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Rhetoric to Reality: Citizenship Delays and U.S. International Obligations in the Post-9/11 Landscape

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Introduction

To "Secure America's Promise as a Nation of Immigrants,"[1] in 2002, the United States Citizenship and Immigration Services (USCIS) engineered a new procedure requiring all applicants for U.S. citizenship to undergo an enhanced Federal Bureau of Investigation background name check (FBI name check).[2] Six years later, despite the stated aims of this procedure—"enhanc[ing] national security"[3] and maintaining the "integrity of the immigration system"[4]—its implementation spawned two problems: (1) a massive backlog of hundreds of thousands of applications[5] and (2) allegations of racial discrimination against individuals of Muslim, Arab, Middle Eastern, and South Asian descent.[6]

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1. EDUARDO AGUIRRE JR., U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., USCIS STRATEGIC PLAN: SECURING AMERICA'S PROMISE 1 (2005), http://www.uscis.gov/files/nativedocuments/USCISSTRATEGICPLAN.pdf.

2. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., A REVIEW OF U.S. CITIZENSHIP AND IMMIGRATION SERVS. ALIEN SECURITY CHECKS 3–4 (2005), http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-06_Nov05.pdf (noting the newly formed U.S. Citizenship and Immigration Services' first goal was to "ensure the security and integrity of the immigration system" by instituting FBI name checks); *see also The Post-9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment: Hearing Before the Subcomm. on Int'l Operations & Terrorism of the Comm. on Foreign Relations*, 108th Cong. 14–20 (2003) (statement by David Hardy, Acting Assistant Director, Records Management Div., Federal Bureau of Investigation), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:92725.pdf (describing the FBI name check process); *see generally* FBI, *National Name Check Program*, http://www.fbi.gov/hq/nationalnamecheck.htm (last visited Feb. 5, 2010) ("The National Name Check Program's (NNCP's) mission is to disseminate information from FBI files in response to name check requests received from federal agencies . . . [and] to determine whether a specific individual has been the subject of or mentioned in any FBI investigation(s).") (alteration in original) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. CITIZENSHIP AND NATURALIZATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., ANNUAL REPORT TO CONGRESS 4 (2007), http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf [hereinafter CIS 2007 REPORT].

4. U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., RESPONSE TO THE CITIZENSHIP AND IMMIGRATION SERVICES. OMBUDSMAN'S 2007 ANNUAL REPORT 7 (2008), http://www.dhs.gov/xlibrary/assets/USCISO_Thematic_Response_2007_FINAL_OMB_cleared.pdf [hereinafter RESPONSE TO CIS 2007 REPORT].

5. CIS 2007 REPORT, *supra* note 3, at 11–20; *see also* RESPONSE TO CIS 2007 REPORT, *supra* note 4, at 2–4 (discussing the backlog problem and its future impact on immigration).

6. *See, e.g.*, CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NEW YORK UNIV. SCH. OF LAW, IRREVERSIBLE CONSEQUENCES: RACIAL PROFILING AND LETHAL FORCE IN THE "WAR ON TERROR" 18 (2006), http://www.chrgj.org/docs/CHRGJ%20Irreversible%20Consequences%20June%202006.pdf ("Profiling of Arabs, Muslims, and South Asians has

As the former Citizenship and Immigration Services Ombudsman (CIS Ombudsman) noted in January 2008, this backlog crisis has become so severe that it now "may be the single biggest obstacle to the timely and efficient delivery of immigration benefits."[7] The empirical data demonstrates the severity of this problem.[8] In 2007, the delayed applications surged to more than 93,359, which resulted in a total of 329,160 individuals experiencing significant naturalization delays.[9] The overall numbers of processed applications skyrocketed.[10] In addition to the surge in backlogged applicants, the USCIS collectively processed more than 1.3 million applications, with the numbers in March 2007 increasing by more than sixty-four percent from September 2006.[11]

This surge has resulted in a dramatic increase in the number of federal lawsuits filed to compel the USCIS to resolve these delays.[12] The federal courts continue to grapple with the legality of the FBI name check procedures.[13] Although this area of law remains unsettled, non-citizens

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increased dramatically in the U.S. and elsewhere since . . . September 11, 2001, with widespread reports of prejudice, harassment and attacks."); *see also* AMNESTY INT'L, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES 1–2 (2004), *available at* http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf (noting the expansion in a number of groups frequently targeted by racial profiling); *see also* Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1177, 1227–37 (2004) (noting the need to "assess the spillover effects that terrorism policy is having on our national immigrant and immigration policy as well as on immigrants—both those here and those waiting to come," and further analyzing how terrorism policy has shaped immigration policy since September 11, 2001).

7. CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, U.S. DEP'T OF HOMELAND SEC., 2007 ANNUAL REPORT HIGHLIGHTS 2 (2007), http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

8. *See id.* ("As of May 2007, USCIS reported 329,160 FBI name check cases pending; [a]pproximately 64% (211,341) of those cases have been pending more than 90 days and approximately 32% (106,738) have been pending more than one year.").

9. *Id.*; *see also* CIS 2007 REPORT, *supra* note 3, at 14 (itemizing the most recent data on overall immigration patterns across the United States for 2007).

10. *See* CIS 2007 REPORT, *supra* note 3, at 14 (finding 1,316,740 "pending applications not included in 'Backlog'").

11. *See id.* (noting 1,237,823 "pending applications not included in 'Backlog'" in September 2006 and 1,316,740 "pending applications not included in 'Backlog'" in March 2007, which is approximately a sixty-four percent increase).

12. *See* THE AM. IMMIGR. L. FOUND., http://www.ailf.org/lac/ clearing house_mandamus.shtml (last visited Feb. 5, 2010) [hereinafter Recent Mandamus Litigation] (citing to and explaining the numerous FBI name check delay cases canvassing the United States) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

13. *See* Memorandum from Michael Aytes, Assoc. Dir., Domestic Operations, U.S. Citizen and Immigration Servs. on Revised Nat'l Sec. Adjudication & Reporting

continue to rely exclusively on domestic statutes to effectuate naturalization and to challenge the immigration system.[14] What federal courts have yet to consider is the possibility that these delays may implicate the United States' obligations under international law.[15] A report prepared by the Center for Human Rights and Global Justice at New York University School of Law (NYU Report)[16] raised this issue in April 2007.[17] The NYU Report contends that the FBI name check delays may violate U.S. law[18] and international law[19] because the process profiles "immigrants perceived to be Muslim, Arab, Middle Eastern, or South Asian on the basis of their name, race, religion, ethnicity, or national origin."[20] The NYU Report also claims that the delays violate binding U.S. obligations to non-citizens under the International Covenant on Civil and Political Rights (ICCPR)[21] and the

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Requirements to Field Leadership 2 (Feb. 4, 2008), http://www.greencard lawyers.com/news/2008/AdjustmentApplications%20.pdf (stating that if "the FBI name check request has been pending for more than 180 days, the adjudicator shall approve the application and proceed with the card issuance").

14. *See generally* Recent Mandamus Litigation, *supra* note 12 (displaying an expansive database list of old and new cases across the United States involving FBI name check delays that relied exclusively on domestic statutes for relief).

15. *See* CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, AMERICANS ON HOLD: PROFILING, CITIZENSHIP, AND THE "WAR ON TERROR" 4 (2006), http://www.chrgj.org/docs/AOH/AmericansonHoldReport.pdf [hereinafter NYU REPORT] (finding "[d]elays in the citizenship process implicate discrimination on grounds that are prohibited under international law" because "[u]nder international law, policies that impose a disproportionate burden on particular groups (either purposely or in effect) must be justified in order not to constitute prohibited discrimination").

16. *See id.* at 2 (basing the report on research conducted by New York University (NYU) School of Law's Center for Human Rights and Global Justice (CHRGJ), the International Human Rights Clinic, and the Immigrant Rights Clinic, in close collaboration with the Council of People's Organization (COPO) in Brooklyn, New York).

17. *See id.* (analyzing the FBI name check delays and their impact on Muslim, Arab, Middle Eastern, and South Asian descent).

18. *See id.* at 25 ("[C]itizenship delays may violate U.S. law, including, for example, section 555(b) of the Administrative Procedure Act.").

19. *See id.* at 31 ("The importance of the right to be infringed by disproportionate name checks, combined with the lack of effectiveness and other detrimental consequences, render such a disproportionate burden unjustified and illegal under international law.").

20. *Id.* at 2.

21. Int'l Covenant on Civil & Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976) (adopted by the United States Sept. 8, 1992) [hereinafter ICCPR], *available at* http://www2.ohchr.org/english/law/ccpr.htm (last visited May 13, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[22]

This Note seeks to contribute to the discussion on this topic by evaluating the NYU Report's conclusions.[23] Contrary to the NYU Report, analysis of the United States' international and domestic legal obligations produces the following conclusion: delays caused by the FBI name check procedures do not place the United States in violation of its obligations.[24] This analysis reveals a fatal flaw in the NYU Report's methodology, which stems from a failure to consider all the applicable reservations, understandings, and declarations (RUDs).[25] These RUDs reveal a different landscape of legal obligation than the abstract assessment that lies at the foundation of the NYU Report.[26] To support this conclusion, this Note analyzes the relevant ICCPR and CERD treaty provisions in light of the applicable RUDs and the political context in which the United States undertook each obligation.[27]

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22. Int'l Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14, at 47, U.N. Doc. A/6014 (1966) (entered into force Jan. 4, 1969) (adopted by the United States Oct. 21, 1994) [hereinafter CERD], *available at* http://www2.ohchr.org/english/law/cerd.htm (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* NYU REPORT, *supra* note 15, at 25–26 (discussing the "[c]itizenship delays for the profiled group also implicate a number of international human rights protections guaranteed to non-citizens," including the ICCPR and the CERD).

23. *See* NYU REPORT, *supra* note 15, at 37–39 (concluding that the name check procedure invites discrimination that is illegal under international law. It also recommends ways the United States can "live up to its international human rights obligations and its democratic ideals and end discrimination and undue delays in the naturalization process").

24. *See infra* Part I (explaining that the FBI name check procedures do not violate international laws); *see also infra* Part VI (discussing the FBI name check procedures and the United States' domestic obligation).

25. *See infra* Part I (highlighting the fact that the NYU Report does not mention the United States' reservations, declarations, or understandings to the ICCPR or the CERD in reaching its conclusion on the United States' treaty violations).

26. *Compare* NYU REPORT, *supra* note 15, at 25–30 (arguing that the United States' actions violate international law while failing to mention the United States' reservations, declarations, or understandings), *with infra* Part I (explaining that the United States' use of RUDs is a compromising mechanism enabling ratification of HRTs while keeping intact the domestic rights structure under the U.S. Constitution and discussing why the United States' RUDs to HRTs would not place the FBI name check delays in direct violation of international obligations).

27. 138 CONG. REC. S4783 (1992) [hereinafter U.S. RUDs to ICCPR]; 140 CONG. REC. S7634-02 (daily ed. June 24, 1994) [hereinafter U.S. RUDs to CERD], *available at* http://www1.umn.edu /humanrts/usdocs/racialres.html (last visited Feb. 5, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

This Note is divided into seven parts. Part I begins by detailing the limitations of the United States' obligations under international human rights law. Part II establishes the United States' ICCPR nondiscrimination obligations. This is accomplished by scrutinizing the confusing textual provisions of the treaty, delineating the scope of the United States' RUDs, and expounding on the conflicts between the United States and the Human Rights Committee (HRC), which serves as the enforcement body of the treaty. Part III analyzes the enforcement mechanisms and the remedies available under the ICCPR. It further explains how the United States' obligations under the ICCPR, circumscribed by the applicable RUDs, hinder enforcement and redress for injured parties. Part IV establishes the United States' CERD nondiscrimination obligations. It also deciphers a complex citizenship exception unveiled by the interplay of the textual provisions, and describes the competing interpretations by the United States and the CERD Committee, which serves as the enforcement body of the treaty. Part V explores why the United States' reservations under the CERD likewise prevent relief for persons alleging impermissible discrimination. Part VI discusses the limited reach of the ICCPR and the non-existent application of the CERD in domestic courts. It focuses on the federal courts' deference to the non-self-execution declarations and to the plenary power doctrine on immigration. Finally, this Note concludes by exploring the future implications of the delays caused by the FBI name check process.

I. The Limits of the United States' Obligations Under International Human Rights Law

Since World War II, the United States has played a commanding role in transforming human rights treaties (HRTs) from mere rhetoric into binding international law.[28] Historically, treaty drafters frequently utilized the U.S. Constitution's Bill of Rights as a model for constructing many of the HRTs currently in use.[29] To date, the United States remains committed

28. *See* Michelle Friedman, *The Uneasy U.S. Relationship with Human Rights Treaties: The Constitutional Treaty System and Nonself-Executing Declarations*, 17 FLA. J. INT'L L. 187, 189 (2005) (discussing the historical backdrop of the United States' role in bringing these treaties to fruition).

29. *See* John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1308–09 (1993) (noting examples of other treaties such as the Torture Convention and the Race Convention).

to advancing HRTs to an extent.[30] The restrictions placed on the United States' support and obligations stem from a fundamental clash between the U.S. constitutional system and the expansive rights articulated within most HRTs to gain broader adherence by the international community.[31] To resolve the inconsistencies between the United States and HRTs regarding the structure, scope, and substance of rights, RUDs became a requirement in all HRTs ratified by the United States since the 1970s.[32]

Over the years, many within the international community have condemned the United States' consistent use of RUDs.[33] Critics cite the United States' perceived double standard of supporting HRTs but conditioning its support through the use of RUDs.[34] Despite the opposition, the United States' use of RUDs remains a common feature of its accession to international legal obligations since the inception of the republic more than two hundred years ago.[35] Moving into the post-9/11 landscape, RUDs may have gained even more importance in the United States with the growing concerns over terrorism and national security. Indeed, RUDs preserve the U.S. constitutional structure, which provides the President with the flexibility to make swift decisions in times of war and national emergency without interference by international organizations.[36]

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30. *See id.* ("It thus seems anomalous [after the United States had such influence on the process] that once these rights are affirmed in a solemn document like the Covenant, the United States should seek to protect itself.").

31. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000) (analyzing this clash in greater detail).

32. *See id.* at 400–01 ("The RUDs address each of the challenges outlined above."); *see also* David N. Cinotti, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1278 (2003) (highlighting the U.S. Senate's consistent pattern of attaching RUDs to "every major human rights treaty to which it has given its advice and consent since World War II").

33. *See* Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 351–53 (2000) (explaining the double standard approach by the United States and the negative reaction by other countries).

34. *See, e.g.*, Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2d 365, 366 (1998) (noting that "the United States does not embrace the international human rights standard that it urges on others"); *see also* Roth, *supra* note 33, at 352 (highlighting the double standard approach).

35. *See* Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L. REV. 89, 91, 97 (1996) (noting that over the last two hundred years, the United States has entered into more than 12,000 bilateral and multilateral agreements and ratified approximately fifteen percent with the inclusion of RUDs).

36. *See, e.g.*, Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. ST. THOMAS L.J. 311, 313 (2005) ("[T]he United States made clear its understanding that certain provisions that it did consent to . . . were no more stringent than analogous rules under the

II. U.S. Nondiscrimination Obligations Under the ICCPR

Several years after the United States ratified the ICCPR with the inclusion of RUDs,[37] the HRC sought to limit the reach of RUDs submitted by state parties regarding nondiscrimination treaty provisions.[38] But the HRC's aim at compliance has proven challenging for two reasons: the flexible design of the ICCPR provisions, and the RUDs submitted by state parties.[39] These challenges have led to a modern day tug-of-war between the HRC and the state parties as to the precise nature of these nondiscrimination obligations.[40]

Scholars often rely on a blend of ICCPR provisions and HRC recommendations when analyzing the United States' ICCPR obligations.[41]

U.S. Constitution."); Bradley & Goldsmith, *supra* note 31, at 400–01 (stating that many treaties pose problems to the U.S. constitutional system, specifically in terms of substance, scope, and structure, and that RUDs alleviate these domestic concerns and allow the U.S. to ratify these treaties).

37. *See* ICCPR, *supra* note 21, at 1 (ratifying the ICCPR on Mar. 23, 1976).

38. *See* Human Rights Comm., *General Comment No. 24(52)*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), *reproduced in* Senate Report, 34 I.L.M. 839, 840–41 (1995) [hereinafter *HRC General Comment 24(52)*], *available at* http://www1.umn.edu/humanrts/gencomm/hrcom24.htm (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The HRC General Comment states:

> As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties.

Id.

39. *See* Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT'L LEGAL STUD. 57, 91 (1999) (explaining that the uncertainty surrounding the construction of the ICCPR and state party reservations to the ICCPR created "a clear tension between the classical view of treaties creating bilateral and multilateral relations between States, which informs the customary law of reservations, and the modern view that human rights treaties essentially create bilateral relations between 'State parties' and individuals").

40. *See id.* ("If the customary law reflected in the ICJ's Advisory Opinion and the Vienna Convention applies to the ICCPR, incompatible reservations unfortunately render the ICCPR wholly void in the reserving State.").

41. *See* NYU REPORT, *supra* note 15, at 25–31 (relying on a blend of ICCPR provisions, HRC Recommendations, and CERD provisions to define the nature and the scope of human rights protections owed to non-citizens by the United States under its treaty obligations).

Despite the advancements made by scholars in addressing this issue, a subtle problem has emerged. The HRC and scholars consistently rely on a selective mix of ICCPR provisions and on supporting documentation that largely exclude RUDs to justify their positions.[42] This Part adjusts that selective framework and reestablishes the United States' ICCPR nondiscrimination obligations through the explicit text of the ICCPR and the United States' RUDs.[43] A three-part analysis accomplishes this end by reviewing the textually confusing articles of the ICCPR, analyzing how the United States solved this confusion through RUDs, and explaining the rationale for the United States' legal use of FBI name check procedures.

A. Textual Confusion

Three ICCPR articles encompass the uneven nondiscrimination provisions at issue. Those articles are Article 2, Article 4, and Article 26. Specifically, Article 2 articulates a restrictive provision that state parties shall ensure the rights of all individuals without making "distinction[s] of any kind regarding race, colour . . . religion . . . or national origin," among others.[44]

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42. *See id.* (relying largely on ICCPR provisions to outline the obligations of the United States).

43. Despite claims made by the NYU Report, greater attention is needed to address this complex and unclear issue.

44. See ICCPR, *supra* note 21, at art. 2, which states:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when

Next, Article 4 permits a state party to derogate from its normal ICCPR obligations during a time of national emergency.[45] But this derogation is limited. A state party can only take measures that are consistent with its obligations under international law and measures that do not involve discrimination based "solely" on the grounds of "race, colour, sex, language, religion, or social origin."[46]

Finally, Article 26 states that all persons are "equal before the law" and entitled to "equal protection of the law" without discrimination.[47] Article 26 is qualified by a second phrase that extends additional rights to "all persons."[48] This phrase guarantees "equal and effective protection against discrimination on any ground such as race, colour . . . religion . . . [or] national origin."[49]

At first glance, these three provisions appear to circumscribe the boundaries of state party obligations with discrimination. A careful study of these provisions, however, unmasks significant textual gaps that may undermine the intended restrictions on these provisions. These textual gaps

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granted.

45. See ICCPR, *supra* note 21, at art. 4, which states:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin . . . .
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

46. *Id.*; Compare ICCPR, *supra* note 44, at art. 2 (protecting against "discrimination on *any* ground" (emphasis added)), with ICCPR, *supra* note 45, at art. 4 ("[D]iscrimination *solely* on the ground." (emphasis added)), and ICCPR, *infra* note 47, at art. 26 ("[W]ithout distinction of any kind."), for closer evaluation of this issue.

47. See ICCPR, *supra* note 21, at art. 26, which states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

48. *Id.*

49. *Id.*

render a state party's obligations under the ICCPR unclear, which may in turn translate to a valid justification for the United States' use of an FBI name check procedure under the ICCPR.

More specifically, two examples demonstrate the confusion surrounding this issue and illustrate why the FBI name check procedures are consistent with ICCPR obligations. First, treaty drafters used the term "distinction" in Article 2, which they juxtaposed with the term "discrimination" in Article 4 and in Article 26.[50] The subtle variation infers that a state party can derogate from its obligation under Article 4 and can utilize a program that does not discriminate based "solely" on "race, colour . . . religion or social origin."[51] Therefore, if all of the Article 4 requirements are satisfied, the United States may be justified in utilizing FBI name check procedures that have an unfortunate "discriminating" effect.[52]

Article 26 provides the second example. The drafters constructed Article 26 with two key phrases: "equal before the law" and "equal protection of the law," which are not listed as non-derogation rights in Article 4.[53] In conjunction, the nondiscrimination terms contained within Article 2 are limited by Article 4,[54] but these terms are absent in Article 26.[55] This juxtaposition reveals a possible exception for state parties to adopt differing standards of treatment for non-citizens and citizens. In context, this implies that the United States can continue performing FBI name checks without violating its ICCPR treaty obligations.

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50. *See id.* at art. 4 (regarding the comparison of the terms "distinctions" and "discrimination" within the three ICCPR articles).

51. *Id.*

52. *Id.*

53. Compare ICCPR, *supra* note 47, at art. 26 ("[R]ace, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."), with ICCPR *supra* note 45, at art. 4 ("[R]ace, colour, sex, language, religion or social origin."), to evaluate the list of terms stated in Article 26 that are not stated as non-derogating rights within Article 4.

54. *See* ICCPR, *supra* note 45, at art. 4 (referring to the Article 4 restrictive exception "solely" during national emergencies).

55. Compare ICCPR, *supra* note 44, at art. 2 (stating that the state shall protect against "discrimination of any kind, *such as*" (emphasis added)), with ICCPR, *supra* note 47, at art. 26 ("[P]rotection against discrimination based on any ground."), and ICCPR, *supra* note 45, at art. 4 (stating that the state can discriminate under certain circumstances so long as it "does not involve discrimination solely on" certain grounds), to see the Nondiscrimination terms in play and how they are limited by Article 4, but remain absent from the provisions in Article 26.

B. Confusion to Clarity: The United States' RUDs

The uncertainty produced by internal inconsistencies in the text of the ICCPR was not lost on the Senate. In 1992, the Senate addressed the textual confusion when it considered whether to give advice and consent for the ratification of the ICCPR.[56] In fulfilling its advice function, the Senate included several RUDs.[57] The Senate also included an explanation of how the ICCPR provisions correspond with U.S. law.[58] The Senate explained that Article 2, Article 4, and Article 26 "do not precisely comport with long-standing Supreme Court doctrine in the equal protection field."[59] Accordingly, the Senate emphasized that U.S. law permits discrimination between "citizens and non-citizens and between different categories of non-citizens, *especially* in the context of the immigration laws."[60]

Citing to a formal HRC interpretation, the Senate reiterated its belief that the ICCPR's inherent flexibility may permit the adoption of different procedures based on nationality and other justifications.[61] This interpretation stated that "identical treatment in every instance" is not mandated by the ICCPR.[62] The Senate reinforced that if the distinctions made under U.S. law are reasonable, objective, and related to a purpose under the ICCPR, they would not violate the United States' treaty obligations.[63] Thus, "distinctions," as defined under Article 2 and Article 26, are "permitted" when they are at a minimum "rationally related to a

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56. *See* SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. REP. NO. 102-23, at 22 (1992), *reprinted in* 31 I.L.M. 645, 654–55 (1992) ("The very broad anti-discrimination provisions contained in the above articles [2, 4, and 26] do not precisely comport with longstanding Supreme Court doctrine in the equal protection field.").

57. U.S. RUDs to ICCPR, *supra* note 27, at 1 ("[T]he Senate's advise and consent to the ratification of the International Covenant on Civil and Political Rights . . . subject to the following Reservations, Understandings, Declarations and Proviso.").

58. *See id.* (noting several exceptions and clarifications, including for example, "[t]hat because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15").

59. S. REP. NO. 102-103, *supra* note 56, at 22.

60. *Id.* (emphasis added).

61. *See id.* (citing to the HRC's General Comment).

62. *Id.* ("In its General Comment on Nondiscrimination, for example, the Committee noted that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.").

63. *See id.* (recommending a specific interpretation of the United States' treaty obligations).

legitimate governmental objective."[64] In addition, under Article 4, the Senate reasoned that discrimination based "solely" on the factors articulated within this article will not "bar distinctions" that render disproportionate effects on people of a certain status.[65] Finally, the Senate emphasized that the United States' ICCPR obligations are defined by RUDs submitted at ratification and the explanations of how those RUDs comport with U.S. law.[66]

C. Rhetoric Revolt: HRC Conflictions to State Party RUDs

Two years later, the HRC responded with General Comment 24(52) to limit the reach of the RUDs submitted by the United States and forty-six other countries.[67] The HRC's efforts, however, had the opposite effect. Rather than tempering the reach of the United States' RUDs, General Comment 24(52) gave the United States an opportunity to respond, clarify, and discuss the limitations of its perceived obligations.[68] Through three key misstatements within General Comment 24(52), this section explains the United States' plausible justification for continuing the FBI name check procedure without violating the ICCPR.

The first issue with General Comment 24(52) involves the HRC's claim to legally binding authority over state parties regarding the interpretation of treaty reservations.[69] The HRC explained that when a state

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64. *Id.*

65. *See id.* ("The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.").

66. *See id.* ("In a few instances, however, it is necessary to subject U.S. ratification to reservations, understandings or declarations in order to ensure that the United States can fulfill its obligations under the Covenant in a manner consistent with the United States Constitution.").

67. *See HRC General Comment 24(52)*, *supra* note 38, 34 I.L.M. at 844 (discussing the 150 reservations of varying significance submitted by state parties upon ratification of the ICCPR).

68. *See Observations by the United States on General Comment 24*, 3 INT'L HUM. RTS. REP. 265, 269 (1996) [hereinafter *U.S. Response*] (discussing five specific concerns of the United States regarding General Comment 24(52)). *See generally Observations by the United Kingdom on General Comment 24*, 3 INT'L HUM. RTS. REP. 261, 261–69 (1996); *Observations by France on General Comment 24 on Reservations to the ICCPR*, 4 INT'L HUM. RTS. REP. 6, 6–8 (1997); United Nations Int'l Law Comm'n U.N. GAOR, 52d Sess., Supp. No. 10, U.N. Doc. A/52/10 (1997).

69. *See HRC General Comment 24(52)*, *supra* note 38, 34 I.L.M., at 844 (stating that a

party submits a reservation that stands against the interpretation of the HRC, this reservation will be considered "contrary to" the object and purpose of the ICCPR.[70] The United States noted that this "surprising assertion" infers that the HRC has the ability to render legally binding interpretations over state parties.[71] This presents a fundamental problem because the ICCPR does not extend this power to the HRC.[72] As the United States explained, ICCPR drafters "could have given the Committee this role but *deliberately* chose not to do so."[73] The United States therefore does not recognize the HRC as a binding legal authority to judge the validity of its RUDs to the ICCPR.[74]

Instead, the United States reaffirmed its adherence to the principles of customary international law reflected in the Vienna Convention on the Law of Treaties, which is widely held as the primary standard on treaty interpretation.[75] The HRC disagreed with this reasoning and explained that the Vienna Convention on the Law of Treaties was "inadequate" and "inappropriate" to address unique problems associated with the ICCPR.[76]

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reservation to an obligation under the ICCPR does not affect a state's duty to comply with its substantive obligations under the treaty).

70. *Id.*

71. *See U.S. Response*, *supra* note 68, at 266 (noting that it would be a departure from the ICCPR's scheme for the HRC to have the authority to bind states to its interpretations of the treaty).

72. *See* ICCPR, *supra* note 21 (lacking any provisions within the fifty-three articles of the ICCPR that give the HRC this authority); *see also U.S. Response*, *supra* note 68, at 266 (stressing that the HRC does not have binding legal authority); *see also* Joseph, *supra* note 39 (explaining that "HRC findings are not legally binding, unlike those of international judicial bodies like the International Court of Justice or the European Court of Human Rights").

73. *U.S. Response*, *supra* note 68, at 267 (emphasis added).

74. *See id.* at 269 (rejecting the proposition that the HRC can sever reservations it deems invalid by stating that the United States' reservations are integral to its consent to be bound by the ICCPR).

75. *See id.* at 266 (noting that the Vienna Convention has established rules of treaty interpretation that the Committee seems to reject); *see generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

76. *See HRC General Comment 24(52)*, *supra* note 38, 34 I.L.M. at 845 (discussing the HRC's reasons for not relying on the Vienna Convention). The HRC stated:

> The Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations

In addition, the HRC reiterated that it would now be regarded as the supreme authority on interpreting whether a state party's RUDs are "compatible with the object and purpose" of the ICCPR.[77] Although the HRC may have good reason for claiming this role, its reasoning conflicts with the ICCPR's overall scheme, and therefore violates international law.[78] Moreover, the HRC realistically has only persuasive power and lacks the authority to dictate to sovereign states the methodology for treaty interpretation, particularly when that methodology is inconsistent with the Vienna Convention on the Law of Treaties.[79]

A second issue involves the role of international peremptory norms[80] in ICCPR reservations.[81] The HRC maintains that when a reservation conflicts with established international peremptory norms, the reservation automatically will be regarded as incompatible with the object and purpose of the ICCPR.[82] The United States does not question this assertion.[83] Rather, the United States questions whether a state party has the freedom to exclude "one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations."[84] This issue remains unclear within international law.[85]

> on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations.

Id.

77. *Id*.

78. *See U.S. Response*, *supra* note 68, at 266 (discussing the role of the HRC in interpreting reservations and treaty terms).

79. *See U.S. Response*, *supra* note 68, at 266 (noting the HRC's lack of authority to render binding interpretations and reinforcing that the HRC appears to reject the rules of treaty interpretation in the Vienna Convention).

80. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (defining international peremptory norms, often termed "jus cogens" [which translates in English to "compelling law"] as baseline fundamental principles of international law recognized by the international community, which cannot be derogated from). These universal norms include: genocide, slavery, and murder as a state policy. *See id.* §§ 702(a)–(c).

81. *See U.S. Response*, *supra* note 68, at 268 (highlighting the peremptory norms relevant to the object and purpose of the treaty).

82. *See HRC General Comment 24(52)*, *supra* note 38, 34 I.L.M. at 842 (stating that the reservations that offend peremptory norms are not compatible with the Covenant).

83. *See U.S. Response*, *supra* note 68, at 267 ("It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant.").

84. *Id.*

85. *Id.* ("It is not at all clear that a State cannot choose to exclude one means of

Accordingly, the United States maintains that the HRC does not have the ability under international law to render binding judgments within this context.[86] Until this area of international law is developed, the United States believes that it remains consistent with its ICCPR obligations when it reserves against the inclusion of specific norms.[87]

Additionally, the United States criticized the HRC's narrow per se approach that invalidated all reservations conflicting with international peremptory norms or the object and purpose of the ICCPR.[88] The HRC does not have the power to make these assertions in this context either.[89] Instead, customary international law provides the appropriate test.[90] This test regarding the object and purpose analysis on non-derogated rights in treaty reservations requires full consideration of the entire treaty and the specific rights and provisions at issue on a case-by-case basis.[91] A subtle problem emerges, however, with application to the ICCPR because the treaty lacks an explicit reference to an accepted object and purpose test regarding interpretation.[92] Therefore, the default guide in this situation is customary international law, which favors the United States' approach.[93]

A third issue involves a fundamental disagreement between the HRC and the United States over a precise definition of the object and purpose of the ICCPR.[94] The HRC narrowly interprets the ICCPR's

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enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations."); *see also* Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 355–63 (2006) (discussing the clash in perspectives on this issue between the Special Rapporteur for the International Law Commission and the HRC).

86. *See U.S. Response*, *supra* note 68, at 266 (stating that the HRC lacks authority to render binding judgments and interpretations).

87. *See id.* at 267 (stating that a liberal view of reservations would secure the widest possible adherence to the ICCPR, which is the primary object and purpose of the Covenant).

88. *See id.* at 267 (noting that the HRC's approach is unsupported by international law).

89. *See id.* at 266 (reinforcing that the HRC lacks the binding legal authority to decide this issue).

90. *See id.* at 267 (arguing that the HRC's per se approach is contrary to international law).

91. *See id.* (recognizing that an analysis of non-derogable rights requires consideration of the specific treaty, right, and reservation at issue).

92. *See* Bradley & Goldsmith, *supra* note 31, at 434 ("Unlike other human rights treaties, including one of the optional protocols to the ICCPR (which the United States has not ratified), the ICCPR contains no clause excluding reservations and no reference to the object and purpose test.").

93. *Id*.

94. *See U.S. Response*, *supra* note 68, at 267 (comparing the different definitions

object and purpose as a "legally binding standard for human rights" when any type of reservation to a critical provision of the treaty undermines its object and purpose.[95] The United States adheres to a broader understanding.[96] It construes the ICCPR's object and purpose to "protect human rights," as defined by the understanding that immediate and universal implementation of all provisions is *not* required.[97] To this end, the United States believes that the object and purpose of the ICCPR are focused on gaining wide adherence by the international community to a basic standard of civil and political rights.[98]

In sum, analysis of these three issues explains why the HRC has limited power to interpret the scope of the United States' RUDs. These limitations are relevant because the HRC would lack the ability to compel the United States to change its policy regarding the FBI name check procedure unless this policy stood in contrast to the overall object and purpose of the treaty or to international peremptory norms.

III. ICCPR International Enforcement Mechanisms and Remedies

This Part explores the clash between the United States and the HRC, which is the enforcement body of the ICCPR.[99] This Part also

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of the object and purpose of the Covenant).

95. *See HRC General Comment 24(52)*, *supra* note 38, 34 I.L.M. at 842 (stating that the underpinning behind the Covenant is to create human rights standards by defining civil and political rights and making them binding obligations on state parties).

96. *See U.S. Response*, *supra* note 68, at 267 (stating that the narrow interpretation of the Committee is unsupported by international law).

97. *See id.* (defining the object and purpose of the Covenant to be protection of human rights, and dismissing the idea that "any reservation to any substantive provision necessarily contravenes the Covenant's object and purpose") (emphasis added).

98. *See id.* ("In fact, a primary object and purpose of the Covenant was to secure the widest possible adherence, with the clear understanding that a relatively liberal regime on the permissibility of reservations should therefore be required.").

99. *See* ICCPR, *supra* note 21, at art. 28 (establishing the HRC and its composition). This article states:

> 1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided. 2. The committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience. 3. The members of the Committee shall be elected and shall serve in their personal capacity.

Id.

analyzes the fundamental problem with the HRC's structure, its design, and its application to the United States' RUDs. Then, it concludes by arguing that individuals and state parties have no means of recovery against the United States for FBI name check delays.

Article 40 is the primary line of ICCPR enforcement for a state party.[100] This article requires a state party to submit periodic reports documenting its progress with implementing the ICCPR.[101] The HRC responds to state periodic reports with its own report documenting a state party's progress.[102] Normally, a back-and-forth constructive dialogue forms, which usually results in greater adherence to the ICCPR.[103] This is not always the case. If a state party refuses to change a conflicting policy, the HRC lacks any legal or physical ability to force compliance.[104] This leaves the HRC with limited recourse.[105] As one scholar correctly noted, "[B]ad publicity is the only sanction for a State that blatantly ignores the [HRC's] findings."[106]

If the HRC demanded that the United States change its FBI name check policy, the United States could simply reject this suggestion without any real consequences. The United States would likely take this precise course of action because it has worked successfully in other contexts.[107]

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100. *See id*. at art. 40 (requiring state parties to submit reports on the measures that they have adopted to comply with the ICCPR for review and response by the HRC).

101. *Id.* at art. 40(1).

102. *Id.* at art. 40(4).

103. *See* Joseph, *supra* note 39, at 65–66 (reinforcing that the fundamental purpose behind this dialogue is to improve the adherence by all state parties).

104. *See* Ineke Boerefijn, *Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reports Procedure Under Article 40 of the Covenant on Civil and Political Rights*, 17 HUM. RTS. Q. 766, 772 (1995) (noting that the aim is to form a "constructive dialogue" between the state parties and the HRC).

105. *See* Joseph, *supra* note 39, at 66 (stating that the "HRC findings are not legally binding, unlike those of international judicial bodies like the International Court of Justice (ICJ) or the European Court of Human Rights"); *see also U.S. Response*, *supra* note 68, at 266 (reinforcing the HRC's lack of binding authority).

106. *See id.* (stating that some state parties will outright reject recommendations by the HRC and refuse to adhere due to soft international law enforcement policies).

107. *See* U.S. STATE DEP'T, UNITED STATES RESPONSES TO SELECTED RECOMMENDATIONS OF THE HUMAN RIGHTS COMMITTEE (2007), http://www.state.gov/documents/organization/100845.pdf (highlighting the issue of extraterritorial application of the ICCPR and the United States' firm disagreement with the HRC and no further consequence for this disagreement). The United States specifically stated at the outset of this response that it takes "this opportunity to reaffirm its long-standing position that the Covenant does

The second mechanism for ICCPR enforcement against a state party is Article 41.[108] This article permits a state party to file formal ICCPR complaints against another state party for treaty violations.[109] But this article's application against the United States proves unrealistic for two reasons: a state party would not jeopardize its relationship with the United States over an internal U.S. immigration policy and Article 41 has never been used by a state party.[110]

A third state party enforcement mechanism is the First Optional Protocol.[111] It provides individuals with redress against a state party.[112] For this protocol to work, the state party in question must ratify this protocol.[113] The United States has not ratified it; so this option is useless. Thus, all three redress options prove ineffective.

IV. U.S. Nondiscrimination Obligations Under the CERD

Two years after ratifying the ICCPR,[114] the United States ratified another multilateral treaty, the CERD, to reinforce its commitment to nondiscrimination.[115] The United States included numerous RUDs to

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not apply extraterritorially." *Id.* at 1 (emphasis added). Additionally, the United States maintains that it "respectfully disagrees with the view of the Committee that the Covenant applies extraterritorially." *Id.* As noted from this long-standing position of the United States, it has suffered no repercussions in relation to its disagreement with the HRC. *Id.*

108. ICCPR, *supra* note 21, at art. 41.

109. *Id.*

110. *See* Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 92 (2002) (explaining that although the optional inter-state procedure in Article 41 falls within the Human Rights Committee's area of operation it has never been used).

111. Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S., vol. 999, p. 171, art. 1 (entered into force 23 Mar. 1976) [hereinafter ICCPR Optional Protocol], *available at* http://www.unhcr.org/refworld/docid/3ae6b3bf0.html (last visited Feb. 5 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

112. *See id*. ("A State Party . . . recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.").

113. *See id*. at art. 9(2) (stating that the Protocol will enter into force three months after ratification).

114. *See* ICCPR, *supra* note 21 (noting that the United States adopted the ICCPR in 1992).

115. *See* CERD, *supra* note 22, preamble (outlining the goal of eliminating all forms of racial discrimination).

most CERD provisions.[116] The international community reacted skeptically to this and questioned the United States' commitment to nondiscrimination.[117] The thrust behind this skepticism stemmed from the blurring effect RUDs had on defining the United States' CERD obligations.[118] Therefore, in application to the FBI name check policy, uncertainty remains regarding whether some legal distinctions under this policy qualify as illegal discrimination under the CERD.[119] The NYU Report focused on this exact point.[120] It argued that the United States violated the CERD through FBI name check delays that target non-citizens within the Muslim, Arab, Middle Eastern, and South Asian communities.[121] The United States addressed similar concerns in its annual report to the CERD Committee, but declined to state that government actions were in violation of the treaty.[122] Instead, it

116. U.S. RUDs to CERD, *supra* note 27 (referencing the formal document listing the RUDs submitted by the United States upon ratification of the CERD).

117. International scholars take issue with the United States' ratification of the CERD with the accompaniment of the non-self-executing doctrine. *See, e.g.*, Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 588 (1997) (noting that the United States' ratification of the CERD with non-self-executing provisions "further exposes the U.S. to justifiable claims of hypocrisy at the international level"); *see also* Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641, 650 (1997) (stressing that it is "politically expedient for the United States to ratify" HRT's with RUDs in the event that this "practice not only restricts these treaties' impact in the United States, but nullifies their effect. This self-serving policy has continued through the Carter, Reagan, Bush, and Clinton administrations").

118. *See* Taifa, *supra* note 117, at 651 (reasoning that this may be due to the United States attaching certain RUDs "to all human rights treaties ratified by the U.S., including . . . provisions which might be in conflict with the U.S. Constitution").

119. *See* NYU REPORT, *supra* note 15, at 25 (referring to the deliberate distinction between citizens and non-citizens because less protection is provided for those discriminated against based on their non-citizen status).

120. *Id*.

121. *See id.* (stating that "[c]itizenship delays for the profiled group also implicate a number of international human rights protections guaranteed to non-citizens," and further explaining that the United States is "obligated to ensure Nondiscrimination in access to citizenship"). The NYU Report consistently relies on the CERD Committee's general recommendations throughout its discussion to argue for clear U.S. obligations under this context. *Id.*

122. *See Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination*, paras. 53–54, *delivered to the U.N. Committee on the Elimination of Racial Discrimination* (Apr. 2007) [hereinafter *CERD Periodic Report*], *available at* http://www.state.gov/g/drl/rls/cerd_report/83404.htm ("Thus, despite significant progress, numerous challenges still exist, and the United States

acknowledged the "on-going challenges" that still exist in this area and explained that government institutions charged with eliminating discrimination are making "significant progress" despite considerable work that remains in fixing this difficult issue.[123]

Building upon the preceding discussion, this Part focuses on the difference between distinctions and discrimination under the United States' CERD obligations relating to FBI name check delays. This Part also unmasks a citizenship exception found within Article 1, Article 2, and Article 5. The analysis then explores the CERD Committee's reaction and the United States' response. Finally, this Part applies this framework to the FBI name check delay issue.

A. Unmasking the Citizenship Exception

The analysis in this section considers the inherent problems with the CERD's expansive definition of "racial discrimination."[124] It is possible that the original CERD drafters never considered that Article 1 might be used to provide state parties with a citizenship exception.[125] For example, the initial Third Committee of CERD drafters structured Article 1(2) as a broad exception to the CERD, which allows a state party to make "distinctions, exclusions, restrictions or preferences . . . between citizens and non-citizens." [126] Accordingly, the United States could use this language to make three legal distinctions that do not rise to the level of discrimination.

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recognizes that a great deal of work remains to be done.").

123. *See id*. at para. 53 (drawing out why these challenges exist within the United States).

124. *See* Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239, 254 (2005) (explaining that because an exact definition was not incorporated under Article 1, the Convention has, in turn, left the CERD Committee with an opening to "their interpretation [of] developments in the human rights cannon").

125. *See id*. at 251 ("The ground of 'national origin' generated considerable discussion in the drafting of the Convention, but has not unduly troubled the Committee in practice.").

126. *See* WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 156–157 (Oxford: Clarendon Press (1983)) (referencing that the Third Committee set forth this provision to "make clear" that discrimination based on alien status would not be prohibited nor condemned) (citing UN docs. A/C3/L 1238; A/6181, particularly ¶¶ 30–37; E/CN.4/Sub.2/335 ¶¶ 38–39).

Alienage is one way the United States could distinguish individuals. The term "alienage" remains absent from Article 1,[127] and therefore operates outside the discrimination definition stated in the CERD.[128] The CERD Committee would object to this narrow interpretation; instead, it would construe Article 1 to include alienage. Under this interpretation, the CERD Committee would then claim that the FBI name check policy amounts to discrimination and violates the CERD. The CERD Committee may have a valid argument under this logic. But it lacks the ability to hold the United States accountable through law or through physical force.

Article 1(3) provides a second way the United States could distinguish individuals.[129] The United States could utilize the national security exception or the alternative grounds exception to justify its actions.[130] Specifically, Article 1(3) states that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of State Parties concerning nationality, citizenship, or naturalization, provided that such provisions do not discriminate against any particular nationality."[131] This implies that discrimination is prohibited against "any particular nationality."[132] Yet, this rhetoric remains silent on alternative grounds for discrimination, and Article 1(3) omits the term "nationality" in its definition.[133] The United States thus has a strong argument for distinguishing individuals based on other grounds, such as national security, while complying with its CERD obligations.

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127. *See* CERD, *supra* note 22, at art. 1(3) ("Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.").

128. *See* Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 311–12 (explaining the exception based on citizenship according to Article 1); *see also* MCKEAN, *supra* note 126, at 157–58 ("The exception of aliens *qua* aliens from the enjoyment on an equal footing of human rights and fundamental freedoms protected by the Convention is a clear restriction on the universality of the principle of equality.").

129. *See* CERD, *supra* note 22, at art. 1 (referring to nationality and naturalization as distinguishing characteristics).

130. *See* NYU REPORT, *supra* note 15, at 12–13 (explaining that the justification of "national security" is commonly cited through jurisprudence on this issue in federal district and appellate courts throughout the thirteen circuits by the USCIS and the FBI).

131. CERD, *supra* note 22, at art. 1(3).

132. *Id.*

133. *Id.*

A third way the United States could distinguish individuals is by limiting its CERD obligations to citizens only.[134] This is possible through a combination of Article 2, Article 5, and Article 1.[135] At the outset of this analysis, focus must be directed to the placement and to the implication of the term "everyone" in Article 5.[136] The syntax structure of Article 5 comports with Article 2 and with the overall consistency of the CERD.[137] This suggests that the Article 5 introductory statement concerning the elimination of discrimination "in all its forms" folds back into a dialogue with Article 1(2), its definitions, and its subsequent paragraphs—namely, the citizen and non-citizen distinction.[138] As such, this analysis reveals the possibility that the United States could legally distinguish non-citizens by limiting its obligations under the CERD to only citizens.[139]

In sum, Article 1 does not protect non-citizens from distinctions made within the United States' FBI name check policy. Article 1 instead provides three ways the United States could make legal distinctions without violating the CERD. Although there is a possibility that treaty drafters overlooked the citizenship exception, this remains unlikely because no state party would relinquish its sovereign power over internal citizenship policies to the governing committee of a multilateral international treaty organization.[140]

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134. *See* Meron, *supra* note 128, at 312–13 (noting the scope and the complications added by Article 5); *see also* Karl Josef Partsch, *Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights*, 14 TEX. INT'L L.J. 191, 197–98 (highlighting the necessity of interpretation of Article 5, Article 2, and Article 1 together with the CERD).

135. *See generally* CERD, *supra* note 22, at arts. 1, 2, 5.

136. CERD, *supra* note 22, at art. 5.

137. *See* Meron, *supra* note 128, at 312 ("Arguably, then, despite the broad language of Article 5, state parties may limit their obligations under Article 5 to citizens if this limitation is not a pretext for racial discrimination.").

138. *See* Partsch, *supra* note 134, at 197–98 (discussing the interpretation of the Article 5 phrase "in all its forms").

139. *See* Meron, *supra* note 128, at 312 (confirming that a state party to the CERD could validly make distinctions based solely on citizenship under Article 5). This option assumes that the United States' aim was not racially motivated and is justified by an alternative explanation. *Id*. Additionally, it is important to note that the CERD has a very liberal scope on the permissibility of citizenship restrictions. *Id*.

140. *See* MCKEAN, *supra* note 126, at 158 (stating that, regarding alien exclusion under the CERD, a "clear restriction on the universality of the principles of equality [of aliens] . . . is made inevitable by the existence of the principle of sovereign states").

1. CERD Committee Response

In response to the broad structure of the CERD, most state parties included RUDs that limited their treaty obligations. This frustrated the CERD Committee. In 1996, the CERD Committee responded by issuing General Recommendation Fourteen to curb the increased use of RUDs by state parties.[141] General Recommendation Fourteen advanced a new test for deciding when state parties' "distinctions" violate the CERD.[142] The test analyzed whether a state party's actions had an "unjustifiable disparate impact" on a particular group as defined by "colour, descent, or national or ethnic origin."[143]

In 1997, the CERD Committee went a step further to regulate RUDs. This time it enacted General Recommendation Thirty[144] with two goals: tempering state parties' RUDs and regulating state parties' naturalization processes.[145] The recommendation also defined the parameters between distinctions based on citizenship and distinctions based on discrimination. The CERD Committee explained that these parameters would focus on actions that are "not applied pursuant to a *legitimate* aim, and are not *proportional* to the achievement of this aim."[146] The new standard became the lens through which the CERD Committee would view and interpret state party obligations, regardless of existing RUDs.[147]

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141. *See* Office of the High Comm'r for Human Rights, *General Recommendation 14: Definition of Discrimination*, para. 1, U.N. Doc. A/48/18 (1993), [hereinafter *General Recommendation XIV*], *available at* http://www.unhchr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3 (stating that the aim is to further define what constitutes a distinction versus discrimination by drawing "attention of States parties to certain features of the definition of racial discrimination in Article 1, paragraph 1") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

142. *Id.*

143. *Id*.

144. *See* Office of the High Comm'r for Human Rights, *General Recommendation No. 30*: *Discrimination Against Non Citizens*, preamble (Jan. 10, 2004) [hereinafter *General Recommendation XXX*] *available at* http://www.unhchr.ch/tbs/ doc.nsf/0/e3980a673769e229c1256f8d0057cd3d?Opendocument (addressing discrimination against non-citizens) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

145. *See id.* (reaffirming and recommending analysis under Article 5 concerning the application of discrimination to non-citizens).

146. *Id.* para. 4 (emphasis added).

147. *See id.* (defining discrimination against non-citizens).

2. U.S. RUDs, Periodic Reports, and the Clarifications

Despite the CERD Committee's new "unjustifiable disparate impact" standard, the United States qualified its acceptance with a modified legal framework.[148] The United States explained that an "unjustifiable disparate impact" would occur only when a race-neutral practice demonstrated "statistically significant racial disparities and are unnecessary, i.e. unjustifiable."[149] In addition, the United States included an equal protection prong, which increased the standard for proving this impact, and further insulated the United States from liability.[150]

With the United States' modified framework in place, analysis shifts to its application for FBI name check delays. The reality of applying this framework is met with two significant roadblocks: one is that state parties have not ever used this test; the other is that the increasing efforts by the USCIS to correct this problem decreased its impact compared to the overall naturalization numbers.[151] Thus, while citizenship delays are important and are in need of correction, this situation appears unlikely to reach a level sufficient to trigger an international treaty violation in which the United States or the CERD Committee would invoke this test.[152]

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148. *See International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Comm. on Foreign Relations*, 103d Cong. 19 (1994) [hereinafter *International Convention Hearing*] (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (reinforcing this premise); *see also CERD Periodic Report*, *supra* note 122, para. 318 ("[I]n seeking to determine whether an action has an effect contrary to the Convention [the Committee] will look to see whether that action has an unjustifiable disparate impact." (internal quotations omitted)).

149. *See CERD Periodic Report*, *supra* note 122, para. 318 (defining unjustifiable disparate impact).

150. *See General Recommendation XXX*, *supra* note 144 (expounding upon the legal differences between the United States' framework and the CERD's framework under this context).

151. *See* CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT 2007 11–16 (2007), http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf (discussing delays and backlogs in 2007); *see also* CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., ANNUAL REPORT 2008, 5–18 (2008), http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf (denoting the most recent report on the continuing challenges with this issue).

152. *See generally CERD Periodic Report*, *supra* note 122. This 2007 periodic report to the CERD Committee does *not* acknowledge or discuss this issue. Instead, the only inference is the continuous problem that the United States acknowledges with racial tensions for people of Muslim descent. *Id.* There is no discussion within the entire document of any issue regarding the background delays and discrimination. *Id.* However, the United States

B. Possible Application of the Citizenship Exception

Taking the analysis a step further, this section explores what could happen if the FBI name check delays reached a level from which the CERD Committee found an "unjustifiable disparate impact."[153] If this occurred, the CERD Committee would likely submit a periodic recommendation report to the United States stressing that the FBI name check delays violated the CERD. The CERD Committee would ask the United States to correct this problem. The United States would then have three options: (1) to accept the CERD Committee's recommendations; (2) to acknowledge the issue, but take no action to rectify the problem; or (3) to outright reject the CERD Committee's request.

Option one is unviable. The reason stems from the United States' regard for the CERD Committee as merely "recommendatory in nature."[154] Options two and three, however, remain viable for several reasons. First, the United States is working to eliminate the citizenship delays.[155] Second, the United States has a Citizenship and Immigration Services Ombudsman in place to correct troubling citizenship situations.[156] It therefore remains unlikely that the U.S. government

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does, in fact, make clear, on its own accord, that there still exists wide-spread discrimination in the wake of 9/11 against people of Muslim, Arab, Middle Eastern and South Asian descent. *Id.* The United States notes that they are committed to solving this issue, but there is never any discussion of FBI name check delays, nor any issue of an "unjustifiable disparate impact." *Id.*

153. *See International Convention Hearing*, *supra* note 147, at 19 (reinforcing this premise); *see also CERD Periodic Report*, *supra* note 122, para. 318 (discussing the unjustifiable disparate impact standard).

154. *See International Convention Hearing*, *supra* note 147, at 15 (pertaining directly to the discussion of state party RUD's within General Recommendation 14).

155. *See CERD Periodic Report*, *supra* note 122, para. 54 (discussing the need for continued progress).

156. *CIS Ombudsman Website Under the Department of Homeland Security*, http://www.dhs.gov/xabout/structure/editorial_0482.shtm (last visited Feb. 5, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Within this website the Ombudsman states:

> The Citizenship and Immigration Services Ombudsman (CIS Ombudsman) provides recommendations for resolving individual and employer problems with the United States Citizenship and Immigration Services (USCIS). As mandated by the Homeland Security Act of 2002 § 452, CIS Ombudsman is an independent office that reports directly to the Deputy Secretary of Homeland Security. The CIS Ombudsman:
>
> - Assists individuals and employers in resolving problems with USCIS;

would allow recommendations from an international organization to trump its own efforts.[157]

In addition, review of this issue and its application to other similar contexts suggests that there would be minimal consequences if the United States took no action or rejected the CERD Committee's recommendation.[158] In the past, the United States disregarded CERD recommendations and suffered no backlash.[159] The plausible explanation for defiance with no consequences comes from the CERD Committee's inability to render binding legal judgments or to force compliance.[160] Accordingly, the CERD Committee's authority would be confined to political pressure and persuasive rhetoric.[161]

V. CERD International Enforcement and Remedies

On the international stage, nearly all of the CERD enforcement mechanism options prove useless against the United States. The CERD provides three options for redress covering both state parties and individuals.[162] On a state level, redress is found under Article 11 and

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- Identifies areas in which individuals and employers have problems in dealing with USCIS; and
- Proposes changes to mitigate identified problems.

Id. *See generally* Noël L. Griswold, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U.L. REV. 207 (2005) (exploring and analyzing the newly established Department of Homeland Security).

157. *See generally CERD Periodic Report*, *supra* note 122 (discussing United States' efforts to combat racial discrimination).

158. Like the ICCPR, drafters of the CERD do not give any binding legal authority to the CERD Committee. Rather, the CERD Committee's role, as generally stated in Article 9, Section 2, is to make "suggestions and general recommendations based on reports and information received from the State Parties." CERD, *supra* note 22, at art. 9; *see also* William F. Felice, *The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights*, 24 HUM. RTS. Q. 205, 217 (2002) (stating that the CERD Committee's function is not a judicial body but rather a mechanism to guide states in their efforts to support their work toward integration of the CERD and ameliorating discrimination).

159. *See* Felice, *supra* note 158, at 216–17 (discussing the United States' failure to achieve a standard of living called for by CERD).

160. *See id.* at 218 (discussing the CERD Committee's past "flimsy and ineffectual reports").

161. *See id.* at 217 (discussing non-judicial role of CERD).

162. *See generally* CERD, *supra* note 22, at arts. 11, 14, 22.

Article 22.[163] On an individual level, Article 14 provides redress to non-state parties.[164]

Beginning with Article 11, state parties can submit complaints to the CERD Committee against another state party for noncompliance with the treaty.[165] This option has never been used.[166] Therefore, a state party would likely not jeopardize its relations with the United States over an internal U.S. citizenship policy.[167]

Article 22 provides a second option. It enables state parties to submit claims to the International Court of Justice (ICJ).[168] Similar to Article 11, this option also remains problematic in application against the United States. The problem stems from the United States' reservation in Article 22, which requires its consent before a claim proceeds to the ICJ. Unfortunately, the United States has never consented to the use of Article 22, nor has any other state party.[169] Although an Article 22 claim is still possible, reality dictates that its success is unlikely. This is especially the case with internal U.S. policies like the FBI name check delays.[170]

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163. CERD, *supra* note 22, at arts. 11, 22 (granting state remedies).

164. CERD, *supra* note 22, at art. 14, para. 5 ("In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.").

165. *See* CERD, *supra* note 22, at art. 11 (discussing state reporting options).

166. There is no record in any official or unofficial report of any state party to the CERD using Article 11.

167. *See International Convention Hearing*, *supra* note 148, at 15 (discussing citizenship policy). CERD Articles 12 and 13 are attached to this provision and set forth the outline for determining how the CERD Committee and the United Nations would approach this situation if a claim ever arose. CERD, *supra* note 22, at arts. 12, 13.

168. *See* CERD, *supra* note 22, at art. 22 (allowing interpretation or application questions to be appealed to International Court of Justice).

169. *See International Convention Hearing*, *supra* note 147, at 14–15 (denoting Conrad K. Harper, Legal Advisor, U.S. Dep't of State's comment that the Clinton Administration "strongly supports" use of international dispute mechanisms but for prudence and for practicality rationales, Advisor Harper stressed that the best course of action is to set in place a layer of protection to shield it from frivolous or politically motivated attacks by other countries).

170. *See* FBI, *National Name Check Program—Frequently Asked Questions*, http://www.fbi.gov/page2/nationalnamecheck.htm (last visited Feb. 5, 2010) (explaining the National Name Check Program) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Finally, Article 14 provides the only enforcement and redress procedure for individuals.[171] It requires a state party's consent before a case can advance.[172] If the state party does not consent, no further relief exists.[173] The United States has not consented to this Article; therefore, it remains an ineffective redress option.[174] In sum, CERD enforcement mechanisms in Article 11, Article 22, and Article 14 prove useless against the United States for FBI name check delays.

VI. Domestic Applications and Enforcement of the ICCPR and the CERD

On the domestic stage, it is nearly impossible to advance FBI name check delay discrimination claims under the ICCPR or the CERD. This Part explains why by analyzing the challenges associated with two hurdles resurrected by the United States. The first section of this Part addresses how federal courts treat the non-self-executing declarations operating within both treaties.[175] The second section of this Part explores the plenary power doctrine and the deference federal courts give to the United States on immigration issues.[176] Finally, this Part concludes by arguing that redress under either treaty is unlikely now or in the future.[177]

A. The Non-self-execution Hurdle

At the outset, the United States believes that existing domestic laws provide sufficient protection against discrimination for citizens and for

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171. *See* CERD, *supra* note 22, at art. 14 (discussing the possible redress option for individuals).

172. *See id.* at art. 14, para. 1 ("No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.").

173. *See id.* ("A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.").

174. *See* Felice, *supra* note 157, at 215–16 (noting that in Advisor Conrad's speech he explained that the United States never consented to this provision and therefore it cannot be bound by it).

175. *Infra* Part VI.A.

176. *Infra* Part VI.B.

177. *Infra* Part VI.C.

non-citizens.[178] Accordingly, the Senate ratified the ICCPR and the CERD as non-self-executing to prevent international treaty claims from conflicting with domestic laws.[179] The Supreme Court has upheld this non-self-execution doctrine consistently for more than 150 years. Recently in 2008, the Supreme Court renewed its commitment to this doctrine in *Medellín v. Texas*.[180] In *Medellín*, the majority stressed that the "long recognized" distinction given to non-self-executing international treaties is that it has no effect in the United States without a congressional statute.[181] The Court reasoned that the objective of non-self-execution is political, not judicial.[182] Congress must pass legislation before a treaty becomes "a rule for the Court."[183] With no legislation

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178. *See* Senate Report, *supra* note 56, at 22–26 (discussing and explaining this issue). For example, the Senate Report clarified that because the ICCPR was a non-self-executing treaty, it "would not . . . become directly enforceable as United States law in U.S. courts." Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 719, 726 (1994). Moreover, the Senate Report also noted that the "U.S. already provides extensive protections and remedies against racial discrimination sufficient to satisfy the requirements of the present convention." *Id.* Finally, the Senate Report also noted:

> For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. Courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.

Senate Report, 31 I.L.M. at 656.

179. *See id.* (stating that non-self-executing treaties "would not . . . become directly enforceable as United States law in U.S. courts").

180. *See* Medellín v. Texas, 552 U.S. 491, 504–05 (2008) (discussing this long-standing precedent). Moreover, writing for the majority, Chief Justice Roberts upheld the doctrine of non-self-executing provisions within international treaties and he further explained that it is not binding on federal and state courts. In support of this holding, the *Medellín* Court cited to the Court's finding in Foster v. Neilson, 27 U.S. 253, 315 (1829) that a non-self-executing treaty was not binding. *Id. See generally* United States v. Percheman, 32 U.S. 51 (1833); *and* Whitney v. Robertson, 124 U.S. 190, 194 (1988).

181. *See Medellín,* 552 U.S. at 504–05.

182. *See id.* at 508 (noting that a non-self-executing treaty created an obligation for the political branches to take action to comply with the United States' commitments and it was not directly enforceable as federal law).

183. *See Medellín*, 552 U.S. at 516 (stating "[t]he point of a non-self-executing treaty is that it 'addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court'" (quoting Foster v. Neilson, 27 U.S. 253, 314 (1829))).

passed pertaining to the ICCPR or the CERD, a plaintiff would find it nearly impossible to circumvent the non-self-executing hurdle.[184]

B. The Nonexistent CERD Claim and the Rare ICCPR Claim

Yet, there are always exceptions within every legal system. Although no exceptional cases have advanced when brought under the CERD, some isolated cases have advanced under the ICCPR. But those cases did not make it far, as demonstrated by three lines of reasoning below.

One line of reasoning comes from Article 50. It states that the ICCPR "extend[s] to all parts of the federal states without any limitations or exceptions."[185] Beazley v. Johnson[186] illustrates a failed attempt at using Article 50.[187] There, the plaintiff argued that the United States consented to Article 50 through ratification of the ICCPR, and therefore the United States was bound by this provision.[188] The court described that reasoning as "nonsensical, to say the very least."[189] The court subsequently dismissed the claim that certain articles would supersede the Senate's non-self-executing provision to the ICCPR.[190]

A second line of reasoning claims the ICCPR is self-executing (instead of non-self-executing). This claim is also meritless as the Fifth Circuit's holding in *Beazley* also illustrates.[191] According to the court, this claim would never make it far because there is no case law to support such an obscure contention.[192]

A third line of reasoning relies on the HRC's non-binding interpretation of United States' obligations under the ICCPR. In *Beazely*,

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184. As of February 17, 2009, Congress has not passed legislation extending rights under the ICCPR or the CERD.

185. ICCPR, *supra* note 21, at art. 50.

186. *See* Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001), *cert. denied*, 123 S. Ct. 573 (2002) (finding that a violation of the Vienna Convention did not dismiss the defendant's indictment).

187. *See id.*

188. *See id.* at 267 ("Beazley claims that this declaration is trumped by article 50.").

189. *Id.*

190. *See id.* at 266 ("[I]n Domingues v. Nevada, the Supreme Court of Nevada concluded that 'the Senate's express reservation of the United States' right to impose a penalty of death on juvenile offenders negate[d] Domingues' claim that he was illegally sentenced' . . . . We agree. " (citing Domingues v. Nevada, 114 Nev. 783, 785 (1998))).

191. *See id.* (rejecting the conclusion that provisions of the ICCPR voided state law).

192. *See id.* at 267 (denoting the court's overall reasoning in dismissing petitioner's claim).

the petitioner claimed that U.S. obligations should be determined by the HRC and not by the United States' non-self-executing doctrine.[193] The trial court found that this approach was procedurally barred and without merit.[194] On appeal, the Fifth Circuit also dismissed this reasoning. It cited a lack of supporting authority.[195] Regardless of this exceptional application, most federal courts continue deferring to the United States through the non-self-execution doctrine.[196]

C. Immigration Plenary Power Preclusion

The federal courts also defer to immigration laws and policies established by Congress and the Executive Branch. This section explains how this deference impacts a possible ICCPR or CERD claim citing discrimination from FBI name check delays. Finally, this section elaborates on state parties and individual's lack of success in challenging this deference.

When the Senate originally crafted the RUDs for the ICCPR, it explained that "U.S. laws permit additional distinctions . . . between citizens and non-citizens and between different categories of non-citizens, *especially in the context of the immigration laws*."[197] This statement

193. *Id.* at 264.

194. *Id.* at 268.

195. *See id.* at 267 (dismissing petitioner's contention that other courts have found "persuasive" the HRC's interpretation of a State Party's adherence to the Covenant under Article 41). The court found instead that the case law asserted by petitioner demonstrated that courts could only use the HRC as a guide, not to void U.S. RUDs. *Id.* The Fifth Circuit relied on several cases in its analysis, including: United States v. Bakeas, 987 F. Supp. 2d 44, 46 & n.4 (D. Mass. 1997) (noting that in this case the dictum of the Massachusetts District Court must be dismissed because the only authority cited by that court was a law review article in its contention that the HRC has the "ultimate authority to decide whether parties' classifications or reservations have any effect"); United States v. Duarte-Acero, 208 F.3d 1282, 1287 (11th Cir. 2000) (perceiving the HRC interpretation of the ICCPR as "most important"); and United States v. Benitez, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (noting interpretation of the HRC as merely "helpful").

196. *See Beazley*, 242 F.3d at 265–67 (rejecting language from the Human Rights Committee stating that making a reservation to the execution of children provision would nullify the treaty); *General Comment 24, General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, paras. 5, 6, 8, 18, U.N. GAOR Human Rights Comm., 52d Sess., paras. 5, 6, 8, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 1994) (finding that a reservation as to the provision on the execution of children would render the entire treaty void).

197. United States: Senate Committee on Foreign Relations Report on the International

reinforces the long-standing plenary power doctrine. Since 1889, the Supreme Court has given "extreme deference" to Congress and to the Executive Branch on the creation and enforcement of immigration laws.[198] This deference leads federal courts to consistently decline the use of heightened scrutiny. Most courts rely instead on the less stringent rational basis standard of review.[199]

To date, federal courts rely on the plenary powers doctrine to dismiss most FBI name check delay claims.[200] Dismissal of these cases is due to the United States' ability to withstand a rational basis standard of review. A subsidiary reason involves the dismissal of claims made by non-citizens under the equal rights provisions of the Fifth Amendment.[201] The rational basis standard of review also places a significant burden on the plaintiff to overcome the U.S. government's national security rationale.[202]

In addition, federal courts frequently use a rational basis test for FBI name check delay claims.[203] As one federal court described, the focus on FBI name checks is not on deciding whether it is good policy, but is instead on deciding whether the policy is rationally related to a legitimate government interest.[204] Moreover, federal courts also reinforce that it is

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Covenant on Civil and Political Rights, 31 I.L.M. 645, 655 (1992) (emphasis added).

198. *See generally* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (finding that treaties did not infringe on Congress' power to regulate Chinese immigration); Shaughnessy v. Mezei, 345 U.S. 206 (1953) (finding that the Court should not second guess Congress' legislative acts on immigration and the Executive's methods of enforcing those acts); Harisiades v. Shaughnessy, 342 U.S. 580 (1951) (finding that the Court should defer to Congress' judgment in regulating immigration regarding the Alien Registration Act).

199. *See* Fiallo v. Bell, 430 U.S. 787, 793 (1977) (stating that this Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control").

200. *See* Recent Mandamus Litigation, *supra* note 12 (providing a comprehensive up-to-date list of all recent actions by federal courts regarding FBI name check delay cases nationwide).

201. *See, e.g.*, Antonishin v. Keisler, 627 F. Supp. 2d 872, 883 (N.D. Ill. 2007) (explaining that in this case in which the plaintiff claimed Fifth Amendment violations from USCIS delays, there existed no suspect class or otherwise fundamental right; therefore a rational basis test would be used). Note that *Antonishin* reinforced its reasoning by citing to Vision Church v. Village of Long Grove, 468 F.3d 975, 1000–01 (7th Cir. 2006). *See also* Plyer v. Doe, 457 U.S. 202, 216 (1982).

202. *See id.* (noting the significant level of deference rational basis review grants to "legislative determinations").

203. *See* Recent Mandamus Litigation, *supra* note 12 (highlighting a string of cases using this standard of review).

204. *See Antonishin*, 627 F. Supp. 2d at 882–83 (noting that the rational basis standard used in this context would be "extremely respectful" to the Immigration and Naturalization Act and the plaintiff would have to find evidence that the statute draws a distinction that

unlikely that the Immigration and Naturalization Act would ever be struck down for FBI name check delays. FBI name check procedures provide a legitimate government interest in safeguarding the United States.[205]

VII. Conclusion

In 2007, the USCIS experienced the most dramatic increase in naturalization applications ever.[206] The unexpected surge overwhelmed an already burdened process and further highlighted significant flaws and offsetting effects of this policy.[207] One specific effect was a further increase in the processing periods due to FBI name checks for many believed to be of Muslim, Arab, Middle Eastern, or South Asian descent.[208] As the NYU Report documented, the processing delays experienced by many of these applicants are perceived by many to be both unnecessary and extremely detrimental on a personal level.[209]

The USCIS has continued to assert that *all* naturalization applicants go through the same screening process regardless of their race, ethnicity or national origin since the 2002 inception of FBI name check procedures to the naturalization process.[210] For most applicants, delays associated with this name check process never create an issue;[211] but for a small percentage,

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simply makes no sense).

205. *See id.* at 884 ("We do not believe that the presence of an applicant's name in an FBI file is so unlikely to reveal derogatory information that the records search is irrational."); *see also* Omeiri v. District Director, Bureau of Citizenship and Immigration, 2007 WL 2121998, at *3 (E.D. Mich. 2007) (stating that "[t]he purpose of the background checks within context of the Immigration and Naturalization Act is to ensure that only worthy applicants are granted the privilege of United States citizenship").

206. *Naturalization Delays: Causes, Consequences and Solutions, Before the S. Comm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 110th Cong. 2, 7 (2008) (statement of Emilio T. Gonzalez, Director of U.S. Citizenship and Immigration Services).

207. *See id.* at 2–9.

208. *See generally supra* note 6 and accompanying references.

209. *See* NYU REPORT, *supra* note 15, at 2–8 (noting this general theme throughout the NYU Report and further documenting specific quotations from the personal effects this policy had on naturalization applicants).

210. U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., FACT SHEET: IMMIGRATION SECURITY CHECKS—HOW AND WHY THE PROCESS WORKS 2 (2006), http://www.uscis.gov/files/pressrelease/security_checks_42506.pdf.

211. *See id.* at 2 (stating that of the total pool of naturalization applications, in 80% of the cases there are no FBI name check matches resulting in delays; and of the remaining 20%, most of the cases are usually resolved within 6 months. And further, "Less than one percent of cases subject to an FBI name check remain pending longer than six months").

it has produced a substantially longer processing time.[212] While the USCIS acknowledges this impact of the name check requirement, it maintains that it will not "forsake integrity and sound decision making in favor of increased productivity, or compromise national security."[213]

Conceding that the FBI name check requirement has produced substantial personal difficulties for many applicants does not in itself justify condemnation of this requirement. It does, however, necessitate a careful analysis of the costs and benefits associated with the existing process, with a particular emphasis on the apparent disparate impact on certain groups of applicants. This Note contributes to such analysis by identifying and applying the correct international human rights framework to analyze the United States' treaty obligations.[214]

Despite the important criticisms contained in the NYU Report, this Note concludes that delays caused by the FBI name check process do not place the United States in violation of its international obligations under the ICCPR or the CERD, nor do these treaties provide any form of meaningful redress for applicants subjected to prolonged processing time. These conclusions are based primarily on the United States' RUDs to each treaty and the effects they have on the United States' international obligations, which were the precise considerations omitted from the NYU Report's analysis.[215] Factoring these RUDs into the equation indicates the ultimate permissibility of the current U.S. naturalization policies.

Of course, concluding that human rights treaties do not provide a meaningful check on the establishment and the implementation of this immigration policy does not indicate that it is wise or even morally legitimate. Legality does not necessarily eliminate compelling policy reasons to reconsider the name check requirement in light of the

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212. *Id.*

213. *Naturalization Delays*, *supra* note 205, at 6.

214. In presenting the foregoing analysis, it is imperative to reinforce that the goal of this Note is not in any way to discredit nor disrespect the individuals affected by the FBI name check delays. Nor is this scholarship meant to in any way discredit the excellent work done by the NYU Center for Human Rights and Global Justice on bringing this issue to forefront of the immigration discussion.

215. NYU REPORT, *supra* note 15, at 25–30 (arguing that the United States' actions violate international law). The NYU Report does not mention the United States' reservations, declarations, or understandings to the ICCPR or the CERD in reaching its conclusion on the United States' treaty violations; *see also infra* Part I (explaining that the underpinning behind the United States' use of RUDs is a compromising mechanism that enables ratification of HRTs while keeping intact the domestic rights structure under the U.S. Constitution. It also briefly discusses why the United States' RUDs to HRTs would likely not place the FBI name check delays in direct violation of international obligations).

unanticipated impact produced by the attendant delays in naturalization processing. However, recent evidence indicates that this impact is becoming less problematic: in June 2009, the USCIS and the FBI announced that they had met their goal of eliminating the naturalization backlog, hired additional personnel, and refined the name check criteria to ensure that ninety-eight percent of all name check requests were completed within thirty days, and the other two percent within ninety days.[216] These developments offer the potential to better align law, policy, and moral imperatives, an outcome that should be considered worthwhile by all critics of the immigration process.

216. Press Release, U.S. Citizenship and Immigration Services, U.S. Dep't of Homeland Sec., USCIS, FBI Eliminate National Name Check Backlog (June 22, 2009), http://www.uscis.gov/files/article/NNCP_backlog_elim_22jun09.pdf.