effective in moving people to productive employment.

Supplemental Material

- Analysis and Recommendations for the Implementation of Managed Care in Medicaid and Medicare Programs for People with Disabilities:
<http://www.ncd.gov/publications/2012/CMSFebruary272012/>
- Guiding Principles: Successfully Enrolling People with Disabilities in Managed Care Plans:
<http://www.ncd.gov/publications/2012/Feb272012/>
- ASAN Public Comment on Defining Home and Community Based Services:
<http://autisticadvocacy.org/2012/06/asan-public-comment-on-defining-hcbs-in-1915i/>
- Guide to the Updated ADA Standards: <http://www.access-board.gov/ada/guide.htm>
- ACLU Comments to Department of Justice: “Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,” January 2011:
http://www.aclu.org/files/assets/ACLU_Comments_for_Title_II_III_ADA_Regulations_-_2010_-_Equipment_FINAL.pdf
- “Honoring the Call to Duty: Veterans’ Disability Benefits in the 21st Century,” 2007:
<http://veterans.senate.gov/upload/VetDisBenefitComm9-27.pdf>
- Veterans’ Benefits Improvement Act of 2008: <http://www.gpo.gov/fdsys/pkg/PLAW-110publ389/pdf/PLAW-110publ389.pdf>
- U.S. Department of Veterans Affairs: “Claims Transformation.”:
<http://benefits.va.gov/transformation/>

Department of Homeland Security

Issue Area: Immigrants' rights

Implementation of Deferred Action for Young Immigrants Who Came to the United States as Children

Background

On June 15, 2012, the Obama administration announced that it would stop deporting and begin giving work permits to certain young adults who came to the U.S. as children and meet other eligibility criteria. Those who are eligible for “deferred action” for two years (subject to renewal) include people who arrived in the U.S. before age 16, are younger than 30, have been in the U.S. for at least five continuous years, graduated from a U.S. high school or earned a GED or served in the U.S. armed forces, and “have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety.”

The affirmative application process for deferred action opened on August 14, 2012, and will remain open with no end-date. Estimates are that anywhere from 800,000 to 1.4 million individuals are eligible to apply. As young people begin to apply for deferred action under the new initiative, important questions about how the program will be implemented remain.

Recommendations

1. The Department of Homeland Security (DHS) should ensure through public announcements and Citizenship and Immigration Services (CIS) policy that information disclosed in the deferred action applications is not used to pursue immigration enforcement actions against applicants' parents, guardians, and close family members.
2. DHS should ensure through public announcements and CIS policy that deferred action applicants are guaranteed confidentiality, and bar the use of information submitted by applicants for prosecutorial purposes, such as establishing removability, except under narrow circumstances such as commission of criminal fraud in the application process itself.
3. DHS should implement an affordable, streamlined application procedure, which clearly communicates warnings and advisories to applicants of any potential risks that could result from the application process.

4. DHS should adopt a policy not to consider any juvenile delinquency adjudications, either for conviction or discretion purposes, in reviewing deferred action applications.
5. DHS should adopt a reasonable interpretation of criminal ineligibility and fraud ineligibility to ensure that meritorious applicants are not deterred from coming forward, or punished for applying for deferred action.

Supplemental Materials

- ACLU Coalition Letter to DHS, June 2012: <http://www.aclu.org/immigrants-rights/coalition-letter-secretary-napolitano-deferred-action-policy-immigrant-youth>
- ACLU Blog, “A Lifeline for DREAMers,” June 2012: <http://www.aclu.org/blog/immigrants-rights/lifeline-dreamers>
- Remarks of President Obama, June 2012: <http://www.whitehouse.gov/blog/2012/06/15/president-obama-delivers-remarks-immigration>
- DHS Memo, June 2012: <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>
- DHS Press Release, June 2012: <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>
- DHS FAQs: <http://www.dhs.gov/news/2012/06/15/fact-sheet-transforming-immigration-enforcement-system>

Issue Area: Immigrants' rights

Adopt Alternatives to Immigration Detention

Background

Along with increased deportation numbers has come a massive increase in the number of people held in immigration detention. In 2002, the former INS detained 202,000 individuals annually. By 2010, that number had increased by 80% to 363,000. The number of detention beds funded through the appropriations process has increased 89% since FY 2003—from 18,000 to the current level of 34,000, with nearly half of those beds contracted from private prison companies. Even though many of the immigrants who are held in this system pose no flight risk or public safety concern and alternatives to detention could be employed at a much lower cost to taxpayers, Immigration and Customs Enforcement (ICE) continues to employ this jail-based model of incarceration at its approximately 250 authorized facilities across the country.

It costs U.S. taxpayers about \$2 billion per year to incarcerate these hundreds of thousands of people, many of whom are subjected to deplorable conditions while detained. While this penal model of detention ranges from \$122 to \$166 per person per day, alternative methods cost between 30 cents and \$14 per person per day. The human and fiscal costs are unjustifiable when immigration detainees are an overwhelmingly non-violent group, and many alternative forms of supervision would effectuate the government's interest in removal without the same economic and human costs.

Recommendations

1. ICE should conduct an independent, comprehensive review of the feasibility and effectiveness of alternatives to detention and less restrictive forms of detention. Pending the completion of such a review, ICE should issue a moratorium on contracting for, or constructing, additional immigration detention bed space.
2. DHS should reduce its budget requests for detention funding, and specify that the number of requested beds does not establish a "quota" requiring the detention of a minimum number of people every day.

Supplemental Materials

- Coalition Letter (Mar. 23, 2012): http://www.aclu.org/files/assets/ngo_fy_2013_ice_approps_recommendations.pdf
- Coalition Letter (Sept. 22, 2011): <http://www.aclu.org/immigrants-rights/coalition-letter-joint-select-committee-deficit-reduction-calling-decrease-dhs>

Issue Area: Immigrants' rights

Improve Immigration Detention Standards

Background

The growth in immigration detention has continued unabated in spite of DHS's consistent failure to implement standards that adequately protect detainees against sexual assault and abuse—a widespread and systemic problem in immigration detention facilities. Government documents reveal nearly 200 allegations of sexual abuse and assault at detention facilities across the country since 2007. Although the Prison Rape Elimination Act (PREA), which was passed by a unanimous Congress in 2003, was clearly intended to cover immigration detainees, DHS resisted implementation in immigration detention facilities. DHS's own recently-issued internal detention standards, the 2011 Performance-Based National Detention Standards (PBNDS) are not only greatly inferior compared with PREA, but they require a prolonged process of contractual renegotiation before being applied to ICE's 250 immigration detention facilities. The PBNDS detention standards are not regulatory and therefore not legally enforceable. Terrible detention conditions persist in facilities across the country, particularly with respect to overuse of administrative segregation, inadequate outdoor recreation, and denial of in-person family contact visits.

DOJ's final implementing rule for PREA, released in May 2012, specifies that PREA standards apply to immigration detention facilities, but tasked rulemaking to DHS under a one-year deadline—further delaying important protections for the growing numbers of immigration detainees in facilities nationwide.

Recommendations

1. DHS should promulgate enforceable and strengthened detention standards that are binding on all facilities that house immigration detainees. DHS should promulgate regulations that are fully PREA-compliant to put a stop to the rampant sexual abuse and assault occurring in immigration detention facilities on or before the deadline of May 2013.
2. ICE should conduct an independent, comprehensive review of the feasibility and effectiveness of alternatives to detention and less restrictive forms of detention. Pending the completion of such a review, ICE should issue a moratorium on contracting for, or constructing, additional immigration detention bed space.
3. ICE should shut down its worst detention facilities, including the Pinal County Jail in Florence, Arizona, and the Etowah County Detention Center in Gadsden, Alabama.

4. ICE should ensure the availability of the Legal Orientation Program (LOP) at all detention facilities.

Supplemental Material

- ACLU Press Release: DOJ PREA Regulations Encouraging but Fail to Protect Immigration Detainees, May 2012: <http://www.aclu.org/immigrants-rights-lgbt-rights-prisoners-rights/doj-prea-regulations-encouraging-fail-protect>
- ACLU Statement before the House Judiciary Subcommittee on Immigration Policy and Enforcement, March 2012: http://www.aclu.org/files/assets/aclu_detention_standards_hearing_statement_final_2.pdf
- “Detention is No Holiday,” *New York Times*, Op-Ed, March 2012: <http://www.nytimes.com/2012/03/28/opinion/detention-is-no-holiday.html>
- ACLU Press Release: Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees Is Widespread National Problem, October 2011: <http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse>
- ACLU Interactive Map: Sexual Abuse in Immigration Detention Facilities: <http://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities>
- PBS Frontline: “Lost in Detention,” October 2011: <http://www.pbs.org/wgbh/pages/frontline/lost-in-detention/>
- ACLU Letter to DHS regarding Unconstitutional conditions of confinement for immigration detainees at Pinal County Jail, June 2012: http://www.aclu.org/files/assets/aclu_letter_re_pinal_county_jail_6-12-12.pdf
- ACLU Blog: “Immigration Detention: A Death Sentence for Too Many,” October 2011: <http://www.aclu.org/blog/immigrants-rights/immigration-detention-death-sentence-far-too-many>
- New York Times: “Officials Hid Truth of Immigrant Deaths in Jail,” January 2010: http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=all&_r=0

Issue Area: Immigrants' rights

Limit Immigration Raids

Background

In September 2006, Immigration and Customs Enforcement (ICE) began aggressively stepping up enforcement efforts inside the country's borders by conducting numerous and far-reaching worksite and residential raids in California, Colorado, Hawaii, Iowa, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Texas, and Virginia, among many other states. These raids have greatly disrupted families and communities and have had a negative impact upon local economies. In recent years, worksite enforcement has come to focus largely on so-called "paper raids," but raids, including home raids, continue—as do the abuses that have characterized these operations since 2006.

ICE agents conducting these raids violate the U.S. Constitution and applicable federal law and regulations with alarming frequency—including by entering homes without consent and without a warrant; using administrative warrants (often based on outdated address information) to gain entry to a home and then, once inside, seizing and interrogating everyone found there about their immigration status; relying on racial profiling to stop and question persons who are or appear to be Latino at homes and worksites; transferring those arrested away from their families and communities to out-of-state detention facilities before they have an opportunity to retain or consult an immigration attorney; subjecting arrestees to coercive suspicionless questioning and verbal abuse; and intimidating arrestees into stipulating their removal without providing adequate procedural safeguards. ICE agents also routinely violate federal regulations limiting their arrest powers and requiring advisories and other due process protections. In addition, ICE agents frequently collaborate with local law enforcement, thereby exacerbating the rights violations and public safety problems that result when local police become engaged in immigration enforcement. This is illustrated, for example, by the way ICE and local police collaborated in a series of home raids in Nashville, Tennessee, which we are currently challenging in court. *Escobar v. Gaines*, No. 11-00994 (M.D. Tenn. case docketed Oct. 19, 2011).

ICE has faced numerous federal lawsuits alleging constitutional violations by both ICE agents and local police in conducting these raids. In addition, ICE's violations have given rise to numerous motions to suppress in immigration proceedings, and in several cases, Immigration Judges have held that the raids were conducted in an unlawful manner and ordered dismissal of the immigration charges against the individuals arrested in the raids.

Recommendations

1. DHS should place a moratorium on immigration raids pending a thorough review of ICE's practices and adherence to the Constitution and federal regulations.

- 2 ICE should encourage prosecutorial discretion determinations for individuals who were placed in removal proceedings as a result of workplace raids or as a result of “collateral arrests” in home raids and deprioritize the proceedings for removal of such individuals.

Supplemental Material

- Complaint, *Escobar v. Gaines*, No. 11-00994 (M.D. Tenn. case docketed Oct. 19, 2011) (damages action alleging ICE raids of homes without showing warrants and without consent; agents used excessive force and derogatory and racist language; when asked to show a warrant, one agent responded, “We don’t need a warrant, we’re ICE,” see ¶198): <http://www.aclu-tn.org/pdfs/Clairmont.pdf>.
- “ICE raids DeKalb County, Alabama,” *Times Journal*, December 16, 2011: http://times-journal.com/news/alabama/article_35567198-2837-11e1-93ab-0019bb2963f4.html
- “Dozens arrested in ICE raids in Alabama over last week, SPLC says”:
<http://weldbham.com/secondfront/2011/12/16/breaking-dozens-arrested-in-ice-raids-in-alabama-over-last-week-splc-says/>
- *Matter of Guevara-Mata*, No. 97-535-293 (Board of Immigration Appeals, June 14, 2011) (affirming Immigration Judge’s grant of motion to suppress, holding that ICE agents’ “forced intrusion into the respondents’ bedroom, as well as their manner of arresting, transporting, detaining, and interrogating the respondents, were . . . severe and egregious” Fourth Amendment violations):
<http://www.legalactioncenter.org/sites/default/files/docs/lac/BIA-Guevara-Mata-6-14-2011.pdf>)
- *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008) (reversing denial of motion to suppress, holding that ICE agents committed egregious Fourth Amendment violations when they “pushed open the door” to enter petitioners’ home without consent and interrogated the occupants): <http://caselaw.findlaw.com/us-9th-circuit/1256887.html>
- “Citizens Caught Up in Immigration Raid,” *New York Times*, October 4, 2007:
<http://www.nytimes.com/2007/10/04/nyregion/04raid.html>
- “Groups Allege Immigrants’ Rights Violated,” *Los Angeles Times*, February 15, 2008:
<http://articles.latimes.com/2008/feb/15/local/me-immig15>.
- Complaint, *Reyes v. Alcanta*, No. 4:07-cv-02271-SBA (N.D. Cal. filed April 26, 2007):
https://www.aclunc.org/cases/closed_cases/asset_upload_file318_8052.pdf

- ALCU Press Release, “Civil Rights Groups Sue Immigration Officials for Unlawfully Detaining a 6-year-old US citizen” April 2007: <http://www.aclu.org/immigrants-rights/civil-rights-groups-sue-immigration-officials-unlawfully-detaining-six-year-old-us>
- ACLU written statement submitted to the Senate Judiciary Committee for a hearing on Homeland Security Oversight, April 2008: http://www.aclu.org/files/images/asset_upload_file292_34770.pdf

Issue Area: Immigrants' rights

End Abusive U.S. Customs and Border Patrol Tactics

Background:

U.S. Customs and Border Protection (CBP) continues its extraordinary and unwarranted expansion with no regard for actual border security needs. In spite of the fact that apprehensions along the southwest border are down 80 percent since 2000, and 2011 saw the lowest number of apprehensions since 1971, the FY 2013 budget request included nearly \$12 billion for CBP, double the agency's budget from 2004. This includes funding for 21,370 Border Patrol agents—the highest number in history and more than double the 10,000 agents funded in 2004.

This rapid expansion has enabled and encouraged racial profiling and other abuses of authority not only at the southern and northern borders but also in interior areas across the country. Due in part to CBP's overstaffing, many agents have shifted from true border enforcement to interior enforcement, with DHS claiming the authority to question people about their immigration status anywhere within 100 miles of a U.S. border. In this "constitution-free zone," which includes two thirds of the U.S. population, DHS disregards basic constitutional protections and considers *everyone*, including U.S. citizens, subject to questioning and detention. .

This has led to the targeting of Latinos, Asians, and other racial minorities by CBP and Border Patrol agents as a result of their appearance or accent. There is evidence that in many areas of the country, local police and CBP collaborate improperly to convert ordinary traffic stops into wide-ranging immigration investigations. Local police sometimes call CBP agents, ostensibly to serve as interpreters, but then CBP agents use the opportunity to check the immigration status of those involved. These local-federal efforts often target racial minorities, and thus CBP is aiding and abetting racial profiling by local police.

CBP agents also have engaged in numerous civil and human rights abuses at ports of entry and the border. Among other practices, they have engaged in the use of excessive force and unwarranted, invasive and humiliating personal searches. They have detained individuals repeatedly and without justification based on misidentification. They have coerced individuals not to challenge their removal from the country and to leave "voluntarily" or under "stipulated removals", by threatening them with long periods in jail, among other things. In addition, agents have engaged in deadly use of force in at least eight incidents since January 2010. To date, none of these fatalities at the hands of border patrol has led to a criminal conviction.

These deaths have led the Office of the United Nations High Commissioner for Human Rights to urge the U.S. government to investigate the Border Patrol's involvement in each fatality.

Recommendations:

1. CBP should reform its use-of-force training and policies, including the incorporation of de-escalation techniques, and adopt a zero-tolerance policy for abuses, thereby holding Border Patrol and CBP agents accountable for human rights abuses at the border.
2. CBP should issue policy guidance followed up by supervisory oversight to prevent Border Patrol and CBP agents from engaging in tactics that coerce individuals into giving up their rights to challenge removal.
3. CBP should suspend immigration enforcement efforts in interior areas of the country.
4. CBP should issue a permanent policy barring immigration enforcement in association with disaster preparedness, evacuation, return, or recovery.
5. CBP should adopt standards governing how agents interact with individuals in short-term custody and in secondary inspection areas at ports-of-entry and interior checkpoints to prevent abuse and ensure constitutionally guaranteed and humane conditions of confinement.
6. CBP should ensure agents video or audio record encounters they have with individuals in short-term custody or in secondary inspection areas at ports-of-entry and interior checkpoints. In addition, CBP should install dashboard cameras in all roving patrol vehicles.

Supplemental Materials

- PBS Need to Know: "Crossing the Line at the Border, Part 2," (July 2012): <http://www.pbs.org/wnet/need-to-know/video/need-to-know-july-20-2012-crossing-the-line-part-2/14271/>
- ACLU Blog, July 20, 2012: <http://www.aclu.org/blog/immigrants-rights-free-speech/pbs-highlight-abuses-border>

- Coalition Letter on CBP Use of Force: <http://www.aclu.org/immigrants-rights/coalition-letter-president-obama-regarding-cbp-use-excessive-force>
- PBS Need to Know: “Crossing the Line at the Border,” (Apr. 20, 2012): <http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/>
- L.A. Times Op-Ed: “What’s Going on With the Border Patrol?” (Apr. 20, 2012): <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420>
- ACLU Blog, Feb. 2, 2012: <http://www.aclu.org/blog/immigrants-rights-racial-justice/getting-nothing-something-overspending-border>
- New York Civil Liberties Union, NYU Law School Immigrant Rights Clinic, and Families for Freedom, Report: “Justice Derailed: What Raids on New York Trains and Buses Reveal about Border Patrol’s Interior Enforcement Practices” (Nov. 2011): <http://www.nyclu.org/news/report-reveals-troubling-border-patrol-tactics-upstate-new-york>
- No More Deaths Report: “A Culture of Cruelty” (Sept. 2011): <http://www.nomoredeathsvolunteers.org/Print%20Resources/Abuse%20Doc%20Reports/Culture%20of%20Cruelty/CultureofCrueltyFinal.pdf>
- U.N. Radio, “United States urged to probe deaths of Mexican migrants at border.” (May 29, 2012): <http://www.unmultimedia.org/radio/english/2012/05/united-states-urged-to-probe-deaths-of-mexican-migrants-at-border/>
- ACLU, “Complaint and request for investigation of abuse of power, excessive force, coercion, and unlawful confiscation of property by Customs and Border Protection at ports of entry along the U.S.-Mexico border.” (May 9, 2012): http://www.aclu.org/files/assets/aclu_2012_cbp_abuse_complaint_2.pdf

Issue Area: Immigrants' rights

End Mass Deportation and Family Separation

Background

In FY 2011, Immigration and Customs Enforcements (ICE) removed a record number of individuals—396,906. By the fall of 2012, it is estimated that the Obama Administration will have deported 80% as many people in just one four-year term, about 1.6 million, as the Bush Administration did in two terms — and during a period of time in which net unauthorized migration was decreasing. While DHS claims it has focused removals on priority groups like dangerous, violent criminals, recent border crossers, and immigration fugitives, the facts reveal a different story. In reality, DHS is deporting never-before-seen numbers of people convicted only of minor and traffic-related offenses and annually separating tens of thousands of U.S. citizen children from their parents.

According to ICE data, only about 55% of those removed in 2011 had criminal convictions, and of those, many had committed only non-DUI traffic offenses (including speeding, reckless driving, driving without a tail-light, or driving without a license). DHS also misleadingly defines “recent border crosser” as a person who has entered in the past three years and is found anywhere in the United States. In addition, DHS has shown callous disregard for the well-being of U.S. citizen children whose families are shattered when a parent is deported. In the first half of 2011 alone, over 46,000 people with children born in the United States were deported, with a significant number of children placed in foster care as a result. This is nearly ten times the rate at which such parents were deported between 1998 and 2007.

While ICE announced in 2011 that it would review 300,000+ pending immigration cases to ensure that those being removed truly fit the Administration’s stated priorities, only a minuscule number of grants of prosecutorial discretion have actually been made. Instead, DHS consistently claims that Congress has appropriated funds for approximately 400,000 deportations annually, as if the appropriation constitutes a mandatory quota, and it continues to strive to meet that level of removal.

Recommendations

1. DHS should review pending immigration cases on a case-by-case basis and ensure robust application of prosecutorial discretion for any individual who does not fit the Administration’s stated priority to deport people convicted of violent or serious felonies.
2. DHS should respond to the drastically reduced number of migrant apprehensions and low levels of domestic violent crime by recalibrating resources away from interdiction and interior enforcement efforts, rather than adhering to a baseless quota of removing 400,000 people annually which leads to families’ separation. The removal of such a

massive number of individuals necessarily undercuts due process and civil liberties and leads to systemic violations of DHS's own guidelines and priorities.

Supplemental Materials

- Coalition Letter, February 2012: http://www.aclu.org/files/assets/ltr_to_secretary_napolitano_on_pd_2012-02-09_final.pdf
- ACLU Blog, November 2011: <http://www.aclu.org/blog/immigrants-rights-national-security/aclu-lens-ny-times-highlights-dhs-latest-plan-deport>
- ICE Director John Morton Memo, June 2011: <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>

Issue Area: Immigrants' rights

Limit Use of State and Local Immigration Enforcement

Background

Notwithstanding the federal government's decision to challenge state laws that mandate local immigration enforcement, DHS continues to use and expand programs like 287g and Secure Communities that use local law enforcement to channel people into federal immigration proceedings. In jurisdictions where local police engage in racial profiling and unconstitutional arrests, DHS programs are complicit in these patterns and practices and undermine DHS's stated enforcement priorities. Although DHS's fiscal year 2013 budget request commendably includes a long-overdue phasing-out of one type of 287(g) agreement, called "task force" agreements, DHS continues to increase the number of state and local "jail enforcement" 287(g) agreements, and to engage in partnerships with bad actors shown to engage in discriminatory policing. Furthermore, the House of Representatives has refused to allow DHS to decrease 287(g) funding.

In addition, DHS has pursued an aggressive nationwide rollout of the Secure Communities ("S-Comm") program. While this program purportedly has the goal of identifying and prioritizing the removal of people with serious criminal convictions, in practice, it facilitates racial profiling and encourages the use of pretextual arrests by state and local law enforcement. S-Comm requires that any time an individual is arrested and booked into jail for any infraction, however minor, his or her fingerprints are electronically run through Immigration and Customs Enforcement's (ICE's) federal immigration databases—even if they are never charged with or convicted of a crime, and even if the arrest is later found to be wrongful or unconstitutional. As a result, local police who have taken it upon themselves to enforce immigration laws have a strong incentive to arrest and book people who look or sound "foreign," even when there will be no state criminal charge, knowing that they will be run through DHS databases at the jail and sent into the removal pipeline, with little to no opportunity for redress for any constitutional violations in the original stop and arrest.

DHS is activating S-Comm nationwide by 2013, even in jurisdictions with a history of racially-biased policing, and against the strong objections of numerous states, localities, and law enforcement leaders. Already, S-Comm has caused the wrongful detention of numerous lawful immigrants and U.S. citizens, as well as crime victims and witnesses, often due to racial profiling and errors in ICE's database.

Finally, ICE continues to use "detainers" as a means of holding and arresting people it has identified as potentially removable non-citizens in state and local law enforcement custody. Detainers are of dubious constitutional validity, and ICE has long engaged in abusive and misleading detainer practices that have resulted in numerous erroneous and extended detentions. Although detainers are simply requests to local correctional officials asking that they continue detaining subjects up to 48 hours (plus evenings and weekends) after they become eligible for release so that ICE can take them into custody, ICE's detainer form

misleadingly suggests that local officials' compliance is mandatory. Furthermore, in practice, ICE routinely issues detainers without any determination that the target is removable, merely for purposes of "investigat[ing]" the subject's citizenship and immigration status.

This "detain first, investigate later" approach is fundamentally at odds with due process and the Fourth Amendment and has widespread deleterious effects on individuals in the criminal justice system, including delays in the release of minor offenders and people who have served their time and the denial of bail. As a result of ICE detainers, many U.S. citizens and other persons who are not deportable have suffered such deprivations of liberty. The indiscriminate issuance of ICE detainers also unfairly renders many people ineligible for treatment and early release programs, as both federal and state corrections systems assume wrongly that an ICE detainer represents a determination that a person will be removed.

In 2011, the DHS Task Force Report on S-Comm recommended that ICE adopt mitigating measures to limit the impact of detainers on minor offenders. ICE, however, has declined to take meaningful action. ICE has stated only that, for people arrested for minor traffic offenses, it will "only consider making a detainer operative upon conviction for the minor criminal traffic offense"—but ICE has failed to clarify what this will mean in practice. Although ICE "has issued instructions to the field," such instructions have not been made public. Moreover, ICE has failed to adopt any mitigating measures at all for people who are arrested for other minor, non-traffic related offenses that are particularly vulnerable to pretextual and racially motivated enforcement, such as loitering.

Recommendations

1. DHS should end state and local law enforcement partnerships that facilitate racial profiling, including the 287(g) and Secure Communities programs, as well as less formal cooperation that relies on state and local police to identify targets for immigration enforcement.
2. As long as such programs remain in effect, DHS should revise the S-Comm program so that no immigration enforcement (including "operative" detainers) occurs for an individual absent conviction for "Level 1" offenses, defined as an aggravated felony or multiple felonies. This step would significantly mitigate the incentive of local law enforcement officers who engage in racial profiling and "arrest first, investigate status later" tactics in order to sweep motorists and passengers of color into jails for the purpose of running immigration checks even when there is no true justification for the arrest under state law. This step is also consistent with DHS's stated priority of targeting for removal those aliens who have been convicted of serious crimes indicating a current danger to public safety and/or national security.
3. DHS should immediately suspend 287(g) and S-Comm in jurisdictions that have enacted "show me your papers" legislation (including Georgia, South Carolina, Indiana, Utah, and Alabama) or that have been found to engage in racial profiling (such as the New Orleans

Police Department), and decline to issue detainers or take enforcement action against people arrested by local law enforcement in such jurisdictions.

4. The federal government, including DHS and DOJ, should address the harms beyond formal immigration enforcement programs that are flowing from state and local anti-immigrant, racial profiling laws. DHS should not conduct any immigration enforcement actions that make the federal government complicit in the implementation of these laws, including joint enforcement operations and information-sharing. In addition, DHS should keep detailed records of all status inquiries from and enforcement actions taken in such jurisdictions, monitor the data and make it publicly available; revoke or deny access to the SAVE (Systematic Alien Verification for Entitlements) database for all state and local agencies where there are reasonable concerns that it will be used to facilitate racial profiling; clarify that the LESC (Law Enforcement Support Center) is for the use of bona fide law enforcement agencies only; de-prioritize responding to status inquiries from jurisdictions where state or local anti-immigrant laws are in effect; and prioritize the consideration of prosecutorial discretion for individuals identified as a result of such state and local laws. Finally, DOJ should devote robust resources to litigating against the laws and monitoring their humanitarian and civil rights effects.
5. DHS should issue guidance articulating the evidentiary standard for the issuance of detainers; the procedures for challenging and withdrawing detainers; and the fact that state and local authorities' compliance with detainers is discretionary, not mandatory. ICE should collect and publish data to monitor field officers' issuance of detainers and to ensure that LEAs comply with detainer guidance.
6. ICE should amend the detainer form, Form I-247, to clarify: "This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency *choosing to honor an immigration detainer* 'shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays.'" ICE should make public its guidance to the field regarding the application of detainers to people arrested for minor traffic offenses, and should clarify that ICE will not issue detainers unless and until it confirms that the person has been convicted of a criminal offense; ICE should also expand this policy of withholding issuance to cover people arrested for other minor offenses. ICE should also instruct local and state agencies to provide copies of detainers immediately to the detainees themselves, as well as any criminal defense or immigration attorneys they may have, and to provide detainees with a list of free immigration legal service providers who can help them understand the detainer form.

Supplemental Material

- ACLU Blog Post on 287(g). June 2012: <http://www.aclu.org/blog/immigrants-rights-racial-justice/reading-fine-print-dhs-has-not-ended-287g-arizona>

- ACLU Blog Post on Secure Communities, April 2012: <http://www.aclu.org/blog/immigrants-rights-racial-justice/whitewashing-s-comms-immigration-enforcement-failures>
- ACLU Blog Post on Racial Profiling, April 2012: <http://www.aclu.org/blog/racial-justice-immigrants-rights/working-end-racial-profiling-aclu-testify-senate-judiciary>
- ACLU Statement on Secure Communities before House Judiciary Subcommittee on Immigration Policy and Enforcement, November 2011: <http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities-house-judiciary-subcommittee-immigration-policy>
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- Jennie Pasquarella, Detain First, Investigate Later: How U.S. Citizens Are Unlawfully Detained Under S-Comm, November 2011: <http://www.aclu.org/blog/immigrants-rights-racial-justice/detain-first-investigate-later-how-us-citizens-are-unlawfully>
- ACLU of Southern California, Domestic Violence Victim's 911 Call for Help Results in Deportation Proceedings, May 2011: <http://www.aclu-sc.org/a-domestic-violence-victims-911-call-for-help-results-in-deportation-proceedings-secure-communities-program-endangers-crime-victims/>

Issue Area: Immigrants' rights

Eliminate Prolonged and Mandatory Detention

Background

Immigration and Customs Enforcement's (ICE's) prolonged and mandatory detention practices deny detainees the most basic element of due process: meaningful bond hearings to determine if their detention is required. Thousands of detainees are forced to endure prolonged or mandatory detention even though they may have substantial defenses to removal, old criminal records, and pose no danger or flight risk. The prospect of prolonged and mandatory detention, along with the fact that approximately 84% of all detainees lack legal counsel, coerces many detainees to abandon meritorious claims to stay in the U.S.

ICE is currently engaged in the widespread misapplication of the mandatory detention statute. Compliance with the statute's mandatory custody requirement does not require the incarceration of individuals who have substantial defenses to removal on which they may prevail, or who finished serving their criminal sentences years ago and have since been leading productive lives that contribute to the community. Nor does mandatory "custody" require detention under the statute; rather, it could also include various forms of supervision, such as electronic monitoring. Moreover, ICE is subjecting individuals to mandatory detention for prolonged periods of time far in excess of the 45-day to five-month period contemplated by the Supreme Court when it upheld the mandatory detention statute.

The government also routinely detains other classes of noncitizens for prolonged periods pending completion of their removal proceedings without affording them meaningful bond hearings where the government bears the burden of showing that their continued detention is necessary. For individuals arrested at the border -- which includes asylum seekers as well as certain returning lawful permanent residents -- the government affords them no bond hearings at all, regardless of how long their detention extends.

Recommendation

1. DHs should review all custody decisions at least every six months and make bond hearings available for all detainees every six months, where the government bears the burden of showing that continued detention is justified. Incorporate this automatic six-month review into the DHS automated risk classification assessment.

2. DHS should issue internal guidance permitting less restrictive forms of custody than incarceration under the mandatory detention statute, such as electronic monitoring, and apply the risk classification assessment to place individuals under such alternative forms of custody where appropriate.
3. DHS should issue internal guidance that the mandatory detention statute does not apply to individuals with potentially valid challenges to removal or with old criminal records.

Supplemental Materials

- ACLU Blog, October 2011: <http://www.aclu.org/blog/immigrants-rights/ending-laws-fuel-mass-detention-and-deportation#http://www.aclu.org/blog/immigrants-rights/ending-laws-fuel-mass-detention-and-deportation>
- ACLU Blog, October 2011: <http://www.aclu.org/blog/immigrants-rights/tragic-costs-immigration-detention#http://www.aclu.org/blog/immigrants-rights/tragic-costs-immigration-detention%20>
- Anna Gorman, “350 immigrants held more than 6 months while fighting deportation, U.S. says.” Los Angeles Times, May 2010: <http://articles.latimes.com/2010/may/20/local/la-me-0520-immig-detain-20100520>

Issue Area: Immigrants' rights

Stand Up Against State and Local Anti-Immigrant Laws

Background

Over the past six years, a number of states and localities have enacted their own immigration laws that attempt, in varying ways, to implement the discredited “attrition through enforcement” strategy advocated by fringe restrictionist groups. These laws present a grave threat to *all* residents’ civil rights, and especially those of people of color, including by guaranteeing racial profiling; terrorize immigrant communities; interfere with the federal government’s ability to set a fair and uniform immigration policy for the entire nation; cause spillover effects in neighboring states and cities; and harm public safety, the economy, and our relationships with other countries.

Recognizing these and other problems, the Department of Justice has sued to block four states’ anti-immigrant laws—beginning with Arizona, which enacted SB 1070 in 2010. The Arizona case was recently decided by the Supreme Court. While the decision was a significant victory in many respects, it allowed the “show me your papers” requirement of SB 1070 to stand, for now. In light of that ruling, and because the other anti-immigrant racial profiling laws that have been enacted in other states include provisions that were not at issue in the Arizona case, more remains to be done:

Recommendations

1. The Department of Justice should press all available arguments in their pending challenges, including any claims against the “show me your papers” requirements that are available in light of the Supreme Court’s Arizona ruling. In addition, DOJ should stand ready to file new challenges to any additional laws that are enacted, and to support in an amicus capacity other ongoing challenges filed by civil rights coalitions.

The government’s future litigation should include not only the federal preemption claims that have been presented to date, but also other claims, including civil rights claims based on the implementation of any provisions that are allowed to go into effect.

2. To the extent that courts have allowed or will allow any parts of these anti-immigrant laws to go into effect, the Administration should ensure that the federal government is not complicit in their implementation, and should take affirmative steps to minimize the laws’ negative impact. Thus, the Administration should at least:

- (i) DOJ and DHS and other relevant agencies should monitor implementation, issue guidance, and undertake investigations as necessary to prevent the denial of civil rights, and preserve access to education, benefits, and federal programs;
- (ii) DHS should terminate all 287(g) agreements, including the jail model, with states and cities that enact anti-immigrant laws;
- (iii) DHS should suspend Secure Communities in those jurisdictions that have enacted such laws;
- (iv) DHS should modify its response protocols generally, and especially in those jurisdictions, to ensure that the limits on state authority laid out in the Arizona decision are observed in practice, and to guard against racial profiling;
- (v) DHS should directly collect data (e.g. when ICE is queried for immigration status) and encourage or, where possible, mandate affected jurisdictions to collect data that will help determine whether extended traffic stops and other detentions, racial profiling or other problematic practices are occurring;
- (vi) DHS should review its enforcement decisions in all affected jurisdictions via a specialized unit at headquarters;
- (vii) DHS should ensure robust and meaningful implementation of prosecutorial discretion in the affected jurisdictions, and issue guidance to ICE trial attorneys in those jurisdictions clarifying that Fourth Amendment and Equal Protection violations should result in termination of any removal proceedings that are brought against victims of such civil rights violations.

Supplemental Materials

- [ACLU Hearing Statement](https://www.aclu.org/files/assets/aclu_statement_for_sjc_hearing_on_state_and_local_governments_enforcing_immigration_law_4_24_12_final.pdf) on Arizona S.B. 1070. April 2012: https://www.aclu.org/files/assets/aclu_statement_for_sjc_hearing_on_state_and_local_governments_enforcing_immigration_law_4_24_12_final.pdf
- [ACLU Blog Post on](http://www.aclu.org/blog/immigrants-rights/hey-russell-pearce-latinos-arizona-arent-kids-breaking-curfew) Senate Judiciary Immigration Subcommittee hearing on state and local immigration enforcement. April 2012: <http://www.aclu.org/blog/immigrants-rights/hey-russell-pearce-latinos-arizona-arent-kids-breaking-curfew>
- ACLU Blog Post on 287(g). June 2012: <http://www.aclu.org/blog/immigrants-rights-racial-justice/reading-fine-print-dhs-has-not-ended-287g-arizona>
- ACLU Blog Post on Secure Communities, April 2012: <http://www.aclu.org/blog/immigrants-rights-racial-justice/whitewashing-s-comms-immigration-enforcement-failures>
- ACLU Blog Post on Racial Profiling, April 2012: <http://www.aclu.org/blog/racial-justice-immigrants-rights/working-end-racial-profiling-aclu-testify-senate-judiciary>

- ACLU Statement on Secure Communities before House Judiciary Subcommittee on Immigration Policy and Enforcement, November 2011:
<http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities-house-judiciary-subcommittee-immigration-policy>
- ACLU Statement on Secure Communities, November 2010:
<http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities>
- ACLU Statement on 287(g) before House Homeland Security Committee, March 2009:
<http://www.aclu.org/immigrants-rights/aclu-testimony-submitted-house-homeland-security-committee-hearing-titled-examinin>

Issue Area: Privacy

Suspend the Employment Verification (E-Verify) System

Background

The E-Verify system is a nationwide employment verification system. While currently mostly voluntary, Congress has been threatening to make it mandatory, despite the fact that it is plagued with errors and prevents innocent workers from gaining employment.

According to estimates of the E-Verify error rate drawn directly from the Department of Homeland Security's (DHS) own reports, at least 80,000 American workers lost out on a new job last year because of a mistake in the government database. If E-Verify becomes mandatory across the country, at least 1.2 million workers would have to go to DHS or to the Social Security Administration (SSA) to correct their records.

In addition, the system for correcting errors is a mess. Both the Department of Justice (DOJ) and DHS have said that employers often fail to notify workers about errors or remedies. When they do, employees have difficulty understanding the complicated error notification letters and there is no centralized forum for fixing records. Some workers actually have to write to many different federal agencies to request records and find errors. According to the Government Accounting Office (GAO), in 2009 the average response time for such requests was a staggering 104 days.

Because E-Verify contains personally identifying information, including photos, and will very soon contain drivers' license information it could easily become a de facto national identity system. E-Verify is internet-based and contains information on every American. It could expand to verify driver's licenses at airports or federal facilities and be combined with travel, financial, or watch list information. The errors and problems with E-Verify as an employment tool would then automatically become problems with travel and other fundamental freedoms.

E-Verify also has reliability problem in its core function: identifying non-work eligible individuals. According to a study funded by DHS undocumented workers actually get through the system 54% of the time.

While Congress mandated the creation of an electronic verification program in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, it did not include any details or direction as to the form that the program should take. Instead, it left that to the discretion of the executive branch. Therefore, the President has the power to declare that the e-Verify program is not a success in its current form, and to suspend it pending a reevaluation.

Recommendation

1. The President should order and DHS should act to suspend enrollment of new employers in the E-Verify program and suspend the rule requiring federal contractors to enroll in E-Verify until the program demonstrates sufficient database accuracy and enforcement of the MOU standards governing employer enrollment, and until the enactment of legislation:
 - providing statutorily guaranteed administrative and judicial processes to ensure that workers who are wrongly delayed or denied the right to work are provided a quick, fair and efficient means of getting back to work and being made financially whole; and
 - safeguarding against the use of E-Verify for any purpose beyond employment verification and barring the inclusion of additional information such as drivers' license photos in the system.

Supplemental Material

- ACLU statement from The House Judiciary Subcommittee on Immigration Policy and Enforcement hearing, E-Verify- Preserving Jobs for American Workers, February 2011: http://www.aclu.org/files/assets/statement_record_Mandatory_EEVS_Feb2011_final.pdf
- Letter from a broad coalition of organizations spanning the political spectrum opposing the Legal Workforce Act or any other mandatory E-Verify provision, June 2011: <http://www.aclu.org/immigrants-rights-technology-and-liberty/coalition-letter-house-urging-opposition-e-verify-and-any>
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-210, 110 Stat. 3009-659 (Sept. 30, 1996): <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html>

Issue Area: Privacy

Improve Privacy Protections in Aviation Security

Background

Since 9/11 funding for aviation security has expanded dramatically. This increase has resulted in several new programs and initiatives that harm citizens' privacy while doing little or nothing to improve security.

Body Scanners and Pat-Downs. In the wake of the attempted terrorist attack by Umar Farouk Abdulmutallab in December 2009, the Transportation Security Administration (TSA) has deployed hundreds of whole body imaging machines and turned their use into a routine airline security procedure. This technology constitutes a direct invasion of privacy. It produces strikingly graphic images of passengers' bodies, essentially taking a naked picture of air passengers as they pass through security checkpoints.

Passengers who opt out of these machines are subject to invasive pat-down procedures. Screeners are now authorized to use the front of their hands and to touch areas around a passenger's breasts and groin. Since the roll out of body scanners and pat-downs, some privacy protections have been announced including requiring some, but not all, machines to have cartoon images that do not reveal these details and barring any storage of images.

SPOT Program. In the Screening of Passengers by Observation Techniques (SPOT) program, behavioral detection officers are purportedly trained to identify threats to aviation by looking for suspicious behavior and appearance. However, the GAO has confirmed that no large-scale security screening program based on behavioral indicators has ever been scientifically validated. GAO noted that while behavioral detection officers had sent over 150,000 travelers to secondary screening there is no evidence the program ever identified a terrorist or other threat to aviation. Meanwhile, SPOT has led directly to racial profiling in at least three cases. According to media accounts and internal government reports, the SPOT program led to widespread racial profiling at Newark's Liberty Airport, Honolulu International Airport, and Boston's Logan Airport. In one case behavior detection officers were described by colleagues as "Mexican hunters" because of their focus on ethnicity rather than specific behaviors.

VIPR Squads. The Visible Intermodal Prevention and Response (VIPR) program creates roving teams of security agents and expands the use of checkpoints currently found in airports to bus and train stations, highways, the subway, and other transportation facilities around the country. The Fourth Amendment protects individuals from unreasonable searches conducted without probable cause. Over the years, the courts have carved an exception for airports, where the government can carry out a limited "administrative" search solely for the purpose of protecting the safety of air travel. Weapons and explosives pose unique dangers on airplanes that make them different from other public spaces like crowded sidewalks, shopping centers, movie theaters, buses or trains. The justification for carving out an exception to our

constitutional freedoms does not extend to these other venues. Ground transportation like trains and buses are ordinary public spaces where Americans should not have to endure suspicionless searches.

Security officials have also questioned the necessity and efficacy of the program. The National President of the Federal Law Enforcement Officers Association described the VIPR program as “clearly a waste of scarce Federal Air Marshal resources.” For a period last year, VIPR squad search tactics led Amtrak to bar them from Amtrak facilities.

Recommendations

1. TSA should initiate a Notice and Comment Rulemaking that codifies existing rules for body scanners including a cartoon image for all scanners. Pat-down procedures should be curbed to reduce intimate touching.
2. TSA should suspend the SPOT Program pending a full investigation of allegations of racial profiling.
3. TSA should discontinue the VIPR Program.

Supplemental Material

- ACLU Statement for the Senate Commerce Committee Hearing, “The State of Aviation Security - Is Our Current System Capable of Meeting the Threat?” focusing on aviation security following the Christmas Day attack, January 2010: <http://www.aclu.org/national-security-racial-justice-technology-and-liberty/aclu-statement-record-aviation-security-subm>
 - ACLU Press Release: <http://www.aclu.org/national-security-racial-justice-technology-and-liberty/aclu-submits-statement-aviation-security-key>
- March 2010: TSA is expanding the use of body scanners in airports: <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/05/AR2010030504321.html>
 - ACLU Press Release: <http://www.aclu.org/technology-and-liberty/tsa-expands-use-invasive-body-scanners>
- DHS announced changes to its international airline passenger screening process, discontinuing its heavy reliance on racial profiling to focus more on intelligence-based screening, April 2010: <http://www.dhs.gov/news/2010/04/02/new-measures-strengthen-aviation-security>

- ACLU Press Release: <http://www.aclu.org/national-security-racial-justice-prisoners-rights/dhs-announces-changes-airline-screening-program>
- ACLU Vote Recommendation for Broun Amendment Regarding SPOT Program, June 2012: <http://www.aclu.org/technology-and-liberty/aclu-vote-recommendation-broun-amendment-regarding-spot-program>
- ACLU Vote Recommendation, Blackburn Amendment #2 (VIPR teams) to H.R. 5855, DHS Appropriations Act, June 2012: http://www.aclu.org/files/assets/060612_vipr_vote_recommendation_final.pdf
- GAO Report, *Efforts to Validate TSA's Passenger Screening Behavior Detection Program Underway, but Opportunities Exist to Strengthen Validation and Address Operational Challenges*, GAO-10-763, May 2010: <http://www.gao.gov/products/GAO-10-763>
- Racial Profiling Rife at Airport, U.S. Officers Say," *New York Times*, August 2011: http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?_r=2&pagewanted=all&
- "Report: Newark airport screeners targeted Mexicans," *NewJersey.com*, June 2011: http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?_r=2&pagewanted=all&
- "TSA Investigates Profiling Allegations At Honolulu Airport," *Huffington Post*, December 2011: http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?_r=2&pagewanted=all&

Issue Area: Free speech

Stop Chilling Political Protest and Expression

Background

In recent years, law enforcement authorities have imposed restrictive “free speech zones” on protesters at political events. These zones allow the police to keep inconvenient protesters away from the media, or to discriminate against individuals based on the causes for which they are protesting. These zones and other law enforcement tactics were found in a report by the Organization for Security and Co-operation in Europe (“OSCE”) to contribute to serious violations of speech and associational rights in the United States.

Additionally, in 2012, Congress passed with little fanfare the “Federal Restricted Buildings and Grounds Improvement Act,” or H.R. 347, which expanded an existing law criminalizing trespassing on and disruptions in or near Secret Service restricted zones. We remain concerned that H.R. 347 can and will be used to deter lawful protests near the large number of individuals who receive Secret Service protection. The law raises additional concerns given the fact it applies to National Special Security Events, or “NSSEs,” which can be designated as such at the sole discretion of the Department of Homeland Security and appear to be increasing in use.

Recommendations

1. The attorney general should issue public guidance governing the use of “free speech” zones, which would remind federal, state and local law enforcement charged with providing security during public demonstrations of the current state of the law and urge officials to refrain from using “protest” zones to discriminate against protesters with a particular viewpoint, or to move protesters away from the media.
2. The Department of Homeland Security should release public guidance on (1) its use of National Special Security Events (“NSSEs”), which includes data on the criteria that will prompt an NSSE designation and the frequency of such designations; and (2) the Secret Service’s enforcement of the recently amended 18 U.S.C. § 1752. The latter guidance should include information on the number of arrests made pursuant to the law, as well as information on where and when the statute is being deployed.

Supplemental Material

- ACLU material on free speech zones: <http://www.aclu.org/free-speech/free-speech-under-fire-aclu-challenge-protest-zones>
- Blog posts on H.R. 347: <http://www.aclu.org/blog/tag/hr-347>

- OSCE Report, Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States, <http://www.osce.org/odihr/97055>

Issue Area: Voting rights
Issue Area: Racial justice
Issue Area: Disability rights

Protect and Enforce Voting Rights

Background

The Obama Administration has stepped up enforcement of our nation's voting rights laws since the end of the Bush Administration and has revitalized the Voting Section of the Civil Rights Division at the Department of Justice. New measures passed in states across the country include voter suppression tactics such as photo ID requirements, proof of citizenship requirements, restrictions on third party voter registration activities, restrictions on early voting, and additional criminal disenfranchisement laws. In response, DOJ has vigorously enforced the Voting Rights Act, including Section 5, to ensure that many of these changes to voting laws do not result in disenfranchisement.

DOJ has also filed suit to enforce Section 203, the minority language provisions of the Voting Rights Act (VRA), as well as Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to protect the voting rights of military and overseas voters. However, no new Section 2 cases have been announced since 2009.

DOJ has also defended challenges to the constitutionality of Section 5 brought by a number of covered districts, including Texas, Arizona, Shelby County, Alabama, and Florida, and private citizens in North Carolina. Litigation over the constitutionality of the Voting Rights Act will be considered by the Supreme Court this term.

Finally, a DHS system called the Systematic Alien Verification for Entitlements (SAVE), primarily intended to determine benefits eligibility for immigrants, is now being used in an expanded variety of contexts at the federal, state, and local levels, including by states seeking to purge their voter rolls of noncitizens. Because there has been no audit of the SAVE program in more than a decade, the system's accuracy, integrity and effectiveness are unclear, leading to serious questions about how the system will work in the voting context and the need for DOJ oversight.

Recommendations

1. The Voting Section should increase emphasis on prosecution of Section 2 cases under the Voting Rights Act on behalf of minority communities and bring additional Section 5 objections to state election laws that disenfranchise voters. While DOJ has increased its Section 5 objections, DOJ should also refuse to pre-clear any new criminal disenfranchisement laws, which it has not yet done, because these laws disproportionately impact communities of color.

2. The Voting Section should increase enforcement of Section 11b (voter intimidation) of the VRA, the National Voter Registration Act (NVRA), and the Help America Vote Act (HAVA).
3. The Voting Section and the Disability Rights Section of the Civil Rights Division should evaluate voter ID requirements and new registration requirements to ensure that people with disabilities have adequate access to the ballot box.
4. When states apply to use the SAVE system to verify voter eligibility, DHS must provide safeguards in the purging process, and DOJ must proactively monitor that process to ensure that federal voting rights protections are not being violated by user agencies. Appropriate safeguards in any memorandum of agreements with the states (MOAs), include, but are not limited to:
 - Appropriate process agreed to in the MOA or guaranteed by state law, by which individuals are notified about, and can appeal, their potential ineligibility to vote.
 - Measures to protect privacy and prevent misuse of the system for purposes other than those authorized by law and the MOA itself.
 - A rigorous initiative to monitor, audit, and enforce user agencies' compliance with the terms of the MOAs, including where necessary, disenrolling non-compliant user agencies from the system.
 - A meaningful process for assisting individuals who seek to correct their records in order to avoid erroneous determinations.
 - Meaningful nondiscrimination protections, including user compliance the VRA and NVRA.
 - A quiet period of 90 days before an election when purges cannot take place
 - Training of all staff who will run queries in SAVE.

Supplemental Materials

- ACLU Map of Voter Suppression Measures Passed Since 2011: <http://www.aclu.org/maps/battle-protect-ballot-voter-suppression-measures-passed-2011>
- ACLU of Ohio Statement for Senate Field Hearing: "New State Voting Laws III: Protecting the Right to Vote in America's Heartland," May 2012: http://www.aclu.org/files/assets/aclu_oh_statement_for_senate_field_hearing_5_2_12_final.pdf
- ACLU Video: Laura W, Murphy, Director of Washington Legislative Office, on Voter Suppression, March 2012: <http://www.aclu.org/voting-rights/aclus-laura-murphy-voter-suppression>

- ACLU Video: Voter Suppression Hits Brokaw, Wisconsin, 2012:
<http://www.aclu.org/voting-rights/voter-suppression-hits-brokaw-wisconsin>
- ACLU Statement for a Senate Field Hearing: “New State Voting Laws II: Protecting The Right to Vote in the Sunshine State,” January 2012:
http://www.aclu.org/files/assets/aclu_fl_statement_for_senate_judiciary_subcomm_field_hearing_on_voter_suppression_2_2_12.pdf
- ACLU Testimony: Laughlin McDonald, Director of ACLU Voting Rights Project, before the U.S. Commission on Civil Rights, February 2012:
http://www.aclu.org/files/assets/aclu_vrp_testimony_for_usccr_section_5_redistricting_hearing_final_updated_2.pdf
- ACLU Statement: Laura W. Murphy and Deborah J. Vagins, Director of Washington Legislative Office, for a House Voting Rights Forum, November 2011:
<http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Murphy111114.pdf>
- ACLU Statement: Laura W. Murphy and Deborah J. Vagins, Director of Washington Legislative Office, before the U.S. Senate Committee on the Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights, September 2011:
http://www.aclu.org/files/assets/aclu_statement_for_senate_judiciary_subcomm_hrg_on_state_voter_suppression_laws_9_8_11.pdf
- ACLU Criminal Disfranchisement Map: <http://www.aclu.org/map-state-felony-disfranchisement-laws>
- ACLU Criminal Disfranchisement Factsheet: <http://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2011>
- Florida Department of State Press Release:
<http://www.dos.state.fl.us/news/communications/pressRelease/pressRelease.aspx?id=598>
- Sample MOA with State and Local Entity:
<http://www.uscis.gov/files/nativedocuments/save-state-local.pdf>

Department of Housing and Urban Development

Issue Area: Women's rights

Provide Enforcement of Fair Housing for Domestic Violence Victims

Background

In January 2006, President Bush signed the reauthorization of the Violence Against Women Act (VAWA), which for the first time enacted housing protections for survivors of domestic violence, dating violence and stalking. Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 601-607 (2006). Congress acknowledged in its findings that domestic violence is a primary cause of homelessness, that 92% of homeless women have experienced severe physical or sexual abuse at some point in their lives, and that victims of violence have experienced discrimination by landlords and often return to abusive partners because they cannot find long-term housing. 42 U.S.C. § 14043e.

In October 2010, the Department of Housing and Urban Development (HUD) issued a final rule on VAWA. This was an important and significant step in VAWA implementation. However, the rule does not specify the mechanism through which survivors can enforce their VAWA rights, including whether they can contact HUD directly. HUD has also indicated for some time that it would issue additional guidance to public housing authorities and multifamily housing operators that address some of the common problems with implementation.

Recommendations

1. HUD should issue additional guidance addressing enforcement of the fair housing protections of VAWA and ensure that public housing authorities and section 8 owners carry out VAWA's mandate.

Supplemental Material

- ACLU Letter to House Financial Services Committee Leadership Urging Implementation of the 2005 Violence Against Women Act, March 11, 2008, <http://www.aclu.org/womens-rights/aclu-letter-house-financial-services-committee-leadership-urging-implementation-2005-v>
- Coalition Memo to HUD Office of Fair Housing and Equal Opportunity regarding VAWA housing enforcement, June 9, 2008, <http://www.aclu.org/womens-rights/enforcement-violence-against-women-act-housing-provisions>
- Coalition Memo to HUD Office of Public & Indian Housing regarding VAWA housing implementation, March 18, 2011, http://www.aclu.org/files/assets/3_18_11_vawa_pih_notice_recommendations2.pdf

- Coalition Letter to HUD regarding HUD programs and VAWA conforming amendments, January 27, 2009, http://www.aclu.org/files/assets/2009-1-27_vawa_coalition_comments.pdf
- ACLU Factsheet: Housing Discrimination and Domestic Violence, http://www.aclu.org/files/pdfs/womensrights/discrimination_housing_2008.pdf
- VAWA 2005 Title VI Housing Amendments, Pub. L. No. 109-162, 119 Stat. 3030, 3031, 3033, 3035 (codified at 42 USC §24043e), <http://www.gpo.gov/fdsys/pkg/PLAW-109publ162/html/PLAW-109publ162.htm>

Issue Area: Religious freedom

Ensure Religion Is Not Used to Discriminate in Government-Funded Programs and Oppose Efforts to Create Discriminatory Exemptions

Background

Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Religious freedom includes two complementary protections: the right to religious belief and expression, and a guarantee that the government does not favor religion or particular faiths. Thus, we have the right to a government that neither promotes nor disparages religion. We have the absolute right to believe whatever we want about God, faith, and religion. And, we have the right to act on our religious beliefs—unless those actions threaten the rights, welfare, and well-being of others.

The right to religious practice deserves strong protection; however, religion cannot be a license to discriminate. When religiously identified organizations receive government funding to deliver social services, they cannot use that money to discriminate against the people they help or against the people they hire, or pick and choose which particular services they will deliver. The government cannot delegate to religiously identified organizations the right to use taxpayer funds to impose their beliefs on others. Religiously identified organizations cannot use taxpayer funds to pay for religious activities or pressure beneficiaries to subscribe to certain religious beliefs. Government-funded discrimination, in any guise, is antithetical to basic American values and to the Constitution.

Religion cannot be used as an excuse to discriminate against employees, customers, or patients. When an organization operates in the public sphere, it must play by the same rules every other institution does. Such organizations should not be given loopholes from laws that ensure equality in the workplace or guarantee access to public accommodations and health care, thus sanctioning discrimination in the name of religion. No American should be denied opportunities, vital services, or equal treatment.

Recommendation

1. Include provisions that prohibit discrimination in the name of religion against beneficiaries, employees, or services in government-funded social service programs and oppose efforts to create discriminatory exemptions in the name of religion in government contracts and grants, as well as in laws and regulations that guarantee equal opportunity and access to services.

Supplemental Material

- ACLU Briefing Paper, *Promoting Equality: An Analysis of the Contraceptive Coverage Rule*, October 2012: http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf
- ACLU of Massachusetts v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012): http://www.aclu.org/files/assets/usccb_decision.pdf.
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- Coalition Letter to President Obama Asking for Clarity on Federally Funded Employment Discrimination and Outlining Other Concerns, September 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-asking-clarity-federally-funded-employment>

Department of Justice

Issue Area: Racial justice

Issue Area: Disability rights

Improve School Discipline Practices and End the School-to-Prison Pipeline

Background

Educational equality is seriously threatened by the “school-to-prison pipeline,” the current national trend where children are pushed out of our public schools and into the juvenile and criminal justice systems because of overreliance on racially discriminatory punitive school discipline policies. The increased use of suspensions, expulsions and arrests decreases academic achievement and increases the likelihood that students will end up in jail cells rather than in college classrooms.

The burden of this trend falls disproportionately on students of color and students with disabilities, who are punished more harshly and more frequently for the same infractions that other kids engage in. These students are also at greater risk for the physical injury, emotional harm, and long-term adverse educational outcomes that can result from the punitive discipline techniques to which they are subjected at a higher rate than their peers, such as corporal punishment and restraint and seclusion. Additionally, subjecting children with disabilities to corporal punishment and restraint and seclusion techniques sends the message that the punishment and segregation of students with disabilities is not only accepted, but endorsed, by adults.

Measures are needed to reverse these trends and instead promote positive behavior supports, in order to ensure that every student can receive a quality education in a healthy school environment.

Recommendations

1. **Issue Federal Guidance on Punitive School Discipline:**
Under the auspices of the Supportive School Discipline Initiative, a joint program of the Departments of Justice and Education aimed at supporting good discipline practices to foster safe and productive learning environments in all classrooms, the Administration must work to ensure that school discipline policies and practices comply with the nation’s civil rights laws, though guidance, public education, and research. As part of this Initiative, the agencies must act swiftly to finalize and issue guidance on the use of punitive school discipline policies and to support positive alternatives to these practices in schools around the country.

The guidance should:

- instruct schools on applying a disparate impact analysis to disciplinary disparities and addressing them through Title VI, the Rehabilitation Act, IDEA, and the ADA;
- examine the disproportionate impact in detail by focusing on high and disparate rates of punitive and exclusionary discipline based on race and disability;
- promote the implementation of positive behavior supports as alternatives to exclusionary practices and referrals to law enforcement;
- encourage strong enforcement of the laws banning corporal punishment and/or restraint and seclusion that are already in place in many states and voice support for a federal ban; and
- clarify for school officials and police (including school resource officers) that police should be responsible only for serious criminal law matters, not for matters that may be minor violations best handled by schools as discipline issues. Guidance should emphasize that law enforcement intervention (including arrest, citation, summons, etc.) ought to be a last resort. Guidance should also be provided to law enforcement agencies about the proper role of police and SROs in schools.

2. Bring Additional School Discipline Litigation:

The Departments of Justice and Education should strengthen efforts to investigate and litigate discriminatory school discipline practices and use all the tools at their disposal to challenge these practices. The agencies, as appropriate to their jurisdictions, should use Title VI and equal protection claims to address the racially disproportionate use of school discipline and use of law enforcement interventions in schools. They should also investigate the racially disproportionate use of arrests, citations and summonses against students of color and bring complaints where warranted.

The agencies should also investigate the disproportionate rates of discipline for students with disabilities, and consider using the Rehabilitation Act, IDEA, and the ADA to file complaints where necessary. They should also undertake independent actions and investigate complaints of the disproportionate disciplining of special education students, particularly when the disparity involves students of color or are for behavior associated with the student's special educational status.

3. Study the Impact of Disproportionate Punitive Discipline and Corporal Punishment:

The newly created White House Initiative on Educational Excellence for African Americans should devote resources to a detailed study on the impact of disproportionate punitive discipline, and the use of corporal punishment in particular. Nearly 60 years after *Brown v. Board of Education*, there are still major barriers to educational equality. African American students are disproportionately disciplined, less likely to graduate, and more likely to be incarcerated. They are more likely to have

inexperienced teachers, to face disproportionate referrals to special education, and to be misdiagnosed with learning disabilities.

4. Reduce the Use of “Restraint and Seclusion” in Schools:

The Department of Education should increase resources and personnel to reduce the use of restraint and seclusion in public schools, employing a “carrot and stick” approach – from adjustments in funding, to putting schools into receivership – in order to move school districts toward the goal of completely eliminating the use of restraint and seclusion in favor of positive behavioral supports.

5. Reduce Policing in Schools through Training and Funding:

New and reauthorized Department of Education programs should consider both punitive school discipline reforms and racial diversity as important factors in awarding federal funds. States and localities that receive federal grants should be required to develop non-punitive alternatives to exclusionary school discipline policies, including over-policing, and ensure appropriate training for school police and personnel in developmentally appropriate tactics. Both schools and police departments should understand that the overuse and/or the racially disproportionate use of law enforcement to respond to student misbehavior could lead to reductions in federal funds. Schools that receive school climate grants should be required to report on the use of law enforcement and their plans for reducing reliance on police as well as any racial disparities in arrests, citations, or tickets. Where the federal government identifies persistent overreliance or disparities, it should deny renewal grants until these problems are adequately addressed.

Supplemental Materials

- Department of Justice Press Release on Supportive School Discipline Initiative: <http://www.justice.gov/opa/pr/2011/July/11-ag-951.html>
- White House Initiative on Educational Excellence for African Americans, July 2012: <http://www.whitehouse.gov/the-press-office/2012/07/26/executive-order-white-house-initiative-educational-excellence-african-am>
- Press Release: ACLU Hails Obama Administration's Supportive School Discipline Initiative: <http://www.aclu.org/racial-justice/aclu-hails-obama-administrations-supportive-school-discipline-initiative>
- ACLU Letter on Keeping All Students Safe Act: http://www.aclu.org/files/assets/aclu_letter_for_senate_help_comm_hrg_s_2020_keeping_all_students_safe_act.pdf

- Press Release: House Of Representatives Holds Hearing On Corporal Punishment In Public Schools: <http://www.aclu.org/racial-justice/house-representatives-holds-hearing-corporal-punishment-public-schools>
- Dignity in Schools Campaign Coalition Sign-on Letter on Corporal Punishment and School Discipline: <http://www.aclu.org/racial-justice/dignity-school-campaign-coalition-sign-letter-corporal-punishment-and-school-discipli>
- A Violent Education: Corporal Punishment of Children in U.S. Public Schools: <http://www.aclu.org/human-rights-racial-justice/violent-education-corporal-punishment-children-us-public-schools>
- Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools: <http://www.aclu.org/human-rights/impairing-education-corporal-punishment-students-disabilities-us-public-schools>
- Huffington Post: Making School a Safe Place for All Students: http://www.huffingtonpost.com/deborah-j-vagins/corporal-punishment-in-schools_b_983041.html
- Huffington Post: An Arcane, Destructive -- and Still Legal – Practice: http://www.huffingtonpost.com/deborah-j-vagins/an-arcane-destructive_b_631417.html
- GAO Report on Restraint and Seclusion: <http://www.gao.gov/new.items/d09719t.pdf>
- U.S. Department of Education – Resource Document on Restraint and Seclusion: <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>

Issue Area: Women’s rights

Issue Area: Racial justice

Provide Pay Equity for Workers

Background

Nearly 50 years after passage of the Equal Pay Act, women still make just 77 cents for every dollar earned by men, and the pay gap is even wider for women of color. Additionally, nearly half of American workplaces either discourage or prohibit employees from discussing pay practices, making it extremely difficult for women to learn they are being paid less than their male colleagues. Over time, the effectiveness of the Equal Pay Act has been weakened by loopholes, leaving women without the resources they need to combat pay discrimination effectively.

To implement President Obama’s pledge in his first term to crack down on violations of equal pay laws, the Administration created the National Equal Pay Task Force in January 2010, bringing together the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL), and the Office of Personnel Management (OPM). In July 2010, the Task Force has identified several persistent challenges for women seeking to achieve equal pay, made recommendations to address each challenge, and developed an action plan to implement those recommendations. Such recommendations include improved wage data collection, better coordination between agencies, educating employers and employees on their respective obligations and rights regarding equal pay, improved training for federal employees responsible for equal pay enforcement, strategic enforcement and litigation focused on wage discrimination, improving the federal government’s role as a model employer, and Administration support for passage of the Paycheck Fairness Act.

Recommendation

1. The President should issue an executive order protecting employees who work for federal contractors from retaliation for discussing their wages. In the absence of passage of the Paycheck Fairness Act, an executive order is needed as a stopgap measure to protect the 26 million people employed by federal contractors nationwide from pay discrimination.
2. The DOL’s Office of Federal Contract Compliance Programs (OFCCP) should finalize its compensation data collection tool, proposed in late 2011, and expand the tool to other types of employment practices in order to help detect other forms of discrimination in the work place. The tool is needed to replace OFFCP’s Equal Opportunity Survey, a vital tool discontinued under the Bush Administration, which ensured federal contractor and subcontractor compliance with non-discrimination requirements.

3. The Administration should fully implement the July 2010 action plan of its National Equal Pay Task Force, which includes recommendations on administrative action to help close the wage gap.
4. The Administration should prioritize bringing both class action and disparate impact cases relating to compensation, undertaking measures to strengthen systemic enforcement of laws prohibiting wage discrimination.

Supplemental Materials

- Equal Pay Task Force Report, April 2012
http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf
- Equal Pay Task Force Recommendations and Action Plan, July 2010
http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf
- Huffington Post: We Can't Wait for Fair Pay, April 2012:
<http://www.aclu.org/blog/womens-rights/we-cant-wait-fair-pay>
- Huffington Post: It's Time to Stop the Catch-22, June 2012:
<http://www.huffingtonpost.com/deborah-j-vagins/the-paycheck-fairness-act-2-b-1568219.html>
- ACLU Letter to President Obama on Equal Pay Day 2012, April 2012:
http://www.aclu.org/files/assets/aclu_letter_to_president_obama_on_retaliation_executive_order_4_17_12_0.pdf
- ACLU Action Urging President Obama to Ban Retaliation in Federal Contracting:
<https://ssl.capwiz.com/aclu/issues/alert/?alertid=61183546>
- ACLU Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/aclu-comments-office-federal-contract-compliance-proposed-data>
- PFA Coalition Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/paycheck-fairness-coalition-sign-comments-office-federal-contract>
- Employment Task Force Coalition Comments on Compensation Data Collection Tool, October 2011: <http://www.aclu.org/racial-justice-womens-rights/employment-task-force-sign-comments-office-federal-contract-compliance>

- ACLU Fact Sheet on Retaliation:
http://www.aclu.org/files/assets/aclu_factsheet_on_retaliation_eo_4_2012.pdf

Issue Area: Voting rights
Issue Area: Racial justice
Issue Area: Disability rights

Protect and Enforce Voting Rights

Background

The Obama Administration has stepped up enforcement of our nation's voting rights laws since the end of the Bush Administration and has revitalized the Voting Section of the Civil Rights Division at the Department of Justice. New measures passed in states across the country include voter suppression tactics such as photo ID requirements, proof of citizenship requirements, restrictions on third party voter registration activities, restrictions on early voting, and additional criminal disenfranchisement laws. In response, DOJ has vigorously enforced the Voting Rights Act, including Section 5, to ensure that many of these changes to voting laws do not result in disenfranchisement.

DOJ has also filed suit to enforce Section 203, the minority language provisions of the Voting Rights Act (VRA), as well as Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to protect the voting rights of military and overseas voters. However, no new Section 2 cases have been announced since 2009.

DOJ has also defended challenges to the constitutionality of Section 5 brought by a number of covered districts, including Texas, Arizona, Shelby County, Alabama, and Florida, and private citizens in North Carolina. Litigation over the constitutionality of the Voting Rights Act will be considered by the Supreme Court this term.

Finally, a DHS system called the Systematic Alien Verification for Entitlements (SAVE), primarily intended to determine benefits eligibility for immigrants, is now being used in an expanded variety of contexts at the federal, state, and local levels, including by states seeking to purge their voter rolls of noncitizens. Because there has been no audit of the SAVE program in more than a decade, the system's accuracy, integrity and effectiveness are unclear, leading to serious questions about how the system will work in the voting context and the need for DOJ oversight.

Recommendations

1. The Voting Section should increase emphasis on prosecution of Section 2 cases under the Voting Rights Act on behalf of minority communities and bring additional Section 5 objections to state election laws that disenfranchise voters. While DOJ has increased its Section 5 objections, DOJ should also refuse to pre-clear any new criminal disenfranchisement laws, which it has not yet done, because these laws disproportionately impact communities of color.

2. The Voting Section should increase enforcement of Section 11b (voter intimidation) of the VRA, the National Voter Registration Act (NVRA), and the Help America Vote Act (HAVA).
3. The Voting Section and the Disability Rights Section of the Civil Rights Division should evaluate voter ID requirements and new registration requirements to ensure that people with disabilities have adequate access to the ballot box.
4. When states apply to use the SAVE system to verify voter eligibility, DHS must provide safeguards in the purging process, and DOJ must proactively monitor that process to ensure that federal voting rights protections are not being violated by user agencies. Appropriate safeguards in any memorandum of agreements with the states (MOAs), include, but are not limited to:
 - Appropriate process agreed to in the MOA or guaranteed by state law, by which individuals are notified about, and can appeal, their potential ineligibility to vote.
 - Measures to protect privacy and prevent misuse of the system for purposes other than those authorized by law and the MOA itself.
 - A rigorous initiative to monitor, audit, and enforce user agencies' compliance with the terms of the MOAs, including where necessary, disenrolling non-compliant user agencies from the system.
 - A meaningful process for assisting individuals who seek to correct their records in order to avoid erroneous determinations.
 - Meaningful nondiscrimination protections, including user compliance the VRA and NVRA.
 - A quiet period of 90 days before an election when purges cannot take place
 - Training of all staff who will run queries in SAVE.

Supplemental Materials

- ACLU Map of Voter Suppression Measures Passed Since 2011: <http://www.aclu.org/maps/battle-protect-ballot-voter-suppression-measures-passed-2011>
- ACLU of Ohio Statement for Senate Field Hearing: "New State Voting Laws III: Protecting the Right to Vote in America's Heartland," May 2012: http://www.aclu.org/files/assets/aclu_oh_statement_for_senate_field_hearing_5_2_12_final.pdf
- ACLU Video: Laura W, Murphy, Director of Washington Legislative Office, on Voter Suppression, March 2012: <http://www.aclu.org/voting-rights/aclus-laura-murphy-voter-suppression>

- ACLU Video: Voter Suppression Hits Brokaw, Wisconsin, 2012:
<http://www.aclu.org/voting-rights/voter-suppression-hits-brokaw-wisconsin>
- ACLU Statement for a Senate Field Hearing: “New State Voting Laws II: Protecting The Right to Vote in the Sunshine State,” January 2012:
http://www.aclu.org/files/assets/aclu_fl_statement_for_senate_judiciary_subcomm_field_hearing_on_voter_suppression_2_2_12.pdf
- ACLU Testimony: Laughlin McDonald, Director of ACLU Voting Rights Project, before the U.S. Commission on Civil Rights, February 2012:
http://www.aclu.org/files/assets/aclu_vrp_testimony_for_usccr_section_5_redistricting_hearing_final_updated_2.pdf
- ACLU Statement: Laura W. Murphy and Deborah J. Vagins, Director of Washington Legislative Office, for a House Voting Rights Forum, November 2011:
<http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Murphy111114.pdf>
- ACLU Statement: Laura W. Murphy and Deborah J. Vagins, Director of Washington Legislative Office, before the U.S. Senate Committee on the Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights, September 2011:
http://www.aclu.org/files/assets/aclu_statement_for_senate_judiciary_subcomm_hrg_on_state_voter_suppression_laws_9_8_11.pdf
- ACLU Criminal Disfranchisement Map: <http://www.aclu.org/map-state-felony-disfranchisement-laws>
- ACLU Criminal Disfranchisement Factsheet: <http://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2011>
- Florida Department of State Press Release:
<http://www.dos.state.fl.us/news/communications/pressRelease/pressRelease.aspx?id=598>
- Sample MOA with State and Local Entity:
<http://www.uscis.gov/files/nativedocuments/save-state-local.pdf>

Issue Area: Women’s rights

Issue Area: LGBT rights

Issue Area: Racial justice

Issue Area: Disability rights

Strengthen Civil Rights Division Enforcement

Background

Under President Obama, the Civil Rights Division of the Department of Justice has worked to undo the politicization that took place during the Bush Administration, in which conservative lawyers with little civil rights experience were hired, leading to the exclusion of long-time staff attorneys from the decision making process. The Assistant Attorney General for Civil Rights has worked to restore the integrity of the Civil Rights Division by hiring qualified attorneys with civil rights backgrounds, and giving career professionals more authority to recommend applicants for attorney positions. He has also stepped up enforcement of civil rights statutes across all the Sections of the Division.

Recommendations

The assistant attorney general for civil rights should continue the work of emphasizing civil rights enforcement at the Civil Rights Division. While not exhaustive, we recommend the agency take the following actions:

1. The Employment Litigation Section should increase investigation and litigation of pattern and practice and disparate impact cases. ELS should also devote increased resources to defending and enforcing all settlement agreements and consent decrees into which it has previously entered.
2. The Special Litigation Section should bring additional pattern and practice police misconduct cases, rebuild its docket of prison conditions of confinement cases and, where appropriate, seek legally binding, court enforceable consent for constitutional and other violations. The Section should issue guidance to law enforcement regarding responses to domestic and sexual violence, drawing on its recent investigations in New Orleans, Puerto Rico, Maricopa County, and Missoula.
3. The Disability Rights Section should bring additional cases to enforce access to, and nondiscrimination by, state and local government programs and activities, particularly including voting accessibility (with the Voting Section), state compliance with *Olmstead v. L.C.*, 527 U.S. 581 (1999), and state and local government employment services (with the Employment Litigation Section). DOJ should issue guidance on ensuring that internet websites are accessible and usable by people with disabilities and, where appropriate, take actions to enforce relevant statutes.

4. The Educational Opportunities Section should initiate cases challenging sex discrimination and race discrimination in education under Title IX and Title VI, including harassment cases and cases challenging unlawful sex segregation in public schools. The Section has been active in LGBT bullying cases and supportive of litigation challenging sex segregation in Louisiana, and should increase engagement on these issues. The Section should also examine high and disparate rates of exclusionary discipline for students of color and students with disabilities and bring much-needed cases, where appropriate.

The Voting Rights Section should increase emphasis on prosecution of Section 2 and 11(b) cases under the Voting Rights Act and bring additional Section 5 objections to state election laws that disfranchise voters, including criminal disfranchisement laws. They should also increase enforcement of the NVRA and HAVA.

Supplemental Material

The Employment Litigation Section

- Department of Justice Employment Litigation Section Overview: <http://www.justice.gov/crt/about/emp/overview.php>
- Department of Justice Employment Litigation Section Cases: <http://www.justice.gov/crt/about/emp/papers.php>
- Civil Rights Coalition Comments on EEOC Strategic Enforcement Plan: <http://www.aclu.org/racial-justice-womens-rights/coalition-comments-eeoc-strategic-enforcement-plan>

The Special Litigation Section

- ACLU Report on Puerto Rico Investigation, June 2012: <http://www.aclu.org/human-rights/island-impunity-puerto-ricos-outlaw-police-force>
- DOJ Report on Investigation of Puerto Rico Police Department, September 2011: http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf
- ACLU Letter Asking DOJ to Intervene in Serious Human Rights Abuses in Puerto Rico, March 2011: <http://www.aclu.org/human-rights/aclu-asks-justice-department-intervene-serious-human-rights-abuses-puerto-rico>

The Disability Rights Section

- ACLU Comments to Department of Justice: “Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,” January 2011: http://www.aclu.org/files/assets/ACLU_Comments_for_Title_II_III_ADA_Regulations_-_2010_-_Equipment_FINAL.pdf
- About the Department of Justice Disability Rights Section: <http://www.justice.gov/crt/about/drs/>

The Educational Opportunities Section

- Educational Opportunities Section Overview: <http://www.justice.gov/crt/about/edu/overview.php>
- Educational Opportunities Section Cases: <http://www.justice.gov/crt/about/edu/documents/classlist.php>
- Department of Justice and Department of Education Joint Guidance on the Voluntary Use of Race: <http://www.justice.gov/crt/about/edu/guidance.php>
- ACLU Comments on Proposed Sex Segregation Regulations, April 2004: http://www.aclu.org/pdfs/depted_singlesexed.pdf
- National Coalition for Women and Girls in Education Recommendations for the Obama Administration and the 111th Congress: <http://www.ncwge.org/PDF/RecommendationsObamaAdminandCongressFINAL.pdf>
- Amicus Brief of DOJ/ED in Vermillion Parish lawsuit: http://www.justice.gov/crt/about/app/briefs/vermillion_brief.pdf
- Diane Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 Science 1706 (2011): <http://www.sciencemag.org/content/333/6050/1706.summary>
- Pedro Noguera, *Saving Black and Latino Boys*, Education Week (Feb. 3, 2012): http://www.edweek.org/ew/articles/2012/02/03/kappan_noguera.html

The Voting Rights Section

- Voting Rights Section Overview:
<http://www.justice.gov/crt/about/vot/overview.php>
- ACLU Map of Voter Suppression Measures Passed Since 2011:
<http://www.aclu.org/maps/battle-protect-ballot-voter-suppression-measures-passed-2011>
- ACLU Testimony: Laughlin McDonald, Director of ACLU Voting Rights Project, before the U.S. Commission on Civil Rights, February 2012:
http://www.aclu.org/files/assets/aclu_vrp_testimony_for_usccr_section_5_redistricting_hearing_final_updated_2.pdf
- ACLU Statement: Laura W. Murphy and Deborah J. Vagins, Director of Washington Legislative Office, for a House Voting Rights Forum, November 2011:
<http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Murphy111114.pdf>
- ACLU Criminal Disfranchisement Map: <http://www.aclu.org/map-state-felony-disfranchisement-laws>

Issue Area: Immigrants' rights

Stand Up Against State and Local Anti-Immigrant Laws

Background

Over the past six years, a number of states and localities have enacted their own immigration laws that attempt, in varying ways, to implement the discredited “attrition through enforcement” strategy advocated by fringe restrictionist groups. These laws present a grave threat to *all* residents’ civil rights, and especially those of people of color, including by guaranteeing racial profiling; terrorize immigrant communities; interfere with the federal government’s ability to set a fair and uniform immigration policy for the entire nation; cause spillover effects in neighboring states and cities; and harm public safety, the economy, and our relationships with other countries.

Recognizing these and other problems, the Department of Justice has sued to block four states’ anti-immigrant laws—beginning with Arizona, which enacted SB 1070 in 2010. The Arizona case was recently decided by the Supreme Court. While the decision was a significant victory in many respects, it allowed the “show me your papers” requirement of SB 1070 to stand, for now. In light of that ruling, and because the other anti-immigrant racial profiling laws that have been enacted in other states include provisions that were not at issue in the Arizona case, more remains to be done:

Recommendations

1. The Department of Justice should press all available arguments in their pending challenges, including any claims against the “show me your papers” requirements that are available in light of the Supreme Court’s Arizona ruling. In addition, DOJ should stand ready to file new challenges to any additional laws that are enacted, and to support in an amicus capacity other ongoing challenges filed by civil rights coalitions.

The government’s future litigation should include not only the federal preemption claims that have been presented to date, but also other claims, including civil rights claims based on the implementation of any provisions that are allowed to go into effect.

2. To the extent that courts have allowed or will allow any parts of these anti-immigrant laws to go into effect, the Administration should ensure that the federal government is not complicit in their implementation, and should take affirmative steps to minimize the laws’ negative impact. Thus, the Administration should at least:

- (viii) DOJ and DHS and other relevant agencies should monitor implementation, issue guidance, and undertake investigations as necessary to prevent the denial of civil rights, and preserve access to education, benefits, and federal programs;
- (ix) DHS should terminate all 287(g) agreements, including the jail model, with states and cities that enact anti-immigrant laws;
- (x) DHS should suspend Secure Communities in those jurisdictions that have enacted such laws;
- (xi) DHS should modify its response protocols generally, and especially in those jurisdictions, to ensure that the limits on state authority laid out in the Arizona decision are observed in practice, and to guard against racial profiling;
- (xii) DHS should directly collect data (e.g. when ICE is queried for immigration status) and encourage or, where possible, mandate affected jurisdictions to collect data that will help determine whether extended traffic stops and other detentions, racial profiling or other problematic practices are occurring;
- (xiii) DHS should review its enforcement decisions in all affected jurisdictions via a specialized unit at headquarters;
- (xiv) DHS should ensure robust and meaningful implementation of prosecutorial discretion in the affected jurisdictions, and issue guidance to ICE trial attorneys in those jurisdictions clarifying that Fourth Amendment and Equal Protection violations should result in termination of any removal proceedings that are brought against victims of such civil rights violations.

Supplemental Materials

- [ACLU Hearing Statement](https://www.aclu.org/files/assets/aclu_statement_for_sjc_hearing_on_state_and_local_governments_enforcing_immigration_law_4_24_12_final.pdf) on Arizona S.B. 1070. April 2012: https://www.aclu.org/files/assets/aclu_statement_for_sjc_hearing_on_state_and_local_governments_enforcing_immigration_law_4_24_12_final.pdf
- [ACLU Blog Post on](http://www.aclu.org/blog/immigrants-rights/hey-russell-pearce-latinos-arizona-arent-kids-breaking-curfew) Senate Judiciary Immigration Subcommittee hearing on state and local immigration enforcement. April 2012: <http://www.aclu.org/blog/immigrants-rights/hey-russell-pearce-latinos-arizona-arent-kids-breaking-curfew>
- ACLU Blog Post on 287(g). June 2012: <http://www.aclu.org/blog/immigrants-rights-racial-justice/reading-fine-print-dhs-has-not-ended-287g-arizona>
- ACLU Blog Post on Secure Communities, April 2012: <http://www.aclu.org/blog/immigrants-rights-racial-justice/whitewashing-s-comms-immigration-enforcement-failures>
- ACLU Blog Post on Racial Profiling, April 2012: <http://www.aclu.org/blog/racial-justice-immigrants-rights/working-end-racial-profiling-aclu-testify-senate-judiciary>

- ACLU Statement on Secure Communities before House Judiciary Subcommittee on Immigration Policy and Enforcement, November 2011:
<http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities-house-judiciary-subcommittee-immigration-policy>
- ACLU Statement on Secure Communities, November 2010:
<http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities>
- ACLU Statement on 287(g) before House Homeland Security Committee, March 2009:
<http://www.aclu.org/immigrants-rights/aclu-testimony-submitted-house-homeland-security-committee-hearing-titled-examinin>

Issue Area: Human rights

Accountability for Torture, Extraordinary Rendition, and Wrongful Detention

Background

Following 9/11, the U.S. government authorized and engaged in widespread and systematic torture, extraordinary rendition, and unlawful detention, including incommunicado detention in so-called CIA “black sites”. Hundreds of prisoners were tortured in U.S. custody — some even killed — as a result of interrogation policies authorized at the highest levels of the U.S. government. The U.S. government engaged in the illegal practice of extraordinary rendition, which involved abducting foreign nationals and transferring them to foreign countries for abusive interrogation without providing any due process or protections against torture. Over 800 men have been detained at Guantanamo and in the CIA black sites; the overwhelming majority were never charged with any crime. The United States has held thousands of detainees in Afghanistan — some for more than six years — without access to counsel or a meaningful opportunity to challenge their imprisonment.

While the ACLU and its partner organizations have secured and made publicly available thousands of records documenting torture, extraordinary rendition, and unlawful detention, the government still keeps many records secret. Our nation cannot properly reckon with these rights violations without a full record of them.

If the U.S. government is to restore its reputation for upholding the fundamental rights of humane treatment and due process, it must provide a remedy to victims of torture, extraordinary rendition, and wrongful detention and hold those responsible for such abuses to account. None of the individuals who have sought to challenge their treatment in U.S. custody or extraordinary rendition by the United States have been allowed their day in court. No victims or survivors of torture, rendition to torture, or wrongful detention have been compensated for their suffering. The lack of remedy persists despite the fact that Article Fourteen of the Convention Against Torture requires the United States to ensure “fair and adequate compensation” for torture victims. No senior officials who designed, authorized, or executed the torture of persons in U.S. custody or the transfer of persons to other countries where they were at risk of torture have faced criminal charges. The U.S. government has refused to cooperate with — and indeed has sought to obstruct — investigations by foreign governments into their own officials’ complicity with the United States’ extraordinary rendition, torture, and abuse of prisoners abroad. The continuing impunity and lack of remedy threaten to undermine the universally recognized and fundamental rights not to be tortured or arbitrarily detained, and send the dangerous signal to government officials that there will be no accountability for illegal conduct.

Recommendations

1. The President should take measures to provide non-judicial compensation to known victims and survivors who suffered torture, transfer to torture, or wrongful detention at the hands of U.S. officials and publicly recognize and apologize for the abuses that were committed.
2. The Department of Justice should cease opposing efforts by victims and survivors to pursue judicial remedies by allowing such cases to be litigated on their merits.
3. The President and relevant agencies should formally honor U.S. officials and soldiers who exposed the abuse of prisoners or who took personal or professional risks to oppose the adoption of interrogation policies that violated domestic and international law.
4. The State Department should support through diplomatic channels efforts by other countries to account for their role in the extraordinary rendition, torture, and abuse of prisoners by and at the behest of the United States abroad. The State Department should facilitate full cooperation by all arms of the federal government with any investigations by foreign governments and promote accountability for torture and abuse and transfer to torture and abuse.
5. The President should order the release of all additional government documents that detail the torture program, with minimal redactions to protect only legitimately classified information (and not merely embarrassing or illegal activity). The document release should include the Presidential directive of 9/17/2001 authorizing the CIA to establish the secret "black sites," where CIA torture occurred, and the 2,000 photographs of abuse in facilities throughout Iraq and Afghanistan that the Defense Department continues to suppress.
6. The State Department should respond to petitions filed against the U.S. before the Inter-American Commission on Human Rights on behalf of victims and survivors of torture and forced disappearance.
7. Declassify and release the investigative report by the Senate Select Intelligence Committee regarding the CIA's use of rendition and torture redacting only as necessary to protect legitimate secrets, and not protect the government from embarrassment or continue to conceal illegal activity.

Supplemental Material

- Executive Order 13491 -- Ensuring Lawful Interrogations:
http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations

- ACLU, The Torture Report (2009): <http://www.thetorturereport.org/>
- ACLU, Torture Database: http://www.thetorturedatabase.org/search/apachesolr_search
- ACLU Report, “Enduring Abuse,” Executive Summary, April 27, 2006: <http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive>
- ACLU, Bagram FOIA: <http://www.aclu.org/national-security/bagram-foia>
- ACLU, Accountability for Torture: <http://www.aclu.org/accountability/>

Issue Area: Human rights

Prevent Torture and Transfer to Torture

Background

No policy decision has done more damage to the rule of law and our nation's moral authority than the post-9/11 embrace of torture and rendition to torture. Government documents show that hundreds of prisoners were tortured in U.S. custody — some even killed — and that torture policies were developed at the highest levels of the U.S. government. The United States also abducted persons and transferred them either to U.S.-run detention facilities overseas or to the custody of foreign intelligence agencies where they were subjected to torture and other abuse, in some cases after the receiving government gave “diplomatic assurances” that the individuals would not be tortured.

President Obama rejected the torture legacy and has done much to restore the rule of law. On January 22, 2009, the President signed an executive order that categorically prohibited torture, reaffirmed the U.S. government's commitment to Common Article 3 of the Geneva Convention, invalidated the flawed legal guidance on torture prohibitions, and limited all interrogations, including those conducted by the CIA, to techniques authorized by the Army's field manual on interrogation. The Administration has also reportedly adopted recommendations aimed at improving the United States' transfer policies, including recommendations that the State Department have a role in evaluating any diplomatic assurances and that assurances include a monitoring mechanism.

Recommendations

To further restore U.S. moral authority and abide by the prohibition against torture:

1. The President must oppose any and all efforts to return to the use of the so-called “enhanced interrogation techniques.”
2. The President must direct the Homeland Security, State, or Defense Departments not to rely on “diplomatic assurances” to deport (pursuant to 8 C.F.R. § 208.18(c)) or otherwise transfer persons out of United States custody to any country where there is a likelihood of torture.
3. The Departments of Homeland Security and Defense and other relevant agencies must, at a minimum, provide meaningful administrative and judicial review whenever the United States seeks to deport or extradite an individual to a country where there is likelihood of torture, to ensure compliance with U.S. obligations under the UN

Convention Against Torture. Such review must extend to the existence and sufficiency of diplomatic assurances.

4. The White House and Defense and State Departments should provide for greater transparency with respect to their policies and procedures related to interrogation and transfers, including by making public the Special Task Force on Interrogations and Transfer Policies recommendations and the subsequent Defense and State Department Inspector General reports.

Supplemental Material

- Executive Order 13491 -- Ensuring Lawful Interrogations:
http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations
- Department of Justice Report, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President, August 2009:
<http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>
- ACLU, The Torture Report, 2009: <http://www.thetorturereport.org/>
- ACLU, Torture Database:
http://www.thetorturedatabase.org/search/apachesolr_search
- ACLU Report, "Enduring Abuse," Executive Summary, April 2006:
<http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive>
- Unfinished Business: Turning the Obama Administration's Human Rights Promises into Policy: <http://www.aclu.org/human-rights/unfinished-business-turning-obama-administrations-human-rights-promises-policy>

Issue area: Human rights

End Human Trafficking and Forced Labor Facilitated by U.S. Government Contracts

Background

The President has demonstrated his commitment to ending the trafficking and forced labor of foreign workers hired under U.S. government contracts to work in support of U.S. military and diplomatic missions abroad and now must ensure this commitment is fulfilled. Recruited from impoverished villages in countries such as India, Nepal, and the Philippines, men and women—known as Third Country Nationals—are charged exorbitant recruitment fees, often deceived about the country to which they will be taken and how much they will be paid, and once in-country, often have no choice because of their financial circumstances but to live and work in unacceptable and unsafe conditions. These abuses amount to modern-day slavery—all on the U.S. taxpayers' dime.

Human trafficking and forced labor on government contracts is also part of contractor malfeasance that wastes tens of millions of U.S. tax dollars annually. The illicit recruitment fees that trafficked individuals pay, together with the salary cost-cutting techniques that contractors employ, go to enrich prime contractors, subcontractors, local recruiters, and others who profit from the exploitation of individuals wanting to work for government contractors or subcontractors.

On September 24, 2012, President Obama signed an executive order aimed at strengthening existing protections against human trafficking and forced labor in U.S. government contracts. The executive order is a significant step towards ending modern-day slavery facilitated by current government contracting processes.

Recommendations

To ensure that the executive order is implemented and to end profits based on government contracting processes that facilitate human trafficking and forced labor, the next administration must:

1. Ensure that the Federal Acquisition Regulatory Council issues regulations that effectively implement the executive order. These regulations should ensure that contractor employees are provided with written contracts in a language that they understand and that provide details of their conditions of employment, including payment of a fair wage, prior to leaving their home country; establish procedures to ensure that prime contractors are held accountable for the hiring practices of their subcontractors; and protect whistle blowers who report instances of contractor employee abuse from retaliation.
2. Improve oversight and monitoring of U.S. contractors' compliance with existing prohibitions on human trafficking and forced labor by ensuring that contracting agencies, including the State and Defense Departments and USAID (a) conduct regular audits and inspections of their contractors; and (b) implement formal mechanisms to

receive and process all credible reports of human trafficking, forced labor, and other abuses and ensure that such reports are investigated.

3. Improve accountability for human trafficking and labor-rights violations in government contracting processes by ensuring (a) the Justice Department initiates, thoroughly investigates, and where appropriate, prosecutes all U.S. contractors who are suspected of engaging in violations of contract employees' rights; and (b) contracting agencies impose stringent penalties on every contractor who engages in or fails to report such abuses.

Supplemental material

- Executive Order - Strengthening Protections Against Trafficking In Persons In Federal Contracts: <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>
- "Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors," joint ACLU-Yale Lowenstein International Human Rights Clinic report: http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf
- Documents Released Under FOIA on Military Contractor Human Trafficking: <http://www.aclu.org/human-rights/military-contractor-human-trafficking-documents-released-under-foia>

Issue Area: National security

Fully Restore the Rule of Law to Detention Policy and Practices

Background

President Obama inherited the terrible legacy of indefinite detention without charge or trial of people picked up away from a battlefield and the use of military commissions at Guantanamo. The Obama Administration has taken some positive steps. It has refused to add to the number of persons held in indefinite detention at Guantanamo, closed the CIA secret prisons, secured some improvements to the military commission statute, and has made diligent diplomatic efforts to resettle or repatriate some detainees. Nevertheless, the Obama Administration also took harmful steps by renewing legal and political claims of authority to hold detainees without charge or trial, re-starting military commission prosecutions that continue to lack basic due process protections, and signing into law an indefinite detention statute and restrictions on transfers of Guantanamo detainees. It is beyond the time to end the Guantanamo legacy and fully restore the rule of law to detention.

Recommendations

The President should take the following actions:

1. Publicly state that he will veto any legislation extending beyond the expiration date of March 27, 2013, the currently applicable statutory restrictions on the transfer of detainees from Guantanamo, and also order the removal of any policy obstacles to the resettlement or repatriation of detainees.
2. Order the closure of the prison at Guantanamo by charging in federal criminal court any detainees against whom there is evidence of criminal conduct that is untainted by torture, and transferring all other detainees to their home countries or to other countries where they will not be in danger of being tortured, abused, or imprisoned without charge or trial.
3. Order the end of the use of indefinite detention without charge or trial, and disclaim any authority for such indefinite detention, of detainees at Guantanamo and prisoners picked up away from a battlefield and brought to Bagram.
4. Order the Department of Defense to terminate the unconstitutional and untested military commissions, and transfer to the Department of Justice anyone who will be charged with a crime for trial in federal criminal court.
5. Order that the Department of Defense and Department of Justice shall not rely on the indefinite detention provisions in the National Defense Authorization Act for Fiscal Year

2012 (“NDAA”) or any of the trial provisions of the Military Commissions Act of 2009, but instead should work for their repeal.

These steps will end the terrible legacy that President Obama inherited from his predecessor at Guantanamo, and fulfill the promise of restoring the rule of law to America’s military detention practices.

Supplemental Materials

- ACLU Letter to Judiciary Committee Urging Jurisdiction over the NDAA
<http://www.aclu.org/national-security/aclu-letter-senate-urging-judiciary-committee-jurisdiction-over-national-defense>
- Coalition Letter to the House Urging Opposition to Blanket Ban on Guantanamo Detainee Transfers in Department of Defense Appropriations Act
<http://www.aclu.org/national-security/coalition-letter-house-urging-opposition-blanket-ban-guantanamo-detainee-transfers>
- ACLU Letter to the White House on GITMO Transfer Provisions in the NDAA
<http://www.aclu.org/national-security/aclu-letter-white-house-gitmo-transfer-provisions-ndaa>

Issue Area: Religious freedom

Issue Area: Free speech

Issue Guidance for Public Schools on the First Amendment

Background

Over the past decade, the Department of Education’s Office of Civil Rights (OCR) has issued insufficient and incomplete guidance for public schools on their obligations under the First Amendment. This is a complicated area of law—and thus merits detailed, comprehensive guidance in order to protect students’ rights.

In 2003, OCR issued two sets of guidance, one on free speech and one on religion in schools. The free speech guidance merely states that the Department of Education enforces civil rights protections for students consistent with the First Amendment. The religion in schools guidance, titled, “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,” focuses almost exclusively on what religious expression is permitted in public schools rather than comprehensively addressing the myriad issues surrounding religion in schools and schools’ constitutional obligations to protect both the right of free exercise for individuals of every faith and the right for students and their families to remain free from governmental coercion and promotion of religion.

In October 2010, OCR issued guidance outlining the legal requirements of state departments of education and local school districts under federal anti-discrimination laws in connection with bullying and other forms of student harassment. The letter provided much in the way of needed guidance, and was especially welcome in light of its express reminder that federal anti-discrimination laws may be used to target harassment based on actual or perceived sexual orientation, gender identity, or religion. The guidance, however, did not address the First Amendment considerations implicated by “pure speech” incidents (which represent a small minority of cases but should nonetheless rarely result in school discipline, let alone school liability), and merely linked to the aforementioned 2003 guidance.

In September 2011, the U.S. Commission on Civil Rights issued a report, *Peer-to-Peer Violence & Bullying: Examining the Federal Response*, which said that OCR should consider issuing guidance “regarding the First Amendment implications of anti-bullying policies” with “concrete examples to clarify the guidance.”

Recommendation

1. The Department of Education should issue comprehensive guidance for public schools on their obligations under the First Amendment to include speech and religion, and how these obligations interact with anti-discrimination laws. This should include (a) more clearly drawing the line between the limited cases of constitutionally protected “pure speech” and unprotected bullying and harassment that can rightly present a violation of

federal anti-discrimination law if they go unchecked; (b) equal emphasis on permissible religious exercise by students and impermissible school promotion of religion; and (c) guidance on religion in schools outside of the context of religious expression, such as guidance on wearing religious clothing or jewelry, teaching about religion, and ensuring a sound science curriculum that does not advance religion.

Supplemental Material

- 2003 Free Speech Guidance:
<http://www2.ed.gov/about/offices/list/ocr/firstamend.html>
- 2003 Religion in Schools Guidance:
http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html
- 2010 Bullying and Harassment Guidance:
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>
- U.S. Commission on Civil Rights, *Peer-to-Peer Violence & Bullying: Examining the Federal Response* (Sept. 2011): <http://www.usccr.gov/pubs/2011statutory.pdf>
- Settlement in *Anderson v. Chesterfield County School District*:
<http://www.aclu.org/religion-belief/anderson-v-chesterfield-county-school-district-consent-decree>

Issue Area: National security

Issue Area: Privacy

Limit Foreign Intelligence Spying on Americans and Increase Transparency on Surveillance Programs

Background

Over the past ten years, the government's authority to conduct surveillance on Americans not suspected of any wrongdoing has grown exponentially. One of the most expansive and secretive authorities—the FISA Amendments Act of 2008—allows the government to conduct dragnet and suspicionless collection of Americans' international communications for foreign intelligence purposes without ever identifying its targets to a court. Section 215 of the Patriot Act, a similarly secretive and troubling surveillance authority, allows the Justice Department to obtain a court order for any tangible thing relevant to an investigation. According to several senators, the government has secretly interpreted Section 215 in a manner that diverges from its plain meaning and that would shock Americans.

Recommendations

1. The Department of Justice and the Director of National Intelligence should increase basic transparency about surveillance authorities included in the FISA Amendments Act, Section 215 of the Patriot Act, and other post-9/11 collection programs to ensure an informed public and congressional debate and accountability. In particular, these agencies should:
 - Release executive memoranda and FISA court opinions interpreting the FISA Amendments Act and Section 215 of the Patriot Act, including only those redactions necessary to protect legitimate secrets; and
 - Disclose (or provide a meaningful unclassified description of) the targeting and minimization procedures used by the government in collecting information under the FISA Amendments Act or Section 215 of the Patriot Act.

2. The President should issue an executive order
 - prohibiting the suspicionless, bulk collection of the communications or records of Americans or individuals in the U.S.;
 - imposing strict use limitations and minimization procedures that prevent the collection, use, or dissemination of information about Americans or individuals in the U.S.

Supplemental Material

- Why the FISA Amendments Act is Unconstitutional:
http://www.aclu.org/files/images/nsaspying/asset_upload_file578_35950.pdf
- Testimony of Jameel Jaffer, Deputy Director of the ACLU, before the House Committee on the Judiciary, Oversight Hearing on the FISA Amendments Act of 2008, May 2012:
https://www.aclu.org/files/assets/aclu_house_testimony_on_fisa_amendments_act.pdf
- ACLU Letter to the Senate Select Committee on Intelligence Requesting Public Oversight of and Amendment to the FISA Amendments Act of 2008, May 2012:
http://www.aclu.org/files/assets/aclu_ltr_to_ssci_opposing_extension_to_faa_-_5_22_12.pdf
- Coalition Letter to the House of Representatives Urging a 'NO' vote on H.R. 5949, a five year extension of the FISA Amendments Act, September 2012:
http://www.aclu.org/files/assets/for_webhub_-_coalition_letter_to_house_urging_no_vote_on_faa_extension_09_11_12.pdf
- Report of the FISA Amendments Act of 2008, The Constitution Project, Liberty and Security Committee, September 2012:
http://constitutionproject.org/pdf/fisaamendmentsactreport_9612.pdf
- ACLU Letter to the Senate, Urging 'NO' vote on H.R. 6304, the FISA Amendments Act of 2008, June 2008:
http://www.aclu.org/files/images/general/asset_upload_file902_35782.pdf
- ACLU Resources on Amnesty v. Clapper: <http://www.aclu.org/national-security/amnesty-et-al-v-clapper>

Issue Area: Privacy

Ensure Judicial Oversight of Location Tracking

Background

GPS and cell phone technology provide law enforcement agents with powerful and inexpensive methods of tracking individuals over an extensive period of time and an unlimited expanse of space as they traverse public and private areas. In many parts of the country, the police have been tracking people for days, weeks, or months at a time, without ever having to demonstrate to a magistrate that they have a good reason to believe that tracking will turn up evidence of wrongdoing. Today, individuals' movements can be subject to remote monitoring and permanent recording without any judicial oversight. Innocent Americans can never be confident that they are free from round-the-clock surveillance by law enforcement of their activities.

In *United States v. Jones*, 132 S. Ct. 945, 954 (2012), the Supreme Court held that a Fourth Amendment search occurred when the government placed a GPS tracking device on the defendant's car and monitored his whereabouts nonstop for 28 days. *Id.* at 954. A majority of the Justices also stated that "the use of longer term GPS monitoring . . . impinges on expectations of privacy" in the location data downloaded from that tracker. *Id.* at 953-64 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring). As Justice Alito explained, "[s]ociety's expectation has been that law enforcement agents and others would not -- and indeed, in the main, simply could not -- secretly monitor and catalog every single movement of an individual's car, for a very long period." *Id.* at 964 (Alito, J., concurring).

Justice Sotomayor emphasized the intimate nature of the information that might be collected by the GPS surveillance, including "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *Id.* at 955 (quoting *People v. Weaver*, 12 N.Y.3d 433, 442 (N.Y. 2009)). While even the limited collection of geo-location information can reveal intimate and detailed facts about a person, the privacy invasion is multiplied many times over when law enforcement agents obtain geo-location information for prolonged periods of time.

Recommendations

1. The Attorney General should order all federal law enforcement to interpret *US v. Jones* to require law enforcement agents to secure a warrant based upon probable cause before obtaining all types of geo-locational information including through GPS or cell phone tracking.

Supplemental Material

- ACLU Page on Government Cell Phone and GPS Location Tracking:
<http://www.aclu.org/government-location-tracking-cell-phones-gps-devices-and-license-plate-readers>
- House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security hearing entitled The Geolocational Privacy and Surveillance Act, testimony of Catherine Crump, May 2012:
<http://judiciary.house.gov/hearings/Hearings%202012/Crump%2005172012.pdf>

Issue Area: National security

Issue Area: Privacy

Issue Area: Free speech

Stop the Monitoring and Improper Recording of Information About Americans' First-Amendment Protected Activities

Background

Since 9/11, the government has engaged in widespread monitoring of peaceful political activists exercising their First Amendment rights to agitate for changes in American policies. It has conducted surveillance of, and collected intelligence about, Americans based on their race, religion, ethnicity, and national origin. These abuses are the result of post-9/11 regulations that swept away long-standing safeguards and allow the FBI to spy on innocent Americans and peaceful groups with little or no suspicion of wrongdoing, using intrusive techniques such as physical surveillance, commercial and law enforcement data base searches, FBI interviews, and informants. Law enforcement agencies have also improperly collected records about Americans' First Amendment protected activity in violation of the Privacy Act, 5 U.S.C. § 552a, which specifically prohibits federal agencies from maintaining records describing how individuals exercise their First Amendment rights absent special, narrow circumstances.

Recommendations

1. The President should issue an executive order directing relevant agencies (e.g. Justice, Defense, Homeland Security) to refrain from monitoring people engaged in political or religious activities unless there is reasonable suspicion that they have committed a criminal act or are taking preparatory actions to do so, and from collecting information regarding people's First Amendment-protected activities unless they are directly related to that criminal activity.
2. The Attorney General should repeal the 2008 Attorney General Guidelines regarding FBI investigations, and replace them with new guidelines that protect the rights and privacy of innocent persons. The new guidelines should:
 - Remove the "Assessment" authority;
 - Require an articulable factual basis for opening a Preliminary Investigation, shorten the time during which a Preliminary Investigation may remain open, and limit the investigative techniques that can be used during a Preliminary Investigation to ensure that the least intrusive means necessary are employed to quickly determine whether a full investigation should be opened.
 - Prohibit the use of race, ethnicity, religion, national origin, or the exercise of First Amendment-protected activity as factors in making decisions to investigate

persons or organizations, or to maintain or disseminate information about their First Amendment-protected beliefs and activities.

- Prohibit the reporting and keeping files on individuals engaging in peaceful political activities.
- Prohibit the misuse of federal law enforcement community outreach programs for intelligence gathering purposes.

Supplemental Material

- Sample Attorney General Guidelines (see below)
- ACLU, Interested Persons Memo: Analysis of Changes to Attorney General Guidelines, June 2002: <http://www.aclu.org/national-security/interested-persons-memo-analysis-changes-attorney-general-guidelines>
- ACLU, Interested Persons Memo: Brief Analysis of Proposed Changes to Attorney General Guidelines, May 2002: <http://www.aclu.org/national-security/interested-persons-memo-brief-analysis-proposed-changes-attorney-general-guideline>
- ACLU Report, "History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement," May 2007: http://www.aclu.org/images/asset_upload_file893_29902.pdf
- ACLU Report, "The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study on FBI Surveillance of Dr. Martin Luther King," March 17, 2002: <http://www.aclu.org/national-security/dangers-domestic-spying-federal-law-enforcement-case-study-fbi-surveillance-dr-mar>
- ACLU Report, "No Real Threat The Pentagon's Secret Database on Peaceful Protest," January 2007: <http://www.aclu.org/national-security/no-real-threat-pentagons-secret-database-peaceful-protest>
- Coalition Letter on new FBI Guidelines, September 2008: <http://www.aclu.org/national-security/aclu-coalition-letter-senate-and-house-judiciary-committee-leadership>
- ACLU Letter to the inspector general asking him to investigate whether the FBI has been violating the current guidelines, September 2008: <http://www.aclu.org/national-security/aclu-asks-inspector-general-investigate-abuses-fbi-guidelines>

- ACLU Letter to Judiciary Leadership Urging an Inquiry into Reports of FBI Use of Racial Profiling, July 2008: <http://www.aclu.org/racial-justice/aclu-letter-judiciary-leadership-urging-inquiry-reports-fbi-use-racial-profiling>
- ACLU Comments on proposed amendments to 28 Code of Federal Regulations Part 23 (Criminal Intelligence Systems Operating Policies), August 2008: http://www.aclu.org/images/asset_upload_file347_36595.pdf
- Office of the Inspector General, U.S. Department of Justice, “A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups,” September 2010: <http://www.justice.gov/oig/special/s1009r.pdf>
- ACLU, Letter to Attorney General asking him to amend the Attorney General Guidelines, October 2011: http://www.aclu.org/files/assets/aclu_letter_to_ag_re_rm_102011_0.pdf
- ACLU EYE on the FBI: The FBI Is Engaged In Unconstitutional Racial Profiling and Racial “Mapping,” October 2012: <http://www.aclu.org/national-security/aclu-eye-fbi-fbi-engaged-unconstitutional-racial-profiling-and-racial-mapping>
- ACLU EYE on the FBI: The FBI is using the guise of “community outreach” to collect and store intelligence information on American’s political and religious beliefs, December 2011: <http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community>
- ACLU EYE on the FBI: The San Francisco FBI conducted a years-long Mosque Outreach program that collected and illegally stored intelligence about American Muslims’ First Amendment-protected religious beliefs and practices, March 2012: http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0_0.pdf
- ACLU, Letter to DOJ Inspector General on Privacy Act Violations and Improper Targeting April 2012: <http://www.aclu.org/national-security/aclu-letter-doj-inspector-general-fbi-privacy-act-violations-and-improper>

Recommended Language

Attorney General Guidelines

Executive Branch:

- 1) The incoming President should direct the Attorney General to thoroughly review the Attorney Guidelines and to amend them to make them consistent with the following principles:

- The FBI should be prohibited from initiating any investigative activity regarding a U.S. person absent credible information or allegation that such person is engaged or may engage in criminal activity, or is or may be acting as an agent of a foreign power. A preliminary investigation opened upon such information or allegation should be strictly limited in scope and duration, and should be directed toward quickly determining whether a full investigation, based on facts establishing reasonable suspicion, may be warranted.
 - Supervisory approval should be required for any level of investigation other than searches of public records and public websites, searches of FBI records, requests for information from other federal, state, local, or tribal law enforcement records, and questioning (but not tasking) previously developed sources.
 - In each investigation, the FBI should be required to employ the least intrusive means necessary to accomplish its investigative objectives. The FBI should consider the nature of the alleged activity and the strength of the evidence in determining what investigative techniques should be utilized. Intrusive techniques such as recruiting and tasking sources, law enforcement undercover activities, and investigative activities requiring court approval should only be authorized in full investigations, and only when less intrusive techniques would not accomplish the investigative objectives.
 - The FBI should be prohibited from collecting or maintaining information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an authorized criminal or national security investigation, and there are reasonable grounds to suspect the subject of the information is or may be involved in the conduct under investigation.
 - The FBI should be prohibited from using community outreach programs for intelligence gathering purposes.
- 2) The new President should work with Congress to establish a statutory investigative charter for the FBI that limits the FBI's authority to conduct investigations without specific and articulable facts giving reason to believe that an individual or group is or may be engaged in criminal activities, is or may be acting as an agent of a foreign power.

Issue Area: Free speech

Stop Chilling Political Protest and Expression

Background

In recent years, law enforcement authorities have imposed restrictive “free speech zones” on protesters at political events. These zones allow the police to keep inconvenient protesters away from the media, or to discriminate against individuals based on the causes for which they are protesting. These zones and other law enforcement tactics were found in a report by the Organization for Security and Co-operation in Europe (“OSCE”) to contribute to serious violations of speech and associational rights in the United States.

Additionally, in 2012, Congress passed with little fanfare the “Federal Restricted Buildings and Grounds Improvement Act,” or H.R. 347, which expanded an existing law criminalizing trespassing on and disruptions in or near Secret Service restricted zones. We remain concerned that H.R. 347 can and will be used to deter lawful protests near the large number of individuals who receive Secret Service protection. The law raises additional concerns given the fact it applies to National Special Security Events, or “NSSEs,” which can be designated as such at the sole discretion of the Department of Homeland Security and appear to be increasing in use.

Recommendations

1. The attorney general should issue public guidance governing the use of “free speech” zones, which would remind federal, state and local law enforcement charged with providing security during public demonstrations of the current state of the law and urge officials to refrain from using “protest” zones to discriminate against protesters with a particular viewpoint, or to move protesters away from the media.
2. The Department of Homeland Security should release public guidance on (1) its use of National Special Security Events (“NSSEs”), which includes data on the criteria that will prompt an NSSE designation and the frequency of such designations; and (2) the Secret Service’s enforcement of the recently amended 18 U.S.C. § 1752. The latter guidance should include information on the number of arrests made pursuant to the law, as well as information on where and when the statute is being deployed.

Supplemental Material

- ACLU material on free speech zones: <http://www.aclu.org/free-speech/free-speech-under-fire-aclu-challenge-protest-zones>
- Blog posts on H.R. 347: <http://www.aclu.org/blog/tag/hr-347>

- OSCE Report, Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States, <http://www.osce.org/odihr/97055>

Issue Area: Privacy

Empower and Enable the Privacy and Civil Liberties Oversight Board

Background

The Privacy and Civil Liberties Oversight Board (PCLOB) was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408 (2004), but was removed from the White House and made an independent agency in the executive branch with the passage of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, Title VIII, § 801 (2007). The Board's mandate is to monitor the impact of US government actions on civil liberties and privacy interests. It has five members who are appointed by the President and subject to confirmation by the Senate.

President Obama waited almost three years, until December 2011, to nominate members to fill this board. In August 2012 four members of the board (minus the chairman) were officially confirmed by the Senate. However under the statute the Chairman is the only full time board member and is responsible for hiring staff. Given this statutory requirement it is not clear that the PCLOB can function now, almost five years after it was reconstituted.

Recommendations

1. The President should promptly nominate a chairman of the PCLOB.
2. The President's first budget proposal should contain sufficient funds to bring the board into existence as an effective entity.
3. The Attorney General should create a mechanism for issuing subpoenas at the request of the Board. This can be done through the creation of a Memorandum of Understanding between the board and the Attorney General in which the Attorney General promises to enforce subpoenas issued by the board's request unless he or she certifies that such a subpoena would be unlawful.

Supplemental Material

- Coalition Letter to President Obama Urging Revitalization of the PCLOB, March 2010: <http://www.aclu.org/technology-and-liberty/coalition-letter-president-obama-urging-revitalization-privacy-and-civil-libe>
- ACLU Testimony for the Senate Homeland Security and Government Affairs' Subcommittee Hearing on Federal Privacy and Data Security, July 2012: <http://www.aclu.org/national-security-technology-and-liberty/testimony-senate-homeland-security-and-governmental-affairs>

- ACLU Report, Enforcing Privacy: Building American Institutions to Protect Privacy in the Face of New Technology and Government Powers:
http://www.aclu.org/files/assets/ACLU_Report_-_Enforcing_Privacy_2009.pdf
- The Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 352, 357-358 (codified at 5 USC 601 note and 42 USC 20002ee (2000)):
<http://www.gpo.gov/fdsys/pkg/PLAW-110publ53/content-detail.html>
- “Who’s Watching the Spies? The civil liberties board goes dark under Bush,” *Newsweek*, July 9, 2008: <http://www.thedailybeast.com/newsweek/2008/07/08/who-s-watching-the-spies.html>

Issue Area: Disability rights

Increase Community Integration and Access for People with Disabilities

Background

People with disabilities are still far too often treated as second class citizens, shunned and segregated by physical barriers and social stereotypes. They are discriminated against in employment, schools, and housing, robbed of their personal autonomy, sometimes even hidden away and forgotten by the larger society.

In 1999, the Supreme Court ruled in *Olmstead vs. L.C. and E.W.* that states may not keep people with disabilities in institutions if they are able to live in the community and wish to do so. It recognized the integration mandate of the Americans with Disabilities Act and declared that unnecessary segregation of people with disabilities is a form of discrimination.

One of the structural impediments to the integration of people with disabilities in the community is that Medicaid funding has traditionally gone to institutional services and not community supports. The current funding mechanisms and CMS culture have been geared toward nursing homes. As a result, even well-intentioned moves toward stopping the segregation of people with disabilities may miss the goal of genuine integration.

The Obama Administration has made significant steps in the right direction towards furthering the community integration of people with disabilities. It has expanded a pilot program called “Money Follows the Person” (MFP) that uses Medicaid dollars to move people with disabilities from nursing homes back to the community, closer to family and friends. However, this has affected less than 1% of the nursing home population so far.

Further healthcare reforms provide both opportunities and dangers for people with significant disabilities. For example, some 27 states are planning to implement managed care programs for Medicaid and Medicare recipients. These programs have the potential to deliver healthcare more efficiently and effectively – but may also push people with disabilities into institutions. When states, such as New York and North Carolina, “carve out” nursing home care from the managed care program, it creates an incentive to move the sickest patients out of the managed care system and into an institution. Similarly, what CMS funds as a “community living option” must provide genuine independence and autonomy for people with disabilities.

Extreme delays in processing of Social Security benefits also frustrate integration of people with disabilities. The Social Security Administration (SSA) currently faces a massive backlog in processing of the Social Security disability benefits determination cases. Although the backlog has been reduced from an average of a 500 day wait to an average 347 day wait, it continues to leave hundreds of thousands of people who are in desperate need of assistance on long waiting lists to receive the benefits promised to them in law. The Administration has made a number of important efforts, including automatic eligibility for some disabilities; online applications, and

video hearings for remote locations, but these efforts have been counterbalanced by a 30% increase in disability claims and a decrease in SSA's budget

Further work is needed to ensure that people with disabilities are able to fully participate in the American dream.

Recommendations

1. CMS should increase incentives for states to implement MFP programs.
2. In implementing and approving managed care programs state by state, CMS should follow the guidelines proposed by the National Council on Disability, especially the provision not to approve any state program that "carves out" nursing homes from its long-term services and supports.
3. CMS should fund community living options that genuinely follow community living principles, and respect the autonomy and choices of people with disabilities. Specifically, in CMS' proposed rules for Medicaid Home and Community Based Services (HCBS), CMS should not fund any settings that isolate people with disabilities from the larger community, that do not allow choice of roommates or a private room, and that limit individuals' freedom of choice on daily living experiences.
4. SSA should resolve the Social Security disability benefits determination backlog thoroughly, expeditiously and fairly. In particular, SSA should undertake a complete review of the process for administering disability cases, and should seek additional funding as necessary to reduce the current backlog of benefits determination cases.
5. The Departments of Veterans Affairs (VA) and Defense (DOD) should implement the recommendations of the Veterans' Disability Benefits Commission (VDBC) and the Iraqi and Afghanistan Veterans' of America (IAVA). As documented by the VDBC, the Dole-Shalala Commission, and in myriad news reports, the DOD's and VA's treatment of wounded and disabled veterans has not lived up to our promises to them. The VA should advocate on behalf of beneficiaries, demanding more resources, and eliminating the backlog of 870,000 claims.
6. DOL and CMS should phase out "sheltered workshops" for people with disabilities in favor of mainstream, supported employment services. Under Section 14(c) of the Fair Labor Standards Act of 1938, certain entities are allowed to pay workers with disabilities less than the federal minimum wage. These "sheltered workshops" almost always segregate people with disabilities from non-disabled workers and pay significantly less than minimum wage. The workshops cost more than supported employment programs yet are less effective in moving people to productive employment.

Supplemental Material

- Analysis and Recommendations for the Implementation of Managed Care in Medicaid and Medicare Programs for People with Disabilities:
<http://www.ncd.gov/publications/2012/CMSFebruary272012/>
- Guiding Principles: Successfully Enrolling People with Disabilities in Managed Care Plans:
<http://www.ncd.gov/publications/2012/Feb272012/>
- ASAN Public Comment on Defining Home and Community Based Services:
<http://autisticadvocacy.org/2012/06/asan-public-comment-on-defining-hcbs-in-1915i/>
- Guide to the Updated ADA Standards: <http://www.access-board.gov/ada/guide.htm>
- ACLU Comments to Department of Justice: “Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,” January 2011:
http://www.aclu.org/files/assets/ACLU_Comments_for_Title_II_III_ADA_Regulations_-_2010_-_Equipment_FINAL.pdf
- “Honoring the Call to Duty: Veterans’ Disability Benefits in the 21st Century,” 2007:
<http://veterans.senate.gov/upload/VetDisBenefitComm9-27.pdf>
- Veterans’ Benefits Improvement Act of 2008: <http://www.gpo.gov/fdsys/pkg/PLAW-110publ389/pdf/PLAW-110publ389.pdf>
- U.S. Department of Veterans Affairs: “Claims Transformation.”:
<http://benefits.va.gov/transformation/>

Issue Area: Criminal law reform

Review Discriminatory Crack Cocaine Sentences

Background

In 2010, Congress passed the Fair Sentencing Act, reducing the 100-to-1 federal sentencing ratio between crack and powder cocaine to 18-to-1. Then in 2011, the U.S. Sentencing Commission amended its Sentencing Guidelines based on the FSA and unanimously agreed to make those changes retroactive. Because of statutory mandatory minimum sentences, the Commission's retroactive amendment does not apply to all offenders who were sentenced before the FSA was enacted in 2010. The President should establish a process to review the sentences of those who were sentenced to crack offenses before enactment of the FSA could have their sentences reviewed to determine whether it is warranted to resentence based on the new 18 to 1 ratio. When appropriate, we urge the President to use his constitutional pardon power to commute the sentences of crack cocaine offenders based on the 18 to 1 ratio.

Recommendations

1. The Administration should create a clemency board to review crack cocaine sentences that did not benefit from the Fair Sentencing Act's 18 to 1 ratio.

Supplemental Materials

- The United States Sentencing Commission Most Frequently Asked Questions the 2011 Retroactive Crack Cocaine Guideline Amendment:
http://www.ussc.gov/Meetings_and_Rulemaking/Materials_on_Federal_Cocaine_Offenses/FAQ/index.cfm
- Analysis of the Impact of the Fair Sentencing Act Amendment if Made Retroactive, May 20, 2011:
http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf

Issue Area: Criminal law reform

Deprioritize Medical Marijuana prosecutions

Background

Cultivation centers that are in compliance with state law exist to serve the needs of seriously ill patients suffering from conditions including cancer and HIV/AIDS. In the Ogden Memorandum (*See link to Ogden Memo below*) the Department of Justice instructed that the “prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.” Similarly, the prosecution of operators of cultivation centers that provide seriously ill patients with a doctor-recommended medicine and are in compliance with state law is not an efficient use of federal resources. These prosecutions diminish patients’ access to medicine and unnecessarily trample on the right of states to define their own criminal laws.

We recognize that, as the Cole Memorandum (*See link to Cole memo below*) stated, state law cannot exempt “large-scale, privately-operated industrial marijuana cultivation centers” from federal criminal liability. This does not mean, however, that the Department of Justice should prioritize the prosecution of entities which provide critical medicine to sick Americans. Accordingly, we request that the Department of Justice expand the Ogden/Cole doctrine and instruct U.S. Attorneys that they should not prioritize the prosecution of operators of medical marijuana cultivation centers that are in compliance with state law.

Recommendations

1. The Department should instruct U.S. Attorneys to de-prioritize prosecutions of operators of medical marijuana cultivation centers that are in compliance with state law.

Supplemental Materials

- David Ogden, Deputy Attorney General 2009 Medical Marijuana Memorandum: <http://www.justice.gov/opa/documents/medical-marijuana.pdf>
- James Cole, Deputy Attorney General 2011 Medical Marijuana Memorandum: http://safeaccessnow.org/downloads/James_Cole_memo_06_29_2011.pdf

Issue Area: Criminal law reform

Deprioritize Prosecutions of Low-Level Drug Offenders

Background

In the federal criminal justice system there are very few options for low level drug offenders other than lengthy prison terms. Much of the alarming growth in the federal prison population has been fueled by long mandatory minimum sentences that are associated with federal drug crimes. One reason that the “War on Drugs” has failed is that prosecutors do not focus enough resources on high level traffickers who are responsible for bringing drugs in to the country. Too much time is spent prosecuting and incarcerating small-time, low level offenders. The Department of Justice and U.S. Attorneys around the country should not concentrate their resources on low-level nonviolent offenders who would be better served by educational and rehabilitative services than by prison.

Recommendations

1. The Department of Justice should issue internal guidance instructing U. S. Attorneys nationwide to shift federal resources away from prosecution of non-violent low level drug offenders in favor of more serious crimes.

Supplemental Materials

- 2011 Sourcebook for Federal Sentencing Statistics:
[http://www.uscourts.gov/Data and Statistics/Annual Reports and Sourcebooks/2011/Tab le33.pdf](http://www.uscourts.gov/Data%20and%20Statistics/Annual%20Reports%20and%20Sourcebooks/2011/Tab%20le33.pdf)

Issue Area: Prison reform

Promote Sentencing Alternatives and Effective Rehabilitation and Reentry

Background

An estimated two-thirds of the 650,000 people returning home from prison will be re-arrested for a felony or serious misdemeanor within three years. There are basic services that should be provided to people when they are in prison in order to reduce their chances of reoffending and improve public safety. In addition, for those who do not pose a real risk to the public, alternatives to incarceration such as drug and alcohol treatment, community service, payment of a fine, and probation have been shown to lead to significantly lower recidivism rates. There should be alternatives in place for non-violent offenders so that taxpayers do not have to pay the cost of incarcerating individuals who are not a risk to the public and may receive better services in the community.

Family ties are incredibly important to maintain in order to reduce recidivism and increase public safety. Yet too often, families are destroyed because a parent or child is in prison. Nearly 3 million children have at least one parent in prison. These children are 6 times more likely to be incarcerated than other youth, according to some public health studies. The vast majority of correctional institutions and systems do not try to foster family ties for the prisoners in their care. In fact, many policies exacerbate the difficulties prisoners and their families face in maintaining family bonds.

The BOP should better utilize existing authority to reduce the prison population which will also result in a decrease in the BOP budget all while promoting public safety. BOP should use its operational discretion under 18 U.S.C. § 3624 to, among other things, maximize the reentry time people spend in residential reentry centers as well as home confinement. Also, the agency should use its direct designation authority under 18 U.S.C. § 3621(b) to expand the criteria for and use of “compassionate release” under 18 U.S.C. § 3582(c)(1)(A).

Recommendations

1. *Drug Treatment:* The Bureau of Prisons (BOP) has failed to provide the congressionally-mandated in accordance with 18 U.S.C 3621(e)(2)(B), one-year sentence reduction incentive for thousands of drug addicted offenders who seek to participate in BOP’s Residential Drug Abuse Program (RDAP). BOP should immediately ensure that offenders are permit participation in RDAP in a timely manner which will reduce sentences by as much as a year and allow for an immediate savings of millions.
2. *Community Corrections:* BOP has consistently underutilized its authority under 18 USC § 3621(b) and § 3624(c) to permit prisoners to serve some or all of their sentences in community corrections facilities (CCCs) and home detention as opposed to prison. BOP

should implement its mandate and allow more inmates to serve their sentences in community corrections facilities.

3. *Pre-release custody*: BOP's failure to implement the directive of the Second Chance Act under 18 U.S.C. 3624(c) to give prisoners 12 months in pre-release custody has resulted in many people remaining incarcerated for longer periods of time than necessary. BOP should use its authority to allow more inmates to serve the last 12 months of their sentences in community corrections facilities.
4. *Compassionate Release and Second Look Resentencing*: BOP has underutilized its authority under 18 U.S.C. § 3582(c)(1)(A)(i) to petition the sentencing court for reduction of a prisoner's term of imprisonment where there have been "extraordinary and compelling" changes in the prisoner's circumstances since sentence was imposed. Even after the U.S. Sentencing Commission (USSC) promulgated a more expansive interpretation of that phrase, BOP issued regulations reiterating a very narrow "terminal illness/total disability" basis for seeking reduction of a prison term. BOP should comply with USSC policy guidance authorizing reductions in a wider range of cases, considered "extraordinary and compelling" by the USSC definition.
5. *Family and Community Ties*: BOP should comply with its policy of not sending prisoners to facilities more than 500 miles from their homes and attempt to house prisoners closer to their communities whenever possible. BOP should also commit to facilitating family visits and community ties with flexible visitation hours, child-friendly visitation policies that allow children to interact with and touch their parents except in the most extreme security situations, and increasing avenues for prisoners to maintain community and family ties through email and Skype.

Supplemental Materials

- *Residential Substance Abuse Program: Incentive for Prisoners Successful Completion*. See 18 U.S.C. 3621(e)(2)(B): <http://www.law.cornell.edu/uscode/text/18/3621>
- *Community Corrections: Credit toward service of sentence for satisfactory behavior*. See 18 USC § 3621(b) and § 3624(c): <http://www.law.cornell.edu/uscode/text/18/3621> and <http://www.law.cornell.edu/uscode/text/18/3624>
- *Pre-release custody*. See 18 U.S.C. 3624(c): <http://www.law.cornell.edu/uscode/text/18/3624>
- *Compassionate Release and Second Look Resentencing*: See 18 U.S.C. § 3582(c)(1)(A)(i): <http://www.law.cornell.edu/uscode/text/18/3582>

- U.S. Department of Justice, Federal Bureau of Prisons: Inmate Security Designation and Custody Classification Program Statement 5100-08, Chapter 5 Management Variables And Public Safety Factors http://www.bop.gov/policy/progstat/5100_008.pdf

Issue Area: Prison reform

Reduce Over-Reliance on the Harmful Use of Long-Term Solitary Confinement

Background

Long-term isolated confinement, often called “solitary confinement,” “ad seg,” “SHU,” “SMU” “the hole,” or “supermax” confinement is the practice of placing people alone in cells for 22 hours a day or more with little or no human interaction, reduced natural light, little access to recreation, strict regulation of access to property, such as radios, TV or commissary items, greater constraints on visitation rights, and the inability to participate in group or social activities, including eating. The length of this type of placement varies, but it can last for years. There is a general consensus among researchers that isolated confinement is psychologically harmful for people.

Historically, American researchers and people in the legal system recognized these harms and government curbed the use of solitary confinement as a method of punishment. Since the 1980s, however, “tough on crime” rhetoric has fueled resurgence in the use of long-term isolated confinement and the building of “supermax” facilities, all justified as the only means necessary to punish “the worst of the worst.” Yet the vast majority of prisoners in isolation are not incorrigibly violent criminals. Instead, many are severely mentally ill or developmentally disabled prisoners, who are difficult to manage in prison settings.

The federal system in particular over-uses solitary confinement. During a recent Senate hearing, Bureau of Prisons (BOP) Director Charles Samuels testified that at least 7% of federal prisoners are held in solitary confinement which amounts to about 15,000 people daily. This overuse of solitary confinement sharply contrasts to some states, such as Mississippi. That state’s Director of Corrections, Christopher Epps, testified at the same Senate hearing that Mississippi now holds only 1.4% of its prison population in solitary confinement and that the state has reduced both violence and costs as a result. Other states, such as Colorado and Maine, have engaged in similar reforms with substantial cost-savings and increased prison safety.

Recommendations

1. BOP should adopt policies and practices to reduce sharply its use of long-term isolation consistent with those set forth in the ABA’s Treatment of Prison Standards. See *Supplemental Materials*

Supplemental Materials

- ACLU Briefing Paper: The Dangerous Overuse of Solitary Confinement, http://www.aclu.org/files/pdfs/prison/stop_sol_briefing_paper_july.pdf

- The ACLU has collected relevant articles, reports, and legal materials pertaining to solitary confinement at www.aclu.org/stopsolitary
- Written Statement of the American Civil Liberties Union Before the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights Hearing on *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences*, June 19, 2012: <https://www.aclu.org/criminal-law-reform/aclu-statement-record-senate-judiciary-subcommittee-hearing-solitary-confinement>
- Governing Magazine’s article on Mississippi’s de-population of its supermax prison. *Mississippi: How America's reddest state -- and most notorious prison -- became a model of corrections reform*: <http://www.governing.com/topics/public-justice-safety/courts-corrections/mississippi-correction-reform.html>
- The ABA Standards for Criminal Justice, Treatment of Prisoners, 2010: <http://www.abanet.org/crimjust/policy/midyear2010/102i.pdf>.
- “Hellhole: Is Long Term Solitary Confinement Torture?” by Atul Gawande, *The New Yorker*, March 30, 2009: http://law.justia.com/cfr/title28/28cfr28_main_02.html
- “An American Gulag: Descending into Madness at Supermax” by Andrew Cohen, *The Atlantic*, June 18, 2012: <http://www.theatlantic.com/national/archive/2012/06/an-american-gulag-descending-into-madness-at-supermax/258323>

Issue Area: Prison reform

Repeal 'Special Administrative Measures' Communications Restrictions for Prisoners

Background

Less than two months after the September 11 terrorist attacks on the United States, the Department of Justice (DOJ) issued an interim rule that expanded the scope of the Bureau of Prisons' (BOP) powers under the special administrative measures (SAM) promulgated in the mid-1990's after the first bombings of the World Trade Center and the Alfred P. Murrah Federal Building in Oklahoma. The regulation became effective immediately without the usual opportunity for prior public comment. After 5,000 comments were submitted opposing the new regulations, BOP finalized the rule nearly six years later in April of 2007

The April 2007 rules violate the attorney-client privilege and the right to counsel guaranteed by the Constitution. These SAM regulations allow the attorney general unlimited and unreviewable discretion to strip any person in federal custody of the right to communicate confidentially with an attorney.

The provisions for monitoring confidential attorney-client communications apply not only to convicted prisoners in the custody of the BOP, but to all persons in the custody of DOJ, including pretrial detainees who also have not been convicted of crime and are presumed innocent, as well as material witnesses and immigration detainees, who are not accused of any crime. 28 C.F.R. § 501.3(f).

Recommendations

1. DOJ should repeal the regulation that directs BOP to facilitate the monitoring or review of communications between detainees and attorneys. Repeal the SAMs that restrict communications by certain Bureau of Prisons detainees and prisoners, and end the ability of wardens and the attorney general to issue SAMs. In particular, DOJ should repeal 28 C.F.R. §§ 501.2(e), 501.3(d), (f) and amend 28 C.F.R. §§ 501.2(c), 501.3(c) to comply with the previous regulations.
2. Because of the extreme social isolation allowable under the SAMs, BOP should conduct a mental health screening of all individuals currently subject to SAM rules. This screening should be performed by competent and objective mental health personnel. Any individuals identified as seriously mentally ill should be immediately removed to an institution that can provide appropriate mental health services in an appropriate setting.

Supplemental Material

- ACLU et. al., Comments Submitted to Department of Justice, Regarding Eavesdropping on Confidential Attorney-Client Communications, 66 Fed. Reg. 55062 (proposed October 31, 2001) (submitted Dec. 20, 2001): http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/coalition-comments-regarding-eaves
- Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Sen. Patrick Leahy, November 2001: <http://www.hrw.org/news/2001/11/19/letter-senator-leahy-attorney-client-communications>
- Akhil Reed Amar & Vikram David Arnar, “The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values,” 34 Conn. L. Rev. 1 163 (2002): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963411##
- Heidi Boghosian, “Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege,” 1 Cardozo Pub. L. Pol’y & Ethics J. 15 (2003): <http://law-journals-books.vlex.com/vid/taint-teams-firewalls-thin-armor-privilege-382683>
- Marjorie Cohn, “The Evisceration of the Attorney-Client Privilege in the Wake of September 11,” 2001, 71 Fordham L. Rev. 1233 (2003): <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3877&context=flr>
- Paul R. Rice & Benjamin Parlin Saul, “Is the War on Terrorism a War on Attorney-Client Privilege?” *Criminal Justice Magazine*, American Bar Association, Summer 2002: http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_c_imag_17_2_privilege.html
- Letter from the Brennan Ctr. for Justice at N.Y. Univ. Law Sch. to Michael B. Mukasey, Att’y Gen. 2 (Oct. 20, 2008), available at http://brennan.3cdn.net/301ff4d661c066cf21_p7m6brynx.pdf.
- Laura Rovner & Jeanne Theoharis, “Preferring Order to Justice,” 61 Am. U. L. Rev. 1331 (2012): <http://www.aulawreview.org/pdfs/61/61-5/Rovner-Theoharis.website.pdf>
- “BOP powers under SAM promulgated after WTC and Murrah bombings”. See 66 Fed. Reg. 55062 (October 31, 2001): <http://fl1.findlaw.com/news.findlaw.com/cnn/docs/doj/dojbop66fr55062.pdf>
- “Updated BOP Powers Under SAM”. See 64 Fed. Reg. 16271 (April 4, 2007): <http://www.fda.gov/OHRMS/DOCKETS/98fr/E7-6180.pdf>

- Special 28 CFR Part 501-SAM regulations http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=b5415ddb0e160951e59dbedbc5e161&tpl=/ecfrbrowse/Title28/28cfr501_main_02.tpl

Issue Area: Prison reform

End Restrictions on Prisoners in Communication Management Units

Background

Communication Management Units (CMUs) are a new type of prison unit designed to impose radical restrictions on communications between certain prisoners and the outside world. Currently, the Bureau of Prisons operates two such units, in Terre Haute, Indiana, and Marion, Illinois.

A pending regulation would impose even greater restrictions than those currently in force, limiting CMU prisoners to one fifteen-minute telephone call per month with immediate family members, single one-hour contact visit per month with immediate family members,; and three pages of correspondence, to and from a single recipient each week, “at the discretion of the warden.”

The proposed regulation’s severe restrictions on communications with the news media and with most family members are unprecedented and almost certainly unconstitutional. Moreover, these restrictions will be imposed by prison officials, with no outside review, applying criteria that are so vague as to provide no meaningful limits on official discretion. The proposed regulation is completely unnecessary, as existing law allows the Bureau to monitor the mail, telephone calls, and visits of persons in its custody. Such monitoring fully accommodates legitimate security concerns without trenching so heavily on the rights of prisoners and those in the outside world who wish to communicate with them.

Recommendations

1. The Bureau of Prisons should withdraw Proposed Rule 28 CFR 540.200 et seq.
2. Close the existing CMUs in Marion, Illinois and Terre Haute, Indiana.

Supplemental Material

- Communication Management Units, 75 Fed. Reg. 17324, April 6, 2010: <http://www.gpo.gov/fdsys/pkg/FR-2010-04-06/pdf/2010-7728.pdf>
- Proposed 28 C.F.R. §§ 540.203(a), 540.204(a), 540.205(a), 75 Fed. Reg. 17324, p. 17328-29, April 6, 2010: <http://www.gpo.gov/fdsys/pkg/FR-2010-04-06/pdf/2010-7728.pdf>

ACLU Comments regarding proposed CMU Regulation:
<http://www.aclu.org/files/assets/2010-6-2-CMUComments.pdf>

Issue Area: Prison Reform

Ensure the Full Implementation and Monitoring of the Prison Rape Elimination Act (PREA)

Background

Sexual violence behind bars remains a crisis in this country. Based on a 2010 study of prisons and jails nationwide, the Bureau of Justice Statistics estimated that 88,500 adult inmates were sexually abused in their current facility over the course of one year. In a similar survey of youth in juvenile facilities, a shocking one in eight reported being sexually abused in the previous year. In both types of facilities, staff-on-inmate abuse was more prevalent than abuse perpetrated by inmates.

In 2003, Congress unanimously passed, and President George W. Bush signed into law, the Prison Rape Elimination Act (PREA). PREA called for the development of binding national standards for the prevention, detection, response, and monitoring of sexual violence behind bars. The bipartisan National Prison Rape Elimination Commission was established to develop these standards, and the Commission submitted its recommendations to Attorney General Holder on June 20, 2009. In May 2012, the Attorney General released the final PREA standards. These standards are binding on federal facilities immediately, while state and county systems have one year to come into compliance or risk losing 5 percent of their federal funding.

While paving the way for groundbreaking standards, PREA provides no mechanism for measuring and monitoring compliance. Such mechanisms must be created by the Department of Justice (DOJ) in order to implement the standards effectively. Moreover, appropriations for PREA implementation have been cut drastically every year since its passage, making the prospects for assisting states and monitoring their compliance with the standards even more challenging.

Recommendations

1. *Establish meaningful compliance monitoring of the standards.* For the standards to have an impact, compliance must be monitored and corrections agencies must be held accountable if they fail to meet these base-level obligations. The DOJ should establish guidelines for local compliance monitoring and then provide ongoing federal oversight to ensure sufficient accountability.
2. *Ensure that the Bureau of Prisons (BOP) fully complies with the PREA standards.* Under PREA, BOP is immediately responsible for implementing the PREA standards. Leadership in the DOJ should ensure that such implementation takes place and that BOP's compliance with the PREA standards is subject to rigorous, independent audits as required by the standards.

3. *Require PREA auditors to file their final reports with DOJ and make these reports public.* By simply requiring auditors to forward their final reports to DOJ, the Department can create a centralized clearinghouse for facility reports. This clearinghouse can be used by the public to determine which agencies are in compliance, or attempting to get in compliance, with the PREA standards. It can also help advocates determine which agencies are *not* undergoing audits.

Supplemental Materials

- Raising the Bar Coalition for Justice and Safety Coalition is a coalition of groups working to ensure robust implementation of the PREA standards in communities and jurisdictions nationwide: <http://raisingthebarcoalition.org/>
- The National PREA Resource Center provides assistance to those responsible for state and local adult prisons and jails, juvenile facilities, community corrections, lockups, tribal organizations, and inmates and their families in their efforts to eliminate sexual abuse in confinement: <http://www.prearesourcecenter.org/>
- PREA Standards : www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

Issue Area: Racial justice
Issue Area: Criminal law reform

End Racial Profiling

Background

Racial profiling in law enforcement has been a problem at all levels of government for many years. In June 2003, the Department of Justice (DOJ) issued guidelines purportedly designed to limit racial profiling in federal law enforcement. These guidelines, however, were not binding and contained wide loopholes.

Recommendations

1. Issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based on race, ethnicity, national origin, sex or religion. Include in the order a mandate that federal agencies collect data on hit rates for stops and searches, and that such data be disaggregated by group.
2. DOJ should issue updated guidelines regarding the use of race by federal law enforcement agencies. The new guidelines should clarify that federal law enforcement officials may not use race, ethnicity, religion, national origin, or sex to any degree, except that officers may rely on these factors in a specific suspect description as they would any noticeable characteristic of a subject.

Supplemental Material

- ACLU Testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights on “Ending Racial Profiling in America”, April 17, 2012:
<http://www.aclu.org/racial-justice/statement-anthony-d-romero-submitted-senate-judiciary-subcommittee-hearing-hearing>
- ACLU Letter in support of the End Racial Profiling Act, February 2, 2012:
<http://www.aclu.org/racial-justice/aclu-letter-support-regarding-passage-end-racial-profiling-act>
- ACLU Testimony to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on “21st Century Law Enforcement: How Smart Policing Targets Criminal Behavior”, November 4, 2011: <http://www.aclu.org/racial-justice/written-statement-aclu-hearing-21st-century-law-enforcement-how-smart-policing>

Issue Area: Prison reform

Improve Transparency and Oversight in Correctional Institutions

Background

The United States imprisons a higher percentage of its population than any other country in the world. One in every 100 adults in the U.S. is behind bars. Over 218,000 of the more than 2.3 million people in prisons and jails in this country are in the custody of the Federal Bureau of Prisons (BOP). However, despite the extraordinary number of people who are incarcerated at any given time, there is very little oversight of prisons, jails and juvenile detention facilities or public accountability for what takes place behind bars.

Prisons, by their nature, are closed institutions in which the government, through the prison Administration and staff, has exceptional power over every aspect of prisoners' lives. The potential for abuse of that power is always present. Conditions within the prison can deteriorate to an extent which endangers the lives of staff and inmates. In order to prevent abuse, prisons need effective forms of oversight to ensure that public officials meet their legal obligation to ensure constitutional conditions of confinement.

Currently, no national standards exist for the treatment of prisoners and no systemic national oversight ensures that the constitutional and human rights of prisoners are protected. The federal courts have traditionally provided some necessary oversight. Since the enactment of the Prison Litigation Reform Act (PLRA) in 1996, however, the power of the federal courts to provide oversight has been drastically undercut. Moreover, the courts are unable to address many systemic and managerial problems actively, particularly before they rise to the level of a constitutional violation. As a result, alternative forms of oversight are essential.

Recommendations

1. Allocate increased funding for oversight of BOP within the Office of the Inspector General of the Department of Justice (OIG). OIG conducts independent investigations, inspections, special reviews, and audits of the programs and personnel of the Justice Department, including the BOP. This office should be fully funded or expanded in order to play a more active oversight role for BOP's facilities across the nation and the over 200,000 individuals incarcerated therein.

Supplemental Materials

- The Report of the Commission on Safety and Abuse in America's Prisons, June 2006: http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf

- The American Bar Association August 2008 policy report and recommendation including key requirements for the effective monitoring of correctional and detention facilities:
<http://www.abanet.org/crimjust/policy/am08104b.pdf>

Issue Area: Religious freedom

Broaden the Department of Justice's Work to Protect Religious Freedom

Background

The Department of Justice's work to protect religious freedom has been focused primarily on religious exercise. This is exemplified by the Special Counsel for Religious Discrimination. Created by the Bush Administration's Department of Justice in 2002, the Special Counsel "coordinate[s] cases involving religion-based discrimination among the various sections of the Civil Rights Division, and . . . oversee[s] outreach efforts to religious communities." While the Special Counsel has done some important work promoting the free exercise of religion and seems to have increased its work to enforce the rights of religious minorities, it has virtually ignored the Establishment Clause of the First Amendment. The Department's work on religious freedom must enforce its two complementary protections: the right to religious belief and expression, and a guarantee that the government neither prefers religion over non-religion nor favors particular faiths over others. These dual protections work hand-in-hand, allowing religious liberty to thrive and safeguarding both religion and government from the undue influences of the other.

Recommendations

1. The Attorney General should broaden the Department's work to protect religious freedom, including the special counsel's mandate, to expressly include vigorous enforcement of religious freedom that includes the Establishment Clause in order to help ensure that the government does not promote, endorse, or favor any religious practice or belief.

Supplemental Material

- Role of Special Counsel:
http://www.justice.gov/crt/spec_topics/religiousdiscrimination/religionpamp.php

Issue Area: Reproductive rights

Enhance Access to Emergency Contraceptives

Background

Access to emergency contraception (EC) is crucial in preventing unintended pregnancy and reducing the need for abortion care for women who have experienced contraceptive failure, who have been raped, or who have had unprotected intercourse. Also known as the “morning-after pill,” EC is a concentrated dose of the birth control pills that millions of women take every day. Timing is critical for EC to be effective: It is most effective the sooner it is taken and must be taken within several days of unprotected intercourse or contraception failure. Despite EC’s effectiveness in preventing unintended pregnancies, government policies continue to hinder women’s access to this important reproductive health service. This arises in three areas.

The first concerns over-the-counter access. In 2009, a federal court had directed the FDA to reconsider its previous decision, under the Bush Administration, to limit over-the-counter access to emergency contraception to 18 year olds. The court also ordered the FDA to make over-the-counter access to emergency contraception immediately (within 30 days) available to 17 year olds, finding the FDA’s justification for denying over-the-counter access to 17 year olds “lacks all credibility” and was based on “fanciful and wholly unsubstantiated ‘enforcement’ concerns.” On December 7, 2011, Secretary Sebelius overruled the Food and Drug Administration’s decision to lift age restrictions on over-the-counter sale of emergency contraception, precluding women under 17 from accessing emergency contraception without a prescription, and thereby requiring women 17 and older to be subject to ID restrictions at the pharmacy counter. Emergency contraception is safe for use by women of all ages. Restricting its availability without a prescription to women over the age of 17 was a decision that has no basis in science. That decision endangers the health of teenage women who may otherwise be faced with an unplanned pregnancy or abortion.

Second, in 2004, the Department of Justice issued sexual assault protocols that fail to mention emergency contraception or to recommend that it be offered to victims of sexual assault. Because of the narrow window in which emergency contraception is effective, the Protocol should explicitly state that treatment of sexual assault victims must include routine counseling about and offering of emergency contraception.

Third, although the Indian Health Service (IHS) clinical manual states that “all FDA-approved contraceptive devices should be available” to its patients, reports indicate that emergency contraception is frequently unavailable at IHS facilities. For some Native American women, however, the next closest commercial pharmacy may be hundreds of miles away and transportation costs may be insurmountable, making timely access to emergency contraception difficult, if not impossible for too many women. Even at those IHS facilities where emergency contraception is available, it is often unavailable over-the-counter—despite FDA guidelines, creating further delay by forcing women to make an appointment with a health care provider in

order to obtain emergency contraception. The failure to adequately stock and offer emergency contraception is particularly concerning given the government's own statistics show that Native American women experience sexual assault at especially high rates.

Recommendations

1. The Department of Health and Human Services (HHS) should lift the age restriction on over-the-counter access, ensuring that FDA policy is based on sound science, not politics.
2. The Department of Justice should modify the sexual assault protocols issued by the agency in 2004 to include the routine offering of pregnancy prophylaxis (or "emergency contraception") to sexual assault victims who are at risk of pregnancy from rape.
3. The IHS Director should instruct regional directors and facilities to make emergency contraception available without a prescription and without having to see a doctor to any woman age 17 or over who requests it.

Supplemental Material

- Emergency Contraception, Women's Health Policy Facts, The Henry J. Kaiser Family Foundation (August 2010): <http://www.kff.org/womenshealth/upload/3344-04.pdf>
- FDA Regulations: <http://www.fda.gov/drugs/drugsafety/postmarketdrugsafetyinformationforpatientsandproviders/ucm109775.htm>
- Statement from FDA Commissioner Margaret Hamburg, M.D. on Plan B One-Step (Dec. 7, 2011): <http://www.fda.gov/NewsEvents/Newsroom/ucm282805.htm>
- "Medical Groups Denounce HHS Decision on Access to Emergency Contraception," The American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the Society of Adolescent Health and Medicine (December 7, 2011): <http://www.acog.org/~media/News%20Releases/20111207Release.pdf>
- American Academy of Pediatrics policy statement on Emergency Contraception, *Pediatrics* (Vol. 116 No. 4), October 2005: <http://ec.princeton.edu/news/aap-ecstatement.pdf>
- Provision of Emergency Contraception to Adolescents: Position Paper of the Society for Adolescent Medicine, *Journal of Adolescent Health* (Vol. 31, No. 1), July 2004: http://www.adolescenthealth.org/AM/Template.cfm?Section=Position_Papers&Template=/CM/ContentDisplay.cfm&ContentID=1472

- Robert Steinbrook, "Science, Politics, and Over-the-Counter Emergency Contraception," *Journal of American Medicine Association* (Jan. 25, 2012):
http://tmedweb.tulane.edu/portal/files/open-access/fim-1/ethics/session-5/2_JAMA-2012-Steinbrook-365-6_22182592.pdf
- Obama Lets Politics Trump Science in Plan B Fight:
<http://www.thedailybeast.com/articles/2012/04/06/obama-lets-politics-trump-science-in-plan-b-fight.html>
- "Emergency Contraception Over-the-Counter: The Importance of Expanding Access for Teens," Reproductive Health Technologies Project (September 2011):
http://www.rhttp.org/contraception/emergency/documents/Teen1pagerFinal9.27.11_000.pdf
- Coalition letter, Re: Failure to include information about emergency contraception in National Protocol for Sexual Assault Medical Forensic Examinations, January 6, 2005:
<http://www.aclu.org/reproductive-freedom/coalition-letter-department-justice-regarding-emergency-contraception-protocol>
- ACLU Reproductive Freedom Project Briefing Paper, "Preventing Pregnancy after Rape: Emergency Care Facilities Put Women at Risk," December 2004:
http://www.aclu.org/files/FilesPDFs/rfp_ec.pdf
- "Committee Opinion: Sexual Assault," American College of Obstetricians and Gynecologists (August 2011):
<http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co499.pdf?dmc=1&ts=20120304T1502100085>
- Abstract: Felicia H. Stewart and James Trussell, "Prevention of Pregnancy Resulting from Rape: A Neglected Preventive Health Measure," *19 Am. J. Preventive Med.* 228, 229 (2000): [http://www.ajpmonline.org/article/S0749-3797\(00\)00243-9/abstract](http://www.ajpmonline.org/article/S0749-3797(00)00243-9/abstract).
- "A Survey of the Availability of Plan B and Emergency Contraceptives within Indian Health Service Roundtable Report on the Accessibility of Plan B as an Over the Counter (OTC) within Indian Health Service," Native America Women's Health Education Resources Center (February 2012):
<http://www.nativeshop.org/images/stories/media/pdfs/Plan-B-Report.pdf>
- "Native Americans Struggle with High Rate of Rape," *New York Times* (May 22, 2012):
<http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?pagewanted=all&r=0>

Issue Area: Women's rights

Provide Guidance on Gender-biased Policing of Domestic and Sexual Violence

Background

In 2011, for the first time ever, the Department of Justice (DOJ) investigated a police department's response to domestic and sexual violence as part of its civil rights mandate. While reports regularly surface of the failure of law enforcement agencies to investigate or respond adequately to domestic and sexual violence, thereby endangering victims and their families, the problem of gender-biased policing had never previously been examined by the Special Litigation Section of the Civil Rights Division, which has jurisdiction to investigate law enforcement agencies.

In the last year, DOJ has opened or completed investigations into policing of domestic and sexual violence by the New Orleans Police Department, Puerto Rico Police Department, Maricopa County Sheriff's Office in AZ, and the City of Missoula Police Department in MT. In New Orleans and Puerto Rico, DOJ found serious issues with policing, including reliance on gender stereotypes in dealing with victims and complaints, frequent misclassification or inappropriate downgrading of offenses, and refusals to hold officers accountable for domestic violence committed by them. The ACLU report, *Island of Impunity: Puerto Rico's Outlaw Police Force*, also documented the systemic problems with the police department's handling of these crimes, leading to high rates of domestic violence homicide.

Apart from investigations into specific departments, DOJ has not provided any general information or guidance about how the U.S. Constitution and federal civil rights laws, like 42 U.S.C. § 14141 and §3789d, apply in the context of policing of domestic and sexual violence, or how law enforcement agencies can ensure that their domestic and sexual violence policies and practices meet their civil rights obligations as well as incorporate best practices. Such guidance would be enormously helpful to victims, advocates, and law enforcement agencies by explaining how systemic failures in policing of domestic and sexual violence can violate equal protection, due process, and statutory obligations and by educating agencies about how their policies and practices can be designed to meet their legal obligations and effectively serve their communities.

Recommendations

1. DOJ should issue guidance to law enforcement explaining how law enforcement responses to domestic and sexual violence can violate the U.S. Constitution and federal law and constitute police misconduct. The guidance should explain the applicable laws, the federal government's oversight role, and the basic principles that should govern law

enforcement response, drawing on current evidence of best practices. The guidance should be disseminated widely to law enforcement agencies and advocates.

Supplemental Materials

- Consent Decree, United States v. City of New Orleans (No. 12-1924, E.D. La., July 24, 2012), http://media.nola.com/crime_impact/other/Federal%20Consent%20Decree.pdf
- ACLU, *Island of Impunity: Puerto Rico's Outlaw Police Force* (2012): <http://www.aclu.org/human-rights/failure-police-crimes-domestic-violence-and-sexual-assault-puerto-rico>

Issue Area: Religious freedom

Withdraw Office of Legal Counsel Opinion that Permits Hiring Discrimination in Government-Funded Jobs

Background

When religiously identified organizations get government money to provide social services, they cannot discriminate on the basis of religion (or any other protected class) in these programs. When using their own funds, however, under Title VII of the Civil Rights Act of 1964 these organizations are permitted to choose their employees based on religion, but may not discriminate in employment on any other protected basis. The George W. Bush Administration, though, upended this established understanding of the law. By executive order and federal regulations, it permitted religiously identified organizations to refuse to hire people—because of their religion—for jobs in government-funded programs. These actions halted the federal government’s six-decade commitment to equal opportunity for all Americans who seek government-funded jobs, regardless of their religious beliefs.

Some social service programs, however, contain independent statutory provisions prohibiting discrimination on the basis of religion that could not be so easily undone. In order to get around these other civil rights laws, the Bush Administration developed and promoted the far-fetched assertion that the Religious Freedom Restoration Act (RFRA) provides religiously identified organizations a blanket exemption to prohibitions against hiring discrimination on the basis of religion. This flawed theory was memorialized an Office of Legal Counsel (OLC) opinion, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,” in 2007.

The OLC opinion wrongly permits RFRA to be used as a tool for overriding statutory protections against government-funded religious discrimination and creates a broad right to receive government grants without complying with applicable laws, regulations, and policies. Such laws, regulations, and policies function as conditions on the government grants awarded to these religiously identified organizations. Conditions on government funding normally would not trigger RFRA and thus, the Bush OLC opinion is both unprecedented and far-reaching.

One notable scholar commented that the OLC opinion is “perhaps the most unpersuasive OLC opinion [he’s] read. And that includes the famous John Yoo opinion, by the way” Another leading scholar stated that she believes OLC “erred in its analysis.” In 2009, nearly 60 organizations called for the Obama Administration to review and withdraw the opinion as a necessary step to fulfill President Obama’s campaign promise to end hiring discrimination in government-funded social service programs. *The New York Times* and *The Los Angeles Times* editorialized on the poorly reasoned opinion.

The OLC opinion, unfortunately, remains in effect. As a result, religiously identified organizations that want to use a religious litmus test when hiring people to provide

government-funded social services must simply self-certify that they have religious objections to civil rights laws otherwise prohibiting such discrimination. The Department of Justice has awarded grants to more than ten self-certifying organizations, yet does not seem to engage in any meaningful review or oversight of the organizations' self-certification.

The potential implications of this policy are wide-ranging. It places the interests of religiously identified organizations, which voluntarily seek government funding, above the right of individuals to a workplace free of religious discrimination—a qualified candidate for a job funded by the government could be told she will not be hired because she is the wrong religion. Moreover, because there seems to be no oversight, organizations that self-certify, and are therefore exempted from prohibitions on religious hiring discrimination, may wrongly think they have an absolute right to structure all aspects of their employer-employee relationships in accordance with their religious teachings—even when this would result in impermissible sex discrimination, such as paying women less than men, inquiring about employees' pregnancies, or refusing to interview transgender individuals. Self-certification may also invite these organizations to believe they are exempted from state and local nondiscrimination laws, which may include categories such as sexual orientation, gender identity, or marital status. They also may believe they can be exempted from other conditions on government money these organizations receive to provide social services on behalf of the government.

Recommendation

1. The Department of Justice Office of Legal Counsel should review and withdraw the 2007 OLC opinion that threatens core civil rights and religious freedom protections. DOJ and all other agencies should rescind all policies, procedures, and guidance that rely upon or implement this OLC opinion.

Supplemental Information

- Letter from 58 organizations calling for review and withdrawal of OLC opinion, September 2009: <http://www.aclu.org/religion-belief/coalition-letter-department-justice-urging-withdrawal-office-legal-counsel-memo-reli>
- *Los Angeles Times* editorial, October 2009: <http://articles.latimes.com/2009/oct/03/opinion/ed-faithbased3>
- *New York Times* editorial, October 2009: http://www.nytimes.com/2009/10/14/opinion/14wed4.html?_r=1&ref=opinion
- Blog regarding Freedom of Information Act request regarding exemptions granted to religiously identified organizations from statutory prohibitions on hiring discrimination: <http://www.aclu.org/religion-belief/aclu-foia-request-department-justice-office-justice-programs-regarding-hiring>

- Office of Legal Counsel, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,” June 2007: <http://www.justice.gov/olc/2007/worldvision.pdf>
- Remarks by Prof. Robert Tuttle at the Brookings Institution’s “Faith-Based and Neighborhood Partnerships in the Obama Era: Assessing the First Year and Looking Ahead,” Feb. 18, 2010 (p. 141):
http://www.brookings.edu/~media/events/2010/2/18%20community%20partnerships/20100218_faith_based
- Statement of Prof. Melissa Rogers, Director, Center for Religion and Public Affairs, Wake Forest University Divinity School) for the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties hearing on “Faith-Based Initiatives: Recommendations of the President’s Advisory Council on Faith-Based and Community Partnerships and Other Current Issues,” Nov. 18, 2010 (pp. 25-33):
http://judiciary.house.gov/hearings/printers/111th/111-156_62343.PDF

Issue Area: Religious freedom

Ensure Religion Is Not Used to Discriminate in Government-Funded Programs and Oppose Efforts to Create Discriminatory Exemptions

Background

Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Religious freedom includes two complementary protections: the right to religious belief and expression, and a guarantee that the government does not favor religion or particular faiths. Thus, we have the right to a government that neither promotes nor disparages religion. We have the absolute right to believe whatever we want about God, faith, and religion. And, we have the right to act on our religious beliefs—unless those actions threaten the rights, welfare, and well-being of others.

The right to religious practice deserves strong protection; however, religion cannot be a license to discriminate. When religiously identified organizations receive government funding to deliver social services, they cannot use that money to discriminate against the people they help or against the people they hire, or pick and choose which particular services they will deliver. The government cannot delegate to religiously identified organizations the right to use taxpayer funds to impose their beliefs on others. Religiously identified organizations cannot use taxpayer funds to pay for religious activities or pressure beneficiaries to subscribe to certain religious beliefs. Government-funded discrimination, in any guise, is antithetical to basic American values and to the Constitution.

Religion cannot be used as an excuse to discriminate against employees, customers, or patients. When an organization operates in the public sphere, it must play by the same rules every other institution does. Such organizations should not be given loopholes from laws that ensure equality in the workplace or guarantee access to public accommodations and health care, thus sanctioning discrimination in the name of religion. No American should be denied opportunities, vital services, or equal treatment.

Recommendation

1. Include provisions that prohibit discrimination in the name of religion against beneficiaries, employees, or services in government-funded social service programs and oppose efforts to create discriminatory exemptions in the name of religion in government contracts and grants, as well as in laws and regulations that guarantee equal opportunity and access to services.

Supplemental Material

- ACLU Briefing Paper, *Promoting Equality: An Analysis of the Contraceptive Coverage Rule*, October 2012: http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf
- ACLU of Massachusetts v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012): http://www.aclu.org/files/assets/usccb_decision.pdf.
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- Coalition Letter to President Obama Asking for Clarity on Federally Funded Employment Discrimination and Outlining Other Concerns, September 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-asking-clarity-federally-funded-employment>

Department of Justice: Drug Enforcement Agency

Issue Area: Criminal law reform

Decriminalize Medical Marijuana

Background

The federal Controlled Substances Act (CSA) classifies marijuana as a Schedule I drug. To qualify for Schedule I status, a substance must, among other requirements, have “no currently accepted medical use in treatment in the United States.” 21 U.S.C. § 812(b)(1)(B). Under the CSA, the Attorney General has the authority to reschedule a drug if he finds that it does not meet the criteria for the schedule to which it has been assigned. The Attorney General has delegated this authority to the Administrator of the Drug Enforcement Administration.

The DEA accepted a petition requesting the rescheduling of marijuana on April 3, 2003, and as required by the CSA the petition was referred to the U.S. Department of Health and Human Services (HHS) in July 2004 for a full scientific and medical evaluation. After a long delay in July 2011, the DEA denied the petition asking the federal government to reschedule marijuana from Schedule I. Also in November of 2011, Washington State Governor Chris Gregoire petitioned the federal Drug Enforcement Administration to reclassify marijuana as a Schedule II drug, which would allow doctors to prescribe it as medicine and pharmacists to sell it.

Marijuana does not meet the requirement for Schedule I for several reasons. First, over one-third of the states and the District of Columbia have decriminalized the medical use of marijuana and nearly one million patients nationwide now use medical marijuana as recommended by their doctors and in accordance with state laws. Moreover, contemporary scientific evidence confirms the therapeutic effects of medical marijuana, which provides unique relief for serious conditions, including cancer and HIV/AIDS, when no other medicine is as effective and free of debilitating side effects. Because marijuana has widely accepted medical use in the United States, it does not meet the statutory definition of a Schedule I substance.

Recommendations

1. DEA should affirm Governor Chris Gregoire’s petition to reclassify cannabis as a Schedule II drug because it does not meet the Controlled Substances Act’s definition of a drug that belongs in this most restrictive category.

Supplemental Material

- DEA Petition Requesting Rescheduling of Marijuana (April 3, 2003): http://www.drugscience.org/petition_intro.html

- DEA Denial of Petition To Initiate Proceedings To Reschedule Marijuana of Petition Requesting Rescheduling of Marijuana:
<https://www.federalregister.gov/articles/2011/07/08/2011-16994/denial-of-petition-to-initiate-proceedings-to-reschedule-marijuana>
- Removal of cannabis from Schedule I of the Controlled Substances Act:
http://en.wikipedia.org/wiki/Removal_of_cannabis_from_Schedule_I_of_the_Controlled_Substances_Act

Department of Labor

Issue Area: Women's rights

Issue Area: Racial justice

Provide Pay Equity for Workers

Background

Nearly 50 years after passage of the Equal Pay Act, women still make just 77 cents for every dollar earned by men, and the pay gap is even wider for women of color. Additionally, nearly half of American workplaces either discourage or prohibit employees from discussing pay practices, making it extremely difficult for women to learn they are being paid less than their male colleagues. Over time, the effectiveness of the Equal Pay Act has been weakened by loopholes, leaving women without the resources they need to combat pay discrimination effectively.

To implement President Obama's pledge in his first term to crack down on violations of equal pay laws, the Administration created the National Equal Pay Task Force in January 2010, bringing together the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL), and the Office of Personnel Management (OPM). In July 2010, the Task Force has identified several persistent challenges for women seeking to achieve equal pay, made recommendations to address each challenge, and developed an action plan to implement those recommendations. Such recommendations include improved wage data collection, better coordination between agencies, educating employers and employees on their respective obligations and rights regarding equal pay, improved training for federal employees responsible for equal pay enforcement, strategic enforcement and litigation focused on wage discrimination, improving the federal government's role as a model employer, and Administration support for passage of the Paycheck Fairness Act.

Recommendation

1. The President should issue an executive order protecting employees who work for federal contractors from retaliation for discussing their wages. In the absence of passage of the Paycheck Fairness Act, an executive order is needed as a stopgap measure to protect the 26 million people employed by federal contractors nationwide from pay discrimination.
2. The DOL's Office of Federal Contract Compliance Programs (OFCCP) should finalize its compensation data collection tool, proposed in late 2011, and expand the tool to other types of employment practices in order to help detect other forms of discrimination in the work place. The tool is needed to replace OFCCP's Equal Opportunity Survey, a vital tool discontinued under the Bush Administration, which

ensured federal contractor and subcontractor compliance with non-discrimination requirements.

3. The Administration should fully implement the July 2010 action plan of its National Equal Pay Task Force, which includes recommendations on administrative action to help close the wage gap.
4. The Administration should prioritize bringing both class action and disparate impact cases relating to compensation, undertaking measures to strengthen systemic enforcement of laws prohibiting wage discrimination.

Supplemental Materials

- Equal Pay Task Force Report, April 2012
http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf
- Equal Pay Task Force Recommendations and Action Plan, July 2010
http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf
- Huffington Post: We Can't Wait for Fair Pay, April 2012:
<http://www.aclu.org/blog/womens-rights/we-cant-wait-fair-pay>
- Huffington Post: It's Time to Stop the Catch-22, June 2012:
<http://www.huffingtonpost.com/deborah-j-vagins/the-paycheck-fairness-act-2-b-1568219.html>
- ACLU Letter to President Obama on Equal Pay Day 2012, April 2012:
http://www.aclu.org/files/assets/aclu_letter_to_president_obama_on_retaliation_executive_order_4_17_12_0.pdf
- ACLU Action Urging President Obama to Ban Retaliation in Federal Contracting:
<https://ssl.capwiz.com/aclu/issues/alert/?alertid=61183546>
- ACLU Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/aclu-comments-office-federal-contract-compliance-programs-proposed-data>
- PFA Coalition Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/paycheck-fairness-coalition-sign-comments-office-federal-contract>

- Employment Task Force Coalition Comments on Compensation Data Collection Tool, October 2011: <http://www.aclu.org/racial-justice-womens-rights/employment-task-force-sign-comments-office-federal-contract-compliance>
- ACLU Fact Sheet on Retaliation: http://www.aclu.org/files/assets/aclu_factsheet_on_retaliation_eo_4_2012.pdf
- White House Report: Keeping America's Women Moving Forward: http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf
- ACLU Letter to Senate in Support of Paycheck Fairness Act, May 2012: <http://www.aclu.org/womens-rights/aclu-letter-senate-support-paycheck-fairness-act-s-3220>

Issue Area: Disability rights

Increase Community Integration and Access for People with Disabilities

Background

People with disabilities are still far too often treated as second class citizens, shunned and segregated by physical barriers and social stereotypes. They are discriminated against in employment, schools, and housing, robbed of their personal autonomy, sometimes even hidden away and forgotten by the larger society.

In 1999, the Supreme Court ruled in *Olmstead vs. L.C. and E.W.* that states may not keep people with disabilities in institutions if they are able to live in the community and wish to do so. It recognized the integration mandate of the Americans with Disabilities Act and declared that unnecessary segregation of people with disabilities is a form of discrimination.

One of the structural impediments to the integration of people with disabilities in the community is that Medicaid funding has traditionally gone to institutional services and not community supports. The current funding mechanisms and CMS culture have been geared toward nursing homes. As a result, even well-intentioned moves toward stopping the segregation of people with disabilities may miss the goal of genuine integration.

The Obama Administration has made significant steps in the right direction towards furthering the community integration of people with disabilities. It has expanded a pilot program called “Money Follows the Person” (MFP) that uses Medicaid dollars to move people with disabilities from nursing homes back to the community, closer to family and friends. However, this has affected less than 1% of the nursing home population so far.

Further healthcare reforms provide both opportunities and dangers for people with significant disabilities. For example, some 27 states are planning to implement managed care programs for Medicaid and Medicare recipients. These programs have the potential to deliver healthcare more efficiently and effectively – but may also push people with disabilities into institutions. When states, such as New York and North Carolina, “carve out” nursing home care from the managed care program, it creates an incentive to move the sickest patients out of the managed care system and into an institution. Similarly, what CMS funds as a “community living option” must provide genuine independence and autonomy for people with disabilities.

Extreme delays in processing of Social Security benefits also frustrate integration of people with disabilities. The Social Security Administration (SSA) currently faces a massive backlog in processing of the Social Security disability benefits determination cases. Although the backlog has been reduced from an average of a 500 day wait to an average 347 day wait, it continues to leave hundreds of thousands of people who are in desperate need of assistance on long waiting lists to receive the benefits promised to them in law. The Administration has made a number of important efforts, including automatic eligibility for some disabilities; online applications, and

video hearings for remote locations, but these efforts have been counterbalanced by a 30% increase in disability claims and a decrease in SSA's budget

Further work is needed to ensure that people with disabilities are able to fully participate in the American dream.

Recommendations

1. CMS should increase incentives for states to implement MFP programs.
2. In implementing and approving managed care programs state by state, CMS should follow the guidelines proposed by the National Council on Disability, especially the provision not to approve any state program that "carves out" nursing homes from its long-term services and supports.
3. CMS should fund community living options that genuinely follow community living principles, and respect the autonomy and choices of people with disabilities. Specifically, in CMS' proposed rules for Medicaid Home and Community Based Services (HCBS), CMS should not fund any settings that isolate people with disabilities from the larger community, that do not allow choice of roommates or a private room, and that limit individuals' freedom of choice on daily living experiences.
4. SSA should resolve the Social Security disability benefits determination backlog thoroughly, expeditiously and fairly. In particular, SSA should undertake a complete review of the process for administering disability cases, and should seek additional funding as necessary to reduce the current backlog of benefits determination cases.
5. The Departments of Veterans Affairs (VA) and Defense (DOD) should implement the recommendations of the Veterans' Disability Benefits Commission (VDBC) and the Iraqi and Afghanistan Veterans' of America (IAVA). As documented by the VDBC, the Dole-Shalala Commission, and in myriad news reports, the DOD's and VA's treatment of wounded and disabled veterans has not lived up to our promises to them. The VA should advocate on behalf of beneficiaries, demanding more resources, and eliminating the backlog of 870,000 claims.
6. DOL and CMS should phase out "sheltered workshops" for people with disabilities in favor of mainstream, supported employment services. Under Section 14(c) of the Fair Labor Standards Act of 1938, certain entities are allowed to pay workers with disabilities less than the federal minimum wage. These "sheltered workshops" almost always segregate people with disabilities from non-disabled workers and pay significantly less than minimum wage. The workshops cost more than supported employment programs yet are less effective in moving people to productive employment.

Supplemental Material

- Analysis and Recommendations for the Implementation of Managed Care in Medicaid and Medicare Programs for People with Disabilities:
<http://www.ncd.gov/publications/2012/CMSFebruary272012/>
- Guiding Principles: Successfully Enrolling People with Disabilities in Managed Care Plans:
<http://www.ncd.gov/publications/2012/Feb272012/>
- ASAN Public Comment on Defining Home and Community Based Services:
<http://autisticadvocacy.org/2012/06/asan-public-comment-on-defining-hcbs-in-1915i/>
- Guide to the Updated ADA Standards: <http://www.access-board.gov/ada/guide.htm>
- ACLU Comments to Department of Justice: “Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,” January 2011:
http://www.aclu.org/files/assets/ACLU_Comments_for_Title_II_III_ADA_Regulations_-_2010_-_Equipment_FINAL.pdf
- “Honoring the Call to Duty: Veterans’ Disability Benefits in the 21st Century,” 2007:
<http://veterans.senate.gov/upload/VetDisBenefitComm9-27.pdf>
- Veterans’ Benefits Improvement Act of 2008: <http://www.gpo.gov/fdsys/pkg/PLAW-110publ389/pdf/PLAW-110publ389.pdf>
- U.S. Department of Veterans Affairs: “Claims Transformation.”:
<http://benefits.va.gov/transformation/>

Issue Area: Women’s rights

Provide Wage and Overtime Protections for Home Health Care Workers

Background

In *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007), the Supreme Court upheld a Department of Labor (DOL) regulation that excludes all workers who provide in-home care for elderly or disabled people from Fair Labor Standards Act (“FLSA”) wage and overtime protections. The exclusion applies to employees of home care companies and agencies of any size. The statute, as amended in 1974, clearly exempted home health aides hired directly by the patient. However, it was unclear whether so-called third-party employees (health care aides hired by an agency) were also meant to be exempt. The court found the federal regulation was entitled to deference because Congress had left a definitional gap in the statute, and that the agency's interpretation was reasonable.

The decision was applauded by home care agencies and state governments, which to a large extent bear the cost of home health care through Medicaid. The decision was criticized by many groups, including labor unions and women's groups, noting that home care workers, the majority of whom are low-income women of color are denied wage protections, despite the fact that they provide indispensable services to the elderly and people with disabilities. The current exclusion of home care workers from employment protections disproportionately harms women and perpetuates inequality on racial, ethnic, and national origin grounds.

In 2012, the DOL’s Wage and Hour Division proposed a rule to expand federal minimum wage and overtime protections to cover home care workers. On March 20, 2012, the Workforce Protections Subcommittee of the House Education and the Workforce Committee held a hearing examining DOL’s proposed rule.

Recommendations

1. DOL should finalize its proposed rule to provide that home health care workers employed by agencies and third party employers are entitled to wage and overtime protections and thereby fix the Supreme Court decision in *Long Island Care at Home Ltd. v. Coke*.

Supplemental Material

- ACLU Comments in Support of the Wage and Hour Division’s proposed changes to the companionship and live-in worker regulations under the Fair Labor Standards Act (FLSA), March 2012:
https://www.aclu.org/files/assets/aclu_comments_to_dol_whd_re_flsa_companionship_and_live_in_workers.pdf

- Women's Rights Coalition letter on Proposed Rule, March 2012:
<http://www.aclu.org/womens-rights/womens-groups-coalition-sign-letter-house-subcommittee-hearing-department-labor>
- Labor Coalition Letter on Proposed Rule, March 2012:
https://www.aclu.org/files/assets/labor_coalition_letter_to_house_on_dol_companion_ship_rules.pdf

Issue Area: LGBT rights

Issue Area: Religious Freedom

End Discrimination in Federal Contracts

Background

Policies that allow individuals to be denied jobs or lose them over factors that are unrelated to job performance or ability are unjust. This is especially true for jobs funded by the government. In 1941, President Franklin D. Roosevelt ordered federal agencies to condition defense contracts on an agreement not to discriminate based on race, creed, color, or national origin. In 1963, President Kennedy reinforced the policy with a new executive order, and in 1965, President Johnson signed the current executive order, Executive Order 11246, covering nearly all federal contracts. And in 1998, President Clinton signed Executive Order 13087, which banned discrimination based on sexual orientation in federal employment.

Currently, however, there is no explicit bar to discrimination based upon either sexual orientation or gender identity by federal contractors. Moreover, in 2002, President Bush amended Executive Order 11246 to waive its prohibition on discrimination on the basis of religion by religious corporations—a step backwards for equal employment opportunities. Approximately 26 million workers, or about 22 percent of the U.S. civilian workforce, are employed by federal contractors. That is nearly 10 times as many people as are directly employed by the government, including postal workers. Hearings on the Office of Federal Contract Compliance Programs (OFCCP) before the Subcommittee on Employer-Employee Relations of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess. (1995) (statement of Deputy Assistant Secretary of Labor for Federal Contract Compliance Shirley J. Wilcher).

Expanding the non-discrimination requirements imposed on federal contractors to include sexual orientation and gender identity and restoring protections against religious discrimination do not require any additional statutory authority. The same procurement statutes and inherent constitutional executive power that provided authority for the prior executive orders on contractors can provide sufficient authority for a new executive order. The President's authority to issue those orders has been consistently upheld by the courts. The President should follow in the footsteps of Presidents Roosevelt, Kennedy, and Johnson in expanding the prohibition on discrimination in government.

Recommendations

1. The President should issue an executive order making it a condition of all federal contracts and subcontracts that contractors and subcontractors agree not to discriminate on the basis of sexual orientation or gender identity in any hiring, firing or terms and conditions of employment and rescind Section (4)(c) of Executive Order 13279.

2. The Department of Labor, Office of Federal Contract Compliance, should issue implementing regulations requiring all government contracts to contain an equal opportunity clause that forbids sexual orientation and gender identity discrimination by federal contractors and subcontractors and rescind any changes to implementing regulations that were made to comport with Executive Order 13279. As a model, the Administration can use current Executive Order 11246, which bans discrimination by contractors and subcontractors on the basis of race, religion, sex and national origin. Similarly, the Department of Labor can use 41 C.F.R. 60-1.4 as a model.

Supplemental Materials

- Executive Order 11246:
<http://www.archives.gov/federal-register/codification/executive-order/11246.html>
- Executive Order 13807:
<http://www.gpo.gov/fdsys/pkg/FR-1998-06-02/pdf/98-14689.pdf>
- Executive Order 13279:
<http://www.gpo.gov/fdsys/pkg/FR-2002-12-16/pdf/02-31831.pdf>
- 41 C.F.R. 60-1.4:
<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div5&view=text&node=41:1.2.3.1.1&idno=41#41:1.2.3.1.1.1.4>
- Hearings on the Office of Federal Contract Compliance Programs (OFCCP) before the Subcommittee on Employer-Employee Relations of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess. (1995) (statement of Deputy Assistant Secretary of Labor for Federal Contract Compliance Shirley J. Wilcher)
<http://usfweb2.usf.edu/ea/home-page/aa-ofccp.htm>
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011:
<http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- News Article – “ACLU: Contractor Policy ‘Most Important Step’ Obama Can Take Now to Fight Anti-LGBT Job Bias”
<http://www.metroweekly.com/poliglot/2012/03/aclu-contractor-policy-most-im.html>
- ACLU Blog Post – “President Obama: LGBT Workers Can’t Wait”
<http://www.aclu.org/blog/lgbt-rights/president-obama-lgbt-workers-cant-wait>

Issue Area: LGBT rights

End Discrimination Against LGBT People in Job Corps and Similar Training Programs

Background

To ensure that applicants and participants are evaluated based on their qualifications, many federal agencies and programs have adopted nondiscrimination policies that prohibit adverse treatment on the basis of sexual orientation or gender identity, among other characteristics. The federal Office of Personnel Management (OPM) in 2011 issued “Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace.” Similar protections and guidance are needed for participants in Job Corps and other job training programs.

Recommendations

1. The Department of Labor should amend Job Corps’ nondiscrimination policy to add “sexual orientation” and “gender identity” to the list of non-merit factors that will not be considered in evaluating applications. Similarly, other job training programs operated or funded by the federal government should adopt policies explicitly barring discrimination on the basis of sexual orientation or gender identity, no matter the type of organization running the job training program.
2. The Department of Labor and any other federal agency overseeing job training programs should promulgate guidance for program staff regarding participation by transgender individuals in those programs. This guidance should, like OPM’s 2011 guidance document, address issues of confidentiality and privacy, dress and appearance, name and pronoun usage, sanitary and related facilities, recordkeeping, and access to benefits programs.

Supplemental Material

- U.S. Office of Personnel Management, *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* (May 27, 2011): <http://www.opm.gov/diversity/Transgender/Guidance.asp>

Issue Area: HIV/AIDS

End Discrimination by the Federal Government and Federal Contractors Against People with HIV

Background

Federal law currently makes discrimination by federal agencies, contractors and subcontractors against people with disabilities illegal. However, individuals with HIV are still categorically excluded from a number of jobs with federal contractors, based on the terms of the federal contracts. Requiring HIV-positive people to sue on an individual basis to enforce their ability to work is a time-consuming, expensive and unnecessary process.

In July 2009, the Department of Justice issued guidelines informing state licensing boards and occupational training schools that it is a violation of the Americans with Disabilities Act (ADA) to bar people with HIV from professions such as barbering, massage therapy, and home healthcare assistance. In addition, in July 2010, the Administration released the first National AIDS Strategy, which, among other things, addressed the need to end the persistent stigma and discrimination that those living with HIV and AIDS often face. The National Strategy discussed the need to increase and strengthen enforcement of civil rights laws, such as the ADA, that protect those who are living with HIV and AIDS from discrimination.

Recommendations

1. The President should issue an executive order banning discrimination against people with HIV by the government, federal contractors and subcontractors. The order should provide that no federal agency categorically bars people with HIV from working under any federal contract, and requiring all agencies, contractors and subcontractors to individually assess whether a person living with HIV can perform the functions of the position or activity.
2. The Department of Labor, Office of Federal Contract Compliance, should issue regulations to implement the order. As a model, the President can use current Executive Order 11246, which bans discrimination by contractors and subcontractors on the basis of race, religion, sex and national origin, and the Department of Labor can use 41 CFR 60-1.4.

Supplemental Material

- U.S. Department of Justice, *Questions and Answers: The Americans with Disabilities Act and the Rights of Persons with HIV/AIDS to Obtain Occupational Training and State Licensing* (July 16, 2009): http://www.ada.gov/qahivaid_license.pdf
- The White House, *National HIV/AIDS Strategy for the United States* (July 13, 2010): <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>

Issue Area: LGBT rights

Cover Treatment of Gender Identity Disorder in Federal Employees' Health Benefits Plans and Under Medicare and Medicaid

Background

Gender Identity Disorder (“GID”) is recognized by the medical and mental health professions as a serious medical condition.¹¹ According to the accepted standards of care for the treatment of GID, hormone therapy and/or sex reassignment surgeries to make the body congruent with the individual’s gender identity, as well as mental health care, are medically necessary treatments for many people with this condition.¹² These treatments are not experimental. Decades of clinical experience and medical research have proven them to be effective and essential to the well-being of patients.¹³ Without the necessary treatment, GID can cause severe psychological distress, dysfunction, debilitating depression and a higher probability of suicide.¹⁴ The major national medical and mental health professional groups have issued policy statements recognizing the medical necessity of such treatments and opposing the exclusion of gender transition-related health care (including hormone therapy and surgeries) from medical insurance coverage.¹⁵

Despite this medical consensus, two health insurance programs operated by the federal government exclude coverage of gender transition-related health care to treat GID. The Federal Employee Health Benefits Plans exclude coverage of “services, drugs, or supplies related to sex transformations.” The Centers for Medicare and Medicaid Services excludes “[t]ranssexual surgery, also known as sex reassignment surgery or intersex surgery” from

¹¹ See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 576-82 (4th Edition, Text Revision 2000); American Medical Association House of Delegates, Removing Barriers to Care for Transgender Patients (April 14, 2008) (“AMA Statement”), available at http://www.ama-assn.org/ama1/pub/upload/mm/16/a08_hod_resolutions.pdf.

¹² World Professional Association for Transgender Health (“WPATH”), Standards of Care for Gender Identity Disorders (7th Ed., July 2012), available at <http://www.wpath.org/documents/SOC%20V7%2003-17-12.pdf>; American Psychological Association Policy Statement: Transgender, Gender Identity, and Gender Expression Non-discrimination (Aug. 2008) (“APA Statement”), available at <http://www.apa.org/about/policy/transgender.aspx>) (recognizing the WPATH standards of care as the established standards for treatment of GID); AMA Statement (same).

¹³ WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (2008) (“WPATH Clarification”), at 3, available at <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>

¹⁴ WPATH Clarification; AMA Statement.

¹⁵ See AMA Statement; APA Statement; WPATH Clarification.

Medicare coverage.¹⁶ While hormone therapy is included in Medicare Part D prescription drug plan formularies, some individuals may be denied coverage for hormones that are not consistent with the gender marker appearing in their records.¹⁷

In addition, individuals insured by Medicaid cannot get coverage for gender transition-related care in a majority of the states. Almost half of the states explicitly exclude such care from coverage under Medicaid.¹⁸ These exclusions bar hormone therapy, surgical procedures and sometimes even mental health care. Many additional states exclude coverage for transition-related care by incorrectly deeming such treatment to be experimental or cosmetic.¹⁹

Recommendations

1. The Office of Personnel Management should require that all Federal Employees Health Benefits Plans provide coverage for medically necessary care for Gender Identity Disorder, including gender transition-related care.
2. The Department of Health and Human Services' Centers for Medicare and Medicaid Services should rescind the National Coverage Determination ("NCD") excluding gender transition-related surgery from Medicare coverage and issue an NCD allowing Medicare coverage for medically necessary care for Gender Identity Disorder, including gender transition-related care.
3. The Department of Health and Human Services should enact a federal regulation to prohibit State Medicaid plans from excluding coverage of medically necessary treatment for Gender Identity Disorder, including gender transition-related health care. One way to do this is to add the following provision to 42 C.F.R. Part 440, Subpart B:

440.280 Proscriptions against certain exclusions

A State plan may not exclude any medically necessary services based on the fact that the services are for the treatment of Gender Identity Disorder (also known as gender dysphoria), including gender transition-related care.

¹⁶ Centers for Medicare and Medicaid Services, National Coverage Determination 140.3, available at <http://www.cms.gov/medicare-coverage-database/details/ncd-details.aspx?NCDId=83&ncdver=1&bc=AgAAQAAAAAAAA&>.

¹⁷ See National Center for Transgender Equality, Medicare Benefits and Transgender People, August 2011, available at http://transequality.org/Resources/MedicareBenefitsAndTransPeople_Aug2011_FINAL.pdf.

¹⁸ See Gehi and Arkles, "Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Care for Transgender People," *Sexuality Research & Social Policy*, Dec. 2007, vol. 4, No. 4, available at <http://srlp.org/files/SRLPmedicaidarticle.pdf>.

¹⁹ *Id.*

Supplemental Materials

See footnotes cited in Background section.

Issue Area: Religious freedom

Ensure Religion Is Not Used to Discriminate in Government-Funded Programs and Oppose Efforts to Create Discriminatory Exemptions

Background

Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Religious freedom includes two complementary protections: the right to religious belief and expression, and a guarantee that the government does not favor religion or particular faiths. Thus, we have the right to a government that neither promotes nor disparages religion. We have the absolute right to believe whatever we want about God, faith, and religion. And, we have the right to act on our religious beliefs—unless those actions threaten the rights, welfare, and well-being of others.

The right to religious practice deserves strong protection; however, religion cannot be a license to discriminate. When religiously identified organizations receive government funding to deliver social services, they cannot use that money to discriminate against the people they help or against the people they hire, or pick and choose which particular services they will deliver. The government cannot delegate to religiously identified organizations the right to use taxpayer funds to impose their beliefs on others. Religiously identified organizations cannot use taxpayer funds to pay for religious activities or pressure beneficiaries to subscribe to certain religious beliefs. Government-funded discrimination, in any guise, is antithetical to basic American values and to the Constitution.

Religion cannot be used as an excuse to discriminate against employees, customers, or patients. When an organization operates in the public sphere, it must play by the same rules every other institution does. Such organizations should not be given loopholes from laws that ensure equality in the workplace or guarantee access to public accommodations and health care, thus sanctioning discrimination in the name of religion. No American should be denied opportunities, vital services, or equal treatment.

Recommendation

1. Include provisions that prohibit discrimination in the name of religion against beneficiaries, employees, or services in government-funded social service programs and oppose efforts to create discriminatory exemptions in the name of religion in government contracts and grants, as well as in laws and regulations that guarantee equal opportunity and access to services.

Supplemental Material

- ACLU Briefing Paper, *Promoting Equality: An Analysis of the Contraceptive Coverage Rule*, October 2012: http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf
- ACLU of Massachusetts v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012): http://www.aclu.org/files/assets/usccb_decision.pdf.
- Coalition Letter to President Obama Regarding the 70th Anniversary of the First Executive Order Barring Employment Discrimination, June 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-regarding-70th-anniversary-first-executive-order>
- Coalition Letter to President Obama Asking for Clarity on Federally Funded Employment Discrimination and Outlining Other Concerns, September 2011: <http://www.aclu.org/religion-belief/coalition-letter-president-obama-asking-clarity-federally-funded-employment>

Department of State

Issue Area: Human rights

Accountability for Torture, Extraordinary Rendition, and Wrongful Detention

Background

Following 9/11, the U.S. government authorized and engaged in widespread and systematic torture, extraordinary rendition, and unlawful detention, including incommunicado detention in so-called CIA “black sites”. Hundreds of prisoners were tortured in U.S. custody — some even killed — as a result of interrogation policies authorized at the highest levels of the U.S. government. The U.S. government engaged in the illegal practice of extraordinary rendition, which involved abducting foreign nationals and transferring them to foreign countries for abusive interrogation without providing any due process or protections against torture. Over 800 men have been detained at Guantanamo and in the CIA black sites; the overwhelming majority were never charged with any crime. The United States has held thousands of detainees in Afghanistan — some for more than six years — without access to counsel or a meaningful opportunity to challenge their imprisonment.

While the ACLU and its partner organizations have secured and made publicly available thousands of records documenting torture, extraordinary rendition, and unlawful detention, the government still keeps many records secret. Our nation cannot properly reckon with these rights violations without a full record of them.

If the U.S. government is to restore its reputation for upholding the fundamental rights of humane treatment and due process, it must provide a remedy to victims of torture, extraordinary rendition, and wrongful detention and hold those responsible for such abuses to account. None of the individuals who have sought to challenge their treatment in U.S. custody or extraordinary rendition by the United States have been allowed their day in court. No victims or survivors of torture, rendition to torture, or wrongful detention have been compensated for their suffering. The lack of remedy persists despite the fact that Article Fourteen of the Convention Against Torture requires the United States to ensure “fair and adequate compensation” for torture victims. No senior officials who designed, authorized, or executed the torture of persons in U.S. custody or the transfer of persons to other countries where they were at risk of torture have faced criminal charges. The U.S. government has refused to cooperate with — and indeed has sought to obstruct — investigations by foreign governments into their own officials’ complicity with the United States’ extraordinary rendition, torture, and abuse of prisoners abroad. The continuing impunity and lack of remedy threaten to undermine the universally recognized and fundamental rights not to be tortured or arbitrarily detained, and send the dangerous signal to government officials that there will be no accountability for illegal conduct.

Recommendations

1. The President should take measures to provide non-judicial compensation to known victims and survivors who suffered torture, transfer to torture, or wrongful detention at the hands of U.S. officials and publicly recognize and apologize for the abuses that were committed.
2. The Department of Justice should cease opposing efforts by victims and survivors to pursue judicial remedies by allowing such cases to be litigated on their merits.
3. The President and relevant agencies should formally honor U.S. officials and soldiers who exposed the abuse of prisoners or who took personal or professional risks to oppose the adoption of interrogation policies that violated domestic and international law.
4. The State Department should support through diplomatic channels efforts by other countries to account for their role in the extraordinary rendition, torture, and abuse of prisoners by and at the behest of the United States abroad. The State Department should facilitate full cooperation by all arms of the federal government with any investigations by foreign governments and promote accountability for torture and abuse and transfer to torture and abuse.
5. The President should order the release of all additional government documents that detail the torture program, with minimal redactions to protect only legitimately classified information (and not merely embarrassing or illegal activity). The document release should include the Presidential directive of 9/17/2001 authorizing the CIA to establish the secret "black sites," where CIA torture occurred, and the 2,000 photographs of abuse in facilities throughout Iraq and Afghanistan that the Defense Department continues to suppress.
6. The State Department should respond to petitions filed against the U.S. before the Inter-American Commission on Human Rights on behalf of victims and survivors of torture and forced disappearance.
7. Declassify and release the investigative report by the Senate Select Intelligence Committee regarding the CIA's use of rendition and torture redacting only as necessary to protect legitimate secrets, and not protect the government from embarrassment or continue to conceal illegal activity.

Supplemental Material

- Executive Order 13491 -- Ensuring Lawful Interrogations:
http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations

- ACLU, The Torture Report (2009): <http://www.thetorturereport.org/>
- ACLU, Torture Database: http://www.thetorturedatabase.org/search/apachesolr_search
- ACLU Report, “Enduring Abuse,” Executive Summary, April 27, 2006: <http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive>
- ACLU, Bagram FOIA: <http://www.aclu.org/national-security/bagram-foia>
- ACLU, Accountability for Torture: <http://www.aclu.org/accountability/>

Issue area: Human rights

End Human Trafficking and Forced Labor Facilitated by U.S. Government Contracts

Background

The President has demonstrated his commitment to ending the trafficking and forced labor of foreign workers hired under U.S. government contracts to work in support of U.S. military and diplomatic missions abroad and now must ensure this commitment is fulfilled. Recruited from impoverished villages in countries such as India, Nepal, and the Philippines, men and women—known as Third Country Nationals—are charged exorbitant recruitment fees, often deceived about the country to which they will be taken and how much they will be paid, and once in-country, often have no choice because of their financial circumstances but to live and work in unacceptable and unsafe conditions. These abuses amount to modern-day slavery—all on the U.S. taxpayers' dime.

Human trafficking and forced labor on government contracts is also part of contractor malfeasance that wastes tens of millions of U.S. tax dollars annually. The illicit recruitment fees that trafficked individuals pay, together with the salary cost-cutting techniques that contractors employ, go to enrich prime contractors, subcontractors, local recruiters, and others who profit from the exploitation of individuals wanting to work for government contractors or subcontractors.

On September 24, 2012, President Obama signed an executive order aimed at strengthening existing protections against human trafficking and forced labor in U.S. government contracts. The executive order is a significant step towards ending modern-day slavery facilitated by current government contracting processes.

Recommendations

To ensure that the executive order is implemented and to end profits based on government contracting processes that facilitate human trafficking and forced labor, the next administration must:

1. Ensure that the Federal Acquisition Regulatory Council issues regulations that effectively implement the executive order. These regulations should ensure that contractor employees are provided with written contracts in a language that they understand and that provide details of their conditions of employment, including payment of a fair wage, prior to leaving their home country; establish procedures to ensure that prime contractors are held accountable for the hiring practices of their subcontractors; and protect whistle blowers who report instances of contractor employee abuse from retaliation.
2. Improve oversight and monitoring of U.S. contractors' compliance with existing prohibitions on human trafficking and forced labor by ensuring that contracting agencies, including the State and Defense Departments and USAID (a) conduct regular audits and inspections of their contractors; and (b) implement formal mechanisms to

receive and process all credible reports of human trafficking, forced labor, and other abuses and ensure that such reports are investigated.

3. Improve accountability for human trafficking and labor-rights violations in government contracting processes by ensuring (a) the Justice Department initiates, thoroughly investigates, and where appropriate, prosecutes all U.S. contractors who are suspected of engaging in violations of contract employees' rights; and (b) contracting agencies impose stringent penalties on every contractor who engages in or fails to report such abuses.

Supplemental material

- Executive Order - Strengthening Protections Against Trafficking In Persons In Federal Contracts: <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>
- "Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors," joint ACLU-Yale Lowenstein International Human Rights Clinic report: http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf
- Documents Released Under FOIA on Military Contractor Human Trafficking: <http://www.aclu.org/human-rights/military-contractor-human-trafficking-documents-released-under-foia>

Issue Area: Human rights

Establish an Interagency Working Group to Address Human Rights Obligations

Background

Since 1992, the U.S. has ratified three major human rights treaties in addition to two optional protocols. Yet, there has been insufficient effort to ensure that U.S. domestic law, policy and practice comply with its human rights legal obligations. Focus on human rights implementation has, for the most part, been limited to the periodic reporting and review process by the Geneva-based committees monitoring treaty compliance. In 2010, the current Administration also committed to submitting to a Universal Periodic Review (UPR) at the United Nations Human Rights Council. The United States accepted a number of recommendations made during that UPR process and in March 2012, it announced a plan to implement the accepted recommendations.

The Administration also recently established an interagency Equality Working Group, with its first priority to improve implementation of the International Convention on the Elimination of All Forms of Racism (ICERD) and submitted its Fourth Periodic Report on its adherence to the International Covenant on Civil and Political Rights (ICCPR) and its First Periodic Report under the Optional Protocols to the Convention on the Rights of the Child. In 2009, the Administration took the important step of signing the U.N. Convention of the Rights of Persons with Disabilities and in May 2012 has sought Senate advice and consent for its ratification.

While these recent developments are welcome, they fall short of ensuring that the U.S. government is comprehensively adhering to its human rights obligations across the board and treating these commitments as the framers of the U.S. Constitution intended—as the supreme law of the land. To ensure full human rights compliance, the President needs to institutionalize a broader, comprehensive, proactive, and transparent interagency approach to implementation of U.S. human rights obligations.

Recommendations

To demonstrate the United States' commitment to fully implement its human rights obligations:

1. The President should order the creation of a formal interagency human rights structure, led by the National Security Council, which is transparent, comprehensive and accessible to civil society. The mechanism should be extended to all aspects of U.S. human rights compliance, not only UPR-related implementation; make clear its mandate, authorities, structure and activities; establish explicit civil society points of contact with each agency involved in the structure; and hold regular, periodic meetings with civil society members. The mechanism, which would best be established by an executive order expanding the authorities established in Executive Order 13107, should also ensure

effective collaboration and improved coordination between federal, state, local, and tribal governments on implementation and enforcement of human rights obligations.

2. Require the Department of Justice-led Equality Working Group to establish a clear, comprehensive plan of action to fully implement the ICERD domestically and improve the United States' compliance with the treaty.

Supplemental Material

- Unfinished Business: Turning the Obama Administration's Human Rights Promises into Policy: http://www.aclu.org/files/assets/unfinished_business_aclu_final.pdf
- Oral Statement by Jamil Dakwar, Human Rights Program Director, American Civil Liberties Union delivered to the UN Human Rights Council, March 21, 2012: https://www.aclu.org/files/assets/oral_statement_unhrc_upr_dakwar_final.pdf
- Statement by the Delegation of the U.S. at the 20th Session of the Human Rights Council, Geneva, Switzerland, July 3, 2012: <http://www.humanrights.gov/2012/07/03/open-and-free-expression-exposes-bigotry-and-hatred-to-the-forces-of-reason-and-criticism/>
- [U.S. Implementation Plan for the 2010 Universal Periodic Review, March 16, 2012.](#) Exec. Order 13107, 3 CFR 234 (1998): <http://www.gpo.gov/fdsys/pkg/CFR-1999-title3-vol1/pdf/CFR-1999-title3-vol1-eo13107.pdf>
- United Nations International Convention on the Elimination of All Forms of Racial Discrimination, adopted January 4, 1969: <http://www.state.gov/documents/organization/100294.pdf>
- ACLU and Rights Working Group Report: The Persistence of Racial and Ethnic Profiling in the United States, 2009: http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf
- ACLU Testimony before the U.S. Senate Committee on the Judiciary Subcommittee on Human Rights and the Law on Implementation of Human Rights Treaties, December 2009: http://www.aclu.org/files/assets/ACLU_Statement_on_HR_Treaty_Implementation_FIN_AL.pdf

Issue Area: Women’s rights

Issue Area: Human rights

Implementation of Inter-American Commission on Human Rights Domestic Violence Recommendations

Background

In August 2011, the Inter-American Commission on Human Rights (IACHR) publicly issued a decision finding that the United States had violated the human rights of Jessica Lenahan, a domestic violence survivor, and her three daughters, who were killed after their father kidnapped them and the Castle Rock, Colorado, police failed to enforce Ms. Lenahan’s protective order. The IACHR found that the U.S. violated Ms. Lenahan’s and her daughters’ rights to equality, life, and protection under the American Declaration on the Rights and Duties of Man by its systemic failure to offer a coordinated and effective response to domestic violence.

The IACHR’s decision is the first in a case involving women’s rights in the U.S. and contains seven recommendations for the United States. The first three are individual remedies for Ms. Lenahan: an investigation into the deaths of the three girls; an investigation into the systemic failures that took place relating to the lack of enforcement of the protective order; and full reparations. The remaining four recommendations call for federal and state policy reforms that will ensure the enforcement of protective orders, adequate funding and training to be provided to ensure effective implementation, adoption of public policies and institutional programs aimed at eliminating the stereotypes of domestic violence victims and preventing violence, and protocols relating to the ways in which law enforcement should respond to reports of missing children in the context of restraining order violations.

The State Department represents the U.S. before the IACHR. Since the decision, the ACLU and other representatives for Ms. Lenahan have met twice with representatives of the U.S. government and IACHR Commissioner Tracy Robinson to discuss compliance with the decision. Although the State Department is the federal agency principally charged with developing U.S. human rights policy and representing the U.S. before international human rights tribunals, the State Department has not yet responded in writing to the IACHR decision or to recommendations made by petitioners and has not issued any communication explaining the decision to federal, state, or local agencies. Such an outreach and education role is crucial, and the State Department has experience from other contexts – such as its communications to state and local officials regarding the Vienna Convention on Consular Notification – that it can draw on.

Recommendations

The State Department should implement the recommendations of the IACHR decision by:

1. Working with federal, state, and local officials to conduct investigations into the deaths of Ms. Lenahan's daughters and the failure of police to enforce her protective order;
2. Providing reparations to Ms. Lenahan, including moral reparations in the form of a public apology;
3. Providing an official response to the decision and requests made by petitioners;
4. Hosting a roundtable with the Department of Justice bringing together law enforcement, domestic violence advocates, and human rights experts to develop approaches and strategies regarding implementation of the decision that can then be shared widely; and
5. Disseminating information about the decision to federal, state, and local law enforcement agencies.

Supplemental Materials

- August 2011 IACHR decision: <http://www.aclu.org/womens-rights/jessica-gonzales-v-usa-iachr-final-report>
- Lenahan v. USA – case webpage: <http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa>

Issue Area: Human rights

Prevent Torture and Transfer to Torture

Background

No policy decision has done more damage to the rule of law and our nation's moral authority than the post-9/11 embrace of torture and rendition to torture. Government documents show that hundreds of prisoners were tortured in U.S. custody — some even killed — and that torture policies were developed at the highest levels of the U.S. government. The United States also abducted persons and transferred them either to U.S.-run detention facilities overseas or to the custody of foreign intelligence agencies where they were subjected to torture and other abuse, in some cases after the receiving government gave “diplomatic assurances” that the individuals would not be tortured.

President Obama rejected the torture legacy and has done much to restore the rule of law. On January 22, 2009, the president signed an executive order that categorically prohibited torture, reaffirmed the U.S. government's commitment to Common Article 3 of the Geneva Convention, invalidated the flawed legal guidance on torture prohibitions, and limited all interrogations, including those conducted by the CIA, to techniques authorized by the Army's field manual on interrogation. The Administration has also reportedly adopted recommendations aimed at improving the United States' transfer policies, including recommendations that the State Department have a role in evaluating any diplomatic assurances and that assurances include a monitoring mechanism.

Recommendations

To further restore U.S. moral authority and abide by the prohibition against torture:

1. The President must oppose any and all efforts to return to the use of the so-called “enhanced interrogation techniques.”
2. The President must direct the Homeland Security, State, or Defense Departments not to rely on “diplomatic assurances” to deport (pursuant to 8 C.F.R. § 208.18(c)) or otherwise transfer persons out of United States custody to any country where there is a likelihood of torture.
3. The Departments of Homeland Security and Defense and other relevant agencies must, at a minimum, provide meaningful administrative and judicial review whenever the United States seeks to deport or extradite an individual to a country where there is likelihood of torture, to ensure compliance with U.S. obligations under the UN Convention Against Torture. Such review must extend to the existence and sufficiency of diplomatic assurances.

4. The White House and Defense and State Departments should provide for greater transparency with respect to their policies and procedures related to interrogation and transfers, including by making public the Special Task Force on Interrogations and Transfer Policies recommendations and the subsequent Defense and State Department Inspector General reports.

Supplemental Material

- Executive Order 13491 -- Ensuring Lawful Interrogations:
http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations
- Department of Justice Report, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President, August 2009:
<http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>
- ACLU, The Torture Report, 2009: <http://www.thetorturereport.org/>
- ACLU, Torture Database:
http://www.thetorturedatabase.org/search/apachesolr_search
- ACLU Report, "Enduring Abuse," Executive Summary, April 2006:
<http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive>
- Unfinished Business: Turning the Obama Administration's Human Rights Promises into Policy: <http://www.aclu.org/human-rights/unfinished-business-turning-obama-administrations-human-rights-promises-policy>

Department of Treasury

Issue Area: National security

Issue Area: Privacy

Provide due process protections in use of Financial watch lists

Background

The Treasury Department's Office of Foreign Assets Control (OFAC) maintains two designation lists: the list of Specially Designated Nationals and the list of Specially Designated Global Terrorists. Generally, the lists include individuals and entities alleged to be owned or controlled by, or acting for or on behalf of, targeted countries or designated terrorist groups. The assets of those on the list are blocked, all transactions by them are made criminal, and U.S. persons are generally prohibited from doing business with them. Like the nation's "Terrorist Watch List," OFAC's lists require reform. Innocent individuals and groups have been added to the lists without any meaningful way to challenge their inclusion. Two federal courts, including a federal appeals court, have now held that OFAC's Administration of the Specially Designated Global Terrorist list violates both the Fourth Amendment and the Fifth Amendment, at least when applied to U.S. entities. In 2009 and 2010, a federal district court in Ohio ruled that OFAC asset seizure procedures violated constitutional due process requirements by failing to provide notice and an opportunity to respond meaningfully before freezing a charity's assets pending investigation whether it should be designated. The court said that the Administration must obtain a warrant based on probable cause before seizing an organization's assets.

Recommendations

1. The Treasury Department should amend regulations governing OFAC's designation procedure to include full due process and redress protections for designated U.S. individuals and entities or those present in the United States, and a warrant based upon probable cause to freeze or seize assets. Standards governing such designations should be transparent.

Supplemental Material

- ACLU, KindHearts for Charitable Humanitarian Development, Inc. v. Geithner: <http://www.aclu.org/national-security/kindhearts-charitable-humanitarian-development-inc-v-geithner-et-al>

- Lawyers Committee Report, “The OFAC List, How a Treasury Department Terrorist Watchlist Ensnarers Everyday Consumers,” March 2007:
http://media.washingtonpost.com/wp-srv/business/documents/ofac_list_march07.pdf
- “Blacklisted by the Bank,” *Christian Science Monitor*, August 25, 2003:
<http://www.csmonitor.com/2003/0825/p15s01-wmcn.html>

Department of Treasury: Internal Revenue Service

Issue Area: LGBT rights

Treat Domestic Partners Equally in Benefit Plans

Background

The money that an employer contributes to a benefit plan is generally deductible by the employer, but not included in the income of the employee. Tax laws create rules on what types of benefit plans qualify for this treatment, and some of those laws cover benefits paid to spouses. Questions have been raised about whether plans that cover the domestic partners of employees qualify. Many of the rules require coverage of spouses but do not limit coverage to spouses.

One example is the joint and survivor annuity available under certain plans. The minimum survivor annuity requirements set out in 26 U.S.C. § 417 are minimum requirements that do not prevent employers from allowing same-sex spouses or domestic partners the same access to the joint and survivor annuities as opposite-sex provisions made available to different-sex spouses.

Recommendations

1. The Internal Revenue Service (IRS) should issue guidance that benefit plans including spousal-type benefits can be extended to plan participants with domestic partners. In particular, the IRS should evaluate all law dealing with spouses and federal tax qualified benefits plans, and for all non-limiting laws, issue a regulation or other administrative directive clarifying that the federal tax qualified benefits plan of a private or public employer will not be disqualified merely for treating same-sex partners the same as spouses for plan benefits.
2. The IRS should issue guidance addressing joint and survivor annuities and all other spousal benefits that can be made available by employers without disqualifying their plans.

Supplementary Materials

- U. S. Office of Personnel Management, Same Sex Domestic Partner Benefits, Frequently Asked Questions, *available at* <http://www.opm.gov/faqs/topic/domesticpartner/index.aspx?page=1>.

- Dunning, Matt, Same-sex domestic partner benefits would cost government \$144M over 10 years. Business Insurance (Nov. 19, 2012) *available at* <http://www.businessinsurance.com/article/20121129/NEWS03/121129878#>.

Department of Veterans Affairs

Issue Area: Disability rights

Increase Community Integration and Access for People with Disabilities

Background

People with disabilities are still far too often treated as second class citizens, shunned and segregated by physical barriers and social stereotypes. They are discriminated against in employment, schools, and housing, robbed of their personal autonomy, sometimes even hidden away and forgotten by the larger society.

In 1999, the Supreme Court ruled in *Olmstead vs. L.C. and E.W.* that states may not keep people with disabilities in institutions if they are able to live in the community and wish to do so. It recognized the integration mandate of the Americans with Disabilities Act and declared that unnecessary segregation of people with disabilities is a form of discrimination.

One of the structural impediments to the integration of people with disabilities in the community is that Medicaid funding has traditionally gone to institutional services and not community supports. The current funding mechanisms and CMS culture have been geared toward nursing homes. As a result, even well-intentioned moves toward stopping the segregation of people with disabilities may miss the goal of genuine integration.

The Obama Administration has made significant steps in the right direction towards furthering the community integration of people with disabilities. It has expanded a pilot program called “Money Follows the Person” (MFP) that uses Medicaid dollars to move people with disabilities from nursing homes back to the community, closer to family and friends. However, this has affected less than 1% of the nursing home population so far.

Further healthcare reforms provide both opportunities and dangers for people with significant disabilities. For example, some 27 states are planning to implement managed care programs for Medicaid and Medicare recipients. These programs have the potential to deliver healthcare more efficiently and effectively – but may also push people with disabilities into institutions. When states, such as New York and North Carolina, “carve out” nursing home care from the managed care program, it creates an incentive to move the sickest patients out of the managed care system and into an institution. Similarly, what CMS funds as a “community living option” must provide genuine independence and autonomy for people with disabilities.

Extreme delays in processing of Social Security benefits also frustrate integration of people with disabilities. The Social Security Administration (SSA) currently faces a massive backlog in processing of the Social Security disability benefits determination cases. Although the backlog has been reduced from an average of a 500 day wait to an average 347 day wait, it continues to leave hundreds of thousands of people who are in desperate need of assistance on long waiting

lists to receive the benefits promised to them in law. The Administration has made a number of important efforts, including automatic eligibility for some disabilities; online applications, and video hearings for remote locations, but these efforts have been counterbalanced by a 30% increase in disability claims and a decrease in SSA's budget

Further work is needed to ensure that people with disabilities are able to fully participate in the American dream.

Recommendations

1. CMS should increase incentives for states to implement MFP programs.
2. In implementing and approving managed care programs state by state, CMS should follow the guidelines proposed by the National Council on Disability, especially the provision not to approve any state program that "carves out" nursing homes from its long-term services and supports.
3. CMS should fund community living options that genuinely follow community living principles, and respect the autonomy and choices of people with disabilities. Specifically, in CMS' proposed rules for Medicaid Home and Community Based Services (HCBS), CMS should not fund any settings that isolate people with disabilities from the larger community, that do not allow choice of roommates or a private room, and that limit individuals' freedom of choice on daily living experiences.
4. SSA should resolve the Social Security disability benefits determination backlog thoroughly, expeditiously and fairly. In particular, SSA should undertake a complete review of the process for administering disability cases, and should seek additional funding as necessary to reduce the current backlog of benefits determination cases.
5. The Departments of Veterans Affairs (VA) and Defense (DOD) should implement the recommendations of the Veterans' Disability Benefits Commission (VDBC) and the Iraqi and Afghanistan Veterans' of America (IAVA). As documented by the VDBC, the Dole-Shalala Commission, and in myriad news reports, the DOD's and VA's treatment of wounded and disabled veterans has not lived up to our promises to them. The VA should advocate on behalf of beneficiaries, demanding more resources, and eliminating the backlog of 870,000 claims.
6. DOL and CMS should phase out "sheltered workshops" for people with disabilities in favor of mainstream, supported employment services. Under Section 14(c) of the Fair Labor Standards Act of 1938, certain entities are allowed to pay workers with disabilities less than the federal minimum wage. These "sheltered workshops" almost always segregate people with disabilities from non-disabled workers and pay significantly less than minimum wage. The workshops cost more than supported employment programs yet are less effective in moving people to productive employment.

Supplemental Material

- Analysis and Recommendations for the Implementation of Managed Care in Medicaid and Medicare Programs for People with Disabilities:
<http://www.ncd.gov/publications/2012/CMSFebruary272012/>
- Guiding Principles: Successfully Enrolling People with Disabilities in Managed Care Plans:
<http://www.ncd.gov/publications/2012/Feb272012/>
- ASAN Public Comment on Defining Home and Community Based Services:
<http://autisticadvocacy.org/2012/06/asan-public-comment-on-defining-hcbs-in-1915i/>
- Guide to the Updated ADA Standards: <http://www.access-board.gov/ada/guide.htm>
- ACLU Comments to Department of Justice: “Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,” January 2011:
http://www.aclu.org/files/assets/ACLU_Comments_for_Title_II_III_ADA_Regulations_-_2010_-_Equipment_FINAL.pdf
- “Honoring the Call to Duty: Veterans’ Disability Benefits in the 21st Century,” 2007:
<http://veterans.senate.gov/upload/VetDisBenefitComm9-27.pdf>
- Veterans’ Benefits Improvement Act of 2008: <http://www.gpo.gov/fdsys/pkg/PLAW-110publ389/pdf/PLAW-110publ389.pdf>
- U.S. Department of Veterans Affairs: “Claims Transformation.”:
<http://benefits.va.gov/transformation/>

Issue Area: Women's rights

Facilitate Disability Benefits for Veterans Based on Military Sexual Assault

Background

As the Department of Defense itself recognizes, service members experience high rates of sexual violence while in the military. As veterans, survivors of sexual violence often cope with post-traumatic stress disorder (PTSD) and other disabling health conditions, yet face major hurdles in obtaining disability benefits related to Military Sexual Trauma (MST) from the Department of Veterans Affairs (VA).

Data produced by the VA in response to FOIA litigation filed by the ACLU and the Service Women's Action Network (SWAN) shows that during FY 2008, 2009 and 2010, only 32.3% of MST-based PTSD claims were approved by the Veterans Administration, compared to an approval rate of 54.2% for all other PTSD claims during that time. Among veterans who had their MST-based PTSD claims approved by the VA, women were more likely to receive a 10% to 30% disability rating, whereas men were more likely to receive a 70% to 100% disability rating. Women, therefore, qualified for less disability compensation even when their PTSD claims were approved.

A contributing factor to the low approval rates and harsh treatment of MST-related disability claims is the VA's regulation dealing with claims based on in-service personal assault, which includes military sexual assault. While the veteran's lay testimony is accepted by the VA to establish that other PTSD stressors (such as combat with the enemy or fear of hostile military or terrorist activity) occurred during service, the current provision dealing with in-service personal assault does not provide that the veteran's testimony is sufficient. The provision instead lists types of records that can corroborate the veteran's account of the stressor. It is well documented, however, that the listed types of records simply do not exist in the vast majority of cases because victims of military sexual assault rarely report the crime due to the risk of retaliation by other service members or command.

Recommendation

1. The VA should change its regulation on PTSD claims, 38 C.F.R. § 3.304, so that the veteran's testimony can satisfy the evidentiary burden of establishing that sexual assault occurred during service, so long as medical evidence establishes the diagnosis of PTSD and its connection to the assault and there is no clear and convincing evidence to the contrary.

In particular, we recommend the following proposed language for 38 C.F.R. § 3.304(f)(5): If the evidence establishes a diagnosis of PTSD, and the veteran's mental health provider connects the PTSD to the claimed stressor of in-service personal assault, then in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone is sufficient to establish the occurrence of the claimed in-service stressor of personal assault.

Supplemental Materials

- July 2012 Blog regarding House hearing on VA disability claims - <http://www.aclu.org/blog/womens-rights/we-must-honor-service-all-veterans-including-sexual-assault-victims>
- July 11, 2012 testimony of Anu Bhagwati, Service Women's Action Network, presenting data on VA disability claims obtained through the ACLU-SWAN FOIA lawsuit: <http://veterans.house.gov/witness-testimony/ms-anu-bhagwati-0>
- Information about the FOIA lawsuit against the Departments of Defense and Veterans Affairs regarding their responses to military sexual assault: <http://www.aclu.org/womens-rights/service-womens-action-network-v-department-defense>

Equal Employment Opportunity Commission

Issue Area: Women’s rights

Issue Area: Racial justice

Issue Area: LGBT rights

Issue Area: Disability rights

Issue Area: Immigrants’ rights

Strengthen Equal Employment Opportunities

Background

Under the Obama Administration, the Equal Employment Opportunity Commission (EEOC) has made progress on effectively enforcing anti-discrimination laws that ensure freedom from discrimination in the workplace. The Commission adopted a Strategic Plan in February 2012 which carefully targets enforcement efforts by identifying important priority issues and setting parameters for determining the focus of coordinated enforcement efforts. Further efforts are needed to ensure that the Commission lives up to the goals of the plan, and ensures workplace fairness for all workers, including women, communities of color, people with disabilities, and the LGBT community.

Recommendations

1. The EEOC should prioritize bringing class action and disparate impact cases to address systemic problems in the workforce. The EEOC should bring these cases to help to strengthen enforcement of laws prohibiting traditional areas of employment discrimination such as compensation discrimination, as well as emerging areas, such as national origin, LGBT, pregnancy, and caregiver discrimination.
2. The EEOC should prioritize problems that affect large numbers of workers – especially the huge numbers of people with disabilities who are not in the workforce. According to 2011 data from the Department of Labor, people with disabilities have an unemployment rate that is 85% higher than the rest of the population. The Commission should hold hearings to explore discrimination against people with disabilities in hiring and promotion and should prioritize cases that show a disparate impact on people with disabilities in hiring and promotion.
3. The EEOC must further strengthen efforts to combat pregnancy discrimination by issuing updated guidance to clarify that the Pregnancy Discrimination Act (PDA) requires employers to grant pregnant workers the same light-duty and other benefits and accommodations that it is required to extend to other workers who are similar in their ability or inability to work, including workers who are entitled to reasonable accommodations under the amended Americans with Disabilities Act and workers who are injured on the job. The Commission should make clear that pregnant workers need

not prove discrimination by means of comparator evidence where the employer has acted based on stereotypes about pregnant workers and mothers. Guidance should also explain that employers may not penalize women who take statutorily protected leave, and clarify that discrimination against breastfeeding workers, such as denying them minor workplace adjustments required to pump breast milk, is prohibited by Title VII as amended by the PDA.

4. Consistent with its responsibility to lead the federal government's efforts to end workplace discrimination through the development of uniform standards defining the nature of sex discrimination under federal statutes, Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978), the EEOC should develop and issue guidance and best practices for private, state and local employers' compliance with Title VII's prohibition on sex discrimination against transgender employees. The guidance and best practices should specify standards for compliance with Title VII with respect to confidentiality and privacy, dress and grooming codes, name and pronoun usage, bathroom and locker room usage, and record-keeping and could be patterned after the U.S. Office of Personnel Management's *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*.
5. The EEOC should issue guidance stating that the Supreme Court decision, *Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) (foreclosing back pay to undocumented immigrants whose rights under the National Labor Relations Act had been violated), does not limit claims or remedies available under existing law (Title VII) for any form of discrimination against undocumented workers, including discriminatory firings.

Recognizing that undocumented workers are particularly vulnerable to employer abuse, in 1999 the EEOC issued a guidance clarifying that with certain narrow exceptions, undocumented workers were entitled to the same relief as other victims of discrimination. In June 2002, responding to the Supreme Court's opinion in *Hoffman*, the EEOC rescinded its earlier guidance. Though the EEOC's Rescission states that neither *Hoffman* nor the Rescission calls into the question "the settled principle of law that undocumented workers are covered by the federal employment discrimination statutes," the EEOC's Rescission has resulted in substantial confusion.

6. The Commission should ensure the exception in Title VII, which permits a religious organization to prefer members of its own religion in hiring, is not used as a defense to otherwise impermissible employment discrimination against its employees. This is so even when the religious organization asserts religious tenets as justification for the impermissible discriminatory action.
7. The EEOC should take steps to reduce its backlog of cases.

Supplemental Materials:

- Civil Rights Coalition Comments on EEOC Strategic Enforcement Plan, June 19, 2010
<http://www.aclu.org/racial-justice-womens-rights/coalition-comments-eeoc-strategic-enforcement-plan>
- EEOC Strategic Plan: http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm
- Draft EEOC Strategic Enforcement Plan:
http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm
- ACLU Comments on EEOC Strategic Enforcement Plan:
http://www.aclu.org/files/assets/aclu_comments_on_eeoc_draft_strategic_enforcement_plan_9_18_12.pdf
- 2012 EEOC Guidance: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- ACLU testimony to EEOC 2011:
http://www.aclu.org/files/assets/aclu_statement_to_eeoc_on_criminal_records_discrimination_7_25_11_corrected.pdf
- ACLU Blog, “EEOC: Help Stop Discriminatory Barriers to Employment”:
<http://www.aclu.org/blog/womens-rights/eeoc-help-stop-discriminatory-barriers-employment>
- ACLU Blog, “Updated EEOC Guidance on Criminal Records: Neither the Apocalypse nor the Total Solution”:
<http://www.aclu.org/blog/immigrants-rights-womens-rights/updated-eeoc-guidance-criminal-records-neither-apocalypse-nor>
- ACLU Comments on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities, March 2012:
http://www.aclu.org/files/assets/aclu_comments_on_pregnancy_and_caregiver_discrimination_final_0.pdf
- Meeting of February 15, 2012 - Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: <http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm>
- Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. Times, Jan. 30, 2012:
<http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html>

- EEOC Directives Transmittal 915-002, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Laws, June 2002: <http://www.eeoc.gov/policy/docs/undoc-rescind.html>
- EEOC, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Law, October 1999 (rescinded by the EEOC after Hoffman Plastic): <http://www.eeoc.gov/policy/docs/undoc.html>
- National Employment Law Project Report, “Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v NLRB,” January 2003: http://www.workplacefairness.org/nelp-undocumented_violations_hoffman
- EEOC Press Release: EEOC Announces Final Bipartisan Regulations for the ADA Amendments Act, March 2011: <http://www.eeoc.gov/eeoc/newsroom/release/3-24-11.cfm>

Issue Area: Women's rights

Issue Area: Racial justice

Provide Pay Equity for Workers

Background

Nearly 50 years after passage of the Equal Pay Act, women still make just 77 cents for every dollar earned by men, and the pay gap is even wider for women of color. Additionally, nearly half of American workplaces either discourage or prohibit employees from discussing pay practices, making it extremely difficult for women to learn they are being paid less than their male colleagues. Over time, the effectiveness of the Equal Pay Act has been weakened by loopholes, leaving women without the resources they need to combat pay discrimination effectively.

To implement President Obama's pledge in his first term to crack down on violations of equal pay laws, the Administration created the National Equal Pay Task Force in January 2010, bringing together the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL), and the Office of Personnel Management (OPM). In July 2010, the Task Force has identified several persistent challenges for women seeking to achieve equal pay, made recommendations to address each challenge, and developed an action plan to implement those recommendations. Such recommendations include improved wage data collection, better coordination between agencies, educating employers and employees on their respective obligations and rights regarding equal pay, improved training for federal employees responsible for equal pay enforcement, strategic enforcement and litigation focused on wage discrimination, improving the federal government's role as a model employer, and Administration support for passage of the Paycheck Fairness Act.

Recommendation

1. The President should issue an executive order protecting employees who work for federal contractors from retaliation for discussing their wages. In the absence of passage of the Paycheck Fairness Act, an executive order is needed as a stopgap measure to protect the 26 million people employed by federal contractors nationwide from pay discrimination.
2. The DOL's Office of Federal Contract Compliance Programs (OFCCP) should finalize its compensation data collection tool, proposed in late 2011, and expand the tool to other types of employment practices in order to help detect other forms of discrimination in the work place. The tool is needed to replace OFCCP's Equal Opportunity Survey, a vital tool discontinued under the Bush Administration, which ensured federal contractor and subcontractor compliance with non-discrimination requirements.

3. The Administration should fully implement the July 2010 action plan of its National Equal Pay Task Force, which includes recommendations on administrative action to help close the wage gap.
4. The Administration should prioritize bringing both class action and disparate impact cases relating to compensation, undertaking measures to strengthen systemic enforcement of laws prohibiting wage discrimination.

Supplemental Materials

- Equal Pay Task Force Report, April 2012
http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf
- Equal Pay Task Force Recommendations and Action Plan, July 2010
http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf
- Huffington Post: We Can't Wait for Fair Pay, April 2012:
<http://www.aclu.org/blog/womens-rights/we-cant-wait-fair-pay>
- Huffington Post: It's Time to Stop the Catch-22, June 2012:
http://www.huffingtonpost.com/deborah-j-vagins/the-paycheck-fairness-act_2_b_1568219.html
- ACLU Letter to President Obama on Equal Pay Day 2012, April 2012:
http://www.aclu.org/files/assets/aclu_letter_to_president_obama_on_retaliation_executive_order_4_17_12_0.pdf
- ACLU Action Urging President Obama to Ban Retaliation in Federal Contracting:
<https://ssl.capwiz.com/aclu/issues/alert/?alertid=61183546>
- ACLU Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/aclu-comments-office-federal-contract-compliance-proposed-data>
- PFA Coalition Comments on Compensation Data Collection Tool, October 2011:
<http://www.aclu.org/racial-justice-womens-rights/paycheck-fairness-coalition-sign-comments-office-federal-contract>
- Employment Task Force Coalition Comments on Compensation Data Collection Tool, October 2011: <http://www.aclu.org/racial-justice-womens-rights/employment-task-force-sign-comments-office-federal-contract-compliance>

- ACLU Fact Sheet on Retaliation:
http://www.aclu.org/files/assets/aclu_factsheet_on_retaliation_eo_4_2012.pdf
- White House Report: Keeping America's Women Moving Forward:
http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf
- ACLU Letter to Senate in Support of Paycheck Fairness Act, May 2012:
<http://www.aclu.org/womens-rights/aclu-letter-senate-support-paycheck-fairness-act-s-3220>

Issue Area: LGBT rights

Provide Guidance Regarding Coverage of Transgender Workers Under Existing Ban on Sex Discrimination

Background

The Equal Employment Opportunity Commission (EEOC) recently ruled, in *Macy v. Holder*, that Title VII's ban on sex discrimination in employment also bans discrimination against transgender people.

Recommendation

1. Consistent with its responsibility to lead the federal government's efforts to end workplace discrimination through the development of uniform standards defining the nature of sex discrimination under federal statutes, Executive Order 12067, the EEOC should develop and issue guidance and best practices for private, state and local employers' compliance with Title VII's prohibition on sex discrimination against transgender employees. The guidance and best practices should specify standards for compliance with Title VII with respect to confidentiality and privacy, dress and grooming codes, name and pronoun usage, bathroom and locker room usage, and record-keeping and could be patterned after the U.S. Office of Personnel Management's *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*.

Supplemental Material

- *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency, No. ATF-2011-00751 (Apr. 20, 2012):
<http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>
- Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978), at § 1-301(a),
<http://www.archives.gov/federal-register/codification/executive-order/12067.html>.
- U.S. Office of Personnel Management, *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* (May 27, 2011):
<http://www.opm.gov/diversity/Transgender/Guidance.asp>
- ACLU Blog Post – “EEOC Breakthrough: Anti-Transgender Discrimination Is Unlawful”
<http://www.aclu.org/blog/lgbt-rights-womens-rights/eeoc-breakthrough-anti-transgender-discrimination-unlawful>

Federal Communications Commission

Issue Area: Free speech

Reclassify Broadband Services and Support Open Internet Principles and Practices

Background

Open Internet principles prohibit Internet providers from censoring lawful content, services, or users. The Internet has blossomed into one of today's most important mediums for the free exchange of ideas and information because of its openness. When Internet providers act as gatekeepers for what individuals can see and do online, they threaten the future of the Internet as we know it. Of course, Internet providers provide enhanced services and even content (Comcast owns NBC, for instance), and are entitled to First Amendment protection when they engage in press activities or commercial speech. But, the simple provision of pure broadband Internet access can constitutionally be subject to appropriate open Internet rules.

There are numerous examples of phone companies and other broadband Internet providers discriminating based on content. For example, Comcast illegally blocked its own subscribers from using popular file-sharing services such as BitTorrent. Verizon Wireless censored all grassroots text-messaging by NARAL Pro-Choice America. At the 2007 Lollapalooza concert, AT&T censored an online Pearl Jam song that criticized the President. Broadband providers are able to engage in such activity because of the natural monopolies their networks grant them and the difficulties in providing for adequate competition among the large "backbone" networks.

The Internet was created under a regime of openness, and an explosion of innovation took place under that regime. Until the commission rule at issue in the Supreme Court's *Brand X* decision in 2005, telephone- and cable-based Internet operators were required to make Internet service "available on nondiscriminatory terms and conditions to all comers."

Open Internet principles represent a preservation of longstanding law rather than a new "regulation of the Internet." The FCC acknowledged that fact in its Comcast/BitTorrent ruling, in which it found that online censorship like Comcast's "poses a substantial threat to both the open character and efficient operation of the Internet, and is not reasonable."

In December 2010, the FCC passed new rules to protect Internet openness. The rule grants full network neutrality protections for the wired Internet, which includes cable and DSL service to homes and businesses, but provides lesser protections for wireless broadband service. The rule also does not reclassify providing simple broadband Internet access as a telecommunications service, which the ACLU and other proponents of network neutrality have long urged. Treating broadband access as similar to phone service would have allowed the FCC to rely on its broader regulatory authority under Title II of the Communications Act to enforce network neutrality principles. As a technical matter, simply providing consumers the ability to exchange data over

the public Internet should be treated the same as the telecommunications networks that are rightly subject to Title II common carrier regulation.

Recommendations

1. The FCC should reclassify simple broadband service as a telecommunications service to give the Commission a firmer legal footing to enforce open Internet protections as it continues to fight challenges to its Open Internet rule.

Supplemental Material

- ACLU Letter Opposing H.J. Res. 37, disapproving the rule submitted by the Federal Communications Commission with respect to regulating the Internet and broadband industry practices, April 2011: http://www.aclu.org/files/assets/ACLU_Letter_to_the_House_Opposing_a_Resolution_Disapproving_a_Crucial_Net_Neutrality_Rule.pdf
- ACLU Scores the Senate Vote on 'Net Neutrality' Disapproval, November 2011: <https://ssl.capwiz.com/aclu/vote.xc/?votenum=200&chamber=S&congress=1121&voteid=61464231&state=US>
- Network Neutrality 101 - Why the Government Must Act to Preserve the Free And Open Internet: <http://www.aclu.org/free-speech-technology-and-liberty/network-neutrality-101-why-government-must-act-preserve-free-and->
- ACLU Testimony for the House Committee on the Judiciary Task Force on Competition Policy and Antitrust Laws Hearing on Net Neutrality and Free Speech on the Internet, March 2008: <http://judiciary.house.gov/hearings/pdf/Fredrickson080311.pdf>
- ACLU testimony before the FCC on Broadband and the Digital Future, July 2008: <http://www.aclu.org/free-speech/aclu-tlp-and-aclu-pa-comments-fcc-re-hearing-broadband-and-digital-future>
- ACLU fact sheet, "Net Neutrality Myths and Facts": <http://www.aclu.org/free-speech/net-neutrality-myths-and-facts>
- Consumer Federation of America and Free Press, "The Importance of the Internet and Public Support for Network Neutrality: National Survey Results," January 2006: http://www.consumerfed.org/elements/www.consumerfed.org/file/net_neutrality_poll.pdf

- US Congressional Research Service. Net Neutrality Background and Issue (RS22444, December 20, 2007), by Angele A. Gilroy: <http://www.fas.org/sgp/crs/misc/RS22444.pdf>

Issue Area: Free speech

Preserve Media Diversity

Background

Currently, a few corporations control most of what Americans hear on radio, see on television and read in print. Increasing media consolidation endangers the diversity of opinion vital to self-government, and media diversity should be fostered through regulation to the maximum extent possible.

The Federal Communications Commission (FCC) has facilitated media consolidation by the relaxation of several media ownership rules. Specifically, in 2002, the FCC proposed to remove what at that time was a 28-year ban on one company owning both a daily public newspaper and a full-service broadcast television or radio station, known as the “newspaper-broadcast cross-ownership rule.” Following a court decision blocking this proposed change, the FCC again attempted to relax the newspaper-broadcast cross-ownership rule in 2006, which was likewise rejected by the courts for failure to comply with certain administrative requirements.

Finally, as part of the requirement that it reassess media ownership rules every four years, the FCC issued a notice of proposed rulemaking in 2011 for its 2010 quadrennial rulemaking (the “2010 proposed rule”). Similar to the 2002 and 2006 proposals, in the top 20 markets, the 2010 proposed rule would allow cross-ownership of (1) a television station and newspaper, so long as the television station is not one of the top four in the market and there remain eight independent major media voices (television stations and major newspapers); and (2) a radio station and daily newspaper. Waivers would be available on a case-by-case basis, and combinations in all other markets would similarly be considered on a case-by-case basis, subject to relatively high presumptions that cross-ownership there would not be in the public interest.

Americans continue to rely for the majority of their local news on local television stations and newspapers. The 2010 proposed rule goes too far in permitting joint ownership of major local news outlets, and will only accelerate the current trend of consolidation and the consequent decrease in viewpoint diversity. As the FCC notes, the internet—while certainly rising in popularity—has yet to provide adequate competition for local television and print media.

Additionally, the 2010 proposed rule would eliminate the radio-television cross-ownership rule, which limits common ownership of television and radio stations based on market size. Much of the FCC’s proposal is based on the lack of substitutability between radio and television, which is largely irrelevant to the promotion of localism and viewpoint diversity. It is also not clear that the current local radio rule (limiting the absolute number of commonly owned stations in a market) will serve to limit the effect of removing the radio-television rule in smaller markets.

Recommendations

1. The FCC should abandon the relaxation of the newspaper-broadcast cross-ownership rule, and retain the radio-television cross-ownership rule (at least for smaller markets), in its final 2010 quadrennial media ownership rulemaking.

Supplemental Material

- Prometheus Radio Project v. FCC (“Prometheus II”), 652 F.3d 431 (3d Cir. 2011) (vacating and remanding 2006 newspaper-broadcast cross-ownership rule):
<http://www.ca3.uscourts.gov/opinarch/083078p.pdf>.
- Notice of Proposed Rulemaking on Media Ownership Rules:
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-186A1.pdf

Issue Area: Free speech

Stop Censoring Broadcast Content through Enforcement of Indecency Laws

Background

In June 2012, the Supreme Court decided *Federal Communications Commission (“FCC”) v. Fox Television Stations (“Fox II”)*. The case involved a challenge to the FCC’s interpretation of the federal statute permitting “indecent” regulation on the airwaves, which, the FCC claimed, allowed it to punish “fleeting expletives” and momentary nudity. The Court narrowly ruled against the government, finding that the FCC failed to give broadcasters sufficient notice that isolated swear words or glimpses of nudity could be legally actionable. The Court did not, however, address the underlying constitutional challenge to the “fleeting expletives” policy, and left the FCC open to further revise the policy in light of “the public interest and applicable legal requirements.”

Section 1464, the indecency statute, is both outmoded and unconstitutional. Television viewers can simply subscribe to cable or log onto the internet to access material with far more than “fleeting expletives” or momentary nudity, rendering the “scarcity” rationale for regulating the broadcast media obsolete. Further, there are numerous cases of broadcasters self-censoring educational and public affairs material to avoid running afoul of section 1464. In just one instance, numerous CBS affiliates decided not to air an award-winning documentary about the 9/11 attacks because of concerns over expletives in real audio footage of firefighters responding to the disaster. This self-censoring demonstrates the clear constitutional infirmities in the statute, and the negative effects for free speech resulting from the FCC’s guidance on how the statute will be enforced.

Recommendations

1. The President should express his support for repeal of 18 U.S.C. § 1464.
2. The FCC should issue public guidance that it will abandon all future indecency enforcement actions. At the very least, it should return to its enforcement posture prior to the violation in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), where enforcement was exceedingly rare. As noted above, the “fleeting expletives” guidance at issue in the *Fox* cases provided little direction for broadcasters, resulting in the self-censorship of programming that simply cannot be considered “indecent” under any reasonable meaning of the word.

3. The FCC's Consumer Advisory Committee should adopt a recommendation to the FCC that it cease enforcing the indecency provision of § 1464.

Supplemental Material

- ACLU amicus brief in *Fox II*: http://www.aclu.org/files/assets/10-1293_bsac_american_civil_liberties_union.pdf

Federal Trade Commission

Issue Area: Privacy

Stop Involuntary Online Consumer Tracking

Background

Rapid technological advances and the lack of an updated privacy law have resulted in a system where Americans are routinely tracked as they surf the Internet. The result of this tracking – often performed by online marketers – is the collection and sharing of Americans’ personal information with a variety of entities including offline companies, employers and the government. As greater portions of our lives have moved online, unregulated data collection has become a growing threat to our civil liberties.

The Internet allows us to connect to one another and share information in ways we never before could have imagined. Many of the civil liberties benefits of the Internet – the ability to access provocative materials more readily, to associate with non-mainstream groups more easily, and to voice opinions more quickly and at lower cost– are enhanced by the assumption of practical anonymity. Similarly, consumers are largely unaware of the breadth of information collection and the various uses to which it is put.

In short, Americans assume that there is no central record of what they do and where they go online. However, in many instances that is no longer the case. Behavioral marketers are creating profiles of unprecedented breadth and depth that reveal personal aspects of people’s lives including their religious or political beliefs, medical information, and purchase and reading habits. Even as behavioral targeting continues to grow, its practitioners have already demonstrated a disturbing ability to track and monitor an individual’s actions online.

Technology is already moving to help. Browser manufacturers are creating technical mechanisms so that web surfers can indicate their preference not to be tracked and standard setting bodies are moving to describe precisely how that preference should be treated. If advertisers and other data collectors agree to honor this “Do Not Track” mechanism, it would set a solid foundation for beginning to protect personal information online.

Recommendation

1. The White House should author baseline privacy legislation for introduction in the 113th Congress including a “Do Not Track” standard. The Federal Trade Commission should aggressively use its regulatory powers to enforce this standard whether promulgated through legislation or self-regulatory agreement.

Supplemental Material

- ACLU Statement for Senate Commerce Committee Hearing on Consumer Privacy Online, July 2010: <http://www.aclu.org/technology-and-liberty/aclu-statement-record-senate-committee-commerce-science-and-technology-hearin>
- ACLU Comments to the Commerce Department in Support of a “Do Not Track” Option to Protect Online Privacy, January 2011: <http://www.aclu.org/technology-and-liberty/letter-federal-trade-commission-proposed-rules-update-coppa>
- ACLU Comments Regarding the FTC’s report on Online Privacy and “Do Not Track”, February 2011:
http://www.aclu.org/files/assets/Final_FTC_Comments_January_2011.pdf
- ACLU Testimony before the Senate Commerce Committee in favor of a “Do Not Track” list, March 2011: <http://www.aclu.org/technology-and-liberty/aclu-testimony-state-online-consumer-privacy-senate-commerce-science-and-tran>
- Coalition letter applauding FTC for updating privacy safeguards in COPPA, December 2011: <http://www.aclu.org/technology-and-liberty/letter-federal-trade-commission-proposed-rules-update-coppa>

Office of the Director of National Intelligence

Issue Area: National security

Issue Area: Privacy

Limit Foreign Intelligence Spying on Americans and Increase Transparency on Surveillance Programs

Background

Over the past ten years, the government's authority to conduct surveillance on Americans not suspected of any wrongdoing has grown exponentially. One of the most expansive and secretive authorities—the FISA Amendments Act of 2008—allows the government to conduct dragnet and suspicionless collection of Americans' international communications for foreign intelligence purposes without ever identifying its targets to a court. Section 215 of the Patriot Act, a similarly secretive and troubling surveillance authority, allows the Justice Department to obtain a court order for any tangible thing relevant to an investigation. According to several senators, the government has secretly interpreted Section 215 in a manner that diverges from its plain meaning and that would shock Americans.

Recommendations

1. The Department of Justice and the Director of National Intelligence should increase basic transparency about surveillance authorities included in the FISA Amendments Act, Section 215 of the Patriot Act, and other post-9/11 collection programs to ensure an informed public and congressional debate and accountability. In particular, these agencies should:
 - Release executive memoranda and FISA court opinions interpreting the FISA Amendments Act and Section 215 of the Patriot Act, including only those redactions necessary to protect legitimate secrets; and
 - Disclose (or provide a meaningful unclassified description of) the targeting and minimization procedures used by the government in collecting information under the FISA Amendments Act or Section 215 of the Patriot Act.
2. The President should issue an executive order
 - prohibiting the suspicionless, bulk collection of the communications or records of Americans or individuals in the U.S.;

- imposing strict use limitations and minimization procedures that prevent the collection, use, or dissemination of information about Americans or individuals in the U.S.

Supplemental Material

- Why the FISA Amendments Act is Unconstitutional:
http://www.aclu.org/files/images/nsaspying/asset_upload_file578_35950.pdf
- Testimony of Jameel Jaffer, Deputy Director of the ACLU, before the House Committee on the Judiciary, Oversight Hearing on the FISA Amendments Act of 2008, May 2012:
https://www.aclu.org/files/assets/aclu_house_testimony_on_fisa_amendments_act.pdf
- ACLU Letter to the Senate Select Committee on Intelligence Requesting Public Oversight of and Amendment to the FISA Amendments Act of 2008, May 2012:
http://www.aclu.org/files/assets/aclu_ltr_to_ssci_opposing_extension_to_faa_-_5_22_12.pdf
- Coalition Letter to the House of Representatives Urging a 'NO' vote on H.R. 5949, a five year extension of the FISA Amendments Act, September 2012:
http://www.aclu.org/files/assets/for_webhub_-_coalition_letter_to_house_urgin_no_vote_on_faa_extension_09_11_12.pdf
- Report of the FISA Amendments Act of 2008, The Constitution Project, Liberty and Security Committee, September 2012:
http://constitutionproject.org/pdf/fisaamendmentsactreport_9612.pdf
- ACLU Letter to the Senate, Urging 'NO' vote on H.R. 6304, the FISA Amendments Act of 2008, June 2008:
http://www.aclu.org/files/images/general/asset_upload_file902_35782.pdf
- ACLU Resources on *Amnesty v. Clapper*: <http://www.aclu.org/national-security/amnesty-et-al-v-clapper>

Peace Corps

Issue Area: Women's rights

Revise Peace Corps Policy on Pregnancy to Accord with Anti-Sex Discrimination Law

Background

Peace Corps policy governing volunteers and trainees (hereinafter "volunteers") is laid out in the Peace Corps Manual. The Manual Section on Volunteer Pregnancy, MS 263, singles out pregnant volunteers for worse treatment than other volunteers who are similarly situated in their ability or inability to work, and treats mothers differently than fathers. As such, the Manual Section runs afoul of the requirements of the Pregnancy Discrimination Act (PDA), the other sex discrimination provisions in Title VII of the Civil Rights Act of 1964, and the Constitution.

Under anti-discrimination law, employers may not "single out pregnancy-related conditions for special procedures for determining an employee's ability to work." Women affected by pregnancy must be treated at least as well as other workers "not so affected but similar in their ability or inability to work." As the Supreme Court noted two decades ago, "[w]ith the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." Employers "may not require a pregnant woman to stop working at any time during her pregnancy unless she is unable to do her work." Similarly, employers may not treat women differently from men based on stereotypes and assumptions about mothers' role in raising children.

Current Peace Corps policy violates these laws by singling out pregnancy, a condition only experienced by women, as requiring presumptive termination. The policy also rests on a presumption that motherhood is incompatible with Peace Corps services, while applying no such presumption to men who father children during service.

Recommendations

1. The Peace Corps should revise the Manual Section on Volunteer Pregnancy along two main principles: Instead of singling out pregnant volunteers, the Peace Corps should apply the same standards and procedures for pregnancy as it does with any other medical condition developed while a volunteer is serving. Likewise, policies on

parenting, such as determinations about whether volunteers can serve effectively after having children, should be sex neutral.

2. The Peace Corps should examine a pregnant volunteer's ability to remain in country only if the pregnant employee shows signs of being unable to do her job, or health facilities are determined to be inadequate after an individualized assessment taking into account the volunteer's particular health circumstances. Such an assessment should follow the same guidelines in place for consideration of other medical conditions. The Peace Corps should also carefully consider its obligations to provide pregnancy accommodations to the pregnant volunteer, in accordance with the PDA.
3. The Peace Corps should revise all language on parenting in the Manual Section on Volunteer Pregnancy to be in accord with the Manual Section on Adoption of Children by Volunteers, MS 206: "Country Directors may permit the Volunteer(s) to continue in service after the adoption of a child if they are satisfied that the adoption is not likely to preclude continued satisfactory service[.]" A similar gender-neutral rule could be written to cover birth children by substituting the word "birth" for "adoption."

In particular, the Peace Corps should strike subsections 3.1, 3.2, 4.1, and 6.2, and amend 4.2 as described in the ACLU and National Women's Law Center August, 2012 letter to the Peace Corps (see Supplemental Material below).

Supplemental Material

- ACLU and NWLC Letter to Peace Corps on Pregnancy Policy, August 2012: <http://www.aclu.org/reproductive-freedom/aclu-and-nwlc-letter-general-counsel-peace-corps-regarding-volunteer-pregnancy>
- 42 U.S.C. 2000e(k) (2012): <http://www.eeoc.gov/laws/statutes/titlevii.cfm>
- 29 C.F.R. pt. 1604 app. (2011): <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=41d0b7354318b3b62a14c2b49ccd4165&rgn=div9&view=text&node=29:4.1.4.1.5.0.21.12.5&idno=29>
- Int'l Union v. Johnson Controls, 499 U.S. 187 (1991): <http://supreme.justia.com/cases/federal/us/499/187/case.html>

- Price Waterhouse v. Hopkins, 490 U.S. 251 (1991):
<http://supreme.justia.com/cases/federal/us/490/228/case.html>
- Cleveland Bd. Of Education v. LaFleur, 414 U.S. 632 (1974):
<http://supreme.justia.com/cases/federal/us/414/632/case.html>

Social Security Administration

Issue Area: LGBT rights

Improve Social Security Administration (SSA) Treatment of Transgender People and Their Families

Background

In May 2012, the ACLU joined a coalition letter to the SSA Commissioner requesting an updated policy for changing gender information in SSA records; revising Program Operations Manual System (POMS) guidance regarding marriages involving a transgender spouse to reflect state and federal law accurately; and phasing out the use of gender data in SSA computer matching programs, such as the Enumeration Verification System (EVS). To date, there has been no action from SSA on any of these three recommendations.

Gender Change in SSA Records

The ability of transgender people to have identifying documents and records that accurately and consistently reflect their lived gender is essential. As a result of ACLU litigation in Alaska and Illinois, both states have instituted new rules for how transgender people can change the gender marker on their driver's licenses (Alaska) or birth certificates (Illinois). Alaska eliminated a surgery requirement altogether, and Illinois eliminated a genital surgery requirement.

Currently, POMS requires that, in order to change the gender listed in an SSA record, the applicant “must submit a letter from his or her surgeon or the attending physician verifying that the sex change surgery was completed.”²⁰ This requirement impedes the goal of simply and accurately identifying all account holders, and is inconsistent with policy changes adopted by other federal agencies regarding gender changes on official documents and records, including the U.S. Department of State, the Office of Personnel Management, the Veterans Health Administration, and U.S. Citizenship and Immigration Services.

Marriages Involving a Transgender Spouse

Current POMS guidance regarding marriages of transgender people applies both to situations involving a “Gender Change Prior to Marriage” and to situations involving a “Gender Change After Marriage.” In both, the guidance requires SSA to request an opinion from a Regional Chief Counsel (RCC) regarding the validity of the marriage in every single case involving a transgender spouse. As the May 2012 coalition letter makes clear, this position has no basis in

²⁰ POMS Section RM 00203.215 Changing Numident Data for Reasons other than Name Change.

law and is a departure from SSA's past practices with regard to marriages involving transgender persons, which treated such marriages as presumptively valid unless there was a specific reason to question the validity of the marriage based on the facts in a particular case. By incorrectly implying that gender transition is not generally considered legitimate and that few states permit transgender persons to marry, the current POMS guidance stands in contrast to other federal agencies that have acted to clarify the administration of benefits for transgender people and their spouses, including the Office of Personnel Management and U.S. Citizenship and Immigration Services. The POMS guidance regarding marriages of transgender people should be revised to ensure that it is accurate, complete, and results in fair dispositions consistent with state and federal law.

Eliminating Gender in SSA Matching Programs

SSA should eliminate gender from the EVS and other matching programs where there is not a clear programmatic need to use this data. The use of gender in SSA matching programs presents grave risks to the privacy rights of transgender workers, including by having their transgender status revealed against their will, and needlessly puts them at risk for workplace discrimination. Government agencies should not disclose information about a person's transgender status to third parties. Despite this, SSA's matching programs do exactly that by notifying third parties of non-matching gender data, thereby revealing an individual's transgender status to participating entities.

Recommendations

1. SSA should adopt the following updated policy for documentation of gender change/correction:

To change gender data in the Numerical Identification System (Numident), the applicant must provide either:

- (1) Official documentation of gender change from a federal or state agency or court, such as an amended passport, driver's license or state identification card, or court order, or;
- (2) A signed original statement, on office letterhead, from a licensed physician or mental health care provider. The statement must include the following information:
 - a. Provider's full name;
 - b. Professional license or certificate number;
 - c. Issuing state or other jurisdiction of professional license/certificate;

- d. Address and telephone number of the provider;
- e. Language stating that he/she has a clinical/patient relationship with the applicant;
- f. Language stating that:
 - i. that the applicant has had appropriate clinical treatment for gender transition to the new gender (male or female); OR
 - ii. that the applicant has an intersex condition or disorder of sex development, and that the correct gender designation should be (male or female);
- g. Language stating “I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.”

Other medical records are not to be requested. Surgical treatment is not a prerequisite for gender change and such documentation must not be requested.

2. The POMS guidance should be revised to clarify that if a gender transition occurred prior to marriage, it will typically be recognized for purposes of marriage in most states. Sufficient documentation of gender change for this purpose shall ordinarily include official documents indicative of recognition by a state or a foreign government. If an amended birth certificate or court order reflecting a gender transition is available, there is no need to gather additional documentation. If a gender transition occurred subsequent to a marriage, a valid marriage entered into between a man and a woman remains valid for its duration in all jurisdictions. A subsequent gender transition by a spouse does not invalidate the marriage.
3. Just as it did with the Social Security Number Verification Service (SSNVS) in September 2011, SSA should eliminate gender from other matching programs, including the EVS.

Supplemental Materials

- Coalition Letter to the Social Security Administration on Transgender Policies, May 2012: <http://www.aclu.org/lgbt-rights/coalition-letter-social-security-administration-transgender-policies>
- ACLU Press Release – “Alaska Lt. Governor Files Regulation for Changing Driver’s Licenses,” July 2012: <http://www.aclu.org/lgbt-rights/alaska-lt-governor-files-regulation-changing-drivers-licenses>

- ACLU of Illinois Press Release – “State Issues New Birth Certificates to Three Transgender ACLU Clients,” July 2011: <http://www.aclu-il.org/state-issues-new-birth-certificates-to-three-transgender-aclu-clients/>