



**International covenant on civil and political
rights**

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HUMAN RIGHTS COMMITTEE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40
OF THE COVENANT**

Third periodic reports of States parties due in 2003

UNITED STATES OF AMERICA* **

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I. INTRODUCTION

1.The Government of the United States of America welcomes this opportunity to provide the Human Rights Committee the U.S. combined second and third periodic report on measures giving effect to U.S. undertakings under the International Covenant on Civil and Political Rights ("the Covenant") in accordance with Article 40 thereof. The organization of this periodic report follows the General Guidelines of the Human Rights Committee regarding the form and content of periodic reports to be submitted by States Parties (CCPR/C/66/GUI/Rev.2).

2.The following information supplements that provided in the U.S. Initial Report of July 1994 (CCPR/C/81/Add.4, published 24 August 1994; and HRI/CORE/1/Add.49, published 17 August 1994). It also supplements the information provided by the U.S. delegation at the meetings of the Human Rights Committee, which discussed the Initial Report on 31 March 1995 (CCPR/C/SR.1401-1402 and SR. 1405-1406, published 24 April 1995). The information also takes into account the concluding observations of the Committee, CCPR/C/79/Add.50; A/50/40, paras. 266-304, published 3 October 1995, and the 27 July 2004 letter of the Committee to the United States in which the Committee invited the United States to address several of its specific concerns.

3.In this consolidated report, the United States has sought to respond to the Committee's concerns as fully as possible, notwithstanding the continuing difference of view between the Committee and the United States concerning certain matters relating to the import and scope of provisions of the Covenant. In particular, in regard to the latter, the United States respectfully reiterates its firmly held legal view on the territorial scope of application of the Covenant. See Annex I.

II.IMPLEMENTATION OF SPECIFIC PROVISIONS OF THE COVENANT

Article 1 - Self-determination

4.The basic principle of self-determination remains at the core of American political life, as the nation was born in a struggle against the colonial regime of the British during the eighteenth century. The right to self-determination, set forth in Article 1 of the Covenant, is reflected in Article IV, Section 4 of the United States Constitution, which obliges the federal government to guarantee to every state a "Republican Form of Government."

5.*The Insular Areas.* The United States continues to exercise sovereignty over a number of Insular Areas, each of which is unique and constitutes an integral part of the U.S. political family.

6.Paragraphs 12-25 of the Initial Report set forth the policy of the United States of promoting self-government in the Insular Areas of the United States. At that time, the Insular Areas of the United States included the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands; the United States also administered Palau, at the time the sole remaining entity of the Trust Territory of the Pacific Islands.

7.The Insular Areas of the United States remain the same, but the status of Palau has changed. In 1986, the government of Palau and the government of the United States signed a Compact of Free Association, which was enacted into law by the U.S. Congress in the same year. However, the Compact was not ratified by the people of Palau until a November 1993 plebiscite. Approval of that plebiscite led, on 1 October, 1994, to the termination of the Trusteeship, independence for Palau and the commencement of Palau's relationship of free association with the United States. Palau became a member of the United Nations on 15 December, 1994.

8.*The Commonwealth of Puerto Rico.* As reported in paragraph 14 of the Initial Report, the people of Puerto Rico expressed their views in a public referendum in November 1993, in which continuation of the commonwealth arrangement received the greatest support, although nearly as many votes were cast in favor of statehood. By contrast, a small minority of some 5 percent chose independence. The people of Puerto Rico more recently expressed their views in a public referendum held on 13 December, 1998. The plebiscite allowed for five options: (1) a "territorial" commonwealth (0.1%); (2) free association (0.3%); (3) statehood (46.5%); (4) independence (2.5%); and (5) "none of the above" (50.3%). The majority, thus, chose "none of the above." To address the

schism in Puerto Rico between those in favor of maintaining the commonwealth status and those in favor of statehood, in 2000, the U.S. Congress held hearings on the right of Puerto Rico to self-determination and passed legislation assigning \$2.5 million to educate Puerto Rico residents about their self-determination choices regarding the Island's future status.

American Indians 9. The United States is home to more than 560 federally recognized tribes with about 50 percent of the American Indian and Alaska Native population residing on or near 280 reservations. These tribal lands represent about four percent of the United States' total land area.

10. In addition, there are approximately 56 million acres held in federal trust for the use and benefit of tribes and individual Indians. Trust land is maintained both on and off Indian reservations, and may not be alienated, encumbered, or otherwise restricted without the approval of the Secretary of the Interior. A significant number of acres of land are owned in fee status whereby the United States holds the fee to the land as a means of acquisition prior to converting the land to trust land.

11. *History of Indian Trust Accounts.* The federal government's Indian trust relationship dates back over a century. As to individual Indians, pursuant to its assimilationist policy in the 19th century, Congress passed the General Allotment Act of 1887, also known as the "Dawes Act." 25 U.S.C. § 331, et seq. (as amended). Under the General Allotment Act, beneficial title of allotted lands vested in the United States as trustee for individual Indians. See *Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001). The trust had a term of 25 years, at which point a fee patent would issue to the individual Indian allottee. See *id.* Allotment of tribal lands ceased with the enactment of the Indian Reorganization Act of 1934 ("IRA"). See *id.* (citing 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 et seq.)). Allotted lands remained allotted, but the IRA provided that unallotted surplus Indian lands return to tribal ownership. See *id.* (citing 25 U.S.C. § 463). In keeping with the government's assimilationist allotment policies, the 1934 Act extended the trust period indefinitely for allotted lands. See *id.* The federal government retained control of lands already allotted but not yet fee patented, and thereby retained its fiduciary obligations to administer the trust lands and funds arising therefrom for the benefit of individual Indian beneficiaries. See *id.* These lands form the basis for some of the Individual Indian Money ("IIM") accounts, which are monitored by the Secretary of the Interior. See *id.* As to the Indian tribes, the United States also holds lands in trust for the tribes. The Secretary of the Interior may collect income from tribal trust property and may deposit it for the benefit of the relevant tribe in the United States Treasury (or other depository institution).

12. *The American Indian Trust Fund Management Reform Act.* After Congress amended the Indian Self-Determination Act in 1994, tribes had the opportunity (subject to the approval of the Bureau of Indian Affairs of the Department of the Interior) to manage their own trust accounts (including IIM accounts). If a tribe chose not to manage its own trust accounts, or if the BIA found that a tribe could not fulfill the fiduciary obligations therein, the government retained control over the accounts. See *Cobell*, 240 F.3d at 1088. In 1994, Congress also enacted the Indian Trust Fund Reform Act, which recognized the federal government's preexisting trust responsibilities. Pub. L. No. 103-412 (1994). That Act, among other things, outlined the "Interior Secretary's duties to ensure 'proper discharge of the trust responsibilities of the United States.'" *Id.* at 1090 (quoting 25 U.S.C. § 162a(d)).

13. In 1996, several beneficiaries of IIM accounts brought a class action (the *Cobell* case) seeking declaratory and injunctive relief, alleging that the Secretaries of the Interior and Treasury breached their fiduciary duties by mismanaging IIM accounts. See *Cobell*, 240 F.3d at 1087. The district court found for the plaintiffs in the initial phase of the case, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed and remanded for further proceedings. See *id.* at 1110. In September 2003, the district court entered a "structural injunction" setting forth detailed requirements for both trust administration and accounting. See *Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003). That ruling is currently on appeal.

14. In 2002 and thereafter, various tribes sued the government in federal district court and the Court of Federal Claims, claiming that the government had failed to provide accountings of their trust funds and trust assets and had mismanaged those funds and assets. As relief, the plaintiffs seek accountings and money damages. Currently, there are 25 tribal trust accounting and asset mismanagement cases pending against the government.

15. *Committee Recommendation: That steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished.* The term "recognized aboriginal rights" does not have a meaning per se in U.S. Indian law and practice. Moreover, under U.S. law recognized tribal property rights are subject to diminishment or elimination under the plenary authority reserved to the U.S. Congress for conducting Indian affairs.

16. *Committee Recommendation: That the government ensure that there is a full judicial review in respect of determinations of federal recognition of tribes.* The U.S. regulatory process for recognizing tribal governments is set forth in 25 C.F.R. Part 83; it provides that determinations may be reviewed in federal court. In particular, an administrative decision not to recognize a tribe can be challenged in federal court. Also, Congress retains the authority, subject to some constitutional constraints, to recognize Indian groups as tribes.

17. *Committee Recommendation: That the Self-Governance Demonstration Project and similar programs be strengthened to continue to fight the high incidence of poverty, sickness and alcoholism among Native Americans.* The Self-Governance Demonstration Project became a permanent program for the U.S. Department of the Interior in 1994 and for the U.S. Department for Health and Human Services in 2003. See 25 U.S.C. § 458aa et seq. As of 2003, more than 200 tribes had participated in the program under 81 agreements with the United States which were funded at a total cost of \$304,857,315. The Self-Governance Program continues to be credited with the improved delivery of services to American Indians and Alaska Natives.

18. *Committee Request: Describe the constitutional and political processes - including the legislative, administrative or other measures in force - which in practice allow the exercise of the right of self-determination within the U.S.* Under the concept of tribal self-determination, the tribes have the right to operate under their own governmental systems within the American political framework. In Article 1, Section 8, Clause 3 of the United States Constitution, tribes are recognized as political entities with

a government-to-government relationship with the United States. The United States enables, assists, and supports the exercise of tribal self-determination. One example of this government support of the exercise of tribal self-determination and self-governance is through Indian Self-Determination Contracts and Grants for the entire range of governmental programs frequently administered by tribal governments, including health, education, human services, public safety and justice, community development, resources management, trust services, and general administration.

19. *Current policy.* As stated by President George W. Bush on 23 September 2004, “my administration is committed to continuing to work with federally recognized tribal governments on a government to government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States.” George W. Bush, Memorandum for the Heads of Executive Departments and Agencies. President Bush stated that his administration would continue to provide Native Americans “with new economic and educational opportunities.” Proclamation No. 7500, 66 Fed. Reg. 57, 641 (Nov. 12, 2001). *See also*, George W. Bush, Letter Celebrating the 35th Anniversary of President Richard Nixon’s Special Message to Congress on Indian Affairs, (July 1, 2005); George W. Bush, Proclamation of National American Indian Heritage Month, (Nov. 4, 2004); and, George W. Bush, Government-to-Government Relationship with Tribal Governments, (Sept. 23, 2004).

20. *Committee Request: Describe the factors or difficulties which prevent the free disposal by peoples of their natural wealth and resources contrary to the provisions of Article 1 of the Covenant and the extent to which such prevention affects the enjoyment of other rights set forth in the Covenant.* Under the concept of tribal self-determination, the tribes have the right to operate under their own governmental systems within the American political framework. In some circumstances, the United States may require that Native Americans secure the consent of the federal government prior to disposing of their property or natural resources. Native Americans are the owners of land and resources, which may be held in either trust or in fee. In either case, there are processes available for the disposal or alienation of the land or the natural resources if they so choose, with the consent of the federal government.

21. *Committee Request: Discuss any restrictions or limitations even of a temporary nature imposed by law or practice on the enjoyment of the right to self-determination.* Under U.S. law, tribes enjoy self-determination regarding issues that have an impact on them or have a nexus with their endeavors, affairs, operations, members, etc. U.S. law, however, makes tribal sovereignty subject to the plenary power of Congress.

22. As reported in paragraph 47 of the Initial Report, in the area of criminal jurisdiction, Congress during the 1950s gave several of the states authority to exercise concurrent jurisdiction on Indian reservations. 18 U.S.C. § 1162; 28 U.S.C. § 1360. Also, in 1968 Congress limited the tribal exercise of criminal jurisdiction to misdemeanors. 25 U.S.C. § 1302(7). While the Supreme Court subsequently concluded that tribes do not have criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), last year the Supreme Court affirmed that Indian tribes do have the jurisdiction and authority to prosecute non-member Indians for crimes committed on their reservations. *See United States v. Lara*, 541 U.S. 193 (2004).

23. *Committee Request: Describe any factors or difficulties affecting the enjoyment of the right to self-determination by persons within the jurisdiction of the State.* Under the concept of tribal self-determination, the tribes have the right to operate under their own governmental systems within the American political framework. To the extent that an owner of trust or fee property is required to obtain federal approval of development of land, a delay may occur in obtaining that federal approval. With regard to political status and cultural development, Indians are citizens of the United States and enjoy the same rights as other citizens. However, when indigenous individuals are in tribal jurisdiction, as a member of the tribe, enjoyment may be limited by the tribe, consistent with the federal Indian Civil Rights Act, 25 U.S.C. 1301. Indigenous governments control tribal membership and therefore set the rules for the enjoyment of culture and values within the tribe, outside of U.S. jurisdiction, so long as they are not in violation of federal law. Tribes generally maintain exclusive jurisdiction over any misdemeanor committed by a tribal member within that tribe’s jurisdiction.

24. *Committee Request: Describe any measures taken to promote the right of self-determination in Non-Self-Governing and Trust Territories under the control of the United States.* Please see paragraphs 5 through 8 of this report.

25. *Committee Request: That the United States should show broader willingness to recognize Indian tribes.* As reported in the Initial Report, since 1978, the United States has been open and accommodating of petitions for recognition. Efforts have been made to streamline the process and isolate its work from undue influence. The Federal Acknowledgment Program maintains a public listing of petitioners which evidences the large volume of petitions actively being considered by the United States. A discussion of the acknowledgment process can be found in paragraphs 51-53 of the Initial Report. Thus far, the status of 60 groups has been resolved either by the U.S. Department of the Interior or through special legislation.

Article 2 - Equal protection of rights in the Covenant

26. The enjoyment by all individuals within the United States of the rights enumerated in the Covenant without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, was elaborated upon in paragraphs 77-100 of the Initial Report.

27. Since submission of its Initial Report, the United States has ratified the International Convention on the Elimination of All Forms of Racial Discrimination; that Convention entered into force for the United States on 20 November, 1994. The United States Initial Report under that Convention was submitted to the UN Committee on the Elimination of Racial Discrimination in September 2000. Committee on the Elimination of Racial Discrimination; Third periodic reports of States Parties due in 1999: United States of America, U.N. Doc. CERD/C/351/Add.1 (2000). The United States was examined by that Committee on that report in August 2001. Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, Comm. on the Elimination of Racial Discrimination, 59th Sess., U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001).

28. *Classifications.* Under the doctrine of equal protection, it has long been recognized that the government must treat persons who

are "similarly situated" on an equal basis, but can treat persons in different situations or classes in different ways with respect to a permissible state purpose. The general rule is that legislative classifications are presumed valid if they bear some reasonable relation to a legitimate governmental purpose. See *FCC v. Beach Communication, Inc.*, 508 U.S. 307 (1993); *McGowan v. Maryland*, 366 U.S. 420, 425-36 (1961). The most obvious example is economic regulation. Both state and federal governments are able to apply different rules to different types of economic activities, and the courts will review such regulation under a very deferential standard. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Similarly, the way in which a state government chooses to allocate its financial resources among categories of needy people will be reviewed under a very deferential standard. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

29. *Suspect classifications.* On the other hand, certain distinctions or classifications have been recognized as inherently invidious and therefore have been subjected to more exacting scrutiny and judged against more stringent requirements. For example, classifications on the basis of racial distinctions are automatically "suspect" and must be justified as necessary to a compelling governmental purpose and as narrowly tailored to achieving a valid compelling government interest. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1961); *Loving v. Virginia*, 388 U.S. 1 (1967).

30. This rule was recently reiterated by the Supreme Court in *Johnson v. California*, 125 S. Ct. 1141 (2005). Petitioner, a prison inmate, sued the California Department of Corrections (CDC), alleging that the CDC's unwritten policy of segregating new and transferred prisoners by race violated the inmate's constitutional right to equal protection of the laws. The CDC contended that the policy was necessary to prevent violence caused by racial prison gangs and was thus reasonably related to legitimate penological interests.

31. The Supreme Court held that the policy was subject to strict judicial scrutiny since it was based on racial classification, and thus the classification was required to be narrowly tailored to further compelling CDC interests. The court found that compromising the inmate's equal protection rights was not necessarily needed for proper prison administration. The CDC's discretion and expertise in the unique area of managing daily prison operations did not warrant deference to the CDC's use of race as a means of controlling prison violence.

32. The court has also affirmed the application of an intermediate level of scrutiny to classifications by gender. See *United States v. Virginia*, 518 U.S. 515 (1996) (stating military college's male-only policy was unconstitutional because the state failed to provide an "exceedingly persuasive justification" for categorically excluding admission of women).

33. *Corrective or affirmative action.* It remains a matter of continuing interest in the United States whether legislation may classify by race for purposes of compensating for past racial discrimination. The general rule that has evolved is that because race is a "suspect classification," in this context as in all others, it will be subject to "strict scrutiny" by the courts. See, e.g., *Adarand Constructors, Inc. v. Perla*, 515 U.S. 200 (1995); *Richmond v. Croson*, 488 U.S. 469 (1989). However, where an employer or other entity has engaged in racial discrimination in the past, it will generally be permitted (and may sometimes be required) to accord narrowly tailored racial preferences for a limited period of time, to correct the effects of its past conduct. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Government entities, however, may also attempt to address discriminatory acts of others when the effects of such discrimination may be extended by government policies.

34. *Black Farmers.* One of the major issues addressed by the U.S. Department of Agriculture (USDA) is the ongoing implementation of the historic civil rights Consent Decree in the federal district court case of *Pigford v. Veneman*, 355 F. Supp. 2d 148 (D.D.C. 2005); see also *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999). *Pigford* is a class action lawsuit brought by African American farmers who alleged that USDA discriminated against them on the basis of their race in its farm credit and non-credit benefit programs.

35. On 14 April, 1999, the U.S. District Court for the District of Columbia approved a Consent Decree resolving the case. See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999). (A consent decree is an order of a judge based upon an agreement, almost always put in writing, between the parties to a lawsuit instead of continuing the case through trial or hearing. A consent decree is a common practice when the government has sued to make a person or corporation comply with the law or the defendant agrees to the consent decree in return for the government not pursuing criminal penalties.)

36. The *Pigford* Consent Decree set up a claims process under which the individual claims of class members would be adjudicated. Class members could either choose Track A, which is an expedited process with a lesser evidentiary standard and automatic relief for prevailing claimants; or Track B, which entitles the claimant to a one-day hearing before the Consent Decree Arbitrator in which the typical evidentiary standard applies and the claimant can receive any relief that the Arbitrator awards.

37. As of 7 December, 2004, over 22,000 individuals filed timely and eligible claims and chose Track A for relief. Less than 200 individuals have chosen Track B. The independent Adjudicator has issued decisions on most of these claims. Over 61 percent of Track A claimants have prevailed. The federal government has paid out over \$660 million on Track A claims and USDA has forgiven over \$15 million in debt. Many claimants who did not prevail on their claims have filed petitions with the Monitor for review of these decisions. Once the Monitor completes her review, the claim may be sent back to the Adjudicator or Arbitrator for reexamination pursuant to the Monitor's direction.

38. The Consent Decree implementation has continued for over 5 years because far more claims were filed than anyone anticipated when the document was signed and approved. At the time the Consent Decree was signed, class counsel anticipated that only 2,000-5,000 claimants would file claims under the Decree. However, over 20,000 individuals filed claims under the Consent Decree. Accordingly, it has taken a substantial time for these claims to be processed and all that this entails under the Consent Decree process. Virtually all of these claims have now been processed and decisions issued on the claims.

39. USDA has voluntarily taken several measures to benefit Consent Decree claimants beyond those required by the Consent Decree

and subsequent Court orders. These measures include refunds to prevailing claimants of administrative offsets on discharged debts; extension of the time for prevailing claimants to take advantage of injunctive relief; and providing additional loan servicing rights, affording some claimants an opportunity to restructure their remaining debt.

40. *Federal statutes.* The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc, et seq., (2004), prohibits governments from imposing a substantial burden on the exercise of religion or otherwise discriminating against individuals or organizations based on their religion through land use regulation. RLUIPA also prohibits government-run institutions, such as prisons, jails, and hospitals, from imposing a substantial burden on the religious exercise of an institutionalized individual. The Attorney General can bring civil actions for injunctive relief to enforce compliance with RLUIPA.

41. The Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15001 (2004), provides support for individuals with disabilities to be more independent and have greater control and choice over where they live and contribute in their communities. The Help America Vote Act of 2002, 42 U.S.C. § 15301 (2004), established standards and funding to strengthen the federal voting process by making it easier for individuals with disabilities to vote. In 1998, Congress extended to technology the prohibition against discrimination on the basis of disability. Through section 508 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(d) (2004), the federal government is required to make its electronic and information technology accessible to and usable by its customers and employees with disabilities. Through eight different statutes, a protection and advocacy system is funded in each U.S. state to assist individuals with disabilities to preserve, restore, or secure their rights under the law, including the right to vote.

42. *Aliens.* Under United States immigration law, an alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Aliens who are admitted and legally residing in the United States, even though not U.S. citizens, generally enjoy the constitutional and Covenant rights and protections of citizens, including the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery; the right to liberty and security of person; the right to humane treatment for persons deprived of their liberty; freedom from imprisonment for breach of contractual obligation; freedom of movement; the right to fair trial; prohibition of ex post facto laws; recognition as a person under the law; freedom from arbitrary interference with privacy, family and home in the United States; freedom of thought, conscience and religion; freedom of opinion and expression; freedom of assembly; and freedom of association.

43. Legal aliens enjoy equal protection rights as well. Distinctions between lawful permanent resident aliens and citizens require justification, but not the compelling state interests required for distinctions based on race. Consistent with article 25 of the Covenant, aliens are generally precluded from voting or holding federal elective office. A number of federal statutes, some of which are discussed above, prohibit discrimination on account of alienage and national origin.

44. Throughout the Immigration and Nationality Act, Congress distinguishes lawful permanent residents (LPRs) and non-LPRs. The federal courts have held that Congress may draw such distinctions consistently with the Equal Protection Clause of the Fifth Amendment so long as there is a facially legitimate and bona fide reason for treating the two classes disparately. *See, e.g., De Leon-Reynoso v. Ashcroft*, 293 F.3d 633 (3d Cir. 2002); *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001).

45. With the creation of the Department of Homeland Security (DHS) in 2003, Congress established an Officer for Civil Rights and Civil Liberties. The Officer is charged with reviewing and assessing information concerning abuses of civil rights, civil liberties, and discrimination on the basis of race, ethnicity and religion, by employees or officials of the Department of Homeland Security. The Officer has a unique internal function of assisting the senior leadership to develop policies and initiatives in ways that protect civil rights and civil liberties. The Officer conducts outreach activities to non-governmental organizations and others to communicate the Office's role and the Department's commitment to the protection of individual liberties. The DHS Office for Civil Rights and Civil Liberties has been actively working to develop relationships with the Arab-American and Muslim-American communities. Reaching out to immigrant communities is an important part of a dialogue to address concerns regarding racial, ethnic, and religious discrimination.

46. *Education.* The Equal Protection Clause of the United States Constitution bars public schools and universities from discrimination on the grounds of race, sex, religion, or national origin. Under Title IV of the Civil Rights Act of 1964, the U.S. Department of Justice may bring suit against a school board that deprives children of equal protection of the laws, or against a public university that denies admission to any person on the grounds of "race, color, religion, sex or national origin." The Department of Justice continues to enforce court-issued consent decrees against local school boards that had engaged in racial segregation in the past in cases that may date back 40 years. The Department of Justice also investigates and brings new cases of education discrimination.

47. The Department of Justice has investigated a number of cases involving discrimination against or harassment of Muslim or Arab children in public schools. For example, the Department brought an action against a school district that barred a Muslim girl from wearing a hijab to school, resulting in a consent decree that will protect the rights of students to wear religious garb. Similarly, the Department obtained a settlement in a case in which another girl was harassed by a teacher and students because she was a Muslim.

48. The U.S. Department of Education administers a number of programs that provide opportunities for the participation of all students, including minorities and women in elementary, secondary and higher education programs, including magnet schools; educational equity programs for women and other students; assistance to school districts and others for the education of Native Hawaiians, Native Americans and Alaskan Natives; financial aid for all students including those who are minorities or women; and grants to strengthen historically Black colleges and universities and other minority serving institutions. In addition, the Elementary and Secondary Education Act of 1965 (ESEA), as reauthorized by the No Child Left Behind Act of 2001 (20 U.S.C. 6301 et seq.) (NCLB Act), promotes high educational standards and accountability in public elementary and secondary schools, and thus provides an important framework for improving student performance for all students. The reauthorized ESEA requires, as a condition of a state's receipt of funds under the "Title I" program, that the results of annual statewide testing be published and broken out, at the school, school district, and state levels, by poverty, race, ethnicity, gender, migrant status, disability status, and limited English proficiency to ensure that no group is left behind. Each state is required to establish academic content and achievement standards and

define adequate yearly progress, for the state as a whole and for schools and school districts, toward ensuring that all students meet these standards. Adequate yearly progress must include measurable annual objectives for continuous and substantial improvement for all public elementary and secondary students and for the achievement of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. If a school or school district fails to make adequate yearly progress, the school or district is subject to a sequence of steps to address the situation, moving from improvement, to corrective action, and to restructuring measures designed to improve performance to meet state standards. The reauthorized ESEA also focuses on reading in the early grades through comprehensive reading programs anchored in scientific research and through enabling limited-English proficient (LEP) students to learn English quickly and effectively through scientifically based teaching methods.

49. The Department of Education's Office for Civil Rights (OCR) enforces laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age in programs that receive federal financial assistance from the Department of Education. These laws include: Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color and national origin); Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in education programs); Section 504 of the Rehabilitation Act of 1973 (prohibiting disability discrimination); Age Discrimination Act of 1975 (prohibiting age discrimination); and Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination by public entities, whether or not they receive federal financial assistance).

50. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs. The IDEA requires school systems to develop appropriate individualized programs for each disabled child designed to meet the child's specific educational needs.

51. Additionally, the IDEA Amendments Act of 1997 and its implementing regulations, at 20 U.S.C. § 1418(c) and 34 C.F.R. 300.755, provide for the collection and examination of data to determine if significant disproportionality based upon race is occurring in the state with respect to the identification of children with disabilities and their placement into particular educational settings. Where significant disproportionality exists, states must provide for the review and, if appropriate, revise the policies, procedures, and practices used in such identification or placement to ensure that they comply with the requirements of the IDEA. The Office of Special Education Programs (OSEP) administers the IDEA and requires each state to include information on disproportionality in its Annual Performance Report.

52. The Supreme Court ruled that under the Americans with Disabilities Act of 1990 (ADA), states are required to place individuals with mental disabilities who are in the state's care in community settings rather than in institutions when the state's treatment professionals have determined that community placement is appropriate, the individual does not oppose the transfer from institutional care to a less restrictive setting and the community setting placement can be reasonably accommodated, taking into account the state's resources and the needs of others with mental disabilities. See *Olmstead v. L.C.*, 527 U.S. 581 (1999). In Executive Order 13217, President Bush selected the top officials in several federal agencies, including the Departments of Education, Labor, and Housing and Urban Development, to assist the states and localities in swift implementation of the *Olmstead* decision to help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life. Executive Order 13217 (June 18, 2001).

53. While the Equal Protection Clause of the Constitution bars governmental discrimination on the basis of race, the Supreme Court has permitted the use of race as a factor when it serves a compelling government interest and is narrowly tailored to achieve that interest. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court upheld the University of Michigan Law School's "affirmative action" program, which allowed the racial and ethnic background of applicants to be considered as a factor in admission decisions. The Court found that the Law School's use of race in admissions to obtain the educational benefits that flow from a diverse student body is constitutional, i.e., that attaining a diverse student body may qualify as a "compelling" interest and that the Law School's use of race is narrowly tailored to achieve this goal. On the issue of whether attaining a diverse student body was a compelling interest, the Court deferred to the Law School's educational judgment that such student body diversity is essential to its educational mission. The Court found the Law School's program to be narrowly tailored to achieve this goal because its interest in achieving a critical mass of minority students was a flexible goal and not a quota, it did not preempt a holistic review of each applicant's file, and it did not "unduly burden" individuals who are not members of the favored racial and ethnic groups. The Court opined that unlike the University of Michigan's undergraduate admissions program, the Law School awarded no "mechanical, predetermined diversity 'bonuses' based on race or ethnicity." The Court also held that "race-conscious admissions policies must be limited in time" and expressed an expectation that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." At the same time, the Court in *Gratz v. Bollinger*, 539 U.S. 244 (2003), struck down the admissions policies of the same university's undergraduate program on the ground that it operated as a mechanical quota that was not narrowly tailored to achieve its goal of racial diversity.

54. **Community and Faith-Based Initiatives.** In January 2001, the President launched an initiative to ensure that community and faith-based organizations are allowed to compete for federal financial assistance on a level playing field to the full extent permitted by law, without regard to the religious nature or lack thereof of the applicant. The President signed two executive orders on 29 January, 2001, that established a White House Office of Faith-Based and Community Initiatives and directed five federal agencies to establish their own centers for this initiative, including the Departments of Education, Justice, Labor, Health and Human Services, and Housing and Urban Development. Executive Orders 13198 and 13199 (January 29, 2001). On 4 June, 2004, the Department of Education issued final regulations ensuring that faith-based organizations may compete on an equal footing for Department funding and that funded programs are implemented in a manner consistent with the Constitution (69 Fed. Reg. 31708-15).

55. **Education and Religion.** Since the Initial Report, the Supreme Court has decided a number of cases involving religion and public schools. These cases fall into two general categories: religious expression in public schools and the funding of religious schools. With regard to religious expression, the Supreme Court has, in a number of decisions, made clear that while the Establishment Clause of

the United States Constitution prohibits state-sponsored prayer in the public schools, at the same time, religious expression by students is constitutionally protected. Thus in *Lee v. Weisman*, 505 U.S. 577 (1992), the Supreme Court struck down a public high school's practice of inviting a clergy member to say a prayer at graduation, and in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), struck down a school's practice of holding a prayer led by a student over a loudspeaker before football games. In sharp contrast, the Supreme Court has consistently struck down government discrimination against student religious speech, even when carried out in the name of separation of church and state. In *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), the Court held that a school must permit equal access to school facilities for after-school meetings of a youth organization whose activities included Bible lessons, prayer, and religion-themed games, when the school had opened facilities to various private secular organizations serving the community. Similarly, in *Rosenberger v. Rector*, 515 U.S. 819 (1995), the Court held a state university that distributed funds to student organizations could not deny funds to a student organization that published a news magazine from a Christian perspective.

56. In the area of funding for religious schools, the Supreme Court has consistently held in recent years that where an education benefit, such as a scholarship, is provided to students on a religion-neutral basis, and the students are free to use the benefit toward the education of their choice, whether secular or religious, providing such a benefit does not violate the non Establishment principle. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The Supreme Court has also upheld various other forms of aid to students at religious schools so long as it is secular in nature, is distributed on a religion-neutral basis, and is not open to diversion to religious uses. Thus the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000) upheld a federal program in which equipment such as computers was loaned to schools, both religious and secular, for purposes of instruction in secular subjects. Likewise, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Court upheld a program in which public school employees went to private schools to provide supplemental instruction to poor children with disabilities.

57. Beginning in 2004, the U.S. Department of Education began administering the D.C. Choice Incentive Program. The purpose of the program is to give the parents of school children in the District of Columbia (DC) the opportunity to exercise greater choice in the education of their children by giving eligible low-income D.C. school children scholarships to attend private schools, including private religious schools.

58. *Education and aliens*. The courts have held that the constitutional guarantee of equal protection of the laws applies to aliens who have made an entry into the United States, even if such entry was unlawful. In *Plyer v. Doe*, 457 U.S. 202 (1982), the Supreme Court invalidated a Texas law which withheld state funds from local school districts for the education of undocumented alien children, and allowed local school districts to refuse to enrol the children. The Court first found that the Equal Protection Clause of the Constitution applies to the undocumented alien children. Then, although the Court did not treat the aliens as a suspect class entitled to strict scrutiny of their differing treatment, the Court nonetheless required the state to demonstrate a rational basis for its restrictions. The Court concluded that the state could not meet this test, rejecting the state's arguments that denial of benefits was justified due to the children's lack of legal status and based on the state's desire to preserve resources for the education of the state's lawful residents.

59. *Remedies*. As reported in paragraph 98 of the Initial Report, U.S. law provides extensive remedies and avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights. In addition to those previously reported, under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (2004), the Attorney General can bring a civil action for equitable relief against a governmental authority to eliminate a pattern or practice of constitutional violations committed by law enforcement officers.

Article 3 - Equal rights of men and women

60. *Constitutional protections*. As discussed in paragraphs 101–109 of the Initial Report, the rights enumerated in the Covenant and provided by U.S. law are guaranteed equally to men and women in the United States through the Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments of the United States Constitution. These provisions prohibit both the federal government and the states from arbitrarily or irrationally discriminating on the basis of gender.

61. *Gender Classifications*. In *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court articulated a standard which governed the field of gender distinctions for several years: “[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. *Id.* at 197; see also, *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

62. However, in *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court articulated the current standard for equal protection review of gender distinctions. The justification for such distinctions must be “exceedingly persuasive.” *Id.* at 533. “The burden of justification is demanding and it rests entirely on the state. The state must show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” *Id.*, (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Furthermore, “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.*

63. In *Nguyen v. INS*, 533 U.S. 53 (2001), the Supreme Court applied the *Virginia* standard to uphold a federal immigration statute that makes gender-based distinctions in the methods of establishing citizenship for a child born out-of-wedlock overseas where one parent is a U.S. citizen and the other is an alien. The statute, 8 U.S.C. § 1409(a), requires that certain steps be taken to document parenthood when the citizen-parent is the child's father but not when the citizen-parent is the child's mother. The Court found that the statute substantially serves the important governmental objectives of ensuring the existence of a biological relationship between the citizen-parent and the child, as the mother-child relationship is verifiable from the child's birth. *Id.* at 62. The Court also reasoned that the statute ensures at least the opportunity for the development of ties between the child and the citizen-parent, and, in turn, the United States, as the very event of birth provides such an opportunity for the mother and child. *Id.* at 64–65. Because fathers and

mothers are not similarly situated with regard to proof of parentage, the Court held that the gender-based distinctions in the statute were justified. *Id.* at 63, 73. The Court also noted that the additional requirements imposed upon fathers were “minimal” and that the statute did not impose “inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers[.]” *Id.* at 70-71.

64. On 23 June, 2000, Executive Order 13160 was issued prohibiting discrimination on the basis of a number of classifications, including sex, in federally-conducted education and training programs. 65 Fed. Reg. 39,775 (2000). This order applies to all federally conducted education and training programs as a supplement to existing laws and regulations that already prohibit many forms of discrimination in both federally conducted and federally assisted educational programs.

65. *Discrimination based on pregnancy.* The Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k)(2004), amended Title VII of the Civil Rights Act of 1964 to provide that discrimination “on the basis of sex” includes discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions[.]” The PDA requires that pregnancy be treated the same as other physical or medical conditions.

66. The PDA has been held to protect not only female employees, but also the spouses of male employees. In *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684-85 (1983), the Supreme Court held that a provision in an employer’s health insurance plan that provided female employees with hospitalization benefits for pregnancy-related conditions, but provided less extensive benefits for spouses of male employees, discriminated against male employees in violation of the Civil Rights Act of 1964, as amended by the PDA. The Court stated that the PDA “makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.” *Id.* at 684.

67. In *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991), the Supreme Court held that a battery manufacturer’s policy prohibiting women capable of bearing children from working in jobs involving lead exposure violated Title VII of the Civil Rights Act of 1964, as amended by the PDA. The Court recognized that the PDA prohibits discrimination not only on the basis of pregnancy, but also on the basis of a woman’s capacity to become pregnant. *Id.*

68. The PDA has been found to apply to contraceptive coverage in employer health insurance plans. On 14 December, 2000, the U.S. Equal Employment Opportunity Commission (EEOC) decided that the exclusion of prescription contraceptives from a health insurance plan that covered other comparable medical treatments was a violation of Title VII of the Civil Rights Act of 1964, as amended by the PDA. However, this was an administrative reasonable cause determination, and not an authoritative construction of the PDA.

69. *Prohibition of Sex Discrimination in Education.* Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) is the principal federal law that prohibits sex discrimination in education programs or activities that receive federal financial assistance. Federal regulations and guidelines require and assist schools in addressing such issues as sexual harassment and nondiscrimination in admissions, financial assistance, course offerings, parental or marital status, and opportunities to participate in interscholastic and intercollegiate athletics. Each school or educational institution is required to designate an employee to coordinate its Title IX responsibilities, including investigating complaints alleging violations of Title IX.

70. Title IX is primarily enforced by the Department of Education’s Office for Civil Rights which investigates complaints, issues policy guidance, and provides technical assistance to schools (such as training, and sponsorship of and participation in civil rights conferences). Students and school employees may also bring private lawsuits against schools for violations of Title IX.

71. Furthermore, every federal agency that provides financial assistance to education programs is required to enforce Title IX. In August 2000, twenty federal agencies issued a final common rule for the enforcement of Title IX. In addition, Executive Order 13160, issued in June 2000, prohibits discrimination based on sex, race, color, national origin, disability, religion, age, sexual orientation, and status as a parent in education and training programs conducted by the federal government.

72. *Prohibition of Discrimination in Education on the Basis of Pregnancy.* The Title IX implementing regulation at 34 C.F.R. 106.40(a) specifically prohibits educational institutions that are recipients of federal financial assistance from applying any rule concerning a student’s actual or potential parental, family, or marital status, which treats students differently on the basis of sex. The Title IX implementing regulation at 34 C.F.R. 106.40(b)(1) prohibits a recipient from discriminating against any student, or excluding any student from its education programs or activities, including any class or extracurricular activity, on the basis of such student’s pregnancy or pregnancy related condition, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. The Title IX implementing regulation at 34 C.F.R. 106.40(b)(3) provides that if a recipient operates a portion of its education program or activity separately for pregnant students, to which admittance is completely voluntary on the part of the student, a recipient shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

73. The Title IX implementing regulation at 34 C.F.R. 106.40(b)(2) provides that a recipient may require a pregnant student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician. With respect to a recipient that does not have leave of absence policies for students, or in the case of a student who does not otherwise qualify for leave under such a policy, the Title IX implementing regulation at 34 C.F.R. 106.40(b)(5) provides that a recipient shall treat pregnancy and pregnancy-related conditions as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student’s physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

74. A recipient shall treat pregnancy and pregnancy-related conditions in the same manner and under the same policies as any temporary disability with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient’s educational program or activity. 34 C.F.R.

75. *Sexual Harassment*. Sexual harassment has been found to be a form of sex discrimination. Thus, federal statutes prohibiting discrimination on the basis of sex in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, and in federally assisted education programs, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, also prohibit sexual harassment. In a series of decisions, the Supreme Court has established the principles underlying the application of these statutes to sexual harassment. First, it is clear that same-sex harassment is actionable, as long as the harassment is based upon sex. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). With respect to employment, where harassment by a supervisor results in a “tangible employment action” such as demotion, discharge, or undesirable reassignment, the employer is liable for a Title VII violation. Even if there has been no such tangible employment action by the employer, there may nonetheless be a Title VII violation if workplace harassment is “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.” *See, Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citations and internal quotation marks omitted). In such cases, however, an employer may avoid liability if it demonstrates that: 1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive opportunities provided by the employer or to avoid harm otherwise. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

76. With respect to education, educational institutions that receive federal financial assistance may be liable for damages in sexual harassment suits if school officials have actual notice of the harassment, and respond to that notice with deliberate indifference. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

77. *Compensation for sex discrimination*. Section 706(g) of the Civil Rights Act of 1964 provides that courts may enjoin respondents from engaging in unlawful employment practices, and order such affirmative action as may be appropriate, including reinstatement or hiring of employees with or without back pay, or any other equitable relief the court may require. 42 U.S.C. § 2000e-5(g)(1). Section 102 of the Civil Rights Act of 1991 provides that Title VII claims not involving disparate impact may result in compensatory and punitive damages in addition to the relief authorized by Section 706(g) of the Civil Rights Act. 42 U.S.C. § 1981a(a)(1). Punitive damages are allowed when the plaintiff can demonstrate that the defendant acted with malice or reckless indifference to the plaintiff’s federally protected rights, but are not allowed against governmental entities. 42 U.S.C. § 1981a(b)(1). The sum of compensatory and punitive damages for each plaintiff cannot exceed \$50,000 for employers with between 14 and 100 employees, \$100,000 for employers with 100 to 200 employees, \$200,000 for employers with 201 to 500 employees, and \$300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3). Federally assisted educational institutions may also be liable for damages for sex discrimination. *See Gebser, supra*.

78. *Family Leave*. The federal Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., guarantees that employees who work for companies with 50 or more employees can take up to 12 weeks of unpaid leave a year for the birth or adoption of a child, or for a serious health condition of the employee or a family member of the employee, including a child, spouse or parent. The FMLA defines a serious health condition as an illness, injury, impairment, or physical or mental condition that involves in-patient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider. 29 U.S.C. § 2611(11).

79. The FMLA allows states to provide additional protections, and several states have family leave laws that are more generous than the FMLA. For example, some states have family and medical leave laws that apply to employers with fewer than 50 employees, provide longer time periods for family and medical leave, use a more expansive definition of “family member,” or require leave for participation in children’s educational activities.

80. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA), also imposes certain obligations on employers with respect to maternity leave. The PDA requires that women affected by pregnancy or childbirth be treated the same as others for all employment-related purposes, including receipt of benefits under fringe benefit programs and leave time. Although an employer need not treat pregnancy more favorably than other conditions, an employer may choose to do so. *See California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (agreeing with lower court that “Congress intended the PDA to be a ‘floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise”) (quoting *California Federal Savings & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

81. *Violence Against Women*. On 13 September, 1994, the U.S. Congress passed the Violence Against Women Act (VAWA), a comprehensive legislative package aimed at ending violence against women. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13701 (2004).

82. VAWA was designed to improve criminal justice responses to domestic violence, sexual assault, and stalking and to increase the availability of services for victims of these crimes. VAWA requires a coordinated community response to domestic violence, sexual assault, and stalking crimes, encouraging jurisdictions to bring together multiple players to share information and to use their distinct roles to improve community responses. These players often include: victim advocates; police officers, prosecutors, judges, probation and corrections officials; health care professionals; leaders within faith communities; survivors of violence against women; and others.

83. VAWA and subsequent legislation created new federal crimes involving interstate domestic violence, interstate violation of a protection order, interstate stalking, and firearms, strengthened penalties for repeat sex offenders, and required states and territories to enforce protection orders issued by other states, tribes and territories. VAWA also created legal relief for certain battered immigrants to prevent abusers from discouraging undocumented alien victims from calling the police or seeking safety due to their unlawful status.

84. VAWA also created the National Domestic Violence Hotline and authorized funds to support domestic violence shelters, rape prevention education, domestic violence intervention and prevention programs, and programs to improve law enforcement, prosecution, court, and victim services responses to violence against women.

85. The Violence Against Women Act of 2000 (VAWA 2000), Pub. L. No. 106-386, 114 Stat. 1464, enacted on 28 October, 2000, and codified at 42 U.S.C. § 3796gg, continued and strengthened the federal government's commitment to helping communities change the way they respond to these crimes. VAWA 2000 reauthorized critical grant programs created by VAWA and subsequent legislation and established new programs such as initiatives addressing elder abuse, violence against women with disabilities, and supervised visitation with children in domestic violence cases. VAWA 2000 also strengthened the original law by improving protections for battered immigrants, sexual assault survivors, and victims of dating violence and creating a new federal cyberstalking crime.

86. *The Office on Violence Against Women (OVW)*. This office, a component of the U.S. Department of Justice, was created in 1995. OVW implements VAWA and subsequent legislation and provides national leadership against domestic violence, sexual assault, and stalking. Since its inception, OVW has launched a multifaceted approach to responding to these crimes. In 2002, Congress passed the Violence Against Women Office Act (Pub.L. 107-273, Div. A, Title IV, Nov. 2, 2002, 116 Stat. 1789) which statutorily established the office. A description of the comprehensive programs to protect women from violence implemented by OVW, recent initiatives to protect women from what is referred to as "stalking", and other federal and state initiatives on this subject is provided in Annex II.

87. *Women and the economy*. Several U.S. federal agencies sponsor programs to advance the ability of women to participate in the workplace. One such agency is the Women's Bureau at the U.S. Department of Labor. The Women's Bureau promotes 21st century solutions to improve the status of working women and their families. For example, GEM-Nursing (Group EIMentoring in Nursing) encourages young men and women ages 15 to 21 to choose careers in nursing through a Web site featuring information on nursing occupations and associations, e-mentoring, and regional events. It is modeled after GEM-SET (Girls' EIMentoring in Science, Engineering, and Technology) which seeks to increase the number of girls age 13 to 18 who pursue careers in science, engineering, and technology through a Web site offering online resources, e-mentoring, and information about regional events. Other Women's Bureau programs address financial security and workplace flexibility. To improve women's financial savvy, the Women's Bureau developed the WiSe Up project for Generation X women ages 22 to 35. WiSe Up includes an eight-unit curriculum available online and in classroom settings, e-mentoring, and monthly teleconferences featuring speakers on financial topics. To promote workplace flexibility options, the Women's Bureau developed Flex-Options for Women. This project brings together corporate executives and entrepreneurs who volunteer to mentor business owners interested in creating or enhancing flexible workplace policies and programs.

88. *Institutional mechanisms for the advancement of women*. The Women's Bureau was created by Congress in 1920 to "formulate standards and policies that shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment." The Director of the Women's Bureau is the principal advisor to the Secretary of Labor on issues affecting women in the labor force. The Women's Bureau's Fiscal year 2003-8 Strategic Plan includes the following goals: to increase women's employment in high-growth, demand-driven occupations; increase opportunities for women to take steps to improve their economic security and retirement savings; and enhance women's quality of life by increasing the number of employer flexible programs and policies.

Article 4 - States of emergency

89. Consistent with the information reported in paragraphs 110 – 127 of the Initial Report, since submission of that report, the United States has not declared a "state of emergency" within the meaning of Article 4 or otherwise imposed emergency rule by the executive branch.

90. However, as reported in that section of the Initial Report, there are statutory grants of emergency powers to the President. Since the submission of the Initial Report, the President has invoked the National Emergencies Act, 50 U.S.C. § 1601 et seq., to declare a national emergency in the following situations:

In 2001, the President of the United States issued a number of executive orders after the September 11 terrorist attacks that declared a national emergency as a result of those attacks pursuant to the National Emergencies Act, 50 U.S.C. §§ 1601-1651 (2005).

91. This invocation was misinterpreted by the (OSCE) as action which required derogation under Article 4 of the Covenant. In correspondence with the OSCE, the United States explained that under U.S. law, declarations of national emergency have been used frequently, in both times of war and times of peace, in order to implement special legal authorities and that the Executive Orders made as a result of the September 11 attacks did not require derogation from its commitments under the Covenant.

92. *Judicial review*. There have been no adverse federal judicial rulings concerning the exercise of emergency powers by the federal authorities since the submission of the Initial Report.

93. In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court stated that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the "necessary and appropriate" force that Congress authorized the President to use against nations, organizations, or persons associated with the September 11 terrorist attacks. 124 S.Ct. at 2639-42 (plurality op.); *id.*, at 2679 (Thomas J., dissenting). A plurality of the Court addressed the entitlements of a U.S. citizen designated as an enemy combatant and held that the Due Process Clause of the United States Constitution requires "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker." *Id.* at 2648. A plurality of the Court observed: "There remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the regulations titled, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997). *Id.* at 2651.

94. On 28 February, 2005, a federal district court held that the Non-Detention Act, 18 U.S.C. § 4001(a), forbids the federal government from detaining Jose Padilla as an “enemy combatant” and that the President lacks any inherent constitutional authority to detain Padilla. *See Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921 (D.S.C. Feb. 2005). In September of 2005, the district court’s decision was reversed by the Fourth Circuit. 2005 U.S. App. LEXIS 19465 (4th Cir. 2005). The Fourth Circuit held that the United States Congress in the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, provided the President all powers “necessary and appropriate to protect American citizens from terrorist acts by those who attacked the U.S. on September 11, 2001.” *Id.* at *30. Those powers included the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, took up arms against the United States in its war against these enemies, a power without which the President could well be unable to protect American citizens. *Id.* at *31.

Article 5 - Non-derogable nature of fundamental rights

95. There is no change from the information reported in paragraphs 128 - 130 of the Initial Report.

Article 6 - Right to life

96. *Right to life, freedom from arbitrary deprivation.* The United States constitutional recognition of every human’s inherent right to life and the doctrine that that right shall be protected by law were explained in paragraphs 131–148 of the Initial Report.

97. In addition, the Born-Alive Infants Protection Act of 2002, which was signed into federal law on 5 August, 2002, makes it clear that “every infant member of the species homo sapiens who is born alive at any stage of development” is considered a “person”, “human being”, and “individual” under federal law. *See* 1 U.S.C. § 8. This is true regardless of the nature of the birth, and whether the live birth resulted from a failed abortion procedure. *Id.*

98. Congress also enacted the Unborn Victims of Violence Act of 2004 “to protect unborn children from assault and murder.” *See* Pub. L. No. 108-212. Federal law now provides that whoever, in the course of committing certain federal crimes, “causes the death ... of a child, who is in utero at the time the conduct take place,” is guilty of a separate offense and shall be punished as if that death had occurred to the unborn child’s mother. *See* 18 U.S.C. § 1841(a). If the person engaging in such conduct intentionally kills the unborn child, he will be punished for intentionally killing a human being. *See* 18 U.S.C. § 1841(a)(2)(C). This law does not, however, authorize the prosecution of any woman with respect to her unborn child, *see* 18 U.S.C. § 1841(c)(3), nor does it criminalize “conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law.” *See* 18 U.S.C. § 1841(c)(1).

99. *Assisted suicide.* In recent years, debate has intensified in the United States over the question of whether terminally ill people should have the legal right to obtain a doctor’s help in ending their lives. The campaign to legalize assisted suicide, also called the right-to-die movement, has been under way since the 1970s but became prominent in the 1990s, at least partly because of the actions of Dr. Jack Kevorkian, a retired Michigan pathologist. Kevorkian helped at least 50 people to die since 1990. In 1999, a Michigan jury convicted Kevorkian of second-degree murder and he is currently serving a 10 to 25 year prison sentence.

100. In November 1994, Oregon became the first state to make assisted suicide legal. Its law, passed by a slim margin in a voter referendum, allows doctors to prescribe a lethal dose of drugs to terminally ill patients who meet certain criteria. In June 1997, the Supreme Court upheld two state laws that barred assisted suicide. *See, e.g., Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997). While finding that states could make assisted suicide illegal, the court also made it clear that states could legalize assisted suicide if they so chose. The debate over assisted suicide continues in the United States. Legislation legalizing the practice has been introduced in a number of states. However, physician-assisted suicide remains illegal in every state except Oregon.

101. The Attorney General has determined that assisting suicide is not a legitimate medical purpose and therefore that the Controlled Substances Act of 1970 (“CSA”), 21 U.S.C. § 801, bars physicians from prescribing federally-controlled substances to assist in a suicide. The validity of the Attorney General’s determination is the subject of litigation and is scheduled for decision by the Supreme Court during the October Term 2005. *See Gonzales v. Oregon*, 125 S.Ct. 1299 (2005).

102. The Supreme Court has recognized that a state has “legitimate interests from the outset of the pregnancy in protecting the life of the fetus that may become a child.” *See Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). Accordingly, it has held that “subsequent to viability, the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.* at 879. At the same time, the Supreme Court has held that a state may not place an “undue burden” on a woman’s ability to abort a pregnancy prior to viability, and has invalidated some legislative efforts to protect an unborn child’s right to life on this ground. *See e.g., Casey*, 505 U.S. 833; *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a state-law ban on a procedure known as “partial birth abortion,” because it failed to allow an exception for the mother’s health, and because the vagueness of the statute’s definition of the procedure it prohibited had the effect of placing an “undue burden” on a woman’s ability to obtain abortion by prohibiting certain common methods of abortion).

103. In 2003, Congress enacted a federal prohibition on partial-birth abortion, finding that “[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.” *See* Pub. L. No. 108-105 at § 2(14)(M). This statute includes a more precise definition of the procedure it prohibits. In addition, the statute contains a congressional finding that “partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman’s health, and lies outside the standard of medical care.” *See* Pub. L. No. 108-105 at § 2(13). The validity of this statute is currently the subject of litigation.

104. *Capital Punishment*. The federal government and 38 states impose capital punishment for crimes of murder or felony murder, and generally only when aggravating circumstances were present in the commission of the crime, such as multiple victims, rape of the victim, or murder-for-hire.

105. Criminal defendants in the United States, especially those in potential capital cases, enjoy many procedural guarantees, which are well respected and enforced by the courts. These include: the right to a fair hearing by an independent tribunal; the presumption of innocence; the minimum guarantees for the defense; the right against self-incrimination; the right to access all evidence used against the defendant; the right to challenge and seek exclusion of evidence; the right to review by a higher tribunal, often with a publicly funded lawyer; the right to trial by jury; and the right to challenge the makeup of the jury, among others.

106. In two major decisions described also in paragraphs 108 and 109, the Supreme Court cut back on the categories of defendants against whom the death penalty may be applied. In *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the Court held that the execution of persons who were under the age of eighteen when their capital crimes were committed violates the Eighth and Fourteenth Amendments. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the execution of mentally retarded criminal defendants was cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments. The Supreme Court has repeatedly refused to consider the contention that a long delay between conviction and execution constitutes cruel and unusual punishment under the Eighth Amendment. See, e.g., *Foster v. Florida*, 537 U.S. 990 (2002). Also, the lower federal courts and state courts have consistently rejected such a claim. See, e.g., *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 461 (1999) (THOMAS, J., concurring in denial of certiorari).

107. *Federal Death Penalty*. The following three federal capital defendants have been executed since the enactment of the current federal death penalty statutes:

Timothy McVeigh was executed by lethal injection at the U.S. Penitentiary at Terre Haute, Indiana, on 11 June, 2001. He had been charged with multiple offenses arising out of the 19 April, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, and resulting deaths of 168 victims. After a jury trial in the U.S. District Court for the District of Colorado, McVeigh was convicted of conspiracy to use a weapon of mass destruction, in violation of 18 U.S.C. § 2332a; use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a; destruction of government property by means of an explosive, in violation of 18 U.S.C. § 844(f); and eight counts of first degree murder, in violation of 18 U.S.C. § 1111 and 18 U.S.C. § 1114.

McVeigh appealed to the court of appeals, which affirmed the convictions and death sentences. *United States v. McVeigh*, 153 F.3d 1186 (10th Cir. 1998). McVeigh then filed a petition for writ of certiorari in the U.S. Supreme Court, which denied the petition. *McVeigh v. United States*, 526 U.S. 1007 (1999). McVeigh later filed a motion to vacate his sentence under 28 U.S.C. § 2255 in the district court, which denied the motion and declined to issue a certificate of appealability. *United States v. McVeigh*, 118 F. Supp. 2d 1137 (D. Colo. 2000). McVeigh applied to the court of appeals for a certificate of appealability, which the court denied. McVeigh's execution followed that decision.

Juan Raul Garza was executed by lethal injection at Terre Haute on 19 June 2001. After a jury trial in the U.S. District Court for the Southern District of Texas, Garza was convicted of numerous offenses, including engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848(a) & (c), and committing three murders while engaged in and in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. § 848(e). He was sentenced to death for each of the murders. The court of appeals affirmed. *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). The U.S. Supreme Court denied his petition for a writ of certiorari. 519 U.S. 825 (1996). Garza filed a motion to vacate his sentence under 28 U.S.C. § 2255, and the district court denied the motion and declined to issue a certificate of appealability. Garza then applied to the court of appeals for a certificate of appealability, and the court of appeals denied the application. *United States v. Garza*, 165 F.3d 312 (5th Cir. 1999). The U.S. Supreme Court again denied certiorari. 528 U.S. 1006. Garza's execution followed that denial.

Louis Jones was executed by lethal injection at Terre Haute on 19 March, 2003. A jury in the U.S. District Court for the Northern District of Texas convicted Jones, a retired U.S. Army Ranger, of kidnapping and killing Tracie McBride, a 19-year-old private in the United States Army, in violation of 18 U.S.C. § 1201(a)(2). The jury sentenced Jones to death. Jones was also convicted of assaulting Private Michael Peacock with resulting serious bodily injury, in violation of 18 U.S.C. § 113(f). Jones appealed his conviction and sentence, which the court of appeals affirmed. *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998). The U.S. Supreme Court granted Jones's certiorari petition and affirmed his conviction and sentence. *Jones v. United States*, 527 U.S. 373 (1999). The Supreme Court denied Jones's petition for rehearing. See *Jones v. United States*, 527 U.S. 1058 (1999).

Jones filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. Following an evidentiary hearing, the district court denied the motion and Jones's application for a certificate of appealability. Jones applied to the court of appeals for a certificate of appealability, which the court denied on 27 March, 2002. *United States v. Jones*, 287 F.3d 325 (5th Cir. 2002). The Supreme Court denied certiorari. 123 S. Ct. 549 (2002). Jones's execution followed thereafter.

108. *Juvenile Death Penalty*. The application of the death penalty to those who commit capital offences at ages 16 and 17 had continued to be the subject of substantial debate in the United States. This debate was recently concluded by the Supreme Court in its ruling in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

109. *Mental defect*. The U.S. Supreme Court has restricted the death penalty, finding that it is a disproportionate punishment where the defendant is mentally retarded. See *Atkins v. Virginia*, 536 U.S. 304 (2002). In addition, a death penalty eligible defendant is entitled to an individualized determination that the death sentence is appropriate in his case, and the jury must be able to consider and give effect to any mitigating evidence that a defendant proffers as a basis for a sentence less than death. See *Johnson v. Texas*, 509 U.S. 350 (1993). Moreover, where the prosecution identifies the likelihood that a defendant will engage in violent conduct in the future as a basis for returning a death sentence and the only alternative to a death sentence is life without the possibility of parole, the jury must be informed that the defendant is parole ineligible, in other words, where a life prison sentence could not result in parole.

See *Simmons v South Carolina*, 512 U.S. 154 (1994).

110. *Capital Punishment and Consular Notification*. Since the initial report, a number of foreign nationals who were tried and sentenced to death by one of the states of the United States have sought to have their convictions or sentences overturned based upon the arresting authorities' failure to provide timely consular notification to the foreign national as required under the Vienna Convention on Consular Relations (VCCR). Paraguay, Germany, and Mexico each brought suit against the United States in the International Court of Justice (ICJ) under the Optional Protocol to the VCCR, asking the court, inter alia, to order the United States to provide new trials and sentencing hearings to foreign nationals when the competent authorities in the United States had failed to provide consular notification as required under the VCCR. See *Vienna Convention on Consular Relations (Paraguay v. U.S.)*, 1998; *LaGrand (Germany v. U.S.)*, 2001; *Avena and Other Mexican Nationals (Mexico v. U.S.)*.

111. The ICJ in *LaGrand* found that the appropriate remedy for cases in which German nationals are sentenced to severe penalties without having been provided consular notification was for the United States to provide, by means of its own choosing, review and reconsideration of the conviction and sentence taking into account the VCCR violation. In March 2004, the ICJ reiterated in *Avena* that review and reconsideration was the appropriate remedy for 51 Mexican nationals who the court found had not been provided consular notification as required.

112. On 28 February, 2005, President Bush determined that "the United States will discharge its international obligations under the decision of the International Court of Justice in *Avena* . . . by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." The U.S. government subsequently filed briefs with the U.S. Supreme Court and the Texas Court of Criminal Appeals in a case involving Ernesto Medellin, one of the individuals named in *Avena*. The government's *amicus* briefs argue that the President's decision is binding on state courts and, consistent with the U.S. government's longstanding interpretation of the VCCR, that the VCCR does not grant a foreign national a judicially enforceable right to challenge his or her conviction or sentence in the United States.

113. The United States' concerns that the ICJ's decisions had interpreted the VCCR in ways not intended or anticipated by the Parties led the United States to withdraw from the Optional Protocol to the VCCR. The Optional Protocol is a purely jurisdictional treaty separate from the VCCR itself. Only about 30 percent of the countries that are Party to the VCCR have chosen to be a Party to the Optional Protocol.

114. The United States remains a Party to the VCCR and is fully committed to meeting its obligations to provide consular notification and access in the cases of detained foreign nationals. As part of its on-going effort to improve compliance with the VCCR, the Department of State's Bureau of Consular Affairs has continued its aggressive program to advance awareness of consular notification and access. Since 1998, the State Department has distributed to federal, state and local law enforcement over 1,000,000 training videos, booklets and pocket cards that provide instructions for arrests and detentions of foreign nationals (the text of the booklet can be found at <http://travel.state.gov/law/notify.html>). State Department experts have conducted over 350 training seminars on consular notification and access throughout the United States and its territories. These included formal training events, presentations and other briefings at law enforcement and criminal justice agencies conferences, training academies and accreditation organizations, and judicial and legislative groups. The State Department has also produced an online training course that provides personnel with up-to-date, interactive training on the topic.

115. *Victims of Crime*. The Office for Victims of Crime (OVC) in the Department of Justice administers programs authorized by the Victims of Crime Act of 1984, in addition to the Crime Victims Fund (the Fund) also authorized by the same statute. The Fund is composed of criminal fines and penalties, special assessments, and bond forfeitures collected from convicted federal offenders, as well as gifts and donations received from the general public. Money deposited in this fund is used to support a wide range of activities on behalf of crime victims, including victim compensation and assistance services, demonstration programs, training and technical assistance, program evaluation and replication, and programs to assist victims of terrorism and mass violence. OVC administers two major formula grant programs: Victim Assistance and Victim Compensation. During the past decade, these two formula grant programs have greatly improved the accessibility and quality of services for federal and state crime victims nationwide.

116. In 2003, Congress passed the Justice for All Act, which sets out the following rights of victims of federal crimes: The right to be reasonably protected from the accused; the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; the reasonable right to confer with the attorney for the government in the case; the right to full and timely restitution as provided in law; the right to proceedings free from unreasonable delay; the right to be treated with fairness and with respect for the victim's dignity and privacy.

117. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime are required to make their best efforts to see that crime victims are notified of, and accorded, these rights.

118. In order to enforce these rights, the crime victim, the crime victim's lawful representative, or the government prosecutor may assert the rights in a federal court. Failure to afford a right does not provide a defendant grounds for a new trial, however, and the act does not create a cause of action for damages or create, enlarge, or imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. In addition, the Department of Justice was required, under the act, to create an ombudsman for victims rights and provide for training and possible disciplinary sanctions for employees who fail to afford victims their rights.

119. In terms of immigration, DHS may grant relief in the form of "U" visas to victims of crimes of violence who have aided in the investigation or prosecution of the perpetrators of violent crime. See Trafficking Victims Protection Act of 2000 (TVPA), Pub. L.

106-386, 114 Stat. 1464 (Oct. 28 2000), Division B, the Violence Against Women Act of 2000 (VAWA). The U visa may be available to a person who suffered substantial physical or mental abuse as a result of having been a victim of a serious crime, including rape, torture, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage (debtors bound in servitude to creditors), involuntary servitude, slave trade; kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, or perjury. *See* INA § 101(a) (15)(U); *See also* TVPA § 1513(b)(3). The U visa implementing regulations have not yet been promulgated. DHS is holding possible U visa cases pending publication of the implementing rule and providing interim employment authorization to applicants who establish prima facie eligibility.

120. *Victim Assistance*. Each year, all 50 states, the District of Columbia and various U.S. territories are awarded OVC funds to support community-based organizations that serve crime victims. Approximately 5,600 grants are made to domestic violence shelters, rape crisis centers, child abuse programs, and victim service units in law enforcement agencies, prosecutors' offices, hospitals, and social service agencies. These programs provide services including crisis intervention, counseling, emergency shelter, criminal justice advocacy, and emergency transportation. States and territories are required to give priority to programs serving victims of domestic violence, sexual assault, and child abuse. Additional funds must be set aside for underserved victims, such as survivors of homicide victims and victims of drunk drivers.

121. *Victim Compensation*. All 50 states, the District of Columbia, Puerto Rico and Guam, have established compensation programs for crime victims. These programs reimburse victims for crime-related expenses such as medical costs, mental health counseling, funeral and burial costs, and lost wages or loss of support. Compensation is paid only when other financial resources, such as private insurance and offender restitution, do not cover the loss. Some expenses, such as replacement of property that is stolen or damaged, are not covered by most compensation programs. Although each state compensation program is administered independently, most programs have similar eligibility requirements and offer comparable benefits.

122. *Victims of International Terrorism*. In addition, the Victims of Crime Act (VOCA) (42 U.S.C. § 10603c) authorizes the OVC Director to establish an International Terrorism Victim Expense Reimbursement Program to compensate eligible "direct" victims of acts of international terrorism that occur outside the United States, for expenses associated with that victimization.

123. *Victims of Trafficking*. Victims who are considered to have been subjected to a severe form of trafficking, and who agree to assist law enforcement in the investigation of trafficking, may be eligible for immigration relief, including "continued presence" and the T-visa. These are self-petitioning visas, under the TVPA. If granted, a T-visa provides the alien with temporary permission to reside in the United States and may lead to legal resident status. The victim also receives an authorization permit to work in the United States.

124. The Department of Homeland Security U.S. Citizenship and Immigration Services (USCIS) processes T-visas; the Department of Homeland Security Immigration and Customs Enforcement (ICE) processes continued presence requests. All victims of trafficking are eligible for victim services upon their identification by federal law enforcement. The types of services available depend on: (1) whether a determination has been made that the victim meets the definition of having been subjected to a severe form of trafficking set out in the TVPA; (2) the victim's immigration status; and (3) the victim's willingness to assist with an investigation and prosecution. To be eligible for services, minor victims need not demonstrate a willingness to assist law enforcement in an investigation nor are they required to have continued presence status. The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 mandated new information campaigns to combat sex tourism, added some refinements to the federal criminal law, and created a new civil action provision that allows trafficking victims to sue their traffickers in federal district courts. The TVPRA provides enhanced protection for victims of trafficking and assistance to family members of victims, including elimination of the requirement that a victim of trafficking between the ages of 15 and 18 must cooperate with the investigation and prosecution of his or her trafficker in order to be eligible for a T-visa, and making benefits and services available to victims of trafficking also available for their family members legally entitled to join them in the United States.

125. *Victims of Trafficking Discretionary Grant Program*. OVC also administers the Services for Trafficking Victims Discretionary Grant Program, which was authorized under the Trafficking Victims Protection Act of 2000. Most trafficking victims do not come to the United States with an immigration status that would allow them to receive benefits and services. The TVPA created a mechanism for allowing non-citizens who were trafficking victims access to benefits and services from which they might otherwise be barred. The TVPA allows for the "certification" of adult victims to receive certain federally-funded or administered benefits and services such as cash assistance, medical care, food stamps and housing. Minor (child) victims do not need to be certified to receive such benefits and services, but instead receive eligibility letters to the same effect. Programs funded by OVC focus on providing comprehensive and specialized services to victims of severe forms of trafficking during the "pre-certification" period, in order to address the emergency and immediate needs of these victims before they are eligible for other benefits and services.

Article 7 - Freedom from torture, or cruel, inhuman or degrading treatment or punishment

126. *Torture*. As described in paragraphs 149 - 187 of the Initial Report, U.S. law prohibits torture at both the federal and state levels within the United States. On 27 October, 1990, the United States ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"). The United States deposited its instrument of ratification with the UN on 21 October, 1994. The Convention Against Torture entered into force for the United States on 20 November, 1994.

127. *Federal Extraterritorial Offense of Torture*. Coincident with the entry into force of the Convention Against Torture, the United States enacted the Torture Convention Implementation Act, codified at 18 U.S.C. § 2340A, which gave effect to obligations assumed by the United States under Article 5 of the Convention Against Torture. As provided in the statute, whoever commits or attempts to commit torture outside the United States (both terms as defined in the statute) is subject to federal criminal prosecution if the alleged offender is a national of the United States or the alleged offender is present in the United States, irrespective of the

nationality of the victim.

128. *Report to the Committee Against Torture*. On 19 October, 1999, the United States submitted its initial report to the UN Committee Against Torture describing in detail U.S. compliance with the obligations it had assumed under the Convention Against Torture. Comm. Against Torture, Initial reports of States Parties due in 1995: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000). The Committee Against Torture began discussion of the U.S. report with a U.S. delegation on 10 May, 2000. Comm. Against Torture, 24th Sess., 424th mtg., pt. 1, U.N. Doc. CAT/C/SR.424 (2000). Discussion occurred over three meetings (May 10, 11, 15) – mtgs 424, 427, 431. Later, the Committee Against Torture offered concluding observations. *Report of the Committee against Torture*, U.N. GAOR, 55th Sess., Supp. No. 44, at 175–80, U.N. Doc. A/55/44 (2000). The United States recently submitted its second periodic report to the Committee Against Torture (*available at* <http://www.state.gov/g/drl/rls/45738.htm>) and awaits the invitation of the Committee Against Torture to discuss that report.

129. *Committee Request*. In its letter of 27 July 2004, the Human Rights Committee requested, *inter alia*, that the United States should address:

problems relating to the legal status and treatment of persons detained in Afghanistan, Guantanamo, Iraq and other places of detention outside the United States of America (art 7, 9, 10, and 14 of the Covenant).

130. The United States recalls its longstanding position that it has reiterated in paragraph 3 of this report and explained in detail in the legal analysis provided in Annex I; namely, that the obligations assumed by the United States under the Covenant apply only within the territory of the United States. In that regard, the United States respectfully submits that this Committee request for information is outside the purview of the Committee. The United States also notes that the legal status and treatment of such persons is governed by the law of war. Nonetheless, as a courtesy, the United States is providing the Committee pertinent material in the form of an updated Annex to the U.S. report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

131. *Cruel, inhuman or degrading treatment or punishment*. Cruel, inhuman or degrading treatment or punishment. Below are examples of federal law enforcement prosecutions for the mistreatment of people in custody. Not all of these examples involve conduct constituting cruel, inhuman or degrading treatment or punishment as defined under Article 7, as ratified by the United States. Mistreatment is conduct less severe than that falling within the scope of U.S. obligations under Article 7; in particular, mere violations of the Fourth Amendment do not fall within the scope of those obligations. Such examples are included simply to demonstrate the scope of remedies that are available in the United States for governmental misconduct:

On 14 July, 2004, an Oklahoma police officer was convicted and awaits sentencing for assaulting and fracturing the hip of a 67-year-old man the officer stopped for a traffic violation. The officer was prosecuted under 18 U.S.C. § 242 for intentional use of unreasonable force under the color of law;

On 19 May, 2004, a Louisiana detention officer was convicted and is awaiting sentencing for repeatedly throwing a handcuffed detainee against a wall resulting in significant lacerations to the victim's face. The officer was prosecuted under 18 U.S.C. § 242 for the willful use of force amounting to the deprivation of the victim's liberty without due process under color of law;

On 25 March, 2004, the Eleventh Circuit affirmed the conviction and sentence of a former deputy sheriff with the Jacksonville, Florida Sheriff's Department, who was charged and convicted for kidnapping, murdering, and stealing money from motorists, bank customers, and drug dealers whom he falsely arrested in 1998 and 1999. He was sentenced to life in prison for, among other charges, the violation of 18 U.S.C. § 241 for conspiracy to deprive one of the victims of life and the others of liberty and property without due process under color of law;

On 24 September, 2003, a North Carolina police officer pleaded guilty to a felony civil rights charge for coercing women, whom he stopped or arrested, into having sex with him. He was sentenced to ten years in prison for willful deprivation of liberty without due process under color of law;

On 2 November, 2000, seven federal correctional officers from the U.S. Penitentiary in Florence, Colorado, were indicted for systematically beating inmates and lying to cover-up their illegal conduct. On 24 June, 2003, the jury convicted the three ringleaders on conspiracy and substantive counts. They were sentenced to 30 and 41 months in prison for, among other charges, the violation of 18 U.S.C. § 241 for conspiring to impose cruel and unusual punishment under color of law. Three additional defendants pled guilty to violating inmates' civil rights prior to trial;

On 15 August, 2001, a Maryland, K–9 [canine] officer was convicted and thereafter sentenced to 10 years in prison for releasing her dog on two men who had surrendered, resulting in serious injuries to the men;

On 9 November, 2000, a correctional officer captain from a state of Florida jail pled guilty to having forcible sexual contact with a female inmate and was thereafter sentenced to 15 months in prison. He was prosecuted under 18 U.S.C. § 242 for willful deprivation of the victim's liberty without due process under color of law;

On 7 February, 2001, six correctional officers with the Arkansas Department of Corrections beat and repeatedly shocked two naked and handcuffed victims with a hand-held stun gun and six-foot long cattle prod. During a separate incident, three of the six defendants shocked and beat another handcuffed inmate. Ultimately, five officers entered guilty pleas while the sixth was convicted at trial. They were sentenced to terms of incarceration ranging from 24 to 78 months under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law;

Between 3 March, 2001 and 21 August, 2001, three other correctional officers with the Arkansas Department of Corrections pled guilty to assaulting an inmate while he was handcuffed behind his back. They were later sentenced to terms of incarceration ranging from 8 to 18 months in prison under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law;

On 29 January, 2002, a North Carolina chief of police was convicted of using excessive force in seven separate incidents, involving six separate arrestees. The defendant was sentenced to 37 months in prison for willfully using unreasonable force under color of law in violations of 18 U.S.C. § 242;

On 23 March, 2000, a U.S. Bureau of Prisons correctional officer in Oklahoma City was convicted of engaging in various degrees of sexual misconduct with five female inmates. As a result, he was sentenced to 146 months in prison under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law;

On 27 May, 2001, the last of five male orderlies at a state-run care facility for developmentally disabled adults near Memphis, Tennessee was convicted for routinely beating residents. One of these beatings resulted in the death of a developmentally disabled patient who could not cry out for help because he was mute. The five orderlies received sentences ranging from 60 to 180 months in prison under 18 U.S.C. § 242 for willful deprivation of the victim's liberty without due process under color of law;

On 23 January, 2001, a Florida Department of Corrections officer with the Metro Dade Jail was convicted of assaulting a female inmate resulting in multiple contusions to her face, back, and neck. He was sentenced to 17 months in prison under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law.

132. The civil rights laws have also been used to prosecute judges who abuse their power. For example, in 1997, the U.S. Supreme Court upheld the conviction of a Tennessee judge who was convicted by a jury of multiple counts of sexually assaulting both female litigants who had cases pending before him as well as female courthouse employees. See *United States v. Lanier*, 520 U.S. 259 (1997). Lanier received a sentence of 25 years in prison.

133. *Basic rights of prisoners.* Complaints about failure by individual law enforcement officers to comply with procedural rights continue to be made to federal and state authorities. The Criminal Section of the Civil Rights Division of the United States Department of Justice is charged with reviewing such complaints made to the federal government and ensuring the vigorous enforcement of the applicable federal criminal civil rights statutes. There have been fewer allegations of violation of procedural rights than physical abuse allegations.

134. *Civil Pattern or Practice Enforcement.* The Civil Rights Division of the U.S. Department of Justice may institute civil actions for equitable and declaratory relief pursuant to the Pattern or Practice of Police Misconduct provision of the Crime Bill of 1994, 42 U.S.C. § 14141, which prohibits law enforcement agencies from engaging in a pattern or practice of violating people's civil rights. Since October of 1999, the Civil Rights Division has negotiated 16 settlements with law enforcement agencies. These settlements include two consent decrees regarding the Detroit, Michigan Police Department, and consent decrees covering Prince George's County, Maryland and Los Angeles, California police departments. Other recent settlements include those entered into with police departments in the District of Columbia; Cincinnati, Ohio; Buffalo, New York; Villa Rica, Georgia; and Cleveland, Ohio. There are currently 13 ongoing investigations of law enforcement agencies.

135. *Civil Rights of Institutionalized Persons Act (CRIPA)*. The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 et seq., permits the Attorney General to institute civil lawsuits against state institutions regarding the civil rights of their residents, including the conditions of their confinement and use of excessive force. The Civil Rights Division of the Department of Justice has utilized this statute to prosecute allegations of torture and cruel, inhuman, and degrading treatment or punishment. By August 2004, the Civil Rights Division had initiated CRIPA actions regarding approximately 400 facilities, resulting in approximately 120 consent decrees and settlements governing conditions in about 240 facilities, since CRIPA was enacted in 1980. CRIPA enforcement has been a major priority of the Division. Over the last six years, the Division has opened 52 new investigations covering 66 facilities. The Division has also entered into 39 settlement agreements including seven consent decrees. There are currently 59 active investigations covering 69 facilities.

136. *Prisoner Litigation.* The Civil Rights Division investigates conditions in state prisons and local jail facilities pursuant to CRIPA, and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or Section 14141, described above. These statutes allow suit for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement. Over the last 6 years, the Civil Rights Division has authorized 16 investigations concerning 17 adult correctional facilities, and 16 investigations of 26 juvenile detention facilities. Since October of 1999, the Civil Rights Division has entered 13 settlement agreements concerning 26 adult correctional facilities and 11 settlement agreements concerning 26 juvenile detention facilities. Since October 1999, pursuant to CRIPA, the Division has issued so-called findings letters - letters detailing patterns or practices of civil rights violations and minimum remedial measures to remedy the violations - covering 13 adult correctional facilities and 17 juvenile detention facilities. Some examples of these investigations follow:

On 7 June, 2004, the Civil Rights Division filed a lawsuit challenging the conditions of confinement at the Terrell County Jail in Dawson, Georgia. The Division's complaint alleged that the jail routinely violated federally protected rights, including failing to protect inmate safety, and failing to provide required medical and mental health care. For example, after jail officials allegedly left one detainee with known mental health problems unsupervised despite his being on "suicide watch," he hanged himself;

On 16 July, 2004, the Division reached an out-of-court agreement with the Wicomico County Detention Center in Salisbury, Maryland regarding systematic violations of prisoners' federally protected civil rights. The Division's three-year investigation revealed evidence that the Detention Center failed to provide required medical and mental health care, failed to provide adequate inmate safety, and failed to provide sufficiently sanitary living conditions. Under the terms of the agreement, the Detention Center will address and correct the deficiencies identified by the Division;

The Division has also issued letters in 2004 reporting its findings regarding conditions at the McPherson and Grimes Correctional Units in Newport, Arkansas, the Garfield County Jail and County Work Center in Enid, Oklahoma, the Patrick County Jail in Virginia, and the Santa Fe Adult Detention Center in New Mexico;

On 18 December, 2003, the Division filed suit to remedy a pattern or practice of unconstitutional conditions at the Oakley and Columbia Training Schools – juvenile justice facilities – in Mississippi. The Division’s investigation found evidence of numerous abusive practices;

On 27 August, 2004, the Division reached an out-of-court agreement with the state of Arkansas regarding the McPherson and Grimes Correctional Units in Newport, Arkansas. The agreement requires changes in staffing and security, and medical and mental health care for both male and female inmates;

Over the last six years, the Division entered into agreements to remedy patterns or practices of unconstitutional conditions of confinement at several local jails or state prisons, including the Wyoming State Prison; the Nassau County Correctional Center in New York State; the Shelby County Jail in Tennessee; the Maricopa County jails in Phoenix, Arizona; and the McCracken County Jail in Kentucky.

137. *Sexual abuse in prison.* The Prison Rape Elimination Act of 2003 (PREA) was enacted to address the problem of sexual assault of persons in the custody of U.S. correctional agencies. The Act, signed into law on 4 September, 2003, applies to all public and private institutions that house adult or juvenile offenders and is also relevant to community-based agencies. The purpose of the Act is to:

Establish a zero-tolerance standard for the incidence of rape in prisons in the United States;

Make the prevention of rape a top priority in each prison system;

Develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;

Increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;

Standardize the definitions used for collecting data on the incidence of prison rape;

Increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;

Protect the Eighth Amendment rights of federal, state, and local prisoners;

Increase the efficiency and effectiveness of federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and

Reduce the costs that prison rape imposes on interstate commerce.

138. Illustrative of the problem of sexual abuse in correctional facilities are *United States v. Arizona* and *United States v. Michigan*, both cases filed under CRIPA in 1997 and dismissed in 1999 and 2000 respectively; the Civil Rights Division sought to remedy a pattern or practice of sexual misconduct against female inmates by male staff, including sexual contact and unconstitutional invasions of privacy. The cases were dismissed after the state prisons agreed to make significant changes in conditions of confinement for female inmates.

139. *Segregation of Prisoners.* In *Sandin v. Conner*, 515 U.S. 472 (1995), the Supreme Court defined the due process requirements for prisoners subjected to segregation for disciplinary reasons. The Court held that a 30 day period of disciplinary segregation from general population did not give rise to a liberty interest that would require a full due process hearing prior to the imposition of the punishment. The Court did leave open the possibility that due process protections would be implicated if the confinement was “atypical and significant.”

140. *Psychiatric hospitals.* As reported in paragraphs 172 – 173 of the Initial Report, individuals with mental illness may be admitted to psychiatric hospitals either through involuntary or voluntary commitment procedures for the purpose of receiving mental health services. Institutionalized persons, including mental patients, are entitled to adequate food, clothing, shelter, medical care, reasonable safety, and freedom from undue bodily restraint. Complaints tend to focus on inadequate conditions of confinement. Since enactment of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, et seq. in 1980, some 400 facilities, including psychiatric facilities, prisons, jails, juvenile facilities, nursing homes, and facilities housing persons with developmental disabilities have been investigated by the U.S. Department of Justice and relief sought, as appropriate. Also, the 1999 U.S. Supreme Court decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), held that unnecessary segregation of people with disabilities in institutions may be a form of discrimination that violates the 1990 Americans with Disabilities Act, when considering all relevant factors including the cost of a less restrictive environment. In addition, the Protection and Advocacy for Individuals with Mental Illness program, enacted in 1986, protects and advocates for the rights of people with mental illnesses and investigates reports of abuse and neglect in facilities that care for or treat individuals with mental illnesses. Patients are also afforded protections under Medicare and Medicaid “Conditions of Participation on Patients’ Rights” and the Children’s Health Act of 2001 related to use of seclusion and restraint.

141. *Medical or scientific experimentation.* The United States Constitution protects individuals against non-consensual experimentation. Specifically included are the Fourth Amendment’s proscription against unreasonable searches and seizures (including seizing a person’s body), the Fifth Amendment’s proscription against depriving one of life, liberty or property without due process, and the Eighth Amendment’s proscription against the infliction of cruel and unusual punishment. In addition, legislation provides similar guarantees (*See* 21 U.S.C. §§ 355(i)(4) & 3360j(g)(3)(D)).

142. Comprehensive control of unapproved drugs is vested by statute in the federal Food and Drug Administration (FDA) within HHS. The general commercialization of such drugs is prohibited, *See* 21 U.S.C. § 355(a), but HHS/FDA permits their use in

experimental research under certain conditions (21 U.S.C. §§ 355(i), 357(d); 21 C.F.R. §§ 50, 56, & 312). The involvement of human beings in such research is prohibited unless the subject or the subject's legally authorized representative has provided informed consent, with the limited exceptions described below. The HHS/FDA regulations state in detail the elements of informed consent (21 C.F.R. §§ 50.20-50.27).

143. U.S. statute and HHS regulations make an exception to requiring consent when the human subject is confronted by a life-threatening situation that requires use of the test article, legally effective consent cannot be obtained from the subject, time precludes consent from the subject's legal representative, and there is no comparable alternative therapy available (21 C.F.R. 50.23(a)-(c)). HHS/FDA regulations also set forth criteria for the President of the United States to apply in making a decision to waive the prior informed-consent requirement for the administration of an investigational new drug to a member of the U.S. Armed Forces in connection with the member's participation in a particular military operation (21 C.F.R. 50.23(d)). This regulation implements, in part, 10 U.S.C. § 1107(f) which specifies that only the President may waive informed consent in this connection, and that the President may grant such a waiver only if the President determines in writing that obtaining consent is not feasible, is contrary to the best interests of the military members, or is not in the interests of U.S. national security. The statute further provides that in making a determination to waive prior informed consent on the ground that it is not feasible on the grounds that it is contrary to the best interests of the military members involved, the President shall apply the standards and criteria that are set forth in these regulations. Finally, HHS/FDA regulations provide an exception to informed consent for emergency research (21 C.F.R. 50.24). This exception allows an Institutional Review Board (IRB) to approve research if it finds that the human subjects are in a life-threatening situation, available treatments are unproven or unsatisfactory, obtaining informed consent is not feasible, participation in the research holds out the prospect of direct benefit to the subjects, the research could not practicably be carried out without the waiver, and other protections are provided.

144. The Fourth, Fifth, and Eighth Amendments to the United States Constitution, by statutes, and by agency rules and regulations promulgated in response to such provisions, prohibit experimentation on prisoners. As a general matter, in the United States, "[e]very human being of adult years or sound mind has a right to determine what shall be done with his own body." See *Schloendorff v. Society of New York Hospitals*, 105 N.E. 92, 93 (1914). Accordingly, prisoners are almost always free to consent to any regular medical or surgical procedure for treatment of their medical conditions. Consent must be "informed": the inmate must be informed of the risks of the treatment; must be made aware of alternatives to the treatment; and must be mentally competent to make the decision. Because of possible "coercive factors, some blatant and some subtle, in the prison milieu," (James J. Gobert and Neil P. Cohen, *Rights of Prisoners*, New York: McGraw Hill, Inc., 1981, pp. 350-51) prison regulations generally do not permit inmates to participate in medical and scientific research.

145. The U.S. Federal Bureau of Prisons prohibits medical experimentation or pharmaceutical testing of *any* type on all inmates in the custody of the U.S. Attorney General who are assigned to the Bureau of Prisons. 28 C.F.R. § 512.11(c).

146. Moreover, the federal government strictly regulates itself when conducting, or funding research in prison settings. HHS, which sponsors over 90 percent of federally conducted or supported human research promulgated in 1976 regulations (45 C.F.R. § 46 (c)) that protect the rights and welfare of prisoners involved in research. An IRB, which approves and oversees all research conducted or supported by HHS, must have at least one prisoner or prisoner representative if prisoners are to be used as subjects in the study. Research involving prisoners must present risks similar to risks accepted by non-prisoner volunteers (See 45 C.F.R. § 46). Furthermore, the regulations established by HHS require that the research proposed must fall into one of four categories:

Study of the possible causes, effects, and processes of incarceration, and of criminal behavior, provided that the study presents no more than a minimal risk and no more than inconvenience to the subject;

Study of prisons as institutional structures or of prisoners as incarcerated persons, provided that the study presents no more than minimal risk and no more than inconvenience to the subject;

Research on conditions particularly affecting prisoners as a class;

Research on practices, both innovative and accepted, which have the intent and reasonable probability of improving the health and well-being of the subject. 45 C.F.R. § 46.306(a)(2).

147. Research conducted under categories 1 and 2 must present "no more than minimal risk and no more than inconvenience to the subjects." For research conducted under category 3, or conducted under category 4 where "studies require the assignment of prisoners in a manner consistent with protocols approved by the IRB to control groups which may not benefit from the research," "the study may proceed only after the Secretary [of HHS] has consulted with appropriate experts, including experts in penology, medicine, and ethics, and published notice, in the Federal Register, of the intent to approve such research."

148. The Secretary of HHS, pursuant to 45 C.F.R. 46.101(i), has waived the applicability of certain provisions of subpart C of 45 C.F.R. part 46 (Additional HHS Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects) to specific types of epidemiological research involving prisoners as subjects. This waiver, effective 20 June, 2003, allows HHS to conduct or support certain important and necessary epidemiological research that would not otherwise be permitted under subpart C.

149. The Secretary of HHS has also waived the applicability of 45 C.F.R. 46.305(a)(1) and 46.306(a)(2) for certain epidemiologic research conducted or supported by HHS in which the sole purposes are the following:

To describe the prevalence or incidence of a disease by identifying all cases; or

To study potential risk factor associations for a disease; and

Where the institution responsible for the conduct of the research certifies to the HHS Office for Human Research Protections, acting

on behalf of the Secretary, that the IRB approved the research and fulfilled its duties under 45 C.F.R. § 46.305(a)(2)–(7) and determined and documented that the research presents no more than minimal risk and no more than inconvenience to the prisoner–subjects; and prisoners are not a particular focus of the research.

Article 8 - Prohibition of slavery

150. *Slavery and involuntary servitude.* Abolition of the institution of slavery in the United States dates from the early 1800s, when the charter for the Northwest Territories provided that neither slavery (government–sanctioned ownership of a person) nor involuntary servitude (the holding of a person through compulsion for labor or services, without government sanction) would exist in certain lands being brought into the United States. Restrictions on the trafficking of slaves were adopted throughout the early 1800s. Slavery was abolished throughout the United States and its Territories by the Thirteenth Amendment to the United States Constitution, adopted in 1865.

151. Although slavery and involuntary servitude have been outlawed throughout the United States since 1865, tragically, modern analogs of that horrible practice continue around the world. The United States estimates that each year between 600,000 and 800,000 persons are trafficked across international borders, including an estimated 14,500 to 17,500 persons trafficked into the United States.

152. Prior to 2000, the United States prosecuted instances of slavery/human trafficking under statutes designed to protect persons in the United States in the free enjoyment of their constitutional rights, such as 18 U.S.C. § 241, which criminalizes conspiracies to interfere with the exercise of constitutional rights, and statutes such as 18 U.S.C. § 1584, which criminalizes involuntary servitude. Under these statutes, the Justice Department could prosecute only cases in which involuntary servitude was brought about through use or threatened use of physical or legal coercion; it was not sufficient to show that labor was forced through psychological coercion or other means. *United States v. Kozminski*, 487 U.S. 931 (1988).

153. Recognizing the fact that human traffickers often use various forms of non–physical and psychological manipulation, including threats to victims and their families, document confiscation, and other forms of disorientation, Congress enacted the Trafficking Victims Protection Act of 2000 (TVPA). The TVPA enhanced the United States’ ability to prosecute slaveholders and to assist victims of human trafficking.

154. The TVPA set forth a three–pronged strategy to combat modern–day slavery: preventing human trafficking by working with authorities in the victims’ home countries, providing protection and assistance to victims, and prosecuting offenders. The TVPA created several new criminal offenses: (i) holding persons for labor or services through a scheme or pattern of coercion (section 1589); (ii) trafficking persons into a condition of servitude or forced labor (section 1590); (iii) trafficking persons for commercial sexual activity through force fraud or coercion, or trafficking minors for commercial sexual activity (section 1591), and (iv) confiscation of identity documents in order to maintain an condition of servitude (section 1592). The TVPA raised the statutory maximum for servitude offenses to twenty years imprisonment, and in cases involving kidnapping, rape, or death of a victim, to life imprisonment. The TVPA provided for victim assistance by allowing trafficking victims to apply for federally funded or federally administered health and welfare benefits and by allowing qualified aliens to remain in the United States. The statute increased penalties for pre–existing crimes including forced labor; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; sex trafficking of children or by force, fraud, or coercion; and unlawful conduct with respect to documents, criminalized attempts to engage in these acts and provided for mandatory restitution and forfeiture.

155. In 2003, the United States renewed the TVPA and added provisions for information campaigns to combat sex tourism, added refinements to the federal criminal law, and created a new civil action provision that allows trafficking victims to sue their traffickers in federal district court.

156. Trafficking cases involve coercion, sometimes following an initial recruitment through false promises, in order to obtain or maintain the victims’ labor or services. Many of the defendants in these cases prey on the vulnerabilities of children or immigrant populations. While the means of isolation and coercion are often similar, victims are placed into various exploitative situations in a number of different industries. Sometimes, the underlying labor is legitimate, such as agricultural labor or domestic service. Other times, the victims are forced into illegal activities, such as prostitution or other commercial sexual activity. All of the victims of these severe forms of trafficking are held through coercive forces that deny them their essential freedom.

157. Since 1992, the Department of Justice has prosecuted 98 involuntary servitude cases involving 284 defendants, with three–fourths of the cases brought in the past five years. The cases have resulted in 194 convictions and guilty pleas and five acquittals. Since the TVPA’s enactment in October 2000 through June 2005, the United States initiated prosecutions of 215 human traffickers, a three–fold increase over the prior four years. During that same period, the United States offered 752 adult and children victims of trafficking health and welfare benefits, including assistance with food, housing, transportation, medical services, and social adjustment services; English language training; job counseling and placement; and legal services. For those victims who wished to be reunited with their families abroad, the United States has assisted in achieving a safe reunion. For those victims who wish to remain in the United States, the United States allows victims to extend their stay in the United States or to apply for a special visa that carries the privilege of applying for permanent residency after three years. The United States is currently one of the few countries that grant the possibility of permanent residency to victims of trafficking. From October 2000 through June 2005, the United States granted immigration benefits to 450 trafficking victims. Additionally, in order to stop trafficking at its source, from October 2001 through June 2005, the United States invested over \$295 million on international anti–trafficking efforts.

158. The Department of Justice’s enforcement efforts in recent years have uncovered trafficking cases involving persons whose labor or services were forcibly obtained or maintained for, among other things: prostitution, nude dancing, domestic service, migrant agricultural labor, “sweatshop” garment factories, and street peddling/begging. The following examples are illustrative of some of the cases brought by the Department of Justice since the passage of the TVPA in October 2000:

The owner of a sweatshop in the Territory of American Samoa was sentenced to 40 years in prison after being convicted of conspiring to enslave workers, involuntary servitude, and forced labor for holding Vietnamese factory workers to work as sewing machine operators in the Daewoosa Samoa garment factory. The workers were deprived of food, beaten, and physically restrained in order to force them to work. The lead defendant, Kil Soo Lee, was sentenced to 40 years in prison in June 2005; two other defendants entered guilty pleas to conspiracy for their involvement in the scheme and were sentenced to 70 and 51 months incarceration. *United States v. Kil Soo Lee*, 159 F. Supp. 2d 1241 (D. Haw. 2001);

A defendant was convicted of forcing a young Cameroonian girl to work as a domestic servant after being brought into the United States illegally. The eleven-year old girl was forced to care for the defendant's two children and performed all the household chores without pay. The defendant beat her, forbade her from speaking of the conditions to anyone, forbade her from leaving the house or opening the door to anyone, and interfered with her mail. The defendant, who fled to Cameroon after being convicted, was sentenced to 210 months in prison and has since been returned to the United States to serve her sentence. *United States v. Mubang*;

Six defendants pleaded guilty to trafficking Mexican women into the United States illegally and forced them into prostitution in Queens and Brooklyn. The male defendants lured the women into the United States and prostitution through personal relationships or marriage. The traffickers controlled their victims in part by holding the victims' children in Mexico. *United States v. Carreto*, et al;

Eight defendants were charged with maintaining trailers along the Texas border as safe houses for illegal aliens newly arrived from the US/Mexico border. Women aliens were kept at the trailers where they were forced to cook and clean and were raped by the defendants. Seven of the eight defendants entered guilty pleas for their involvement in the scheme and were sentenced to terms of incarceration ranging from 4 months to 23 years in prison. Three of the seven defendants were ordered to pay \$11,532 in restitution. The final defendant is a fugitive. *United States v. Soto Huarto*, et al;

Two defendants, who operated a tree cutting business, were convicted for holding two Jamaican immigrants in conditions of forced labor and document servitude in New Hampshire. The defendants obtained workers from Jamaica by means of false promises of good work and pay. Once the workers arrived in New Hampshire, their visas and others documents were confiscated and the workers were paid substantially less than promised, were housed in deplorable conditions, were denied medical treatment, and were routinely threatened. The defendants were sentenced to 70 months in prison, three years supervised release and ordered to pay a \$12,500 fine and \$13,052 restitution. *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004);

Two Russian nationals were convicted at trial of recruiting women from Uzbekistan into the United States under false pretenses, then forcing them to work in strip clubs and bars in order to pay back an alleged \$300,000 smuggling fee. The victims' passports were taken away, they were required to work seven days a week, and they were told that their families in Uzbekistan would be harmed if they did not comply with the defendants' demands. The defendants were sentenced to 60 months incarceration and ordered to pay almost \$1,000,000 in restitution. *United States v. Gasanova*, 332 F.3d 297 (5th Cir 2003).

159. Since 1992, the Department of Justice has prosecuted 78 involuntary servitude cases involving 245 defendants, with three-fourths of the cases brought in the past five years. The cases have resulted in 187 convictions and guilty pleas and four acquittals.

160. *Forced Labor*. As reported in paragraph 202 of the Initial Report, the United States does not engage in practices of forced labor. In addition, the newly enacted criminal statute, 18 U.S.C. §1589, prohibits forced labor by private parties who obtain or maintain labor or services through coercion that does not rise to the level mandated for other offenses by the U.S. Supreme Court in *United States v. Kozminski*, 487 U.S. 931 (1998).

161. *Worst Forms of Child Labor*. On 2 December, 1999, the United States ratified ILO Convention 182 on The Worst Forms of Child Labor. The treaty came into force for the United States on 2 December, 2000. By ratifying the convention, the United States committed itself to take immediate action to prohibit and eliminate the worst forms of child labor.

Article 9 – Liberty and security of person

162. The Supreme Court has used the vagueness doctrine to limit statutory authorizations for arrest of suspected gang members. In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Court struck down a city ordinance that permitted arrest if a police officer observed those he reasonably believed to be street gang members loitering, ordered the persons to disperse, and the persons disobeyed that order. In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), however, the Court held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, even one punishable only by a fine.

163. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that Miranda requirements regarding the admissibility of statements during custodial interrogations were constitutionally based and could not be overruled by legislation. The Court subsequently divided over related questions. In *United States v. Patane*, 542 U.S. 630 (2004), a plurality concluded that the Constitution does not generally require suppression of the physical fruits of voluntary statements that were not preceded by Miranda warnings. On the other hand, in *Missouri v. Seibert*, 542 U.S. 600 (2004), a plurality refused to allow deliberate evasions of Miranda, requiring suppression of statements that were made after Miranda warnings had been given but had first been obtained without giving the suspect Miranda warnings.

164. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), involved the case of a U.S. citizen, Yaser Esam Hamdi, who was captured by the U.S. military during military operations against al Qaeda and the Taliban in Afghanistan and eventually detained within the United States at a naval brig in South Carolina. Hamdi was a U.S. citizen by birth but had lived with his family in Saudi Arabia for virtually his entire life. The Supreme Court stated that the Authorization for Use of Military Force ("AUMF"), passed by Congress in the wake of the 11 September, 2001 terrorist attacks, authorized the President to detain individuals, including U.S. citizens, determined to be enemy combatants for the duration of armed hostilities. A plurality of the Court further stated that the Constitution requires that U.S. citizens so detained receive notice of the factual basis for their classification as enemy combatants, as well as a fair

opportunity to rebut the government's factual assertions before a neutral decision-maker. Subsequent to the Supreme Court's decision, the United States released Hamdi and repatriated him to Saudi Arabia pursuant to a settlement agreement under which he renounced U.S. citizenship and agreed to various restrictions to ensure he would not pose a future threat to the United States.

165. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), involved the case of a U.S. citizen, Jose Padilla, who associated with forces hostile to the United States in Afghanistan and took up arms against United States forces in their conflict with al Qaeda. He then escaped to Pakistan, where he was recruited, trained, funded, and equipped by al Qaeda leaders to engage in hostile acts within the United States. However, upon traveling to the United States, Padilla was apprehended by the United States at Chicago's O'Hare International Airport. Padilla was determined to be an enemy combatant and transferred to the custody of the Department of Defense based on Presidential findings that he was associated with al Qaeda and had engaged in hostile and war-like acts including preparation for acts of international terrorism, and was detained at a naval brig in South Carolina, after which a petition for a writ of habeas corpus was filed on his behalf. The Supreme Court held that it was incorrect for that petition to have named the Secretary of Defense as respondent, because the Secretary of Defense was not Padilla's immediate custodian. The Supreme Court also held that the petition should have been filed in the district where Padilla was being confined, South Carolina, rather than New York, where it was actually filed. Subsequent to the Supreme Court decision, Padilla refiled the habeas case in the appropriate district court and against the appropriate respondent. On 9 September, 2005, the U.S. Court of Appeals for the Fourth Circuit held that Padilla's detention was authorized by the AUMF. *Padilla v. Hanft*, 2005 U.S. App. LEXIS 19465 (4th Cir. 2005). In so holding, the Fourth Circuit reversed the decision of a lower court that had found Padilla's detention unlawful and had ordered the government to release him unless it elected to bring criminal charges against him or hold him as a material witness. Rejecting the lower court's analysis, the Fourth Circuit stated that Padilla's "military detention as an enemy combatant by the President is unquestionably authorized by the AUMF as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan."

166. In 1996, thirty-four percent of the 56,982 defendants charged with a federal offense were ordered detained by the court pending adjudication of the charges. Defendants charged with violent (49.7%), immigration (47.9%), or drug trafficking (45.7%) offenses were detained by the court for the entire pretrial period at a greater rate than other offenders. Of the 19,254 defendants for who detention was ordered, 42.3 percent were detained because they were considered a flight risk, 10.6 percent because they were considered a danger either to the community or prospective witnesses or jurors, and 47 percent for both reasons.

167. In 2000, an estimated 62 percent of defendants facing felony charges in the nation's 75 most populous counties were released prior to the disposition of their cases. Murder defendants (13%) were the least likely to be released prior to case disposition, followed by defendants whose most serious arrest charge was robbery (44%), motor vehicle theft (46%), burglary (49%), or rape (56%). Less than half of defendants with an active criminal justice status, such as parole (23%) or probation (41%), at the time of arrest were released, compared to 70 percent of these with no active status.

168. *Detention to secure the presence of a witness.* A person may also be held in custody to secure his presence as a material witness at an upcoming trial. The Supreme Court has stated that the "duty to disclose knowledge of crime ... is so vital that one known to be innocent may be detained in the absence of bail, as a material witness." See *Stein v. New York*, 346 U.S. 156, 184 (1953). Federal law accordingly has a material witness statute, 18 U.S.C. § section 3144, that provides:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of [the Bail Reform Act]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

169. The government has relied on this statute as authority to detain not only trial witnesses, but grand jury witnesses as well. One federal district court held that § 3144 does not apply to grand jury witnesses. See *United States v. Awadallah*, 202 F. Supp. 55, 61–79 (S.D.N.Y. 2002). Another federal court within the same district rejected *Awadallah*, holding that § 3144 provides clear authority to detain individuals to testify before the grand jury. *In re Application of the United States for a Material Witness Warrant*, 213 F.Supp.2d 287, 288–300 (S.D.N.Y. 2002). The issue went to the Court of Appeals for the Second Circuit which held in 2003 that a grand jury proceeding is a "criminal proceeding" for purposes of § 3244, meaning that material witnesses may be detained under § 3244 for the grand jury process. See *United States v. Awadallah*, 349 F.3d 42, 55 (2d Cir. 2003). A detained witness in a grand jury investigation may have a hearing on the propriety of the detention and is entitled to the protections of § 3142 "insofar as they are applicable in the grand jury setting." *Id.* at 61. A court may order that a deposition be taken to release a detained witness earlier than would be possible by requiring the witness to testify before the grand jury. *Id.* at 60. The decision of the Second Circuit was not appealed.

170. *Detention of aliens.* The Immigration and Nationality Act ("INA") provides for mandatory detention of certain categories of aliens during immigration proceedings, including certain criminal aliens, and certain aliens who pose a threat to national security. See 8 U.S.C. §§ 1226(c), 1226(a), and 1225(b). Aliens that do not fall under the mandatory detention requirements may be released by the Secretary of Homeland Security on conditions, including bond, if they do not pose a flight risk or danger to the public. In general, aliens who have made an entry into the United States may challenge the Secretary's custody determination in a hearing before an immigration judge. See 8 U.S.C. § 1226(a).

171. Once an alien has been ordered removed from the United States, detention is mandatory during removal efforts for the next 90 days for most criminal aliens and those who pose a national security risk. If the alien has not been removed at the end of this 90-day period, the alien may be detained for another 90-day period pending removal or may be released on conditions if the alien does not pose a flight risk or danger to the public. If, after 180 days post-order detention, an alien's removal is not significantly likely in the reasonably foreseeable future, the alien must be released, with certain limited exceptions. See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 125 S. Ct. 716 (2005).

172.*Habeas corpus*. The writ of habeas corpus can be used to review a final conviction – in addition to the statutory right to appeal one’s conviction – as well as to challenge execution of a sentence or to challenge confinement that does not result from a criminal conviction, such as the commitment into custody for mental incompetency or detention for immigration reasons. *INS v. St. Cyr*, 533 U.S. 289 (2001). Also, the Supreme Court has held that some individuals detained in connection with hostilities or as enemy combatants are entitled to habeas corpus review.

173.In 2003, petitions for writ of habeas corpus were filed in U.S. courts on behalf of some of the detainees at Guantanamo seeking review of their detention. On 28 June, 2004, the United States Supreme Court, the highest judicial body in the United States, issued two decisions pertinent to many enemy combatants. One of the decisions directly pertained to enemy combatants detained at Guantanamo Bay, and the other pertained to a citizen enemy combatant held in the United States. See *Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004); see also *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (involving a decision on which U.S. federal court has jurisdiction over habeas action). In *Rasul v. Bush*, the Supreme Court decided only the question of jurisdiction. The Court ruled that the U.S. District Court for the District of Columbia had jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. 124 S.Ct. at 2698. The Court held that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants, “no less than citizens,” could invoke the habeas jurisdiction of a district court. *Id.* at 2696. The Supreme Court left it to the lower courts to decide “[w]hether and what further proceedings may become necessary after [the United States government parties] make their response to the merits of petitioners’ claims.” *Id.* at 2699. In *Hamdi v. Rumsfeld*, a plurality of the Court addressed the entitlements of a U.S. citizen designated as an enemy combatant and held that the Due Process Clause of the United States Constitution requires “notice of the factual basis for [the citizen-detainee’s] classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.” 124 S.Ct. at 2648. A plurality of the Court observed: “There remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal,” and proffered as a benchmark for comparison the regulations titled, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190–8, §1–6 (1997). *Id.* at 2651.

Article 10 - Treatment of persons deprived of their liberty

174.*Humane treatment and respect*. As discussed in paragraphs 259 – 299 of the Initial Report, the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as federal and state statutes, regulate the treatment and conditions of detention of persons deprived of their liberty by state action. When the actual practice of detention in the United States does not meet constitutional standards, individuals are held accountable.

175.The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(a), authorizes the Attorney General of the United States to sue for equitable relief when there is reasonable cause to believe that a state or locality is subjecting institutionalized persons to conditions that deprive them of their rights under the United States Constitution or federal laws.

176.*Correctional systems: federal government*. Individuals convicted of federal crimes are sentenced by U.S. District Courts to the custody of the United States Attorney General. The Attorney General is appointed by the President and confirmed by the U.S. Senate, and manages the U.S. Department of Justice (DOJ). The Attorney General delegates custody responsibilities to the Federal Bureau of Prisons (BOP). The Director of the Bureau of Prisons retains full administrative responsibility for offenders designated to the Attorney General’s custody.

177.The BOP operates 106 correctional facilities throughout the nation, including 17 penitentiaries, 60 correctional institutions, 10 independent prison camps, 12 detention centers, and 7 medical referral centers. The Bureau is responsible for the incarceration of inmates who have been sentenced to imprisonment for federal crimes, the detention of some individuals awaiting trial or sentencing in federal court, and the confinement of the District of Columbia’s (D.C.) sentenced felon inmate population. The BOP places sentenced inmates in facilities commensurate with their security and program needs through a system of classification which allows the use of professional judgment within specific guidelines. Persons being detained prior to their trial, or while waiting for their immigration hearings, are normally designated to special “detention” facilities or housing units within correctional institutions. These inmates are, to the extent practicable, managed separately from convicted offenders. See 18 U.S.C. § 3142(i)(2).

178.The Bureau of Prisons contracts with privately-operated prisons and community corrections centers (CCCs or halfway houses), with local jails for short-term confinement, and with privately-operated juvenile facilities. The BOP uses contracting to help manage the federal inmate population when the contracting arrangement is cost-effective and complements the agency’s operations and programs. Offenders in pre-release CCC are still under the custody of the Attorney General and the BOP, although the daily management of these inmates is administered by the staff of the halfway house. Private halfway houses are monitored regularly by BOP staff who provide training to CCC staff and who inspect the facilities to ensure that the CCC is in compliance with federal regulations regarding offender program needs and facility safety requirements.

179.The operation of federal correctional institutions is directly supervised by the Director of the Bureau of Prisons, who reports to the Attorney General. When problems arise or allegations are raised regarding misconduct, the Attorney General may initiate an investigation. The Office of Inspector General within the Department of Justice conducts such investigations at the Attorney General’s request. In addition, the BOP investigates allegations of staff misconduct internally through its Office of Internal Affairs. A separate branch of the Department of Justice may become involved if there is reason to believe the prisoners’ rights are being violated. The legislative branch, the U.S. Congress, may initiate an investigation of the BOP’s operations where problems are brought to their attention. Finally, federal courts may be called upon to resolve problems.

180.In December 2003, the Office of the Inspector General (OIG) of the Department of Justice issued a report examining allegations that some correctional officers at the Federal Bureau of Prisons’ (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York, physically and verbally abused individuals detained after the 11 September, 2001, attacks on the United States. This report was issued as a supplemental report to the OIG’s June 2003 report that examined the treatment of 762 detainees held on immigration

charges in connection with the federal government's investigation of the 11 September, 2001 attacks.

181. The OIG's December 2003 report concluded that the evidence substantiated allegations of abuse by some MDC correctional officers of some detainees, and the OIG recommended that the BOP discipline certain MDC employees. After reviewing the matter, the Department of Justice's Civil Rights Division declined criminal prosecution of the correctional officers.

182. While the OIG report did not find evidence that the detainees were brutally beaten, the OIG concluded that the evidence showed that some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods. In addition, the OIG found that some MDC staff verbally abused some detainees. The OIG determined that the way these MDC officers handled some detainees was in many respects unprofessional, inappropriate, and in violation of BOP policy.

183. The OIG's report also discussed other findings concerning the treatment of detainees at the MDC. For example, the OIG found that the MDC videotaped detainees' meetings with their attorneys. On many videotapes, portions of detainees' conversations with their attorneys were audible. This violated a federal regulation (28 C.F.R. § 543.13(e)) and BOP policy.

184. In an appendix to the OIG's December 2003 report, the OIG provided the BOP with recommendations regarding discipline for specific MDC employees. That section of the report was not released publicly because of the potential of disciplinary proceedings against the correctional officers.

185. The BOP initiated an investigation based on the OIG's findings to determine whether discipline was warranted. The BOP completed its review in July 2005. It sustained many of the OIG's findings and has initiated the disciplinary process.

186. *Complaints.* As reported in paragraphs 276 – 280 of the Initial Report, the Department of Justice receives and acts on complaints sent directly from both federal and state prisoners. Since the passage of the statute in 1980, some 400 institutions have been investigated.

187. *Prosecutions.* Abuses do occur in jails and prisons in the United States. The Department of Justice has prosecuted a variety of cases involving federal and state prison officials, including the following examples:

Six correctional officers at the Cummins Unit of the Arkansas Department of Corrections beat and shocked two naked and handcuffed victims with a hand-held stun gun and cattle prod on the buttocks and testicles in retaliation for them throwing urine and water on a female officer. During a separate incident, three of the six defendants shocked and beat another handcuffed inmate as punishment for his earlier refusal to submit to handcuffing. Five defendants entered guilty pleas while the sixth defendant was convicted at trial. The defendants were sentenced to terms of incarceration ranging from 12 to 108 months. *United States v. Bell*;

Four officers at the Lea County Correctional Facility in Hobbs, New Mexico were charged with kicking an inmate multiple times in the head while he was lying on the floor and while one of the four defendants, a lieutenant, failed to prevent the assault. The defendants subsequently prepared and submitted false statements to investigators in order to hide the truth about the assault. Three of the defendants were convicted at trial while the fourth defendant entered a guilty plea pre-trial. The defendants were sentenced to terms of incarceration ranging from 24 to 78 months. *U.S. v. Fuller, et al*;

A correctional officer at the Federal Correctional Institute in Danbury, Connecticut, pled guilty to engaging in sexual acts with five female inmates. The defendant was sentenced to 20 months in prison. *U.S. v. Tortorella*;

Seven correctional officers at the United States Penitentiary in Florence, Colorado, participated in frequent, unlawful assaults of inmates in retaliation for inmate misconduct. Three of the seven were convicted at trial and sentenced to terms of incarceration ranging from 30 to 41 months while four officers were acquitted. Three additional defendants pled guilty to civil rights violations prior to trial. See, *U.S. v. LaVallee, et al*, 269 F.Supp.2d 1297 (D. Colo. 2003).

188. Since October 1997, the Department of Justice has filed charges in 270 cases of official misconduct against more than 470 law enforcement officers. Approximately one third of those cases filed involved violations of a prisoner or person in jail.

189. *Adult aliens in immigration custody.* The Department of Homeland Security continues to address allegations that arise about the treatment of aliens held in immigration detention. Within the Department of Homeland Security, the Bureau of Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO) detains approximately 19,000 aliens in Service Processing Centers, Contract Detention Facilities and local facilities through Inter-governmental Service Agreements (IGSA). ICE regularly meets at both the national and local levels with various non-governmental organizations (NGOs) (such as the American Immigration Lawyers Association, the American Bar Association, Catholic Legal Immigration Network) to address such allegations. A national NGO working group meets in Washington, D.C. at ICE Headquarters. ICE also regularly meets with consular officials to address allegations of mistreatment.

190. Since the Initial U.S. Report, in November 2000, the former Immigration and Naturalization Service (INS) promulgated the National Detention Standards (NDS). These 36 standards were the result of negotiations between the American Bar Association, the Department of Justice, the INS and other organizations involved in pro bono representation and advocacy for immigration detainees. The NDS provides policy and procedures for detention operations. Previously, policies governing detention operations were not consolidated in one location, but were instead sent to field officers via periodic memoranda containing guidance and policy statements. As a result, local differences among INS detention offices were possible.

191. The NDS are comprehensive, encompassing areas from legal access to religious and medical services, marriage requests to recreation. The four legal access standards concern visitation, access to legal materials, telephone access, and group presentations on legal rights. In July 2003, the 37th standard was introduced for Staff-Detainee Communication. Effective March 2003, the Office of Detention and Removal Operations became a division of ICE within the Department of Homeland Security. Effective September

2004, the Detainee Transfer standard was added. The 38 NDS can be accessed via the Internet at <http://www.ice.gov/graphics/dro/opsmanual/index.htm>.

192. ICE is committed to ensuring that the conditions of confinement for aliens detained pursuant to ICE authority meet or exceed the National Detention Standards. These standards are based on current ICE detention policies, Bureau of Prisons' Program Statements and the widely accepted American Correctional Association Standards for Adult Local Detention Facilities, but are tailored to serve the unique needs of ICE detainees. All ICE facilities are required to comply with such standards. Additionally, wherever possible, ICE works with private contract facilities and state, local and federal government agencies which are holding aliens under Intergovernmental Service Agreements to ensure that non-ICE facilities comply with ICE's detention standards.

193. On 24 January, 2002, DRO completed and implemented the Detention Management Control Program (DMCP) to operational components at all levels. The DMCP replaced the outdated INS Jail Inspection Program. The purpose of the DMCP is to prescribe policies, standards, and procedures for ICE detention operations and to ensure detention facilities are operated in a safe, secure and humane condition for both detainees and staff. The DMCP consists of a series of events designed to ensure that reviews/inspections of detention facilities are conducted in a uniform manner.

194. All Service Processing Centers, Contract Detention Facilities, and Intergovernmental Service Agreements are reviewed annually using procedures and guidance as outlined in DMCP. During FY 2003, a cumulative total of 8 Special Assessments were conducted as a result of reported significant incidents, reported deficiencies, at-risk detention reviews or significant media event. Some examples follow:

A special assessment was prompted at a facility in Oklahoma following an escape. Health, welfare and safety issues were identified during the assessment. Corrective actions taken by ICE included the removal of all ICE detainees from the facility and the termination of the agreement;

Following an escape of a detainee, a special assessment was conducted at a facility used in Washington. The population was ordered reduced due to health, welfare and safety issues. Monthly site visits were instituted until the facility became compliant with the contract and applicable standards. The contractor removed the Warden and Assistant Warden;

After allegations of assault on a detainee by staff at a parish jail in Louisiana, a special assessment was conducted. The officer was arrested and prosecuted by the Parish District Attorney, other staff were terminated, and disciplinary action initiated. No further action by ICE was required.

195. ICE concluded capacity studies for its Service Processing Centers (SPCs) in 2003. These studies were conducted by an independent agency. They determined the proper population levels at each facility based on operational, design, and emergency capacity parameters. Pursuant to completion of these studies, ICE issued policy directives mandating facility compliance with assessed appropriate population levels. In addition, the DHS Office for Civil Rights and Civil Liberties reviews certain specific allegations of mistreatment or abuse at immigration detention facilities and makes recommendations to ICE to assist in the implementation of the National Detention Standards.

196. *Care and Placement of Unaccompanied Alien Children*. Effective March 2003, functions under U.S. immigration laws regarding the care and placement of unaccompanied alien children (UACs) were transferred from the Commissioner of the former Immigration and Naturalization Service to the Office of Refugee Resettlement (ORR) within the Administration for Children and Families (ACF) at the Department of Health and Human Services (HHS). See section 462 of the Homeland Security Act of 2002. DHS and HHS ORR also have joint obligations under the settlement agreement that followed the Supreme Court's decision in *Reno v. Flores*, 507 U.S. 292 (1993). The *Flores* agreement directs that when a child is in the custody of the federal government the child will be treated with dignity, respect and special concern for the particular vulnerabilities of children. The agreement favors release to custodians where consistent with public safety, the safety of the juvenile, and the need for the juvenile to appear for immigration proceedings. Juveniles are only released to a responsible adult.

197. Responsibilities of ORR under the law include: making and implementing placement determinations and policies, identifying sufficient qualified placements to house UACs, ensuring that the interests of the child are considered in decisions related to the care and custody of UACs, reuniting UAC with guardians or sponsors, overseeing the infrastructure and personnel of UAC facilities, conducting investigations and inspections of facilities housing UACs, collecting and comparing statistical information on UACs, and compiling lists of qualified entities to provide legal representation for UACs.

198. The UAC Program has accomplished a great deal since its inception within ORR. The program has made great strides in improving overall services within facilities, including enhanced clinical and mental health services. The program has also been faced with a dramatic increase in the number of apprehended juveniles due to increased Department of Homeland Security border initiatives. As a result, the program has added over 300 shelter or foster care beds to accommodate the influx, marking a significant achievement for this program. This was accomplished without reliance on secure detention facilities. In fact, since March 2003 the program has dramatically reduced its reliance on secure detention by ensuring that only those with a severe criminal background are placed in a secure juvenile facility. Children are never mixed with an adult population, since the current facilities under contract are licensed to serve only juvenile populations. Currently, less than 2 percent of the total UAC population is in a secure environment. Finally, all facilities are required to ensure an appropriate level of care in terms of education, counseling, recreation and mental health services.

199. *Reform and rehabilitation*. While there is no right under the United States Constitution to rehabilitation, *Coakley v. Murphy*, 884 F.2d 1218 (9th Cir. 1989), all prison systems have as one of their goals the improvement of prisoners to facilitate their successful reintegration into society. The mission of the Federal Bureau of Prisons is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. Moreover, the Bureau of

Prisons has a responsibility to provide inmates with opportunities to participate in programs that can provide them with the skills they need to lead crime-free lives after release. The BOP provides many self-improvement programs, including work in prison industries and other institution jobs, vocational training, education, substance abuse treatment, religious observance, counseling, and other programs that teach essential life skills. 28 C.F.R. parts 544, 545, 548, and 550.

200. Some minimum-security inmates from federal prison camps perform labor-intensive work off institutional grounds for other federal entities such as the National Park Service, the U.S. Forest Service, and the U.S. armed services. These inmates work at their job site during the day and return to the institution at night.

201. Federal prisoners are also provided the opportunity to participate in self-improvement programs that can provide them with the skills they need to lead crime-free lives after release. These programs include vocational training, substance abuse treatment, religious observance, parenting, anger management, counseling, and other programs that teach essential life skills. In the Bureau of Prisons, currently 34 percent of the inmates have a substance abuse disorder. The Bureau of Prisons also provides other structured activities designed to teach inmates productive ways to use their time.

Article 11 - Freedom from imprisonment for breach of contractual obligation

202. As reported in the Initial Report, in the United States, imprisonment is never a sanction for the inability to fulfill a private contractual obligation.

Article 12 - Freedom of movement

203. As reported in the Initial Report, in the United States, the right to travel - both domestically and internationally - is constitutionally protected. The U.S. Supreme Court has held that it is "a part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment". See *Zemel v. Rusk*, 381 U.S. 1 (1965). As a consequence, governmental actions affecting travel are subject to the mechanisms for judicial review of constitutional questions described elsewhere in this report. Moreover, the United States Supreme Court has emphasized that it "will construe narrowly all delegated powers that curtail or dilute citizens' ability to travel". See *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

204. *Alien travel outside the United States.* Non-citizen residents are generally free to travel outside the United States, but may need special permission to return in some circumstances. For example, lawful permanent residents need permits to re-enter the United States for travel abroad of one year or more. These documents should be applied for before leaving the United States, see 8 U.S.C. § 1203, INA § 223; 8 C.F.R. § 223.2(b), but departure before a decision is made on the application does not effect the application. Aliens with pending applications for lawful status who travel abroad must apply for advance permission to return to the United States if they wish to re-enter the country. A departure before a decision is made on such an application is deemed an abandonment of the application, with limited exceptions. A refugee travel document allows people who are refugees or asylees to return to the United States after travel abroad. Although it should be applied for before travel, it may be issued even where the applicant is outside the United States. 8 C.F.R. § 223.2(b)(2)(ii). In addition, the INA vests in the President broad authority to regulate departure of citizens and aliens from the United States. See INA § 215, 8 U.S.C. § 1185.

205. *Alien travel within the United States.* Travel within the United States may be restricted for illegal aliens who are charged as removable and placed in immigration proceedings. As a condition of release from detention, restrictions may be placed on travel outside certain geographical areas to limit risk of flight.

Article 13 - Expulsion of aliens

206. On 1 March, 2003, the US Immigration and Naturalization Service ("INS") ceased to exist as an independent agency within the Department of Justice, and its functions were transferred to the newly formed Department of Homeland Security, along with more than 20 other agencies. See Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, § 441, 116 Stat. 2135, 2178, 2192 (Nov. 25, 2002). The Executive Office for Immigration Review ("EOIR"), which includes the Immigration Courts and the Board of Immigration Appeals, remained within the Department of Justice. Since the Initial Report, numerous aspects of U.S. immigration law and practice have changed substantially. The following discussion seeks to highlight the most notable developments.

207. At present, the United States provides annually for the legal immigration of over 700,000 aliens each year, with special preferences granted for family reunification and particular employment categories. In 2003, 705,827 aliens immigrated legally to the United States. In addition, each year the United States grants admission to refugees fleeing their home country, and accords asylum to many others already present in the United States. Illegal immigration to the United States, however, continues to grow substantially. The total number of aliens illegally in the United States was estimated in 2000 to be over 7 million. This number rose consistently by approximately 350,000 a year from 1990-1999. Using this estimate, the number of illegal aliens residing in the United States today may be as high as 8.5 million. In response, the United States has sought to balance its legal immigration system with a fair and just removal process that works to expel illegal aliens while securing the borders and protecting United States citizens and lawfully admitted aliens.

208. There have been considerable changes in U.S. immigration law since the Initial Report. One significant piece of immigration reform legislation enacted since the last U.S. report is the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 279 (1996) (AEDPA). The AEDPA, among other things, established a ground of inadmissibility to the U.S. for members or representatives of foreign terrorist organizations and provided related bars to various immigration benefits and forms of relief from deportation such as withholding of deportation, voluntary departure, and adjustment of status. The Act also established new alien terrorist removal procedures at title V of the INA, although the special procedures have not yet been employed. In addition, the AEDPA allowed for deportation of nonviolent offenders prior to completion of their sentences and broadened the definition of "aggravated felony", to which significant immigration consequences attach.

209. Several months later, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3546 (Sept. 30, 1996) (IIRIRA), which comprehensively overhauled the immigration laws of the United States. IIRIRA replaced exclusion and deportation proceedings with “removal proceedings.” 997. An alien in removal proceedings post-IIRIRA can be charged as removable in one of two ways, “inadmissible” or “deportable.”

210. Prior to IIRIRA the government looked to whether an alien had made an “entry” into the United States to determine whether exclusion or deportation proceedings applied. Entry referred to those aliens, within the United States, who were inspected and admitted, as well as those who evaded inspection and came into the United States illegally. The INA now requires that the government look not to whether an alien had “entered” the United States, but whether the alien had been “admitted” to the United States. Admission is statutorily defined in the INA as a lawful entry following inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A). Aliens who have been admitted to the United States are charged as deportable when placed into removal proceedings. Aliens who are present in the United States but were never inspected and admitted at an official entry point to the United States are charged as inadmissible. The provisions of the INA apply different grounds of removal to deportable (8 U.S.C. § 1227), and inadmissible (8 U.S.C. § 1182) aliens.

211. *Arriving Aliens Who Are Inspected at the Border.* An alien has the burden of satisfying the immigration officer at the border point of entry that the alien is entitled to be admitted to the United States and is not subject to removal. If the officer concludes the alien is not entitled to be admitted to the United States, the officer may temporarily detain the alien for further inquiry. The purpose of the second inquiry is to gather additional information regarding the alien’s admissibility. If DHS determines that the alien will not be admitted, the alien is detained for further proceedings. DHS may at any time permit an alien to withdraw his or her application for admission. 8 C.F.R. § 235.4.

212. *Parole.* DHS may, in its discretion, parole (release) into the United States an arriving alien who is not admitted. In general, parole may be granted on a case-by-case basis for urgent humanitarian reasons or significant public benefit. 8 U.S.C. § 1182(d)(5). Parole may also be granted to aliens who have serious medical conditions where detention would not be appropriate. 8 C.F.R. § 1212.5(b)(1).

213. *Unaccompanied Juveniles.* Special rules apply to unaccompanied juveniles. The care and placement of unaccompanied juveniles was recently transferred from DHS to the U.S. Department of Health and Human Services, Office of Refugee Resettlement (ORR), by the Homeland Security Act of 2002. ORR endeavors to place unaccompanied juveniles with a relative or in a licensed shelter care facility. 8 C.F.R. §§ 1212.5(a)(3)(i), 1236.3.

214. *Removal.* Aliens physically present in the United States, who were not stopped at or near the border, may be expelled or “removed” pursuant to extensive procedural safeguards provided by the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. Aliens who are illegally present in the United States are subject to removal proceedings. Expedited removal is discussed below in the removal hearing subcategory. Aliens who were admitted (inspected and authorized by an immigration officer upon arrival) are charged as deportable when placed into removal proceedings. Grounds for deportation include, but are not limited to: (i) violation of nonimmigrant status; (ii) marriage fraud; (iii) falsification of documents; (iv) alien smuggling; (v) national security grounds; and (vi) conviction of certain crimes.

215. *Inadmissible Aliens.* Aliens who have not been admitted to the United States are charged as inadmissible when placed into removal proceedings. Grounds of inadmissibility include, but are not limited to: (i) health related grounds; (ii) certain criminal violations; (iii) national security and terrorism grounds; (iv) public charge; (v) aliens present without being admitted or paroled; and (vi) falsification of facts or documents to procure an immigration benefit. Regardless of whether an alien is charged as inadmissible or deportable, removal hearings are held before one of the U.S. Immigration Courts, which reside within the Department of Justice’s Executive Office of Immigration Review.

Relief and protection from removal

216. *Waivers.* Various waivers are available for some of the grounds of inadmissibility. For example, a waiver of inadmissibility is available under section 212(h) of the INA for certain minor criminal offenses. To qualify, the alien applicant must demonstrate that he or she is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident of the U.S. and that the U.S. citizen or lawful permanent resident family member would suffer extreme hardship if the alien applicant were removed from the United States. 8 U.S.C. § 1182(h).

217. *Cancellation of Removal.* Section 304 of IIRIRA eliminated the former INA § 212(c) waiver of inadmissibility and the former form of relief called “suspension of deportation” and replaced them with a form of relief from removal called “cancellation of removal.” See 8 U.S.C. § 1229b(a). One form of cancellation of removal is for lawful permanent residents (LPR), the other for non-LPRs. As a general matter, an immigration judge may cancel the removal of an LPR if the alien has been an LPR for at least five years, has resided continuously in the United States for at least seven years after having been admitted in any status, and has not been convicted of an aggravated felony.

218. Cancellation of removal is also available to a non-LPR who is inadmissible or deportable from the United States if the alien has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application, has been a person of good moral character during such period, has not been convicted of a criminal offense or security or terrorist related crime, and establishes that removal would result in “exceptional and extremely unusual hardship” to the alien’s spouse, parent, or child, who is a U.S. citizen or LPR. See 8 U.S.C. § 1229b(b).

219. *Asylum.* See discussion below under sub-heading “United States refugee and asylum policy.”

220. *Convention Against Torture.* Regulations implementing Article 3 of the Convention Against Torture permit aliens to raise

Article 3 claims during the course of immigration removal proceedings. These regulations fully implement U.S. obligations under Article 3 and set forth a fair and rule-bound process for considering claims for protection. Individuals routinely assert Article 3 claims before immigration judges within the EOIR, whose decisions are subject to review by the Board of Immigration Appeals, and ultimately, to review in U.S. federal courts. In exceptional cases where an arriving alien is believed to be inadmissible on terrorism-related grounds, Congress has authorized alternate removal procedures in limited circumstances that do not require consideration or review by EOIR. *See* 8 U.S.C. § 1225(c). The implementing regulations provide that removal pursuant to section 235(c) of the Act shall not proceed “under circumstances that violate Article 3 of the Convention Against Torture.” *See* 8 C.F.R. § 235.8(b)(4).

221. Article 3 protection is a more limited form of protection than that afforded to aliens granted asylum under the INA. This more limited form of protection is similar to withholding of removal, *see* 8 U.S.C. § 1231(b)(3), through which the United States implements its nonrefoulement obligations under the Refugee Protocol. An alien granted protection under the Convention Against Torture may be removed to a third country where there are no substantial grounds for believing that the alien will be subjected to torture. Furthermore, the regulations contain special streamlined provisions for terminating Article 3 protection for an alien who is subject to criminal and security-related bars, when substantial grounds for believing the alien would be tortured if removed to a particular country no longer exist. Finally, in a very small number of appropriate cases, pursuant to 8 C.F.R. § 208.18(c), the United States may consider diplomatic assurances from the country of proposed removal that the alien will not be tortured if removed there. In such removal cases, the Secretary of Homeland Security (and in cases arising prior to the enactment of the Homeland Security Act, the Attorney General), in consultation with the Department of State, would carefully assess such assurances to determine whether they are sufficiently reliable so as to allow the individual’s removal consistent with Article 3 of the Torture Convention.

222. Aliens who are subject to criminal- or security-related grounds - and are thus ineligible for other immigration benefits or protection - may be eligible for protection under Article 3. The United States provides a more limited form of protection - “deferral of removal” - to aliens otherwise subject to exclusion grounds.

223. *Voluntary Departure.* The Attorney General or Secretary of Homeland Security may permit an alien voluntarily to depart the United States at the alien’s own expense in lieu of being subject to removal proceedings or prior to the completion of removal proceedings. Voluntary departure is beneficial inasmuch as it allows the removable alien to avoid an order of removal, which can trigger a lengthy bar to readmission to the United States. The period within which the alien must voluntarily depart may not exceed 120 days. Certain criminal or terrorist aliens are ineligible for this form of relief from removal. *See* 8 U.S.C. § 1229c(a).

224. An alien, unless subject to the criminal or terrorist bars to voluntary departure, may also request voluntary departure at the conclusion of removal proceedings. *See* 8 U.S.C. § 1229c(b). In order to receive post-hearing voluntary departure, an alien must have been physically present in the United States for at least one year prior to service of the NTA, must show good moral character, must not be subject to the criminal or terrorist bars to such relief, must not have been granted voluntary departure prior to the hearing, and must establish by clear and convincing evidence that he or she can leave at their own expense and that he or she intends to do so. The qualifying alien may only receive up to 60 days to effect a grant of voluntary departure following completion of removal proceedings.

225. *Removal hearing.* In general, proceedings before an immigration judge commence when the Department of Homeland Security (DHS) issues a Notice to Appear (NTA), charging the alien as deportable or inadmissible and thus removable from the United States. 8 C.F.R. § 239.1(a). An alien who concedes removability may apply for discretionary relief from removal provided he or she meets the statutory requirements for such relief. An alien who has not applied for discretionary relief or voluntary departure may be ordered removed from the United States by the immigration judge.

226. In cases where an alien was admitted to the United States and deportability is at issue, the burden is on the government to establish that the alien is deportable by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A). When an alien has been charged as inadmissible, the burden is on the alien to prove that he or she is clearly and beyond doubt entitled to be admitted to the United States, or, that by clear and convincing evidence, he or she is lawfully present in the United States pursuant to a prior admission. 8 U.S.C. § 1229a(c)(2)(A) and (B).

227. Upon issuance of the NTA, DHS may either take the alien into custody upon issuance of a warrant, or release the alien on bond or conditional parole. 8 C.F.R. § 236(a). Such actions occur at the discretion of DHS, with some exceptions noted below. In most cases, an immigration judge may review a custody or bond decision made by DHS at the request of an alien or his or her representative. Exceptions include: (i) aliens who have violated national security grounds; and (ii) aliens convicted of certain serious crimes. 8 C.F.R. §§ 1003.19; 1236.1.

228. Review by the federal courts of the lawfulness of detention remains available through a petition for writ of habeas corpus (habeas petition). DHS is obligated by statute to take into custody any alien convicted of certain criminal offenses or terrorist activity, but in most cases may release the alien if such release is deemed necessary to provide protection to a witness or potential witness cooperating in a major investigation, and DHS decides that the alien’s release will not pose a danger and the alien is likely to appear for scheduled proceedings. 8 U.S.C. § 1226(c)(2). An alien’s release on bond or parole may be revoked at any time in the discretion of DHS. 8 U.S.C. § 1226(b).

229. Removal hearings are open to the public, except that the immigration judge may, due to lack of space, or for the purpose of protecting witnesses, parties, the public interest, or abused alien spouses, limit attendance or hold a closed hearing in any specific case. 8 C.F.R. § 1003.27. Proceedings may also be closed to the public upon a showing by DHS that information to be disclosed in court may harm the national security or law enforcement interests of the United States. 8 C.F.R. § 1003.27(d).

230. At the outset of a proceeding, the immigration judge must advise the alien of their right to representation, information on pro-bono counsel, and that the alien will have the opportunity to examine and object to evidence and to cross-examine witnesses. The immigration judge must also read to the alien the facts alleged in the NTA and request that the alien admit or deny each factual

allegation under oath. *See* 8 C.F.R. § 1240(b)(1).

231. During removal proceedings, the immigration judge has the authority to determine whether an alien is inadmissible or deportable, to grant discretionary relief from removal (e.g., voluntary departure, asylum, cancellation of removal), and to determine the country to which an alien's removal will be directed. An alien in removal proceedings retains the right to representation, at no expense to the government, by qualified counsel of his choice. 8 U.S.C. § 1229a(b)(2)(B)(4). An alien must also be afforded a competent, impartial interpreter if the alien is not able to communicate effectively in English.

232. The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), amended the INA, significantly expanded the terrorism-related grounds of inadmissibility and deportability. The USA PATRIOT Act also set forth provisions authorizing immigration authorities to detain and remove alien terrorists and those who support them and providing for humanitarian immigration relief to non-citizen victims of the attacks on 11 September, 2001.

233. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 7, 2004), established new grounds of inadmissibility and deportability and bars to immigration relief designed to prevent human rights abusers (i.e., those aliens who have engaged in genocide, torture, extrajudicial killings, or severe violations of religious freedom) from entering or remaining in the United States. The statute also broadened the authority of the Office of Special Investigations (OSI) within the Department of Justice's Criminal Division. The OSI detects, investigates and takes legal action to denaturalize aliens who are inadmissible for having participated in Nazi persecution, genocide, torture or extrajudicial killing. In addition, the law created the Human Smuggling and Trafficking Center within the Department of State to achieve greater integration and overall effectiveness in the U.S. government's efforts to combat alien smuggling, trafficking in persons, and criminal support of clandestine terrorist travel.

234. *Hearing in Absentia*. If an alien fails to appear at his or her removal proceeding, he or she will be ordered removed from the United States if the government establishes by "clear and unequivocal evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. § 1229a(b)(5). An in absentia order may be rescinded in two circumstances. The alien may make a motion to reopen within 180 days of the final order if he or she can show that the failure to appear was due to exceptional circumstances, or he or she may file a motion to reopen at any time showing that he or she did not receive proper notice of the hearing. 8 U.S.C. § 1229a(b)(5)(C).

Additional removal proceedings in particular circumstances

235. *Expedited Removal of Arriving Aliens*. The IIRIRA established a special, expedited removal procedure for certain aliens. Persons found to be inadmissible at a port-of-entry under sections 212(a)(6)(C) (seeking to procure visa or admission to the United States by fraud or willful misrepresentation) or 212(a)(7) (not possessing valid entry documents) of the INA are subject to immediate removal unless the alien satisfies exceptions defined in the INA. 8 U.S.C. § 1225(b)(1). Expedited removal procedures currently are also applied to two categories of aliens who evade inspection and enter the United States illegally: (1) aliens arriving by sea who have not been in the United States for at least two years; and (2) aliens apprehended within 100 miles of a U.S. international land border within 14 days of entry. Implementation of expedited removal with respect to the latter category has commenced in select areas of the United States and was recently expanded to cover the entire southwest border of the United States. Expedited removal is necessary to prevent potential dangerous mass migrations of economic migrants by sea and to enhance the security and safety of the U.S. land border.

236. Before the expedited removal procedure is used, the examining officer creates a statement of the facts regarding an alien's identity, alienage, and inadmissibility. 8 C.F.R. § 235.3(b)(2)(i). The officer also advises the alien of the charges against him or her and affords the alien the opportunity to respond to those charges. *Id.* If an alien claims to be a permanent resident, a refugee, an asylee, or a United States citizen, the alien is referred to an immigration judge for a determination of that claim or for a removal hearing if the claim is verified. 8 C.F.R. § 235.3(b)(5).

237. Aliens placed in expedited removal are generally not entitled to a hearing before an immigration judge unless they are found to have a "credible fear" of persecution or torture in their country of origin (i.e., a "significant possibility" that the alien could establish eligibility for asylum or for protection under the Convention Against Torture). 8 U.S.C. § 1225(b)(1)(B)(v). If the alien expresses a fear of return to his or her country or indicates a desire to apply for asylum, the alien is referred to an asylum officer for a credible fear interview to determine whether the alien has a credible fear of persecution or torture. 8 C.F.R. § 235.3(b)(4). An alien has the right to contact family members, friends, attorneys, or representatives prior to the interview. 8 C.F.R. § 1235.3(b)(4)(B). The alien may have a representative present at the interview, and the asylum officer must arrange for an interpreter for the interview if necessary. 8 C.F.R. § 1208.30(d)(5). If the asylum officer finds that the alien does not have a credible fear of persecution or torture, the alien may request review of that determination by an immigration judge. 8 C.F.R. § 1235.3(4)(C). If the officer finds that credible fear exists, the alien is referred to an immigration judge for full consideration of any protection claims. 8 C.F.R. § 208.30(f).

238. Aliens denied admission at the border are considered to be at "the threshold of entry" and thus cannot assert a liberty interest under the Constitution to be admitted into the United States. *Shaughnessy v. Mezei*, 345 U.S. 206 (1953); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

239. *Aliens Convicted of Serious Crimes*. An alien who has not been lawfully admitted for permanent residence and has been convicted of an aggravated felony may be placed into a different kind of removal proceeding under section 238 of the INA, 8 U.S.C. § 1228. An alien placed into section 238 proceedings must be given written notice of the allegations and legal charges. 8 C.F.R. § 1238.1(i). The alien may inspect the evidence supporting the charges and may rebut the charges within 10 days (13 days by mail) of service of the notice. 8 C.F.R. § 1238.1(ii). During this period, the alien may request in writing the country he or she elects as the country of removal. *Id.* The alien has the right to representation by counsel of his or her choice, at no expense to the government, during this process and retains the right to request withholding of removal under 8 U.S.C. § 1231(b)(3) if he or she fears persecution

or torture in the designated country of removal.

240. *Decisions and appeals.* A decision of an immigration judge in a removal hearing may be written or oral. 8 C.F.R. § 1003.37. Appeal from the decision lies with the Board of Immigration Appeals. 8 C.F.R. § 1003.38.

241. *Federal Court Review.* Judicial review of the Board of Immigration Appeals decision is generally available via a petition for review in a U.S. Court of Appeals. 8 U.S.C. § 1252(a). An alien may not seek judicial review unless and until he or she has exhausted his or her administrative remedies. 8 U.S.C. § 1252(d)(1). An alien, in limited circumstances, may also file a petition for habeas corpus in a federal district court to challenge the lawfulness of his or her detention. *Zadvydas*, 533 U.S. 678.

242. *Post-Order Detention.* Section 241(a)(1)(A) of the INA provides that “when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days.” 8 U.S.C. § 1231(a)(1)(A). The law requires that, during the 90-day period, certain criminal and terrorist aliens must be detained. 8 U.S.C. § 1231(a)(2)(A). After 90 days, detention of such aliens is no longer mandatory, and is based on an assessment of the flight and safety risk attributed to the alien given his or her history. 8 C.F.R. § 241.4. If after six months there is no significant likelihood of removal in the reasonably foreseeable future, an alien must be released unless special circumstances exist (e.g., alien’s release would endanger national security). *Zadvydas*, 533 U.S. 678; 8 C.F.R. § 241.14. Before determining whether a special circumstance applies, DHS makes a determination that no conditions of release can be reasonably expected to avoid the action threatened by the alien. *Id.*

243. In *Clark v. Martinez*, 543 U.S. ___, 125 S. Ct. 716 (2005), the Supreme Court interpreted INA § 241(a)(6) to mean that the six-month presumptive detention period noted in *Zadvydas* applies equally to all categories of aliens described in INA § 241(a)(6). As a result, the provisions of 8 C.F.R. §§ 241.13 and .14 apply to inadmissible and excludable aliens, including Mariel Cubans, alien crewman, and stowaways.

244. *Country of removal.* Section 241(b) of the INA, 8 U.S.C. § 1231(b), sets forth what is generally a four-step process to determine the country to which an alien will be removed. First, an alien generally will be removed to the country of his choice. If that removal option is not available, the alien generally will be removed to the country of his citizenship. Third, in the event those removal options are not available, the alien generally will be removed to one of the countries with which he has a lesser connection (e.g., country of birth, country from which he traveled to the United States, country of last residence). Finally, if the preceding removal options are “impracticable, inadvisable, or impossible” other countries of removal will be considered. *See generally Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005) (holding that INA generally does not require foreign government’s “acceptance” of alien in order for DHS to effect removal to that country).

245. *United States refugee and asylum policy.* The refugee and asylum policy of the United States, remains that set forth primarily in the Refugee Act of 1980 and the Immigration and Nationality Act, in accordance with the United States’ historical commitment to the protection of refugees and in compliance with the 1967 United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968), to which the United States acceded in 1968.

246. *Refugee admissions.* The Immigration and Nationality Act (INA) provides for the admission into the United States of refugees outside the United States. To be considered a refugee for the purpose of admission to the United States a person must meet the definition contained in INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). See below.

247. Each year, after appropriate consultation with Congress, the President determines an authorized admission level for refugees. The admission ceiling for refugees in U.S. fiscal year 1994 was 121,000. The annual ceiling represents the maximum number of refugees allowed to enter the United States in the stated year, allocated by world geographical region. INA § 207(a). The President may accommodate an emergency refugee situation by increasing the refugee admissions ceiling for a 12-month period. INA § 207(b); 8 U.S.C. § 1157(b). The numbers of refugees admitted to the United States in subsequent fiscal years are as follows: FY 1995: 99,490; FY 1996: 75,682; FY 1997: 70,085; FY 1998: 76,554; FY 1999: 85,317; FY 2000: 73,144; FY 2001: 69,304; FY 2002: 27,029; FY 2003: 28,422; and FY 2004: 52,868. See Annex III for more details.

248. *Asylum.* Under the INA, persons at a United States port of entry or within the United States may seek refugee protection through a grant of asylum or withholding of removal. Asylum is a discretionary form of relief from removal that may be granted to an individual determined to be a refugee. The United States definition of refugee, derived from the U.N. Refugee Protocol, is “any person who is outside of any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A). U.S. law further provides that a person “who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.” INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).

249. The United States refugee definition excludes “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(B). The statutory provision for withholding of removal (*non-refoulement*), derived from Article 33 of the Convention, provides that an individual cannot be removed to a country where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). There are bars to a grant of asylum or withholding of removal, even if eligibility is otherwise established, based on persecution of others, criminal activity, or security concerns, described below. There are certain limitations on the right to apply for asylum, also discussed further below. A related form of protection, temporary protected status, discussed in greater detail below, is available to persons already within the United States when the Homeland Security Secretary determines that certain extreme and temporary conditions in their

country of nationality (such as ongoing armed conflict or an environmental disaster) generally do not permit the United States to return them to that country in safety.

250. Asylum Claims: Numbers. At present, there are some 100,000 asylum claims pending in various stages of adjudication within the affirmative asylum process. This does not include asylum cases filed by individuals in removal proceedings, which are pending before the Executive Office for Immigration Review within the Department of Justice. All but approximately 30,000 of these applications were submitted by individuals who now are covered by special legislation that allows them to apply for lawful permanent resident status. It is expected that the vast majority of the applicants covered by the special legislation will either become lawful permanent residents under those provisions and withdraw their claims for asylum or, having abandoned their asylum claims, will not appear for an asylum interview when scheduled. It is anticipated the Asylum Program will have addressed the backlog of asylum claims by the end of 2006. The number of new asylum receipts has decreased significantly since 2001 and 2002, when the Asylum Division was receiving approximately 60,000 new cases annually. In fiscal year 2004, the Asylum Division received 28,000 applications. The Asylum Division received approximately 23,500 new applications in fiscal year 2005.

251. Asylum Claims: Process. Asylum applications may be submitted by persons who are at a United States port of entry or are physically present in the United States. An asylum applicant may include in his or her application his or her spouse and any unmarried children under age 21 who are present in the United States. Asylum may be granted without regard to the applicant's immigration status or country of origin. There are two paths for an alien present in the United States seeking asylum. First, the alien may come forward to United States Citizenship and Immigration Services (USCIS) within the Department of Homeland Security to apply "affirmatively." Second, the alien may seek asylum as a defense to removal proceedings, even if an ineligibility determination was made during the affirmative process. Under the affirmative process, grants of asylum are within the discretion of the Secretary of the Department of Homeland Security, as executed by Asylum Officers within USCIS. Under the defensive process, grants of asylum are within the discretion of the Attorney General, as executed by immigration judges or the Board of Immigration Appeals within the Department of Justice, Executive Office for Immigration Review.

252. Asylum Application: Prohibitions. The IIRIRA of 1996 (discussed *supra*), which applies to all asylum applications filed on or after 1 April, 1997, included certain prohibitions on the ability to apply for asylum. Under these provisions, an asylum-seeker is not permitted to apply for asylum in the United States if 1) he or she can be returned pursuant to a bilateral or multilateral agreement to a third country where he or she would have access to full and fair procedures for determining a claim to asylum, 2) he or she failed to submit an application for asylum within 1 year from the date of last arrival, unless the person can establish exceptional circumstances relating to the delay or changed circumstances that materially affect eligibility for asylum; or 3) he or she was previously denied asylum in the United States, unless there have been changed circumstances that materially affect eligibility for asylum. INA § 208(a)(2), 8 U.S.C. § 1158(a)(2). These limitations on applying for asylum are not applicable to requests for withholding of removal (non-refoulement). To date, the United States has entered into only one bilateral agreement to return asylum-seekers to a safe third country under the limitation on filing noted above. In December 2002, the United States entered into such an agreement with Canada. The agreement is limited to individuals seeking asylum at land border ports of entry on the U.S.-Canadian border and contains broad exceptions based on principles of family unity. The agreement went into effect on 29 December, 2004, after both countries issued final implementing regulations.

253. Affirmative asylum. Affirmative asylum claims are heard and decided by a corps of USCIS Asylum Officers located in eight regional offices. The Asylum Officer conducts an interview with the applicant "in a non-adversarial manner ... to elicit all relevant and useful information bearing on the applicant's eligibility," 8 C.F.R. § 208.9(b). The applicant may have counsel present at the interview and may submit the affidavits of witnesses. In addition, the applicant may supplement the record at the time of the interview. 8 C.F.R. § 208.9.

254. If the Asylum Officer determines that the applicant is not eligible for asylum and the applicant is not in valid immigration status, the applicant is placed in removal proceedings before an immigration judge within the Department of Justice, and the asylum application is referred to the immigration judge to consider *de novo*. 8 C.F.R. § 208.14. If an ineligible applicant is in valid status, the Asylum Officer denies the asylum application, after the applicant is provided the reasons for the negative determination and an opportunity to rebut the grounds for denial. The applicant retains his or her valid status (e.g., student status). Each Asylum Officer decision is reviewed by a Supervisory Asylum Officer. The basis for an Asylum Officer's decision to deny or refer an application must be communicated to the applicant in writing and must include an assessment of the applicant's credibility. 8 C.F.R. § 208.19. There is no appeal of a grant or denial of asylum by an Asylum Officer. If a denied asylum seeker no longer retains valid status (either it expired or the asylum seeker took actions inconsistent with that status) and is placed in removal proceedings, he or she can apply for asylum *de novo* with the immigration judge.

255. Asylum: Country Conditions Information. Copies of all asylum applications are forwarded to the Office of Country Reports and Asylum Affairs (CRA) within the Department of State's Bureau of Democracy Rights and Labor (DRL). At its option, DRL may comment on the application or may provide detailed country conditions information relevant to the application. 8 C.F.R. § 208.11. In addition to any information from the Department of State, DHS/USCIS Asylum officers consider country conditions information from a wide variety of sources. The Resource Information Center within the Asylum Division of DHS/USCIS is responsible for assisting Asylum Officers with country conditions research and disseminating reliable country conditions information and reports to the eight asylum field offices.

256. Asylum: Mandatory denials. Asylum claims cannot be granted when: (i) the alien ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime (including an aggravated felony), constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to arrival in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; (v) the alien is inadmissible under certain statutory provisions relating to terrorist activity; or (vi) the alien was firmly resettled in another country prior to arriving to the United States. INA §

208(b)(2).

257. *Asylum: Discretionary denials.* An application for asylum may also be denied as a matter of discretion, where appropriate. INA § 208(b)(1); 8 C.F.R. §§ 208.13-.14, 1208.13-.14.

258. *Asylum Termination.* Asylum officers also have limited power to terminate asylum. This power may be exercised when: (i) there is a showing of fraud in the asylum application such that the applicant was not eligible for asylum when it was granted; (ii) the individual no longer meets the definition of refugee owing to a fundamental change in circumstances; (iii) the individual may be removed, pursuant to a bilateral or multilateral agreement to a country other than the country of nationality (or if no nationality, the country of last habitual residence) in which the individual's life or freedom would not be threatened on account of one of the protected characteristics in the refugee definition, and the individual is eligible to receive asylum or equivalent temporary protection (currently the United States has not entered into any such agreements); (iv) the individual has voluntarily availed himself or herself of the protection of his or her country by returning there with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; (v) the individual has acquired a new nationality and enjoys the protection of the country of his or her new nationality; or (vi) a mandatory bar to a grant of asylum applies. INA § 208(c)(2), 8 C.F.R. § 208.24(a).

259. *Asylum and withholding of removal in removal proceedings.* If an alien has been served with a Notice to Appear, he must appear before an immigration judge, with whom he may file an asylum application. The filing of an asylum application is also considered a request for withholding of removal under INA section 241(b)(3). 8 C.F.R. §§ 208.3(b), 1208.3(b).

260. *Asylum and withholding of removal for aliens subject to expedited removal.* In 1997, Congress created expedited removal, which provides for the prompt removal of certain aliens who are illegally arriving at or present in the United States. INA § 235(b). Aliens subject to expedited removal may be removed without referral to an immigration judge for a removal hearing. INA § 235(b)(1)(A)(i). However, an alien subject to expedited removal who expresses either an intention to apply for asylum or a fear of persecution must first be interviewed by an asylum officer. INA § 235(b)(1)(A)(ii). If the asylum officer finds that the alien has a significant possibility of establishing eligibility for asylum or withholding of removal, the alien will be served with a Notice to Appear and given an opportunity to seek protection in removal proceedings before an immigration judge. INA § 235(b)(1)(B)(ii). If the asylum officer makes a negative finding, the alien will be removed, unless he or she requests that an immigration judge review the finding. An immigration judge review of an asylum officer's negative finding must be completed within seven days of the finding. INA § 235(b)(1)(B)(iii)(III).

261. Withholding of removal under INA § 241(b)(3) differs from a request for asylum in four ways. First, section 241(b)(3) prohibits the government from removing an alien only to a specific country, while asylum protects the alien from removal generally. Second, in order to qualify for withholding of removal, an alien must demonstrate that his or her "life or freedom would be threatened" in the country of removal, whereas asylum only requires the alien to demonstrate a well-founded fear of persecution. Third, protection under section 241(b)(3) cannot result in permanent residence, while asylees are eligible to apply for permanent residence after one year. Fourth, relief under section 241(b)(3) is a mandatory restriction imposed on the government while asylum is an immigration benefit which the government has discretion to grant or deny. While asylum claims may be adjudicated either by an asylum officer or an immigration judge, withholding of removal claims made under INA § 241(b)(3) are adjudicated by immigration judges only. 8 C.F.R. §§ 208.16(a), 1208.16(a).

262. An alien will be denied withholding of removal under INA § 241(b)(3) and may be removed to a country, notwithstanding any threat to his or her life or freedom that may exist there, if: (i) he or she has engaged in persecution of others; (ii) he or she has been convicted of a particularly serious crime that constitutes a danger to the community of the United States; (iii) there are serious reasons to believe that he or she has committed a serious non-political crime outside of the United States; or (iv) there are reasonable grounds to believe that he or she may represent a danger to the security of the United States. INA § 241(b)(3)(B).

263. Denial of asylum or withholding of removal by an immigration judge could result in a final order of removal. Aliens granted withholding of removal could also become subject to final orders of removal because the government may remove these aliens to certain countries where their lives or freedom would not be threatened. INA § 241(b)(1), (2). Aliens may appeal immigration judge decisions to the Board of Immigration Appeals within 30 days of the immigration judge's decision. 8 C.F.R. § 1240.15. Appeal, through a "petition for review," to a federal court of appeals is permitted within 30 days of the Board's decision. INA § 242(b)(1).

264. *Rights of refugees and asylees.* An applicant for asylum may be granted employment authorization if: (1) he or she has received a recommended approval of his or her asylum application; or (2) 180 days have elapsed following the filing of the asylum application, and the application has not been denied. 8 C.F.R. § 208.7. An asylum applicant may be granted, in the discretion of the Secretary of Homeland Security, advance parole to travel abroad to a third country. 8 C.F.R. § 212.5(f).

265. *Spouses and Children.* The spouse and children of the person granted asylum or admitted as a refugee may accompany or follow such person without having to apply for protection independently. INA §§ 207(c)(2), 208(b)(3).

266. *Permanent residence.* Persons admitted to the United States as refugees are eligible for permanent resident status after one year of continuous physical presence in the United States. The number of refugees adjusting to permanent resident status is not subject to the annual limitation on immigrants into the United States. INA § 209. An asylee may also apply for permanent resident status after being continuously present in the United States for at least one year after being granted asylum.

267. *Temporary Protected Status.* Under INA § 244, 8 U.S.C. § 1254a, the Secretary of Homeland Security has the authority to grant temporary protected status to aliens in the United States, temporarily allowing foreign nationals to live and work in the United States without fear of being sent back to unstable or dangerous conditions. The United States thus may become, at the Secretary's discretion, a temporary safe haven for foreign nationals already in the country if one of three conditions exist: (i) there is an ongoing armed conflict within the state which would pose a serious threat to the personal safety of returned nationals; (ii) there has

been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial but temporary disruption of living conditions in the area affected; the state is temporarily unable to handle adequately the return of its nationals; and the state officially requests temporary protected status; or (iii) there exist extraordinary and temporary conditions in the state that prevent nationals from returning in safety, as long as permitting such aliens to remain temporarily in the United States is not contrary to the national interest of the United States. INA § 244(b)(1). A designation of temporary protected status may last for 6 to 18 months, with the possibility of extension for an additional 6, 12, or 18 months. INA § 244(b)(2), (3)(C).

268. An alien is ineligible for temporary protected status if he has been convicted of at least one felony or two or more misdemeanors, or is subject to a bar to asylum. INA § 244(c)(2)(B). An alien may also be denied temporary protected status if certain grounds of inadmissibility apply and are not waived. INA § 244(c)(2)(A). The Secretary of Homeland Security must withdraw temporary protected status if: (i) the Secretary finds that the alien was not eligible for such status; (ii) the alien was not continuously physically present in the United States, except for brief, casual, and innocent departures or travel with advance permission; or (iii) the alien failed to re-register annually. INA § 244(c)(3).

269. An alien granted temporary protected status cannot be removed from the United States and is authorized to work while in such status. INA § 244(a)(1). The alien may also travel abroad with advance permission. INA § 244(f)(3). A designation temporary protected status designation does not prevent an alien from applying for any immigration benefit to which the alien may be entitled. INA § 244(a)(5).

270. Since the temporary protected status program began in 1991, eligible nationals from (or aliens having no nationality who last habitually resided in) the following states or parts of states have been granted temporary protected status for the following periods:

Angola: 29 March, 2000 - 29 March, 2003;

Burundi: 4 November, 1997 - 2 November, 2006 (with the possibility of further extension);

Bosnia-Herzegovina: 10 August, 1992 - 10 February, 2001;

El Salvador: 1 January, 1991 - 30 June, 1992; 9 March, 2001 - 9 September, 2006 (with the possibility of further extension);

Guinea-Bissau: 11 March, 1999 - 10 September, 2000;

Honduras: 5 January, 1999 - 5 July, 2006 (with the possibility of further extension);

Kosovo Province: 9 June, 1998 - 8 December, 2000;

Kuwait: 27 March, 1991 - 27 March, 1992;

Lebanon: 27 March, 1991 - 28 March, 1993;

Liberia: 27 March, 1991 - 28 September, 1999; 1 October, 2002 - 1 October, 2006 (with the possibility of further extension);

Montserrat: 28 August, 1997 - 27 February, 2005;

Nicaragua: 5 January, 1999 - 5 July, 2006 (with the possibility of further extension);

Rwanda: 7 June, 1994 - 6 December, 1997;

Sierra Leone: 4 November, 1997 - 3 May, 2004;

Somalia: 16 September, 1991 - 17 September, 2006 (with the possibility of further extension); and,

Sudan: 4 November, 1997 - 2 May, 2007 (with the possibility of further extension).

Article 14 - Right to fair trial

271. *Competent, independent and impartial tribunal.* States may set appropriate standards of conduct for their judges. See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976). The Supreme Court has held, however, that a state canon of judicial conduct that prohibits candidates for judicial elections from announcing their views on disputed political or legal issues violates the First Amendment. See *Republican Party v. White*, 536 U.S. 765 (2002).

272. *Trial by jury.* The right to trial by jury reflects "a profound judgment about the way in which law should be enforced and justice administered". See *Duncan v. Louisiana*, 391 U.S. at 155. In the U.S. system, the jury is the fact-finder. Therefore, a judge may not direct the jury to return a verdict of guilty, no matter how strong the proof of guilt may be. See *Sparf and Hansen v. United States*, 156 U.S. 51, 105-6 (1895). A criminal defendant is entitled to a jury determination beyond a reasonable doubt of every element of the crime with which he is charged, as well as any fact (other than the fact of a prior conviction) that increases the statutory maximum penalty for the offense. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). See also, *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

273. *Civil cases.* Guarantees of fairness and openness also are ensured in the civil context, with federal and state constitutions providing basic and essential protections. In civil disputes, the fundamental features of the United States judicial system - an independent judiciary and bar, due process and equal protection of the law - are common. Most importantly, the Due Process and Equal Protection Clauses of the Constitution - applicable to the states through the Fourteenth Amendment - mandate that judicial decision-making be fair, impartial, and devoid of discrimination. Neutrality is the core value.

274. Neutrality means the absence of discrimination. As is the case with criminal trials, the Equal Protection Clause bars the use of discriminatory stereotypes in the selection of the jury in civil cases. As the Supreme Court held in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991): "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." In *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994), the Court extended this principle to cases involving gender-based exclusion of jurors, holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." As the Court explained (*id.* at 146): "When persons are excluded from participation in our democratic processes solely because of race or gender, ... the integrity of our judicial system is jeopardized."

275. Fairness of civil proceedings also is ensured by the requirement that where they might result in serious "hardship" to a party adversary hearings must be provided. For instance, where a dispute between a creditor and debtor runs the risk of resulting in repossession, the Supreme Court has concluded that debtors should be afforded a fair adversarial hearing. See *Fuentes v. Shevin*, 407 U.S. 67 (1972). See also, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

276. This is particularly true in civil cases involving governmental action, where the Supreme Court, since the 1970s, has recognized the importance of granting procedural rights to individuals. In determining whether procedures are constitutionally adequate, the Court weighs the strength of the private interest, the adequacy of the existing procedures, the probable value of other safeguards, and the government's interest. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Depending on these factors, the United States Constitution mandates different types of guarantees in civil proceedings involving the government. Basic requirements include an unbiased tribunal; notice to the private party of the proposed action; and the right to receive written findings from the decision maker. Applying these principles, the Court has thus held that persons have had a right to notice of the detrimental action, and a right to be heard by the decision maker. See *Grannis v. Ordean*, 234 U.S. 385, 394 (1918) ("The fundamental requisite of due process of law is the opportunity to be heard"); See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare entitlements cannot be interrupted without a prior evidentiary hearing). In the context of civil forfeiture proceedings, the Court has held that citizens have a Due Process right to a hearing to oppose the forfeiture of their property. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-62 (1993). And in *Degen v. United States*, 517 U.S. 820 (1996), the Court ruled that this right to a hearing applies even when the citizen is a fugitive who refuses to return in person to this country to face criminal charges. When action is taken by a government agency, statutory law embodied in the Administrative Procedure Act also imposes requirements on the government, such as the impartiality of the decision maker and the party's right to judicial review of adverse action. As Justice Frankfurter once wrote, the "validity and moral authority of a conclusion largely depend on the mode by which it was reached ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951).

277. Although inequalities in wealth distribution certainly have an impact on individuals' access to the courts and to representation, the equal protection components of state and federal constitutions have helped smooth these differences. In particular, the Supreme Court has held that access to judicial proceedings cannot depend on one's ability to pay where such proceedings are "the only effective means of resolving the dispute at hand". *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971) (holding unconstitutional a state law conditioning a judicial decree of divorce upon the claimant's ability to pay court fees and costs). See also, *M.L.B. v. S.L.J.*, 519 U.S. 201 (1996) (holding unconstitutional a state law conditioning a parent's right to appeal from a trial court's decree terminating her parental rights on her ability to pay record preparation fees).

278. Inequalities remain, though, in part because neither the Constitution nor federal statutes provide a right to appointed counsel in civil cases. Nonetheless, the Supreme Court has made it easier for indigent parties to afford legal representation by invalidating prohibitions against concerted legal action. The Court has thus recognized a right for groups to "unite to assert their legal rights as effectively and economically as practicable". See *United Trans. Union v. State Bar of Michigan*, 401 U.S. 576, 580 (1971). In addition, Congress long ago enacted the "federal *in forma pauperis* statute ... to ensure that indigent litigants have meaningful access to the federal courts." See *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). And in the past 40 years, Congress has enacted an increasing number of fee-shifting statutes - such as the Civil Rights Attorneys Fees Awards Act in 1976 and the Equal Access to Justice Act in 1980 - that enable prevailing parties in certain kinds of cases to recoup all or part of their attorney's fees and expenses from the losing parties.

Rights of the accused

279. *Right to prepare defense and to communicate with counsel.* Defendants retained in custody acquire their Sixth Amendment right to counsel when formal adversarial judicial proceedings are initiated against them. See *Brewer v. Williams*, 430 U.S. 387, 398 (1977). A suspect's invocation of the right to counsel is specific to the charged offense and does not also invoke the right to counsel for later interrogation concerning another factually related offense, unless the two offenses would be deemed the same for double jeopardy purposes. See *Texas v. Cobb*, 532 U.S. 162, 173 (2001). In a landmark decision, the Supreme Court held that the admission of out-of-court testimonial statements violates the Sixth Amendment's Confrontation Clause unless those witnesses are unavailable for trial and the defendant has had an opportunity to cross-examine those witnesses. *Crawford v. Washington*, 541 U.S. 36 (2004).

280. The Sixth Amendment also guarantees a defendant the right to counsel. Although there is no right to appointment of counsel for misdemeanor offenses where no sentence of actual imprisonment is imposed, a suspended sentence may not be activated based upon a defendant's violation of the terms of probation where he was not provided with counsel during the prosecution of the offense for which he received a sentence of probation. *Alabama v. Shelton*, 535 U.S. 654 (2002).

281. *Right to legal assistance of own choosing.* The right to counsel in all federal criminal prosecutions is provided for by the Sixth Amendment. This right has been extended to state courts through operation of the Due Process Clause of the Fourteenth

Amendment. In the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court mandated that every indigent person accused of a felony in a state court must be provided with counsel. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Supreme Court extended this rule to provide for the appointment of counsel to indigent persons charged with any offense, including misdemeanors, which could result in incarceration. In addition, a defendant may not be sentenced to imprisonment based upon his violation of the terms of probation previously imposed for a misdemeanor offense, if he was not provided with counsel during the prosecution of the misdemeanor offense. See *Alabama v. Shelton*, 535 U.S. 654 (2002).

282. *Protection against self-incrimination.* The Fifth Amendment provides that "No person shall be ... compelled in any criminal case to be a witness against himself." This constitutional protection of the individual's right against self-incrimination in criminal cases is applicable to the states as well as the federal government.

283. The Fifth Amendment thus prohibits the use of involuntary statements. It not only bars the government from calling the defendant as a witness at his trial, but also from taking statements from the accused against the accused's will. If a defendant confesses, he may seek to exclude the confession from trial by alleging that it was involuntary. The court will conduct a factual inquiry into the circumstances surrounding the confession to determine if the law enforcement officers acted in a way to pressure or coerce the defendant into confessing and, if so, whether the defendant lacked a capacity to resist the pressure. See *Colorado v. Connelly*, 479 U.S. 157 (1986). Physical coercion will render a confession involuntary. See *Brown v. Mississippi*, 297 U.S. 278 (1936).

284. An individual's right against compelled self-incrimination applies regardless of whether charges have been formally filed. To ensure that the individual has knowingly waived Fifth Amendment rights when he gives a statement during questioning by government agents, the investigating officer conducting a custodial interrogation is obligated to inform the suspect that the suspect has a right to remain silent, that anything he says can be used against him, and that the suspect has a right to speak with an attorney before answering questions. See *Miranda v. Arizona*, 384 U.S. 436 (1966). See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("Miranda announced a constitutional rule" that cannot be overruled by congressional enactment).

285. *Review of conviction and sentence.* Individuals who allege their convictions or punishments are in violation of federal law or the Constitution may seek review in federal court by way of an application for a writ of habeas corpus. See, e.g., *Ex parte Bollman*, 8 U.S. 74, 95 (1807); *Stone v. Powell*, 428 U.S. 465, 474-75 n.6 (1976); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). State prisoners in custody may seek federal court review on the ground that they are in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2241, 2254. The prisoner seeking federal review must first exhaust all state appellate remedies. 28 U.S.C. § 2254 (b), (c). Federal courts have imposed limitations on the types of issues that can be raised in habeas corpus applications as well as procedural requirements for raising those issues, largely out of respect for the states' interest in the finality of their criminal convictions. See *Coleman v. Thompson*, 501 U.S. 722 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Teague v. Lane*, 489 U.S. 288 (1989). In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) that modified the habeas corpus statutes by codifying many of the judicially-created limitations. See 110 Stat. 1214 (effective April 24, 1996).

286. *Double jeopardy protections for defendants.* The government's *Petite* policy is set out in the United States Attorney's Manual § 9-2.031 (2000). The policy precludes federal prosecution of a defendant after he has been prosecuted by state or federal authorities for "substantially the same act[s] or transaction[s]," unless three requirements are satisfied. First, the case must involve a "substantial federal interest." Second, the "prior prosecution must have left that interest demonstrably unvindicated." The policy notes that this requirement may be met when the defendant was not convicted in the prior proceeding because of "incompetence, corruption, intimidation, or undue influence," "court or jury nullification in clear disregard of the law," or "the unavailability of significant evidence," or when the sentence imposed in the prior proceeding was "manifestly inadequate in light of the federal interest involved." Prosecutions that fall within the *Petite* policy must be approved in advance by an Assistant Attorney General. In *Smith v. Massachusetts*, 125 S. Ct. 1129 (2005), the Supreme Court held that a judge's ruling during a trial that charges should be dismissed for lack of evidence constituted a "judgment of acquittal," which could not be revisited by that judge or any other under the Double Jeopardy Clause.

287. *Procedure in the case of juvenile persons.* Historically, confidentiality was one of the special aspects of juvenile proceedings and the proceedings and records were generally closed to the public and press. More recently, states have modified or removed traditional confidentiality provisions, making records and proceedings more open.

288. All states and the federal criminal justice system allow juveniles to be tried as adults in criminal court under certain circumstances. In some states, a prosecutor has discretion over whether to bring a case in criminal or juvenile court. Some state laws also provide for automatic prosecution in criminal court for serious offenses, repeat offenders, or routine traffic citations. A juvenile who is subject to the adult criminal justice system is entitled to the constitutional and statutory rights and protections provided for adults.

Article 15 - Prohibition of ex post facto laws

289. Paragraphs 508 - 511 of the Initial Report describe the United States Constitutional prohibition against enacting ex post facto laws. Article I, section 9 of the Constitution, addressing the duties of the U.S. Congress, states that "No ... ex post facto Law shall be passed". Article I section 10 provides that "No state shall ... pass any ... ex post facto Law." That legal situation has not changed.

Article 16 - Recognition as a person under the law

290. As reported in paragraphs 513 and 514 of the Initial Report, all human beings within the jurisdiction of the United States are recognized as persons before the law. In addition, the Born Alive Infants Protection Act of 2002, which was signed into federal law on 5 August, 2002, makes it clear that "every infant member of the species homo sapiens who is born alive at any stage of development" is considered a "person," "human being," and "individual" under federal law. See 1 U.S.C. § 8. Congress also enacted the Unborn Victims of Violence Act of 2004 "to protect unborn children from assault and murder." See Pub. L. No. 108-212.

Federal law now provides that whoever, in the course of committing certain federal crimes, “causes the death of . . . a child, who is in utero at the time the conduct take place,” is guilty of a separate offense and shall be punished as if that death had occurred to the unborn child's mother. *See* 18 U.S.C. § 1841(a). If the person engaging in such conduct intentionally kills the unborn child, he will be punished for intentionally killing a human being. *See* 18 U.S.C. § 1841(a)(2)(C). This law does not, however, authorize the prosecution of any woman with respect to her unborn child, *See* 18 U.S.C. § 1841(c)(3), nor does it criminalize “conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law,” *see* 18 U.S.C. § 1841(c)(1).

Article 17 - Freedom from arbitrary interference with privacy, family, home

291. *Right to privacy.* As reported in paragraphs 515 - 544 of the Initial Report, freedom from arbitrary and unlawful interference with privacy is protected under the Fourth Amendment to the Constitution.

292. *Technology: movements and conversations: electronic surveillance.* The U.S. Congress has also recognized that there could be substantial privacy infringements through the use of electronic devices to track the movements of persons or things and to intercept private communications. Such devices include wiretaps, pen registers and trap and trace devices (which record, respectively, outgoing and incoming dialing, routing, addressing, or signaling information used by communication systems, such as telephones or computer network communications), digital “clone” pagers and surreptitiously installed microphones. Note that there is a significant difference in constitutional and statutory protections afforded to “content” devices, such as wiretaps, as opposed to “non-content” devices, such as pen registers. (See below for a discussion of pen/trap provisions of Titles II and III of ECPA, Pub. L. No. 99-508, 100 Stat. 1848).

293. In 1968, Congress enacted what is generally referred to as Title III to regulate the use of electronic audio surveillance and interception. 18 U.S.C. §§ 2510-21 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968 - Wiretapping and Electronic Surveillance, Pub. L. No. 90-351, 82 Stat. 212). Title III essentially bans the use of certain electronic surveillance techniques by private citizens. It makes punishable as a felony any intentional interception of any wire, oral, or electronic communication that would not be otherwise readily accessible to the public; use of an interception device; or disclosure of the contents of any communication that has been unlawfully intercepted. 18 U.S.C. § 2511.

294. Title III, however, exempts law enforcement from the general prohibition if it meets certain explicit conditions. The primary condition is that the government must obtain an appropriate court order authorizing the interception.

295. Before applying for a court order authorizing the interception of wire or oral communications, law enforcement generally must obtain prior approval from specified senior officials in the Department of Justice, in the case of federal law enforcement, or from senior state or local prosecuting officials, in the case of state or local law enforcement. For the interception of electronic communications, which, generally, are non-voice-based communications, federal agents must get approval from a federal prosecutor to seek a court order; state and local law enforcement must get approval from senior state or local prosecuting officials to seek a court order.

296. Having obtained approval, the agent must then apply for an order from a court. The application must set forth sufficient facts to satisfy the court that probable cause exists to believe that (i) certain identified persons have committed, are committing, or will commit one of the felony offenses specified by the statute, which include serious felony offenses in the case of federal interceptions of oral or wire communications or any interceptions by state law enforcement, and include any federal felony in the case of an electronic communications interception by federal agents; (ii) all or some of the persons have used, are using, or will use a targeted communication facility or premises in connection with the commission of the listed offense; and (iii) the targeted communication facility or premise has been used, is being used, or will be used in connection with the crime. The agent's application must also satisfy the judge that other less intrusive investigative procedures have been tried without success, would not be likely to succeed, or would be too dangerous to use. The application must also include a complete statement of all other applications that have been made for electronic surveillance involving the persons, facilities, or premises.

297. The court's order may authorize the interception for no more than 30 days. The court, however, may grant extensions of the order if the government files an application justifying the extension. 18 U.S.C. § 2518(5). In addition, the judge issuing the order and the Department of Justice are required to report to the Administrative Office of U.S. Courts on each court-ordered electronic surveillance and the number of arrests, suppression orders, and convictions that resulted from them. 18 U.S.C. § 2519.

298. There is an exception to the requirement of prior judicial approval where there is an emergency involving immediate danger of death or serious bodily injury or conspiratorial activities that threaten national security or are characteristic of organized crime, and there is insufficient time to obtain a prior court order. 18 U.S.C. § 2518(7). When electronic surveillance is utilized in these emergency instances, the government must obtain a court order within 48 hours.

299. During the period of surveillance the agents are under a continuing duty to minimize - that is, to not record or overhear conversations that are not related to the crimes or persons for which the surveillance order was obtained. The recordings must also be sealed in a manner that will protect them from tampering. The government is expressly limited in the purposes for which, and to whom, it may disclose those communications. Section 223 of the USA PATRIOT Act provided for civil liability for unauthorized disclosures and provided that a person aggrieved by certain willful violation may commence an action for money damages against the United States. It also provides for the initiation of administrative proceedings.

300. Title III predated the use of video surveillance and was passed in the wake of two Supreme Court decisions that addressed non-consensual interception of oral communications. Moreover, in 1968, when Title III was enacted, video cameras were too bulky and too noisy to be effective as surreptitious recording devices, and thus were not considered when the electronic surveillance statute was enacted. For both these reasons, the statute did not address the use of electronic video interception for gathering non-aural evidence, and Congress has not passed subsequent legislation addressing the issue. However, the federal appellate courts that have considered

the issue all agree that the government may conduct video surveillance. Because interception of visual, non-verbal conduct is not regulated by statute, the courts analyze it under the requirements of the Constitution. As long as the interception is conducted in a manner consistent with the protections provided by the Fourth Amendment, the courts will permit its use. *See, e.g., United States v. Falls*, 34 F.3d 674 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992) (*en banc*); *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1985), *cert. denied*, 479 U.S. 827 (1986); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

301. Congress enacted the Electronic Communications Privacy Act ("ECPA") in 1986 to address, among other matters, (i) access to stored wire and electronic communications and transactional records and (ii) the use of pen registers and trap and trace devices. (See Titles II and III of ECPA, Pub. L. No. 99-508, 100 Stat. 1848.) Title II of ECPA generally prohibits unauthorized access to or disclosure of stored wire and electronic communications, absent certain statutory exceptions. Title II of ECPA also provides for legal process that law enforcement may use to obtain such stored communications and transactional records. The pen register and trap and trace provisions of ECPA prohibit the installation or use of a pen register or trap and trace device, except as may be provided for in the statute. Except in narrow, specified emergencies, law enforcement may not install a pen register or a trap and trace device without a prior court order.

302. Under the federal statutes, communications can be acquired if one of the parties to the communication has given prior consent to their acquisition. 18 U.S.C. §§ 2511(2)(c), 2701(c)(2), 3123(b)(3) (2004). Similarly, the Fourth Amendment's protection of one's reasonable expectation of privacy does not require that the government obtain a warrant for a consensual interception, i.e. where one of the parties consents. In a case where an undercover agent wore a recording device concealed on his person, the Supreme Court explained:

[The] case involves no "eavesdropping" whatever in any proper sense of that term. The government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of [the suspect's] premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an undercover agent who was there with [the suspect's] assent, and it neither saw nor heard more than the agent himself. *See Lopez v. United States*, 373 U.S. 427, 439 (1963).

303. Though federal judges need not authorize interception orders where one party to the conversation has consented to the electronic eavesdropping, the U.S. Department of Justice has adopted certain written guidelines for federal prosecutors. These guidelines are set forth in the Attorney General's Memorandum of May 30, 2002, which states:

304. When a communicating party consents to the monitoring of his or her oral communications, the monitoring device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual monitoring must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, unless that agent or person is acting pursuant to a court order that authorizes the entry and/or trespass, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party. *See United States v. Yonn*, 702 F.2d 1341, 1347 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983) (rejecting the First Circuit's holding in *United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975), and approving use of fixed monitoring devices that are activated only when the consenting party is present). *See United States v. Shabazz*, 883 F. Supp. 422 (D. Minn. 1995). The same rule applies to consensual videotaping.

305. Another area of note regarding technology and privacy is individuals' privacy with respect to information maintained on computer databases. In general, individuals are entitled to privacy by the Privacy Act, 5 U.S.C. § 552(a). The Privacy Act generally bars federal agencies from using or disclosing information collected for one purpose for a different purpose, unless the use or disclosure falls within one of the specifically enumerated exceptions in the Act. The Computer Matching and Privacy Protection Act of 1988 specifically addresses the use by federal agencies of computer data. The Act regulates the computer matching of federal data for federal benefits eligibility or recouping delinquent debts. The government may not take adverse action based on such computer checks without giving individuals an opportunity to respond. Three other federal laws that protect information commonly maintained on computer database are the Fair Credit Reporting Act (15 U.S.C. §§ 1681-81(v)), the Video Privacy Protection Act (18 U.S.C. § 2710), and the Right to Financial Privacy Act (12 U.S.C. §§ 3401-22). The first regulates the distribution and use of credit information by credit agencies. The second prevents the disclosure and sale of customers' video-rental records without the customers' consent. The last sets procedures regarding when federal agencies may review customers' bank records.

306. A number of federal statutes, in addition to those described above, protect information commonly maintained in computer databases. These include the Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681(v)), which regulates the distribution and use of credit information by credit agencies; the Video Privacy Protection Act (18 U.S.C. § 2710), which addresses the disclosure and sale of customer records regarding video rentals; the Right to Financial Privacy Act (12 U.S.C. § 3401-3422), which sets procedures regarding access to customers' bank records by the federal government; the Privacy Protection Act (42 U.S.C. § 2000aa-2000aa-12), which provides special procedures for government searches or seizures of the press and other publishers; title V of the Gramm-Leach-Bliley Act (Pub. L. No. 106-102, 113 Stat. 1338), which addresses the protection and disclosure of nonpublic customer information by financial institutions; and provisions of the Health Insurance Portability and Accountability Act (42 U.S.C. §§ 1320d-1320d-8), which provides for the creation of protections regarding the privacy of individually identifiable health information.

307. With respect to aliens, a number of laws protect the confidentiality of certain information, with limited exceptions, including asylum applications (8 C.F.R. 208.6 and 1208.6), information relating to battered spouses and children seeking immigration relief (8 U.S.C. § 1186A(c)(4)), and alien registration and fingerprint records (8 U.S.C. § 1304(b)).

308. *USA PATRIOT Act*. In the wake of the tragedy of 11 September, 2001, Congress passed the USA PATRIOT Act primarily to provide federal prosecutors and investigators with the critical tools needed to fight and win the war against terrorism. The USA PATRIOT Act principally did four things. First, it removed the legal barriers that prevented the law enforcement and intelligence communities from sharing information. By bringing down "the wall" separating law enforcement and intelligence officials, the USA PATRIOT Act has yielded extraordinary dividends, such as by enabling the Department of Justice to dismantle terror cells in such places as Oregon, New York, and Virginia. Second, it updated federal anti-terrorism and criminal laws to bring them up to date with the modern technologies actually used by terrorists, so that the United States no longer had to fight a digital-age battle with legal authorities left over from the era of rotary telephones. Third, it provided terrorism investigators with important tools that were previously available in organized crime and drug trafficking investigations. For example, law enforcement had long used multi-point, or "roving," wiretaps to investigate nonterrorism crimes, such as drug offenses. Now, federal agents are allowed to use multi-point wiretaps, with court approval, to investigate sophisticated international terrorists who are trained to evade detection. Fourth, the USA PATRIOT Act increased the federal criminal penalties for those who commit terrorist crimes and made it easier to prosecute those responsible for funneling money and providing material support to terrorists.

309. The USA PATRIOT Act has been the subject of a vigorous public debate, which has focused on a handful of the Act's many provisions. As noted above, the Act authorizes multi-point wiretap surveillance in foreign intelligence investigations. This authority is directed to the problem of terrorists who seek to avoid surveillance by frequently changing telephones, and allows foreign intelligence investigators in certain specified circumstances to obtain from a federal court a wiretap order that permits surveillance of a specified person rather than a specific phone. This authority has been available in criminal investigations for years, but only became available in foreign intelligence investigations upon enactment of the USA PATRIOT Act. It allows surveillance to continue uninterrupted even though the terrorist changes phones. This authority has been an essential tool in conducting sensitive national security-related surveillance. There have been no verified abuses of this authority.

310. Another provision of the USA PATRIOT Act created a nationally uniform process and standard for obtaining delayed-notice search warrants, which have been available for decades and were common long before the USA PATRIOT Act was enacted. Like all criminal search warrants, a delayed-notice search warrant is issued by a federal judge only upon a showing that there is probable cause to believe that the property sought or seized constitutes evidence of a criminal offense. A delayed-notice warrant differs from an ordinary search warrant only in that the judge authorizes the officers executing the warrant to wait for a limited period of time before notifying the subject of the search because immediate notice would have an "adverse result." In passing the USA PATRIOT Act, Congress recognized that delayed-notice search warrants are a vital aspect of the Department of Justice's strategy of detecting and incapacitating terrorists, drug dealers, and other criminals before they can harm U.S. citizens. A delayed-notice search warrant is an invaluable though rarely used tool; delayed-notice has been used in less than 0.2 percent of all federal warrants authorized in the period of time between the enactment of the USA PATRIOT Act and 31 January, 2005. There have been no verified abuses of this authority.

311. A third provision of the USA PATRIOT Act authorizes federal prosecutors to issue subpoenas for records about an individual that are held by third parties. It is important to understand that federal prosecutors, by obtaining grand-jury subpoenas, have long been able to obtain business records, of exactly the sorts that are the subject of this provision, in ordinary criminal investigations without the involvement of a judge. The USA PATRIOT Act simply extended a similar authority to investigators in international terrorism and espionage investigations, and in addition imposed a requirement that those investigators obtain prior judicial approval. Moreover, because the provision at issue explicitly states that an investigation cannot be conducted of a United States person based solely upon activities protected by the First Amendment of the Constitution, investigators are expressly prohibited from investigating United States persons solely because of, for example, their library habits or the websites they visit. As the Attorney General testified before Congress, between the passage of the USA PATRIOT Act and 30 March, 2005, this business records provision was not used a single time to request library or bookstore records. However, we know from experience that terrorists and spies do use libraries to further their hostile intentions, and we cannot afford to make libraries safe havens. There have been no verified abuses of this authority.

312. The USA PATRIOT Act has helped to protect Americans from terrorist attacks while at the same time safeguarding their civil rights and civil liberties, such as by preserving the important role of judicial and congressional oversight. Many key provisions of the USA PATRIOT Act are scheduled to expire at the end of 2005, and Congress is considering reauthorization of those provisions. The House passed a reauthorization bill on 21 July, 2005, by a vote of 257-171, and the Senate passed a similar bill by unanimous consent on July 29, 2005. The next step in the process will be a conference between the two houses to resolve differences in the two bills. These bills have followed extensive debate and oversight by Congress as it considered whether to renew these critical intelligence and law enforcement tools. For example, the Attorney General has testified in front of the Senate and House Judiciary Committees and Senate Select Committee on Intelligence on the subject, and in total, the Department of Justice has provided 32 witnesses at 18 congressional hearings on the USA PATRIOT Act in 2005. In his congressional testimony, the Attorney General urged that all 16 sunset provisions should be reauthorized without any additional sunsets and opposed any weakening of the Act. As the extensive hearings and public debates have confirmed, there have been no verified abuses of the USA PATRIOT Act provisions.

Article 18 - Freedom of thought, conscience, and religion

313. There have been a number of notable changes in United States law to the protections of religious freedom outlined in paragraphs 545-579 of the Initial Report.

314. As noted in the Initial Report, in response to the ruling by the United States Supreme Court in *Employment Div., Dep't of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), that religious believers may not obtain exemptions to religion-neutral laws of general applicability that infringe on their religious practices, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 U.S.C. § 2000(b)(2004). This law provided that government action that substantially burdened religious

exercise was invalid unless it was justified by a compelling government interest and was the least restrictive way to achieve that interest. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down RFRA as applied to the states on the grounds that it exceeded Congress's power over states. RFRA continues to apply to actions by the federal government.

315. There have been two major developments in response to the invalidation of RFRA. First, many states have adopted their own versions of RFRA to ensure that religious exercise is not burdened by state action. Second, the Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 804, which imposes, among other things, a requirement on states that in most circumstances burdens on religion through land use regulation and burdens on the religious exercise of prisoners must, as with RFRA, be justified by a compelling government interest and through the least restrictive means. The Supreme Court upheld a constitutional challenge to the prisoner-rights portion of RLUIPA in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), finding that the law's protection of inmate religious rights did not violate the Establishment Clause. In *Cutter*, the Court emphasized that there is a long tradition in the United States of accommodating religious practice through laws such as RLUIPA, and the fact that a law may provide exceptions to general rules for religious reasons but not other reasons does not render it invalid.

316. As discussed above, there have been important developments in the area of religion in schools. The Supreme Court has re-emphasized that state-sponsored religious speech in public schools is severely restricted, while at the same time religious speech by students at schools is strongly protected. On the issue of funding, which was discussed at great length in the Initial Report, the Supreme Court has moved toward two principles. First, where an educational benefit such as a scholarship is provided directly to a student, and the student is then free to use it toward education at the school of his choice, whether public or private, secular or religious, the non-Establishment principle of the Constitution is not violated. Second, where aid is given directly to a school, it will be upheld if the aid is secular in nature, is distributed in a neutral manner without regard to religion, and there is no risk of substantial diversion of the aid to religious purposes.

317. Consistent with the principles laid out in the school aid cases, the Congress has enacted numerous provisions permitting federal funding of religiously affiliated charities. For example, Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), permits religious organizations to participate in certain welfare grant programs. If there is a system where beneficiaries receive a voucher to redeem at any of a number of service providers, the statute provides that religious organizations must be permitted to participate, consistent with the Establishment Clause. If there is a direct grant program where funds are given directly by the state to providers, the statute provides that religious providers must be permitted to participate, provided that they not discriminate against beneficiaries or require beneficiaries to participate in any religious activities, and that beneficiaries have a non-religious provider available to them if they so chose. Similarly, the President has, through issuance of several executive orders, created an office of Faith-Based and Community Initiatives in the White House and within numerous agencies, to ensure that charities are not excluded from programs solely on the grounds that they are religious.

318. The law regarding government-sponsored religious displays, as discussed paragraph 572 in the Initial Report, remains fact-specific. In *McCreary County v. American Civil Liberties Union of Kentucky*, 125 S. Ct. 2722 (2005), the Supreme Court held that the display of a framed copy of the Ten Commandments in the hallway of a courthouse violated the Establishment Clause, largely because of the religious purpose of the government officials who put it up. The same day, in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), the Court upheld a stone monument of the Ten Commandments that had stood on the grounds of the Texas state capitol for more than forty years and which had been donated by a civic group.

319. *Charitable status for taxation and solicitation.* It bears emphasis that there is no requirement in the United States for religious organizations to register with any government agency in order to operate, 26 U.S.C. 508(c)(1)(A), and regulation of their activities by the government is restricted by the Constitution. For example, in *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), the Supreme Court held that a municipality could not require religious organizations engaging in door-to-door solicitation to register with the municipality.

320. Similar autonomy is granted in the operation of the tax code. To obtain the federal tax benefits outlined in paragraphs 555 through 557 of the initial report, a church that meets the criteria for a public charity is entitled to operate as a tax-favored charity automatically, without being required to apply for such recognition. 26 U.S.C. § 508(c)(1)(A).

321. As an additional accommodation for religious institutions, Congress has also imposed strict limitations on the abilities of the IRS to conduct tax inquiries and examinations of religious institutions. 26 U.S.C. § 7611. These limitations extend to any institution claiming to be a church, whether or not officially recognized by the IRS. A tax inquiry of a church may only be initiated when the Director of Exempt Organizations, Examinations reasonably believes that the religious organization: (a) may not qualify for the exemption; or, (b) may not be paying tax on an unrelated business or unrelated taxable activity. *Id.* Even after the reasonable belief has been established, the IRS must provide the church with an opportunity to resolve the concerns before undertaking an official inspection of the church's record. *Id.* Furthermore, the IRS cannot conduct a subsequent tax inquiry/examination of previously audited religious institution for a five-year period unless the previous examination resulted in revocation, notice of deficiency of assessment, or a request for a significant change in church operations, including a significant change in accounting practices. 26 U.S.C. § 7611(f)(1).

322. When religious institutions have been found to be operating for the financial benefit of an individual, or engaging in lobbying or political activities, the IRS may revoke their tax-exempt status. *See, e.g., Branch Ministries v. Rossotti*, 211 F.3d 137, 143-44 (D.C. Cir. 2000) (upholding revocation of tax-exempt status of church that intervened in a political campaign). Furthermore, the United States Supreme Court has held that "Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment activities." *See, Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (upholding IRS denial of tax exemption status to a nonprofit organization because of organization's substantial attempts to influence legislation).

323. *Establishment.* The Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (codified in scattered sections of 11 U.S.C.), amends federal bankruptcy law to state that a transfer of a charitable

contribution (up to 15% of the debtor's gross income in the relevant year) to a qualified religious or charitable institution is not considered "fraudulent" under the Bankruptcy Law, thus prohibiting a bankruptcy trustee from recouping such a contribution from a recipient institution under normal rules, which allow recoupment if the transfer is made within one year of when the debtor declares bankruptcy and at a time when the debtor is insolvent.

324. Section 4454 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 426-432 (Aug. 5, 1997), allows individuals who have sincere religious objections to receiving medical care to obtain Medicare and Medicaid reimbursement programs for non-medical health care provided in religious non-medical health care institutions. This statute authorizes payment for non-medical health care services that would ordinarily be provided in a hospital or extended-care skilled nursing facility, and permits payment for such services if the individual has a condition such that he or she would qualify for benefits for treatment in a hospital or extended-care skilled nursing facility.

325. The International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified in scattered sections of 22 U.S.C.) states that the United States' policy is to promote, and to assist other governments in the promotion of, religious freedom; requires the President to annually designate countries of particular concern for religious freedom; and amends the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2), to make foreign government officials who have committed severe violations of religious freedom ineligible to receive visas or admission into the United States.

326. The Church Arson Prevention Act of 1996, Pub. L. No. 105-155, 110 Stat. 1392 (1996) (amending 18 U.S.C. § 247 to clarify that federal jurisdiction exists over offenses relating to damage to religious real property).

Article 19 - Freedom of opinion and expression

327. The First Amendment to the United States Constitution provides that "Congress shall make no law abridging the freedom of speech." Paragraphs 580 - 588 of the Initial Report describe how freedom of opinion and expression are zealously guarded in the United States, as well as the limitations on freedom of expression.

328. Freedom of speech also encompasses certain rights to seek and receive information. The most important means by which these rights are promoted is by the First Amendment's special concern for freedom of the press, which is protected from prior restraint (that is, censorship in advance of publication) in the absence of proof of direct, immediate, and irreparable and substantial damage to the public interest. See *New York Times, Inc. v. United States*, 403 U.S. 713 (1971). The First Amendment protects the publication of truthful information about matters of public importance, even where the disclosure of the information affects significant privacy interests, as long as the person who discloses it did not violate the law in obtaining the information. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In addition to publishing information, the press, and the public as a whole, have been held to have a constitutional right to gather information concerning matters of public significance in certain circumstances. For example, the public generally has a right of access to observe criminal trials, since such access is viewed as instrumental to the effectuation of the rights to speak and publish concerning the events at trial. This right does not entail a general constitutional obligation on the part of the government to disclose information in its own possession. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 428 U.S. 32 (1999). However, the First Amendment is supplemented by a number of laws that promote access to government, such as the Freedom of Information Act, 5 U.S.C. § 552, the Government in the Sunshine Act, 5 U.S.C. § 552b, and the Federal Advisory Committee Act, 5 U.S.C. App. 2.

329. Under U.S. law and practice, government is accorded broad scope to shape the content of official utterances and is not as a general matter compelled to speak on behalf of those with whom it disagrees. The courts have held, in the context of government or government assisted programs, that the government may limit the extent to which such programs provide access to information for the beneficiaries. Thus, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the U.S. Supreme Court upheld government regulations proscribing abortion counseling in programs receiving federal funding, but noted that the recipient of those funds could still provide counseling and related services through separate and independent programs. The Court noted that its holding merely allowed the government to refrain from funding speech activity that it did not support, and did not suggest that the government could condition or restrict speech in areas that have been traditionally open to the public for free expression, such as public parks or universities. Along similar lines, the government, through the National Endowment for the Arts, can consider factors such as "decency and respect" in deciding whether to help fund the work of controversial artists. See *National Endowment of the Arts v. Finley*, 524 U.S. 569 (1998). The government may not, however, impose viewpoint-specific restrictions within the context of a government-created public forum for speech, such as on a student publication funded by a state university. *Rosenberger v. Univ. of Virginia*, 515 U.S. 819 (1995).

Article 20 - Prohibition of propaganda relating to war or racial, national, or religious hatred

330. The following U.S. reservation to Article 20 remains in effect:

That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

331. The reasons for this reservation, as discussed in paragraphs 596 - 598 of the Initial Report, remain unchanged.

332. *Hate crimes.* As reported in paragraphs 599 - 606 of the Initial Report, the Civil Rights Division of the U.S. Department of Justice enforces several criminal statutes which prohibit acts of violence or intimidation motivated by racial, ethnic, or religious hatred and directed against participation in certain activities.

333. Following are several examples of recent cases:

A self-described "Luciferian," pled guilty to setting a total of twenty nine fires in eight states throughout the United States. The defendant was sentenced to life in prison without parole for his guilty pleas to setting five church fires in Georgia, including a fire at the

New Salem United Methodist Church in which a volunteer firefighter was killed while on duty. See *United States v. Ballinger*, 153 F. Supp. 2d 1361 (N.D. Ga. 2001);

A defendant was convicted of violating the Church Arson Prevention Act for making telephonic bomb threats to three synagogues in Minnesota. The defendant made religiously threatening and terroristic threats on the voice mail systems of the Bet Shalom Temple, Mount Zion Temple, and Bais Yaakov School. The defendant was sentenced to 16 months in prison. See, *United States v. Corum*, No. 01-236 2003 U.S. Dist. LEXIS 7726 (D. Minn., Apr. 17, 2003).

334. Incidents involving violent acts of racial and ethnic hatred are a high priority for prosecution. During the last five years, nearly 300 defendants were charged federally in connection with crimes such as cross-burnings, arson, vandalism, shootings and assault for interfering with various federally protected rights (such as housing, employment, education, and public accommodations) of Black, Hispanic, Asian, Native American, and Jewish victims. Since 1993, virtually all defendants charged in these cases have been convicted.

335. Several examples of recent cases include:

Six adults and one juvenile in Wisconsin conspired to injure and intimidate Hmong people living within their communities. Armed with shotguns, they planned to detonate an explosive to lure the Asians out of their Two Rivers, Wisconsin home and shoot them. They detonated an explosive under a van parked in front of a Hmong family's home, but fled when a police car patrolling the area appeared. Two days later, three of the same defendants set fire to the front porch of another Asian family's home in Manitowoc, Wisconsin, using gasoline to accelerate the fire as the family slept. Five children were pulled through a bedroom window to safety by their father while a teenager and the mother escaped from the basement out a back door. The fire destroyed the house. All seven defendants entered guilty pleas to various federal crimes in connection with these incidents. The defendants were sentenced to terms of incarceration ranging from 24 months to 19 years. *United States v. Franz* and *United States v. LeBarge*;

A defendant was convicted of interfering with housing rights for assaulting and vandalizing the property of African-American and Hispanic residents of a Bessemer City, North Carolina neighborhood because he believed that only Whites should live there. The defendant was sentenced to 110 months in prison. *United States v. Nichols*, 2005 U.S. App. LEXIS 19802 (4th Cir. 2005).

Post-September 11 efforts to counter crimes against Muslims

336. After the September 11 attacks on the World Trade Center and the Pentagon, the United States saw a rise in bias crimes against Muslims and Arabs, as well as those wrongly perceived to be Muslim and Arab, including Sikhs and South Asians. These bias crimes included attacks on individuals ranging from Internet and telephone threats and assault to murder, as well as attacks on mosques and businesses ranging from graffiti and vandalism to arson.

337. The Department of Justice has put a priority on investigating and prosecuting these cases. The Department has investigated more than 650 such crimes, resulting in more than 150 state and local prosecutions, as well as the prosecution of 27 defendants on federal civil rights charges.

338. Several experienced attorneys in the Civil Rights Division's Criminal Section have been tasked to review all new allegations and to participate in or monitor those investigations that are opened to ensure uniform decision-making in the initiation of federal investigations and prosecutions and to optimize resource allocation. A few examples of federal prosecutions are as follows:

Two defendants in the Los Angeles, California area were charged with conspiring to fire-bomb the King Fahd mosque, the office of the Muslim Public Affairs Council, and the district office of United States Representative Darrell Issa. One died from self-inflicted injury in prison. The other pled guilty to certain federal charges, and is awaiting sentencing. *United States v. Krugel*;

A defendant in Seattle, Washington pled guilty for shooting at two Islamic worshipers and for dousing cars with gasoline in an attempt to ignite them and cause damage to the Islamic Idriss Mosque. He was sentenced to 78 months in prison. *United States v. Cunningham*;

The president of the Arab-American Institute in Washington, D.C. received a threatening message on his voice mail. After pleading guilty, the defendant, who placed the call from Boston, was sentenced to 2 months confinement and a \$5,000 fine. *United States v. Rolnik*;

A defendant in Tallahassee, Florida, intentionally crashed his truck into a mosque. He was convicted and was sentenced to 27 months imprisonment. *United States v. Franklin*;

A defendant in Detroit, Michigan, placed a telephone call to a Pakistani family's home in that city, leaving a threatening message on their voice mail. He pled guilty and was sentenced to 10 months incarceration. *United States v. Bolen*.

Article 21 - Freedom of assembly

339. The First Amendment to the United States Constitution proscribes the making of any law abridging "the right of people peaceably to assemble". This right has been interpreted quite broadly, as discussed in paragraphs 607 - 612 of the Initial Report.

Article 22 - Freedom of association

340. *United States Constitution*. Although the freedom of association is not specifically mentioned in the United States Constitution, it has been found to be implicit in the rights of assembly, speech, and expression. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 898 (1982); *Healey v. James*, 408 U.S. 169 (1972). Taken together, these provisions of the First, Fifth and Fourteenth

Amendments guarantee freedom of assembly in all contexts, including the right of workers to establish and join organizations of their own choosing, without previous authorization by or interference from either the federal government or the state governments. *See, Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967). Freedom of assembly continues to be practiced in the United States, as described in paragraphs 613 - 654 of the Initial Report.

341. The right to associate for purposes of expressive activity receives heightened protection. This right, termed the right of "expressive association," encompasses both the expression of ideas within a group among its members, and expression by the group to the wider public. The first category is exemplified by *Boy Scouts v. Dale*, 530 U.S. 640 (2000), in which the Supreme Court held that the Boy Scouts could exclude a homosexual man from a position as assistant scoutmaster, despite a state law barring such discrimination, on the grounds that the Boy Scouts is a group dedicated to instilling certain morals and values in boys, and that homosexuality is contrary to those morals and values. An example of the second type of case is *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which the Supreme Court held that a private group that sponsored an annual Saint Patrick's Day parade could not be required by a state to allow an Irish-American homosexual group to march in the parade. In each case, the ability to exclude those with views at odds with the views of the group was deemed fundamental to the group's ability to carry out its expressive mission.

342. In a recent decision, the Supreme Court decided that, because of the impossibility of distinguishing between a state university's ideological and educational activities, state universities can use mandatory student fees to fund organizations whose positions are opposed by particular students as long as the funding decisions are made in a viewpoint-neutral manner. *Univ. of Wisconsin v. Southworth*, 529 U.S. 217 (2000).

343. *Labor associations.* As stated in the Initial Report, the provisions of the National Labor Relations Act apply generally, with specified exceptions, to all employers engaged in an industry affecting interstate commerce (the vast majority of employers), and thus, to their employees, and that, generally, it applies to employees regardless of their nationality or legal status in the United States. However, in 2002, in *Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), the Supreme Court limited one remedy under U.S. labor law on the ground that an illegal immigrant may not be awarded back pay for hours not worked and for a job obtained in the first instance by a criminal fraud.

344. *Trade union structure and membership.* The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) reported that it comprised 66 national union affiliates as of July 2002. There are approximately 70 other national unions that are not affiliated with the AFL-CIO. There are approximately 29,000 unions at the local, intermediate body and national levels that represent private sector employees and federal government employees.

345. The following 2004 data, reported in a 27 January, 2005 U.S. Department of Labor, Bureau of Labor Statistics news release shows:

15,472,000 wage and salary workers in the U.S. (12.5% of all employed wage and salary workers) belonged to labor unions; of those, 7,267,000 were employed in government, and 8,205,000 were employed in private industry;

Among private industry groups, manufacturing had the largest number of union members (2,036,000); followed by education and health services (1,405,000); transportation and public utilities (1,218,000); construction (1,110,000); wholesale and retail trade (1,028,000); leisure and hospitality (319,000); professional and business services (246,000); mining (57,000); finance (56,000); and agriculture (23,000);

36.4 percent of government (federal, state and local) employees were union members, as compared to some 7.9 percent of wage and salary workers in private industry;

The percentage of union members among full-time workers is 13.9 percent and 6.4 percent for part-time workers; the percentage of union membership among men was 13.8 percent, and 11.1 percent for women; Blacks (15.1%); Whites (12.2%) and Hispanics (10.1%).

346. In addition to the estimated 15.5 million wage and salary employees who belonged to a union in 2004, there were about 1.6 million workers whose jobs were covered by a union (or employee association) contract, but who were not union members.

Article 23 - Protection of the family

347. *Right to Marry.* United States law has long recognized the importance of marriage as a social institution which is favored in law and society. Marriage has been described as an institution which is the foundation of society "without which there would be neither civilization nor progress". *See Maynard v. Hill*, 125 U.S. 190, 211 (1888).

348. As described in paragraphs 658 - 673 of the Initial Report, marriage has traditionally been defined in the United States as the status of relation of a man and a woman who have been legally united as husband and wife. Marriage is contractual in nature, in that it creates certain rights and responsibilities between the parties involved. However, the contract of marriage is unique in the eyes of the law. As one court stated:

While we may speak of marriage as a civil contract, yet that is a narrow view of it. The consensus of opinion in civilized nations is that marriage is something more than a dry contract. It is a contract different from all others. For instance: only a court can dissolve it. It may not be rescinded at will like other contracts. Only one such can exist at a time. It may not exist between near blood kin. It legitimizes children. It touches the laws of inheritance. It affects title to real estate. It provides for the perpetuity of the race. It makes a hearthstone, a home, a family. It marks the line between the moral of the barnyard and the morals of civilized men, between reasoning affection and animal lust. In fine, it rises to the dignity of a status in which society, morals, religion, reason and the state itself have a

live and large interest. *See Bishop v. Brittain Inv. Co.*, 129 S.W. 668, 676 (Mo. 1910).

349. *Same Sex Marriage*. In 1996, Congress passed and President Clinton signed the Defense of Marriage Act ("DOMA"). The DOMA provides that, for purposes of federal law, the word "marriage" means the union of one man and one woman and the word "spouse" means a person of the opposite sex. It also provides that no state could be required to adopt another state's law with respect to same-sex marriage. The only courts to rule on the issue upheld the constitutionality of the DOMA. *See, e.g., Smelt v. County of Orange*, 274 F. Supp. 2d 861 (C.D. Cal. 2005); *In re Kandau*, 315 B.R. 123 (W.D. Wash. 2004); *see also, Order Granting Motion to Dismiss*, Case No: 8:04-cv-11680-T-30-TBM (U.S. District Court for the Middle District of Florida, Jan. 19, 2005).

350. In addition, the Federal Marriage Amendment ("FMA") to the Constitution, which was supported by President Bush, was introduced in Congress in 2004. The FMA states that "marriage" consists only of the union of a man and a woman and that the federal and state constitutions shall not be construed to require marriage for any other union. It failed to pass the Senate on a procedural vote on 7 July, 2004, by 48-50 and failed in the House 227-186 on 30 September, 2004.

351. Same sex marriage has also been an issue at the state level. In 2003, the Massachusetts Supreme Judicial Court held that under the equality and liberty guarantees of the Massachusetts constitution, the marriage licensing statute limiting civil marriage to heterosexual couples was unconstitutional because it was not rationally related to a permissible legislative purpose. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). State trial courts in California, New York, and Washington have also found a right to same-sex marriage under their state constitutions, but those cases are on appeal. In contrast, an intermediate appeals court in New Jersey found that the state constitution did not confer a right to same-sex marriage, *Lewis v. Harris*, A-2244-03T5 (June 14, 2005), a decision that has been appealed to the state supreme court. Further, the Supreme Court of Oregon, invalidated marriage licenses to homosexual couples that had been granted by one county. *Liv. Oregon*, No. CC 0403-03057, CA A124877, SC S51612, April 14, 2005.

352. As of 2005, seventeen states have constitutional amendments defining marriage as solely between a man and a woman, and twenty-seven other states define marriage as a union between a man and a woman by statute. Eleven of the constitutional amendments were enacted in November 2004 as a result of the Goodrich case noted above. In addition, voters in five other states will vote on amendments in 2005 and 2006 that are likely to ban same-sex marriage.

353. In addition to these measures, California, New Jersey, Vermont, and Connecticut have adopted statewide domestic partnership or civil union laws providing virtually the same benefits as marriage to homosexual couples.

Procedures for marriage

354. *Blood tests*. While many states require a blood test as one of the requirements that must be met before obtaining a marriage license, recently, several states have considered abandoning this requirement. In states that do require testing, the statutes generally require that in order to obtain the marriage license, the parties must be free of certain sexually-transmitted or other communicable diseases. Failure to comply with this requirement generally does not invalidate the marriage, although it may subject the parties and the issuing authority to penalties.

355. *Waiting periods*. Most states require a waiting period between the issuance of the license and the performance of the actual wedding ceremony. However, the length of the required waiting period varies widely among the states. The length can range from 3 days to a maximum of 30 days, with several states requiring no waiting period. In states with a waiting period requirement, failure to comply with the requirement generally will not invalidate the marriage if it is the only defect.

356. *Common-law marriage*. Common-law marriage is a non-ceremonial or informal marriage by agreement, entered into by a man and woman having capacity to marry, ordinarily without compliance with statutory formalities. Thirteen states and the District of Columbia recognize common-law marriages entered within their jurisdiction. In addition to capacity and an agreement, most jurisdictions require some act of consummation, such as cohabitation, to make the common-law marriage valid. Some courts also require proof that the parties held themselves out to the world as husband and wife or that they were thought of as husband and wife in the community in which they lived. In those states that continue to recognize common-law marriages, the marriage is considered just as valid as those contracted in full compliance with the statutory requirements.

357. *Custody and visitation*. A recent Supreme Court case addressed the issue of the visitation rights of grandparents. In *Troxel v. Granville*, 530 U.S. 57 (2000), the grandparents sought greater visitation rights to their grandchild. The Washington Supreme Court held that the Washington state statute, granting broad grandparent visitation rights, "impermissibly infringed on the mother's constitutional right to make major life decisions for her child." *In re Smith*, 969 P.2d 21 (Wash. 1998). The United States Supreme Court affirmed that decision and observed that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *See, Troxel*, 530 U.S. at 66.

358. *Parental Child Abduction*. Abduction of children by their parents or guardians continues to be a serious problem, particularly at the international level. The United States is a State Party to the Hague Convention on the Civil Aspects of International Child Abduction, and has taken legislative steps to ensure that the provisions of the Convention are binding in U.S. courts.

359. *Child support and enforcement of decrees*. In recognition of the need to improve child support enforcement by the states both interstate and within each state, the United States Congress passed in 1975 comprehensive legislation (Title IV-D of the Social Security Act [IV-D Program] - 42 U.S.C. §§ 651-55) establishing a mandatory requirement for the states to set up a state agency to locate obligors, establish paternity, and enforce child support. The legislation also established on the federal level an Office of Child Support Enforcement in the Department of Health and Human Services to regulate and evaluate the state programs and to operate a federal Parent Locator Service. The enforcement services under this program are available to all children. Since 1975, Congress has

enacted a number of measures, notably in 1984, 1988 and 1996, to improve and strengthen the enforcement program and to require the states to establish child support guidelines, and to provide efficient enforcement procedures such as liens, capture of tax refunds for overdue support, automatic wage withholding, and direct interstate wage withholding.

360. To improve on the Uniform Reciprocal Enforcement of Support Act (URESA), because interstate enforcement remained a major problem, the Commission on Interstate Child Support and the Commissioners on Uniform State Laws drafted a new enforcement system, the Uniform Interstate Family Support Act (UIFSA). Importantly, the Welfare Reform Act, signed by President Clinton, required all states to enact UIFSA and it is currently the law in every state and the District of Columbia.

361. In spite of these legal safeguards and extensive programs, however, it is clear that more needs to be done to address the problem of interstate enforcement of child support orders throughout the United States.

Article 24 - Protection of children

362. *UN Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict*. On 19 June, 2002, the United States Senate gave its advice and consent to ratification of the UN Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict. The United States deposited its instrument of ratification on 23 December, 2002. The Protocol came into effect for the United States on 23 January, 2003.

363. *UN Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography*. On 19 June, 2002, the United States Senate gave its advice and consent to ratification of the UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography. The United States deposited its instrument of ratification on 23 December, 2002. The Protocol came into effect for the United States on 23 January, 2003.

364. *ILO Convention 182 on the Worst Forms of Child Labor*. On 5 November, 1999, the United States Senate gave its advice and consent to ratify ILO Convention 182 on the Worst Forms of Child Labor on the grounds that the United States was in full compliance with its provisions. (See Senate Resolution 145, Cong. Rec. S14226-03 (1999) and Senate Treaty Document 106-5). The resolution contains the U.S. understandings of the terms of the Convention. The President ratified Convention 182 on 2 December, 1999, and it came into effect for the United States on 2 December, 2000.

365. *Children born outside of marriage*. A child born abroad and out of wedlock acquires at birth the nationality of a citizen mother who meets a specified residency requirement. 8 U.S.C. § 1409(c) (2005). However, when the father is the citizen-parent, one of three steps must be taken before the child turns 18: legitimization, a declaration of paternity under oath by the father, or a court order of paternity. See, 8 U.S.C. § 1409(a)(4)(2005). *Tuan Anh Nguyen v. INS*, 533 U.S. 53(2001); *Miller v. Albright*, 523 U.S. 420 (1998).

366. *Non-citizen children*. School children in the United States cannot be denied a free public education on the basis of their immigration status. See *Phyller v. Doe*, 457 U.S. 202 (1982).

367. *Education*. The Office for Civil Rights (OCR) in the U.S. Department of Education is responsible for enforcing federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age by recipients of federal financial assistance, as well as a law that ensures equal access to public school facilities for the Boy Scouts of America and certain other youth groups. These civil rights laws represent a national commitment to end discrimination in education programs. Because most educational institutions receive some type of federal financial assistance, these laws apply throughout the nation. Coverage of these civil rights laws extends to nearly 15,000 school districts; more than 4,000 colleges and universities; about 5,000 proprietary organizations, such as training schools for truck drivers and cosmetologists; and thousands of libraries, museums, vocational rehabilitation agencies, and correctional facilities. Consequently, these civil rights laws protect large numbers of students attending, or applying to attend, U.S. educational institutions. In certain situations, the laws also protect persons who are employed or are seeking employment at educational institutions. Overall, these laws protect nearly 53.2 million students attending elementary and secondary schools; and nearly 15.4 million students attending colleges and universities.

368. *Children with Disabilities*. A recent decision by the Supreme Court, *Olmstead v. L.C.*, 527 U.S. 581 (1999), held that, under the Americans with Disabilities Act, a state must place qualified individuals with mental disabilities, including children, in community settings rather than in institutions, whenever treatment professionals determine that a community placement is appropriate, and where the attendant circumstances, including the cost of a more integrated setting and the state's resources, permit. Under President Bush's New Freedom Initiative, announced in 2001, the President signed an executive order expanding the goal of community placement to include all Americans with disabilities, not just those with mental disabilities.

369. The Individuals with Disabilities Education Improvement Act was enacted in 2004. It contained amendments to the Individuals with Disabilities Education Act (IDEA), which more closely aligned the IDEA with the No Child Left Behind Act of 2001. The IDEA has helped to improve the educational opportunities for children with disabilities. IDEA focused attention on improving results for children with disabilities through early identification of disabilities, early provision of services, and meaningful access to the general curriculum, including the involvement of the disabled child's regular education teacher in the development, review, and revision of the child's individualized educational program. IDEA requires high expectations for students with disabilities through the development of state performance goals for these students; the inclusion of children with disabilities in general state and district-wide assessments with any necessary accommodations; and reports on progress to the parents of children with disabilities as often as such reports are provided for children without disabilities. IDEA also promotes the integration of children with disabilities with non-disabled children. Higher achievement levels should result in better preparation for higher education, employment, and community living.

370. IDEA provides formula grants to states to assist in the provision of early intervention and special education services. These programs are intended to ensure that the rights of infants, toddlers, children, and youth with disabilities and their parents are protected. Over 6 million infants, toddlers, children, and youth with disabilities are served through these programs under IDEA. In

addition, IDEA provides for discretionary grants to institutions of higher education and other nonprofit organizations to support research, technical assistance, technology and personnel development, and parent-training and information centers.

371. The Office of Rehabilitative Services administers the IDEA. That Office develops and disseminates federal policy on the education of infants, toddlers, children, and youth with disabilities; administers the formula grants and discretionary programs authorized by Congress; supports research to improve results for children with disabilities and youth; and promotes the training of personnel, parents, and volunteers to assist in the education provided children and youth with disabilities. Furthermore, that Office monitors and reports on the implementation of federal policy and programs as well as the effectiveness of early intervention and educational efforts for children and youth with disabilities and coordinates with other federal, state, and local agencies, along with organizations and private schools, regarding the review of policy, program, and implementation issues related to the IDEA.

372. *Financial support programs.* The federal government and states administer various programs to provide temporary assistance and help parents find and succeed at employment through which they can support their families. The Temporary Assistance for Needy Families (TANF) program provides grants to states who administer the nation's primary temporary cash assistance for low-income families with dependent children. TANF is structured to provide temporary cash assistance and services intended to help parents pursue their highest possible degree of family self-sufficiency. Many states also offer cash and employment assistance to low-income individuals who need employment. The Federal Supplemental Security Income program provides cash assistance to low-income aged, blind, or disabled individuals who are unable to hold gainful employment. Low-income families with children might also be eligible for the Earned Income Tax Credit (EITC), a federal tax credit that offsets Social Security payroll taxes by supplementing wages, and some U.S. states offer an additional state EITC for these families.

373. *Child labor laws.* As discussed in paragraphs 717 – 720 of the Initial Report, the federal Fair Labor Standards Act (FLSA) establishes national minimum wage, overtime, record keeping and child labor standards affecting more than 80 million full- and part-time workers in both the public and private sectors. 29 U.S.C. §§ 201 et seq.

374. Violators of the FLSA's child labor provisions may now be charged in the form of administrative civil money penalties of up to \$11,000 for each violation and, in certain circumstances, may be subject to criminal penalties.

375. The Wage and Hour Division (WHD) of the U.S. Department of Labor's Employment Standards Administration, enforces the FLSA child labor provisions. Its enforcement strategy is built around: comprehensive compliance assistance, education, and outreach programs directed at young workers, parents, educators and employers; the development of partnerships with other governmental and non-governmental entities to promote compliance with the child labor laws; public education efforts to foster awareness of and support for child labor provisions, and strong enforcement through directed and targeted investigations of employers of young workers. In part, as a result of the Department of Labor's enhanced, targeted child labor enforcement and outreach, the number of young workers whose employment was found to be in violation of federal child labor provisions dropped substantially over the last decade, and the number of workplace injuries and fatalities to young workers has also continued to decline.

376. On 2 December, 1999, the United States ratified ILO Convention 182 on the Worst Forms of Child Labor. The Convention requires ratifying states to take immediate and effective measures to prohibit and eliminate the worst forms of child labor. Before recommending to the President of the United States that the U.S. government ratify the convention, the Tripartite Advisory Panel on International Labor Standards (TAPILS), a sub-group of the President's Committee on the International Labor Organization comprising legal advisors from the Departments of Labor, State and Commerce, the American Federation of Labor and Congress of Industrial Organizations and the United States Council for International Business, concluded that existing law and practice of the United States already gave effect to the terms of the Convention. Thus, no U.S. laws were enacted or modified as a consequence of U.S. ratification of the Convention.

377. Convention 182 also commits States Parties to assist one another in their efforts to meet the convention's provisions. Since 1995, the U. S. Department of Labor (USDOL) has contributed approximately \$320 million to the International Labor Organization's International Program on the Elimination of Child Labor (ILO-IPEC) to support programs aimed at removing children from exploitative work and providing them with education and rehabilitation and their families with viable economic alternatives. In addition, as part of its Child Labor Education Initiative, since 2001, USDOL has awarded some \$210 million in grants to expand access to education in countries with a high incidence of exploitative child labor. The Child Labor Education Initiative nurtures the development, health, safety and enhanced future employability of children around the world by using education as a means to prevent and combat abusive or hazardous child labor.

378. *Armed conflict.* Under U.S. law, in order to serve in any branch of the U.S. military, a person must be at least 18 years of age, or at least 17 years of age and have parental consent. Prior to U.S. ratification of the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict, it was the practice of the U.S. Department of Defense that individuals under the age of 18 should not be stationed in combat situations. See Regular Army and Army Reserve Enlistment Program, Army Regulation 601-210, Headquarters, Department of the Army, 1 December 1988, Chapter 2. However, coincident with ratification of the Optional Protocol, each branch of the U.S. military has adopted policies that fulfill the obligation assumed by the United States under the Optional Protocol that all feasible measures should be taken to ensure that persons under the age of 18 do not take a direct part in hostilities.

379. *Sexual exploitation of children.* The production, distribution, receipt and possession of child pornography are illegal under both federal and state law. In 2003, Congress enacted the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (the "PROTECT Act"), Pub. L. 108-21 (2003), which significantly increased the maximum penalties and created new mandatory minimum penalties for federal child pornography crimes. The United States Supreme Court has ruled that the government has a compelling interest in the protection of victims of child pornography, one which overrides the free speech interests of pornographers. See *Osborne v. Ohio*, 495 U.S. 103 (1990).

380. *Trafficking in children.* Trafficking in children is illegal under the Thirteenth Amendment to the Constitution, which prohibits all

forms of slavery and involuntary servitude, except as punishment for crime. This constitutional prohibition is supplemented by numerous federal and state statutes. The Mann Act, for example, prohibits trafficking in individuals for purposes of prostitution and imposes heightened penalties in the case of children. See 18 U.S.C. § 2421 et seq. In addition, 18 U.S.C. § 1591 criminalizes sex trafficking of children where there is an interstate commerce jurisdictional element. The Trafficking Victims Protection Act of 2000 makes it a crime to induce a minor to engage in a commercial sex act and does not require a showing of transport nor the use of force, fraud, or coercion. All minors deemed victims under the TVPA are also eligible for certain protections and services, including immigration relief and access to refugee benefits. The PROTECT Act of 2003 also increases the penalties, removes any statute of limitations for sex crimes against children, and expands federal jurisdiction to reach U.S. citizens who travel abroad for child sex tourism. As an additional tool in the arsenal to combat trafficking internationally, U.S. citizens who engage in illicit sexual conduct with minors abroad are also subject to criminal prosecution. See 18 U.S.C. § 2423.

381. The federal government administers a number of health care programs which are designed to ensure that all children in the United States receive adequate care, free of charge if necessary.

382. The primary financing mechanism for publicly funded health care in the United States is the Medicaid insurance program, 42 U.S.C. § 1396 et seq. Operated by the states under broad federal guidelines, Medicaid covers most, but not all, low-income pregnant women, children, and caretaker relatives of children. Medicaid has been a vehicle for improving prenatal care and reducing infant mortality. In addition, the preventive component of Medicaid, the Early and Periodic Screening Diagnosis and Treatment (EPSDT) service, requires that states provide a package that includes screening, diagnostics and treatment to most Medicaid-eligible individuals under the age of 21. Data available from the Medicaid Statistical Information System indicates that approximately 90 percent of individuals under age 21 received some type of service in FY 2002. In addition, data from the HHS Centers for Medicare and Medicaid Services (CMS) show that for FY 2002, over 28 million individuals were eligible for EPSDT services, an increase of 10 million individuals since 1991. Likewise, expenditures for care for individuals under age 21 have increased from \$16.3 billion in 1991 to \$51.5 billion in 2002. In addition, the State Children's Health Insurance Program (SCHIP), a federal-state partnership, is the largest single expansion of health insurance coverage for children in the United States in more than 30 years, was created in 1997. SCHIP is designed to provide health insurance coverage to uninsured children, many of whom come from working families with incomes too high to qualify for Medicaid but too low to afford private health insurance. The SCHIP law authorized \$40 billion in federal funds over ten years to improve children's access to health coverage. About 5.8 million children who otherwise would not have health coverage were enrolled in SCHIP at some point during FY 2003.

383. There are three principal programs for delivery of public medical care in the United States, all managed by HHS. The Title V Maternal and Child Health Block Grant program makes federal funds available to U.S. states to "provide and assure mothers and children (in particular those with low income or with limited availability of health services) access to quality maternal and child health services." States are required to match federal funds to deliver care at the local level. Although it has suffered from funding constraints, Title V represents a commitment on the part of the United States to provide primary health care to all American children free of charge if necessary.

384. The second initiative is the Community Health Center program, overseen by the HHS Health Resources and Services Administration (HHS/HRSA), which finances community, migrant, homeless, and public housing Community Health Centers in medically underserved communities and medically underserved populations around the nation. By the end of FY 2003, nearly 3,600 health care sites, supported by approximately 900 public and private non-profit entities, provided comprehensive primary care to 12.4 million patients. These patients included almost 3.6 million women of childbearing age (29 percent of all patients), ages 15 to 44 years, and 3.7 million children (30 percent) ages zero to 14. FY 2003 was the second year of President Bush's five-year Community Health Centers Initiative to support 1,200 new access points and expanded sites in order to serve another 6.1 million patients by 2006.

385. The third principal program is the HHS/HRSA National Health Service Corps, which unites primary care clinicians (physicians, dentists, dental hygienists, nurse practitioners, physician assistants, certified nurse midwives, clinical psychologists, clinical social workers, licensed professional counselors, marriage and family therapists, and psychiatric nurse specialists) with communities in need of health services (health professional shortage areas). Sixty percent of these clinicians are in rural and frontier areas, while 40 percent are in the inner city.

386. Another federal health care program is the Title X Family Planning program, also administered by HHS. The Title X family planning program makes available a broad range of acceptable, age-appropriate and effective family planning methods and related preventive health care on a voluntary basis to all individuals who desire such care, with priority given to low-income persons.

387. Finally, one program that contributes significantly to the well being of low-income women and children is the Supplemental Food Nutrition Program for Women, Infants and Children (WIC), (42 U.S.C., § 1786). This latter program provides nutritious foods, including medical foods where indicated, nutrition education, and health care referrals and screenings, such as anemia testing and immunization record reviews semi-annual physical exams to low-income, high-risk pregnant and post-partum women, infants and children under five years of age. WIC foods offer nutrients vital during pregnancy, infancy and early childhood that research has shown to be lacking in the WIC population. Research has shown that WIC reduces the incidence of pre-term birth, low birth weight, infant mortality, and health care costs, improves nutrient intakes and cognitive functioning in children, and, produces many other positive effects.

388. *Immunization.* One of the most important health services provided for children in the United States is immunization. Approximately one half of childhood vaccines administered in the United States are financed through the private sector. The other half is financed through a combination of state and federal funds administered by the National Immunization Program within the HHS Centers for Disease Control and Prevention.

389. In 1993, the U.S. Congress enacted a new childhood immunization program under Medicaid (Pub. L. No. 103-66, 107 Stat.

312, section 13631) and the Government Performance and Results Act (GPRA) that requires accountability for federal funds. Under the GPRA, HHS/CMS implemented a Medicaid childhood immunization project that involved 49 U.S. states and the District of Columbia. As a result of these efforts, the rate of fully immunized preschool children has improved in the United States. States are now requiring their Managed Care Organizations (MCOs) and other providers to provide information on immunizations given to a state or local registry and/or demonstrate that a minimum number of Medicaid beneficiaries are fully immunized. Additionally, the HHS Vaccines for Children Program (VFC), established in 1994, ensures equal access to immunizations for all children and it is a state-operated federal entitlement program that reduces vaccine cost as a barrier to immunization for our neediest children. The HHS VFC program has spent more than \$1.167 billion in FY 2003 to purchase vaccines for eligible children. The VFC provides immunizations for children who are uninsured, Medicaid recipients, Native Americans, or Alaskan Natives. Additional doses of vaccines are needed for vulnerable children who are not eligible for the VFC program. Federal funding for the Immunization Grant Program (also called the "317 grant program") was launched in 1963 to serve the under-insured who go to state and local public health departments for vaccinations. In 2003, HHS/CDC awarded \$408 million in federal grants to state, local and territorial public health agencies for 317 program operations and vaccine purchases.

390. *Services for children with disabilities.* The federal-state Medicaid program provides a range of health and support services for children with disabilities, including physician and hospital services, prescription drug coverage, diagnostic services, rehabilitation services such as physical, occupational and speech therapy, case management, transportation and respite care.

391. Under the Supplemental Security Income (SSI) program, low-income individuals who are blind or disabled are provided with cash income payments from the federal government. Children are eligible if they are disabled and if their family income and resources fall below a certain level. As of the end of May 2004, approximately 981,000 children, most with severe disabilities, receive SSI monthly cash payments. Many also receive additional cash payments from state supplementary programs.

392. In the area of education, the Individuals with Disabilities Education Act assists families in securing free and appropriate public education for children with disabilities. The Act also requires that the government provide children with disabilities with "related services," which include education-related therapies and health services. These services are provided free of charge. As of 2002, approximately 6.5 million children received services from this program.

393. *Registration and identity.* The United States does not have a system of national identification cards or registration for citizens or nationals. However, aliens over the age of 14 who remain in the United States over 30 days must register and be fingerprinted, with limited exceptions. *See* 8 U.S.C. § 1302. Aliens under the age of 14 must be registered by a parent or legal guardian. Aliens 18 years or older must keep in their possession at all times any evidence of registration issued to them. Registered aliens are required to notify DHS in writing of a change of address within 10 days. *See* 8 U.S.C. § 1305(a).

394. In addition, DHS may prescribe special registration and fingerprinting requirements for selected classes of aliens not lawfully admitted to the United States for permanent residence, *see* 8 U.S.C. § 1303(a), and may require, upon 10 days notice, that natives of specified foreign countries notify DHS of their current address and furnish additional specified information. 8 U.S.C. § 1305(b).

395. The National Security Entry-Exit Registration System (NSEERS), described at 8 C.F.R. § 264.1(f), 67 Fed. Reg. 52584 (Aug. 12, 2002), established special registration procedures for nonimmigrant nationals or citizens of specified countries.

396. *Nationality.* Acquisition of U.S. citizenship is governed by the United States Constitution and by federal statute. The Fourteenth Amendment of the Constitution provides that "[a]ll persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States" regardless of the nationality of their parents. The Immigration and Nationality Act further provides that a child born abroad to a U.S. citizen parent (or parents) shall acquire U.S. citizenship at birth provided the U.S. citizen parent (or parents) complied with specified requirements for residency or physical presence in the United States prior to the child's birth. 8 U.S.C. § 1401. Recently, the Supreme Court ruled with respect to the child born abroad out of wedlock to a U.S. citizen- father that one of three affirmative steps must be taken before the child turns 18 for the child to acquire U.S. citizenship: legitimization, a declaration of paternity under oath by the father, or a court order of paternity. *See*, 8 U.S.C. § 1409(a)(4) (2005); *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420 (1998).

Article 25 - Access to the political system

397. The U.S. political system is open to all adult citizens without distinction as to gender, race, color, ethnicity, wealth or property. The right to vote is the principal mechanism for participating in the U.S. political system. The requirements for suffrage are determined primarily by state law, subject to limitations of the Constitution and other federal laws that guarantee the right to vote. Over the course of the nation's history, various amendments to the Constitution have marked the process toward universal suffrage. In particular, the Supreme Court's interpretations of the Equal Protection Clause of the Fourteenth Amendment have expanded voting rights in a number of areas.

398. The Presidential election in 2000 saw an extremely close contest, with President George W. Bush winning the state of Florida by fewer than 1,000 votes. The contesting of the result raised some allegations of voting irregularities. However, subsequent investigations by the United States Department of Justice revealed no evidence in support of these allegations, nor any violations of federal voting rights violations that affected the outcome of the election.

399. The administration of elections in the United States is very decentralized, and is entrusted primarily to local governments. However, in 2002, Congress enacted the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301-15545, which provides funds for the purchase of new voting equipment, to assist in the administration of federal elections, and to establish minimum federal election administration standards. These new requirements include provisional balloting, identification for new voters, voter education, voting equipment for disabled voters, and statewide computerized voter registration lists.

400. The United States invited the Organization for Security and Co-operation in Europe (OSCE) to observe the 2004 presidential

election, as it has done for every presidential and midterm election in the United States since 1996. The U.S. invitation was issued in accordance with the commitment the United States undertook with 54 other OSCE participating States in the 1990 Copenhagen Document. Following the invitation, the OSCE deployed an Election Observation Mission (EOM) on 4 October, 2004.

401. The EOM was a joint effort of the OSCE Office for Democratic Institutions and Human Rights and the OSCE Parliamentary Assembly focusing on specific issues including those related to the implementation of the Help America Vote Act in the framework of the presidential and congressional elections.

402. Although all of the new HAVA requirements were not yet effective in 2004, the presidential election was conducted successfully with minimal problems. In support of federal election laws, the Department of Justice mounted its largest ever election monitoring effort, ultimately deploying 1,996 federal observers to 163 elections in 29 states. While advocates again raised some allegations of voting rights violations, investigation by the Department of Justice found no evidence to support these claims. In fact, the turnout of the voting age population was the highest in more than 35 years, since the 1968 presidential election. Turnout increased by nearly 17 million votes from the 2000 election and there were nearly 13 million new voters, an increase of 8 percent in voter registration. Long lines in some precincts resulted from the unprecedented increase in turnout, a reflection of increased citizen interest in participating in the election process.

403. The OSCE raised some complaints of limited access for its observers. However, these complaints misunderstand United States election laws. As noted, elections, including the admission of observers to polling places, are largely subject to state, and not federal law. The federal government lacks general authority to admit observers into polling places. At the same time, however, US elections are extremely transparent, and every state allows representatives of political parties and candidates to observe every step of the voting and balloting counting process. But, state and local authorities determine whether to grant permission to outside observers, particularly those who have no stake in the election process, to observe elections. The U.S. Department of State is committed to facilitating OSCE observation of elections in the United States and looks forward to improved coordination in the future.

404. Ultimately, the OSCE's final report found that the November 2nd elections were conducted in an environment that reflects a long democratic tradition, including institutions governed by rule of law, free and professional media and civil society involved in all aspects of the election process.

405. In the presidential race in particular, the mission found that there was exceptional public interest not only in the two main presidential candidates and respective campaign issues, but also in the election process itself with civil society substantially contributing towards awareness of election issues and voter participation.

406. The final report did, however, note several issues. Included among these were inconsistencies among election standards, possible conflicts of interest arising from the way in which election officials are appointed, allegations of electoral fraud and voter suppression in the pre-election period, limited access to observers in some jurisdictions, and long lines on election day.

407. *Disability.* The right of blind or disabled citizens to vote is guaranteed by Section 208 of the Voting Rights Act, 42 U.S.C. § 1973aa-6, by the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. §§ 1973ee et seq., and by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 et seq., which prohibits discrimination against disabled persons in all programs of state and local governments. Section 301 of the Help America Vote Act of 2002, 42 U.S.C. § 15481, also contains new provisions protecting disabled voters that will become effective on 1 January, 2006, and require voting systems to be accessible for disabled voters so that they are able to vote with the same opportunity for privacy and independence as other voters.

408. *Citizenship.* Under federal law and the laws of the various states, the right to vote is almost universally limited to citizens of the United States.

409. *Absence from jurisdiction.* All states have procedures that permit those who will be out of town on election day, or who are prevented because of injury or illness from going to the polls, to vote by absentee ballot, either by mail or in person in advance of the election. Many states now also allow early voting for a specified period of time prior to election day. The right to vote in federal elections by overseas citizens and members of the military and their dependents is guaranteed by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973 et. seq.

410. *Criminal conviction and mental incompetence.* The 14th Amendment to the United States Constitution explicitly recognizes the right of states to bar an individual from voting "for participation in rebellion, or other crime." Accordingly, most states deny voting rights to persons who have been convicted of certain serious crimes. The standards and procedures for criminal disenfranchisement vary from state to state. In most states, this disability is terminated by the end of a term of incarceration or by the granting of pardon or restoration of rights.

411. This is a matter of continuing scrutiny in the states of the United States. In March 2005, the Nebraska legislature repealed the lifetime ban on all felons and replaced it with a two-year post-sentence ban. In 2003, Alabama enacted a law that permits most felons to apply for a certificate of eligibility to register to vote after completing their sentence. In 2001, New Mexico repealed the state's lifetime voting ban for persons with felony convictions. Policy changes that lower barriers to voting for ex-felons have also recently been enacted in Connecticut, Delaware, Kentucky, Maryland, Nevada, Pennsylvania, Virginia, Wyoming, and Washington.

412. In August 2001, the National Commission on Federal Election Reform, chaired by former Presidents Carter and Ford, recommended that all states restore voting rights to citizens who have fully served their sentences.

413. *District of Columbia.* The United States was founded as a federation of formerly sovereign states. In order to avoid placing the nation's capital under the jurisdiction of any individual state, the United States Constitution provides Congress with exclusive jurisdiction over the "Seat of Government of the United States," which is the District of Columbia. U.S. Const. art. 1 § 8. The District of Columbia initially occupied land donated by the state of Maryland and the state of Virginia, also known as the Commonwealth of

Virginia. The Virginia portion of the District of Columbia was, however, returned to Virginia in 1846.

414. The right of residents of the District of Columbia (DC) to vote for the President and Vice President is guaranteed by the 23rd Amendment. They are represented in the House of Representatives by a non-voting Delegate, who sits on committees and participates in debate, but cannot vote. D.C. does not have representation in the Senate.

415. *Insular areas*. Residents of Guam, the U.S. Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Puerto Rico do not vote in elections for President and Vice-President. The Twelfth Amendment and Twenty-Third Amendments to the Constitution extend the right to vote in presidential elections to citizens of "states" and to citizens of the District of Columbia. These provisions do not extend to the Insular Areas. See *Attorney General of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (residents of Guam not permitted to vote in presidential elections). *Igartua-De la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), and *Igartua-De la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000) (residents of Puerto Rico had no right under Article II of the Constitution to vote in presidential elections); *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001) (federal and state laws denying a former resident of New York the right to vote in presidential elections once he became resident of Puerto Rico were not unconstitutional). Please see additional information under "self-determination."

416. In August of 2005, the U.S. Court of Appeals for the First Circuit Court held that Puerto Rico is a Commonwealth, not a state, therefore under the United States Constitution, Puerto Rico does not have any electors in the Electoral College which casts the final vote for President and Vice President of the United States. *Igartua-De la Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005). Furthermore, the First Circuit stated that courts cannot grant the right to vote to members of a Commonwealth, rather the right must come through an amendment to the Constitution that only Congress can create. *Id.* at 151.

417. *Removal from office*. Article 2, section 4 of the Constitution provides that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Under Article 1, the Senate has the sole power to try impeachments, and the House of Representatives has the sole power to impeach. In addition, each House of the Congress has the power to pass judgment on the qualifications of its members and expel members. Similar procedures are generally available at the state and local level, and there are legal safeguards to protect office holders from abuse of these processes. See *Powell v. McCormack*, 395 U.S. 486 (1969) (Congress cannot exclude a member who has the qualifications prescribed in the Constitution); *Bond v. Floyd*, 385 U.S. 116 (1966) (exclusion for the expression of political views violates the free speech guarantee of the First Amendment). Also commonly available at the state and local level is the recall process, by which voters can petition for an election to determine whether an elected official should remain in office.

418. In 1998, William Jefferson Clinton, the 42nd President of the United States, became the first elected President of the United States to be impeached, tried, and then acquitted by the Senate after a scandal exposed his affair with a White House intern. The impeachment resolution included two Articles of Impeachment. The first alleged that President Clinton willfully corrupted and manipulated the judicial process of the United States for his personal gain. The second alleged that he prevented and obstructed the administration of justice and engaged in a course of conduct designed to delay, cover up, and conceal evidence.

419. In 2003, a recall movement arose against California Governor Gray Davis in reaction to the Governor's response to the 2001 California energy crisis and the 2003 budget deficit. The 2003 recall was a special election permitted under California law. After several legal and procedural efforts failed to stop it, California's first-ever gubernatorial recall election was held on October 7. California voted to recall Davis and to elect Arnold Schwarzenegger as his replacement. The result was officially certified on November 14 and Schwarzenegger was sworn in on November 17. Governor Davis was the first governor recalled in the history of California, and just the second in U.S. history.

Access to public service

420. The U.S. government employs approximately 2,725,000 civilian workers, located in the 50 states and the District of Columbia, of whom some 300,000 are hired annually. With few exceptions, federal employees are selected pursuant to statutes establishing a merit-based civil service system designed to make employment opportunities available to the most qualified applicants through recruitment, hiring, retention and evaluation procedures that are free from considerations of politics, race, sex, religion, national origin, disability and age.

421. The statutory mandate for the federal civil service is as follows:

"Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." 5 U.S.C. § 2301 (b)(1).

422. The federal civil service system has its origin in the Civil Service Act of 1883. Until this Act, it was the practice of the federal government to reward political loyalists with jobs. It was not surprising, therefore, that the primary purpose of this first Civil Service Act was to remove political influence from federal personnel management decisions. The concept of merit selection, which was codified in this Act, remains in effect to this day.

423. Central to the United States' merit-based system is the process of open competition, and today more than half of all federal jobs are filled through such competition. The federal competitive service requires applicants to compete for positions based on a written examination and/or an evaluation of their education and work experience. Once hired, advancement is also competitive and based on performance and merit. Moreover, as a result of the leadership of the federal government and the success of the federal merit system, the great majority of state and local governments, who employ in excess of 15,680,000 civil servants, have adopted similar merit-based employment procedures.

424. The 1978 Civil Service Reform Act created a federal equal opportunity recruitment program to meet the statute's goal of

recruitment from all segments of the workforce. One of the purposes of the Act is to promote "a competent, honest, and productive federal workforce reflective of the nation's diversity". Pursuant to this mandate, special efforts are taken to recruit minorities and women who may be underrepresented in various job categories. Efforts are also made to ensure that the selection procedures themselves are not culturally biased and do not artificially eliminate from consideration otherwise qualified members of underrepresented groups.

425. In addition, the federal civil service and many state and local civil service programs have taken important steps to protect their employees from political influence. In accordance with the principles of a merit-based civil service, the Hatch Act, passed in 1939, prohibits federal employees from actively participating in partisan politics. Congress determined that partisan political activity must be limited in order for public institutions to perform fairly and effectively. However, the law does not prohibit federal employees from registering, voting, making financial contributions to political candidates, and expressing their personal opinions on political candidates and questions.

426. National policy in this area has also been codified in various federal, state and local civil rights laws. These laws ensure that employment decisions at all levels of government are free from bias based upon race, sex, religion, national origin, disability and age. The laws also provide aggrieved individuals access to impartial and independent tribunals to adjudicate alleged violations of their rights.

427. The policies and protections of the federal, state and local civil service systems offer all Americans the promise of being treated equally in civil service employment. Women and minorities are still overrepresented at the lower levels of pay and authority, but their status in public sector employment exceeds their status in private sector employment. As of 2003, women constitute 45 percent of federal civilian government employees.

428. *U.S. Congress.* A record 83 women serve in the 109th United States Congress (2005-2007): 69 in the House of Representatives and 14 in the Senate. In addition, three women serve as Delegates to the House from Guam, the Virgin Islands and Washington, DC.

429. Of the 83 women serving in Congress, 24.7 percent of the women are women of color. A total of 14 Black women, 7 Hispanic women, and 3 Asian women are currently serving in Congress. Women make up approximately 14 percent of the United States Congress.

430. In the 109th Congress, Representative Nancy Pelosi (D-CA), the House Democratic Leader, became the first woman to lead her party in Congress. Five other women hold leadership positions in Congress.

431. *State elective executive offices.* Women made substantial gains at the state level in the 1992 elections. The number of women holding statewide elective executive posts increased four percentage points, from 18.2 percent (59 women) to 22.2 percent (72 women).

432. Currently, a record number of 8 women are simultaneously serving as Governor of the 50 states. Additionally, a woman was recently elected to serve as the first woman Governor of Puerto Rico. Eight women are serving as Lieutenant Governors of their state.

433. *Women appointed to government positions.* With the increased awareness of women as active voters and elected officials has come an increase in the number of women appointed to cabinet-level positions in federal, state, and local government, women judges, and women as members of special advisory commissions on a wide range of specialized topics. Nevertheless, the systematic inclusion of women at all levels of the planning process in policymaking is far from complete.

434. *National executive offices.* Two women currently serve at Cabinet-level positions in the Administration: Condoleezza Rice is the Secretary of State and Margaret Spellings is the Secretary of Education.

Minorities in government

435. The representation of minorities at all levels of public service continues to increase.

436. *U.S. Congress.* Like women, minorities have made significant gains in Congressional representation as a result of the 2005 elections. Currently, 42 Blacks are members of the House and 1 is a member of the Senate. There are 24 Hispanics in the House, and 2 in the Senate. There are 4 Asian Americans in the House, and 2 in the Senate.

Article 26 - Equality before the law

437. As indicated in the discussion of the Initial Report, all persons in the United States are equal before the law. Subject to certain exceptions, such as the reservation of the right to vote to citizens, they are equally entitled to all the rights specified in the Covenant. In addition, as discussed at length under Article 2, all persons in the United States enjoy the equal protection of the laws. Any distinction must at minimum be rationally related to a legitimate governmental objective, and certain distinctions such as race can be justified only by a compelling governmental interest, a standard that is almost never met.

Article 27 - The rights of minorities to culture, religion and language

438. *Linguistic freedom.* The First Amendment to the Constitution guarantees all persons in the United States the right to converse or correspond in any language they wish. Virtually every major language is spoken somewhere in the United States, and there are no restrictions on the use of foreign language in the print or electronic media. Under Sections 203 and 4(f)(4) of the Voting Rights Act, 42 U.S.C. §§ 1973b and 1973aa-1a, the states and political subdivisions are required to provide multilingual election services for all

elections in those jurisdictions in which members of a single language minority with limited English proficiency constitute more than 5 percent of the voting age population or more than 10,000 citizens of voting age. The language minorities that are covered are limited to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish Heritage. This requirement of the Voting Rights Act is scheduled to expire in 2007 unless renewed by Congress. In those jurisdictions that are not covered by the language minority provisions of the Voting Rights Act, Section 208 of the Act, 42 U.S.C. 1973aa-6, mandates that any voter who requires assistance to vote by reason of an inability to read or write the English language may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

439.*No Child Left Behind*. The No Child Left Behind Act of 2001 (NCLB Act) also will go a long way to ensure that all children receive a quality education, through its comprehensive overhaul of the Elementary and Secondary Education Act of 1965 (ESEA). Title I of the ESEA provides financial assistance to school districts with high concentrations of students from low-income families to improve the academic achievement of students who are failing, or at risk of failing, to meet state academic standards. The NCLB Act strengthens Title I accountability by requiring states to implement statewide accountability systems for all schools and students. Each state is required to establish academic content and achievement standards and define adequate yearly progress, for the state as a whole and for schools and school districts, toward ensuring that all students meet these standards. Adequate yearly progress must include separate measurable annual objectives for continuous and substantial improvement for all public elementary and secondary students and for the achievement of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. These accountability systems also will include annual testing for students in grades 3-8. The reauthorized ESEA requires, as a condition of a state's receipt of Title I funds, that the results of annual statewide testing be published and broken down, at the school, school district, and state levels, by poverty, race, ethnicity, gender, migrant status, disability status, and limited English proficiency to ensure that no group is left behind.

440.If a school or school district fails to make adequate yearly progress, the school or district is subject to a sequence of steps to address the situation, moving from improvement, to corrective action, and to restructuring measures that will seek to get them on course to meet state standards. Parents and students attending these schools must be given the opportunity to attend another public school within the district. A school district with persistently failing schools must set aside a portion of its Title I funds for "supplemental educational services" (tutoring or other academic support provided outside the regular school day). If a school meets or exceeds adequate yearly progress objectives or closes achievement gaps, it will be eligible for state achievement awards. These measures will provide incentives for schools and districts to improve and increase choice for parents and students.

441.In addition, the ESEA, as reauthorized by the NCLB Act, recognizes reading as the fundamental building block of a child's education. It includes President Bush's commitment to ensure that every child can read by the end of the third grade. The Reading First initiative substantially increases the U.S. investment in early reading programs based on scientific research. This should reduce the number of children identified for special education due to lack of appropriate reading instruction. States and districts receive grants that may be used for screening and diagnostic assessments to identify students in grades K-3 at risk of reading failure as well as to provide professional development in reading instruction for K-3 teachers. Assistance for pre-K reading programs also is provided. Finally, states receive grants that focus on scientifically based research to prepare and recruit high-quality teachers.

442.*Serving Limited English Proficient Children*. The NCLB Act simplified federal support for English language instruction by combining categorical bilingual and immigrant education grants into a state formula program. This formula program assists states and school districts in doing the comprehensive planning needed to implement programs for limited English proficient (LEP) students that help these students learn English as quickly and effectively as possible, through scientifically based teaching methods, and to help these students to achieve the same high academic standards as other students. This formula program also increases flexibility and accountability for states and districts in addressing the needs of LEP students. In addition, under the reauthorized Title I program, all LEP students must be tested for English language proficiency, as well as for reading and language arts in English, after they have attended a U.S. school for three consecutive years, subject to certain exceptions.

443.Furthermore, the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students (OELA), formerly the Office of Bilingual Education and Minority Languages Affairs, provides national leadership in promoting high-quality education for the nation's population of LEP students. OELA's mission is to ensure that all limited English proficient students learn English and achieve to the same high academic achievement targets in content areas of reading, math, and science that states set for all students, as well as to build partnerships between parents and the communities. OELA administers grant programs that help every child learn English and content matter at high levels and collaborates with other federal, state, and local partners to strengthen and coordinate services for LEP children and promote best practices.

444.The Department of Justice enforces section 204 the Equal Educational Opportunities Act, 20 U.S.C. § 1703, which forbids states from denying equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by such actions as failing to take appropriate steps to overcome language barriers that impede equal participation by its students in its instructional programs.

445.Finally, as discussed above, OCR enforces Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit discrimination based on race, color, and national origin by recipients of federal financial assistance. In *Lau v. Nichols*, 414 U.S. 563 (1974), the U.S. Supreme Court affirmed the former Department of Health, Education, and Welfare's Office for Civil Rights' Memorandum of 25 May, 1970, which directed school districts to take affirmative steps to help LEP students overcome language barriers and to ensure that they can participate meaningfully in each district's educational programs. To comply with Title VI, programs to educate national origin minority group children with limited proficiency in English must be: 1) based on a sound educational theory; 2) adequately supported so that the program has a realistic chance of success (with adequate and effective staff and resources); and 3) periodically evaluated and revised, if necessary.

446.OCR's policy is designed to ensure that LEP children at the elementary and secondary level learn English and enter the educational mainstream. School districts have substantial flexibility in implementing programs and services to meet the needs of LEP

students, so long as the programs and services are effective. Neither OCR nor the Department of Education requires or advocates a particular program of instruction for LEP students.

III. Committee Suggestions and Recommendations

447. The Committee recommended that the United States review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to Article 6, paragraph 5, and Article 7 of the Covenant.

448. Comment: The United States has reviewed its reservations, declarations and understandings to the Covenant, and concluded that they are appropriate. With reference to Article 6(5) and Article (7) of the Covenant, the United States notes that its reservations are founded in United States constitutional principles. In that regard, with respect to Article 6(5), the United States also notes that, since its Initial Report, the Supreme Court has ruled that the execution of offenders who were under 18 years of age at the time of their offense is prohibited by the United States Constitution. See *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

449. The Committee hopes that the government of the United States will consider becoming a Party to the First Optional Protocol to the Covenant.

450. Comment: The United States has considered this issue and has no current intention of becoming a Party to the First Optional Protocol to the Covenant.

451. The Committee recommends that appropriate inter-federal and state institutional mechanisms be established for the review of existing as well as proposed legislation and other measures with a view to achieving full implementation of the Covenant, including its reporting obligations.

452. Comment: The United States has considered this issue, and on December 18, 1998, the President issued Executive Order 13107 regarding the implementation of human rights treaties. This order declares, inter alia, that it "shall be the policy and practice of the government of the United States, ... fully to implement its obligations under the international human rights treaties to which it is a Party and that all executive departments and agencies ... shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully."

453. The order further establishes an Interagency Working Group on Human Rights Treaties "for the purpose of providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters. The principal functions of this group include, inter alia, (i) coordinating the preparation of reports that are to be submitted by the United States in fulfillment of its international human rights treaty obligations, (ii) coordinating responses to complaints submitted to the United Nations, the Organization of American States, and other international organizations alleging human rights violations by the United States, and (iii) developing effective mechanisms to review legislation proposed by the Administration for conformity with international human rights obligations and that these obligations are taken into account in reviewing legislation under consideration by the Congress. Consistent with the order, a variety of inter-agency procedures now exist to ensure that the matters addressed by the order are coordinated among all relevant agencies.

454. With respect to complying with its reporting obligations on a timelier basis, since the fall of 2003, the Department of State has more than doubled the resources it has dedicated to the purpose of completing such reports. The United States government is committed to submitting timely treaty reports.

455. The Committee emphasizes the need for the government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action. State legislation which is not yet in full compliance with the non-discrimination Articles of the Covenant should be brought systematically into line with them as soon as possible.

456. Comment: The United States agrees that efforts to prevent and eliminate public and private discrimination consistent with our Constitution are of the utmost importance. The Civil Rights Division of the Department of Justice, the independent Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs of the U.S. Department of Labor, and the Office for Civil Rights of the U.S. Department of Education, among others, vigorously enforce anti-discrimination laws, including, among others, the Civil Rights Act of 1964, the Voting Rights Act of 1965, Executive Order 11246, Title IX of the Education Amendments, the Americans with Disabilities Act of 1992, and the Help America Vote Act of 2002.

457. At the same time, the United States government believes that discriminatory attitudes and prejudices are best fought by promoting equal access and individual merit as the guiding forces behind opportunity and advancement in society. The United States Supreme Court has interpreted the United States Constitution's equal protection principle to be incongruent with fostering racial or gender preferences and classifications except in the most compelling circumstances. See *Gutter v. Bollinger*, 539 U.S. 309 (2003); *United States v. Virginia*, 518 U.S. 515, 531 (1996). Under U.S. law, vague and amorphous allusions to societal discrimination at large are not a compelling interest; policies aimed at remedying discrimination in a particular institution or program can be considered a compelling interest. *Croson*, 488 U.S. at 499-506; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Furthermore, we note that no provision in the Covenant requires the use of "affirmative action" as a governmental policy.

458. The Committee urges the State Party to revise federal and state legislation with a view to restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with Article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were 18. The Committee considers that the determination of methods of execution must take into account the prohibition against causing avoidable pain and recommends the State Party to take all necessary steps to ensure respect of Article 7 of the Covenant.

459.Comment: While, consistent with reservation (2) of the United States to the Covenant, the Covenant imposes no constraint on the crimes for which the United States may impose capital punishment, under the United States Constitution the use of the death penalty is restricted to particularly serious offenses. Also, see our response to Comment 1. Regarding Article 7, the United States reminds the Committee that under U.S. reservation (3), the United States is bound by Article 7 only to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution. The United States government takes the position that methods of execution currently employed in the United States do not constitute cruel and unusual punishment under our Constitution.

460.The Committee urges the State Party to take all necessary measures to prevent any excessive use of force by the police; that rules and regulations governing the use of weapons by the police and security forces be in full conformity with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; that any violations of these rules be systematically investigated in order to bring those found to have committed such acts before the courts; and that those found guilty be punished and the victims be compensated.

461.Comment: The United States refers the Committee to the various sections of this report that demonstrate that the United States, at the state and federal level, prohibits and punishes excessive use of force by government officials.

462.Regulations limiting the sale of firearms to the public should be extended and strengthened.

463.Comment: This recommendation states a policy preference rather than addressing a duty or obligation under the Covenant. As the Committee is aware, the Second Amendment of the United States Constitution states that "[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." The United States recognizes that this Amendment protects a right of the public to possess firearms. The Second Amendment, however, allows for reasonable restrictions designed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse, and there are many such restrictions at both the federal and state level. Pursuant to federal law, a person seeking to purchase firearms from a Federal Firearm Licensee is subject to a background check to determine whether the transfer should be denied because the person falls within a prohibited category. In addition, the United States government, under its Project Safe Neighborhoods initiative and in partnership with state and local law enforcement, vigorously prosecutes prohibited persons found in possession of firearms.

464.The Committee recommends that appropriate measures be adopted as soon as possible to ensure to excludable aliens the same guarantees of due process as are available to other aliens and guidelines be established which would place limits on the length of detention of persons who cannot be deported.

465.Comment: The Department of Homeland Security and the Department of Justice have promulgated extensive regulations governing the continued detention of aliens who are subject to an order of removal, deportation, or exclusion. *See generally* 8 C.F.R. 241.13, 241.14, 1241.14.

466.The United States Supreme Court has long held that aliens who have been stopped at the border and are seeking admission in the first instance or who have been inspected and denied admission have no constitutional or statutory entitlement to be admitted or released into the United States. *See generally* *Zadvydas v. Davis*, 533 U.S. 678, 693-694 (2001); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *see also* *United States v. Flores-Montano*, 124 S. Ct. 1582, 1585 (2004) ("The government's interest in preventing the entry of unwanted persons . . . is at its zenith at the international border."); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."). In neither *Zadvydas v. Davis*, 533 U.S. 678 (2001), nor *Clark v. Martinez*, 125 S. Ct. 716 (2005), did the Supreme Court purport to impose constitutional limits on the government's detention authority, especially with regard to aliens who are dangerous to national security or who pose threats to public safety.

467.The Committee's recommendation was given careful consideration, but it is the view of the United States that current U.S. law fully satisfies the obligations the United States has assumed under the Covenant. United States immigration law draws reasonable distinctions, with respect to the nature and quantum of rights afforded in the detention and removal process, between aliens who were stopped at the border and not lawfully admitted to the United States and those who were lawfully admitted. Governments may make such reasonable distinctions under national law consistent with the Covenant. In addition, the United States has a legitimate interest in taking steps so that aliens who pose a threat to the public safety or national security are removed from the country as soon as practicable and, while awaiting removal, are subject to appropriate custody or detention.

468.The Committee does not share the view expressed by the government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State Party even when outside that state's territory.

469.Comment: The United States continues to consider that its view is correct that the obligations it has assumed under the Covenant do not have extraterritorial reach. Please note Annex I to this report.

470.The Committee expresses the hope that measures be adopted to bring conditions of detention of persons deprived of liberty in federal or state prisons in full conformity with Article 10 of the Covenant. Legislative, prosecutorial and judicial policy in sentencing must take into account that overcrowding in prisons causes violation of Article 10 of the Covenant.

471.Comment: All prisons in the United States are subject to the strictures of the federal Constitution and federal civil rights laws. Prisons must ensure that "inmates receive adequate food, clothing, shelter, and medical care and must 'take reasonable measures to

guarantee the safety of inmates." *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994). The Americans with Disabilities Act and the Rehabilitation Act generally require prison physical spaces and programs to be accessible to inmates with impairments, subject to appropriate security and safety concerns, and the Individuals with Disabilities in Education Act requires prisons to provide inmates with appropriate special educational services.

472. As noted, the federal Constitution prohibits prison conditions, including overcrowding, when such constitutes "cruel and unusual punishment." *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981). However, in making such a determination, "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens." *Id.* Overcrowding, standing alone, does not violate federal law. Nor does the United States agree that overcrowding, standing alone, violates Article 10(1).

473. Existing legislation that allows male officers access to women's quarters should be amended so as to provide at least that they will always be accompanied by women officers.

474. Comment: It is not the practice of the federal Bureau of Prisons or of most state corrections departments to restrict corrections officers to work only with inmates of the same sex. Furthermore, requiring female officers always to be present during male officers' access to women's quarters would be extremely burdensome on prison resources. Appropriate measures are taken, however, to protect female prisoners. Staff are trained to respect offenders' safety, dignity, and privacy, and procedures exist for investigation of complaints and disciplinary action-including criminal prosecution-against staff who violate applicable laws and regulations.

475. Conditions of detention in prisons, in particular in maximum security prisons, should be scrutinized with a view to guaranteeing that persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person, and implementing the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials therein.

476. Comment: All prisoners in the United States are guaranteed treatment that does not constitute cruel and unusual punishment prohibited by the United States Constitution. Also, *see* the response to Question 10, *supra*. It is also worth noting that the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials are non-binding recommendations.

477. Appropriate measures should be adopted to provide speedy and effective remedies to compensate persons who have been subjected to unlawful or arbitrary arrests as provided in Article 9, paragraph 5, of the Covenant.

478. Comment: The Constitution of the United States prohibits unreasonable seizures of persons, and the Supreme Court has allowed the victims of such unconstitutional seizures to sue in court for money damages. *See, e.g., Bivens v. Six Unnamed Known Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In addition, the United States reminds the Committee of the understanding (2) of the United States concerning Article 9(5).

479. The Committee recommends that further measures be taken to amend any federal or state regulation which allow, in some states, non-therapeutic research to be conducted on minors or mentally-ill patients on the basis of surrogate consent.

480. Comment: The U.S. government's position in the protection of human subject regulations is grounded in extensive public review and debate, based on the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Fourteen federal government departments and agencies have adopted regulations that provide protection for human subjects in federally-conducted or -supported research. Under these rules, a legally authorized representative may consent to a subject's participation in research, including nontherapeutic research. This includes mentally ill subjects or subjects with impaired decision-making capacity, including minors. The rules provide rigorous safeguards for research subjects in general and recognize that additional protections may be necessary for vulnerable populations. The U.S. government does not see a need to reexamine that position.

481. The Committee recommends that the current system in a few states in the appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body.

482. Comment: The United States does not believe there is any reason to reconsider the state practice of election of judges. Popular election of judges, though not provided for in the federal Constitution, is one means of ensuring democratic accountability of the state and local judicial branch of government. Furthermore, each state is entitled to determine the structure of its government, with only limited, circumscribed restrictions in federal law.

483. The Committee recommends that steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished. The Committee urges the government to ensure that there is a full judicial review in respect of determinations of federal recognition of tribes. The Self-Governance Demonstration Project and similar programs should be strengthened to continue to fight the high incidence of poverty, sickness and alcoholism among Native Americans.

484. Comment: Under United States Constitutional law, the Congress has plenary power over Native American communal rights.

485. Indigenous groups seeking recognition as federally recognized tribes may submit an application for recognition to the Department of the Interior, or else be recognized through Congressional or other Executive Branch actions. Indigenous groups who are unsuccessful in this process may seek review of a recognition decision in a United States federal court.

486. The United States also provides a diverse array of funding and training opportunities, as well as direct services, available to Native Americans and Alaska Natives, some of which promote home ownership and small business development, combat drug and

alcohol abuse, promote health and healthy living, and equip and train law enforcement officials.

487. The Committee expresses the hope that, when determining whether currently permitted affirmative action programs for minorities and women should be withdrawn, the obligation to provide Covenant's rights in fact as well as in law be borne in mind.

488. Comment: See response to Question 4, *supra*.

489. The Committee recommends that measures be taken to ensure greater public awareness of the provisions of the Covenant and that the legal profession as well as judicial and administrative authorities at federal and state levels be made familiar with these provisions in order to ensure their effective application.

490. Comment: There is extensive awareness of the provisions of the Covenant at the state and federal levels.

Notes

Annex I

TERRITORIAL APPLICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Vienna Convention on the Law of Treaties states the basic rules for the interpretation of treaties. In Article 31(1), it states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Resort to this fundamental rule of interpretation leads to the inescapable conclusion that the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party.

Article 2(1) of the Covenant states that "[e]ach 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." Hence, based on the plain and ordinary meaning of its text, this Article establishes that States Parties are required to ensure the rights in the Covenant only to individuals who are both *within* the territory of a State Party *and* subject to that State Party's sovereign authority.

This evident interpretation was expressed in 1995 by Conrad Harper, the Legal Adviser of the U.S. Department of State, in response to a question posed by the UN Committee on Human Rights, as follows: Mr. HARPER (United States of America) said:

Mr. Klein had asked whether the United States took the view that the Covenant did not apply to government actions outside the United States. The Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a Party's territory. Article 2 of the Covenant expressly stated that each State Party undertook to respect and ensure the rights recognized "to all individuals within its territory and subject to its jurisdiction". That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words "within its territory" had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party's territory.

A further rule of interpretation contained in the Vienna Convention on the Law of Treaties states in Article 32 that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

In fact, there is no ambiguity in Article 2(1) of the Covenant and its text is neither manifestly absurd nor unreasonable. Thus there is no need to resort to the travaux préparatoires of the Covenant to ascertain the territorial reach of the Covenant. However, resort to the travaux serves to underscore the intent of the negotiators to limit the territorial reach of obligations of States Parties to the Covenant.

The preparatory work of the Covenant establishes that the reference to "within its territory" was included within Article 2(1) of the Covenant to make clear that states would not be obligated to ensure the rights recognized therein outside their territories.

In 1950, the draft text of Article 2 then under consideration by the Commission on Human Rights would have required that states ensure Covenant rights to everyone "within its jurisdiction." The United States, however, proposed the addition of the requirement that the individual also be "within its territory." Eleanor Roosevelt, the U.S. representative and then Chairman of the Commission emphasized that the United States was "particularly anxious" that it *not* assume "an obligation to ensure the rights recognized in it to citizens of countries under United States occupation." She explained that:

The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states. Another illustration would be leased territories; some countries leased certain territories from others for

limited purposes, and there might be question of conflicting authority between the lessor nation and the lessee nation.

Several delegations spoke against the U.S. amendment, arguing that a nation should guarantee fundamental rights to its *citizens* abroad as well as at home. René Cassin (France), proposed that the U.S. proposal should be revised in the French text replacing “*et*” with “*ou*” so that states would not “lose their jurisdiction over their foreign citizens.” Charles Malik (Lebanon) cited three possible cases in which the United States amendment was open to doubt:

First, . . . [the] amendment conflicted with Article [12], which affirmed the right of a citizen abroad to return to his own country; it might not be possible for him to return if, while abroad, he were not under the jurisdiction of his own government. Secondly, if a national of any state, while abroad were informed of a suit brought against him in his own country, he might be denied the rightful fair hearing because of his residence abroad. Thirdly, there was the question whether a national of a state, while abroad, could be accorded a fair and public hearing in a legal case in the country in which he was resident.

Mrs. Roosevelt in responding to Malik’s points, could “see no conflict between the United States’ amendment and Article [12]; the terms of Article [12] would naturally apply in all cases.” Additionally, she asserted that “any citizen desiring to return to his home country would receive a fair and public hearing in any case brought against him.” Finally, she reiterated generally that “it was not possible for any nation to guarantee such rights [e.g., the right to a fair trial in foreign courts] under the terms of the draft Covenant to its nationals resident abroad.”

Ultimately, the U.S. amendment was adopted at the 1950 session by a vote of 8-2 with 5 abstentions. Subsequently, after similar debates, the United States and others defeated French proposals to delete the phrase “within its territory” at both the 1952 session of the Commission and the 1963 session of the General Assembly.

Notes

Annex II

PROGRAMS TO PROTECT WOMEN FROM VIOLENCE

The Office on Violence Against Women (OVW) of the Department of Justice administers one formula and eleven discretionary grant programs, as well as a training and technical assistance initiative. Since 1994, OVW has awarded more than \$1.6 billion in grant funds, making over 3,700 discretionary grants and 500 STOP (Services*Training*Officers*Prosecutors) formula grants to the states and territories. These grant programs help state, tribal, and local governments and community-based agencies to train personnel, establish specialized domestic violence and sexual assault units, assist victims of violence, and hold perpetrators accountable. By forging state, local, and tribal partnerships among police, prosecutors, the judiciary, victim advocates, and victim service providers, VAWA grants help provide victims with the protection and services they need to pursue safe and healthy lives and enable communities to hold offenders accountable for their violence.

One of the grant programs created by VAWA was designed to encourage jurisdictions to treat domestic violence as a serious violation of criminal law. Historically, the criminal justice system treated domestic violence as a private, family matter. Only in the past two decades has spousal and partner violence been acknowledged as a crime requiring the full force and attention of the criminal justice system. In recent years, many state laws have provided broader powers to police to arrest perpetrators of domestic violence, including the ability to make an arrest without a warrant when a law enforcement officer has probable cause to believe that a crime has been committed. Additionally, many police departments have implemented policies and practices that encourage or mandate arrest of abusers based on probable cause that the person committed domestic violence or violated a protection order. The grant program helps encourage jurisdictions to develop such mandatory or pro-arrest policies.

In the past, many states did not consider rape of a spouse a crime or considered it a lower level offense than rape of a stranger. Currently, all states have laws penalizing spousal rape, although it is still a lower-level offense in some states and some states require additional proof from spousal victims than from other victims of rape. However, states are continuing to strengthen their laws in this area.

In addition, historically, during rape trials, defendants would often present personal information about the victim, such as the victim’s past sexual conduct. Most states now have “rape shield laws” which are intended to prevent offenders from using victims’ past sexual conduct or sexual predisposition. VAWA included a federal rape shield law.

Historically, domestic violence was seen as only pertaining to domestic relationships, such as spouses or cohabitants. Thus, many of the domestic violence laws did not include violence that was committed by a partner in a dating relationship. Currently, many states have enacted laws to include victims of violence in dating relationships and more states continue to do so. In addition, VAWA 2000 expanded several grant programs to include abuse in dating relationships.

The U.S. Department of Health and Human Services (HHS) also is responsible for implementing a significant portion of the programs created under VAWA and VAWA 2000. HHS administers the National Domestic Violence Hotline, a toll-free crisis line that provides information to victims throughout the country about local resources. HHS also has expanded resources for domestic violence programs and battered women’s shelters, and raised awareness of domestic violence in the workplace among health care providers. In addition, HHS provides grants to states for rape prevention and education programs conducted by rape crisis centers and helps build new community programs to prevent intimate partner violence.

VAWA and subsequent legislation provide federal prosecutors with important tools to support and supplement state and local prosecution of domestic violence and stalking crimes. Historically, domestic violence and stalking crimes were exclusively dealt with by the states. While domestic violence remains primarily a matter for state and local authorities, VAWA and subsequent legislation provide federal tools to prosecute domestic violence or stalking offenders in certain situations involving firearms or interstate travel or

activity.

One federal crime that was created by VAWA and amended by VAWA 2000 is the crime of interstate domestic violence. A person commits this crime who travels in interstate or foreign commerce, or leaves or enters Indian country with the intent to kill, injure, harass, or intimidate a spouse or intimate partner when in the course of or as a result of such travel, the person commits or attempts to commit a crime of violence against that spouse or intimate partner. The definition of spouse or intimate partner includes a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, a person who cohabits or has cohabited with the abuser as a spouse, and any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the state or tribal jurisdiction in which the injury occurred or where the victim resides. A person who causes a spouse or intimate partner to travel in interstate or foreign commerce, or leave or enter Indian country, by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against the spouse or intimate partner also is guilty of the offense of interstate domestic violence.

VAWA also penalized interstate violations of protection orders. It is a federal crime to travel in interstate or foreign commerce, or leave or enter Indian country, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued and subsequently engage in a violation of such portion of the order. Under this provision, it is also a federal crime to cause another person to travel in interstate or foreign commerce, or leave or enter Indian country, by force, coercion, duress, or fraud, if in the course of, as a result of, or to facilitate such conduct or travel the offender engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued.

In 1996, Congress created a federal stalking crime. It is now a federal crime to travel in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or leave or enter Indian country, with the intent to kill, injure, harass, or intimidate any person if, in the course of or as a result of such travel, the offender places that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of that person's immediate family, or that person's spouse or intimate partner. The terms immediate family and spouse or intimate partner include a spouse or former spouse of the stalking target, a person who shares a child in common with the stalking target, a person who cohabits or has cohabited as a spouse with the stalking target, any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the state or tribal jurisdiction in which the injury occurred or the victim resides, and a parent, child, sibling, and all household members related to the stalking target by blood or marriage.

One example of a case successfully prosecuted under the interstate stalking law was brought in the District of Maine. The defendant and his wife of approximately twelve years lived in California where the defendant had a long history of domestic abuse toward his wife. He had held a knife to her throat, threatened to break every bone in her face, left a bullet on her pillow and threatened to hunt her down if she ever left. After one particularly bad assault, the victim obtained a protection order and fled to her sister in Maine. The defendant was released from jail on the assault charge and tracked the victim down in Maine. She learned that he stopped in Utah to pick up a gun and was on his way to Maine. When the defendant arrived in Maine at the children's school, he was arrested. A handgun was found in his belongings. He was convicted at a bench trial and sentenced in 2003 to a 96 month term of imprisonment.

In another case brought under this law, in 2000, a defendant who was from North Carolina was sentenced to life in federal prison without parole, following his jury conviction in the District of Maryland for conspiracy to kidnap and kidnapping resulting in the death of the victim. A man from Maryland had traveled to North Carolina, and recruited the defendant, along with a co-conspirator, to dispose of the body. Upon arriving in Maryland, the defendant and his co-conspirator agreed to assist in the abduction of the victim, who was the former girlfriend of the man from Maryland. The defendant and his co-conspirator kidnapped the victim on 4 December, 1998, as she was leaving her place of employment. Followed by the co-conspirator, the defendant drove the victim to a home, incapacitated her, placed her in the trunk of her car, and drove her to North Carolina. With the victim still in the car, the defendant set the car on fire. The co-conspirator, who testified at trial, pled guilty to conspiracy to kidnap. The man from Maryland, also a defendant in the case, pled guilty to conspiracy to kidnap, kidnapping, and interstate stalking.

The federal stalking crime also includes "cyberstalking." It is a federal crime to use the mail or any facility of interstate or foreign commerce (including telephones, fax machines, and the Internet) to engage in a course of conduct that places a person in reasonable fear of the death of, or serious bodily injury to, that person, a member of that person's immediate family, or that person's spouse or intimate partner. The offender must commit these acts with the intent either (1) to kill or injure a person in another state or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States or (2) to place a person in another state or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States in reasonable fear of the death of, or serious bodily injury to, that person, a member of that person's immediate family, or that person's spouse or intimate partner. A course of conduct is defined as a pattern composed of two or more acts evidencing a continuity of purpose.

In one federal cyberstalking case, in the District of Minnesota, a defendant from Long Beach, California, who sent threatening e-mail messages to a Minnesota woman, was convicted by a jury of interstate cyberstalking and sending threatening communications. The defendant had begun an online relationship with the woman, who claimed to be a widow. He and the woman arranged to meet in California, but she backed out of the meeting. The defendant tracked her down and learned that she actually was married. Shortly thereafter, he began sending her threatening e-mails, including threats to murder her children. The defendant also created web sites where he posted pictures of the victim's children with their home address and telephone number. On the web sites and in chat rooms, he also pretended to be the children and claimed the children enjoyed being raped. Following his conviction, he was sentenced to ten years in federal prison.

In 1994, the Gun Control Act of 1968 was amended to create a new federal offense that bars certain domestic violence offenders from owning, possessing, transporting, shipping or receiving firearms and/or ammunition. Pursuant to this provision, a person may be

subject to federal prosecution if the person possesses, transports, ships, or receives firearms or ammunition while subject to a “qualifying” protection order. For the order to qualify, it must be issued after a hearing of which the person (against whom the order was issued) received actual notice and had an opportunity to participate. The order also must restrain the person from harassing, stalking, or threatening an intimate partner or a child of the intimate partner or engaging in any other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child. In addition, it must include a finding that the person represents a credible threat to the physical safety of the intimate partner or child or the terms of the order must explicitly prohibit the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

In 1996, the Gun Control Act was amended again to create another federal offense that bars certain domestic violence offenders from possessing, transporting, receiving or shipping firearms and ammunition. Under the new provision, a person may be subject to federal prosecution if the person possesses, transports, receives or ships firearms or ammunition after a state or federal conviction for a “qualifying” misdemeanor crime of domestic violence. For the offense to qualify, it must have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. The offense also must have been committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. The qualifying misdemeanors may vary from state to state, depending upon statutory language.

Following are some additional examples of cases prosecuted under the federal domestic violence laws:

In the District of Maine, a defendant pled guilty to charges of interstate domestic violence, interstate violation of a protection order, interstate stalking, and other charges. In 1999, the defendant and his accomplice abducted his estranged wife from her home in Maine after he killed her brother and her boyfriend. The accomplice lured the first murder victim from the home by claiming she needed help with her car. After the defendant killed the estranged wife’s brother, the accomplice lured the estranged wife’s boyfriend from the home on the same pretext. Following the murders, the defendant and his accomplice abducted his wife at gunpoint and took her to New York. They held her in a motel room until New York authorities were able to rescue her. At the time of these crimes, the defendant was subject to a New York protection order obtained by his wife. The defendant is currently serving a sentence of life without parole and the accomplice is serving a twenty-nine year sentence.

In the District of South Dakota a defendant pled guilty to charges of possessing a firearm after conviction of a misdemeanor crime of domestic violence. In this case, the victim called police who found the defendant drunk, in the backyard, shooting firearms (a rifle and a handgun) into the air and threatening to kill the victim. After a four hour standoff, the defendant surrendered. Police found 17 more firearms, including a sawed off rifle, and ammunition in the house. The defendant was sentenced in 2000 to a 70 month term of imprisonment.

In the Western District of Kentucky a defendant pled guilty to charges of possessing a firearm while subject to a protection order. While under a protection order, the defendant held his ex-girlfriend, her children and her roommate hostage with a handgun and threatened to kill them if they called the police. He was sentenced in 2000 to a 24 month term of imprisonment.

In the Eastern District of Kentucky, a jury convicted a defendant of charges of interstate domestic violence, interstate violation of a protection order, possession of a firearm while subject to a protection order and other offenses. In February 1997, the defendant assaulted and abducted his estranged wife with a shotgun and a knife in Kentucky, and took her to Tennessee. Once in Tennessee, he raped her. The next day the defendant returned his wife to Kentucky. She went to the hospital for treatment of her injuries and filed a police report. She also obtained a protection order against her husband. Two months later the defendant was released on charges related to the Tennessee abduction and traveled from Kentucky to his estranged wife’s new home in Indiana. He broke into her home, abducted her at gunpoint and dragged her out of the home into the woods. She was able to escape and was taken to the hospital for treatment of her injuries. The defendant was convicted on all charges at trial and was sentenced to a 30 year and ten month term of imprisonment.

All states have laws allowing victims of domestic violence to apply to a court for a protection order against their abuser. Such orders generally include provisions requiring the abuser to stay a specified distance away from the victim and to refrain from abusing the victim. Many states also allow victims to get orders excluding the abuser from a common dwelling, giving the victim custody of the children, and providing for child support, among other things. VAWA requires states, territories, and Indian tribes to enforce protection orders issued by other jurisdictions if certain statutory requirements are met.

Many victims of domestic violence try to change their identity or go into hiding to protect themselves from their abusers. In order to help such victims, many states have passed laws creating a confidential address for victims of domestic violence. These laws create programs where the state provides a central address that all victims enrolled in the program can use as their mailing address for all purposes, including such things as voter registration and service of process. The state then forwards the victim’s mail to the victim’s actual address, but keeps the actual address confidential. In addition, the Social Security Administration has created a policy of assigning new Social Security numbers (SSN) to victims of harassment, abuse, or life endangerment, including victims of domestic violence, to make it easier to obtain new social security numbers. The policy was designed to make it easier for these individuals to elude their abusers and reduce the risk of further violence.

Many states have recognized the need to train criminal justice system personnel about domestic violence, sexual assault, and stalking in order to help such personnel identify victims of these crimes and provide appropriate responses. For instance, many states have enacted laws requiring training for police officers, prosecutors, and/or judges. Many VAWA grants provide funds to assist with such training.

Since 1993, rates of violence against women in the United States have decreased. In 1999, about 85% of victimizations by intimate partners, including current or former spouses, boyfriends, or girlfriends, were committed against women. Nearly one-third of women murdered each year in the United States are killed by their intimate partners. Approximately one million women are stalked each

year. However, between 1993 and 2001 the overall rate of intimate partner violence against women age 12 or older decreased by 49.3%. In 2002, 247,730 rapes/sexual assaults were committed against women age 12 or older. The rate of rapes/sexual assaults has decreased 56 percent from 1993 to 2002.

Annex III

Refugee Admissions from FY 1994 to FY 2004

	FY-2004			FY-2003		
Region	Original Ceiling	Final Ceiling	Arrivals	Original Ceiling	Final Ceiling	Arrivals
Africa	25 000	30 000	29 125	20 000	20 000	10 717
East Asia	6 500	8 500	8 079	4 000	4 000	1 724
Europe	13 000	13 000	9 254	16 500	16 500	11 269
Latin America	3 500	3 500	3 556	2 500	2 500	452
Near East/South Asia	2 000	3 000	2 854	7 000	7 000	4 260
Subtotal	50 000	58 000	52 868	50 000	50 000	28 422
Unallocated reserve	20 000	12 000		20 000	20 000	

Private Sector Initiative

Total	70 000	70 000	52 868	70 000	70 000	28 422
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	FY-2002			FY-2001		
Region	Original Ceiling	Final Ceiling	Arrivals	Original Ceiling	Final Ceiling*	Arrivals
Africa	22 000	22 000	2 536	20 000	21 000	19 021
East Asia	4 000	4 000	3 489	6 000	6 000	3 725
Europe	26 000	26 000	15 395	37 000	37 000	31 525
Latin America	3 000	3 000	1 936	3 000	3 500	2 973
Near East/South Asia	15 000	15 000	3 673	10 000	12 500	12 060
Subtotal	70 000	70 000	27 029	76 000	80 000	69 304
Unallocated reserve				4 000		

Private Sector Initiative						
Total	70 000	70 000	27 029	80 000	80 000	69 304

	FY-2000			FY-1999		
Region	Original Ceiling	Final Ceiling	Arrivals	Original Ceiling	Final Ceiling**	Arrivals
Africa	18 000	18 000	17 559	12 000	13 000	13 036
East Asia	8 000	8 000	4 561	9 000	10 500	10 204
Europe	47 000	47 000	37 662	48 000	61 000	55 877
Latin America	3 000	3 000	3 233	3 000	2 250	2 110
Near East/South Asia	8 000	8 000	10 129	4 000	4 250	4 090
Subtotal	84 000	84 000	73 144	76 000	91 000	85 317
Unallocated reserve	6 000	6 000		2 000		
Private Sector Initiative						
Total	90 000	90 000	73 144	78 000	91 000	85 317

	FY-1998			FY-1997		
Region	Original Ceiling	Final Ceiling	Arrivals	Original Ceiling	Final Ceiling	Arrivals
Africa	7 000	7 000	6 662	7 000	7 000	6 069
East Asia	14 000	14 000	10 848	10 000	10 000	8 590
Europe	51 000	51 000	54 260	48 000	48 000	48 450
Latin America	4 000	4 000	1 587	4 000	4 000	2 986
Near East/South Asia	4 000	4 000	3 197	4 000	4 000	3 990
Subtotal	80 000	80 000	76 554	73 000	73 000	70 085
Unallocated reserve	3 000	3 000		5 000	5 000	
Private Sector Initiative						

Total	83 000	83 000	76 554	78 000	78 000	70 085
	FY-1996	FY-1995				
Region	Original Ceiling	Final Ceiling*	Arrivals	Original Ceiling	Final Ceiling	Arrivals
Africa	7 000	7 700	7 502	7 000	7 000	4 779
East Asia	25 000	25 000	19 234	40 000	40 000	36 926
Europe	45 000	45 000	41 617	48 000	48 000	45 703
Latin America	6 000	6 000	3 541	8 000	8 000	7 618
Near East/South Asia	4 000	4 300	3 788	5 000	5 000	4 464
Subtotal	87 000	88 000	75 682	108 000	108 000	99 490
Unallocated reserve	3 000	2 000		2 000	2 000	
Private Sector Initiative				2 000	2 000	
Total	90 000	90 000	75 682	112 000	112 000	99 490
		FY-1994				
Region		Original		Final		Arrivals
Ceiling		Ceiling*				
Africa		7 000		7 000		5 856
East Asia		45 000		45 000		43 581
Europe		55 000		53 000		50 838
Latin America		4 000		9 000		6 437
Near East/South Asia		6 000		6 000		5 861
Subtotal		117 000		120 000		112 573
Unallocated reserve		3 000		3 000		
Private Sector Initiative		1 000		1 000		
Total		121 000		121 000		112 573

* Regional ceilings adjusted during the Fiscal Year as needed to reflect revised projections.

** Revised ceilings following emergency consultations (Kosovo crisis).
