

**AMERICAN BAR ASSOCIATION  
MASSACHUSETTS BAR ASSOCIATION  
REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1           **RESOLVED**, That the American Bar Association, which supports the  
2 independence of the judiciary and the legal profession and opposes any Nation's  
3 detention of individuals without charge or access to counsel, calls upon the Government  
4 of Turkey to:

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- 6           (1) immediately release each detained individual unless there is evidence  
7           establishing reasonable grounds to believe that the individual has committed a  
8           crime;
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- 10          (2) meet its obligations to protect human rights, to respect the prohibition against  
11          torture, to respect freedom of speech and of the press, and to ensure that any  
12          measures taken during the declared state of emergency derogate from those  
13          obligations only to the extent that the exigencies of the situation absolutely  
14          require;
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- 16          (3) provide a fair hearing before an impartial tribunal applying established legal  
17          principles before suspending any judge from the bench or any lawyer from the  
18          bar and adhere to international standards concerning the independence of  
19          judges and lawyers;
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- 21          (4) fully inform the Secretary General of the Council of Europe of each measure  
22          that it has taken in derogation of the European Convention on Human Rights,  
23          including the reasons for each such measure; and
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- 25          (5) fully inform the Secretary-General of the United Nations of each measure that  
26          it has taken in derogation of the International Covenant on Civil and Political  
27          Rights, including the reasons for each such measure and the date on which it  
28          ceases the measure.

## REPORT<sup>1</sup>

### Background

On July 15, 2016, a small group of officers of Turkey's military reportedly declared martial law and attempted to overthrow the government of President Recep Tayyip Erdogan.<sup>2</sup> Reports of the attempted coup indicate that it was put down within approximately 10-12 hours and that some 260 people were killed and 1,400 wounded.<sup>3</sup> Turkish officials accused a "Fethullah Gulen Movement" of being behind the coup.<sup>4</sup> Fethullah Gulen, who formerly was closely associated with President Erdogan, has denied any involvement.<sup>5</sup> Gulen is currently living in Pennsylvania.<sup>6</sup>

Within hours of the reported failed coup, the Turkish High Council for Judges and Prosecutors had suspended a reported 2,745 judges and prosecutors (comprising approximately twenty percent of the entire judiciary) of their functions.<sup>7</sup> Hundreds of arrest warrants immediately issued, resulting in the arrest of many hundreds of judges and prosecutors within just the first few days.<sup>8</sup> Within hours after the attempted coup had been put down, it was that, in addition to these 2,745 members of the judiciary, 2 members of the Constitutional Court, 140 members of the Court of Appeals and 48

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<sup>1</sup> The Report recognizes the important contributions made by Susan Simone Kang, Esq., Director of Graduate Legal Education and International Programs at Boston College Law School, and Kathleen Hamill, Esq., Visiting Scholar and Fellow, FXB Center for Health and Human Rights, Harvard University.

<sup>2</sup> The Washington Post, July 20, 2016, "How Turkey's Military Coup Failed," available at [https://www.washingtonpost.com/world/middle-east/how-turkeys-military-coup-failed/2016/07/20/a02b8a24-4eb3-11e6-bf27-405106836f96\\_story.html](https://www.washingtonpost.com/world/middle-east/how-turkeys-military-coup-failed/2016/07/20/a02b8a24-4eb3-11e6-bf27-405106836f96_story.html).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> "Fethullah Gulen: I Condemn All Threats to Turkey's Democracy," The New York Times, Op-Ed, July 25, 2016, available at [http://www.nytimes.com/2016/07/26/opinion/fethullah-gulen-i-condemn-all-threats-to-turkeys-democracy.html?\\_r=0CITE](http://www.nytimes.com/2016/07/26/opinion/fethullah-gulen-i-condemn-all-threats-to-turkeys-democracy.html?_r=0CITE).

<sup>6</sup> Fethullah Gulen is an Islamic scholar, preacher and social advocate. For published reports in America on Gulen, see, e.g., "Who is Fethullah Gulen, and What is His Role?" The New York Times, available at <http://www.nytimes.com/live/turkey-coup-erdogan/who-is/>. According to a story published July 16, 2016 on the website vox.com, Gülen is said to preach "an inclusive brand of Sunni Islam that emphasizes cooperation and tolerance, views modernity as broadly compatible with Islam, and, above all, stresses the importance of education outside of narrow religious schools." *Turkey's coup: the Gulen Movement, explained*, available at <http://www.vox.com/2016/7/16/12204456/gulen-movement-explained>. Gulen denies involvement in any attempted coup.

<sup>7</sup> See Statement: "Situation in Turkey," Council of Europe, Strasbourg, July 20, 2016, available at <https://www.coe.int/et/web/commissioner/-/situation-in-turkey>. See also Press Release, 19 July, 2016, United Nations Office of the High Commissioner, "UN Experts Urge Turkey to Respect the Independence of the Judiciary and Uphold the Rule of Law," available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285&LangID=E>.

<sup>8</sup> *Id.*

# 10B

judicial members of the Council of State had also been ordered detained.<sup>9</sup> Shortly thereafter, 16 Reporters of the Constitutional Court were also ordered detained.<sup>10</sup>

On July 20, 2016, the Turkish government issued a decree announcing a state of emergency.<sup>11</sup> On July 21, 2016 the Secretary General of the Council of Europe was informed by the Turkish authorities<sup>12</sup> of Turkey's intent to derogate from the European Convention on Human Rights, pursuant to Article 15 of the Convention.<sup>13</sup>

By July 24, 2015, Amnesty International had gathered credible information that more than 10,000 people had been detained and that some of the detainees were being tortured.<sup>14</sup> The targets appear primarily to be senior military officers, who are being subjected to beatings and other mistreatment, including rape.<sup>15</sup>

## **Mass Detention Without Meaningful Access To Counsel**

It appears that as of July 30, 2016, approximately 12,096 persons have been arrested, including some 1,214 judges and prosecutors.<sup>16</sup> Beyond the 1,214 who have been formally arrested, as of July 31, 2016, some 3,049 judges and prosecutors have been detained.<sup>17</sup> The Justice Ministry has announced plans to appoint a total of 5,110 new

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<sup>9</sup> "Coup Attempt Shakes Up Turkish Judiciary," Hurriyet Daily News, July 16, 2016, available at <http://www.hurriyetdailynews.com/coup-attempt-shakes-up-turkish-judiciary-with-big-shift.aspx?pageID=238&nID=101692&NewsCatID=341>.

<sup>10</sup> See 29 July 2016 news report of the Constitutional Court of the Republic of Turkey, available at <http://www.anayasa.gov.tr/icsayfalar/duyurular/detay/48.html>.

<sup>11</sup> Decree "Bakanlar Kurulu Karari," (number: 2016/9064), dated 20 July 2016.

<sup>12</sup> See Council of Europe Secretariat, Press release, 21 July 2016, available at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DC-PR132\(2016\)&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DC-PR132(2016)&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true). Turkey's formal Notice of Derogation to the European Convention on Human Rights is available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930086&SecMode=1&DocId=2380804&Usage=2>.

<sup>13</sup> Article 15, Section 1 of the European Convention on Human Rights states, in relevant part, "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention *to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*" (emphasis added).

<sup>14</sup> Report of Amnesty International Charity Ltd., 24 July, 2016, available at <https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/>.

<sup>15</sup> *Id.*

<sup>16</sup> <http://m.haberturk.com/gundem/haber/1274431-feto-sorusturmasinda-tutuklu-sayisi-12-bini-asti>.

<sup>17</sup> Hurriyet Daily News, July 31, 2016, "Prosecutor Demands Freezing Assets of Over 3,000 Judges, Prosecutors," available at <http://www.hurriyetdailynews.com/prosecutor-demands-freezing-assets-of-over-3000-judges-prosecutors.aspx?pageID=238&nID=102240&NewsCatID=338>

judges and prosecutors next month, in order to reduce disruptions in judicial processes.<sup>18</sup> Additionally, the chief prosecutor in Ankara has demanded that the assets of the 3,049 detained judges and prosecutors (including all vehicles, bank accounts, assets in safe deposit boxes, etc.) be “frozen.”<sup>19</sup> Also, at least 89 arrest warrants have issued for journalists and more than 40 journalists have been detained.<sup>20</sup>

There are credible reports concerning the detainees’ lack of access to defense counsel. Amnesty International investigators interviewed more than 10 Turkish lawyers, working to represent over one hundred suspected coup sympathizers in both Ankara and Istanbul, who gave information about the conditions of their clients’ confinement.<sup>21</sup> The lawyers represented up to 18 detainees each, including many soldiers and judges, prosecutors, police, and other civil servants.<sup>22</sup> These attorneys reported that almost without exception “their clients were being held incommunicado . . . and had not been able to inform their families of where they were or what was happening to them.”<sup>23</sup> The detainees “were not able to phone a lawyer and in most cases did not see their lawyers until shortly before being brought to court or being interrogated by prosecutors.”<sup>24</sup> The practice of the interrogators is not to inform counsel or their lawyers of any specific charges for which the detainees ostensibly have been arrested.<sup>25</sup> Soldier detainees reportedly “were brought to court in groups as large as 20 and 25 people.”<sup>26</sup> Private lawyers are “not allowed to represent detainees,” who were all assigned bar association legal aid lawyers, who reported that “after the hearings they were not allowed to speak to their clients who were remanded in pre-trial detention.”<sup>27</sup>

The right to counsel is guaranteed under Article 14 of the *International Covenant on Civil and Political Rights* (“ICCPR”)<sup>28</sup> as well as under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (“European Convention on

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Amnesty International, “Turkey Arrest Warrants For 42 Journalists a Brazen Attack On Press Freedom,” July 25, 2016, available at <https://www.amnesty.org/en/latest/news/2016/07/turkey-arrest-warrants-for-42-journalists-a-brazen-attack-on-press-freedom/>.

<sup>21</sup> Amnesty International, “Turkey: Independent monitors must be allowed to access detainees amid torture allegations,” <https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Article 14, paragraph 3 of the *International Covenant on Civil and Political Rights* provides that everyone shall have the right to “be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him and the right to have “adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.”

# 10B

Human Rights” or “ECHR”),<sup>29</sup> both of which Turkey has ratified.

It is well-understood that access to effective counsel is most critical in declared or undeclared states of emergency, which give rise to serious human rights violations such as arbitrary detention, torture and ill-treatment, enforced disappearance, denial of the right to challenge in court the legality of a detention, denial of the right to be tried by an independent court, unfair trials and attacks on freedom of expression and association.<sup>30</sup> Just as an independent judiciary is critical to safeguard against arbitrary detention and other such human rights violations, the role of the lawyer in such a crisis is paramount. Anyone who is detained has a right to be informed immediately of the reason for his detention and of his rights, in particular the right to the assistance of legal counsel.<sup>31</sup> International law “also establishes that all persons detained under suspicion of a criminal offence have a right to legal assistance before trial [and] If they are unable to afford a legal counsel of their own choosing, they must have a right to competent and effective legal aid free of charge.”<sup>32</sup> “Furthermore, detainees are entitled to have adequate time and facilities to communicate confidentially with their lawyers.”<sup>33</sup>

The Turkish detainees have evidently enjoyed none of these basic protections, despite clear and well-established international standards, such as have been mentioned and such as are set out in the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, concerning requisite guarantees governments are expected to provide to ensure the proper functioning of lawyers.<sup>34</sup>

## ***The Mass Sackings Of Thousands Of Turkish Judges Violate Established Standards On Judicial Independence***

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<sup>29</sup> Article 6, paragraph 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides, “Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; and (c) to defend himself in person or through legal assistance of his own choosing....”

<sup>30</sup> See *Interim Report of the Special Rapporteur to the United Nations General Assembly on the Independence of Judges and Lawyers*, dated 12 August 2008, especially paragraphs 9, 24 & 26. The Interim Report is available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/458/34/PDF/N0845834.pdf?OpenElement>.

<sup>31</sup> *Interim Report of the Special Rapporteur to the United Nations General Assembly on the Independence of Judges and Lawyers*, Para. 26, citing *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Basic Principles on the Role of Lawyers*, paras. 16-22, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

Under paragraphs 17 and 18 of the "*Basic Principles on the Independence of the Judiciary*," endorsed in 1985 by the United Nations General Assembly, judges shall be suspended or removed only after "a fair hearing," and "only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."<sup>35</sup> Paragraph 20 of the "Basic Principles" provides that all "disciplinary, suspension or removal proceedings should be subject to an independent review."<sup>36</sup>

There is no question but that the suspensions of the judges, which occurred within hours of the failed coup, was ordered without an opportunity for a hearing, for reasons unrelated to the individual judges' capacity and without any showing that any judge was involved with the attempted coup.<sup>37</sup>

ABA 2008 Midyear Meeting Resolution 10D was adopted during a crisis in another country in which numerous judges were removed from office, detained and arrested.<sup>38</sup> In Resolution 10D, in recognition of the critical importance of an independent judiciary to a legitimate constitutional democracy, the Association resolved the judges should be reinstated and that all judges, lawyers and other people who were wrongly arrested during the state of emergency be released.<sup>39</sup>

As Kathryn Grant Madigan, then President of the New York State Bar Association, wrote in the (similarly) late-filed Report that accompanied the Resolution presented by the New York State Bar Association in 2008:

...it is essential that the American Bar Association's governing body, its House of Delegates, express its support for the rule of law ... , including ... the reinstatement of Supreme Court justices and high court judges who were removed from office, and the release of those wrongfully detained.

The rule of law is essential to the effective functioning of a free and democratic society; chaos and instability result from its absence. Crucial to the rule of law is a free and independent judiciary. Judges should never be subject to detention because of fears about their potential rulings....<sup>40</sup>

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<sup>35</sup> "Basic Principles on the Independence of the Judiciary," Endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

<sup>36</sup> *Id.*

<sup>37</sup> See Law Council of Australia Press Release, July 22, 2016, "*Grave Concerns for Turkey Following Mass Removal of Judges....*" ("It is also the Law Council's understanding that there is no suggestion that any Turkish judge was involved in ... the attempted coup."), available at <http://www.aapmedianet.com.au/releases/release-details?id=862273>.

<sup>38</sup> See ABA 2008 Midyear Meeting, Resolution 10D, adopted February 11, 2008.

<sup>39</sup> *Id.*, paragraph 2.

<sup>40</sup> *Id.*, Report accompanying Resolution, page 2.

## 10B

This resolution is also consistent with other ABA policy. In ABA 2007 Annual Meeting Resolution 110D, the Association adopted the *Principles on Judicial Independence and Fair and Impartial Courts*, which among other things expresses the principle of institutional independence, a principle that “recognizes the judiciary as a separate and co-equal branch of government charged with administering justice pursuant to the rule of law, and as a constitutional partner with the executive and legislative branches authorized to manage its own internal operations without undue interference from the other branches.”<sup>41</sup>

Several highly respected professional associations have expressed grave concern about,<sup>42</sup> or have condemned,<sup>43</sup> the arbitrary mass removal of the Turkish judges. It appears that the mass suspensions of judges, without any opportunity for a hearing, without any mechanism for independent review, and in the absence of any suggestion of any unfitness or lack of capacity, clearly violates established international standards on the independence of the judiciary.

The Association accordingly should call upon the Turkish Government to respect international legal standards concerning the independence of lawyers and judges and to provide a fair hearing before an impartial tribunal applying established legal principles before suspending or dismissing any lawyer or judge from the bar or a tribunal.

### **The Mass Detentions Violate Many Basic Principles Of Human Rights Law**

#### **A. The European Convention on Human Rights**

It is true that Turkey has given notice of its derogation from the principles of Human Rights protected by the European Convention on Human Rights. But the right of a State to derogate from its obligations under the convention is not absolute, meaning that a State may not abrogate certain basic protections under any circumstances.<sup>44</sup> The right to be free from torture is one of those “non-derogable” rights and this right apparently has been violated in the case of certain detainees.

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<sup>41</sup> ABA 2007 Annual Meeting Resolution 110D, adopted August 13-14, 2007.

<sup>42</sup> E.g., International Association of Women Judges, Statement of 25 July 2016, available at <http://www.iawj.org/News23July2016JudgesinTurkey.html>; Law Council of Australia Press Release, July 22, 2016, available at <http://www.aapmedianet.com.au/releases/release-details?id=862273>. See also Conference of Chief Justices, “Resolution In Support of Due Process and Judicial Independence in the Aftermath of the Military Coup Attempt in Turkey,” approved July 27, 2016, publication pending.

<sup>43</sup> See, e.g., “International Bar Association Human Rights Institute Condemns Mass Removal of Judges Following Attempted Coup in Turkey,” July 20, 2016 press release available at <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4c12eee3-bf1d-47cc-9080-9e4464d4bb85>.

<sup>44</sup> In particular, Article 15, Section 2 of the Convention provides that the right to be free from torture, guaranteed under Article 3 of the Convention, shall never be derogated. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, (“ECHR”) available at: <http://www.refworld.org/docid/3ae6b3b04.html>.



Additionally, mass detentions where individuals are systematically not being informed of charges or given meaningful recourse to *habeas corpus* constitute violations of the European Convention on Human Rights, to the extent that these practices are not “strictly required by the exigencies of the situation,” under Article 15, Section 1.<sup>45 46 47</sup>

Also, Turkey has decreed blanket impunity with respect to whatever human rights violations related to the purge may take place under the current state of emergency,<sup>48</sup> which again, to the extent that this decree is not “strictly required by the exigencies of the situation,” under Article 15, Section 1, contravenes Article 5, Section 5 of the ECHR.<sup>49</sup>

### **B. The View Of The Commissioner for Human Rights**

The Commissioner for Human Rights for the Council of Europe has pointed out, the sheer length of these detentions (as evidently is being contemplated pursuant to the 30 day declaration of state of emergency) is on its face inconsistent with rulings of European Court of Human Rights (“the ECtHR”) interpreting the ECHR.<sup>50</sup>

***I consider that the aforementioned Decree contains several other aspects that raise very serious questions of compatibility with the ECHR and rule of law principles, even taking into account the derogation in place:***

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<sup>45</sup> ECHR Article 15, Section 1 states, in relevant part, “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention **to the extent strictly required by the exigencies of the situation**, provided that such measures are not inconsistent with its other obligations under international law.” (emphasis added).

<sup>46</sup> Article 5 of the ECHR provides for the right to be informed of the charges for which one is being detained ECHR. “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.” Available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>47</sup> As for the right of *habeas corpus*, ECHR Article 5, Section 4 provides, “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” Available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>48</sup> See Decree “Bakanlar Kurulu Karari,” (number: 2016/9064), dated 20 July 2016.

<sup>49</sup> ECHR Article 5, Section 4 provides, “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.” Available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>50</sup> Statement: “Measures Taken Under the State of Emergency in Turkey” Council of Europe, Strasbourg, July 27, 2016, <https://www.coe.int/et/web/commissioner/-/measures-taken-under-the-state-of-emergency-in-turkey>, citing *Aksoy v. Turkey*, ECtHR, December 18, 1996 (fourteen day period of detention was not necessitated by the exigencies of the situation, and left persons vulnerable to arbitrary interference with their right to liberty and freedom from torture).



# 10B

Restrictions to the right of access to a lawyer, including the confidentiality of the client-lawyer relationship for persons in detention, which could affect the very substance of the right to a fair trial, and restrictions to visitation rights (Article 6);

The scope of the Decree, which concerns not only the coup attempt, but the fight against terrorism in general; both for physical and legal persons, punishments foreseen in the Decree apply not only in cases of membership or belonging to a terrorist organisation, but also for contacts with such an organisation (Articles 1, 2, 3 and 4);

Simplified procedures to dismiss judges, including judges of the Constitutional Court and Supreme Courts, without any specified evidentiary requirements (Article 3);

The immediate closure of 1,125 associations, 104 foundations, 19 trade unions, 15 universities, 934 private schools, and 35 private medical establishments. I note that it is not the activities of these bodies that are suspended or placed under trustee control: they are disbanded and their assets revert automatically to state authorities. The Decree further provides a simplified administrative procedure for the disbanding of further organisations (Article 2);

A simplified administrative procedure to terminate the employment of any public employee (including workers), with no administrative appeal and no evidentiary requirements (Article 4);

Automatic cancellation of passports of persons being investigated or prosecuted, without court order (Article 5);

Cancellation of rental leases between public bodies and persons considered to be a member of or in contact with a terrorist organisation, a measure that is likely to affect not only the suspects but also their families (Article 8).

*Another worrying feature of the Decree is that it foresees complete legal, administrative, criminal and financial impunity for administrative authorities acting within its framework (Article 9) and the fact that administrative courts will not have the power to stay the execution of any of these measures (Article 10), even if they consider that such measures are unlawful. These two provisions effectively remove the two main safeguards against the arbitrary application of the Decree.*

*In my view, given the extremely broad and simplified procedures, arbitrariness is in all likelihood unavoidable and damages caused to any physical or legal person may therefore be irrevocable. Such urgency and derogation from ordinary guarantees of due process might be*

*necessary for certain groups, for example for military personnel in the light of the shocking events of 15 July, but perhaps not for others.*<sup>51</sup>

**C. Human Rights Violations Under The International Covenant on Civil and Political Rights**

Article 9 of the International Covenant on Civil and Political Rights (“ICCPR” or “the Covenant”) also provides protections that, evidently, are all being disregarded in the current state of emergency.<sup>52</sup> Turkey furthermore appears to be in violation of certain provisions of Article 14 of the Covenant as well.<sup>53</sup> In particular, the circumstances of detention, and the concomitant denial of meaningful access to counsel, contravene the provisions of ICCPR concerning arbitrary detention and unlawful confinement, notice of the reasons for arrest and charges and the right of *habeas corpus*.<sup>54</sup>

<sup>51</sup> *Id.*, (emphasis added) available at <https://www.coe.int/et/web/commissioner/-/measures-taken-under-the-state-of-emergency-in-turkey>.

<sup>52</sup> Article 9 of The International Covenant on Civil and Political Rights, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>, provides, in part:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. ... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

<sup>53</sup> Specifically, ICCPR Article 14, paragraph 3, sections (a), (b) and (d), provide the following protections:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; and

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing...

<sup>54</sup> See also General Comment No. 35, Article 9 (Liberty and Security of Person), adopted by the United Nations Human Rights Committee at its 112<sup>th</sup> session (October 7-31, 2014), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR)

# 10B

It is worth observing here, as the UN Special Rapporteur on Torture has observed, that judges, prosecutors and lawyers are especially vulnerable to ICCPR Article 9 and 14 abuses.<sup>55</sup> Those who work in the judicial system are at risk or face situations that result in violations of their human rights, especially in the face of governmental pressure.<sup>56</sup> According to the Special Rapporteur, these situations consist mainly of harassment, intimidation, vilification and threats, but may include enforced disappearances, assassinations or summary executions of judges, prosecutors or lawyers, simply because they are doing their jobs.<sup>57</sup>

Additionally, with respect to incommunicado detention -- *status quo* in the mass detentions that are presently ongoing in Turkey -- the Special Rapporteur has repeatedly called for this practice to be declared illegal.<sup>58</sup> The United Nations Human Rights Committee, too, has urged all States to enact provisions against incommunicado detention.<sup>59</sup>

## **D. The Turkish Government Should Give Proper Notice and Full Information Concerning Its Derogation From Law Protecting Human Rights**

Both Article 15 of the ECHR and Article 4.3 of the ICCPR require notice of derogation from its provisions; both also require immediate reporting obligations to the Secretary General of the Council of Europe<sup>60</sup> and the Secretary-General of the United

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<sup>55</sup> Report of the Special Rapporteur to the United Nations General Assembly On The Question of Torture (E/CN.4/2004/56), para. 37; see also U.N.G.A. A/62/207 par. 25.

<sup>56</sup> *Id.*

<sup>57</sup> The Special Rapporteur reported that in 2006, “55 per cent of communications, relating to some 148 cases in 54 countries, dealt with violations of the human rights of judges, lawyers, prosecutors and court officials. Threats, intimidation and acts of aggression directed against lawyers accounted for 17 per cent of communications issued by the Special Rapporteur; the corresponding figure for judges and prosecutors was 4 per cent. Arbitrary detention and judicial harassment accounted for 26 per cent of communications concerning lawyers and 4 per cent of those concerning judges and prosecutors. Assassinations of lawyers, judges and prosecutors accounted for 4 per cent of the total number of communications.” U.N.G.A. A/62/207 para. 25.

<sup>58</sup> Report of the Special Rapporteur on the Question of Torture (E/CN.4/2004/56), para. 37; see also U.N.G.A. A/63/271 par. 25.

<sup>59</sup> United Nations Human Rights Committee, general comment No. 20. See also U.N.G.A. A/63/271 par 25.

<sup>60</sup> Specifically, Article 15, section 3 of the ECHR provides, “Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

Nations<sup>61</sup> respectively. Notice must be given of the measures taken in derogation of law and the reasons for such action.<sup>62</sup> Under Article 15, section 1 of the ECHR, states may take measures derogating from their obligations only “to the extent strictly required by the exigencies of the situation.”<sup>63</sup> Similarly, under Article 4.1 of the ICCPR, parties to the Covenant only “may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.”<sup>64</sup>

On July 24, 2016, the Turkish government did file with the Secretary-General of the Council of Europe a notice of derogation from the ECHR, which included a “Joint Declaration by the Grand National Assembly” and two “information notes.”<sup>65</sup> But this notice is inadequate both as to the provisions of law being derogated and the justifications.<sup>66</sup>

Notably, the Turkish government has not given *any* notice to the United Nations Human Rights Committee of its plain derogation from the human rights protections set out in ICCPR.<sup>67</sup> The Turkish government’s breach of its obligations under the ICCPR, and its breach of the Covenant’s notice provisions, are seem clear.

It is appropriate to call upon the Turkish government to comply with its obligations under the ECHR to keep the Secretary General of the Council of Europe *fully* informed of the measures it has taken in derogation of the European Convention on Human Rights and the reasons justifying such derogation.<sup>68</sup>

It is also appropriate to urge the Turkish government to comply with its obligations under the ICCPR to provide to the Secretary-General of the United Nations

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<sup>61</sup> Article 4.3 of the ICCPR, similarly, provides, “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.”

<sup>62</sup> See fn. 61, 62, *supra*.

<sup>63</sup> ECHR, Article 15, Section 1, at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>64</sup> ICCPR, Article 4.1, at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

<sup>65</sup> “Communication transmitted by the Permanent Representative of Turkey and registered by the Secretariat General on 24 July 2016,” (“the July 24, 2016 notice of derogation”) available at, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930086&SecMode=1&DocId=2380804&Usage=2>.

<sup>66</sup> *Id.*, at 3, 9-10, 12.

<sup>67</sup> In 2006, Turkey ratified the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty; international law does not permit a State which has ratified the Covenant and its Second Optional Protocol to denounce or withdraw from it. See <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20282&LangID=E#sth.ash.6w4nFPKQ.dpuf>.

<sup>68</sup> See fn. 61, *supra*.

# 10B

full notice of derogation from provisions of the ICCPR and the reasons by which each such measure of derogation was actuated.<sup>69</sup>

## Conclusion

In recent years, the human rights situation in Turkey has been deteriorating, leading the US State Department to highlight abuses in its recent Country Reports on Human Rights Practices for 2015.<sup>70</sup> As stated in this Report, the then-current state of emergency in Turkey has led to numerous, serious ongoing violations of core rule of law principles. The current, ongoing, declared state of emergency in Turkey is, at a minimum, being applied loosely and liberally to the detriment of well-understood and well-recognized civil and political rights. The future of Turkey as a legitimate constitutional democracy is in grave doubt, as has been observed in the mass media.<sup>71</sup>

The voice of the American Bar Association needs to be heard in this time of crisis. Whenever the detention of persons without charge or access to counsel has been at issue, the Association has not hesitated to speak out.<sup>72</sup> Here, literally thousands of judges have been arbitrarily suspended, detained and arrested without due process or indeed any just cause and the state of emergency declared by the Turkish government has resulted in extensive, serious, human rights abuses. Faced with this reality, the eyes of the world, quite properly, will be looking to our Association.

Respectively Submitted,

Robert W. Harnais, President  
Massachusetts Bar Association

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<sup>69</sup> See fn. 62, *supra*.

<sup>70</sup> This 2015 State Department Report detailed incidents of arbitrary arrests, arrest procedures and treatment of detainees, torture, including incidents at police stations out of view of closed circuit cameras, etc. See Country Report on Human Rights Practices for 2015/Turkey, U.S. Department of State, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>.

<sup>71</sup> See, e.g., “Turkey coup: What does the state of emergency mean for democracy,” available at <http://www.cnn.com/2016/07/21/europe/turkey-coup-emergency/>.

<sup>72</sup> E.g., ABA 2009 Midyear Meeting Resolution 10A, adopted by the House of Delegates on February 16, 2009 (concerning persons detained at Guantanamo Bay Naval Base).

GENERAL INFORMATION FORM

Submitting Entity: Massachusetts Bar Association

Submitted By: Robert W. Harnais, President

1. Summary of Resolution(s). This resolution expresses grave concern over the mass detentions and arrests of thousands of Turkish judges, lawyers, prosecutors and journalists, without charge or access to counsel and calls upon the Turkish government to release all improperly detained individuals.

This resolution also calls upon the Turkish Government to adhere to provide a fair hearing before an impartial tribunal applying established legal principles before suspending or dismissing any lawyer or judge from the bar or a tribunal.

This resolution also requests that the Turkish Government commit to protect human rights, to respect freedom of speech and to ensure that any measures taken that derogate from such obligations be only those that are strictly necessary given exigencies of the situation.

This resolution also urges the Turkish Government to provide an explanation of the actions taken during the state of emergency and why such actions were required.

2. Approval by Submitting Entity. The resolution was approved by the Massachusetts Bar Association on August 3, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously?  
No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

At the 2007 Annual Meeting, the House of Delegates approved Resolution 110D, in which the Association adopts the *Principles on Judicial Independence and Fair and Impartial Courts*, dated August 2007.

This resolution would not be affect that policy.

5. What urgency exists which requires action at this meeting of the House? The issues raised in this resolution pertain to the risk of unlawful detention, torture and violations of international law related to the mass detentions of judges, prosecutors, journalists and others in Turkey.

6. Status of Legislation. None.

# 10B

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
8. Cost to the Association. (Both direct and indirect costs) --- No cost to the Association is anticipated.
9. Disclosure of Interest. None.
10. Referrals.
11. Contact Name and Address Information. (Prior to the meeting).

Alice E. Richmond  
ABA State Delegate from Massachusetts  
Richmond & Associates  
39 Brimmer St.  
Boston, Massachusetts 02108  
PH: (617) 750-3816; (617) 523-8187  
E-mail: [arichmond@rpalaw.com](mailto:arichmond@rpalaw.com)

12. Contact Name and Address Information. (Who will present the report to the House)?

Request for privileges of the floor for:  
Kevin J. Curtin, Massachusetts Bar Association  
Middlesex District Attorney's Office  
15 Commonwealth Avenue  
Woburn, MA. 02482  
Phone: 781 897-6831/508 423-0140 (cell)



## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution expresses grave concern over the mass detentions and arrests of thousands of Turkish judges, lawyers, prosecutors and journalists, without charge or access to counsel and calls upon the Turkish government to release all improperly detained individuals.

This resolution also calls upon the Turkish Government to adhere to provide a fair hearing before an impartial tribunal applying established legal principles before suspending or dismissing any lawyer or judge from the bar or a tribunal.

This resolution also requests that the Turkish Government commit to protect human rights, to respect freedom of speech and to ensure that any measures taken that derogate from such obligations be only those that are strictly necessary given exigencies of the situation.

This resolution also urges the Turkish Government to provide an explanation of the actions taken during the state of emergency and why such actions were required.

### 2. Summary of the Issue that the Resolution Addresses

Human rights abuses in Turkey related to the post-attempted coup crackdown by the Turkish government, which has included the arbitrary suspensions from service, detention and arrest of literally thousands of Turkish judicial officers.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This resolution is intended to help bring attention to and remedy serious violations of established international standards with respect to detainees' meaningful right to counsel, their arbitrary, *incommunicado* detention, unlawful confinement, lack of notice of reasons for their arrest and charges and their lack of recourse in the manner of *habeas corpus*, in addition to the gross violations of norms concerning principles of judicial independence that are related to the sacking, detention and arrest of thousands of Turkish judges and prosecutors.

### 4. Summary of Minority Views

None known.

PROPOSAL: Amends §2.1 of the Association’s Constitution to realign the districts.

(Legislative Draft – Additions underlined; deletions struck through)

Article 2. Definitions and General Provisions

§2.1 Definitions. In this Constitution, the Bylaws, and any rules of the House of Delegates the term:

... (g)“District” refers to the following areas with states listed in the rotational order of representation on the Board, which order within a district may be varied by unanimous agreement among the affected states:

At the conclusion of the ~~2004~~ 2017 Annual Meeting:

- District 1 Rhode Island, Maine, Vermont, New Hampshire
District 2 Connecticut, Michigan, Massachusetts
District 3 New Jersey, Pennsylvania
District 4 Virginia, District of Columbia
District 5 Kentucky, Alabama, North Carolina
District 6 Louisiana, Tennessee, Georgia, Maryland
District 7 Ohio, Illinois
District 8 Florida, Texas
District 9 Missouri, Minnesota, Wisconsin
District 10 Wyoming, Nebraska, South Dakota, North Dakota
District 11 Arizona, Colorado, Oklahoma
District 12 Arkansas, Iowa, New Mexico, Tennessee, Kansas, Louisiana
District 13 Montana, Alaska, Oregon, New Mexico, Puerto Rico
District 14 California
District 15 New York
District 16 South Carolina, Delaware, Mississippi, West Virginia, Arkansas
District 17 Utah, Hawaii, Nevada, Idaho
District 18 Maryland, Washington, Indiana, Connecticut
District 19 Iowa, Oregon, South Carolina

Article 26. Board of Governors

§26.1 Terms and Election.

(b) In 1985 and each succeeding third year, a member of the Board from each of the third, fifth, ninth, fourteenth, fifteenth, sixteenth, and seventeenth districts shall be elected; in 1986 and each succeeding third year, a member of the Board from each of the seventh, eighth, tenth, eleventh, and thirteenth districts shall be elected; in 1987 and each succeeding third year, a member of the Board from each of the first, second, fourth, sixth, and twelfth districts shall be elected; and in 1989 and each succeeding third year, a member of the Board from the eighteenth districts shall be elected; and in 2017 and each succeeding third year, a member of the Board from the nineteenth district shall be elected.

## RESOLUTION

1 RESOLVED, That the American Bar Association adopts the black letter of the *ABA Standards*  
2 *for Criminal Justice: Criminal Justice Mental Health Standards*, chapter seven of the ABA  
3 Standards for Criminal Justice, dated August 2016, to supplant the Third Edition (August 1984)  
4 of the *ABA Criminal Justice Mental Health Standards*.

### **PART I: THE CRIMINAL JUSTICE SYSTEM AND THE MENTAL HEALTH SYSTEM**

...

211 **Standard 7-1.4. Roles of the attorney representing a defendant with a mental**  
212 **disorder**

213

214

...

215

216 (d) Attorneys who represent defendants with mental disorders should seek  
217 relevant information from family members and other knowledgeable collateral  
218 sources. Unless Model Rule of Professional Conduct 1.14b (regarding an  
219 attorney's duty to take protective action for clients with diminished capacity)  
220 applies, ~~A~~attorneys should share information about their clients with family  
221 members and knowledgeable collateral sources only with their clients' assent,  
222 and in a way that does not compromise the attorney-client privilege.

223

224

...

(Deletions Struck Through; Additions Underlined)

**RESOLUTION**

1 RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA  
2 Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

3  
4 Rule 8.4: Misconduct

5  
6 It is professional misconduct for a lawyer to:

7  
8 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or  
9 induce another to do so, or do so through the acts of another;

10  
11 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness  
12 or fitness as a lawyer in other respects;

13  
14 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

15  
16 (d) engage in conduct that is prejudicial to the administration of justice;

17  
18 (e) state or imply an ability to influence improperly a government agency or official or to  
19 achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

20  
21 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable  
22 rules of judicial conduct or other law; or

23  
24 (g) ENGAGE IN CONDUCT THAT THE LAWYER KNOWS OR REASONABLY  
25 SHOULD KNOW IS HARASSMENT OR DISCRIMINATION ~~harass or discriminate~~ on the  
26 basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender  
27 identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule  
28 PARAGRAPH does not limit the ability of a lawyer to accept, decline, or withdraw from a  
29 representation in accordance with Rule 1.16. THIS PARAGRAPH DOES NOT PRECLUDE  
30 LEGITIMATE ADVICE OR ADVOCACY CONSISTENT WITH THESE RULES.

DELETIONS STRUCK THROUGH; ADDITIONS UNDERLINED

# REVISED 109

31 Comment

32  
33 ...

34  
35 [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence  
36 in the legal profession and the legal system. Such discrimination includes harmful verbal or  
37 physical conduct that manifests bias or prejudice towards others because of their membership or  
38 perceived membership in one or more of the groups listed in paragraph (g). Harassment includes  
39 sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who  
40 is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome  
41 sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a  
42 sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law  
43 may guide application of paragraph (g).

44  
45 [4] Conduct related to the practice of law includes representing clients; interacting with witnesses,  
46 coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or  
47 managing a law firm or law practice; and participating in bar association, business or social  
48 activities in connection with the practice of law. Paragraph (g) does not prohibit conduct  
49 undertaken to promote diversity. LAWYERS MAY ENGAGE IN CONDUCT UNDERTAKEN  
50 TO PROMOTE DIVERSITY AND INCLUSION WITHOUT VIOLATING THIS RULE BY,  
51 FOR EXAMPLE, IMPLEMENTING INITIATIVES AIMED AT RECRUITING, HIRING,  
52 RETAINING AND ADVANCING DIVERSE EMPLOYEES OR SPONSORING DIVERSE  
53 LAW STUDENT ORGANIZATIONS.

54  
55 [5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or  
56 legal issues or arguments in a representation. A TRIAL JUDGE'S FINDING THAT  
57 PEREMPTORY CHALLENGES WERE EXERCISED ON A DISCRIMINATORY BASIS  
58 DOES NOT ALONE ESTABLISH A VIOLATION OF PARAGRAPH (G). A lawyer does not  
59 violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting  
60 the lawyer's practice to members of underserved populations in accordance with these Rules and  
61 other law. A lawyer may charge and collect reasonable fees and expenses for a representation.  
62 Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to  
63 provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to  
64 avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's  
65 representation of a client does not constitute an endorsement by the lawyer of the client's views or  
66 activities. See Rule 1.2(b).

67  
68 ...

## RESOLUTION

1 RESOLVED, That the American Bar Association amends Principles 2(B) and 6 of the ABA  
2 *Principles for Juries and Jury Trials* as follows:

3 2(B) Eligibility for jury service should not be denied or limited on the basis of race,  
4 national origin, gender, age, religious belief, income, occupation, disability, marital status,  
5 sexual orientation, gender identity, gender expression or any other factor that discriminates  
6 against a cognizable group in the jurisdiction other than those set forth in A. above.  
7

8 6(C) The court should:  
9

- 10 1. Instruct the jury on implicit bias and how such bias may impact the decision making  
11 process without the juror being aware of it; and  
12
- 13 2. Encourage the jurors to resist making decisions based on personal likes or dislikes or  
14 gut feelings; THAT MAY BE BASED ON ATTITUDES TOWARD RACE,  
15 NATIONAL ORIGIN, GENDER, AGE, RELIGIOUS BELIEF, INCOME,  
16 OCCUPATION, DISABILITY MARITAL STATUS, SEXUAL ORIENTATION,  
17 GENDER IDENTITY, OR GENDER EXPRESSION.

Deletions struck through; Additions underlined