

# **Actions For Restoring America: Transition Recommendations for President-Elect Barack Obama**

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## Introduction

### *Actions For Restoring America*

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#### *How to Begin Repairing the Damage to Freedom in America After Bush*

The next president will become chief executive of a nation that has been greatly weakened – in particular, our freedoms, our values, and our international reputation have been greatly undermined by the policies of the past eight years.

Presidents have enormous power not only to set the legislative agenda, but also to establish policy by executive order, federal regulation, or simply by refocusing the efforts and emphases of the executive agencies. The new president must use all of these tools to restore our freedoms and move the country forward.

Doing so will require determined action in the face of inevitable opposition. It will require conveying to the American people why grants of unchecked power do not actually make us safer, and why Americans must stand firm in protecting the values that at our best we have always represented and defended at home and around the world.

It will not be easy to undo eight years of sustained damage to our fundamental rights. But it can be done.

This paper lists many of the actions that the new president should take in order to decisively signal a restoration of American values and a rejection of the shameful policies of the past eight years.

The first year of any new administration is crucial and sets the stage for what will follow. The new President needs to hit the ground running and to make full use of that first crucial year.

We have grouped needed actions into those that the new president should take on day one, in the 100 days and then the first year. Those actions include executive orders as well as mandates or directives from the president to his cabinet secretaries and agency heads.



## Part 1 – Day One

### **Day One: Stop Torture, Close Guantanamo, End Extraordinary Renditions**

The next president will have a historic opportunity – on day one – to take very important steps to restore the rule of law in the interrogation and detention of detainees held at Guantanamo Bay, Iraq, Afghanistan, and in secret prisons around the globe. Every action taken pursuant to an executive order of President Bush can be reversed by executive order of the next president.

Therefore, on the first day in office, the next president should issue an executive order directing all agencies to modify their policies and practices immediately to:

- Cease and prohibit the use of torture and abuse, without exception, and direct the attorney general immediately after his or her confirmation to appoint an outside special counsel to investigate and, if warranted, prosecute any violations of federal criminal laws prohibiting torture and abuse;
- Close the detention facility at Guantanamo Bay and either charge and try detainees under criminal law in federal criminal courts or before military courts-martial or transfer them to countries where they will not be tortured or detained without charge;
- Cease and prohibit the practice of extraordinary rendition, which is the transfer of persons, outside of the judicial process, to other countries, including countries that torture or abuse prisoners.

### **Stop Torture and Abuse**

The next president should issue an executive order, on the first day in office, that orders all agencies to take immediate steps to ensure that torture and abuse is prohibited by the federal government, that no agency may use any practice not authorized by the Army Field Manual on Intelligence Interrogations, that no president or any other person may order or authorize torture or abuse, that all

violations of Common Article 3 of the Geneva Conventions are prohibited, that all persons being held overseas must be registered with the International Committee of the Red Cross in conformity with Defense Department practices, and that all intelligence interrogations must be video recorded. In addition, the president should order all agencies to comply with requests from members of Congress for unredacted copies of documents related to the development and implementation of U.S. interrogation policies. The president should also ask the U. S. attorney general to appoint an outside special counsel to investigate and, if warranted, prosecute any violations of federal criminal laws prohibiting torture and abuse – focusing not just on crimes committed in the field, but also on crimes committed by civilians, of any position, in authorizing or ordering torture or abuse. Finally, the president should order the immediate closure of all secret prisons, and prohibit the CIA and its contractors from detaining anyone.

### **Close Guantanamo and Restore the Rule of Law for Detainees**

On the first day in office, the president should order the shutdown of the Guantanamo Bay detention facility and restoration of the rule of law for the detainees now held there. Specifically, the president should order the prompt shutdown of the detention facility, the transfer of any prisoners charged with a crime to a facility within the continental United States for trial in a federal criminal court or before a military court-martial, and the transfer of all uncharged detainees to countries where they will not be abused or imprisoned without charge.

### **End and Prohibit the Practice of Extraordinary Rendition**

The president should order all agencies, on the first day in office, to end and prohibit any rendition or transfer of any person to another country without judicial process. The president should prohibit the rendition or transfer of any person to another country where there is a reasonable possibility the person would be subject to torture or abuse or detained without charge. Any person subject to any transfer shall have a due process right to challenge any transfer before an independent adjudicator, with a right to a judicial appeal.

In each instance, the executive order should by its terms rescind any conflicting previous order – none of which have been made public and remain secret to this day.

## Part 2 – First 100 Days

- 1. Warrantless spying.** Issue an executive order recognizing the president's obligation to comply with FISA and other statutes, requiring the executive branch to do so, and prohibiting the NSA from collecting the communications, domestic or international, of U.S. citizens and residents. Issue an executive order prohibiting new FISA powers from being used to conduct suspicionless bulk collection. Re-examine the recent amendments to Executive Order 12333 to limit and regulate all intelligence community activities and to fully protect the privacy and civil liberties of U.S. citizens and residents. Repeal and make public any secret executive orders that limit or qualify that order. Order the attorney general to launch an investigation to determine if any laws were broken or to appoint a special counsel to do the same.
- 2. Watch lists.** Issue an executive order requiring watch lists to be completely reviewed within 3 months, with names limited to only those for whom there is credible evidence of terrorist ties or activities. Repeal Executive Order 13224, which creates mechanisms for designating individuals and groups as terrorist suspects and preventing US persons and companies from doing business with them – a power of such breadth that, the record shows, it inevitably leads to the designation of many innocent people and does more harm than good.
- 3. Freedom of Information – Ashcroft Doctrine.** Direct the attorney general to rescind the "Ashcroft Doctrine" regarding Freedom of Information Act compliance, which instructs agencies to withhold information whenever there is a "sound legal basis" for doing so, and return to the compliance standard under Attorney General Janet Reno, which promoted an "overall presumption of disclosure" of government information through the FOIA unless it was "reasonably foreseeable that disclosure would be harmful."
- 4. Monitoring of activists.** Direct the attorney general and other relevant agency heads (eg, Defense and Homeland Security) to end government monitoring of political activists. Direct the attorney general to repeal the new Attorney General Guidelines regarding FBI investigations, and replace them with new guidelines that protect the rights and privacy of innocent persons. An executive order should also direct the relevant agencies to refrain from monitoring political activists unless there is reasonable suspicion that they have committed a criminal act or are taking preparatory actions to do so.

5. **DOJ's Civil Rights Division.** Order renewed civil rights enforcement at Civil Rights Division, DOJ. Specifically: in Voting Section – prosecution of Section 2 and Section 5 cases on behalf of minority communities; in Employment Litigation Section – renewed class action litigation and disparate impact cases; in Special Litigation Unit of Civil Rights Division – reinvigorate prosecution of pattern and practice law enforcement misconduct cases, rebuild docket of prison conditions of confinement cases and where appropriate seek consent decrees by accepting admissions of constitutional violations.
6. **Real ID Act.** Direct the Secretary of Homeland Security to suspend the regulations (73 Fed. Reg. 5272) for the Real ID Act pending congressional review.
7. **Abortion gag rule.** Rescind the Executive Memorandum of March 28, 2001, known as the “Mexico City policy” or “Global Gag Rule,” prohibiting foreign aid to organizations overseas that promote or perform abortions.
8. **Ban all workplace discrimination against sexual minorities by the federal government and its contractors.** Issue an executive order prohibiting sexual orientation and gender identity discrimination by federal contractors, and expand the existing order banning sexual orientation discrimination in federal employment to also protect against gender identity discrimination.
9. **Death penalty.** Implement a federal death penalty moratorium until racial disparities are addressed. The federal death penalty system suffers from obvious and extreme racial disparities. In fact, the next six people scheduled to be executed are African-American men. The glaring racial disparities in the federal death penalty system must be carefully studied and addressed, and no executions should take place until this occurs.
10. **“Faith-based initiatives.”** Restore fundamental religious-liberty protections by halting Bush Administration efforts to permit direct funding of houses of worship, underwrite religious proselytism with taxpayer dollars, and allow government-funded religious discrimination. In particular, repeal Executive Order 13279, which allows churches and religious organizations to engage directly in government funded religious discrimination in hiring, and repeal Executive Orders 13198, 13199, 13280, and 13397, which created new offices of Faith-Based Initiatives at the White House and other federal agencies. A new executive order should be drafted to protect the First Amendment rights

of religious organizations, program beneficiaries and those who wish to be employed by these programs.

## Part 3 – First Year Recommendations

Torture and Guantanamo (Justice Department, security agencies)

\* Day-One Recommendation

### Torture and Abuse

#### Background

At its best the United States has led the way on human rights and humane treatment for all, including the weakest and/or least popular groups in society and those accused of wrongdoing. We have served as a beacon and possessing a moral authority on the subject around the world. But justice and human rights have suffered greatly under the Bush Administration. The next president can begin to fix that damage to our national self-definition and to our moral authority around the globe.

#### Recommendations

1. The president should issue an executive order, on the first day in office, that orders all agencies to take immediate steps to ensure that torture and abuse is prohibited by the federal government, that no agency may use any practice not authorized by the Army Field Manual on Intelligence Interrogations, that no president or any other person may order or authorize torture or abuse, that all violations of Common Article 3 of the Geneva Conventions are prohibited, that all persons being held overseas must be registered with the International Committee of the Red Cross in conformity with Defense Department practices, and that all intelligence interrogations must be video recorded.
2. The president should order all agencies to comply with requests from Members of Congress for unredacted copies of documents related to the development and implementation of U.S. interrogation policies.
3. The attorney general should appoint an outside special counsel to investigate and, if warranted, prosecute any violations of federal criminal laws prohibiting torture and abuse – focusing not just on crimes committed in the field, but also on crimes committed by civilians, of any position, in authorizing or ordering torture or abuse.

4. The president should order the immediate closure of all secret prisons, and prohibit the CIA and its contractors from detaining anyone.
5. The president should rescind any conflicting previous orders – none of which have been made public and remain secret to this day.

Torture and Guantanamo (security agencies)

\* Day-One Recommendation

## Guantanamo

### Background

Perhaps the single most prominent example of the Bush Administration's disdain for the rule of law is the placement of terrorist suspects (many of whom have turned out to be innocent) in Guantanamo Bay. Placed in this unique U.S. military base precisely in the hopes that it would be accepted by the U.S. courts as a legal no-man's land, the existence of the Guantanamo detention center serves as a standing announcement of the betrayal of American belief in the rule of law.

### Recommendations

Order the shutdown of the Guantanamo Bay detention facility and restoration of the rule of law for the detainees now held there. Specifically, the president should:

1. Order the prompt shutdown of the detention facility
2. Order the transfer of any prisoners charged with a crime to a facility within the continental United States for trial in a federal criminal court or before a military court-martial
3. Order the transfer of all uncharged detainees to countries where they will not be abused or imprisoned without charge.
4. Rescind any conflicting previous orders – none of which have been made public.



Torture and Guantanamo (security agencies)

\* Day-One Recommendation

## Extraordinary Rendition

### Background

The CIA has engaged in an unlawful practice: abducting foreign nationals for detention and interrogation in secret overseas prisons. For example, an innocent German citizen, Khaled El-Masri, was kidnapped by the CIA, beaten, drugged, and transported to a secret CIA prison in Afghanistan. But, although the story of Mr. El-Masri's mistaken kidnapping and detention at the hands of the CIA is known throughout the world, his lawsuit was dismissed by the U.S. District Court for the Eastern District of Virginia after the government invoked the so-called "state secrets" privilege. That decision was upheld by the U.S. Court of Appeals for the Fourth Circuit, and the Supreme Court's refusal to hear the case lets that decision stand.

### Recommendations

Order all agencies, on the first day in office, to end and prohibit any rendition or transfer of any person to another country without judicial process. The president should prohibit the rendition or transfer of any person to another country where there is a reasonable possibility the person would be subject to torture or abuse or detained without charge. Any person subject to any transfer shall have a due process right to challenge any transfer before an independent adjudicator, with a right to a judicial appeal. The executive order should by its terms rescind any conflicting previous order – none of which have been made public.

\* First 100 Days Recommendation

## Spying on Americans

### Background

The Bush Administration's Program of warrantless spying on Americans violates our nation's most fundamental precepts and threatens not only our privacy, but chills our rights of Free Speech and Association.

### Recommendations

1. Issue an executive order recognizing the president's obligation to comply with FISA and other statutes, requiring the executive branch to do so, and prohibiting the NSA from collecting the communications, domestic or international, of U.S. citizens and residents.
2. Issue an executive order prohibiting new FISA powers from being used to conduct suspicionless bulk collection.
3. Re-examine the recent amendments to Executive Order 12333 and revise the order to limit and regulate all intelligence community activities and to fully protect the privacy and civil liberties of U.S. citizens and residents. In particular, the new Executive Order should:
  - o Limit the ODNI, CIA and NSA to collecting and evaluating foreign intelligence information.
  - o Prohibit the National Security Agency from intercepting international communications of U.S. persons, absent a warrant based on probable cause.
  - o Prohibit the military from playing any role in civilian surveillance within the United States, or in surveillance of U.S. persons abroad.
  - o Establish minimization procedures that prevent the collection of information regarding U.S. persons not reasonably suspected of involvement in espionage, terrorism or other criminal activity, and require the prompt destruction of U.S. person information inadvertently collected.

- Restrict the FBI to investigating criminal activities, including espionage and terrorism, and eliminate foreign and domestic intelligence investigations of groups or individuals unrelated to criminal offenses.
  - Prohibit the exchange of personally identifiable information between agencies except for evidence of espionage or other criminal activity, which may be transmitted to agencies responsible for investigating or prosecuting such violations.
4. Make publicly available any and all internal policies, procedures or memoranda produced by or for the intelligence and law enforcement agencies regulated under E.O. 12333, which interpret or qualify provisions of that order.
  5. Make all minimization procedures designed to protect the privacy and civil liberties of U.S. persons public, as well and any internal policies or memoranda that interpret these procedures.
  6. Order the attorney general to launch an investigation to determine if any laws were broken or to appoint a special counsel to do the same.



National Security and Privacy (Justice Department, security agencies)

\* First 100 Days Recommendation

## Monitoring of activists

### Background

Under the Bush Administration, the government has engaged in widespread monitoring of peaceful political activists exercising their First Amendment rights to agitate for changes in American policies.

### Recommendations

1. Direct the attorney general and other relevant agency heads (eg, Defense and Homeland Security) to end government monitoring of political activists.
2. Issue an executive order directing the relevant agencies to refrain from monitoring political activists unless there is reasonable suspicion that they have committed a criminal act or are taking preparatory actions to do so.
3. Direct the attorney general to repeal the new 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:
  - o Prohibit the use of intrusive investigative techniques absent specific and articulable facts that give a reasonable indication that the subject of the investigation is engaging in a violation of federal law.
  - o Specifically prohibit the use of race, religion, national origin, or the exercise of First Amendment-protected activity as factors in making decisions to investigate persons or organizations.
  - o Specifically prohibit the reporting of and keeping files on persons engaging in peaceful political activities.

National Security and Privacy (Department of Homeland Security)

\* First 100 Days Recommendation

## Real ID Act

### Background

The Real ID Act of 2005 would turn our state driver's licenses into a genuine national identity card and impose numerous new burdens on taxpayers, citizens, immigrants, and state governments – while doing nothing to protect against terrorism. As a result, it is stirring intense opposition from many groups across the political spectrum. This Web site provides information about opposing Real ID.

### Recommendations

The Secretary of Homeland Security should suspend the regulations (73 Fed. Reg. 5272) for the Real ID Act pending congressional review.

National Security and Privacy (security agencies)

\* First 100 Days Recommendation

## Watch lists

### Background

The last 8 years have been characterized by the creation of a wide variety 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.

### Recommendations

1. The President should issue an executive order requiring watch lists to be completely reviewed within 3 months, with names limited to only those for whom there is credible evidence of terrorist ties or activities.
2. Repeal Executive Order 13224, which creates mechanisms for designating individuals and groups as terrorist suspects and preventing US persons and companies from doing business with them – a power of such breadth that, the record shows, it inevitably leads to the designation of many innocent people and does more harm than good.

## **Financial watch lists**

### **Background**

The Treasury Department Office of Financial Assets Control's (OFAC) Specially Designated Nationals List includes individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Like the nation's "Terrorist Watch List," the OFAC list requires reform. The assets of those on the list are blocked and U.S. persons are generally prohibited from doing business with them. Many innocent individuals have been caught up by this list.

### **Recommendations**

Reform the Treasury Department Office of Financial Assets Control (OFAC) designation procedure to establish full due process protections for individuals or groups designated for sanctions, create an effective redress program for individuals or organizations mistakenly flagged as a designated person, and issue transparent standards governing such designations. The duties and rights of the Board, including its subpoena power, are detailed in The Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, Title VIII, § 801 (2007).

## Employee databases

### Background

American employees are increasingly being subjected to vetting through federal databases that are rife with error.

Social Security “No Match” letters are mailed annually to employers to inform them that employee-provided Social Security tax information does not match a file at the Social Security Administration. This is simply a notice that there may be a confusion about a person’s current name or its spelling, or that another database error has occurred. Only occasionally does it indicate that an employee may not be lawfully eligible to work. Furthermore, these letters represent information that could be many months (if not more than a year) old. This is at best, a grossly ineffective tool for trying to target immigration enforcement.

The voluntary Basic Pilot Employment Verification System (aka “E-Verify”) is a nationwide employment verification system. While currently 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.

### Recommendations

1. **No Match letters.** Pledge not to turn the Social Security No Match Letter system into a de facto immigration enforcement tool. Disavow and withdraw the finalized rule republished in the Federal Register on October 23, 2008. (A federal judge issued a preliminary order stopping the government from enforcing the rule last year. The court's order continues to apply to the republished rule.) The republished No Match rule would – if allowed to go into effect – require employers to terminate employees who do not resolve discrepancies identified in a No Match letter within an impossibly short time frame.
2. **E-Verify.** Suspend enrolling new employers in the “e-verify” (formerly Basic Pilot) program until DHS 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. While Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub. L. 104-210, 110 Stat. 3009-659 (Sept. 30, 1996) mandated the creation of an electronic verification program, it did not include any details or direction as to the form that that program should take, but left that to the discretion of the executive. Therefore, it is within the president's power to declare that in its current form the e-Verify program is not a success, and to suspend it pending a reevaluation.

## Secure Flight

### Background

The Bush Administration has been attempting to implement a domestic airline passenger screening system for most of its tenure. But the program, currently dubbed "Secure Flight," has been beset by many problems, many stemming from the thorny problems that an identity-based approach to airline security poses in a country without a system of cradle-to-grave national identification papers. The administration is currently prohibited from implementing Secure Flight until minimal conditions for fairness and effectiveness set by Congress are met.

No law requires the federal government to implement a Secure Flight program as currently constructed by the Department of Homeland Security. Currently, the security decisions in Secure Flight are made based on frequently inaccurate information contained in secret watch lists maintained at the Terrorism Screening Center that are completely inaccessible to the public and effectively shielded from scrutiny or correction. (The many problems with bloated watch lists affecting innocent travelers have received wide media attention.)

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458 § 4012, 118 Stat. 3638, 3714-19 (2004) (codified as amended at 49 U.S.C. § 44903(j)(2)), required that the federal government take over from the airlines the process of matching air travelers' names to the "no-fly" and "selectee" watch lists. DHS states it is fulfilling this requirement with the Secure Flight program; however, Secure Flight does not fulfill a number of the requirements set out in IRTPA for such a passenger-prescreening program.

For example, IRTPA says the program must: "ensure that Federal Government databases that will be used to establish the identity of a passenger under the system will not produce a large number of false positives." Also, the program must have sufficient redress "procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." The current redress procedure, under a DHS program called "TRIP," is wholly inadequate and does not provide for individual access to or correction of the erroneous data in the system.

The administration recently announced new regulations to implement Secure Flight. 73 Fed. Reg. 64,017 (Oct. 28, 2008). The proposed regulations would limit the amount of data collected to a flyer's name, date of birth and gender. They would require that the airlines and their contractors send this data to TSA in advance of a flight for vetting against the watch list.

The new regulations are more limited in scope and an improvement over past versions of Secure Flight. But they still do not address the underlying problems with the watch list – and they impose extraordinary new costs on the airlines and travel industry, which must reconfigure legacy systems to collect new data and transmit it to TSA.

### **Recommendations**

The Department of Homeland Security should delay implementation of the Secure Flight passenger-prescreening program until:

1. The watch lists are substantially reformed so that innocent Americans are not unfairly targeted.
2. The Congress appropriates sufficient funds to compensate the airlines for the new reporting requirement.
3. DHS demonstrates that it has created a fair and expeditious system of redress.

## Harmonize privacy rules

### Background

Privacy laws in most of the developed world – particularly Europe – are generally more comprehensive and protective than in the United States. And other advanced industrial democracies have governmental institutions dedicated to protecting privacy.

The difference in laws has resulted in a clash between the United States and major allies such as EU and Canada over data handling both by governments and the private sector. It is a burning issue that needs to be resolved.

For example, the difference in laws has led to transatlantic negotiations over the sharing of airline passenger name records (PNR) and financial data (SWIFT).

A Passenger Name Record (PNR) contains the travel information for a passenger or a group of passengers traveling together. Access to PNR data is covered in Europe by the EU Data Protection Directive, among other laws, and such data can legally be transferred only to countries with comparable data protection laws. The US has demanded increasingly broad access to the PNR data of Europeans, which Europe has balked at because of the US's poor data protection laws. Such laws give few rights (such as access or correction) to U.S. citizens and even fewer to non-U.S. citizens.

Currently, the US Department of Homeland Security has an office in Brussels to better interact with EU officials. However, there is no privacy liaison or privacy officer in that office.

As for the EU, the Article 29 Working Party on Data Protection of the European Union was established by Article 29 of Directive 95/46/EC. It is an independent advisory body and includes representatives from the data protection authority of each EU Member State, the European Data Protection Supervisor and the European Commission. It publishes opinions and recommendations on data protection topics and advises the European Commission on the adequacy of data protection standards in non-EU countries.

The SWIFT scandal emerged in June 2006 as news reports described a massive Treasury Department program to secretly review international financial transactions, including those of American citizens and corporations. The Society

for Worldwide Interbank Financial Telecommunication (SWIFT) was the Brussels-based banking consortium that revealed the private financial data to U.S. government officials after receiving “compulsory subpoenas.” Since the 2001 attacks, various reports and President Bush himself had said that the US was watching financial transactions, but what had not been known before the news reports was the breadth and depth of the monitoring. No outside governmental official, such as a federal judge, reviewed the program before its 2006 disclosure. The result was a public uproar; Belgium and Germany declared that the program was in violation of European privacy laws. European privacy regulators, including the Article 29 Working Party, exerted pressure and SWIFT changed its manner of operation to better protect European law and privacy.

Meanwhile, the Council of Europe in 2008 recommended that non-member countries be allowed to sign on to a key agreement that has basic principles for the protection of data (not just electronic data), special rules on transborder data exchange, and mechanisms for mutual assistance and consultation between the countries that are party to the pact. The agreement is Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, (“Convention 108”), which was opened for signature by the member countries of the Council of Europe in 1981.

### **Recommendations**

The US should stop pressuring the European Union to override the EU’s own privacy laws and move to harmonize privacy rules in a pro-privacy direction. Key steps include:

1. **Sign Convention 108.** Sign on to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, and implement its articles.
2. **Reopen negotiations.** Reopen negotiations with allies on the transfer of data internationally, such as those regarding airline passenger records (PNR) or financial data (SWIFT), in order to bring US policies in compliance with international human rights standards.
3. **Consultative status.** Seek consultative status (through the secretaries of State and Homeland Security) with the Article 29 Working Party on Data Protection of the European Union for the purpose of further harmonization of data protection and privacy principles. We should not be asking the

rest of the developed world to abandon its more advanced privacy protections.

4. **Privacy liaison.** Appoint a privacy liaison or officer to the Brussels office of the US Department of Homeland Security.

## Civil Liberties Oversight Board

### Background

The Privacy and Civil Liberties Oversight Board 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.

The terms of its original members expired in January, President Bush has still not nominated candidates for all seats on the board, and none have been confirmed by the Senate. As a result, the revised Board has never gone into operation.

### Recommendations

1. Appoint all members to the Privacy and Civil Liberties Oversight Board and strongly urge the Senate to hold prompt confirmation hearings for the candidates.
2. The president's first budget proposal should contain sufficient funds to actually bring the board back into existence as an effective entity.
3. The U.S. attorney general should create a mechanism for issuing subpoenas at the request of the Board. For example, 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.

## DNA databases

### Background

The collection and banking of DNA samples raises extraordinary privacy and racial justice concerns. Of particular concern is the recent trend – limited almost exclusively to the United States and the United Kingdom – to expand DNA databases to include those who have been merely arrested for, and not convicted or even charged with, a crime. Despite what is often claimed, DNA is not a fingerprint. The forcible collection and retention of DNA from innocent people constitutes a significant intrusion into individuals' privacy rights.

The Justice Department has proposed a regulation that will require any person arrested on federal charges, including misdemeanor charges, to submit a DNA sample to be included in the national criminal DNA databank. 73 Fed. Reg. 21083-21087 (April 18, 2008). The Department's analysis offered in support of this regulation utterly fails to address the legal and privacy problems with the proposed regulation. For example, although the analysis cites the single case that has upheld arrestee testing of persons arrested of violent crimes, it does not even mention that another appellate court has applied firmly established Supreme Court precedent to hold that "tak[ing] a biological specimen from a person who has been charged but not convicted violate[s] the Fourth Amendment to the United States Constitution." *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006).

Nothing in the governing statute requires the Attorney General to issue this unconstitutionally broad regulation; Congress has said only that the Attorney General "may" take DNA samples from arrestees. 42 U.S.C. § 14135a(a)(1)(A). If, after a careful, balanced analysis, the Attorney General agrees with the conclusion of *Welfare of C.T.L.* that arrestee collection violates the Fourth Amendment, he has both the statutory discretion and the constitutional duty to adopt regulations that prohibit such collection. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Meredith Corp. v. F.C.C.* 809 F.2d 863, 874 (D.C. Cir. 1987).

Interpol recently proposed an international genetic database that would allow DNA profiles collected at state and national levels to be shared internationally. The Final Report by the European Working Party on DNA profiling, which served

as the basis for Interpol's resolution on DNA profiling, failed to specify the need for due process or privacy standards for this massive database.

### **Recommendations**

1. Direct the Attorney General to order a detailed analysis of the policy and legal issues surrounding the blanket collection of DNA from persons arrested for federal crimes and issue regulations that limit such collection to comply with the Fourth Amendment by prohibiting the taking of DNA samples from arrestees without a warrant.
2. Adopt a position with Interpol that any contribution to an international DNA databank will be dependent on adequate due process and privacy standards, and will be limited to records related to persons convicted of serious offenses.

## Open Government (Justice Department)

### \* First 100 Days Recommendation

## Freedom of Information

### Background

Democracy cannot flourish in an atmosphere of secrecy and unilateral assertions of executive privilege. Americans have a right to know what their government is doing and to insist that the executive branch act only within its constitutional bounds.

### Recommendations

Direct the attorney general to rescind the "Ashcroft Doctrine" regarding Freedom of Information Act compliance, which instructs agencies to withhold information whenever there is a "sound legal basis" for doing so, and return to the compliance standard under Attorney General Janet Reno, which promoted an "overall presumption of disclosure" of government information through the FOIA unless it was "reasonably foreseeable that disclosure would be harmful."

## **FOIA ombudsman**

### **Background**

As a result of continuous efforts by the Bush administration to undermine the Freedom of Information Act (FOIA), Congress enacted the "OPEN Government Act of 2007" to strengthen the public's access to government documents. The act's centerpiece was the creation of an ombudsman to help FOIA requesters resolve problems without having to resort to litigation. The ombudsman assists requesters by providing informal guidance and nonbinding opinions regarding rejected or delayed FOIA requests. The ombudsman also reviews agency compliance with FOIA.

President Bush transferred the FOIA ombudsman from the National Archives to the Justice Department even though the OPEN Government Act requires that the ombudsman position be located within the Archives. The president's action violates the OPEN Government Act and effectively eliminates the ombudsman's independent ability to ensure that the administration and federal agencies comply with FOIA.

### **Recommendations**

Return the Freedom of Information Act ombudsman back to the National Archives and Records Administration from the Justice Department, as the law requires.

## Scientific freedom

### Background

The Bush Administration sought to increase political control over scientific and academic inquiry through a series of measures that served to undermine the integrity of regulatory science. A rule published by the White House Office of Management and Budget in 2007 granted the agency unprecedented power over federal agency peer review – including authority to impose highly rigid peer review requirements for scientific assessments and establish or approve processes for selecting reviewers. These powers afforded to OMB are entirely inappropriate, given the agency's undeniable political motivations and its negligible scientific or peer review expertise.

Executive Order 13422, issued in January 2007, effectively repealed President Clinton's Executive Order 12866 and expanded White House control of the review process. The order requires that each agency maintain a regulatory policy office run by a political appointee to supervise the development of rules and documents providing guidance to regulated industries. Federal agencies must identify "the specific market failure" or problem that justifies government intervention before deciding whether to issue regulations. The White House also must review "any significant guidance documents" before they are issued. By shifting the power to review the legitimacy of scientific findings from communities of scientists to the White House, the ruling did little to improve the quality of regulatory science, while leaving it more vulnerable to political whim.

### Recommendations

Restore an appropriate balance between the White House Office of Management and Budget (OMB) and federal regulatory agencies. Specifically, repeal Executive Order 13422, which dramatically expanded the role of OMB in reviewing all agency regulations, and repeal OMB's one-size-fits-all directives on peer review and risk assessment.

## Signing statements

### Background

President Bush has made a practice of issuing “signing statements” alongside legislation that he signs into law that include interpretations of or reservations from the underlying law that are at odds with the intent of Congress’s actions.

For example, on December 20, 2006, President Bush added a signing statement to HR 6407, the “Postal Accountability and Enhancement Act.” In the statement, Bush asserted he had the unprecedented authority to search Americans’ mail without a warrant. HR 6407 reiterated the 30-year-old prohibition on opening First Class mail of domestic origin without a warrant. In 1996, the postal regulations were altered to permit the opening of First Class mail without a warrant in narrowly defined cases where the postal inspector believes there is a credible threat that the package contains dangerous material, such as bombs. Instead of referencing the narrow exception in the postal regulations, the president’s signing statement suggests that he is assuming broader authority to open mail without a warrant.

### Recommendations

1. Repudiate all signing statements that permit deviation from statutory law based on claims of inherent Article II power.
2. Reaffirm the president’s obligation to abide by acts of Congress as well as the federal courts’ exclusive role as interpreter of the law.

## Presidential documents

### Background

The Presidential Records Act of 1978 (PRA), 44 U.S.C. §§ 2201-07, was enacted following Watergate as an open government measure. Under the act, there is a presumption that presidential records will be released no later than 12 years after a president leaves office. The act transfers “ownership, possession, and control” of all presidential and vice-presidential documents from private to public hands. When the president and vice president complete their terms of office, the national archivist is required to assume custody of the records and make them publicly available whenever permitted under the PRA. Access to the records can be denied at the end of the 12-year embargo only if a former or incumbent president claims an exemption under a “constitutionally based” executive privilege or in the interests of national security.

In one of his last acts as president in January 1989, Ronald Reagan issued EO 12667, published at 54 Fed. Reg. 3403 (Jan. 16, 1989). That executive order established procedures for presidential review and approval of record dispositions recommended by the archivist.

On February 8, 2001, shortly after President Bush came into office, he was notified of a scheduled release of about 68,000 pages of presidential records from the Reagan administration. Following several extensions of time to review the records prior to release, President Bush issued EO 13233, published at 66 Fed. Reg. 56025 (Nov. 1, 2001). That executive order gives the president and any former president uncontrolled discretion to decide whether to release to the public presidential records subject to the PRA. EO 13233 has eviscerated the underlying purpose of the PRA. It has barred access to presidential papers for which there are no legitimate constitutionally based or national security grounds to do so, and instead has been used to prevent embarrassing or illegal actions from being made public.

### Recommendations

1. Repeal EO 13233, the executive order limiting presidential authority to release presidential documents of his or her predecessor, and restore President Reagan’s EO 12667.

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2. Issue an executive order confirming that the vice president is an entity within the executive branch and is subject to the same requirements as the president vis à vis the preservation of presidential records.

## Federal websites

### Background

Congress passed the E-Government Act of 2002, 44 U.S.C. §§ 101, *et seq.* to improve the management and promotion of electronic government services and processes through a federal chief information officer within OMB. It establishes several measures that require agency use of Internet-based information technology to improve public access to government information and services. The act became effective in April 2003. Although some federal agencies have made progress towards compliance, over five years later most still fall far short of full compliance with the law.

### Recommendations

Issue an executive order to require full implementation of the E-Government Act by federal agencies, and to establish measures for accountability for those that fail to do so.

## **DOJ politicization**

### **Background**

As the hiring scandals of 2007-2008 revealed, the Department of Justice has become overly politicized in the past 8 years. Politics has been allowed to trump fidelity to the law.

### **Recommendations**

The attorney general should create a blue-ribbon commission to study and make recommendations on remedying the politicization of the Department of Justice under the Bush Administration. The commission should report on its recommendations within 90 days.

## Overclassification

### Background

Overclassification of public documents is running rampant within the federal government. Ultimately, this threatens to poison the open functioning of government that is vital to a healthy, well-functioning democracy.

### Recommendations

1. End the practice of reclassifying declassified documents, revise classification procedures to end overuse, and end the practice of using control markings to improperly restrict public access to unclassified information.
2. Reform military and intelligence classification rules to reduce unnecessary classification and reduce the time period materials may be classified in compliance with the Moynihan Commission Report.
3. Educate classifying officials regarding the negative security consequences of over-classification and hold original classification authorities responsible for their classification decisions, with penalties for over-classification and rewards for disseminating information.
4. Draft documents in a manner that allows the greatest distribution of information possible to those in the intelligence and law enforcement communities that can use the information to increase security, to members of Congress, and to the public at large.

## Death penalty

### Background

The federal death penalty system suffers from racial disparities. Race, class and geography play significant roles in who receives death sentences and who actually has the sentence imposed. One hundred and thirty innocent people have been released from death row and there is evidence that innocent people have been executed. As a result of this injustice some states have instituted moratoriums to study their capital punishment system. The federal death penalty also faces these problems.

In 2000, the United States Department of Justice produced a statistical report that demonstrated that the federal death penalty was plagued by racial disparities. After the 2000 statistical study was released, President Bill Clinton determined that the Department of Justice needed time to continue the examination of the federal capital punishment system and ordered more examination.

The new study was authorized by Janet Reno under the Clinton administration. A supplemental report was created by Attorney General John Ashcroft (the "Ashcroft Report"), but controversy resulted from its failure to account for race-of-the-victim discrimination.

The president of the United States has the constitutional power to declare a moratorium on the federal government's use of capital punishment. Article II, Section 2, Clause 1 of the United States Constitution gives the president "Power to Grant Reprieves and Pardons for Offenses against the United States." This authority allows the president to grant reprieves to everyone on federal death row until the issues of racial, ethnic and geographic disparities are studied and, if possible, addressed. The president can also exercise the pardon power to commute all of the sentences on federal death row that were given during this time of questionable justice.

### Recommendations

1. Declare a federal death penalty moratorium until racial disparities are addressed.

2. Order a new federal study to examine, in particular, why cases are selected for federal prosecution instead of state prosecution, which cases receive plea offers, and the characteristics of cases in which the death penalty is sought by the attorney general.

## Travel to Cuba

### Background

For almost fifty years the United States has had in place an embargo against Cuba, but it has failed to achieve the government's objective of ending the Castro government. The policy, especially as embodied in restrictions on financial transactions for travel to Cuba, has largely prevented the exchange of ideas that is more likely to bring about democratic reforms, and has limited the freedom of Americans to travel and engage in dialogue with Cuban citizens. Ending the embargo has increasing bipartisan support in Congress.

In 2004, new regulations adopted at the direction of President Bush imposed far harsher limits on visits and remittances to family members in Cuba. Before the 2004 regulations, Americans could travel to Cuba once every 12 months to visit relatives, and could go more often under a humanitarian exception for emergencies such as grave illness. Under the Bush regulations, visits were limited to once every 3 years with no humanitarian exception. In addition, the scope of family permitted to make visits was narrowed. These regulations further undermine family relationships, violate humanitarian principles, and are counterproductive.

### Recommendations

1. Direct the Treasury Department to immediately issue amendments to the Cuban Assets Control Regulations, part 515 of chapter V of 31 CFR, to allow financial transactions without a license for travel to Cuba for educational, cultural, artistic, religious and other purposes relating to the exchange of ideas and information.
2. Direct the Treasury Department to immediately issue amendments to the Cuban Assets Control Regulations, part 515 of Chapter V of 31 CFR, to allow unlimited visits to family members in Cuba and to allow remittances to meet family needs.
3. Restore regulations in effect prior to 2004 allowing fully hosted travel to Cuba for any purpose.

## Human rights treaties

### Background

Since 1992, the U.S. has ratified three major human rights treaties in addition to two optional protocols. Yet, very little oversight and minimal legislative initiatives have focused on codifying the rights and obligations under these treaties and protocols. In most cases, U.S. action has been limited to the periodic reporting and review process by the Geneva-based committees monitoring compliance with these treaties. International human rights treaties should not be seen as merely non-binding international commitments between countries with no domestic effect, but rather must be treated as the supreme law of the land – exactly how the framers of the U.S. Constitution intended.

### Recommendations

The new administration will have a unique opportunity to reassert the commitment of the United States to the rule of law as well as to send a clear message to the world regarding the new leadership role of the U.S. vis-à-vis human rights issues. Steps it should take to do that should include:

1. Fully implement U.S. treaty obligations by reactivating the Interagency Working Group on Human Rights Treaties (which under the Bush administration was replaced by the Policy Coordination Committee on Democracy, Human Rights and International Operations). The interagency working group was created under Executive Order 13107 on December 10 1998 with a strong mandate stating that “it shall be the policy and practice of the Government...fully to respect and implement its obligations under the international human rights treaties to which it is a party,” including the ICCPR (International Covenant on Civil and Political Rights), the CAT (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and the CERD (Convention on the Elimination of All Forms of Racial Discrimination), “and other relevant treaties ... to which the United States is now or may become a party in the future.”
2. The Working Group should create an open and transparent process for treaty reporting, coordinated by permanent staffers (which is the practice for the State Department’s human rights reports on other countries). In particular, a database for tracking compliance with various treaty

obligations should be continually updated and open to the public, and mechanisms should be created to allow for review of U.S. treaty reports by the public and other branches of government before their submission to international bodies.

3. The Working Group should compile a comprehensive human rights report on the United States on an annual basis (again, as is currently done by the State Department for other countries).

## **Mutual Legal Assistance Treaties**

### **Background**

Since 9/11, the United States has negotiated with other nations a series of new extradition treaties and Mutual Legal Assistance Treaties (MLATS), which govern how law enforcement agencies cooperate. Some of these agreements contain provisions that do not comport with International Human Rights principles – for example, insufficient protections against torture or abuse, or insufficient protections for the rights of criminal defendants to mount an adequate defense.

### **Recommendations**

Open a review of all MLATs and extradition agreements negotiated by Bush Administration for the purpose of assuring that they conform to Human Rights Principles – for example, those contained in the International Covenant on Civil and Political Rights (ICCPR).

## **'Special Administrative Measures' for prisoners**

### **Background**

Less than two months after the September 11 terrorist attacks on the United States, the Department of Justice issued an interim rule that drastically 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. *See* 66 Fed. Reg. 55062 (October 31, 2001). The regulation became effective immediately without the usual opportunity for prior public comment. After 5,000 comments were submitted opposing the new regulations, the Bureau of Prisons finalized the rule nearly six years later in April of 2007. *See* 64 Fed. Reg. 16271 (April 4, 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 the Department of Justice, 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. The Justice Department should repeal the regulation that directs the Bureau of Prisons to facilitate the monitoring or review of communications between detainees and attorneys. Repeal the Special Administrative Measures (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, 28 C.F.R. §§ 501.2(e), 501.3(d), (f) should be repealed. And 28 C.F.R. §§ 501.2(c), 501.3(c) should be amended to comply with the previous regulations.
2. Because of the extreme social isolation allowable under the SAMs, the BOP should conduct a mental health screening of all individuals currently

subject to the 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.

## Prisoner communications

### Background

On April 3, 2006, the Bureau of Prisons proposed a new regulation imposing severe restrictions on the ability of persons in bureau custody to communicate with the outside world. Although the regulation is titled "Limited Communication for Terrorist Inmates," the regulation can be applied to persons who have not been convicted or charged with any act of terrorism, or indeed with any crime at all. See 71 Fed. Reg. 16520-16525 (Apr. 3, 2006). This proposed rule has never been finalized, although it is set for final action in November 2008.

The proposed regulation provides that a BOP warden may determine that a person in BOP custody has "an identifiable link to terrorist-related activity." The warden's actions are not subject to external review. 28 C.F.R. § 540.200(a). Once a person is so designated, his or her communications with the outside world are all but eliminated. See 28 C.F.R. §§ 540.202(a); 540.203(a); 540.204(a)(1). For example, there is no provision for communication with friends, relatives other than immediate family, or members of the news media.

The regulation also threatens the operation of a free press in that it would completely bar a class of persons from communicating with the news media in any form. Such a ban is unprecedented in American jurisprudence. Under existing case law it is also unconstitutional; the Supreme Court has consistently assumed that communications between prisoners and members of the news media enjoy constitutional protection.

The proposed regulation is also unnecessary as existing bureau regulations allow prison officials to control and limit prisoners' correspondence, telephone calls, and visits, and to monitor those communications to detect and prevent possible criminal activity.

### Recommendations

Withdraw Proposed Rule 28 CFR 540.200 et seq.

## **Crack/Powder Sentencing**

### **Background**

For 20 years, a disparity has existed in the Federal Sentencing Guidelines between the sentences given out for sale or possession of cocaine in its crack and powder forms. According to current guidelines, a conviction for the sale of 500 grams of powder cocaine results in a 5-year mandatory minimum sentence, while the same penalty is triggered for sale or possession of only 5 grams of crack cocaine.

This 100:1 disparity in the mandatory minimum sentences is not only unjust, it is unwarranted by the facts. Experts from the medical, scientific, and criminal justice communities have all testified that there is no basis for the sentencing disparity.

### **Recommendations**

The attorney general should revise the US Attorneys' Manual to require that crack offenses are charged as "cocaine" and not "cocaine base," effectively resulting in elimination of the disparity.

There is currently no regulation in place to be amended or repealed; there is, of course, a federal statutory scheme that prohibits cocaine use unless pursuant to prescription or approved research. US Attorneys, however, have broad charging discretion to decide what types of cases to prosecute, and with drugs, what threshold amounts will trigger prosecution. The US Attorneys' Manual contains guidelines promulgated by the attorney general and followed by U.S. Attorneys and their assistants.

## Medical 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). Lyle Craker (who is represented by the ACLU), the director of the Medicinal Plant Program at the University of Massachusetts, applied over seven years ago 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, DEA Administrative Law Judge Mary Ellen Bittner issued an opinion and recommended urging the DEA to grant Craker’s application. But with no set deadline to respond, DEA appears to be using delay as its primary tactic as it has failed to respond to Judge Bittner’s opinion.

### Recommendations

1. Halt the use of Justice Department funds to arrest and prosecute medical marijuana users in states with current laws permitting access to physician-supervised medical marijuana. In particular, the US Attorney general should update the US Attorneys’ Manual to de-prioritize the arrest and prosecution of medical marijuana users in medical marijuana states. There is currently no regulation in place to be amended or repealed; there is, of course, a federal statutory scheme that prohibits marijuana use unless pursuant to approved research. But US Attorneys have broad charging discretion in determining what types of cases to prosecute, and with drugs, what threshold amounts that will trigger prosecution. The US Attorneys’ Manual contains guidelines promulgated by the Attorney general and followed by US Attorneys and their assistants.
2. The DEA Administrator should grant Lyle Craker’s application for a Schedule I license to produce research-grade medical marijuana for use in DEA- and FDA-approved studies. This would only require DEA to

approve the current recommendation of its own Administrative Law Judge.

3. All relevant agencies should stop denying the existence of medical uses of marijuana – as nearly one-third of states have done by enacting laws – and therefore, under existing legal criteria, reclassify marijuana from Schedule I to Schedule V.
4. Issue an executive order stating that, “No veteran shall be denied care solely on the basis of using marijuana for medical purposes in compliance with state law.” Although there are many known instances of veterans being denied care as a result of medical marijuana use, we have not been able to identify a specific regulation that mandates or authorizes this policy.

## Civil rights (all agencies)

### \* First 100 Days Recommendation

## Discrimination against sexual minorities with federal dollars

### Background

Policies that allow individuals to be denied jobs or lose them over factors that are unrelated to job performance or ability are unjust. Recognizing that, President Clinton in 1998 signed EO# 13087, which banned discrimination based on sexual orientation in federal employment. However, there is still no bar to discrimination based on gender identity.

In addition, there is no bar to discrimination based upon either sexual orientation or gender identity by federal contractors. 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 Before the Subcomm. On Employer-Employee Relations of the House Comm. on Economic and Educational Opportunities, 104th Cong., 1st Sess. (1995) (statement of Deputy Assistant Secretary of Labor for Federal Contract Compliance Shirley J. Wilcher).

In the absence of an executive order protecting persons employed by federal contractors against discrimination based on sexual orientation, the federal government has no assurance that its contractors are following the type of nondiscriminatory employment practices that have governed the civilian federal workforce with respect to sexual orientation for 10 years.

Expanding the nondiscrimination requirements imposed on federal contractors to include sexual orientation and gender identity does not require any additional statutory authority. 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, EO # 11246, which was subsequently amended. Nearly all federal contracts are covered by the order. The same procurement statutes and inherent constitutional executive power that provided authority for the 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.

## Recommendations

The president should follow in the honorable footsteps of presidents Roosevelt, Kennedy, and Johnson in expanding the prohibition on discrimination in government. Specifically:

1. 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.

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. 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 CFR 60-1.4 as a model.

2. The president should issue an executive order updating and expanding EO# 13087 to prohibit discrimination based upon gender identity in federal employment, and ordering all agencies to take those steps necessary to implement the order.

## Civil Rights (Justice Department)

### \* First 100 Days Recommendation

## The Civil Rights Division

### Background

Under President Bush the Civil Rights Division of the Department of Justice has been rendered largely ineffective. The Division has not properly enforced the nation's civil rights laws, has avoided challenging cases that could yield significant rulings and advance civil rights, and in some cases has switched sides from defending the civil rights of minority plaintiffs to supporting their opponents. Current and former lawyers in the Civil Rights Division report that political appointees continually overruled their decisions and exerted undue political influence over voting rights cases. One-third of the lawyers in the Civil Rights Division have left the department and those that remain have been barred from making recommendations in major voting rights cases.

### Recommendations

The attorney general should emphasize renewed civil rights enforcement at the Civil Rights Division. While not exhaustive, the agency's actions should include the following changes:

1. The Voting Section should increase emphasis on prosecution of Section 2, Section 5, and Section 203 cases under the Voting Rights Act on behalf of minority communities; make appropriate and timely Section 5 objections; address ongoing concerns regarding the Section's use of US Attorneys' criminal prosecutors for election day monitoring; and address the problems of voter caging and aggressive voter challenges at the polls.
2. The Employment Litigation Section should rescind any policy aimed at limiting or reducing the number of pattern and practice and disparate impact cases, and take steps to increase investigation and litigation of pattern and practice and disparate impact cases alleging race, national origin, and sex discrimination. The Employment Litigation Section should also commit to fully defending and enforcing all settlement agreements and consent decrees into which it has previously entered, including those agreements undermined and attacked under the Bush Administration.

3. The Special Litigation Unit should reinvigorate its prosecution of pattern and practice law enforcement cases, rebuild its docket of prison conditions of confinement cases and, where appropriate, seek consent decrees by accepting admissions of constitutional violations.
4. The Justice Department Civil Rights Division Disability Rights Section should reinvigorate enforcement with regards to access to, and nondiscrimination by, state and local government programs and activities, particularly including voting accessibility, state compliance with *Olmstead v. L.C.*, 527 U.S. 581 (1999), and state and local government employment services. The DOJ should also focus efforts on ensuring that internet websites are accessible and usable by people with disabilities by issuing guidance and, where appropriate, taking actions to enforce the 2004 Americans with Disabilities Act and Section 508 of the Rehabilitation Act (29 U.S.C. § 794d).
5. The Educational Opportunities Section should again initiate affirmative 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.

## Other Agencies' Civil Rights Enforcement

### Background

In addition to the Department of Justice, renewed civil rights enforcement is also needed at other federal agencies, including the EEOC, the Department of Labor, the Department of Agriculture, and the Department of Education.

### Recommendations

All relevant agencies should renew civil rights enforcement, including but not limited to the following actions:

1. The Department of Labor (DOL) should revive efforts to hold businesses accountable and protect the rights of all workers. DOL should, for example, reinstate the Office of Federal Contract Compliance Program's Equal Opportunity Survey, a vital tool in ensuring that federal contractors and subcontractors comply with non-discrimination requirements. DOL should similarly conduct surveys to assess whether employers are complying with the FMLA. In addition, DOL should, in order to provide a regulatory fix for the Supreme Court's decision in *Long Island Care at Home v. Coke*, amend its FLSA regulations to clarify that home health care workers are entitled to wage and overtime protections.
2. The Department of Education (ED) should take a more proactive role in promoting diversity and equal opportunity in education. Currently, the ED supports failing race neutral education policies and single-sex education policies that lack proper safeguards against discrimination and stereotyping. The ED's Office of Civil Rights (OCR) should reinstate its support for affirmative action policies, as well as repeal regulations vastly expanding unnecessary sex segregation in public schools. ED should meaningfully study and seek to remedy sex and race-based disparities in education.
3. The Department of Agriculture should actively promote equal opportunity for disadvantaged farmers and provide compensation for past discrimination. The USDA has assisted a very small percentage of African American farmers filing for restitution for past discrimination.

4. Urge the EEOC to reverse or modify any policy or practice that has reduced race, national origin, and sex discrimination cases pursued by the commission. The president should call upon the commission to reinvigorate its class action and disparate impact cases, undertaking measures to strengthen enforcement of laws prohibiting wage discrimination, pregnancy discrimination, and caregiver discrimination. The commission should also be urged to issue EEOC Guidance indicating that the Supreme Court's decision in *Hoffman Plastics v. NLRB* does not limit claims or remedies under Title VII for any form of discrimination, including discriminatory firings, for undocumented workers. The EEOC should also be urged to take steps to reduce its backlog of cases. The president should make appointments to the EEOC that reflect these priorities.
5. The Department of Housing and Urban Development (HUD) should finalize and adopt regulations addressing sexual harassment in housing under the Fair Housing Act that were initially proposed in 2000 under the Clinton Administration, thus making clear that the Fair Housing Act's prohibition on sex discrimination in housing reaches sexual harassment.

## **Federal Racial Profiling**

### **Background**

Racial profiling in law enforcement has been a problem at all levels of government for many years. In June of 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.

### **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 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.

## **Affirmative action**

### **Background**

The Bush Administration has taken numerous steps to undercut long-established affirmative action programs and policies. Affirmative action is one of the most effective tools for redressing the injustices caused by our nation's historic discrimination against people of color and women.

For example:

- The current administration and the Department of Education opposed race-conscious college admission programs.
- The Department of Labor suspended affirmative action in government contracting in efforts to rebuild the Gulf Coast.
- The Government Accountability Office reported that federal agencies such as the Defense Department and the Treasury Department awarded a minimal number of advertising contracts to disadvantaged and minority-owned firms.
- The Small Business Administration proposed a rule that would limit set-asides for women-owned small businesses.

### **Recommendations**

Act to renew efforts to promote diversity in education and the workplace by reversing agency guidance or practices that have eliminated or imposed heightened requirements to sustain affirmative action programs. Federal departments and executive agencies should renew enforcement of and compliance with executive orders covering civil rights. For example, the administration should emphasize the necessity of complying with the following executive orders and pursuing the following requirements and goals:

- Equal employment in the federal government (*see, e.g.*, EO # 11478, 13152)
- Nondiscrimination in federally conducted education and training programs (*see, e.g.*, EO # 13160)
- Increased opportunities for women-owned small businesses (*see, e.g.*, EO # 13157)

- Increased opportunities and access for disadvantaged businesses in federal contracting (*see, e.g.*, EO # 13170).

## Rights of the disabled

### 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. Many people with disabilities continue to be excluded from the American dream.

### Recommendations

The new administration should reinvigorate efforts to protect persons with disabilities by taking steps such as:

1. Sign the U.N. Convention on the Rights of Persons with Disabilities and seek its ratification. While the United States was a leader in being the first country to adopt a global disability rights law (the ADA), the Convention goes further in a number of steps, and addresses some shortcomings of the ADA. The Convention requires countries to adopt measures to ensure access, and redress discrimination in broader ways than does the ADA. A majority of countries have signed the Convention.
2. The Justice Department should amend its proposed rules of June 17, 2008, adopting the 2004 Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines (2004 ADAAG). If the rules have been finalized, it should initiate a new rulemaking to rescind several provisions of the rules, including:
  - “Safe harbors”: The DOJ has proposed a number of safe harbor provisions that would exempt from compliance numerous types of municipal facilities and limit required access modifications. Required modifications should be addressed on a case-by-case basis as under current law and regulation. Better is an approach in which past efforts at compliance should be considered as one factor in the program access analysis.
  - Access to court: The 2004 ADAAG delineated required modifications for court access, but unfortunately the DOJ’s proposal

would effectively not adopt these. The 2004 ADAAG guidelines for courthouse accessibility should be adopted.

- Prisons and jails: The proposed DOJ rules contain many admirable requirements for access in prisons and jails, but the rule also creates an express exception from the integration mandate where the correctional agency believes it “appropriate to make an exception for a specific individual.” This exception would swallow the rule and should be removed.
  - The Department proposes amending § 35.172(a) to state that agencies enforcing Title II “shall investigate complaints.” The regulation currently provides that agencies “shall investigate each complete complaint.” Agencies should continue to investigate each complaint instead of selecting among them.
3. The Social Security Administration should resolve the Social Security disability benefits determination backlog thoroughly, expeditiously and fairly. A current backlog of benefits determination cases is leaving hundreds of thousands of people who are in desperate need of assistance on years-long waiting lists to receive the benefits promised to them in law. In particular, Social Security should undertake a complete review of the process for administering disability cases, and should seek additional funding as necessary to reduce this backlog.
  4. The departments of Veterans Affairs and Defense should implement the recommendations of the Veterans’ Disability Benefits Commission (VDBC). 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. If implemented, the VDBC’s recommendations would dramatically improve the lives of our disabled veterans.
  5. HHS should dramatically expand its experimental “Money Follows the Person” (MFP) program for the financing of disability benefits. MFP refers to an overall strategy for appropriating funds in a way that supports an individual’s choice of settings. This allows individuals to get services more locally, gives people with disabilities more control in determining where they live and receive services, and allows them to do so closer to their homes and families. At the same time, it allows states to deliver services in a more cost-effective manner, and helps them to comply with a court decision, *Olmstead v. L.C.*, 527 U.S. 581 (1999), which requires that state services be provided in the most integrated setting possible and where appropriate, in a person’s community.



## **School harassment based on sexual orientation and gender identity**

### **Background**

Federal law makes it clear that sexual harassment and harassment based on sex are illegal in schools. But it isn't clear that harassing students because they are not "masculine" or "feminine" enough, including because they are perceived to be gay and therefore flaunting stereotypical ideas about gender, violates the law.

### **Recommendations**

Make clear that harassment based on lack of conformity to gender stereotypes violates the law. In particular, the Department of Education Office of Civil Rights (OCR) should issue a revised guidance manual on sexual harassment. OCR should reaffirm that sexual harassment includes harassment directed at students for their lack of conformity to gender stereotypes, and should clarify that this includes harassment of students (who may be – or may simply be perceived to be – lesbian, gay, bisexual or transgender) because of their lack of conformity to gender stereotypes in areas such as appearance, mannerisms, interests, dating partners or other ways of expressing their gender.

## **Benefit plans covering domestic partners**

### **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.

### **Recommendations**

The federal government should make it clear that under the rules covering benefit plans, spousal-type benefits can be extended to plan participants with domestic partners. In particular, the Internal Revenue Service (IRS) should evaluate all the provisions about spouses in the laws concerning federal tax qualified benefits plans, and for all those laws which are not limiting, issue a regulation or other administrative directive clarifying that the federal tax qualified benefits plan of a private or public employer that treats same-sex partners the same as spouses for plan benefits will not be disqualified.

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. The IRS should issue guidance addressing joint and survivor annuities and all other spousal benefits that can be made available by employers without subjecting their plan to disqualification.

## Same-sex couples under Medicaid

### Background

There is a disparity in treatment between Medicaid beneficiaries with opposite-sex spouses and those with same-sex domestic partners under the rules on liens, adjustments and recoveries, and transfers of assets:

- A lien may not be placed on the home of a long-term care beneficiary so long as his or her spouse is residing in the home. 42 U.S.C. § 1396p(a)(2)(A).
- An adjustment or recovery may not be made from the estate of a deceased long-term care beneficiary so long as his or her surviving spouse is alive. 42 U.S.C. § 1396p(b)(2).
- A disposition of assets for less than fair-market value does not render a long-term care beneficiary ineligible for medical assistance where it is a transfer of his or her home to his or her spouse. 42 U.S.C. § 1396p(c)(2)(A)(i).

There are also other Medicaid program benefits given to beneficiaries with opposite-sex spouses that could be given to beneficiaries with same-sex domestic partners without violating the Defense of Marriage Act because such benefits are neither explicitly nor implicitly limited by Title XIX of the Social Security Act to beneficiaries with spouses. This has not been done by the Bush Administration.

### Recommendations

1. The Centers for Medicare and Medicaid Services (CMS) should end the disparity between Medicaid beneficiaries with opposite-sex spouses and those with same-sex domestic partners under the rules on liens, adjustments and recoveries, and transfers of assets

CMS has express statutory authority to establish criteria for hardship waivers. For example, 42 U.S.C. § 1396p(c)(2)(D) says: "An individual shall not be ineligible for medical assistance . . . to the extent that . . . the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary." The State Medicaid Manual § 3258.10(C)(5) says: "Undue hardship exists when application of the transfer of assets

provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life." CMS could clarify that, under this subregulatory guidance, the term "undue hardship" encompasses the loss of the home of a long-term care beneficiary so long as his or her same-sex domestic partner is residing in the home.

2. CMS should carry out a comprehensive review of the Medicaid program in order to identify all other program benefits that are enjoyed by beneficiaries with opposite-sex spouses that may be extended to beneficiaries with same-sex domestic partners. In all such instances, CMS should, at a minimum, clarify for states that recognize the relationships of same-sex domestic partners (i.e., states that permit same-sex couples to enter into marriages, civil unions, domestic partnerships, or reciprocal beneficiaryships) that they may extend such benefits to beneficiaries with same-sex domestic partners, consistent with their obligations under state law, without risk of a disallowance or noncompliance action by CMS. CMS could do this either through notice-and-comment rulemaking or through subregulatory guidance (e.g., a State Medicaid Director letter).

## **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 being considered.

### **Recommendations**

The Department of Health and Human Services 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 and gender identity.

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, where such characteristic is unrelated to the individual placement needs of a particular child.

## **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.

### **Recommendations**

Ban discrimination against people with HIV by the government, federal contractors and subcontractors. Issue an executive order ensuring 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. 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.

## Political protest

### Background

In recent years the Secret Service has on numerous occasions imposed restrictive “free speech zones” on protesters at presidential appearances. The Secret Service agreed to stop the practice as part of the settlement in the ACLU’s case against it, *ACORN v. Secret Service*. However, the Secret Service subsequently violated the settlement agreement and has continued to target political protesters during events attended by the president and senior administration officials. (It does not appear that the Secret Service has a written policy on free speech zones, but it has employed the tactic on numerous occasions.)

In addition, the White House Office of Presidential Advance created a policy in the Presidential Advance Manual, which states that ticket distribution is “vital to ... deterring potential protesters.” The Manual and the manner in which it has been implemented have targeted demonstrators or protesters who express a viewpoint that differs from the president’s or is critical of the president or his/her policies.

Discrimination against protesters runs contrary to American values and has three practical consequences: a) it prevents governmental critics from gathering in traditional public areas where other members of the public are allowed to congregate; b) it insulates government officials from seeing or hearing the protesters and vice-versa; and c) it gives to the media and the American public the appearance that there is less dissent from government policies than there really is. Similar methods were used by the Chinese government to stifle all political protest during the 2008 Olympics in Beijing.

### Recommendations

1. Issue an executive order directing the Secret Service to end the use of so-called “free speech zones,” and repeal procedures in the Presidential Advance Manual for deterring political protest.
2. The Advance Manual must be revised to afford full First Amendment protection to all demonstrators or protesters and limit safeguards to only those individuals who engage in or have stated they will engage in activity unprotected under *Brandenburg v. Ohio*.



## Media Consolidation

### Background

Currently, six large corporations control most of what Americans hear on radio, see on television and read in print. Nearly every American relies upon broadcast and print media for the information they need to participate effectively in the political process. Increasing media consolidation and the monopolization it fosters endanger the diversity of opinion vital to self-government.

The Federal Communications Commission (FCC) has accelerated media consolidation. On December 18, 2007, the Commission eliminated a longstanding rule that prevents one company from owning both the major daily newspaper and TV station in the same market. The FCC has authority under Section 202(h) of the Telecommunications Act of 1996 to review its ownership rules every four years to evaluate whether the rules are necessary and in the public interest. When the Commission previously relaxed its cross-ownership rules in 2003, a federal court rejected its action (*Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (3d Cir. 2004)). Despite that ruling, the FCC revived its relaxed standard, which became effective on March 24, 2008.

The Commission's rule allows cross-ownership of one major daily newspaper and either one television station or one radio station in the same market (73 Fed. Reg. 9481, 21 Feb 2008). Ownership of a newspaper and either a television station or a radio station would be allowed in the top 20 U.S. markets, including Boston, Chicago, Dallas-Ft. Worth, New York, Los Angeles, Philadelphia, and San Francisco-Oakland-San Jose, if: (1) the transaction involves the combination of a major daily newspaper and one television or radio station; and (2) for television stations, there are at least 8 other media sources (major newspapers and television stations) that remain in the market and the station is not one of the top four Nielson-ranked stations. The FCC has granted permanent waivers to the rule, even in cases involving companies that own newspapers and television stations outside the top 20 markets, like Gannett and Media General.

The Commission's rule eliminates a 32-year blanket ban on newspaper-broadcast cross-ownership. There are fewer locally owned media outlets today than ever before, and the latest rule will only exacerbate this problem, harming both competition and diversity of expression and independence in editorial comment.

## **Recommendations**

Urge the FCC to address the growing problem of media consolidation, and to suspend and reverse its rule loosening cross-media ownership (73 Fed. Reg. 9481, 21 Feb 2008), and make appointments to the commission with that goal in mind.

## Network neutrality

### 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.

There are numerous examples of phone companies and Internet providers discriminating based on content. For example, the FCC recently found that 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.

The Internet was created under a regime of openness, and an explosion of innovation took place under that regime. Until the Supreme Court *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 recently 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."

### Recommendations

1. Urge the FCC to continue to administratively enforce the principle of an open Internet upon Internet network providers, as it did with its Comcast decision in August 2008. Specifically, the president should urge the FCC to provide for meaningful enforcement available to all users of text messaging, short code, and broadband services, and uphold the concepts of neutrality, non-discrimination, equality of access, and non-exclusivity in the provision of those services.

2. Urge the FCC to issue regulations that codify its “Four Freedoms” of an open Internet and the principles outlined in the Commission’s Comcast/BitTorrent ruling.
3. Make appointments to the FCC with these priorities in mind.

## Online censorship of soldiers

### Background

Soldiers deployed overseas increasingly use the Internet to stay connected with their family and friends back home through e-mails, videos, blogs, on-line chats, and voice over Internet protocol (VOIP), which operates like an online telephone call. They also use the Internet for news and information that they may not collect through official channels or publications such as *Stars and Stripes*. In many cases, soldiers have used the Internet to provide insight into their daily lives, how the wars in Afghanistan and Iraq are really going, and their own candid assessments of how American policy is interpreted abroad. Telephone calls using commercial carriers are frequently expensive and unavailable, making the Internet the only medium for real-time communications for our overseas troops.

In 2007, the Department of Defense and military commanders substantially curtailed much of the soldiers' online activities. In April 2007, the Army issued Regulation 530-1, an updated operational security policy, which requires soldiers to consult with a commanding officer before posting information in a public forum. The policy effectively chills most blogging activity because soldiers are apprehensive about asking their commander for permission. The policy allows commanders to identify and suppress dissent from soldiers under their command, even when no legitimate operational security issues are implicated.

On May 11, 2007, DOD issued a memorandum from General B.B. Bell that blocked the use of all DOD network resources to access 13 popular recreational Internet sites commonly used by soldiers, sailors, and airmen to send personal videos, photos, and data files. Some of the sites in DOD's censorship order include youtube.com, photobucket.com, and myspace.com. The memorandum justified the new policy as necessary to safeguard operational security and reduce traffic impacting DOD's network and bandwidth availability. Although private Internet connections can still be used, most troops deployed to combat areas such as Afghanistan and Iraq and more remote bases in locations such as Korea and Guantanamo Bay are limited to using DOD network resources.

### Recommendations

The military should end online censorship of soldiers deployed overseas, except where it involves suppression of mission-critical or classified information. Troops stationed overseas should be permitted to exercise their speech and associational rights, subject only to legitimate operational security concerns. Censorship of communications and information that do not implicate those concerns must be prohibited. To the extent that the bandwidth or network services are currently inadequate, appropriations should be committed to remove those barriers. Those who would fight and die to defend our freedoms abroad should not be denied those same rights themselves.

## **Fleeting expletives**

### **Background**

Thirty years ago the Federal Communications Commission banned the use of "indecent speech" in broadcasting. The commission has long held broadcasters liable for airing material that "dwells on or repeats at length descriptions of sexual or excretory organs or activities" or "appears to pander or is used to titillate."

In 2003, however, the FCC increased its enforcement of "indecent speech" after the rock star Bono of U2 spontaneously blurted out the "f word" during a live broadcast of the Golden Globe Awards on NBC. The FCC initially did not act but then due to political pressure reversed itself and fined stations that aired the accidental expletive.

In 2007, the Second Circuit Court of Appeals rejected the FCC's strict enforcement policy on broadcasters that air "fleeting expletives." The court's decisions dealt with several cases of unscripted swear words, and it ruled that the FCC crossed a line by arbitrarily redefining its standards. In rejecting the FCC's argument, the court noted that "In recent times even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced 'sexual or excretory organs or activities.'"

The FCC's regulation of "indecent speech" was arbitrary, inconsistent and irreconcilable with core First Amendment values.

The share of media subject to FCC oversight is in decline: more than 80 percent of U.S. homes receive cable and satellite programming not subject to FCC regulation.

### **Recommendations**

Urge the FCC to end its policy of fining broadcasters for fleeting expletives and momentary lapses of decency standards. 19 FCC Rcd 4975 (2004) Make appointments to the commission with this goal in mind.

## **World Intellectual Property Organization (WIPO)**

### **Background**

The World Intellectual Property Organization (WIPO) is a UN agency that creates international treaties governing intellectual property. These issues include: patents, copyrights, and particular rights for performers and recorded music. There are currently 184 Member States, more than 90 percent of the countries of the world, in WIPO.

Our negotiations with WIPO have been restrictive of free speech and fair use of data.

### **Recommendations**

Direct US negotiators to reverse the current policy and strike a negotiating posture with WIPO that emphasizes the free flow of information and respect for the fair use of information. (The head negotiator for the U.S. delegation changes depending upon the topic of the meeting; in the recent past it has been the director of the US Patent and Trademark Office, Secretary of State and other officials.)

Freedom of Belief (all agencies)

\* First 100 Days Recommendation

## The faith-based initiative

### Background

Since his election in 2000, President Bush has engaged in consistent efforts to intertwine government and religion. His faith-based initiative, which provides direct governmental funding to religious groups that provide social services, has been a central component of this effort. This has 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. Facing lack of congressional support for this effort, President Bush issued a series of executive orders that set up special faith-based-initiative offices in the White House and at various agencies. Executive Orders 13198 and 13199 (signed January 29, 2001), 13280 (signed December 12, 2002), 13342 (signed June 1, 2004), and 13397 (signed March 7, 2006) mandated that the White House, the departments of Justice, Education, Labor, Health and Human Services, Housing and Urban Development, Agriculture, Commerce, Veteran Affairs, and Homeland Security, the Agency for International Development and the Small Business Administration all establish a Center for Faith-Based and Community Initiatives.

These orders permitted each agency's faith-based office to distribute taxpayer dollars to any church, place of worship, or other religious group with no clear standards or limitations consistent with the Constitution. These executive orders amounted to a political tool used by the White House and various executive agencies to specifically court churches and religious organizations to apply for governmental funds, and ultimately, shifted the focus away from the need to expand resources for helping all community-based organizations across the country provide social services.

Executive Order 13279 (Signed on December 12, 2002) has been perhaps the broadest of President Bush's executive orders carrying out his faith-based initiative. President Bush issued the order ostensibly to provide "equal protection for faith-based and community organizations." But the true aim of this executive order was to circumvent Congress's refusal to permit religious discrimination,

coercion and proselytizing in government-funded programs. The order allows churches and other religious organizations receiving government funds to discriminate on the basis of religion in hiring, and to engage in conduct that essentially amounts to religious coercion of beneficiaries. Executive Order 13279 essentially authorizes government-funded religious discrimination and coercion.

## Recommendations

1. Repeal Executive Order 13279 and issue a new executive order that prohibits government-funded religious employment discrimination, and allows for enforcement of applicable state and local antidiscrimination laws.
2. Repeal Executive Orders 13198, 13199, 13280, 13342, and 13397, and issue a new executive order containing clear standards and protections consistent with the Constitution, including provisions to:
  - Ensure that no direct government funds are used to support any religious activity, programming, or materials, and inform beneficiaries of their rights.
  - Provide for increased monitoring and oversight by funding agencies to ensure compliance with applicable law.
  - Restore and strengthen the fundamental, constitutionally mandated prohibition on direct government funding of houses of worship (while continuing to permit funding of social service organizations that merely are religiously affiliated, and therefore able to segregate their government-funded nonreligious programs from their religious activities).
  - Instruct all departments and agencies to issue, to the extent required, new regulations consistent with the new executive order.
3. Issue a new executive order regarding the role of faith-based organizations in publicly funded social services that:
  - Prohibits direct government funding of houses of worship and provides clear standards and protections consistent with the Constitution. (There are some circumstances where organizations

that have religious affiliations may be able to segregate their government-funded nonreligious programs from their ongoing religious activities. In such cases, the *nonreligious programs* operated by organizations with religious affiliations may participate in some programs provided that they account for the separation of funds and that they adhere to the same rules and regulations that apply to other non-profit entities.)

- Explicitly prohibits religious employment discrimination in government-funded programs.
- Allows for enforcement of applicable state and local antidiscrimination laws.
- Provides real programmatic oversight to ensure accountability and to ensure that no direct government funds are used to support any religious activity, programming, or materials.

All departments and agencies should be instructed to issue, to the extent required, new regulations consistent with the new executive order.

## **Broaden the mandate of the Special Counsel for Religious Discrimination**

### **Background**

Created by the Bush Administration's Department of Justice in 2002, the Special Counsel for Religious Discrimination is currently "charged with coordinating enforcement of the civil rights laws addressing religious freedom and religious discrimination." While the office has done some important work promoting the free exercise of religion, it has virtually ignored the Establishment Clause of the First Amendment.

### **Recommendations**

The new administration should broaden the special counsel's mandate expressly to include vigorous enforcement of the Establishment Clause in order to help ensure that the government does not promote, endorse, or favor any religious practice or belief.

## Local immigration enforcement

### Background

The federal government has been soliciting and entering into memorandums of understanding (MOUs) with states and localities as authorized under section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), which deputize law enforcement to enforce federal immigration laws. This represents a reversal of the longstanding policy of separation of police and immigration powers, which increases racial profiling of immigrants and non-immigrants alike, inhibits the establishment of trust between police officers and communities, strains local law enforcement resources, and leaves enforcement in the hands of officers who cannot possibly be trained in the complexities of immigration law.

### Recommendations

Stop entering into or soliciting 287(g) MOUs with states and localities, and give notice to relevant states and localities that all prior 287(g) MOUs will no longer be effective, in order to return all federal immigration enforcement powers to DHS only.

## **Immigration raids**

### **Background**

Since September 2006, ICE has aggressively stepped 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.

Various lawsuits have been brought against ICE in federal court alleging constitutional violations in the way that ICE has conducted these raids – including ICE agents conducting warrantless searches of homes, relying on racial profiling to stop and question persons who are or appear to be Latino at factories and other 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, and intimidating arrestees into stipulating their removal without providing adequate procedural safeguards.

### **Recommendations**

Issue a moratorium on immigration raids pending a thorough review of their fairness and efficacy.

## **ID theft prosecutions**

### **Background**

ICE's immigration raids have had the effect of criminalizing many workers who are already exploited by their employers. In May 2008, ICE and the Department of Justice conducted the largest ever single-site immigration raid in Postville, Iowa. More than 300 workers were arrested and charged criminally with aggravated identity theft under 18 U.S.C. § 1028(A)(a)(1), which carries a mandatory two-year minimum prison term if convicted. The employer had been under investigation by the Iowa Labor Commission and the U.S. Department of Labor for various egregious labor abuses against workers, including child labor violations.

The workers had very little or no time to meet with their defense attorneys, and almost all pled guilty within ten days after the raid to the lesser offense of knowingly using a false Social Security number or knowingly using a false employment document. As part of the exploding plea agreements offered by the government, the majority of the workers received 5-month prison sentences and waived all of their rights to any immigration relief through a stipulated judicial order of removal under 8 U.S.C. 1228(c)(5). Many of the Postville workers may have been eligible to apply for asylum or other forms of immigration relief but lost the opportunity to apply for such relief because of a stipulated judicial order of removal that was part of the plea agreement.

### **Recommendations**

1. Stop charging and prosecuting immigrant workers for aggravated identity theft and related crimes and instead enforce workplace labor protections under the law.
2. Stop the use of stipulated judicial orders of removal.

## **Deportation to nations that torture**

### **Background**

It is illegal under international law to torture, or to transfer individuals to countries where they are at risk of torture. As a result, the United States has been seeking “diplomatic assurances” from nations where suspects will likely face torture, that those suspects will not be tortured or ill-treated. But “diplomatic assurances” from nations that torture are inherently unreliable.

### **Recommendations**

Prohibit the reliance on “diplomatic assurances” to deport (pursuant to 8 C.F.R. § 208.18(c)) or otherwise transfer persons from the United States. At a minimum, ensure that no such assurances are used without an opportunity for meaningful judicial review of whether they are sufficient to comply with U.S. obligations under the UN Convention Against Torture.

## **Detention standards**

### **Background**

The size of the daily immigration detention population more than doubled between FY 1996 and FY 2007, from 9,011 to 30,295 noncitizens. The largest increase occurred between FY 2006 and FY 2007 when Congress increased bed space funding from 20,800 to 27,500 beds. In 2008, Division E of the Consolidated Appropriations Act (P.L. 110-161) appropriated \$2.4 billion for Immigration Customs Enforcement Detention Removal Operations to fund 32,000 beds, an increase of \$397 million (20 percent) over the FY 2007 appropriation.

Despite this explosive growth in immigration detention, there are no regulations or enforceable standards regarding detention conditions, including medical treatment, mental health care, religious services, transfers, and access to telephones, free legal services, and library materials. Several national newspapers have reported on dozens of deaths in immigration detention due to substandard or, in some cases, a complete absence of medical care provided to detainees.

### **Recommendations**

1. Promulgate enforceable and strengthened detention standards that are binding on all facilities that house immigration detainees.
2. Issue a moratorium on contracting for, or construction of, additional immigration detention bed space pending a comprehensive review of the feasibility and effectiveness of alternatives to detention and less restrictive forms of detention.

## **Expedited removal**

### **Background**

In 2004 the attorney general authorized "expedited removal" against persons arrested inside the United States. See 69 Fed. Reg. 48877 (Aug. 11, 2004). This action authorized application of expedited removal to persons within the United States who are allegedly apprehended within 100 miles of the border and who are unable to demonstrate that they have been continuously physically present in the country for 14 days.

### **Recommendations**

Repeal the 2004 Attorney general authorization for use of "expedited removal" against persons arrested inside the United States. At minimum, suspected undocumented immigrants who are present inside the United States should not be removed without any meaningful administrative review.

## Board of Immigration Appeals

### Background

The Board of Immigration Appeals has ceased to function as an effective appeals mechanism under the Bush Administration. In 2002 Attorney General Ashcroft purged 10 members of the BIA and imposed 'streamlining' regulations, 67 Fed. Reg. 165 at 54877 (Aug. 26, 2002) *effective* Sept. 26, 2002, that greatly curtailed thorough review by the Board of Immigration Appeals. A new, truncated process led to an upsurge in the volume of rulings, many of which contained no analysis or reasoning. As a result, the federal appeals courts were in turn flooded with immigration appeals, were obliged to review immigration judge rulings without the benefit of reasoned administrative appeals decisions, and were compelled to expend disproportionate federal court resources on immigration matters.

### Recommendations

Restore the BIA as a meaningful appellate body.

1. Restore the BIA in both quantity and quality of judges by appointing 10 qualified judges to the BIA.
2. Repeal the "streamlining" regulations to ensure careful and meaningful administrative BIA review.
3. Restore the full measure of judicial review that normally governs final agency action under the Administrative Procedures Act and historically applied to immigration decisions until the current restrictions were enacted in the 1996 IIRIRA.
4. Halt the practice of AWO (Affirmance Without Opinion) decisions of immigration court orders, thereby returning to the BIA practices in place prior to the streamlining initiative. A restored BIA also furthers the goal of restoring full judicial review over immigration matters by establishing an immigration administrative process in which the courts can legitimately place confidence, that corrects errors by the immigration judges, and will likely diminish the volume of cases reaching the federal courts.

## Single-sex education

### Background

The Department of Education (ED) has reversed prior interpretations of Title IX that prohibited coeducational schools from segregating students by sex for classes or other activities in almost all circumstances.

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, Department of Education 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).<sup>1</sup>

In October 2006, however, ED revised its Title IX regulations to permit coeducational schools to offer sex-segregated classes in a wide variety of circumstances. 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 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

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<sup>1</sup> 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).

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). (In contrast, they do not set out any requirement that enrollment in a single-sex school must be voluntary.) 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’.

### **Recommendations**

The Department of Education should require the agency to rescind 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.

## **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 the approximately two and a half years since enactment, HUD has not issued regulations interpreting and explaining the law and has distributed inaccurate information about VAWA's applicability. In addition, many public housing authorities remain unaware of VAWA and have not trained their staff or given notice to tenants and voucher landlords about the availability of VAWA protections. Those public housing authorities that have attempted, in good faith, to satisfy VAWA's provisions cannot resolve certain issues that require direction from HUD and that would benefit from a consistent, national interpretation. With respect to enforcement, HUD has approved plans submitted by public housing authorities that do not comply with VAWA and has not put in place any process for accepting and investigating complaints alleging VAWA violations.

### **Recommendations**

HUD should issue and enforce regulations implementing the fair housing protections of VAWA and ensure that public housing authorities and section 8 owners carry out VAWA's mandate.

## Discrimination remedies

### Background

Confusion surrounds the issue of whether immigration status can be used to limit liabilities or prevent plaintiffs from bringing suit. The Equal Employment Opportunity Commission (EEOC) has not set out clear guidance on this issue.

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. Directive Transmittal, 915.022 (October 26, 1999). On June 27, 2002, responding to the Supreme Court's opinion *Hoffman 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), the EEOC rescinded its earlier guidance. Directive Transmittal, 915.022.

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. Some employers believe that immigration status might factor into questions of liability and could be used to deter plaintiffs from bringing suit. Moreover, in at least one state (New Jersey), the *Hoffman* decision was used to conclude that an undocumented worker who was discriminatorily discharged on the basis of her gender was not entitled to protection under the state's anti-discrimination law.

### Recommendations

Urge the Equal Employment Opportunity Commission to issue guidance stating that the Supreme Court decision, *Hoffman Plastic Compounds v NLRB*, does not limit claims or remedies available under existing law (Title VII) for any form of discrimination against undocumented workers, including discriminatory firings. Make appointments to the EEOC with that goal in mind.

## Home health care workers

### Background

In *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007), the Supreme Court upheld a 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. New York City filed an amicus brief in the case arguing that covering these workers would result in government paying an additional \$250 million dollars per year to the 60,000 home care attendants in the city. The decision was criticized by 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 the infirm.

### Recommendations

The Department of Labor (DOL) should amend its Fair Labor Standards Act (FLSA) regulations to make clear that home health care workers are entitled to wage and overtime protections in order to fix the Supreme Court decision in *Long Island Care at Home Ltd. v. Coke*.

The problematic provision is 29 C.F.R. § 552.109(a), which declares that third-party employers of workers providing companionship services need not pay those employees the federal minimum wage or overtime. As the Supreme Court explained, "On at least three separate occasions during the past 15 years, the Department considered changing the regulation and narrowing the exemption in order to bring within the scope of the FLSA's wage and hour coverage

companionship workers paid by third parties (other than family members of persons receiving the services, who under the proposals were to remain exempt). 58 Fed.Reg. 69310-69312 (1993); 60 Fed.Reg. 46798 (1995); 66 Fed.Reg. 5481, 5485 (2001). But the Department ultimately decided not to make any change. 67 Fed.Reg. 16668 (2002)."

## Reproductive Freedom (president)

### \* First 100 Days Recommendation

## Global gag rule on abortion

### Background

On his second day in office, President Bush followed the path charted by Presidents Reagan and George H.W. Bush and issued an executive order that prohibits the United States from granting family-planning funds to any overseas health clinic unless it agrees not to use private, non-U.S. funds for abortion services, counseling or advocacy in favor of abortion access. This policy, known as the global gag rule or Mexico City policy, has eroded family planning and reproductive health services in developing countries across the world.

The global gag rule has hamstrung the efforts of clinics around the world to provide comprehensive health-care services to women in need. For some clinics, medical professionals are barred from adequately advising patients of their medical options; for others, clinics have been closed, community outreach programs have been curtailed or eliminated, and contraceptive supplies have dried up. Some women without access to comprehensive medical care resort to unsafe, clandestine abortions, which account for the deaths of approximately 70,000 women and the hospitalization of another five million for significant medical injuries each year.

In addition to cutting off access to desperately needed contraceptives and services, the global gag rule represents an abandonment of our country's deeply-rooted commitment to free speech. It gags medical professionals, thereby further isolating the women who rely on the services and information these professionals provide. It suppresses the voices of nonprofit groups that want to use their own funds to petition their governments to promote policies that reduce the toll of unsafe abortions on women's lives.

### Recommendations

Rescind the Executive Memorandum of March 28, 2001, known as the "Mexico City policy" or "Global Gag Rule," prohibiting foreign aid to organizations overseas that promote or perform abortions.

## Abortion restrictions

### Background

Abortion is an important part of women's reproductive health care, and as affirmed by the 1973 US 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. Moreover, 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. 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.

### Recommendations

- 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 next President should indicate that the Administration is committed to working with Congress to fully repeal these restrictions.
- The budget should also 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, 2008, Pub. L. No. 110-161 § 508(d), 121 Stat. 1844, 2209.

## Emergency contraceptives

### Background

The Bush administration has restricted access to emergency contraception in a number of ways.

First, in 2002, the Department of Defense removed safe and effective emergency contraception from its Basic Core Formulary (a list of medications for Military Treatment Facilities), making it much less likely that the drug will be stocked on military bases. In FY 2007 the Department of Defense received 2,688 complaints of sexual assault – a number far lower than the actual number of assaults because an estimated 79% of military victims choose not to report, according to the GAO. As a result, it is important that women serving overseas have access to emergency contraception, should they want or need it, lest women who serve our country overseas and are victims of sexual assault find themselves re-victimized by the denial of medical care.

Second, on August 24, 2006, after more than three years of delay, the FDA finally approved the emergency contraceptive pill Plan B without a prescription for women over the age of 18. Plan B is safe for use by women of all ages. Restricting its availability without a prescription to women over the age of 18 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.

Third, in 2005, 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. Emergency contraception must be taken within days after unprotected intercourse, but experts agree that it is more effective the sooner it is taken. Because this narrow window of effectiveness makes timely access to emergency contraception critical, the Protocol should explicitly state that treatment of sexual assault victims must include routine counseling about and offering of emergency contraception.

### Recommendations

1. The Department of Defense should mandate that emergency contraception be included in the Basic Core Formulary for every military base.
2. The FDA should review and evaluate the scientific data underlying the age restriction on over-the-counter access to emergency contraception to ensure that FDA policy is based on sound science, not politics.
3. The Department of Justice should modify the sexual assault protocols issued by the agency in 2005 to include the routine offering of pregnancy prophylaxis (or "emergency contraception") to sexual assault victims who are at risk of pregnancy from rape.

## Regulations on birth control and religious refusals

### Background

The Department of Health and Human Services (HHS) has proposed a new regulation that could be interpreted as allowing institutions and individuals to deny women access to birth control and refuse to provide information and counseling about basic health care services.

HHS proposed the new rule on August 26, 2008 (45 CFR Part 88, RIN 0991-AB48). It purports to interpret three federal statutes (Church Amendments (42 U.S.C. § 300a-7), Public Health Service (PHS) Act §245 (42 U.S.C. § 238n), and the Weldon Amendment (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209)). The rule will likely become final in the next several months.

The proposed rule appears to allow certain publicly funded health care entities – both individuals and institutions – that have a religious objection to performing abortions to refuse to provide women with even the most basic information and counseling about the procedure. Moreover, statements by the Secretary suggest that HHS intends for the rule to create a new right for institutions and individuals to refuse to provide contraceptive services. If this occurs, the regulation could also undermine state reproductive health laws by preventing states from enforcing important measures that have expanded access to contraception.

The proposed rule does not strike the appropriate balance between patient access and religious liberty and could seriously undermine women's ability to obtain essential reproductive health services. Moreover, the rule is unnecessary: existing federal law (through Title VII of the Civil Rights Act of 1964) already protects both individual religious liberty and access to reproductive health care services. It requires an employer to attempt to accommodate current and prospective employees' refusals to provide any health care service on the basis of religious beliefs, so long as the accommodation does not pose an undue hardship on the employer's overall ability to provide health care services to its patients. Title VII thus contemplates a careful balancing of interests and gives employers leeway to take into account the effect of an employee's refusal on public health and safety. At the same time, Title VII seeks the maximum possible accommodation of an individuals' religious objection. The regulation seeks to upset that existing balance and to take the patients' needs out of this equation.

## **Recommendations**

HHS should act to suspend enforcement of the rule and undertake a review of its potential impact on patients' access to health care services.

## **Abortion clinic violence**

### **Background**

Under President Clinton, new attention was given to the problem of violence against abortion clinics. In January 1995, President Clinton directed all 93 United States Attorneys to establish local taskforces to coordinate law enforcement efforts relating to violence against abortion clinics and providers. The taskforces included representatives of federal and local law enforcement agencies and worked with the United States Marshals Service and senior officials in DOJ to evaluate risks to particular abortion providers or their patients and to coordinate the provision of security for them when needed.

Additionally, in response to a number of bombings and other unlawful acts of violence, obstruction, and intimidation at reproductive health clinics nationwide, the Acting Assistant Attorney General for Civil Rights in 1997 formed a working group at the Department of Justice (DOJ) to coordinate policy objectives among federal agencies and to ensure that law enforcement efforts were sufficient to prevent illegal interference with the delivery of constitutionally protected reproductive health care services. Chaired by the Acting Assistant Attorney General for Civil Rights, this working group consisted of senior representatives of the Civil Rights Division, the Executive Office of United States Attorneys, the Office of the Deputy Attorney General, the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco and Firearms (ATF), and the United States Marshals Service. The group met monthly to share information and coordinate the government's prevention and law enforcement activities.

Recent reports of arson, blockades, and attempted bombings at abortion clinics underscore the need for a renewed commitment to combating and preventing clinic violence.

### **Recommendations**

The attorney general should re-establish these or similar taskforces. Doing so would help ensure that existing laws prohibiting clinic violence are fully enforced and that state and local law enforcement are aware of the critical role they play in ensuring the safety of patients and providers.

## **Affordable birth control**

### **Background**

A 2005 policy change made birth control much less affordable for low-income individuals and college students.

For nearly twenty years, Congress increased access to affordable prescription drugs at no cost to the federal government by permitting pharmaceutical companies to voluntarily offer nominally priced drugs to certain health care providers. Unfortunately, a change made under the Deficit Reduction Act of 2005 (DRA) unintentionally stripped eligibility for these low-cost drugs from hundreds of family planning providers (those who do not receive Title X funds) and all university and college health centers – approximately 1,370 nationwide. This affects hundreds of thousands of low-income women and over three million college students.

As a result of this policy change, which went into effect in January 2007, birth control prices for college students and many low-income women have risen from \$5 or \$10 per pack to \$40 or \$50 per pack. Some college health clinics can no longer afford to carry birth control. Additionally, in an effort to preserve low- and no-cost birth control for their low-income patients, safety-net providers are cutting back on staff, hours of operation, and services. As a result, some women can no longer get contraception and an increasing number face unintended pregnancies.

Under the 2005 DRA (PL 109-171), the Secretary of HHS can designate an entity as a “safety-net provider” eligible to receive nominally-priced drugs (PL 109-171, Title VI, Subtitle A, §6001(d)(2)). Under the Bush Administration, the Centers for Medicare and Medicaid Services (CMS) has not proposed rules for designating “safety-net providers.”

### **Recommendations**

The Secretary of HHS, who oversees the Centers for Medicare and Medicaid Services, should propose rules to ensure that all safety-net providers and college and university health clinics are eligible for affordable birth control.

## The shackling of pregnant prisoners

### Background

Pregnant women who are incarcerated or detained in the United States are often subject to the use of physical or mechanical restraints during transport, labor, deliver 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. Shackling a woman in labor makes the birthing process more difficult and painful and places a barrier between the woman and her health care provider. 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 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 California, Illinois, or Vermont, the three states that have outlawed the shackling of pregnant women. Moreover, the shackling of pregnant immigrant women detained by ICE is entirely unnecessary and inappropriate because these women are not even held on criminal charges and represent no threat to public safety.

### Recommendations

Issue an executive order directing all federal departments and agencies responsible for the custody or control of pregnant prisoners and detainees to end this practice. 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.