

# CENTER FOR CONSTITUTIONAL



## **The Center for Constitutional Rights' Submission to assist UN Special Rapporteur on Minority Issues in Country Visit to the United States (November 8 - November 22, 2021)**

**Submitted November 9, 2021**

*The Center for Constitutional Rights works with communities under threat to fight for justice and liberation through litigation, advocacy, and strategic communications. Since 1966, the Center for Constitutional Rights has taken on oppressive systems of power, including structural racism, gender oppression, economic inequity, and governmental overreach. The Center for Constitutional Rights has special consultative status with ECOSOC and welcomes the opportunity to contribute to the UN Special Rapporteur on Minority Issues' country visit and review of the United States' compliance with international human rights law.*

## CENTER FOR CONSTITUTIONAL RIGHTS

### Briefing Paper to UN Special Rapporteur on Minority Issues, Fernand de Varennes

Submitted November 9, 2021

This short briefing paper is presented to the UN Special Rapporteur on Minority Issues, Fernand de Varennes, to assist in his country visit to the United States from November 8 to November 22, 2021. It outlines the Center for Constitutional Rights' key concerns with regard to the laws, policies and practices that impact minoritized communities, including Indigenous, Black, brown, Muslim and immigrant communities.<sup>1</sup> **By perpetuating systematic inequality, exclusion, and discrimination against oppressed communities, the U.S. is failing to uphold the human rights of the most marginalized people and abide by its obligations under international human rights law.** Below is an overview of the general situation of persons belonging to minoritized populations, and specifically the unwillingness of the U.S. government to provide adequate remedy for historical injustice. The submission gives particular attention to the systemic barriers minoritized communities face with regard to effective political participation, including systemic denials in the right to vote and to voice dissent, as well the U.S. government's failures to guarantee access to Justice, including through the criminalization of communities.

#### General situation of persons belonging to minorities and the failure to repair

The systemic discrimination of minoritized communities in the U.S. is rooted in the country's history of colonization, genocide and enslavement. The failures of the U.S. to reckon with these and other historical injustices, including land theft, forcible transfer, Jim Crow, and racial segregation and inequality, not only perpetuates current oppression of Black and Native people, but reinforces ideologies of human hierarchy that threaten all minoritized communities. Further, the U.S. legal framework of civil rights and non-discrimination, which promotes legal equality as opposed to social equality, is insufficient to address historical harms and to otherwise guarantee the social and economic rights of minoritized communities.<sup>2</sup>

The Center for Constitutional Rights commends the recent report by the UN High Commissioner for Human Rights for its interrogation of the root causes of systemic anti-Black racism, and the inevitable legacy of such grave human rights violations, particularly in the absence of accountability or reparations.<sup>3</sup> The structural inequalities

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<sup>1</sup> See also, Center for Constitutional Rights, "Shifting Power to the People: A Rights-Based Vision for Biden & the 117th Congress." May 2021, available online:

<https://docs.google.com/document/d/1xqanLBEgaG4hA7IK2BZSDFCGbmgS2T5EgXXvkaKtL4k/edit#>

<sup>2</sup> See the Center for Human Rights & Global Justice and the Robert L. Bernstein Institute for Human Rights' panel, "The Black Lives Matter Movement, Racial Inequality, and Human Rights in the United States." 22 September 2015, available online: <https://www.youtube.com/watch?v=hqL4lyulMkI>; see also, Carol Anderson, "Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955." Cambridge University Press, 2003, Cambridge.

<sup>3</sup> See UN High Commissioner of Human Rights, "Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers." A/HRC/47/53, 1 June 2021.

facing Black Americans and other minoritized communities, such as racial health disparities,<sup>4</sup> as well as the impacts of the prison industrial complex<sup>5</sup> and environmental racism,<sup>6</sup> must be placed within a historical context; and any assessment of compliance with international human rights standards must be measured against the U.S.'s' repairment of historical injustice.

### **I. Questions for U.S. government officials:**

1. What steps is the U.S. government taking to ensure domestic implementation of human rights norms and international law obligations?
2. Does the government plan to reinstate treaty making with Native nations and acknowledge Native independence, guaranteeing the fundamental right to self-determination for Native people, communities, land bases, and political and economic systems; and recognize full rights and equal protection for Native people by ensuring treaty rights and Indigenous rights be applied and upheld in accordance with The Red Deal?
3. Will the U.S. create a commission to examine, assess, and propose reparations for Native people and nations for historical and ongoing injustices, including genocide, forcible transfer, land dispossession, dehumanization, racial inequity, the murder and disappearance of Indigenous women and girls, and all forms of violence against Native people?
4. Will the U.S. Congress enact S. 40 (2021), the Commission to Study and Develop Reparation Proposals for African-Americans Act, or will the Biden Administration establish a similar commission by executive order, and ensure the scope of the duties includes an express mandate to analyze such structural inequality as mass incarceration and COVID-19 health disparities within the context of lingering negative effects of the institution of slavery?

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<sup>4</sup> See Center for Constitutional Rights, "Center for Constitutional Rights Priorities for CARES-2." May 12, 2021, available online: <https://ccrjustice.org/center-constitutional-rights-priorities-cares-2>; see also maya finoh, "Government COVID-19 failures are unsurprising—the system is built to fail." *The Daily Outrage/ CCR Blog*. May 4, 2021, available online: <https://ccrjustice.org/home/blog/2020/05/04/government-covid-19-failures-are-unsurprising-system-built-fail>

<sup>5</sup> See American Civil Liberties Union, Center for Constitutional Rights and the US Human Rights Network, "Universal Periodic Review of the United States | Briefing on Structural racism, the criminal legal system and policing." October 20, 2020, available online at: <https://www.aclu.org/letter/universal-periodic-review-united-states-briefing-structural-racism-criminal-legal-system-and>

<sup>6</sup> See Center for Constitutional Rights, "RISE St. James - The Fight to Protect the Burial Rights of Enslaved People." Available online at:

<https://ccrjustice.org/home/what-we-do/our-cases/rise-st-james-fight-protect-burial-sites-enslaved-people>

## **The failure to guarantee the right to effective political participation of minorities, including the right to vote and voice dissent:**

The fulfillment of human rights and the ability to live full, healthy, vibrant lives requires that all people can self-determine and equitably control political, economic, cultural, and social power. Below we consider the systematic denial of Black people of the right to vote, and similarly condemn the U.S. laws and policies that disenfranchise 3.5 million people living in U.S. territories/colonies, as well as the disenfranchisement of formerly and currently incarcerated people, which is a particular threat to the civic participation of minoritized populations. We also contextualize the right to voice dissent as central to full political participation, which together with the right to vote has overwhelmingly been defined by exclusion, suppression, intimidation, and disenfranchisement.

### **I. *Systematic Disenfranchisement* | GOP conspiracy to deprive Black citizens of the right to vote**

Prior to the Voting Rights Act of 1965, which formally prohibited racial discrimination in voting, Jim Crow laws legitimizing anti-Black racism, enforcing racial segregation, and disenfranchising millions of Black voters were the norm. We have entered a new phase in the generations-long, nationwide efforts to disenfranchise Black voters and other minoritized communities. The coordinated gerrymandering strategy after the 2010 midterm elections and census meant that Republicans gained a vast majority of seats in the U.S. House of Representatives in 2012, despite the fact that Democratic candidates won a majority of votes. Significantly, no Republican president has been elected by popular vote in the 21<sup>st</sup> century.<sup>7</sup>

Since the Supreme Court gutted the Voting Rights Act in the 2013 *Shelby County v. Holder* decision, the GOP has only increased their assault on voting rights – deploying tactics aimed at inhibiting voter registration and turnout, voter roll purges, passing restrictive I.D. laws, even shuttering polling places, and dramatically and illegally redrawing electoral districts. The active disenfranchisement of Black voters is grounded in anti-Black racism and white supremacy and fueled by corporate and private actors such as the American Legislative Exchange Council (ALEC)<sup>8</sup>, Council for National Policy (CNP), Redistricting Majority Project (REDMAP), and other GOP-aligned entities.

### **II. *Systematic Disenfranchisement* | The criminalization of dissent**

In response to the systematic exclusion from the political process, minoritized and marginalized populations have long sought alternative venues to demand their rights and voice their dissent against an unjust status quo. The treatment of

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<sup>7</sup> This is not to suggest that Democrat-affiliated interests have not also sought at times to suppress Black voting. What is true now is that there has been a clear, focused, sustained, across-the-board, nation-wide strategy to suppress and dilute Black voting and that of other minoritized communities in very pronounced ways for over 20 years, with particular renewed efforts and success in 2010, which lead to the redistricting efforts and new tactics after the election of Barack Obama and then the 2010 census.

<sup>8</sup> See CCR, “ALEC Attacks: How evangelicals and corporations captured state lawmaking to safeguard white supremacy and corporate power.” 2019. Available online at [www.alecattacks.org](http://www.alecattacks.org)

protesters has been starkly delineated along racial lines, with Indigenous and racial justice activists under particular threat of both discriminatory treatment and violence by U.S. law enforcement, as well as discriminatory legislation and frivolous lawsuits designed to stifle dissent.<sup>9</sup>

As Indigenous Water Protectors and Land Defenders lead the front-line defense against the oil and gas industry across the country, they are experiencing serious attacks on their rights to free speech, expression and association. In 2017, the partial owner of the Dakota Access Pipeline, Energy Transfer Equity, filed a bizarre and far-fetched lawsuit naming various environmental organizations and "Earth First!" as defendants, and later individual activists including Krystal Two Bulls, an Oglala Lakota and Northern Cheyenne organizer. The baseless lawsuit, which was a textbook example of a "strategic lawsuit against public participation," or SLAPP, was dismissed in 2019.

Since the protests at Standing Rock opposing the Dakota Access Pipeline in North Dakota in February 2017, more than 60 bills that heighten the risk and criminal penalties of dissent have been introduced across 30 states. In 2018, the Louisiana Mid-Continent Oil and Gas Association (LMOGA) drafted and proposed an amendment to Louisiana's Critical Infrastructure law in an attempt to chill, and harshly punish opposition to LMOGA's pipeline projects. The law was passed in August 2018 and swiftly used to charge Indigenous Water Protectors with felonies for their non-violent protest. On July 13, 2021, a local district attorney in Louisiana rejected all charges against the 17 individuals who were charged with felonies under the 2018 law and declined to prosecute them.

In addition to the legislative measures used to silence activism, the U.S. government, through the U.S. Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI) has been systematically surveilling and monitoring the activity of the Movement for Black Lives (M4BL), in what is the latest iteration of criminalizing the Black freedom struggle.<sup>10</sup> The U.S. government cast Black human rights defenders as extremists and potentially violent threats, and engaged in sweeping surveillance of constitutionally protected activities.<sup>11</sup> During the 2020 protests following the police murder of George Floyd, law enforcement met protestors with tear gas and physical violence, and issued over 10,000 arrests, with over 90 people facing federal charges.<sup>12</sup> These tactics are designed to chill the activities of minoritized communities and deny their full participation in political, civil and social life.

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<sup>9</sup> See International Center for Nonprofit Law 'US Protest Law Tracker'. Available at: <https://www.icnl.org/usprotestlawtracker/>; Protect the Protest Taskforce, "Who is Vulnerable?" *What is a SLAPP lawsuit?* Available online at: <https://protecttheprotest.org/category/resource-categories/who-is-vulnerable/>

<sup>10</sup> See CCR. "Color of Change v. Department of Homeland Security and Federal Bureau of Investigation," March 19, 2018, available at: <https://ccrjustice.org/COC-FOIA>; see also CCR. "Briefing Guide: Color of Change v. FBI & DHS," May 16, 2018, available at: <https://ccrjustice.org/briefing-guide-color-change-v-fbi-dhs>

<sup>11</sup> See CCR and Color of Change. "Briefing Guide: The DHS "Race Paper"," March 19, 2018, available at: <https://ccrjustice.org/sites/default/files/attach/2018/03/COC%20FOIA%20-%20Full%20Briefing%20Guide%20Final.pdf>

<sup>12</sup> See Movement for Black Lives, "Free 'Em All: Protect Front Line Freedom Fighters," *Amnesty for Protestors*. Available online at: <https://m4bl.org/amnesty-for-protestors/>

### III. **Systematic Disenfranchisement | Questions for U.S. government officials:**

1. What steps is the U.S. government taking to protect and promote the right to self-determination of all people under U.S. control, including people living in U.S. territories, and formerly and currently incarcerated people?<sup>13</sup>
2. Will the U.S. Congress establish independent, non-partisan electoral commissions to oversee redistricting to help ensure free and fair elections and prevent gerrymandering?
3. What measures are the U.S. government taking to prohibit any current or pending disenfranchisement laws or voter suppression bills,<sup>14</sup> including by establishing remedies and penalties for voter disenfranchisement and voter suppression violations?
4. What steps is the U.S. government taking to end repressive police and federal control and restriction of protests, and to repeal laws that criminalize protest-related activities?
5. How does the U.S. government intend to prevent corporations and powerful actors from abusing the court system to intimidate and silence their critics, including the use of SLAPPs?
6. Will federal and state-level officials drop the charges against protestors demanding environmental and racial justice, including during the protests against Line 3, and the 2020 uprisings for Black Lives?
  1. Further, will the Biden Administration stop pursuing the sentencing, which includes a politically-motivated terrorism enhancement, of Colin Mattis and Urooj Rahman, Black and South Asian attorneys, respectively, who are facing up to 10 years in prison for alleged property damage during a protest against police brutality?

#### **Access to Justice and Administration of Criminal Justice:**

The criminal legal system requires the mass criminalization, incarceration, and surveillance of minoritized people, particularly communities of color, immigrant communities, and LGBTQIA+ communities, domestically and around the world. The criminalization of minoritized communities provides a consistent stream of Black, brown, indigenous, and queer bodies to be warehoused in prisons and detention centers for the profit of institutions. Cruel and excessive charges and sentences that are disproportionately imposed upon minoritized communities, such as

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<sup>13</sup> See CCR, "Guarantee Self-Determination and Genuine Access to the Democratic Process." *Shifting Power to the People*. May 2021, available online: <https://docs.google.com/document/d/1xqanLBEgaG4hA7IK2BZSDFCgBmgs2T5EqXXvkaKtL4k/edit#heading=h.aduxcba4me6s>

<sup>14</sup> See Voting Rights Lab 'States Voting Rights Tracker'. Available at: <https://tracker.votingrightslab.org/pending/search>

Death-by-Incarceration sentences (legally known as life without the possibility of parole), must be understood as a direct legacy and evolution of racialized chattel slavery.<sup>15</sup>

The nexus of systems that criminalize oppressed populations to create a sustained revenue stream for private for-profit corporations and governments is referred to as the Prison Industrial Complex (PIC).<sup>16</sup> The PIC includes U.S. government experiments in the post-9/11 context in new forms of inhumane confinement and indefinite detention without charge, as well as the deplorable immigration detention system. The administration of and access to justice for all communities remain in direct conflict with the PIC, and as a result, the abolition of the U.S. system of discriminatory policing, incarceration and surveillance is the only viable mechanism by which justice can be afforded to the oppressed.

### **I. *Criminalizing Communities* | Targeting Black, African, Arab, Middle Eastern, Muslim, and South Asian (BAMEMSA) Communities following 9/11<sup>17</sup>**

In the aftermath of 9/11, the U.S. government launched a platform of human rights abuses. The U.S.-waged “War on Terror” fundamentally transformed laws, policies, and narratives, and stripped the rights and humanity of Muslims and communities of color within the U.S. and abroad who have borne the brunt of endless war, torture, surveillance, and discriminatory and racist policing.<sup>18</sup> Nearly two decades later, the injustice of indefinite detention without charge or fair trial at the Guantánamo Bay prison continues as just one component of the post-9/11 legal regime that endures with bipartisan support. Guantánamo embodies the fact that the U.S. government has viewed communities of color – citizens and non-citizens alike – through a security threat lens, to devastating consequences. As a step towards the necessary transformation of our carceral society, the Biden Administration must close Guantanamo.

The federal Bureau of Prisons (BOP) also surreptitiously created two experimental “Communications Management Units (CMUs)” in the early 2000s to isolate certain incarcerated people from the prison population and the outside world and severely restrict their communications. Muslims, who comprise 6 percent of the federal prison population, represented 60 percent of people held in extreme isolation in CMUs. Currently, there are two CMUs, one located in Terre Haute, Indiana and the other in Marion, Illinois. Through the Center for Constitutional Rights’ litigation, *Aref et al. v. Garland et al.*, it was revealed that individuals detained were sent to these isolation for their Constitutionally-protected beliefs, or in retaliation for challenging poor treatment or other rights violations in the federal prison system. The BOP provides no

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<sup>15</sup> See CCR, “Scott v. Pennsylvania Board of Probation and Parole.” Available online at:

<https://ccrjustice.org/home/what-we-do/our-cases/scott-v-pbpb>

<sup>16</sup> See Critical Resistance, “What is the PIC? What is Abolition?” Available online at:

<http://criticalresistance.org/about/not-so-common-language/>

<sup>17</sup> See CCR, “The 9/11 Effect.” Available online at: <https://ccrjustice.org/home/what-we-do/projects/911-effect>

<sup>18</sup> See CCR, “Unconstitutional and Unjust: Dismantling 20 Years of Discriminatory ‘National Security’ Policy.” September 20, 2021, available online at:

<https://ccrjustice.org/unconstitutional-and-unjust-dismantling-20-years-discriminatory-national-security-policy>

transparency regarding the decision to designate a person to a CMU, nor are there mechanisms of accountability.

## II. ***Criminalizing Communities*** | Disparate impact and treatment of Black migrants

The criminal legal system, designed to control and warehouse Black people, acts as a feeder into the immigration and deportation system, enabling the inherently anti-Black biases of the former to be mirrored and magnified in the latter.<sup>19</sup> Black migrants are over-represented in U.S. immigration detention centers and are subject to discriminatory deportations. Cameroonian migrants have experienced significant violations of their human rights while in detention, including assault by staff and retaliation for nonviolent protests at ICE facilities, nonconsensual and irreversible medical procedures such as sterilizations, and the failure to provide adequate medical care to pregnant women. Cameroonians, like other Black migrant populations seeking refuge in the U.S. from violence or disaster in their home countries, face high rates of detention due to the unavailability of access to Temporary Protected Status, Deferred Action for Childhood Arrivals, and other programs more widely available to non-Black immigrant populations. The Center for Constitutional Rights and our partners recently filed a Freedom of Information Act (FOIA) lawsuit demanding information about the U.S. government's wrongful deportation of asylum seekers to Cameroon.

The U.S. must guarantee Black migrants their fundamental human right to migrate, particularly in cases where individuals are fleeing crisis or attempting to meet their basic needs and where the U.S. has clear international law obligations. In response to compounded crises in Haiti, including a deadly earthquake, the COVID-19 pandemic, and an active hurricane season, the U.S. government upheld a rigid Temporary Protected Status deadline, continued deportations, separated families and denied asylum. Immigration policies must be decoupled from racialized policing and fundamentally reimagined away from its colonial, anti-Black and xenophobic frame.

## III. ***Criminalizing Communities*** | Questions for U.S. government officials:

1. When will the U.S. government close Guantánamo, take accountability for violating the human rights of detainees, and pay reparations to survivors and their communities?
2. By what date will the government close all CMUs and offer meaningful repair to impacted individuals?
3. Does the federal government intend to sign the Cameroon TPS Act of 2021 into law or extend Temporary Protected Status to Cameroonians, Haitians, and all migrants seeking asylum?

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<sup>19</sup> See CCR. "Cameroonian Immigration Detention in Crisis." October 12, 2021, available online at: <https://ccrjustice.org/home/get-involved/tools-resources/publications/cameroonian-immigration-detention-crisis>