



**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**

**Fourth periodic report**

**United States of America\* \*\***

[30 December 2011]

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

\*\* Annexes can be consulted in the files of the Secretariat.

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## I. Introduction

1. It is with great pleasure that the Government of the United States of America presents its Fourth Periodic Report to the United Nations Human Rights Committee concerning the implementation of its obligations under the International Covenant on Civil and Political Rights (“the Covenant” or “ICCPR”), in accordance with Covenant Article 40. The United States is committed to promoting and protecting human rights. In the words of President Barack H. Obama:

“By no means is America perfect. But it is our commitment to certain universal values which allows us to correct our imperfections, to improve constantly, and to grow stronger over time. Freedom of speech and assembly has allowed women, and minorities, and workers to protest for full and equal rights at a time when they were denied. The rule of law and equal administration of justice has busted monopolies, shut down political machines that were corrupt, ended abuses of power. Independent media have exposed corruption at all levels of business and government. Competitive elections allow us to change course and hold our leaders accountable. If our democracy did not advance those rights, then I, as a person of African ancestry, wouldn't be able to address you as an American citizen, much less a President. Because at the time of our founding, I had no rights -- people who looked like me. But it is because of that process that I can now stand before you as President of the United States.”

*Remarks by President Obama at the New Economic School, Moscow, July 7, 2009.*

2. Treaty reporting is a way in which the Government of the United States can inform its citizens and the international community of its efforts to ensure the implementation of those obligations it has assumed, while at the same time holding itself to the public scrutiny of the international community and civil society. As Secretary of State Hillary Clinton has stated, “Human rights are universal, but their experience is local. This is why we are committed to holding everyone to the same standard, including ourselves.” In implementing its treaty obligation under ICCPR Article 40, the United States has taken this opportunity to engage in a process of stock-taking and self-examination. The United States hopes to use this process to improve its human rights performance. Thus, this report is not an end in itself, but an important tool in the continuing development of practical and effective human rights strategies by the U.S. Government. As President Obama has stated, “Despite the real gains that we’ve made, there are still laws to change and there are still hearts to open.”

3. 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 as contained in document CCPR/C/2009/1. The information supplements that provided in the United States Initial Report of July 1994 (CCPR/C/81/Add.4, published 24 August 1994, and HRI/CORE/1/Add.49, published 17 August 1994, with related supplemental information and hearings), as well as the information provided by the United States in its combined Second and Third Periodic Report (CCPR/C/USA/3), and information provided by the U.S. delegation during Committee meetings considering that report (CCPR/C/SR/2379-2381). It also takes into account the Concluding Observations of the Human Rights Committee published 18 December 2006 (CCPR/C/USA/CO/3/Rev.1). The United States has provided the text and explanations for reservations, understandings and declarations it undertook at the time it became a State Party to the Covenant in its prior reports. For purposes of brevity those descriptions and explanations will not be repeated in this report.

4. In this report, the United States has considered carefully the views expressed by the Committee in its prior written communications and public sessions with the United States.

In the spirit of cooperation, the United States has provided as much information as possible on a number of issues raised by the Committee and/or civil society, whether or not they bear directly on formal obligations arising under the Covenant. During preparation of this report, the U.S. Government has consulted with representatives of civil society and has sought information and input from their organizations. Civil society representatives have raised a variety of concerns on many of the topics addressed in this report, a number of which are noted in the text of the report. The United States Government has also reached out to state, local, tribal, and territorial governments to seek information from their human rights entities on their programs and activities, which play an important part in implementing the Covenant and other human rights treaties. Information received from this outreach is referenced in some portions of the report and described in greater detail in Annex A to the Common Core Document.

## **II. Implementation of specific provisions of the Covenant**

### **Article 1 – Self determination**

5. The United States remains firmly committed to the principle of self-determination, and that principle, set forth in Article 1 of the Covenant, remains at the core of American political life. *See generally*, U.S. Constitution, Articles I and II.

#### **1. The Insular Areas**

6. 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. Paragraphs 12-25 of the Initial Report and paragraphs 5-14 of the combined Second and Third Periodic Report set forth the policy of the United States of promoting self-government in the Insular Areas of the United States.

7. The Insular Areas of the United States remain the same as indicated in the combined Second and Third Periodic Report. They include Puerto Rico, a Commonwealth that is self-governing under its own constitution; Guam, an unincorporated, organized territory of the United States; American Samoa, an unincorporated, unorganized territory of the United States; the U.S. Virgin Islands, an unincorporated, organized territory of the United States; and the Northern Mariana Islands, a self-governing commonwealth in political union with the United States. The United States has recognized as sovereign, self-governing nations three other areas that were formerly districts of the Trust Territory of the Pacific Islands: the Marshall Islands (1986), the Federated States of Micronesia (1986) and Palau (1994). Compacts of Free Association are currently in force between the United States and these three nations.

8. *The Commonwealth of Puerto Rico.* As reported in paragraph 8 of the combined Second and Third Periodic Report, the people of Puerto Rico have expressed their views on their relationship with the United States in a number of public referenda, most recently in December 1998. In 1992 President George H.W. Bush declared the policy that the will of the people of Puerto Rico regarding their political status should be ascertained periodically through referenda sponsored either by the United States Government or by the legislature of Puerto Rico, 57 F.R. 57093 (Dec. 2, 1992). This policy has been continued by Presidents Clinton, George W. Bush, and Obama. President Clinton established the President's Task Force on Puerto Rico's Status in December 2000, and Task Force Reports have been issued in 2005, 2007, and 2011. In 2009, President Obama expanded the mandate of the Task Force to include recommendations on policies that promote job creation, education, health care, clean energy, and economic development in Puerto Rico. The 2011 Task Force Report

included extensive recommendations on these issues, as well as a recommendation, inter alia, that “the President, Congress and the leadership and people of Puerto Rico work to ensure that Puerto Ricans are able to express their will about status options and have that will acted upon.” A link to the 2011 Task Force Report can be found at: [http://www.whitehouse.gov/sites/default/files/uploads/Puerto\\_Rico\\_Task\\_Force\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf).

## 2. American Indians and Alaska Natives

9. The United States is home to over 560 federally recognized tribes, with about 50 percent of the American Indian and Alaska Native population residing on or near their homelands. The United States holds 56 million surface acres and 57 million acres of subsurface mineral estates in trust for American Indians in the contiguous 48 United States, while Alaska Natives and their corporations have property rights in more than 44 million acres of land in Alaska.

10. *Current policy.* More than 40 years have passed since the United States adopted the policy of greater tribal autonomy. It has enabled tribal governments to establish, develop and enhance tribal institutions and infrastructure ranging from those addressing the health, education and welfare of their communities to those such as tribal courts, fire protection and law enforcement, which have allowed tribes to better protect their communities. The lesson is that empowering tribes to deal with the challenges they face and taking advantage of the available opportunities will result in tribal communities that thrive. Despite the success of this policy, however, the devastating consequences of past policies still haunt the United States. Tribal communities still suffer among the most challenging socioeconomic conditions. Some reservations face unemployment rates of up to 80 percent. Nearly a quarter of all Native Americans live in poverty. Approximately 14 percent of homes on reservations do not have electricity; and 9 percent do not have access to a safe water supply. In some instances, poverty leads to crime and exposure to crime, and Native communities are faced with an increase of youth gangs, violent crime at rates higher than the national average, and high rates of violence against women and children. They are also faced with low rates of school matriculation and completion, and disproportionate health disparities.

11. In the face of these challenges, President Obama believes that tribal leaders must be part of the solution. Thus, the Obama Administration seeks to build relationships between the federal government and tribal governments that rest on mutual respect and working together on a government-to-government basis within the U.S. system. To address the myriad challenges noted above, the Administration has taken a number of steps to strengthen the government-to-government relationships between the United States and federally recognized tribes. For example, on November 5, 2009, President Obama reached out to American Indian and Alaska Native tribes by inviting representatives from the more than 560 federally recognized tribes in the United States to attend a White House Tribal Nations Conference. Nearly 500 tribal leaders participated, as well as Members of Congress, several cabinet secretaries and other senior administration officials from the Departments of State, Justice, Commerce, Education, Energy, Agriculture, Labor, Health and Human Services, Housing and Urban Development, the Interior, and the Environmental Protection Agency. President Obama delivered opening and closing remarks and participated in interactive discussion with the leaders. Specific discussions in areas such as economic development and natural resources, public safety and housing, education, and health and labor, were also led by other high-level Administration representatives. Links to the President’s speeches are at: <http://www.whitehouse.gov/the-press-office/remarks-president-during-opening-tribal-nations-conference-interactive-discussion-w> and at <http://www.whitehouse.gov/the-press-office/remarks-president-closing-tribal-nations-conference>.

12. On November 5, 2009, the President also signed a Memorandum directing every federal agency to develop plans to implement fully Executive Order 13175 on

“Consultation and Coordination with Tribal Governments,” which mandates that all agencies have a process to ensure meaningful and timely input by tribal officials in the development of certain policies that have tribal implications. The link to the President’s Memorandum is at: <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>. During 2010, the White House issued a progress report following up on the 2009 Conference. It is at: [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/tnc\\_progress\\_report.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/tnc_progress_report.pdf). Tribal consultations are now at historic levels – marking a new era in the United States’ relationship with tribal governments. For example, the United States Environmental Protection Agency finalized an Agency-wide Tribal Consultation Policy on May 4, 2011, to fully comply with Executive Order 13175 on tribal coordination and consultation. The Policy provides tribal governments a meaningful opportunity to provide input before EPA makes final decisions on actions that may affect tribal interests and supports EPA’s priority of strengthening its partnership with tribes.

13. A second White House Tribal Nations Conference was held in December 2010 to continue the dialogue and build on the President’s commitment to strengthen the government-to-government relationship between the U. S. Government and federally recognized tribes. The White House issued a synopsis of the event at: [http://www.whitehouse.gov/sites/default/files/Tribal\\_Nations\\_Conference\\_Final\\_0.pdf](http://www.whitehouse.gov/sites/default/files/Tribal_Nations_Conference_Final_0.pdf). During this Conference, President Obama announced United States support for the United Nations Declaration on the Rights of Indigenous Peoples and noted that the United States was releasing a more detailed statement about U.S. support for the Declaration and the Administration’s ongoing work on Native American issues. The link to the President’s remarks is at: <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>. The accompanying statement is at: <http://usun.state.gov/documents/organization/153239.pdf>. This announcement underscores the U.S. commitment to strengthening the government-to-government relationships with federally recognized tribes and furthering U.S. policy on indigenous issues. The decision represents an important and meaningful change in the U.S. position, and resulted from a comprehensive, interagency policy review, including extensive consultation with tribes.

14. A third Tribal Nations Conference was hosted by President Obama in Washington on December 2, 2011. Session topics included: Creating Jobs and Growing Tribal Economies, Promoting Safe and Strong Tribal Communities, Protecting Natural Resources and Respect for Cultural Rights, Improving Access to Healthcare, Education, Housing, Infrastructure and Other Federal Services, and Strengthening the Government-to-Government Relationship. During the closing session, tribal leaders heard from Education Secretary Arne Duncan and President Obama delivered closing remarks. Earlier the same day, President Obama signed an Executive Order that establishes an initiative that will help expand educational opportunities and improve educational outcomes for all American Indian and Alaska Native students, including opportunities to learn their Native languages, cultures, and histories and receive a complete and competitive education that prepares them for college and a career and productive and satisfying lives. The White House also released a report, “Achieving a Brighter Future for Tribal Nations,” which provides a summary of some of the many actions the Obama Administration has taken to address the concerns of American Indians and Alaska Natives. The link to the President’s remarks, the Executive Order, and the Report is at: <http://www.whitehouse.gov/the-press-office/2011/12/02/president-obama-hosts-2011-white-house-tribal-nations-conference>.

15. In February 2009, the newly-appointed Secretary of the Interior, Ken Salazar, outlined the Obama Administration’s policies with regard to Indian tribes and Alaska Native communities. Secretary Salazar pledged to restore integrity in governmental relations with Indian tribes and Alaska Native communities, to fulfill the United States’ trust responsibilities to Native Americans and to work cooperatively to build stronger

economies and safer Native American communities, by helping address economic development, education and law enforcement, and other major challenges facing Indian tribes and Alaska Native communities. Secretary Salazar also pledged to seek to resolve the longstanding litigation concerning the management of Native American lands and assets, as well as the settlement of water rights claims. He reiterated President Obama's pledge to empower American Indian and Alaska Native people in the development of the national agenda, and stated strong support for tribal self-governance. Secretary Salazar stated that the Department of the Interior would look at ways to preserve native languages through the Indian education system, and would examine other issues related to education. He further stated that he would work to strengthen tribal court systems, and that he planned to address the serious declining conditions of detention facilities in Indian country as well as staffing needs for those facilities. In April 2009, Secretary Salazar announced \$500 million in Indian Country Economic Recovery Projects aimed at job creation, construction and infrastructure improvements, and workforce development.

16. In December 2010, Energy Secretary Chu announced the establishment of a Department of Energy Office of Indian Energy Policy and Programs, led by a member of the Cheyenne River Sioux Tribe. The office is charged with directing and implementing energy planning and programs that assist tribes with energy development and electrification of Native American lands and homes. The office has done extensive outreach to Indian tribes regarding energy issues on tribal lands and in May 2011 held a Department of Energy Tribal Summit that brought together over 350 participants, including tribal leaders and high-ranking cabinet officials, to interact directly on energy development and related issues. The U.S. Government is also working with tribal leaders to bring high speed internet access to their communities. Both the Department of Agriculture and the Department of Commerce have programs to do so and have awarded loans and grants worth over \$1.5 billion for projects to benefit tribal areas. These infrastructure investments go hand-in-hand with a wide range of projects to create jobs in Indian communities and prepare American Indians and Alaska Natives to fill them.

17. *Federal Government – Indian trust relationship.* The federal government-Indian trust relationship dates back in some instances over two centuries, and arises from a series of Supreme Court decisions, federal statutes regulating trade with Indian tribes, and Indian treaties. In furtherance of its 19<sup>th</sup> century policy of assimilation, Congress passed the General Allotment Act of 1887, also known as the "Dawes Act," 25 U.S.C. 331, et seq. (as amended), which provided that beneficial title to allotted lands would vest 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. 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 would return to tribal ownership. *See id.* (citing 25 U.S.C. 463). The 1934 Act extended the trust period indefinitely for allotted lands. 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 from those lands for the benefit of individual Indian beneficiaries. 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.* In addition to the IIM accounts, the federal government 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.

18. Approximately 56 million surface acres and 57 million acres of subsurface mineral estates are 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 also owned in fee status whereby an Indian tribe holds the fee to the land pending consideration of a trust acquisition by the United States. The Department of the Interior has taken 105,000 acres of land into trust for tribes in the past two years as part of its effort to restore tribal homelands. In addition, as noted above, Alaska Natives and their corporations have property rights in more than 44 million acres of land in Alaska.

19. *The American Indian Trust Fund Management Reform Act.* Since Congress amended the Indian Self-Determination Act in 1994, tribes have had the opportunity, subject to the approval of the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI), to manage their own trust accounts, including IIM accounts held for the benefit of individuals. If a tribe chose not to manage its own trust accounts, or if the BIA found that a tribe could not fulfill the necessary fiduciary obligations, the government retained control over the accounts. *See Cobell*, 240 F.3d at 1088. In 1994, Congress also enacted the Indian Trust Fund Management 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)).

20. *The Cobell case.* The *Cobell* case was filed in 1996 as a class action on behalf of approximately 500,000 individual beneficiaries of IIM accounts, alleging that the Secretaries of the Interior and Treasury had breached their fiduciary duties relating to accounting of IIM accounts, and seeking declaratory and injunctive relief, *see Cobell v. Babbitt*, 30 F. Supp. 2d 24, 29 (D.D.C. 1998). 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 Cobell v. Norton*, 240 F. 3d, 1081, 1110 (D.D.C. 2001). In September 2003, the district court entered an injunction setting forth detailed requirements for both trust administration and accounting, *see Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003). In 2008, the district court held that DOI continued to breach its duty to account for trust funds, but that an accounting of the funds was impossible as a matter of law. *See Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 39, 104 (D.D.C. 2008). The court thus granted monetary relief to the plaintiffs in the amount of \$455.6 million, based on the unproven shortfall of the trusts' actual value as compared to its statistically likely value. *See Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 238, 251-52 (D.D.C. 2008). Both the plaintiffs and the federal government appealed these rulings. In July 2009, the U.S. Court of Appeals for the District of Columbia Circuit rendered its opinion on the appeal, holding that while the district court's analysis of duty and breach were generally correct, the court had erred in freeing the DOI from its burden to make an accounting. *See No. 08-5500* (D.C. Cir., July 24, 2009). The appellate court held that it is within the power of the district court, sitting in equity, to approve a plan for an accounting that efficiently uses limited government resources and does not "exceed the benefits payable to Individual Indians." *Cobell v. Salazar*, 573 F. 3d 808, 810 (D.C. Cir. 2009).

21. On December 8, 2009, Attorney General Eric Holder and Secretary of the Interior Ken Salazar announced a negotiated settlement of the *Cobell* class-action lawsuit. On October 9, 2010, President Obama signed into law the Claims Resolution Act. After fourteen years of litigation, enactment of the Claims Resolution Act finally closed an unfortunate chapter in U.S. history. The Act creates a fund of \$1.5 billion to address historic accounting and trust management issues and also allocates up to \$1.9 billion to convert some of the most highly fractionated individual Indian lands into land that can be managed for the broader benefit of the respective tribe. As part of the \$1.9 billion, a trust fund of up to \$60 million dollars is being created for a scholarship fund for Native American students. In addition, this law includes an unprecedented package of four water settlements benefitting seven tribes and their members in Arizona, Montana, and New



Mexico. This law acknowledges the water rights of the Crow Tribe, White Mountain Apache Tribe, and the Pueblos of Taos, Tesuque, Nambe, Pojoaque, and San Ildefonso, and will help provide permanent access to secure water supplies year round. The settlement represents a major step forward in President Obama's agenda to empower tribal governments, fulfill the federal government's trust responsibilities to tribal members, and help tribal leaders build safer, stronger, healthier and more prosperous communities.

22. *Tribal trust cases.* In addition to the *Cobell* case, which concerns trust funds for individual Indians, a number of tribes have sued the federal government in federal district courts and the Court of Federal Claims claiming failure to provide accountings of tribal trust funds and trust assets, and mismanagement of those funds and assets. The plaintiffs seek accountings and money damages. Overall, approximately 100 tribal trust accounting and asset mismanagement cases are pending against the federal government.

23. To ensure that Native Americans are represented among the top officials in this Administration, President Obama and heads of federal departments and agencies have appointed a number of Native Americans to high-level positions. These include: Larry EchoHawk of the Pawnee Nation as Assistant Secretary of the Interior for Indian Affairs; Dr. Yvette Roubideaux of the Rosebud Sioux tribe as the Director of the Indian Health Service; Hilary Tompkins of the Navajo Nation as the Solicitor of the Interior; Lillian Sparks of the Rosebud and Oglala Sioux Tribes as Commissioner for the Administration for Native Americans; Mary McNeil of the Winnebago Tribe as Deputy Assistant Secretary for Civil Rights for the United States Department of Agriculture; Janie Simms Hipp of the Chickasaw Nation as Senior Advisor to the Secretary of Agriculture on Tribal Relations; Donald "Del" Laverdure of the Crow Nation as the Principal Deputy Assistant Secretary for Indian Affairs in the Department of Interior; Jodi Gillette of the Standing Rock Sioux Tribe as former Deputy Associate Director of the White House Office of Intergovernmental Affairs and now Deputy Assistant Secretary for Indian Affairs at the Department of the Interior; Tracy LeBeau of the Cheyenne River Sioux Tribe as Director of the Office of Indian Energy Policy and Programs at the Department of Energy; and Kimberly Teehee of the Cherokee Nation as Senior Policy Advisor for Native American Affairs in the White House Domestic Policy Council. Working with tribal leaders, this team is helping to shape federal policies that affect tribal communities.

24. As a follow-up to the first Tribal Nations Conference, Secretary of the Interior Salazar and Secretary of Education Arne Duncan met with prominent Native American educators to discuss the educational challenges and opportunities facing tribal communities and to share strategies that have helped to advance opportunities for Native American students around the nation. In addition to providing support for tribal schools and colleges, the Department of the Interior has actively provided educational and training opportunities for Native American youth related to current energy, environmental and business challenges, often in partnership with universities and research centers. For example, in 2009 and 2010, such opportunities included a partnership with Argonne National Laboratory to mentor American Indian and Alaska Native interns in management of tribal energy and natural resources, and the creation of the Tribal Energy and Environmental Information Clearinghouse (TEEIC) – a knowledge base to help tribes and tribal organizations develop environmental analysis and evaluation programs and processes that further their energy and economic goals (*see [www.teeic.anl.gov](http://www.teeic.anl.gov)*); a partnership with the Colorado School of Mines to assist tribal colleges in developing energy engineering courses; and an annual Indian Education Renewable Energy Challenge for tribal college and Bureau of Indian Affairs high school students, sponsored by the Department of the Interior in partnership with Argonne National Laboratory. Internship and energy challenge opportunities are being planned for 2012.

25. Although tribal lands often have oil, gas, coal, or uranium resources, and tremendous renewable energy resources, tribal communities face immense energy challenges. Tribal lands are home to the most underserved populations in terms of energy services in the United States. American Indians and Alaska Natives have the highest percentage of un-electrified and un-weatherized homes, and the highest rates for fuel and electricity in the country are found in tribal communities. In that context, there is a significant need as well as opportunity for fostering the development of future American Indian and Alaska Native leaders with the scientific and technological skill required to assist tribal communities in managing their lands and developing their energy resources. To help develop these future energy leaders, the Department of Energy contributes to the education of American Indian and Alaska Native youth through two initiatives: Tribal Energy Program's internship program with Sandia National Laboratory, and a new pilot project called the American Indian Research and Education Initiative (AIREI). AIREI will recruit Native American students to join student/faculty teams to participate in community energy projects on tribal lands, with the mentorship of the Department's National Laboratories. Through these efforts DOE and the National Laboratory resources are integrated into the national American Indian STEM (Science, Technology, Engineering and Mathematics) educational infrastructure, providing a significant contribution to the science education experience of Native American students, particularly those pursuing careers in energy development.

26. Perhaps the most important long-term investment for any country, people, or individual is in education. Tribal leaders have stressed the importance of greater tribal control over the education of American Indian and Alaska Native students. The Administration has proposed changes to the U.S. law to enhance the role of tribes in the education of their youth and to give them greater flexibility in the use of federal funds to meet the unique needs of American Indian and Alaska Native students. The Administration has also accelerated the rebuilding of schools on tribal lands and is working to improve the programs available at tribal colleges.

27. The Administration is also moving forward on other issues critical to members of Indian tribes. For example, the historic reform of the U.S. health care system, enacted in March 2010, includes important provisions to reduce the gaping health care disparities that Native Americans still face. Signing and implementing this landmark law constitutes a major step toward fulfilling our national aspiration to provide high-quality, affordable health care to all citizens, including American Indians and Alaska Natives. First Lady Michelle Obama has also made a particular effort to involve Native American youth in her "Let's Move!" initiative to address child obesity. She has, for example, recruited Native American athletes to encourage Native American children to adopt healthy lifestyles.

28. Another public health challenge on which the Administration is focusing particularly intensely is the unacceptably high rate of suicide by Native American youth. This tragedy is not unique to North America. The Administration has held listening sessions with tribal leaders across the country.

29. The U.S. government has also made improving public safety in tribal communities a high priority; in 2009, Attorney General Holder announced a Department of Justice initiative for this purpose. The Attorney General met with the leaders of federally-recognized Indian tribes in October 2009 to discuss public safety challenges in tribal communities, and the Department of Justice issued a directive to all United States Attorneys with federally recognized tribes in their districts to develop, after consultation with those tribes, operational plans for addressing public safety in Indian country. The Department also added 28 new Assistant U.S. Attorneys dedicated to prosecuting crime in Indian country in nearly two dozen districts. In addition, the Federal Bureau of Investigation (FBI) added nine positions, including six agents to work on Indian country

investigations. In 2010, the FBI Office for Victim Assistance added 12 additional Victim Specialist positions to provide victim assistance in Indian country. On July 29, 2010, President Obama signed into law the Tribal Law and Order Act which requires the Justice Department to disclose data on cases in Indian country that it declines to prosecute and gives tribes greater authority to prosecute and punish criminals themselves. The law includes new guidelines and training for domestic violence and sex crimes. In addition, it strengthens tribal courts and police departments and enhances programs to combat drug and alcohol abuse and help at-risk youth. The Department of the Interior has also initiated a major law enforcement program, which has established high priority performance goals for crime reduction on four targeted reservations, resulting in a permanent “surge” on those reservations. The initiative involves “bridge training” for state police officers, enabling them to become federal officers; and collaboration with the Indian Health Service to develop a unified response mechanism to prevent and contain suicide emergencies. This initiative also includes a substantial effort to recruit and hire new personnel.

30. The Department of Justice also has created a Tribal Nations Leadership Council, made up of tribal leaders selected by the federally recognized tribes, to advise the Department on issues critical to Indian country. Combating crimes involving violence against women and children on Native lands is a particularly high priority for the U.S. government. In 2011, the Attorney General launched a Violence Against Women Federal and Tribal Prosecution Task Force composed of federal and tribal prosecutors. The Task Force was created to facilitate dialogue and coordinate efforts between the Department and tribal governments regarding the prosecution of violent crimes against women in Indian country, and to develop best-practices recommendations for both federal and tribal prosecutors. In July 2011, the Department proposed legislation that would significantly improve the safety of Native women and allow federal and tribal law enforcement agencies to hold more perpetrators of domestic violence accountable for their crimes. In addition, the American Recovery and Reinvestment Act of 2009 specifically allocated more than \$3 billion to assist tribal communities. These funds are being used to renovate schools on reservations across the country, to create new jobs in tribal economies, improve housing, support health care facilities, and bolster policing services.

31. Indigenous representatives and some representatives of civil society have raised a number of particular concerns. These include access to sacred sites, religious freedom for prisoners at the federal and state levels, and violence against women and children in tribal communities. The Administration is aware of these concerns and is working to address them through the initiatives referenced above and others noted later in this report.

## **Article 2 – Equal protection of rights in the Covenant**

### **1. General Equal Protection**

32. 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 discussed in paragraphs 77-100 of the United States Initial Report and paragraphs 26-59 of the combined Second and Third Periodic Report. While Articles 2 and 26 are not identical, there is overlap in their coverage. Therefore the material in this section relates to both Articles 2 and 26, as well as general related information.

33. The United States became a party to the International Convention on the Elimination of All Forms of Racial Discrimination on 20 November 1994, and the United States submitted its combined Initial, Second and Third Periodic Report to the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) in September 2000. The United States’ combined Fourth, Fifth and Sixth Periodic Report was submitted

to the Committee on 24 April 2007, and a United States delegation appeared before the CERD Committee concerning that Report at its 72<sup>nd</sup> Session, 18 February - 7 March 2008. The Committee's Concluding Observations and Recommendations, issued on 8 May 2008, can be found at CERD/C/USA/CO/6. The U.S. reports and Committee's Concluding Observations and Recommendations are available at <http://www.state.gov/g/drl/hr/treaties/>.

34. Classifications. Under the U.S. constitutional doctrine of equal protection, neither the federal government nor any state may deny any person equal protection under the law. The general rule is that legislative classifications are presumed valid if they bear some rational 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 this 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 this highly deferential standard. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

35. Suspect and quasi-suspect classifications. On the other hand, certain governmental distinctions or classifications, such as those based on race and sex, have been recognized as inherently suspect or quasi-suspect and therefore have been subjected to more exacting judicial scrutiny and judged against more stringent requirements. For example, classifications on the basis of racial distinctions must be justified as narrowly tailored to achieve a compelling governmental interest. See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *McLaughlin v. Florida*, 379 U.S. 184 (1961); *Loving v. Virginia*, 388 U.S. 1 (1967); and *Brown v. Board of Education*, 347 U.S. 483 (1954). As noted in the Second and Third Periodic Report, this rule was reiterated by the Supreme Court in *Johnson v. California*, 543 U.S. 499 (2005). In that case, petitioner, a prison inmate, sued the California Department of Corrections, alleging that its unwritten policy of segregating new and transferred prisoners by race violated the constitutional rights of inmates to equal protection of the laws. The Department contended that the policy was necessary to prevent violence caused by racial prison gangs and was thus reasonably related to legitimate penological interests. The Supreme Court held that the policy, which was based on an express racial classification, was subject to strict judicial scrutiny, and thus had to be narrowly tailored to further compelling interests of the Department.

36. The Supreme Court also has applied heightened scrutiny to classifications on the basis of sex. See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that a public military college's male-only admissions policy was unconstitutional because the state could not establish that its policy was substantially related to the achievement of an important governmental objective as required by the Equal Protection Clause).

37. The Supreme Court has yet to rule on the appropriate level of equal protection scrutiny for classifications based on sexual orientation. In two cases, the Supreme Court invalidated sexual orientation classifications under a more permissive standard of review without determining whether heightened scrutiny applied. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). As reflected in recent court filings, it is the position of the United States Government that classifications based on sexual orientation are subject to heightened equal protection scrutiny.

38. Corrective or affirmative action. In some circumstances, classification by race is permissible for certain purposes, such as redressing past racial discrimination and promoting diversity in educational settings. Because race has been recognized as a "suspect classification," individual classifications that distribute a benefit or a burden based on race will be subject to "strict scrutiny" by the courts. Where a government employer or other

government entity has engaged in racial discrimination in the past, it will generally be permitted (and may sometimes be required) to consider race in a narrowly tailored fashion to correct the effects of its past conduct. See *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Government entities may also take race into account when necessary to address discriminatory acts of others when the effects of such discrimination are extended by government policies. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

39. The United States Supreme Court has addressed affirmative action plans in the education context. In *Grutter v. Bollinger*, the Court recognized a compelling interest in achieving a genuinely diverse student body and held that race could be considered as a part of an effort to achieve that diversity, including by ensuring enrollment of a critical mass of minority students at universities and graduate schools. Specifically, the Court held that the University of Michigan Law School's interest in "assembling a class that is . . . broadly diverse" is compelling because "attaining a diverse student body is at the heart of [a law school's] proper institutional mission." *Grutter*, 539 U.S. 306 at 329 (2003). The Court found the Law School's program to be narrowly tailored to achieve this mission because it applied a flexible goal rather than a quota, because it involved a holistic individual review of each applicant's file, because it did not "unduly burden" individuals who were not members of the favored racial and ethnic groups, and because under the program, the Law School periodically reviewed its use of race to determine if it was still necessary. *Id.* at 342-43. At the same time, however, in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court struck down the admissions policies of the University of Michigan's undergraduate affirmative action program, holding that they failed to give each applicant sufficient individualized consideration, and were therefore not "narrowly tailored" to meet the university's objective of achieving diversity. See 539 U.S. at 270.

40. Since the submission of the Second and Third Periodic Report in 2005, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Supreme Court addressed the use of racial classifications in the assignment of students to elementary and secondary public schools in two consolidated cases. A majority of the justices held that avoiding racial isolation and seeking diversity are compelling interests for school districts. *Id.* at 783, 797 (Kennedy, J., concurring); *id.* at 838-47 (Breyer, J. dissenting). However, the Court also held that in both particular cases at issue, the school districts' uses of individualized racial classifications for student assignment were impermissible. See *id.* at 720-25, 733-35 (plurality opinion); *id.* at 782 (Kennedy, J., concurring). Justice Kennedy suggested in his concurring opinion in the case that school districts may attempt to further compelling interests in achieving educational diversity and eliminating racial isolation by employing factors that do not rely on the race of individual students or, where necessary, by using the sort of tailored, individualized considerations upheld in *Grutter*.

41. On December 2, 2011, the Department of Education's Office for Civil Rights (ED/OCR) and the Department of Justice's Civil Rights Division (DOJ/CRD) jointly issued guidance that explains how educational institutions can lawfully pursue voluntary policies to achieve diversity or avoid racial isolation within the framework of Titles IV and VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the Supreme Court's decisions, including in *Grutter*, *Gratz*, and *Parents Involved*. The guidance is presented in two documents -- one for elementary and secondary schools, and one for colleges and universities. Both guidance documents also include examples of different educational contexts within which institutions may, in appropriate circumstances, permissibly consider race to pursue their compelling objectives.

## 2. Statutory Framework

42. General framework. A number of federal statutes prohibit discrimination by state or local governments; private entities in the areas of employment, housing, transportation, and public accommodation; and private entities that receive federal financial assistance. The federal government is actively engaged in the enforcement of such statutes against discrimination in the areas of employment, housing and housing finance, access to public accommodations, and education. In addition, most states and some localities also have laws prohibiting similar types of activity, and in many cases state and federal authorities have entered into work sharing arrangements to ensure effective handling of cases where state and federal jurisdiction overlaps. These are described in more detail in Annex A to the Common Core Document.

43. The most comprehensive federal statute, the Civil Rights Act of 1964, prohibits discrimination in a number of specific areas including: Title VI (prohibiting discrimination on the basis of race, color or national origin in programs and activities receiving federal financial assistance); and Title VII (prohibiting discrimination in employment on the basis of race, color, religion, sex or national origin). In addition, Title VIII of the Civil Rights Act of 1968 (the “Fair Housing Act”) prohibits discrimination in the sale, rental and financing of dwellings and in other housing-related transactions on the basis of race, color, religion, sex, national origin, familial status, or disability. These provisions and other civil rights laws are enforced by a number of federal agencies, including the Department of Justice (DOJ), the Department of Education (ED), the Department of Labor, the Equal Employment Opportunity Commission (EEOC), the Department of Health and Human Services, and others. For example, among other things, DOJ’s Civil Rights Division coordinates the U.S. government’s enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance. If a recipient of federal financial assistance is found to have discriminated and voluntary compliance cannot be achieved, the federal agency providing the assistance could either initiate fund termination proceedings or refer the matter to DOJ for appropriate legal action. Aggrieved individuals may file administrative complaints with the federal agency that provides funds to a recipient, or where the alleged discrimination is intentional, the individuals may file suit for appropriate relief in federal court. Title VI itself prohibits intentional discrimination. However, most funding agencies have regulations implementing Title VI that also prohibit recipient practices that have an unjustified discriminatory effect based on race, color, or national origin. More than 28 federal agencies have adopted regulations implementing Title VI.

44. Newly enacted federal laws. On March 23, 2010, President Obama signed into law the Affordable Care Act, landmark legislation to give Americans access to health insurance by holding insurance companies accountable, bringing down costs, and giving Americans more choices, P. L. 111-148 , 124 Stat. 119. Section 1557 of the Affordable Care Act extends the application of existing federal civil rights laws prohibiting discrimination on the basis of race, color national origin, sex, disability, and age to any health program or activity receiving federal financial assistance, including credits, subsidies, or contracts of insurance; any health program or activity administered by an executive agency; or any entity established under Title I of the Affordable Care Act.

45. In addition, the Fair Sentencing Act, which President Obama signed on August 3, 2010, reduces sentencing disparities between powder cocaine and crack cocaine offenses, capping a long effort to address the fact that those convicted of crack cocaine offenses are more likely to be members of racial minorities, P. L. 111-220, 124 Stat. 2372.

46. On October 28, 2009, President Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, P. L. 111-84, 123 Stat. 2190. The new law

authorizes funds and technical assistance for state, local, and tribal governments to enable them more effectively to investigate and prosecute hate crimes. The statute also creates a new federal prohibition on hate crimes, 18 U.S.C. 249; simplifies the jurisdictional predicate for prosecuting violent acts undertaken because of the actual or perceived race, color, religion, or national origin of any person; and, for the first time, allows federal prosecution of violence undertaken because of the actual or perceived gender, disability, sexual orientation or gender identity of any person. The Act covers attacks causing bodily injury and attempts to cause such injury through fire, a firearm, a dangerous weapon, or an incendiary or explosive device. It does not criminalize speech.

47. In addition, the American Recovery and Reinvestment Act of 2009, P. L. 111-5, also contains elements that help reduce discrimination and improve the lives of minority populations. For example, the Race to the Top program sets up the largest competitive education grant program in U.S. history (\$4.35 billion), to provide incentives to states to implement large-scale, system changing reforms that improve student achievement, narrow achievement gaps, and increase graduation and college enrollment rates. Other Recovery Act funds are being used to promote high-quality early childhood education, provide increases in available financial assistance and loans for postsecondary school, and provide \$12 billion for community colleges to give access to workers who need more education and training. The Homeless Prevention and Rapid Re-Housing Program awarded nearly \$1.4 billion in 2009 to more than 6,400 local programs to help prevent and end homelessness for nearly a half million people. In addition, the financial reform legislation enacted in 2010 includes a new consumer protection bureau that will help address the disproportionate effect of the foreclosure crisis on communities of color.

48. On January 29, 2009, as one of his first official acts, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009, P. L. 111-2, 123 Stat. 5. This legislation overrides a U.S. Supreme Court decision, which held that plaintiffs were required to file wage discrimination claims under Title VII of the 1964 Civil Rights Act within 180 days of a company's decision to pay a worker less than a counterpart doing the same work, even if the employee had not yet discovered that she was being paid less. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Under the new law, the statute of limitations for bringing a claim runs from the time an individual is "affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." This change in law also applies to claims under the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973.

49. In February 2009, the Obama Administration also announced its support for the Joint Statement in the General Assembly of December 18, 2008 on Human Rights, Sexual Orientation and Gender Identity. Likewise, in March 2011, the Administration joined 85 countries at the Human Rights Council in issuing a "Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity." The text of the 2011 statement is available at <http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>.

50. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009, P. L. 110-325. The ADAAA provides that the Americans with Disabilities Act definition of disability "shall be construed in favor of broad coverage," and "should not demand extensive analysis." To effectuate this goal, the legislation makes it easier to meet the definition of a covered impairment that "substantially limits a major life activity" through several important changes: (1) "substantially" does not mean "severely" or "significantly" restricted; (2) "major life activities" include "major bodily functions"; (3) mitigating

measures other than ordinary eyeglasses and contact lenses are not considered in determining if an impairment is substantially limiting; and (4) impairments that are “episodic” or “in remission” are substantially limiting if they would be when active. Moreover, the ADAAA revised the definition of “regarded as” having a disability to prohibit discrimination based on an actual or perceived physical or mental impairment that is not minor and transitory. The ADAAA also included a conforming amendment to section 504 of the Rehabilitation Act of 1973, another federal law that prohibits disability discrimination by entities that receive federal financial assistance.

51. The Genetic Information Nondiscrimination Act of 2008 (GINA), P.L. 110-233, 122 Stat. 881, which governs the use of genetic information in health insurance (Title I) and employment (Title II), was signed into law on May 21, 2008, and took effect November 21, 2009. Genetic information protected under GINA includes genetic services (genetic tests, counseling, or education), genetic tests of family members, and family medical history. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other covered entities, and strictly limits the disclosure of genetic information. Enactment of this law was spurred by concerns in Congress that people would refuse to take potentially helpful genetic tests because of concerns about how employers and insurance companies might use this information.

52. In July 2006, Congress reauthorized certain provisions of the federal Voting Rights Act that were set to expire in 2007, P. L. 109-246, 42 U.S.C. 1973c(a)-(b). This reauthorization continued in effect section 5 of the Act, which requires certain jurisdictions (all or part of 16 states) to seek federal preclearance of any voting change to ensure that the change neither has the effect nor the purpose of denying anyone the right to vote on account of race, as well as the portion of the Act that requires certain jurisdictions with a concentration of citizens with limited English proficiency to provide language assistance to those voters. The Supreme Court considered a statutory and constitutional challenge to the reauthorized section 5 of the Act in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009). In that case, a municipal utility district in Texas sought to terminate its obligations under Section 5, or to “bail out”; it also argued, in the alternative, that if it were ineligible to bail out, section 5 would be unconstitutional. The Court did not reach the question of the statute’s constitutionality. Instead, it held that political subdivisions (like the plaintiff) are eligible to bail out under section 5.

53. The Violence against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), P. L. No. 109-162, signed into law on January 5, 2006, improves and expands legal tools and grant programs addressing domestic violence, dating violence, sexual assault, and stalking. VAWA 2005 reauthorized critical grant programs created by the original Violence Against Women Act and subsequent legislation to support investigating and prosecuting cases of domestic violence, dating violence, sexual assault and stalking and to assist victims of these crimes. It also establishes new programs, including programs to improve court response, to enhance culturally and linguistically specific services for victims, to aid teen victims, and to support rape crisis centers and other programs to assist sexual assault victims. In addition, the Act strengthens federal laws, provides new sources of funding to assist victims of sexual assault and stalking, and provides a means for communities to build an effective coordinated community response to these crimes. Finally, the Act expands immigration protections for immigrant victims of domestic violence, sexual assault, trafficking, and other crimes.

54. Title IX of VAWA 2005 includes for the first time provisions specifically aimed at ending violence against American Indian and Alaska Native women – an issue identified by some members of civil society and others as needing urgent attention. Title IX, “The Safety for Indian Women Act,” honors the government-to-government relationship between the



Federal government and tribes and aims to strengthen the capacity of tribes to exercise their sovereign authority to respond to violent crimes against women. Since passage of VAWA 2005, the DOJ Office on Violence Against Women, the office responsible for implementing the provisions of Title IX, has:

(a) Successfully developed and implemented the Grants to the Indian Tribal Governments Program (Tribal Governments Program), which has distributed over \$129 million to tribal governments, tribal consortia, and tribal organizations to support tribal communities to address violence against women;

(b) Appointed a Deputy Director for Tribal Affairs, who oversees a staff of four grant program specialists, coordinates implementation of Title IX of VAWA 2005, and meets with tribal leaders nationwide to gain a more specific understanding of the needs and challenges that tribes face;

(c) Fostered the growth of nonprofit tribal domestic violence, and sexual assault coalitions to empower American Indian and Alaska Native women to take a more active role in leading the movement to end violence against Native American women;

(d) Established a federal advisory committee to assist the National Institute of Justice in conducting research about the nature and dynamics of violence against Native American women; and

(e) Conducted five successful annual tribal consultations attended by leaders from nearly 100 tribes each year to solicit recommendations about how the Department of Justice can improve its response to violence against Native American women.

(f) In addition, VAWA 2005 supports community efforts to help some of the most vulnerable victims, including the elderly, those with disabilities, and children exposed to violence.

### **3. Equal Protection in Education**

55. Equal protection and education generally. The Equal Protection Clause of the United States Constitution bars public schools and universities from engaging in discrimination on the grounds of, *inter alia*, race, sex, religion, or national origin. In addition, federal civil rights laws prohibit discrimination on the basis of race, color, national origin, religion, sex, age, and disability in education programs and activities receiving federal financial assistance. The Departments of Justice (DOJ) and Education (ED) enforce these federal statutes. On March 8, 2010, the Secretary of Education announced the reinvigoration of the Department's equity and enforcement activities. ED has since investigated and resolved record numbers of complaints, initiated civil rights compliance reviews of educational institutions, issued new policy guidance, improved data collection, and revamped technical assistance efforts.

56. On April 20, 2010, in an event attended by the Vice President, the Secretary of Education announced ED's issuance of a Dear Colleague letter (a letter to state education officials) that provides clarification on part three of the three-part test used to assess whether institutions are providing nondiscriminatory athletic opportunities as required by one of the Title IX athletics regulatory requirements. The Dear Colleague letter reaffirms that the ED Office for Civil Rights (ED/OCR) evaluates multiple indicators, including surveys, to determine whether there is unmet athletic interest and ability among students (generally women) who are underrepresented in an institution's athletic program, and provides technical assistance on the nondiscriminatory implementation of surveys. On June 29, 2010, ED and DOJ released a joint ED/DOJ letter to college and university presidents regarding the accessibility of electronic book readers for individuals who are blind or have low vision. The letter states that it is impermissible under federal law for colleges and

universities to use electronic book readers or similar technology in a teaching or classroom environment if the device is inaccessible to individuals who are blind or have low vision, unless those students are provided an equally effective accommodation or reasonable modification that allows those students to receive all the educational benefits of the technology. On May 26, 2011, ED/OCR issued two new Dear Colleague Letters and a Frequently Asked Questions (FAQ) document as a follow-up to the June 2010 letter on electronic book readers. These materials, which were sent to postsecondary education officials and elementary and secondary education officials, answered questions about the obligations of educational institutions that provide benefits to students by means of these technologies. The letter to elementary and secondary education officials also explained that the legal requirements articulated in the June 2010 letter also apply to elementary and secondary schools.

57. In October 2010, ED/OCR issued a Dear Colleague letter concerning institutions' obligations to protect students from student-on-student harassment on the basis of race, color, national origin, disability, and sex, including real or perceived non-conformity with sex stereotypes. The letter clarifies the relationship between bullying and discriminatory harassment, provides examples of harassment, and illustrates how a school should respond in each case. On April 4, 2011, ED/OCR issued a Dear Colleague letter providing guidance and examples of Title IX requirements and how they relate to sexual harassment and sexual violence, discussing proactive efforts schools can take to prevent sexual violence and educate employees and students, and providing examples of the types of remedies schools and OCR may use to respond to sexual violence. In addition, on May 6, 2011, ED/OCR and DOJ issued a Dear Colleague letter reminding state and local education officials of their obligation under federal law to provide equal opportunities, including a basic public education, to all children residing in their districts and to offer assistance in ensuring compliance. The letter reiterated that under the 1982 Supreme Court decision in *Plyler v. Doe*, 457 U.S. 202, the undocumented or non-citizen status of a student, or his or her parent or guardian, is irrelevant to the student's entitlement to elementary and secondary education. Accordingly, districts may not request information with the purpose or the result of denying access to public schools on the basis of race, color, or national origin. Finally, in 2011, ED formed the Equity and Excellence Commission to examine the potential impact of school finance on educational opportunity and recommend ways for restructuring school finance systems to increase equity and achievement.

58. Under Title IV of the Civil Rights Act of 1964, DOJ may bring suit against a school board that deprives children of the 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." DOJ 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 or more. It also investigates and brings new cases of education discrimination. For example:

(a) In *Hudson and U.S. v. Leake County Sch. Dist.* (S.D. MS), DOJ secured a consent decree on March 23, 2011, that requires the district to redraw attendance zone lines, close two single-race schools, and address faculty and staff assignments, facilities, extracurricular activities, and quality of education concerns. DOJ invested significant time and effort in soliciting community input on the proposed plan, including a community meeting on December 7, 2010, attended by over 800 students, parents, and community members.

(b) Using its Title IV authority, DOJ entered into a settlement agreement with the University of South Carolina on November 20, 2010, after investigating allegations that one of USC's sororities intentionally excludes African-American students from membership. In the settlement, USC agreed to: revise the university's policies and

procedures related to student complaints of discrimination and harassment; retain a third-party consultant to revise the complaint resolution process; implement a comprehensive training program for students, faculty, and staff; and submit compliance reports to DOJ.

(c) In *United States v. Philadelphia School District and School Reform Commission*, (E.D. PA), DOJ secured a court-approved settlement agreement to resolve an investigation of a complaint alleging race and national origin-based harassment of Asian students at South Philadelphia High School (SPHS). Specifically, the complaint alleged persistent harassment, including an incident in December 2009, in which approximately 30 Asian students were violently attacked in and around school grounds leading to approximately 12 students being sent to the emergency room. The settlement agreement requires the district to: retain an expert consultant in the area of harassment and discrimination based on race, color, and/or national origin; review the district's policies and procedures concerning harassment; develop and implement a comprehensive plan for preventing and addressing student-on-student harassment at SPHS; conduct training of faculty, staff, and students on discrimination and harassment based on race, color, and national origin and to increase multi-cultural awareness; maintain records of investigations and responses to allegations of harassment; and provide annual compliance reports to DOJ as well as make harassment data publicly available.

59. The U.S. Department of Education (ED) continues to administer a number of programs that provide opportunities for the participation of all students, including minorities and women, in elementary, secondary and higher education programs. These include, but are not limited to, educational equity programs for women and other students; assistance to school districts and others for the education of Native Hawaiians, Native Americans and Alaska 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. ED also administers the Elementary and Secondary Education Act of 1965 (ESEA), which, as amended, 20 U.S.C. 6301 et seq., provides a framework for improving student performance for all students. The ESEA requires that as a condition of a state's receipt of funds under the Title I program, the results of annual statewide testing be published and broken out at the school, school district, and state levels, by poverty, race, ethnicity, sex, immigration status, disability status, and English learners (ELs). Each state is required to establish achievement standards that apply to all public elementary and secondary students and to define measurable objectives for the yearly progress of all such students as well as the progress of certain subgroups of students, specifically including economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and ELs. Schools or districts that do not make adequate yearly progress with respect to any of these groups of students are subject to a sequence of corrective steps.

60. The Secretary of Education announced a blueprint for reform of the ESEA in 2010. ED plans to work with Congress to re-tool the ESEA to promote the use of academic standards that prepare students to succeed in college and the workplace, and to create accountability systems that recognize student growth and school progress toward meeting that goal. The Administration proposal is designed to address the challenges that have been experienced under the ESEA, while continuing to focus on closing the achievement gap. More recently, in September 2011, President Obama announced that, while Congress continues its work on ESEA reauthorization, ED will provide, pursuant to the Secretary's waiver authority under the ESEA, flexibility to states, districts, and schools to support state and local reform efforts in critical areas such as transitioning to college- and career-ready standards and assessments; developing systems of differentiated recognition, accountability, and support; and evaluating and supporting teacher and principal effectiveness. In order to help states and districts move forward with reforms in these areas, ED has offered states the opportunity to request flexibility regarding certain requirements

of the ESEA that may be barriers to such efforts in exchange for states' meeting four principles aimed at increasing the quality of instruction and improving student academic achievement.

61. ED/OCR also continues to enforce laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age in programs that receive financial assistance from ED. 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 or activities); Section 504 of the Rehabilitation Act of 1973 (prohibiting disability discrimination); the 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). ED/OCR also enforces the Boy Scouts of America Equal Access Act, which requires public elementary schools and state and local education agencies to provide equal access for certain patriotic youth groups to meet on school premises or in school facilities before or after school hours.

62. One of the most important ways ED/OCR carries out its responsibilities is by investigating and resolving complaints. Individuals who believe there has been a violation of the civil rights laws enforced by ED/OCR may file a complaint with the appropriate regional enforcement office. In fiscal year 2010, ED/OCR received 6,933 complaints and resolved 6,830, some of which had been filed in previous years. In 2011, it has received 7,841 complaints and resolved 7,434, some of which had been filed in previous years.

63. In addition to resolving complaints brought by individuals, ED/OCR initiates investigations ("compliance reviews") where there is information that suggests that widespread discrimination is infringing upon the rights of protected students and their parents. During fiscal year 2010, it initiated 37 compliance reviews (including 54 different sites) and resolved 27. In fiscal year 2011, it has initiated 37 compliance reviews and resolved 4. In addition, in fiscal year 2011 OCR has launched 3 directed investigations involving sexual harassment and violence and one involving racial harassment. These compliance reviews and directed activities address a range of civil rights issues, such as sexual harassment and sexual violence, racial harassment, sex discrimination in athletics, accessibility of facilities for persons with disabilities, access to Advance Placement and similar courses for students with disabilities as well as minority students, discriminatory discipline of students with disabilities and minority students, minority and English learner (EL) students inappropriately included in or excluded from special education services, meaningful access to districts' educational programs for EL students and their parents, and other issues.

64. ED/OCR also provides technical assistance and offers policy guidance on how to prevent and address discrimination on the basis of race, color, national origin, sex, disability, or age to the thousands of educational institutions and millions of students and parents who fall under its jurisdiction. In fiscal years 2010 and 2011, OCR has delivered over 750 technical assistance presentations, both to help educational institutions comply with federal civil rights requirements, and to inform parents, students and others of their rights under the law.

65. Examples of recent resolutions of ED/OCR and DOJ/CRD complaints and compliance reviews include:

(a) ED/OCR initiated compliance reviews of several postsecondary institutions in response to multiple acts of sexual violence. Prior to the conclusion of its investigation and any findings, the institutions asked to enter into a voluntary resolution agreement which, when fully implemented, will ensure that they do not discriminate on the basis of sex in the educational programs and activities that they operate. The agreements required

the institutions to revise their Title IX grievance procedures that address complaints of sex discrimination, including sexual harassment and sexual assault, and their nondiscrimination notices, and to effectively publish these materials; develop, with ED/OCR's assistance, an online Title IX training program that will be completed by employees, including coaches and residential assistants; create a committee, including representation from student groups, the Title IX Coordinator, and others to identify strategies for ensuring that students understand their rights under Title IX and strategies for the prevention of sexual harassment/sexual assault incidents, including outreach and educational activities; revise existing freshman orientation programs and returning student orientation programs to include topics such as how to recognize sexual harassment, the connection between alcohol abuse and sexual harassment and sexual assault, students' ability to speak with a counselor if they are concerned about issues of sexual harassment, the updated grievance procedures for Title IX complaints, and other information and resources regarding Title IX; and conduct checks with students on campus to assess the effectiveness of steps taken pursuant to the agreement.

(b) In April 2011, DOJ/CRD, in conjunction with ED/OCR, reached a settlement agreement with a school district in Owatonna, Minnesota, to resolve an investigation into the racial and national origin harassment and disproportionate discipline of Somali-American students at a high school. The complaint alleged severe and pervasive harassment of Somali-American students, culminating in a fight in November 2009, involving 11 White and Somali-American students. Evidence gathered during an extensive investigation showed that the district disciplined only the Somali-American students involved in the November 2009 incident and that the district's policies, procedures and trainings were not adequately addressing harassment against Somali-American students. The settlement requires the district to, inter alia, issue an anti-harassment statement to all district students, parents and staff; train all district faculty, staff and students on discrimination and harassment; meet with Somali-American students to discuss their concerns about harassment; and establish a working group of district personnel, students and parents to make recommendations to the district regarding the effectiveness of the district's anti-harassment program.

(c) In March 2010, DOJ/CRD reached a settlement agreement with the Monroe City School District in Louisiana to address educational inequities between schools serving virtually all Black student populations and the school serving most of the District's White students. The settlement agreement stemmed from a longstanding desegregation order governing the District and addresses the District's failure to offer equal access to advanced classes to Black/African American students. For instance, at a 100 percent Black high school, the Division found that the school offered no Advanced Placement (AP) courses and only five Gifted and Honors classes. However, at the high school serving virtually all of the District's White high school students, the District offered more than 70 Gifted, Honors and AP courses. The agreement requires the District to take specific steps to offer the same courses at every high school in the District, including AP, pre-AP, Gifted and Honors classes. Additionally, the agreement requires that the District work with a third-party organization, the Equity Assistance Center of the Intercultural Development Research Association, to ensure an equitable opportunity for all District students to participate in Gifted, Honors, pre-AP and AP programming.

(d) In October 2010, DOJ/CRD worked with ED/OCR to reach a settlement agreement with Boston Public Schools to remedy the school system's failure to serve thousands of English learner students as required by federal law. While conducting a joint investigation, DOJ/CRD and ED/OCR determined that, since 2003, the Boston Public Schools had failed to properly identify and adequately serve thousands of EL students as required by the Equal Educational Opportunities Act of 1974 and Title VI of the Civil Rights Act of 1964. With the cooperation of the Boston Public Schools, CRD and OCR

conducted an extensive examination of the school system's policies and practices, including site visits to schools. As a result of the agreement, more than 4,000 students who were inappropriately characterized as having "opted out" of EL services will now have EL and compensatory services made available to them. In addition, approximately 4,300 students who were improperly identified as non-EL students will, for the first time, be offered EL services. The settlement agreement will ensure that the EL students who attend Boston Public Schools will no longer be denied language support services based on a system that did not accurately assess or provide for their language needs.

66. ED/OCR oversees the Civil Rights Data Collection (CRDC), which collects data related to public school districts and elementary and secondary schools' obligations to provide equal educational opportunity, including student enrollment and educational programs and services data that are disaggregated by race/ethnicity, sex, English learners (EL), and disability. OCR added new data items to the 2009-2010 CRDC, such as students' participation in algebra and other college-preparatory subjects, retention, teacher experience/absenteeism, school funding, harassment, restraint/seclusion, and additional information related to discipline.

67. DOJ/CRD also coordinates the U.S. Government's enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, which prohibits sex-based discrimination in federally-assisted educational programs. It developed the Title IX common rule, published on August 30, 2000, by 21 agencies (including DOJ) that, until that time, did not have Title IX regulations, to ensure consistent application of the prohibition against sex discrimination.

68. Education and disabilities. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., as amended, 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 an appropriate individualized education program for each child with a disability designed to meet the child's specific educational needs. In 2009, the Supreme Court held that the IDEA authorizes reimbursement for private special education services when a public school district fails to provide a "free appropriate public education" as required by the Act, and where private school placement is appropriate, regardless of whether the child had previously received special educational services through the public school district. *Forest Grove School District v. T.A.*, No. 08-305 (June 22, 2009). The IDEA and its implementing regulations provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in any state or local school district with respect to the identification of children with disabilities, their placement into particular educational settings, and the incidence, duration, and type of disciplinary actions taken against students with disabilities. Where significant disproportionality exists, states must provide for the review and, if appropriate, revision of the policies, procedures, and practices used in such identification or placement to ensure compliance with the IDEA; require any school district so identified to reserve fifteen percent of its total IDEA grant funds to provide coordinated early intervening services, particularly to children in the over identified group; and require school districts so identified to report publicly on revisions to policies, procedures, and practices. The Office of Special Education and Rehabilitative Services (OSERS) in ED administers the IDEA.

69. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Department of Education's implementing regulations, 34 C.F.R. Part 104, prohibit recipients of ED's financial assistance from discriminating on the basis of disability. Recipients are prohibited from disability-based discrimination in elementary and secondary schools and postsecondary institutions. Under these regulations, "[a] recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate

public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." See 34 C.F.R. 104.33.

70. Education and religion. As discussed in greater detail in paragraphs 55 through 57 of the Second and Third Periodic Report, the United States Supreme Court has held that while the Establishment Clause of the United States Constitution prohibits state-sponsored prayer in public schools, at the same time, private religious expression by students is constitutionally protected. Thus, while a public high school may not invite a religious leader to say a prayer at graduation, *Lee v. Weisman*, 505 U.S. 577 (1992), public secondary schools that have opened their facilities to non-curriculum-related student groups to meet on school premises during non-instructional time must not deny equal access to school facilities for after-school meetings of youth organizations, including those whose activities include Bible lessons, prayer, and religion-themed games, *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001); (see also, Equal Access Act, 20 U.S.C. 4071 (a) (making it "unlawful for a public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings"). Title IV of the Civil Rights Act of 1964 also prohibits discrimination on the basis of religion by public elementary and secondary schools and public institutions of higher learning. Further, DOJ/CRD and ED/OCR enforce Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin by recipients of federal funds. While Title VI does not cover discrimination based solely on religion, members of religious groups are protected under Title VI from discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics. These principles apply to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Jews, Muslims or Sikhs).

71. Education and aliens. The constitutional guarantee of equal protection of the laws applies in some respects to aliens who have made an entry into the United States, even if such entry was unlawful. In *Plyler v. Doe*, 457 U.S. 202 (1982), the U.S. Supreme Court invalidated a Texas law that withheld state funds from local school districts for the education of undocumented alien children and allowed local school districts to refuse to enroll the children. Finding that the Equal Protection Clause of the Fourteenth Amendment to the Constitution applies to undocumented alien children, the Supreme Court required the state to demonstrate that the Texas law furthered a "substantial goal of the State" and concluded that the state could not meet this test. *Id.* at 218 n.16. Thus, the Court applied an intermediate level of scrutiny to the state's classification – less than strict scrutiny, but more than rational basis review. *Id.* In May 2011, ED and DOJ issued a joint "Dear Colleague" letter discussing enrollment policies and procedures that comply with the civil rights laws, as well as *Plyler*. The letter reminded school districts that prohibiting or discouraging children from enrolling in schools because they or their parents or guardians are not U.S. citizens or are undocumented violates Federal law.

#### **4. Equal Protection in Housing and Lending**

72. Fair housing. Ensuring equal opportunity in housing is one of the strategic goals of the U.S. Department of Housing and Urban Development (HUD). HUD's Office of Fair Housing and Equal Opportunity (FHEO) administers and enforces federal laws that prohibit discrimination on the bases of race, color, religion, sex, national origin, disability, and familial status, and that require federal, state, and local governments to take proactive measures to ensure balanced living patterns. The Fair Housing Act also protects purchasers from discrimination in obtaining loans for the purchase of housing. HUD further administers programs to educate lenders, housing providers, developers, architects, home-

seekers, landlords, and tenants about their rights and obligations under the law. Working with national, state, and local partners – as well as the private and nonprofit sectors – FHEO is involved in a cooperative effort to increase access to the nation’s housing stock so that more Americans can obtain housing of their choice. The laws implemented by FHEO include the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Section 109 of the Housing and Community Development Act of 1974, and Section 3 of the Housing and Urban Development Act of 1968. Recent charges brought by HUD include: (1) a charge against the owners of several apartment buildings in suburban Philadelphia for discrimination against families with children for terminating the lease of a woman because she adopted an 11-year-old child; (2) a charge against the owners and managers of an apartment complex in the state of Washington for discriminating against Blacks, Hispanics, Asian Americans, and families with children; (3) a charge against a San Juan, Puerto Rico housing developer for violating the Fair Housing Act by allegedly denying a mobility impaired homeowner an accessible parking space close to her home; and (4) a charge against New York landlords for denying a veteran with a disability the use of a service dog in his apartment. Information on HUD enforcement and programs can be obtained at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp) .

73. DOJ/CRD is also charged with enforcing the Fair Housing Act; the Equal Employment Credit Opportunity Act, which prohibits discrimination in credit; and Title II of the Civil Rights Act of 1964, which prohibits discrimination in certain places of public accommodation such as hotels, restaurants, and theaters; and the Servicemembers Civil Relief Act, which provides for protections in areas such as housing, credit, and taxes for military personnel while they are on active duty. Under the Fair Housing Act, DOJ may bring lawsuits where there is reason to believe that a person or entity is engaged in a “pattern or practice” of discrimination, or where a denial of rights to a group of persons raises an issue of general public importance. DOJ also brings cases where a housing discrimination complaint has been investigated by HUD, HUD has issued a charge of discrimination, and one of the parties to the case has elected to go to federal court. Particularly in the wake of the nationwide housing and foreclosure crisis, the enforcement of fair housing and fair lending has been a top priority for DOJ/CRD. As a result of the infusion of resources, as of September 2011, DOJ/CRD had seven law suits and more than 20 open investigations. Its dedicated fair lending unit is targeting its enforcement actions to specific discriminatory lending practices, including:

- (a) Discrimination in the underwriting or pricing of loans, such as discretionary mark ups and fees;
- (b) Redlining through the failure to provide equal lending services to minority neighborhoods;
- (c) Reverse redlining through the targeting of minority communities for predatory loans;
- (d) Steering minority borrowers into less favorable loans; and
- (e) Marital status, gender, and age discrimination in lending.

74. Since the fair lending unit was created in 2010, DOJ/CRD has filed six fair lending cases involving allegations of a pattern or practice of discrimination or discrimination against a group of persons. Recent accomplishments have included the filing of a consent decree requiring payment of a minimum of \$6.1 million in *United States v. AIG Federal Savings Bank and Wilmington Finance* (2010), which involved racial discrimination against Black/African American borrowers in fees charged on wholesale mortgage loans; and resolution of *U.S. v. Fountain View Apartments, Inc.* (2010), a Fair Housing Act case alleging discrimination on the basis of race and familial status in apartment rentals. Additional information on cases can be found at



[www.justice.gov/crt/housing/fairhousing/whatnew.htm](http://www.justice.gov/crt/housing/fairhousing/whatnew.htm), and in U.S. reports filed with the Committee on the Elimination of Racial Discrimination, available at <http://www.state.gov/g/drl/hr/treaties/>. Other recent cases include the following:

(a) In December 2010, PrimeLending, a national mortgage lender with offices in 32 states, agreed to pay \$2 million to resolve allegations that it engaged in a pattern or practice of discrimination against Black/African American borrowers nationwide by charging them higher prices on retail loans made through PrimeLending's branch offices. PrimeLending gave its employees wide discretion to increase their commissions by adding "overages" to loans, which increased the interest rates paid by borrowers. This policy had a disparate impact on Black/African American borrowers.

(b) In May 2011, Citizens Republic Bancorp Inc. (CRBC) and Citizens Bank of Flint, Michigan, agreed to open a loan production office in a Black/African American neighborhood in Detroit, invest approximately \$3.6 million in Wayne County, Michigan, and take other steps as part of a settlement to resolve allegations that they engaged in a pattern or practice of discrimination on the basis of race and color. The complaint alleges that Citizens Bank, and Republic Bank before it, have served the credit needs of the residents of predominantly White neighborhoods in the Detroit metropolitan area to a significantly greater extent than they have served the credit needs of majority Black/African American neighborhoods. Those neighborhoods are easily recognized because the Detroit metropolitan area has long had highly-segregated residential housing patterns, especially for Blacks/African Americans.

(c) DOJ/CRD continues to use its traditional fair housing tools to prevent segregation and re-segregation of communities. In November 2009, CRD secured DOJ's largest ever monetary settlement of rental discrimination claims, requiring owners of numerous apartment buildings in Los Angeles to pay \$2.7 million to Black and Hispanic victims of discrimination seeking rental homes. The lawsuit also alleged that the defendants discriminated on the basis of familial status (having children under 18).

(d) In February 2010, DOJ/CRD reached a \$2.13 million settlement of claims of pervasive racial discrimination and harassment at an apartment building in Kansas City, Kansas. The complaint alleged that the property manager displayed and distributed racially hostile symbols and items on the premises, such as hangman's nooses, and openly made racially derogatory and hostile remarks about Black or African American residents.

75. DOJ has also brought numerous cases alleging sexual harassment in housing. These cases have resulted in the payment of millions of dollars in damages to female tenants, as well as orders permanently barring sexual harassers from managing rental properties. Many of the victims in these cases are minority women. For example, on August 6, 2010, a federal jury in Detroit, Michigan returned a \$115,000 verdict in *United States v. Peterson*, a case under the Fair Housing Act alleging sexual harassment against female tenants. The United States presented evidence that a maintenance man subjected six women to severe and pervasive sexual harassment, ranging from unwelcome sexual comments and sexual advances, to requiring sexual favors in exchange for their tenancy.

76. Despite the numerous laws and policies designed to ensure equal access to housing, racial disparities in housing and lending are of continuing concern. This is one of the issues raised in civil society consultations. The U.S. Government is aware of these issues and is committed to working to eliminate any disparities that exist. To identify racial and ethnic discrimination in housing, HUD and DOJ/CRD use testers of different backgrounds who apply for the same living accommodations. With the goal of expanding such testing to include discrimination based on sexual orientation and gender identity, HUD held consultations with residents in five cities to offer ideas on how to test for such additional

bases of discrimination. Those consultations have informed a Housing Discrimination Study into the area of LGBT discrimination. The study is currently ongoing.

## 5. Equal Protection in Employment

77. Employment discrimination. The EEOC is the lead federal agency dealing with employment discrimination. The EEOC enforces Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Titles I and V of the Americans with Disabilities Act of 1990 (as amended), Sections 501 and 505 of the Rehabilitation Act of 1973, and Title II of the Genetic Information Nondiscrimination Act of 2008. The EEOC accepts charges of employment discrimination and investigates, attempts to resolve, and in some instances litigates these charges. During fiscal year 2010, the EEOC received a total of 99,922 such charges (compared to 75,426 charges in fiscal year 2005, the year of the last report). Of these, 36.3 % alleged retaliation, 35.9 % discrimination based on race, 29 % on sex, 23.3 % on age, 25.2 % on disability, 11.3% on national origin, and 3.8 % on religion.<sup>1</sup> The EEOC also conducts administrative hearings and adjudicates complaints of employment discrimination filed against the federal government as an employer, and it may award relief to federal government employees and applicants. During fiscal year 2010, EEOC received 5,788 requests for hearings and 4,545 appeals from federal employee discrimination claims (compared to 10,279 hearing requests and 7,490 appeals in 2005). In the federal sector, retaliation claims outnumber all others, followed by race and sex discrimination claims. More details about EEOC enforcement can be found at [www.eeoc.gov](http://www.eeoc.gov) and in United States' reports to the Committee on the Elimination of Racial Discrimination, available at <http://www.state.gov/g/drl/hr/treaties/>. In addition, examples of EEOC enforcement actions with regard to discrimination in employment under Title VII are set forth in the discussions herein, including examples of enforcement based on pregnancy and sexual harassment (Article 4), religion (Article 18) and religion/national origin (Article 20).

78. DOJ/CRD enforces Title VII against state and local government employers. In addition to suits on behalf of individuals who experience discrimination, it investigates and brings cases challenging patterns or practices of discrimination. These cases allow DOJ/CRD to seek broad relief for many victims, and to help change discriminatory policies in the workplace. Additionally, CRD enforces the anti-discrimination provision of the Immigration and Nationality Act, codified at 8 U.S.C. 1324b, which prohibits discrimination on the basis of citizenship or immigration status by employers with four or more employees. Employers may not treat work-authorized individuals differently because of their citizenship status.

(a) On August 1, 2011, DOJ/CRD announced that it had reached a settlement with the State of New Jersey and the New Jersey Civil Service Commission in a suit alleging a pattern or practice of employment discrimination against Blacks and Hispanics. The complaint challenged New Jersey's use of a written examination for promotion to the rank of police sergeant, alleging that the practice disproportionately excluded Black and Hispanic candidates since 2000, and was not proven to be job-related and consistent with business necessity. The consent decree, preliminarily entered on September 15, 2011, and amended on November 2, 2011, will require that New Jersey no longer use the written examination and that New Jersey develop a new lawful selection procedure that complies with Title VII. It also requires that New Jersey pay \$1 million into settlement funds towards back pay to Black and Hispanic officers who were harmed by the challenged

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<sup>1</sup> Because complainants often file charges on several bases, the percentages add up to more than 100 percent.

promotional practices. Additionally, Black and Hispanic officers eligible for relief under the consent decree may receive a priority offer of promotion to police sergeant positions.

(b) In July 2009, the U.S. District Court for the Eastern District of New York found that the City of New York engaged in a pattern or practice of discrimination in the hiring of entry-level firefighters. DOJ/CRD's complaint alleged that the use of the written tests to screen applicants for entry-level firefighter positions, and its decision to rank-order applicants who passed the written examinations for further consideration, had an unlawful disparate impact on Black and Hispanic applicants. The court found that the City's use of the two written examinations as an initial pass/fail hurdle and use of applicants' written examination scores (in combination with their scores on a physical abilities test) to rank-order and process applicants for further consideration for employment violated Title VII. In January 2010, the court issued an order outlining the broad scheme for relief, and on October 5, 2011, the court issued a memorandum and draft remedial order regarding the applicants' claims for class-wide injunctive relief. The court has not yet entered an order defining back pay and other injunctive relief that CRD has requested.

(c) In May 2011, DOJ/CRD reached a settlement agreement with the Maricopa County Community College District in Arizona, resolving allegations that the district engaged in a pattern or practice of discrimination against non-citizens in the hiring and employment-eligibility verification process. According to CRD's findings, the district had a policy of requiring newly hired workers who are not U.S. citizens, but are authorized to work, to present specific documentation that is not required by federal law.

(d) On August 22, 2011, DOJ/CRD reached a settlement with Farmland Foods, Inc., resolving allegations that the pork producer engaged in a pattern or practice of discrimination by imposing unnecessary and excessive documentary requirements on non-U.S. citizens and foreign-born U.S. citizens when establishing their eligibility to work in the United States. In addition to ending its impermissible document requests and modifying its employment eligibility verification process, the employer agreed to pay \$290,400 in civil penalties and to train its human resources personnel.

79. DOJ/CRD has placed a priority on prosecuting bias crimes and incidents of discrimination against Muslims, Sikhs, and persons of Arab and South Asian descent, as well as persons perceived to be members of these groups. All of its litigating sections, including employment, education, and housing, are engaged in this effort. DOJ and CRD in particular have also engaged in extensive outreach efforts to these communities to educate people about their rights and available government services. CRD is suing the New York Metropolitan Transit Authority under Title VII alleging discrimination against Muslim and Sikh employees for refusing to permit them to wear headscarves and turbans while working as bus and subway operators and other public-contact positions. In addition, in June 2009, DOJ/CRD filed suit against Essex County, New Jersey, alleging that it discriminated against a Muslim corrections officer when it refused to allow her to wear a religiously mandated headscarf.

80. Additionally, the Department of Labor's Office of Federal Contract Compliance Programs enforces nondiscrimination and affirmative action requirements applicable to most federal government contractors and subcontractors. At the state and local level, discrimination in employment may be addressed by state and local human rights/civil rights entities separately or in partnership with EEOC (*see* Common Core Document Annex A). In claims against the state or local governments themselves under Title VII, EEOC forwards completed investigations to DOJ/CRD for potential litigation.

81. Employment testing/screening. The Supreme Court recently examined the interplay of disparate treatment (intentional discrimination) and disparate impact (policies or practices that have a discriminatory effect, regardless of intention) under Title VII in employment

testing. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). Officials in New Haven, Connecticut, had discarded the results of a test designed to identify promotion candidates in the Fire Department out of concern that minority applicants would file lawsuits alleging that the test had an unjustified race-based disparate impact in violation of Title VII of the Civil Rights Act. White firefighters and two Hispanic firefighters who had scored well on the test sued, alleging that the City's decision not to use the test amounted to discrimination based on race. In a 5 to 4 decision, the Court adopted a "strong-basis-in-evidence" standard, reasoning that such a standard would give effect to both the disparate impact and disparate treatment components of Title VII. Under this standard, before an employer can reject the results of an employment test for the asserted purpose of avoiding or remedying an unintentional disparate impact under Title VII, the employer must have a strong basis in evidence to believe that it will be subject to disparate impact liability if it makes employment decisions based on the test. Finding that New Haven's race-based rejection of the test results did not satisfy the strong-basis-in-evidence standard, the Court struck down the action. After the Supreme Court's ruling, minority firefighters filed two lawsuits against New Haven alleging that use of the test results to make promotions resulted in a disparate impact violation of Title VII. Both lawsuits are currently pending in the court system.

82. In addition, in a different case involving a test for firefighters administered by the city of Chicago, the Supreme Court held that a plaintiff who does not file a timely charge challenging the initial adoption of a practice may nonetheless assert a timely disparate impact claim challenging the employer's later application of that practice (i.e., through continued reliance on the test results), as long as the plaintiff alleges each of the elements of a disparate impact claim with respect to the later application. *Lewis v. Chicago*, 130 S. Ct. 2191 (2010). Based on this ruling, some of the plaintiffs were allowed to proceed with their claims of disparate impact race discrimination as a result of the firefighter test, and obtained relief from an injunctive order that requires the city to hire 111 Blacks/African Americans as firefighters, to provide them retroactive seniority credits, and to fund their pensions so as to account for the benefits that would have accrued had they been hired after taking the test. Additionally, the agreement requires the city to provide back pay to a class of approximately 6,000 Black/African American firefighters who were affected by the test but not hired under the order. See Joint Motion for Entry of an Injunctive Order of Relief, *Lewis v. Chicago*, No 98 C 5596 (N.D. Ill., filed Aug. 12, 2011).

83. Protection against retaliation. Anti-discrimination laws in the United States generally protect those who file a claim or assist in the claims of others against retaliation or reprisal. The federal government understands that without robust prohibitions against retaliation, the underlying "enforcement scheme[s] would unravel." *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 180 (2005). Thus, under Title VII of the Civil Rights Act, for example, it is unlawful for an employer to take any action that "well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination." *Burlington N. and Santa Fe Rwy v. White*, 548 U.S. 53, 68 (2006). The U.S. Supreme Court has endorsed the importance of anti-retaliation provisions in a series of recent decisions arising under a variety of different civil rights protections. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (Fair Labor Standards Act prohibition against retaliation extends to internally-made oral complaints); *Thompson v. North American Stainless, L.P.*, 131 S. Ct. 863 (2011) (Title VII anti-retaliation protections cover adverse actions against a worker in the "zone of influence" of the person who has engaged in protected activity, which includes firing the fiancé of a worker who filed an EEO complaint); *Crawford v. Metro. Gov't of Nashville and Davidson County*, 555 U.S. 271 (2009) (Title VII anti-retaliation protection extends beyond protection for filing a charge of discrimination and includes those who participate in internal investigations regarding workplace discrimination); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (Age Discrimination in Employment Act protections against discrimination for federal

employees and applicants includes prohibition against retaliation); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (claims under the prohibition in 42 U.S.C. § 1981 against discrimination in making and enforcing contracts include employment contracts where the victim is targeted for retaliation for attempting to help another); *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (Title IX claim of discrimination in education may include retaliation).

84. Some U.S. courts have recognized that because discrimination against lesbian, gay, bisexual, and transgender people often centers on the ways in which they do not conform to traditional gender stereotypes, such discrimination may be actionable under Title VII's prohibition on sex discrimination, as construed by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination resulting from stereotypical notions about appropriate gender norms (i.e., "gender stereotyping") is discrimination "because of sex" within the meaning of Title VII). See *Prowel v. Wise Bus. Forms Inc.*, 579 F. 3d 287 (9th Cir. 2009); *Smith v. City of Salem*, 378 F. 3d 566, 575 (6th Cir. 2004). Nonetheless, the lack of explicit protection against employment discrimination based on sexual orientation and gender identity under federal law and the laws of a number of states is of continuing concern and has been raised by some civil society representatives. The Employment Non-Discrimination Act, now pending before Congress, would provide such protection under federal law. President Obama has announced his support for the Employment Non-Discrimination Act and his belief that anti-discrimination employment laws should be expanded to outlaw discrimination based on sexual orientation and gender identity.

## **6. Equal Protection in Health Care and Social Services**

85. The U.S. Department of Health and Human Services (HHS) administers programs that protect the health of all Americans and provide essential human services, especially for those least able to help themselves.

86. In October 2009, President Obama signed into law the Ryan White HIV/AIDS Treatment Extension Act of 2009, CARE Act, which reauthorizes the Ryan White program for four years through September 30, 2013. In response to the domestic HIV/AIDS epidemic, this Act provides funds for states, metropolitan areas, and local communities, to improve the quality and availability of care for low-income, uninsured, and underinsured individuals and families affected by HIV/AIDS. Administered by HHS Health Resources and Services Administration (HRSA), these programs provide care to an estimated 571,000 people living with HIV/AIDS in the United States. This Act reflects U.S. dedication to improving access to life-extending treatment and medical management for people living with HIV/AIDS. Enactment of this legislation has been accompanied by a number of initiatives to address the AIDS epidemic, including renewal of the charter of the Presidential Advisory Council on HIV/AIDS, the lifting of the HIV/AIDS travel ban, and initiation of ACT AGAINST AIDS. ACT AGAINST AIDS, a five-year national communication and mobilization campaign, was launched April 7, 2009. The goal of this initiative is to reduce HIV incidence through: (a) refocusing attention on domestic HIV and AIDS and combating complacency; (b) promoting awareness, targeted behavior change, and HIV testing; and (c) strengthening and establishing networks, community leadership and engagement, and other partnerships to extend the reach and credibility of HIV prevention messages.

87. On July 13, 2010, the United States released the National HIV/AIDS Strategy (NHAS) and Federal Implementation Plan to: (1) reduce HIV incidence; (2) increase access to care and optimize health outcomes; and (3) reduce HIV-related health disparities. The NHAS is a coordinated national response to the HIV/AIDS epidemic by federal, state, and local governments, as well as the business community, faith communities, philanthropy,

and the scientific and medical communities. This ambitious plan is the nation's first-ever comprehensive coordinated HIV/AIDS roadmap with clear and measurable targets to be achieved by 2015.

88. The HHS Office for Civil Rights (HHS/OCR) continues to enforce laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, religion, and age in programs that receive federal financial assistance from HHS. These laws include: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title II of the Americans with Disabilities Act of 1990, as amended; the Multiethnic Placement Act of 1994, as modified by Section 1808 of the Small Business and Job Protection Act of 1996 (prohibiting the use of race, color, or national origin to delay or deny a child's adoption or foster care placement, or deny an individual's opportunity to participate); and Section 1557 of the Affordable Care Act of 2010. HHS/OCR also enforces federal laws prohibiting discrimination in specific HHS-funded programs and block grants, including Projects for Assistance in Transition from Homelessness, the Family Violence Prevention and Services Act, the Low-Income Home Energy Assistance Act, the Maternal and Child Health Services Block Grant, Preventative Health and Health Services Block Grants, Community Mental Health Services Block Grants, and Substance Abuse Prevention and Treatment Block Grants. Through prevention and elimination of unlawful discrimination, HHS/OCR helps HHS carry out its overall mission of improving the health and well-being of all people affected by its many programs.

89. HHS/OCR carries out these responsibilities primarily through conducting investigations to resolve discrimination complaints brought by individuals. It also works with its sister civil rights agencies throughout the federal government to sponsor public education events and develop technical assistance material to raise awareness of civil rights requirements. In fiscal year 2010, 4,100 covered entities took corrective actions as a result of HHS OCR intervention. HHS/OCR also provided training and technical assistance to more than 55,975 individuals. In addition to resolving individual complaints and public education, HHS/OCR conducts reviews of new Medicare provider applicants to ensure compliance with federal civil rights laws. Through this program, HHS/OCR also provides technical assistance to Medicare applicants, reviews health care facilities' policies and procedures for civil rights compliance, and sends clearance letters to facilities that have demonstrated compliance. During fiscal year 2010, HHS/OCR completed 1,859 new Medicare application reviews.

90. Despite the legal protections in force and the work to ensure equal access to health care, some civil society representatives have raised concerns regarding racial and ethnic disparities in access to health services, including reproductive health services for women, and in some health indices in the population. These issues are discussed in more detail in the U.S. reports to the Committee on the Elimination of Racial Discrimination, available at <http://www.state.gov/g/drl/hr/treaties/>. The United States continues actively to address such issues through numerous legal and programmatic mechanisms, including through enactment and implementation of the Patient Protection and Affordable Healthcare Act of 2010.

## **7. Equal Protection for Persons with Disabilities**

91. In addition to the protections for persons with disabilities in education and employment, discussed above, U.S. law also includes other more general protections for persons with disabilities. Under a United States Supreme Court ruling interpreting the Americans with Disabilities Act (ADA), states must place qualified individuals with disabilities in community settings rather than in institutions, whenever community placement is appropriate, and when the placement can be reasonably accommodated, taking

into account factors such as available state resources and needs of others with disabilities. *Olmstead v. L.C.*, 527 U.S. 581 (1999); see also Executive Order 13217.

92. On June 2, 2009, the 10th anniversary of the *Olmstead* decision, President Obama launched “The Year of Community Living,” a new effort to eliminate the unjustified institutional isolation of individuals with disabilities, including children with disabilities, and directed the appropriate federal agencies to work together to identify ways to improve access to housing, community support, and independent living arrangements. Further, DOJ, which leads the federal government’s enforcement of the ADA, has stressed its renewed commitment to litigation under *Olmstead*, including its willingness to transform its approach to investigating and litigating cases involving the institutionalization of individuals with disabilities, so that DOJ can best realize the full promise of *Olmstead*. DOJ has been actively pursuing enforcement actions in a variety of states to require community placements for persons with disabilities.

(a) In July 2011, DOJ/CRD entered into a comprehensive, cooperative agreement with the State of Delaware that will transform Delaware’s mental health system and resolve ADA violations. Over the next five years, Delaware will prevent unnecessary hospitalization by expanding and deepening its crisis services, provide assertive community treatment teams, intensive case management, and targeted case management to individuals living in the community who need support to remain stable. In addition, the state will offer scattered-site supported housing to everyone in the agreement’s target population who needs that housing support. Finally, Delaware will offer supports for daily life, including supported employment, rehabilitation services and peer and family supports.

(b) In October 2010, DOJ/CRD entered into a comprehensive settlement agreement with the State of Georgia to resolve a lawsuit the United States brought against the state alleging unlawful segregation of individuals with mental illness and developmental disabilities in the state’s psychiatric hospitals. Over the next five years, Georgia will increase its assertive community treatment, intensive case management, case management, supported housing and supported employment programs to serve 9,000 individuals with mental illness in community settings. Georgia will also create at least 1,000 Medicaid waivers to transition all individuals with developmental disabilities from the state hospitals to community settings; and increase crisis, respite, family and housing support services to serve individuals with developmental disabilities in community settings.

93. The Department of Housing and Urban Development (HUD) has embarked on a post-*Olmstead* initiative, using existing enforcement tools under Section 504, the Fair Housing Act, and title II of the ADA. Specifically HUD has:

(a) Issued 1000 Special Purpose Vouchers to support persons with disabilities to move into communities in conjunction with the Money Follows the Person (MFP) initiatives at HHS and has undertaken steps to ensure that those vouchers continue to be targeted to the same populations when they change housing;

(b) Encouraged public housing authorities to expand opportunities for people with disabilities by:

(c) Adopting policies that allow for public housing authority staff to take applications at the institutions where persons with disabilities currently reside;

(d) Encouraging public housing authorities to partner with local organizations such as the local Center for Independent Living & the National Disability Rights Network;

(e) Performed targeted outreach to ensure information regarding accessible units reaches eligible individuals in nursing homes and other institutions, see 24 C.F.R. 8.6(b);

(f) Created waiting list preferences for persons exiting institutions who require accessible units;

(g) Disseminated notices of the opening of Housing Choice Voucher (HCV) waiting lists to institutions identified by state MFP agencies, Medicaid agencies, and other local partner agencies;

(h) Adopted policies that take into account and provide support to address the challenges of locating accessible housing when considering requests for extensions of HCV, see 24 C.F.R. 8.28(a)(4), including adopting specific policies to encourage private landlords with accessible units, including tax credit assistance properties to participate in HCV programs, see 24 C.F.R. 8.28, and encouraging private landlords to make accessibility modifications to private units and use high payment standards as an incentive.

(i) HUD also uses its enforcement authority to promote and protect the rights of persons with disabilities to equal access to housing with reasonable accommodations.

94. In addition, on July 30, 2009, the United States signed the United Nations Convention on the Rights of Persons with Disabilities. In authorizing Ambassador Rice to sign the Convention, the President issued remarks calling on the Senate to provide prompt advice and consent upon transmittal. The link to the President's remarks can be found at: <http://www.whitehouse.gov/the-press-office/remarks-president-rights-persons-with-disabilities-proclamation-signing>.

95. The Department of Health and Human Services (HHS) also plays a key role in carrying out the President's community living initiative. Among other activities, HHS Secretary Sebelius is working with Secretary Donovan of the Department of Housing and Urban Development to improve access to housing, community support, and independent living arrangements. In implementing the *Olmstead* decision and the community living initiative at HHS, Secretary Sebelius has created an HHS Coordinating Council, led by the Office on Disability. HHS's Office for Civil Rights (HHS/OCR) is a member of the Coordinating Council, along with the Administration for Children and Families, the Administration on Aging, the Centers for Medicare and Medicaid Services, the Health Resources and Services Administration, the Office of the Assistant Secretary for Planning and Evaluation, the Office of Public Health and Science, and the Substance Abuse and Mental Health Services Administration. These agencies are tasked with aggressively addressing the barriers that prevent some individuals with disabilities from enjoying meaningful lives in their communities. HHS/OCR is also partnering with the Department of Justice to promote vigorous enforcement of the Americans with Disabilities Act (ADA) and the *Olmstead* decision, and to maximize the effectiveness of federal leadership in promoting civil rights and setting forth the Administration's position in federal courts.

96. HHS/OCR investigates complaints alleging violations of ADA's "integration regulation," which requires that individuals with disabilities receive public services in the most integrated setting appropriate to their needs. This was the regulation at issue in the *Olmstead* decision, discussed above. HHS/OCR has received complaints filed by or on behalf of a wide range of individuals, including individuals with physical, psychiatric, developmental, and cognitive impairments, and individuals of all ages. Through September 2010, HHS/OCR had conducted 581 investigations, achieving corrective action in 61 % of investigated cases. As a result of HHS/OCR's efforts, many individuals have been able to move from an institution to the community, and many individuals have avoided unnecessary institutionalization. For example:

(a) Community services are being provided to individuals who had been institutionalized for decades;



(b) Community services are being provided or restored to individuals who lost their housing and/or community-based supportive services when they entered institutions due to an acute health care problem;

(c) Community services are being provided to individuals with disabilities through Medicaid “waiver” programs;

(d) Increased hours of personal care and assistance are being provided to individuals who need them to stay in the community;

(e) Individuals with disabilities are having greater control over their community-based care and services;

(f) Individuals are provided reasonable accommodations where they reside, rather than having to move to a more restrictive setting.

## **8. Equal Protection and Agriculture**

97. The U.S. Department of Agriculture (USDA) continues to implement the historic civil rights Consent Decree in the federal district court case of *Pigford v. Vilsack*, (D.D.C. 1997), described in paragraph 34 of the Second and Third Periodic Report. The Consent Decree settled a class action brought by Black/African American farmers alleging discrimination in farm credit and non-credit benefit programs. As of June 30, 2010, over 22,600 class members had received more than \$1 billion in damages and debt relief. There has been concern, however, about the large number of petitioners whose petitions have not been considered on the merits. For that reason, the Farm Bill of 2008, Public Law 110-246, sec. 14012, provided relief to claimants who failed to have their petitions considered on the merits. Under that act, up to \$100 million was made available for potential settlement costs. More recently, the federal government entered a settlement for \$1.25 billion with a class of individuals who brought claims under Section 14012, contingent on the necessary appropriations by Congress. Funds were appropriated in December 2010, and the settlement received final approval from the federal district court.

98. USDA has voluntarily taken a number of measures to benefit Consent Decree claimants beyond those required by the Consent Decree and subsequent court orders. These 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 provision of additional loan servicing rights, affording some claimants an opportunity to restructure their remaining debt. In addition, USDA has developed several other initiatives to assist minority and socially disadvantaged farmers, including an Office of Advocacy and Outreach, a Minority Farm Register to assist in outreach, and new guidelines for improving minority participation in county committee elections. The recent \$1.25 billion settlement is noted above.

99. Native American farmers brought a similar class action against USDA in 1999 alleging discriminatory lending practices with regard to Native American applicants. The court approved a settlement of that lawsuit, *Keepseagle v. Vilsack*, on April 28, 2011. The settlement establishes an administrative claims process for Native American farmers alleging discrimination against USDA. The settlement agreement provides for \$680 million in monetary relief; up to \$80 million in debt relief; payments of 25 % of awards to off-set any tax obligations; and wide-ranging programmatic relief, including a moratorium on accelerations, foreclosures, and offsets on accounts involving all Native American borrowers in the Farm Service Agency’s database; a customer’s guide on the Farm Loan Program (FLP); meetings with class counsel to discuss possible changes to the FLP; increased technical assistance in order more fully to utilize USDA programs, to be conducted in multiple locations throughout the country; and the creation of an Ombudsperson and a Council on Native American Farming and Ranching to address issues

affecting Native American farmers and ranchers. The time for filing a claim began on June 29, 2011, and will end on December 27, 2011. Many of the components of programmatic relief are already underway and the Obama administration has worked diligently to ensure that notice of the opening of the claims process has been augmented through the multiple field offices of USDA located throughout the country.

100. The Obama Administration is also establishing a voluntary claims process to make available \$1.33 billion or more to Hispanic farmers and female farmers who alleged discrimination by USDA in the making or servicing of farm loans during certain periods between 1981 and 2000. In addition, USDA will also provide a total of up to \$160 million in debt relief to successful Hispanic and female claimants who currently owe USDA money for eligible farm loans.

## **9. Law with regard to Aliens**

101. As noted in the Second and Third Periodic Report, 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). As a matter of U.S. law, aliens within the territory of the United States, regardless of their immigration status, enjoy robust protections under the U.S. Constitution and other domestic laws. Many of these protections are shared on an equal basis with citizens, including a broad range of protections against racial and national origin discrimination. In particular, the Supreme Court has held that the equal protection and due process protections of the Fourteenth Amendment “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.” *Yick Wo v. Hopkins*, 118 U.S. 356,369 (1886). Similarly, the Court has held that aliens are “person[s]” within the meaning of the due process protections of the Fifth Amendment. See *Kwong Hai Chew*, 344 U.S. at 596 &n.5; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”). Among other protections afforded to aliens within the United States, aliens, like citizens, are entitled to the constitutional guarantee against cruel and unusual punishment and slavery and involuntary servitude.

102. In addition to the constitutional protections afforded to aliens, many federal statutes provide aliens with further protections against discrimination. Many of these statutes were enacted because of the recognition that aliens may be especially vulnerable and may require additional protections against discrimination, particularly in the employment arena. These federal civil rights laws prohibit discrimination on the basis of race, color, and national origin, and apply to both citizens and aliens.

103. Distinctions between lawful permanent resident aliens and citizens require justification, but not the level of “compelling” state interest required for distinctions based on race. See generally, *Fiallo v. Bell*, 430 U.S. 787, 792-94 (1977). Consistent with article 25 of the Covenant, aliens are generally precluded from voting or holding federal elective office although they may hold some other governmental positions, *Sugarman v. Dougall*, 413 U.S. 634 (1973). A number of federal statutes, some of which are discussed above, prohibit discrimination on account of alienage and national origin.

104. The Immigration and Nationality Act distinguishes between 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 (3rd Cir. 2002); *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001).

105. Reaching out to immigrant communities continues to be an important means of addressing concerns regarding racial, ethnic, and religious discrimination. The Department of Homeland Security (DHS) Office for Civil Rights and Civil Liberties (CRCL) leads DHS efforts to develop relationships with communities whose civil rights may be affected by DHS activities. CRCL conducts regular roundtable meetings that bring together DHS officials with diverse communities in cities across the country. Some of these roundtables are hosted exclusively by CRCL; others are conducted in partnership with other federal agencies. Within DHS, the Transportation Security Administration (TSA), Customs and Border Protection (CBP), the Office of Policy, the Federal Emergency Management Agency (FEMA), the Homeland Security Advisory Council (HSAC) and the U.S. Citizenship and Immigration Service (USCIS) also frequently participate in community engagement efforts. In addition, CRCL sponsors dozens of other events each year, including meetings on topics of particular interest (e.g., modesty concerns related to TSA's Advanced Imaging Technology and pat-down procedures) and youth engagement events (e.g., Muslim American youth roundtables). Further, DHS participates in numerous annual conferences and conventions sponsored by community-based organizations.

106. DHS/CRCL also investigates complaints under 6 U.S.C. 345 and 42 U.S.C. 2000ee-1, which require the DHS Officer for Civil Rights and Civil Liberties to:

(a) Review and assess information alleging abuses of civil rights, civil liberties, and racial, ethnic, or religious profiling, 6 U.S.C. 345(a)(1);

(b) Oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights or civil liberties of individuals affected by the programs and activities of the Department, 6 U.S.C. 345(a)(4);

(c) Investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General, 6 U.S.C. 345(a)(6); and

(d) Periodically investigate and review Department, component, or element actions, policies, procedures, guidelines, and related laws and their implementation to ensure that such department, agency, or element is adequately considering civil liberties in its actions, 42 U.S.C. 2000ee-1(a)(2).

107. In addition, other federal government departments also have active outreach programs to immigrant communities. DOJ/CRD works closely with immigrant communities to address civil rights concerns, such as racial profiling by law enforcement and discrimination in the areas of housing, employment and education, and prosecute racially- or ethnically-motivated hate crimes against immigrants. The Department of Justice's Community Relations Service (DOJ/CRS) provides conflict resolution services, including mediation, technical assistance, and training throughout the United States to assist communities in avoiding racial and ethnic conflict and preventing violent hate crimes on the basis of race, color, national origin, gender, gender identity, sexual orientation, religion or disability. DOJ/CRS works with a panoply of racial and ethnic groups in the United States, including new immigrants as well as Hispanic Americans, Asian Americans, South Asian Americans, Somali Americans, Ethiopian Americans, Arab Americans and others. Similarly, the EEOC reaches out to new immigrants in many ways, including by offering information about employment discrimination and how to file EEOC charges in languages such as Spanish, Arabic, Chinese, Haitian/Creole, Korean, Russian, and Vietnamese. The EEOC in particular has worked to ensure that the Arab- and Muslim-American communities are aware of their rights to a workplace free from discrimination and to religious accommodations, barring undue hardship, of sincerely held religious beliefs. The

Department of Justice offers pamphlets on national origin discrimination in different languages, available at [http://www.justice.gov/crt/legalinfo/nordwg\\_brochure.php](http://www.justice.gov/crt/legalinfo/nordwg_brochure.php).

108. The Department of Housing and Urban Development (HUD) also reaches out to immigrant communities to educate residents on their rights under the Fair Housing Act through publications that are translated into many languages. HUD has recently increased its efforts by reaching out to service providers and advocates that work directly with immigrant communities and educating those intermediaries on fair housing law.

#### **10. Equal Opportunity in the Military**

109. The Department of Defense (DoD), through its Military Equal Opportunity Program (DoD Directive 1350.2, Department of Defense Military Equal Opportunity (MEO) Program, August 18, 1995) works to ensure full equality of opportunity and freedom from harassment or discrimination based on race, color, religion, sex, or national origin. DoD Directive 1350.02 provides that it is DoD policy that “[s]ervice members shall be evaluated only on individual merit, fitness, and capability. Unlawful discrimination against persons or groups based on race, color, religion, sex, or national origin is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment. Unlawful discrimination shall not be condoned.” Furthermore, the entire chain of command must be used “to promote, support, and enforce the MEO program. The chain of command is the primary and preferred channel for identifying and correcting discriminatory practices. This includes the processing and resolving of complaints of unlawful discrimination and sexual harassment, and for ensuring that human relations and EO matters are taken seriously and acted upon as necessary.”

110. DoD Directive 1350.2 directs that the Secretaries of the Military Departments (Army, Navy and Air Force) are responsible for ensuring these policies “are understood and executed at all levels of military command.” Commanders are required to assess their organizational Equal Opportunity (EO) climate, and are “held accountable for the EO climates in their commands.” They are charged with identifying and eliminating any “practices that unlawfully discriminate against military personnel based on race, religion, color, sex, or national origin.”

111. The U. S. military prohibits discrimination within its ranks, and it proactively combats such actions in its conduct with the outside world. DoD Directive 5410.18 prohibits DoD from providing community relations support to “events sponsored by organizations restricting membership by race, creed, color, national origin, or gender....” The DoD Human Charter Goals, signed by then-Secretary of Defense Cohen in July 24, 1998, establish that DoD make a goal for itself, “To make military service in the Department of Defense a model of equal opportunity for all regardless of race, color, sex, religion, or national origin.”

112. On December 18, 2010, Congress passed a law to repeal 10 U.S.C. 654, the law prohibiting gay and lesbian service members from openly serving in the military, commonly referred to as “Don’t Ask Don’t Tell.” Don’t Ask, Don’t Tell Repeal Act of 2010. Under the Repeal Act, the repeal took effect 60 days following delivery to Congress of a certification by the President, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff stating that the statutory conditions for repeal had been met, including that implementation of repeal “is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces”. In July 2011, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff made the certification and delivered it to Congress. The repeal became effective on September 20, 2011.

## 11. Remedies

113. United States law provides a variety of avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights. Specific remedies were described in paragraph 98 of the Initial U.S. Report and paragraph 59 of the Second and Third Periodic Report. Developments in legal remedies since the submission of the Second and Third Periodic Report are addressed throughout this report under appropriate subject headings, for example reference to the Lilly Ledbetter Fair Pay Restoration Act under Article 2, above.

### Article 3 – Equal rights of men and women

114. 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 to the United States Constitution. These provisions prohibit both the federal government and the states from discriminating on the basis of sex. On March 11, 2009, President Obama issued Executive Order 13506 creating the White House Council on Women and Girls. The mission of this Council is to establish a coordinated federal response to issues that affect the lives of American women and girls and to ensure that federal programs and policies address and take into account the distinctive concerns of women and girls, including women of color and those with disabilities. In setting up the Council, President Obama stated that issues such as equal pay, family leave, and child care are not just women's issues, but issues that affect entire communities, our economy and our future as a nation.

115. In addition to setting up the Council, one of President Obama's first actions was to sign the Lilly Ledbetter Fair Pay Act of 2009, which helps ensure that claims for pay discrimination will not be barred because claimants were not aware of the initial discriminatory pay-setting decision. On June 10, 2010, President Obama issued a proclamation commemorating the 90<sup>th</sup> Anniversary of the Department of Labor Women's Bureau, established by Congress in 1920. He said, "As a Nation, we must recommit to the enduring vision of the Women's Bureau and work to support all wage-earning women." The Women's Bureau's vision is to empower all working women to achieve economic security. The Bureau is focusing on four policy areas: 1) promoting high-growth, high-paying "green" jobs, nontraditional jobs, and science, technology, engineering and mathematics (STEM) occupations for women; 2) narrowing the wage gap between men and women; 3) promoting work-life balance, especially workplace flexibility; and 4) improving services for homeless women veterans. The Director of the Women's Bureau is the principal adviser to the Secretary of Labor on issues affecting women in the labor force. Some federal agencies also have programs to encourage the advancement of women in their own workforces.

116. President Obama also convened a National Equal Pay Task Force that brought together the leadership of agencies with a role to play in wage discrimination affecting women – the EEOC, DOL, DOJ, and Office of Personnel Management. On July 20, 2010, the Task Force released recommendations for government actions to ensure full compliance with wage discrimination laws and to help provide solutions for families balancing work and caregiving responsibilities. These recommendations called for improved interagency coordination on wage discrimination enforcement efforts, increased outreach and education concerning wage discrimination, and evaluation of current data collection needs and capabilities. As an example of increased outreach and education concerning wage discrimination, President Obama issued a proclamation to commemorate National Equal Pay Day, the day that the average wage of a woman since the prior year catches up to the amount earned by the average man in the prior year (for 2011 -- April 28), and relevant

agencies conducted public forums and outreach events concerning sex-based pay discrimination. See Presidential Proclamation – National Equal Pay Day, <http://www.whitehouse.gov/the-press-office/2011/04/11/presidential-proclamation-national-equal-pay-day>. Joint efforts between EEOC and OPM also are underway to enforce equal pay laws within the federal government. See Joint Letter for Equal Pay in the Federal Government, [http://www.eeoc.gov/federal/memo\\_epa.cfm](http://www.eeoc.gov/federal/memo_epa.cfm)

117. DOJ/CRD continues its efforts to aggressively enforce civil rights laws to give meaning to the promise of equal opportunity.

(a) Since 2009, the United States has filed seven cases under the Fair Housing Act alleging that a landlord or a landlord’s agent has engaged in a pattern or practice of sexually harassing female tenants. DOJ/CRD has found that the similarities in these cases are striking; the victims are typically low-income women with few housing options who are subjected to what the DOJ has found are repeated sexual advances and, in some cases, sexual assault by landlords, property managers, and maintenance workers.

(b) The pattern or practice investigation of the New Orleans Police Department (NOPD) marked the first time ever that DOJ found reasonable cause to believe that a police department had engaged in a pattern or practice of gender-biased policing. Among other things, DOJ/CRD found that NOPD systematically misclassified large numbers of possible sexual assaults, resulting in a sweeping failure to properly investigate many potential cases of rape, attempted rape, and other sex crimes.

(c) DOJ/CRD has stepped up enforcement of the Freedom of Access to Clinic Entrances (FACE) Act, protecting the right to access and provide reproductive health services without interference. Since 2009, it has filed eight civil FACE complaints, which have already resulted in three consent decrees. Comparatively, in 2007, one civil FACE case was filed, and in the preceding eight years, DOJ did not file a single civil FACE case.

(d) DOJ/CRD has stepped up enforcement of prohibitions on employment discrimination. For example, last spring, it reached a consent decree with the Hertford County, North Carolina, Public Health Authority to resolve a claim that the Health Authority rescinded an offer of employment and refused to hire a woman for a Health Educator Specialist position after learning she was pregnant.

(e) DOJ/CRD has also looked for opportunities to weigh in on Title IX cases. In 2009, it filed an amicus brief in a case against the Florida High School Athletics Association, which had reduced the maximum number of competitions that a school could schedule while exempting 36,000 boys who played football and only 4,300 girls and 201 boys who participated in competitive cheerleading. After the court accepted CRD’s brief, the association voted unanimously to rescind its policy.

118. Sex-based classifications. Under Supreme Court holdings, justification for distinctions based on sex must be “exceedingly persuasive.” *United States v. Virginia*, 518 U.S. 515, 553 (1996). The burden of justification is demanding and it rests entirely on the state, which 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.* In addition, “the 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.* Applying this standard in *Nguyen v. INS*, 533 U.S. 53 (2001), the Supreme Court upheld a federal immigration statute that made sex-based distinctions in the process for establishing citizenship for children born out-of-wedlock where one parent was a U.S. citizen and the other was an alien. The statute required certain steps to be taken to document parenthood when the citizen parent was the father, but not when the citizen parent was the mother. The Court found that the statute sought to further an important

governmental interest in ensuring a biological relationship between the citizen parent and the child – a situation with regard to which mothers and fathers are differently situated, since a mother’s relationship is verifiable from birth. Recently, the U.S. Supreme Court affirmed by an equally divided court a Court of Appeals ruling that it is constitutional to impose a different physical presence requirement for unmarried U.S. citizen mothers and fathers with regard to the ability of their children born abroad to acquire U.S. citizenship, in view of the objective to reduce statelessness of children of unmarried U.S. citizen mothers. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011).

119. In 2009, the Supreme Court reaffirmed the viability of constitutionally-based claims of sex discrimination, holding that the existence of the specific statutory remedy in Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681 (barring sex discrimination in federally funded education programs and activities), does not preclude constitutional equal protection claims for such discrimination, *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009). In that case, parents who alleged that the school’s response was inadequate to their claims of sexual harassment of their kindergarten-age daughter by an older male student at school brought claims against the school under both Title IX and the Equal Protection Clause of the Constitution. Overturning lower court decisions that had limited the parents to proceeding under Title IX, the Supreme Court held that Title IX supplemented rather than replaced the claim for unconstitutional sex discrimination in schools.

120. One emerging area of employment discrimination enforcement involves allegations that implicit bias or a general policy of discrimination infected otherwise subjective employment decisions. These issues arose in the recent case of *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), in which a class of over 1 million female Wal-Mart employees in stores around the United States alleged that Wal-Mart discriminated against them on the basis of sex in determining pay and making promotions, in violation of Title VII of the Civil Rights Act of 1964. The Court held that plaintiffs had not produced significant proof that Wal-Mart operated under a general policy of discrimination against women that was central to the claim of each female employee in the class, and thus did not satisfy the “commonality” requirement for a class action under Rule 23(a)(2) of the Federal Rules of Civil Procedure. Rather, regional and individual store managers had discretion to make decisions on pay and promotion for employees in their regions or stores. The Court ruled that plaintiffs’ evidence of subjective decisionmaking was insufficient to meet their burden of demonstrating a common question of law or fact under Rule 23(a)(2). Rather, plaintiffs must identify a specific employment practice common to all class members to satisfy Rule 23(a)(2). In addition, the Court held that the plaintiffs’ claims for back pay could not be certified under Rule 23(b)(2), which does not permit certification of class actions for individualized monetary relief claims. Since this filing, several smaller groups of women have filed smaller pay and promotion class claims concerning the practices of a particular region within Wal-Mart.

121. Discrimination in employment based on pregnancy. The Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. 2000e (k) (2004), which amended Title VII of the Civil Rights Act, protects women from employment 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 with respect to leave, health insurance, and fringe benefits. As noted in paragraphs 65 to 68 of the Second and Third Periodic Report, the Supreme Court has held that the PDA protects not only female employees, but also the female spouses of male employees. Finally the PDA prohibits discrimination on the basis of a woman’s capacity to become pregnant, as well as pregnancy, childbirth or related conditions. The EEOC’s charge filing statistics report a sharp increase in charges filed under the PDA since the last report (6,119 in 2010, up from 4,730 in 2005). Examples of recent PDA litigation include:

(a) In March 2011, DOJ resolved a lawsuit alleging that the Hertford County, North Carolina, Public Health Authority engaged in pregnancy discrimination in violation of Title VII. The complaint alleges that the health authority discriminated against a female applicant on the basis of her sex when the authority's former health director rescinded an offer of employment to Ms. Sathoff once the health director learned that she was pregnant. Under the terms of the consent decree, the health authority will implement policies and procedures that prohibit sex discrimination, including pregnancy discrimination, and provide training to all health authority employees with hiring responsibilities and all supervisors on the law of equal employment opportunity, including discrimination based on sex. Additionally, the health authority will pay a \$20,000 monetary award. *U.S. v. Hertford County, NC* (E.D. N.C. 2011)

(b) In June 2009, DOJ filed a lawsuit against the Sheriff of Bryan County, Oklahoma, alleging that the Sheriff engaged in a pattern and practice of discrimination against women based on pregnancy by requiring the reassignment of female Confinement Officers employed at the Bryan County Jail to administrative duties upon their becoming pregnant. The Sheriff did not treat any other medical condition in a similar manner and did not take into account the female officer's ability to continue performing her regular duties while pregnant. The case was resolved in June 2009 through a consent decree that requires the Sheriff to implement a policy that prohibits employment discrimination on the basis of pregnancy, to treat pregnancy as it does any other medical condition, and to provide mandatory training regarding sex and pregnancy discrimination to Bryan County Sheriff's Office employees. *U.S. v. Bryan County, OK* (E.D. Okla. 2009).

(c) In May 2009, the court approved and entered a consent decree requiring the Sheriff of Hendry County, Florida, to implement a policy that prohibits employment discrimination on the basis of pregnancy, and to provide mandatory training regarding sex and pregnancy discrimination to certain employees. The consent decree requires the Sheriff to provide a former deputy with a monetary award of \$33,280 for lost wages and compensatory damages, and offer her an opportunity for reinstatement. Two other female employees, who also were subjected to the mandatory light duty policy, will receive \$1,500 each in compensatory damages under the terms of the consent decree, which expired in May 2011. *U.S. v. Sheriff of Hendry County, FL* (M.D. Fla. 2009).

(d) In December 2010, EEOC obtained a settlement of \$1.62 million for a class of 29 female security guards who were allegedly subjected to discrimination based on pregnancy. The lawsuit alleged that the employer had a nationwide practice of forcing pregnant employees to take leave or discharging them because of pregnancy. Several of the women alleged that they were prevented from attempting their annual physical agility and firearms tests, or forced to take such tests before their certifications had expired. In addition to the monetary relief, the settlement requires the employer, for a period of two years, to report to EEOC any employees who are required to take a leave of absence while pregnant, are terminated while pregnant, or who lodge internal complaints of pregnancy discrimination; report to EEOC about any physical agility test it intends to implement to screen or re-qualify employees and whether pregnant employees are permitted to take the test; and to provide annual training to managers and supervisors concerning the requirements of the Pregnancy Discrimination Act. The agreement further provides for the company CEO to issue a message concerning discrimination and transmit to all employees a well-defined, comprehensive anti-discrimination policy. *EEOC v. Akal Security, Inc.* (D. Kansas (2010).

(e) In April 2010, EEOC obtained a settlement of \$570,000 and additional relief from a company that closed a charter middle-school where the pregnant workers were employed, and then re-opened as a private middle and high school on the same grounds without retaining the pregnant workers. The court-approved consent decree required the



school to provide EEO training for relevant managers and supervisors, create an anti-discrimination policy and distribute it to employees, post a notice regarding the case in the workplace, and provide the EEOC with regular reports of its internal complaints for two years. EEOC v. Imagine Schools, Inc. (W.D. Mo.).

122. Caregiver discrimination in employment. Caregiver discrimination (also known as “family responsibility discrimination”) refers to employment discrimination against those who are responsible for caring for others, often young children or elderly family members. While “caregivers” are not expressly protected under the employment discrimination laws, caregiver discrimination may include pregnancy discrimination claims under Title VII and the PDA, in addition to Title VII allegations that employers stereotype caregivers, particularly female caregivers, as less capable and committed to their employment than men or women without such responsibilities. Men also may become victims of this form of sex discrimination if they are denied leave for caregiving purposes that is granted to female workers. In May 2007, EEOC issued “Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities” (<http://www.eeoc.gov/policy/docs/caregiving.html>), in which the EEOC explained that caregiver discrimination could violate Title VII of the Civil Rights Act. In April 2009, the EEOC issued “Best Practices to Avoid Discrimination Against Caregivers” (<http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>).

123. Pregnancy/maternity leave discrimination in housing and lending. The Fair Housing Act prohibits discrimination on the basis of familial status, which includes anyone who is pregnant or is in the process of securing legal custody of a child, in all housing transactions, including mortgage lending. In 2011, HUD's Office of Fair Housing and Equal Opportunity (FHEO) received an increasing number of complaints of lending discrimination involving maternity/paternity leave issues. The alleged discrimination often involves pregnant women, women who have recently given birth and who are on maternity leave, as well as men who are on paternity leave due to the birth or adoption of a child. These cases include outright rejection of lending applications, and lender modification of the terms and conditions of the loan once pregnancy, recent birth or adoption or maternal/paternity leave becomes known to the lending institutions. Alteration or imposition of new terms and conditions on a mortgage loan solely because of the borrower's status with regard to pregnancy or maternity/paternity leave is contrary to the Fair Housing Act:

(a) In June 2011, HUD conciliated a complaint against Cornerstone Mortgage Company filed by Dr. Elizabeth Budde, who alleged that she was initially denied a mortgage loan even though she was on paid maternity leave and planned to return to work. The Department initiated its own complaint against the lender to resolve systemic issues. Under the terms of the conciliation, Cornerstone agreed to pay Dr. Budde \$15,000 in compensation, create a \$750,000 victims' fund to compensate other Cornerstone borrowers who experienced similar discrimination, and notify all borrowers who applied during a two-year time frame of their right to seek compensation if they experienced treatment that was discriminatory because a borrower or co-borrower was pregnant or on maternity leave; and adopt a new policy clarifying how it will treat applicants for loans who are on parental leave, including maternity leave.

(b) On July 5, 2011, the United States filed a Fair Housing Act *complaint* against the nation's largest mortgage insurance company and two of its underwriters in *United States v. Mortgage Guaranty Insurance Corp., et al.* (W.D. Pa.). The complaint alleges that the defendants discriminated on the basis of sex and familial status by requiring women on paid maternity leave to return to work before the company would insure their mortgages. The case was referred to DOJ/CRD after HUD received a complaint from a homeowner in Wexford, Pennsylvania, who was required to return to work from paid maternity leave to obtain mortgage insurance. HUD conducted an investigation and issued a charge of

discrimination. In addition to seeking relief for the individual homeowner, the lawsuit also includes a claim that the defendants' actions constitute a denial of rights granted by the Fair Housing Act to a group of persons that raises an issue of general public importance.

124. To address the number of cases dealing with this form of discrimination, FHEO is preparing guidance to enable its staff to identify and investigate fair lending complaints involving allegations of discrimination against individuals applying for loans on the basis of sex, familial status, or disability involving maternity/paternity leave issues. This upcoming guidance will help equip field investigators with the tools necessary to combat prohibited and discriminatory behaviors/practices of mortgage and lending companies.

125. Prohibition of sex discrimination in education. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., continues to prohibit sex discrimination in education programs or activities that receive federal financial assistance. Federal regulations and Department of Education (ED) policy provide more detailed guidance on conduct that violates Title IX, including sexual harassment, the failure to provide equal opportunity in athletics, discrimination based on pregnancy, and discrimination in admissions and course offerings. Each school or educational institution is required to designate an employee to coordinate its Title IX responsibilities, including investigating complaints.

126. Title IX is enforced primarily by ED/OCR, which investigates complaints, conducts compliance reviews, issues policy guidance, and provides technical assistance to schools. In addition, every federal agency that provides financial assistance to education programs is required to enforce Title IX. In August 2000, DOJ and twenty federal agencies issued a final common rule for the enforcement of Title IX. The Supreme Court has found an implied private right of action for students and school employees to bring private lawsuits against recipients of federal financial assistance for violations of Title IX. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). In 2005, the Supreme Court held that Title IX's private right of action encompasses claims of retaliation against an individual for complaining about sex discrimination because such retaliation is an example of the intentional sex-based discrimination prohibited by Title IX. *Jackson v. Birmingham*, 544 U.S. 167 (2005).

127. Prohibition of discrimination in education on the basis of pregnancy. As discussed in paragraphs 72-74 of the Second and Third Periodic Report, Title IX's implementing regulations, 34 C.F.R. 106.40 (a) and (b), specifically prohibit 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 that treats students differently on the basis of sex and from discriminating against any student on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the recipient's education program or activity. The regulations further require recipients to treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom in the same manner and under the same policies as any temporary disability with respect to benefits and policies. In addition, while normal pregnancies do not generally satisfy the definition of disability under Section 504 of the Rehabilitation Act of 1973 or under the Americans with Disabilities Act of 1990 (ADA), both of which prohibit disability discrimination, a particular woman's complicated or unusual pregnancy may be considered a disability under Section 504 or the ADA. The requirements of the law and regulations, as described in the Second and Third Periodic Report, have not changed.

128. Sexual harassment in employment. Sexual harassment is a form of sex discrimination prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (employment) The law described in paragraphs 75 and 76 of the Second and Third

Periodic Report concerning the protections offered by these statutes has not changed. Examples of recent enforcement actions involving sexual harassment include:

(a) In August 2011, the EEOC obtained a settlement in a sexual harassment and retaliation case against a private contractor that provided firefighting services to governments. The case concerned a female worker who complained about sexual remarks, drawings, and pornography at work and was reassigned, disciplined, and told to “get along.” A man who supported her charge also was reassigned. The settlement provides for \$ 215,000, some of which will be used to establish an outreach fund to actively recruit women as firefighters. It also requires the company to create interactive training for all personnel concerning anti-discrimination laws, provide an internal policy for handling harassment complaints, appoint a compliance officer to administer the policy, and submit to three years of monitoring by the EEOC. *EEOC v. ITT Corp.*, (D. Hawaii 2011).

(b) In March 2011, the EEOC obtained jury verdicts of \$1.26 million and \$1.5 million in two separate cases of sexual harassment. The large size of these verdicts was due to both the nature of the conduct and the employer’s inappropriate response to complaints. In one, a manager frequently propositioned his subordinates, teenage employees, and grabbed their breasts and buttocks, made frequent lewd gestures, and on one occasion, stuck his tongue in the mouth of a teenage employee. This manager, who was engaged in a consensual sexual relationship with the company’s owner, was never disciplined for his conduct despite repeated complaints. *EEOC v. KarenKim, Inc.* (W.D.N.Y. 2011). The second case, involving the higher award, involved managers who exposed their genitalia to subordinate employees, forced female workers to touch their private parts, and required female sales staff to join a “smooching club” in order to receive sales leads or accounts necessary to earn commissions. During the trial, management testified that they had no policies concerning workplace harassment and did not think they were necessary. *EEOC v. Mid-American Specialties* (W.D. Tenn. 2011).

(c) In November 2009, EEOC settled a claim of same-sex harassment involving a class of men targeted for sexual harassment by other men; this harassment included sexually charged remarks, touching of genitalia, and forcing victims into episodes of simulated rape. Managers witnessed employees dragging their victims kicking and screaming into the refrigerator, but they took no action to stop this conduct. One worker called the police in response to the harassment. The settlement provides the workers with \$345,000 and requires the company to provide training for its employees and manager about sexual harassment, establish an ombudsman for hearing sexual harassment complaints of employees, expunge from personnel files any references to the workers’ having filed EEOC charges, provide a neutral employment reference for class members who seek outside employment, review and revise its written policies on sexual harassment, and regularly report information regarding its compliance with the settlement to EEOC for the duration of the 2 year consent decree. *EEOC v. Cheesecake Factory, Inc.* (D. Az.).

129. Sexual harassment in housing. The Fair Housing Act prohibits discrimination on the basis of sex, and courts have consistently recognized sexual harassment as a form of discrimination that violates the Fair Housing Act. When HUD receives a complaint alleging sexual harassment, it investigates it and, if discrimination is found, charges the perpetrator. In one recent case, HUD charged an on-site manager with sexually harassing female tenants in violation of the Fair Housing Act. The case was heard in federal court with representation for the complainant by DOJ. In September 2011, DOJ reached a settlement, requiring the defendants to pay \$8,000 to each of the 10 victims and \$15,000 to the United States as a civil penalty. It further prohibits the defendants from engaging in discrimination and prevents the on-site manager from returning to work in the management, rental, or maintenance of rental housing. In 2008, HUD issued guidance on how the Fair Housing Act

applies in cases of sexual harassment. The Department is in the process of preparing a regulation on harassment under the Fair Housing Act.

130. Remedies for sex discrimination. The types of injunctive and compensatory relief available in cases of sex discrimination described in paragraph 77 of the Second and Third Periodic Report remain available without change. Individuals who receive less pay for substantially equal work in the same facility based on their sex also may pursue claims under the Equal Pay Act of 1963. Under the Equal Pay Act, workers may recover back pay, and in cases of “willful violations,” also may be awarded liquidated damages, or double the amount of the back pay award. Where both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are violated in a pay discrimination case, the worker cannot recover both compensatory and liquidated damages, but he or she may receive whichever damage award is greater. EEOC also may seek an injunction to prohibit employers from transporting or selling goods produced in violation of the Equal Pay Act.

131. Employment -- family leave. The Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 et seq., guarantees that eligible employees who work for a covered employer 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, child, spouse or parent. Serious health condition is defined 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). The FMLA allows states to provide additional protections, and several states do so. 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.

132. In 2008, the FMLA was amended by the National Defense Authorization Act (NDAA), P. L. 110-18,<sup>1</sup> to permit an eligible employee who is the “spouse, son, daughter, parent, or next of kin” to take up to 26 workweeks of leave to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty.” The amendment also permits an eligible employee to take FMLA leave for “any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.” On November 17, 2008, the Department of Labor published a final rule implementing these amendments and also incorporating developments in the law concerning the FMLA, input from stakeholders and public comments, and the Department’s 15 years of experience in administering and enforcing the Act. *See* 73 Fed. Reg. 67933 (November 17, 2008). This rule became effective on January 16, 2009. The rule provides for Military Caregiver Leave and Qualifying Exigency Leave (available for short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities agreed to by the employer and employee). It also updates and streamlines other aspects of administration of the Act. On October 28, 2009, these FMLA military family leave provisions were further amended by the National Defense Authorization Act for Fiscal Year 2010 (2010 NDAA), Pub. L. 111- to broaden coverage for qualifying exigency leave and expanded military caregiver leave to cover employees with family members who are veterans with a qualifying serious illness or injury. On December 21, 2009, the FMLA was amended to expand FMLA coverage in the airline industry by establishing a special hours of service requirement for flight crew employees, Pub. L. 111-119.

133. Employment – maternity leave. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA) (see above), 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). However, the Court recently found no discrimination against women who received less seniority credit for time spent on maternity leave before the PDA went into effect, which resulted in their receiving lower pensions than workers who were credited for leave of similar duration taken for other purposes. *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009). The Court’s rationale focused on the interplay between the PDA and Title VII of the Civil Rights Act’s allowance for bona fide seniority systems that were lawful when the seniority was calculated. The Court also relied on the lack of Congressional intent to apply the PDA retroactively to pregnancy-based distinctions. Since this ruling only applies to leave taken prior to 1978, its impact is limited.

134. Violence against women. In recognition of the severity of the crimes associated with domestic violence, sexual assault, and stalking, Congress passed the Violence Against Women Act of 1994 (VAWA 1994) as part of the Violent Crime Control and Law Enforcement Act of 1994. VAWA is a comprehensive legislative package designed to end violence against women; it was reauthorized in both 2000 and 2005. VAWA was designed to improve criminal justice responses to domestic violence, dating violence, sexual assault, and stalking and to increase the availability of services for victims of these crimes. VAWA promotes a coordinated community response (CCR) to domestic violence, sexual assault, and stalking, encouraging jurisdictions to bring together victim advocates, police officers, prosecutors, judges, probation and corrections officials, health care professionals, leaders within faith based organizations, and survivors of violence against women and others from diverse backgrounds to share information and to use their distinct roles to improve community responses to violence against women. The federal law takes a comprehensive approach to violence against women by combining tough new penalties to prosecute offenders while implementing programs to aid the victims of such violence.

135. Implementation of the Violence against Women Act (VAWA) continues to be an important federal priority, led by the Office on Violence Against Women in the U.S. Department of Justice. DOJ/OVW was created specifically to implement VAWA and subsequent legislation. OVW administers financial support and technical assistance to communities around the country to facilitate the creation of programs, policies, and practices aimed at ending domestic violence, dating violence, sexual assault, and stalking. Its mission is to provide national leadership to improve the nation’s response to these crimes through the implementation of the VAWA and related legislation. OVW pursues this mission by supporting community efforts, enhancing education and training, disseminating best practices, launching special initiatives, and leading the nation’s efforts to end violence against women.

136. In 2002, legislation was enacted that made OVW a permanent part of DOJ, with a Presidentially-appointed, Senate-confirmed Director. Currently, OVW administers two formula grant programs and 19 discretionary grant programs, all of which were established under VAWA and subsequent legislation. Since its inception in 1995, OVW has awarded over \$4 billion in grants and cooperative agreements and has launched a multifaceted approach to implementing VAWA. In addition to overseeing these grant programs, OVW often undertakes a number of special initiatives in response to areas of special need. These special initiatives allow OVW to explore different innovations in the violence against women field and share knowledge that can be replicated nationwide.

137. As part of the 2009 American Recovery and Reinvestment Act, \$225 million was provided to the Office of Violence Against Women in the Department of Justice for five of its programs: \$140 million for the Services Training Officers Prosecutors Formula Grant Program (STOP Program) to enhance services and advocacy to victims and improve the criminal justice system response to violence against women; \$8.75 million for state sexual assault and domestic violence coalitions; \$43 million for the Transitional Housing Assistance Program; \$20.8 million for the Tribal Governments Grant Program to enhance the ability of tribes to respond to violent crimes against American Indian and Alaska Native women; and \$2.8 million for the Tribal Sexual Assault and Domestic Violence Coalitions to end violence against American Indian and Alaska Native women. Initiatives taken under Title IX of VAWA 2005 to address violence against women in Native American and Alaska Native communities are described in detail under article 2 above.

138. DHS/CRCL also investigates allegations of violations of the confidentiality provisions of VAWA 2005. These provisions prescribe strict limitations on the disclosure of information relating to aliens who are applying for or who have been granted forms of immigration relief for victims of certain crimes, such as domestic abuse or trafficking in persons. The provisions also preclude DHS from taking enforcement action against such victims based solely on information supplied by the perpetrator of the crime or abuse. In 2009, DHS/CRCL completed its first investigation regarding alleged VAWA confidentiality violations by U.S. Immigration and Customs Enforcement (ICE) employees and has worked on additional complaints since then. CRCL's recommendations to ICE included: (1) additional training for all new ICE employees, officers, and field staff on relevant VAWA issues; and (2) enhanced communication systems and technologies among DHS immigration Components to ensure that ICE agents know when aliens have VAWA applications pending with USCIS in order to ensure that such aliens are treated in accordance with VAWA protections. USCIS now uses special indicators in existing information systems to alert other DHS users if an alien has a pending VAWA application. USCIS also provided training to other DHS components to help them understand these confidentiality indicators.

139. In 2010, CRCL made new, additional recommendations to USCIS to develop a nationwide standard operating procedure addressing the acceptance and processing of change of address letters in order to better protect VAWA applicants' confidentiality. CRCL recommended that the procedure include enhanced mechanisms for USCIS to verify acceptance of a change of address request for a VAWA applicant. In addition, CRCL recommended that USCIS ensure that all field offices interpret and implement the new procedures in a uniform manner. In response to these concerns, CRCL and USCIS collaborated to improve the processes by which protected VAWA and T and U visa filers may update an address or check the status of a benefit case, including ensuring that only those authorized to inquire about or change an address for these types of cases are allowed to do so (see paragraphs 165 and 168 below for a description of these visa programs). This enhancement requires additional steps for USCIS to verify the identity of the inquiring party, updated training for call center employees to properly handle requests from protected filers, and additional warning language on web content and other publications to help prevent the unauthorized disclosure of information.

140. HUD has implemented VAWA through a rule issued on October 27, 2010. The new rule clarifies and aligns HUD's statutory responsibilities with VAWA, providing more detailed guidance to housing authorities and Section 8 property owners on how to implement VAWA, and making a commitment to provide further guidance in the future. The new rule requires that housing authorities or management agents exhaust protective measures before eviction. Evictions can only take place after the housing or subsidy providers have taken actions that will reduce or eliminate the threat to the victim, including transferring the abuse victim to a different home, barring the abuser from the property,

contacting law enforcement to increase police presence or develop other plans to keep the property safe, and seeking other legal remedies to prevent the abuser from acting on a threat. The new rule also broadens the definitions of "actual and imminent threat," to help housing or subsidy providers understand that to use "imminent threat" of harm to other residents as a reason for eviction of the victim, the evidence must be real and objective - not hypothetical, presumed or speculative. See <http://edocket.access.gpo.gov/2010/pdf/2010-26914.pdf>.

141. HUD has issued guidance explaining that victims of domestic violence not only have rights under VAWA but also may be protected under the Fair Housing Act's prohibitions against sex discrimination where housing issues are implicated. Women are overwhelmingly the victims of domestic violence; according to the DOJ Bureau of Justice Statistics (DOJBJS), 85 % of victims of domestic violence are women. In 2009, women were about five times as likely as men to experience domestic violence. Based in part on such statistics, which show that discrimination against victims of domestic violence is almost always discrimination against women, domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may have a cause of action for sex discrimination under the Fair Housing Act. See <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf>.

142. In addition, certain racial and ethnic groups experience disproportionately high rates of domestic violence. For example, Black/African American and American Indian/Alaska Native women experience higher rates of domestic violence than White women. Black or African American women experience intimate partner violence at a rate 35 % higher than that of White females, and about 2.5 times the rate of women of other races. American Indians and Alaska Natives are victims of violent crime, including rape and sexual assault, at more than double the rate of other racial groups.<sup>2</sup> Women of certain national origins also experience domestic violence at disproportionate rates. Women who experience housing discrimination based on domestic violence may therefore also have causes of action for race or national origin discrimination under the Fair Housing Act. The availability of a Fair Housing Act cause of action provides victims of unlawful discrimination with the possibility of bringing claims for actual damages and injunctive relief either in federal or state courts or through an administrative complaint investigated by HUD or a state or local fair housing enforcement agency.

143. Women and the economy. In 2010, of the 123 million women aged 16 years and over, 72 million (59 %) were labor force participants; of those, 66 million women were employed, with 73 % working full time and 27 % part time. The largest percentage of employed women (41 %) worked in management, professional, and related occupations; 32 % in sales and office occupations; 21 % in service occupations; 5 % in production, transportation and material moving occupations; and 1 % in natural resources, construction and maintenance occupations. In 2008, the unemployment rates for men and women were 6.1 % and 5.4 %, respectively. The rates rose in 2009 to 10.3 % for men and 8.1 % for women, and in 2010 to 10.5 % for men and 8.6 % for women. For the majority of occupational groups, employment losses among men were larger than those of women. Much of the overall decline in men's employment can be attributed to their concentration in the manufacturing and construction industries, which sustained the majority of job losses during the recession. Men also accounted for 60 % of job losses in management, business, and financial occupations. During the recovery period, women have experienced high job losses due to their disproportionate representation in industries that continue to experience

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<sup>2</sup> Steven W. Perry, U.S. Dep't of Justice, NCJ 203097, *A Bureau of Justice Statistics Statistical Profile, 1992-2002: American Indians and Crime* (2004).

job losses, such as state and local government. In 2009, women held 49.8 % of nonfarm payroll jobs, compared with 48.6 % in 2007. These figures reflect the growing importance of women as wage earners. Nonetheless, women on average earn only 77-80 % of what men earn.

#### **Article 4 – States of emergency**

144. 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. As reported in the Initial Report and in paragraphs 89 and 90 of the Second and Third Periodic Report, certain statutory grants of emergency powers to the President do exist in the United States, *see, e.g.* National Emergencies Act (NEA), 50 U.S.C. 1601 et seq. and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq. Since the submission of the Second and Third Periodic Report, the President has invoked the NEA and IEEPA on several occasions, generally to block the property of persons who were contributing to conflict in nations or persons who were undermining democratic processes and institutions in nations seeking to establish democratic systems. These authorities exist for reasons unrelated to Article 4 and do not restrict civil and political rights falling within the scope of the Covenant such that derogation under Article 4 would be necessary or appropriate.

145. Judicial review. There have been no significant adverse federal judicial rulings concerning the exercise of emergency powers by federal authorities since the submission of the Second and Third Periodic Report.

#### **Article 5 – Non-derogable nature of fundamental rights**

146. There is no change from the information reported in paragraphs 128-130 of the Initial Report, including the U.S. declaration concerning Article 5, paragraph 2, set forth in paragraph 129 of the Initial Report.

#### **Article 6 – Right to life**

147. Right to life, freedom from arbitrary deprivation. The recognition by the U.S. Constitution of every human’s inherent right to life and the doctrine that this right shall be protected by law were described in paragraphs 131-148 of the Initial Report.

148. Assisted suicide. Active debate continues in the United States over the question of whether terminally ill persons should have the legal right to obtain a doctor’s help in ending their lives. In November 1994, Oregon became the first state to legalize assisted suicide. Its law allows doctors to prescribe a lethal dose of drugs to terminally ill patients who meet certain criteria. In 2008, the State of Washington enacted a similar provision that allows patients with six or fewer months to live to self-administer lethal doses of medication. Legislation legalizing the practice has also been introduced in other states, but has not yet been enacted. In June 1997, the Supreme Court upheld two state laws that barred assisted suicide, but also found that states could legalize assisted suicide if they so chose. *See, e.g., Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

149. As noted in paragraph 101 of the Second and Third Periodic Report, in 2001 Attorney General Ashcroft determined that assisting suicide was not a legitimate medical purpose and therefore that the Controlled Substances Act of 1970 (CSA), 21 U.S.C. 801, barred physicians from prescribing federally-controlled substances to assist in a suicide. The Supreme Court, however, struck down that directive in 2006, holding that the CSA does not give the Attorney General the authority to prohibit Oregon doctors from



prescribing such substances to assist terminally ill patients in ending their own lives, and therefore that the directive exceeded the Attorney General's authority under the Act. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

150. Capital punishment. As of 2011, capital punishment is available as a penalty that may be imposed by the federal government, including in the military justice system, and 34 states for crimes such as murder or felony murder 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. This issue is also discussed in Part III, below.

151. The U.S. Supreme Court has recently further narrowed the categories of defendants against whom the death penalty may be applied consistent with the U.S. Constitution. In 2008, the Supreme Court held in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), that the Eighth Amendment bars states from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the child's death. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court struck down the execution of persons who were under the age of eighteen when their crimes were committed as violating the Eighth and Fourteenth Amendments of the Constitution. As a consequence of the Supreme Court's holding in *Roper*, the United States now implements Article 6(5) in full, though the United States has a reservation with respect to juvenile offenders that was submitted at the time of ratification. In addition, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the execution of individuals with intellectual disabilities (referred to by the Court as individuals with mental retardation) constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

152. Heightened procedural protections apply in the context of capital punishment. Under Supreme Court decisions, a defendant eligible for the death penalty 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). As noted in paragraph 105 of the Second and Third Periodic Report, criminal defendants in the United States, including those in potential capital cases, enjoy 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; 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, the right to counsel whether or not the defendant can afford to pay; the right to trial by jury; and the right to challenge the makeup of the jury, among others.

153. The number of states that have the death penalty and the size of the population on death row have all declined in the last decade. As of December 2011, 34 states had laws permitting imposition of the death penalty – down from 38 states in 2000. In New York, the death penalty was declared unconstitutional under the New York State Constitution in 2004; New Jersey officially removed the death penalty from its books in 2007; and in March 2009, the Governor of New Mexico signed a law repealing the death penalty in New Mexico for offenses committed after July 2009. On March 9, 2011, Illinois became the 16<sup>th</sup> state to abolish the death penalty. On November 22, 2011, the Governor of Oregon declared a moratorium on its use in that state. In a number of other states, although capital punishment remains on the books, it is rarely, if ever, imposed. Nine states that retain the death penalty, for example, have not conducted an execution in the last decade.

154. In 2010, 46 inmates were executed in the United States, and 114 new death sentences were imposed. In 2009, 52 inmates were executed in the United States and 112 new sentences were imposed, including four federal death sentences. Since 2005, when the Second and Third Periodic Report was submitted, there have been no federal executions. The 2010 figures represent a more than 45 % reduction from the 85 executions that

occurred in 2000. The number of new inmates on death row also declined to 114 in 2010, from 234 in 2000, and the size of the death row population declined to 3,261 in 2010, from 3,652 in 2000.

155. The death penalty continues to be an issue of extensive debate and controversy in the United States. Concerns include the overrepresentation of minority persons, particularly Blacks/African Americans, in the death row population (approximately 41.5 % of the 2009 death row population was Black/African American, a much higher percentage than the general representation in the population), and the use of the method of lethal injection. Attorney General Eric Holder authorized a study of racial disparities in the federal death penalty during his tenure as Deputy Attorney General during the Clinton Administration. That study found wide racial and geographic disparities in the federal government's requests for death sentences. The study was done in connection with a new system requiring all U.S. Attorneys to obtain the Attorney General's approval before requesting death sentences. In July 2011, DOJ implemented a new capital case review protocol based on comments received from the judiciary, prosecutors, and the defense bar regarding ways to improve DOJ's decision-making process for death penalty cases.

156. 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). Lower federal courts and state courts have also consistently rejected such claims.

157. Capital Punishment and Consular Notification. Paragraphs 110 to 112 of the Second and Third Periodic Report noted that a number of foreign nationals who were tried and sentenced to death in state court have sought to have their convictions or sentences overturned based on the arresting authorities' failure to provide timely consular notification as required under the Vienna Convention on Consular Relations (VCCR). Germany, Paraguay and Mexico each brought consular notification cases against the United States in the International Court of Justice (ICJ). In the cases involving Germany and Mexico, the ICJ ordered the United States to provide review and reconsideration of the convictions and sentences of the German and Mexican nationals covered by the respective judgments.<sup>3</sup> *See LaGrand* (Germany v. U.S.) (2001); *Avena and Other Mexican Nationals* (Mexico v. U.S.) (2004). The United States undertook to discharge its international obligations under the judgment in *Avena* in 2005 when the President issued a Memorandum directing state courts to give effect to the decision in accordance with general principles of comity in the cases of 51 Mexican nationals identified in the ICJ judgment.<sup>4</sup>

158. When the case involving Ernesto Medellín, one of the individuals named in *Avena*, was heard by the Texas Court of Criminal Appeals and then by the U.S. Supreme Court, the U.S. Government filed briefs with those courts, arguing that the President's Memorandum was binding on state courts. However, the U.S. Supreme Court held that the President alone was not empowered to enforce the judgment in U.S. courts by issuing his Memorandum. *Medellin v. Texas*, 552 U.S. 491 (2008). The United States continues actively to explore the options for giving domestic legal effect to the *Avena* judgment, including pursuing

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<sup>3</sup> Paraguay withdrew its case, and the ICJ did not rule on its merits.

<sup>4</sup> Osbaldo Torres, one of the 51 Mexican nationals addressed in *Avena*, had already had his death sentence commuted to a term of imprisonment by the Government of Oklahoma on 13 May 2004. Thereafter, the Oklahoma Court of Criminal Appeals found that Torres was prejudiced by the failure to inform him of his rights under the Vienna Convention, but only in the context of his capital sentence. In light of the Governor's grant of clemency and limitation of Torres' sentence to life without the possibility of parole, the court found no further relief required. *Torres v. State*, 2005 OK CR 17.

legislation to implement that judgment. The Administration worked closely with Senator Patrick Leahy to develop the Consular Notification Compliance Act of 2011, S. 1191, introduced in the Senate on June 14, 2011, and fully supports its prompt enactment by Congress. This legislation would give the *Avena* defendants on death row, along with similarly situated foreign nationals, the right to judicial review and reconsideration of their convictions and sentences to determine if they were actually prejudiced by the failure to follow consular notification and access procedures in the VCCR and comparable bilateral agreements. On the basis of the introduction of this legislation, the United States filed an amicus curiae brief with the U.S. Supreme Court in support of the application of Humberto Leal García, another *Avena* defendant, for a stay of execution. The United States also sent letters to relevant Texas authorities, including the Governor, urging them to take all available steps under Texas law to delay Mr. Leal's execution to allow a reasonable opportunity for enactment of the legislation. The U.S. Supreme Court denied the application, finding that pending legislation was not sufficient to justify the stay, and the state of Texas also declined to stay the execution, and Leal was executed by Texas authorities on July 7, 2011. The United States remains resolved to work to secure timely enactment of the Consular Notification Compliance Act.

159. Although the United States withdrew from the optional protocol establishing ICJ jurisdiction over VCCR disputes in 2005, the United States remains a party to the VCCR and is fully committed to meeting its obligations to provide consular notification and access in cases of detained foreign nationals. As part of this effort, the Department of State's Bureau of Consular Affairs has pursued an aggressive program to advance awareness of consular notification and access. State Department officials have produced a widely-used Consular Notification and Access Manual, significantly updated and expanded in September 2010, which provides comprehensive guidance to law enforcement officials, practitioners, and academics (*see* [www.travel.state.gov/consularnotification](http://www.travel.state.gov/consularnotification)); conducted hundreds of training seminars on consular notification and access throughout the United States and its territories; and have produced and distributed training videos and other training materials.

160. Victims of crime. The DOJ Office for Victims of Crime (DOJ/OVC) administers programs authorized by the Victims of Crime Act of 1984. OVC administers two major formula grant programs that have greatly improved the accessibility and quality of services for federal and state crime victims nationwide: the Victim Assistance and Victim Compensation programs. OVC also administers the Crime Victims Fund, authorized by the Act, composed of criminal fines and penalties, special assessment, and bond forfeitures collected from convicted federal offenders, as well as gifts and donations from the general public. The fund supports 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. Among other things, the American Recovery and Reinvestment Act of 2009 included a direct appropriation of \$100 million in grant funding to be administered by OVC.

161. OVC continues to oversee implementation of the 2004 Justice for All Act, which sets forth the 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 the 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.

162. Enforcement of these rights may be pursued in federal court by the crime victim, the crime victim's lawful representative, or the government prosecutor. Failure to afford a right under the act, however, does not provide a defendant grounds for a new trial, 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. The act also required the Justice Department to create an ombudsman for victims' rights and to provide for training and possible disciplinary sanctions for employees who fail to afford victims their rights.

163. Victim assistance and compensation. Each year, all 50 states, the District of Columbia and various U.S. territories are awarded OVC grants 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 various agencies and hospitals.

164. 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. Although each state program is administered independently, most states have similar eligibility requirements and offer comparable benefits. Of the \$100 million made available in the American Recovery and Reinvestment Act of 2009, \$47.5 million was distributed among eligible state agencies for victim compensation programs.

165. As noted in paragraph 119 of the Second and Third Periodic Report, under the Violence Against Women Act of 2000, 114 Stat. 1464, the Department of Homeland Security (DHS) may grant immigration 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. 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 and who assists government officials in the investigation or prosecution of the crime. Such serious crimes include rape, torture, trafficking, prostitution, sexual exploitation, female genital mutilation, being held hostage, kidnapping, abduction, and others. DHS began issuing such visas in August 2008, based on regulations covering the U visa program published in September 2007, 8 CFR 212.17, 214.14, 274a.12(a)(19)-(20). In fiscal year 2010, the following numbers of visas were issued under this program:

Fiscal Year	VICTIMS			FAMILY OF VICTIMS			TOTALS		
	Applied	Approved*	Denied**	Applied	Approved*	Denied*	Applied	Approved*	Denied**
2010	10,742	10,073	4,347	6,418	9,315	2,576	17,160	19,388	6,923

\* Some approvals and denials are from prior fiscal year(s) filings.

\*\* Some applicants have been denied twice (i.e., filed once, denied, and then filed again).

[http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static\\_files/I-914T\\_I-918U-visastatistics-2011-june2.pdf](http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static_files/I-914T_I-918U-visastatistics-2011-june2.pdf)

166. In July 2010, DHS announced that it had approved 10,000 petitions for U visas in fiscal year 2010, an important milestone in its efforts to provide relief to victims of crimes. This marked the first time that DHS, through extensive outreach and collaboration, has reached the statutory maximum of 10,000 U visas per fiscal year since it began issuing U-

visas in 2008. In September 2011, DHS announced that it had again approved 10,000 petitions for U visa status in Fiscal Year 2011.

167. Victims of international terrorism. The Victims of Crime Act (VOCA), 42 U.S.C. 10603c, authorizes the Director of OVC to establish an International Terrorism Victim Expense Reimbursement Program to reimburse eligible “direct” victims of acts of international terrorism that occur outside the United States for expenses associated with that victimization. OVC published regulations covering the program in September 2006, 71 Fed. Reg. 52446-52455, and is actively implementing the program, including outreach efforts to victims of international terrorism.

168. Victims of trafficking. As noted in paragraph 123 of the Second and Third Periodic Report, victims who are considered to have been subjected to a severe form of trafficking in persons, and who meet several other criteria, may be eligible for immigration relief, including “Continued Presence,” a form of temporary immigration relief available during the pendency of an investigation or prosecution, and the “T visa.” The T visa is a self-petitioning visa provided under the Immigration and Nationality Act, as amended by the Trafficking Victims Protection Act (TVPA). If granted, a T visa provides the alien with temporary permission to reside in the United States for up to four years, with some exceptions, and the victim may be eligible to apply for lawful permanent resident status (a “green card”) after three years. The person also receives an authorization permit to work in the United States. Certain immediate family members of the T visa holder may qualify for derivative immigration relief as well. Upon identification as victims of trafficking, all such victims may be eligible for victim services provided by non-governmental victim service programs, as well as by Victim/Witness Coordinators and Specialists at the local and state levels. To be eligible to apply for federal benefits to the same degree as a refugee, alien victims require “certification” by the HHS (which requires adult victims to have Continued Presence, a bona fide T visa application, or an approved T visa). Minor alien victims can be “certified” by HHS immediately upon identification, regardless of the status of immigration relief. In addition to the T visa, the U visa, described above, is a form of immigration relief available to victims of human trafficking.

169. On July 22, 2010, DHS launched the “Blue Campaign,” a first-of-its-kind initiative to coordinate and enhance the Department’s efforts to combat human trafficking. The Blue Campaign leverages the varied authorities of DHS component agencies to deter human trafficking by increasing awareness, protecting victims, and contributing to a robust criminal justice response. The campaign is led by an innovative cross-component steering committee, chaired by the Senior Counselor to the Secretary and comprised of representatives from 17 operational and support components from across DHS. To help citizens learn to identify and properly report indicators of human trafficking, the Department launched public outreach tools, including a new, comprehensive one-stop website for the Department’s efforts to combat human trafficking: [www.dhs.gov/humantrafficking](http://www.dhs.gov/humantrafficking). The Blue Campaign also features new training initiatives for law enforcement and DHS personnel, enhanced victim assistance efforts, and the creation of new partnerships and interagency collaboration. In 2011, the Blue Campaign began broadcasting public service awareness announcements via television and print displays.

170. The DOJ Office for Victims of Crime (DOJ/OVC) also administers grant programs to address the needs of the victims of human trafficking. These programs are authorized under the TVPA of 2000 as well as the subsequent amendments to the TVPA in 2003, 2005, and 2008. Programs funded by DOJ/OVC have traditionally focused on providing services to alien victims even during the pre-certification period in order to address emergency and immediate needs of these victims before they are eligible for other benefits and services. In 2009, OVC expanded the trafficking victim service program to also provide

specialized services to U.S. citizens and legal permanent residents, under age 18, who are victims of sex or labor trafficking, as defined by the TVPA.

### **Article 7 – Freedom from torture and cruel, inhuman or degrading treatment or punishment**

171. In addition to U.S. obligations under the ICCPR, torture is absolutely prohibited by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), by customary international law, and by U.S. domestic law, which prohibits acts of torture both inside and outside the United States, and at both the federal and state levels (see paragraphs 149-187 of the Initial Report). Torture and cruel treatment in armed conflict are also prohibited by the Geneva Conventions of 1949. On March 7, 2011, the United States also confirmed its support for Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions, which contain fundamental humane treatment protections for individuals detained in international and non-international armed conflicts. U.S. commitments to ensuring compliance with the prohibition on torture and cruel, inhuman and degrading treatment or punishment are addressed further in the discussion of Article 9 (Liberty and Security of Person) and in Part III. U.S. obligations concerning Article 3 of the Convention against Torture are addressed in the discussion under Article 13.

172. As discussed in paragraph 150 of the Initial Report, a range of federal and state laws prohibit conduct constituting torture or cruel, inhuman or degrading treatment or punishment. The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishments for convicted inmates. Cruel and unusual punishments include uncivilized and inhuman punishments, punishments that fail to comport with human dignity, and punishments that include physical suffering, including torture. *Furman v. Georgia*, 408 U.S. 238 (1972); *Brown v. Plata*, 131 S. Ct. 1910 (2011). The Fifth and Fourteenth Amendment Due Process Clauses prohibit, inter alia, governmental action that “shocks the conscience,” including acts of torture and cruel treatment, *Rochin v. California*, 342 U.S. 165 (1952), as well as punishing persons without first convicting them under appropriate standards. The Fourteenth Amendment applies both of these Amendments to the conduct of state officials.

173. Under 18 U.S.C. 242, individuals who acted under color of law may be prosecuted for willful deprivations of constitutional rights, such as the rights to be free from unreasonable seizure and from summary punishment or cruel and unusual punishment, and the right not to be deprived of liberty without due process of law. Violations of 18 U.S.C. 242 can occur for conduct less severe than conduct that falls within the scope of “cruel, inhuman or degrading treatment or punishment” under Article 7 of the ICCPR. (In particular, violations of the Fourth Amendment, including unreasonable seizure discussed further under Article 9 below, do not necessarily fall within the scope of Article 7 obligations.) Violations of the prohibition on torture or cruel, inhuman or degrading treatment or punishment are also prohibited under other federal and state laws, and could be prosecuted, for instance, as aggravated assault or battery or mayhem; homicide, murder or manslaughter; kidnapping; false imprisonment or abduction; rape, sodomy or molestation; or as part of an attempt, a conspiracy or a criminal violation of an individual’s civil rights. Civil actions may also be brought in federal or state court under the federal civil rights statute, 42 U.S.C. 1983, directly against state or local officials for money damages or injunctive relief. Such civil bases for relief are described in greater detail in Part III of this report, below.

174. The Detainee Treatment Act of 2005 also prohibits cruel, inhuman, or degrading treatment or punishment of any “individual in the custody or under the physical control of

the United States Government, regardless of nationality or physical location,” Codified at 42 U.S.C. 2000dd.

175. Lastly, 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 (as those terms are 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.

176. In order to strengthen its efforts against international human rights violators where the United States has jurisdiction, in 2009 the Office of Special Investigations and the Domestic Security Section of the Department of Justice were merged to become the new Human Rights and Special Prosecutions Section. The office has responsibility for the enforcement of criminal laws against suspected participants in serious international human rights offenses, including genocide, torture, war crimes, and the use or recruitment of child soldiers under the age of 15.

177. Administration Policy on Torture and Cruel, Inhuman or Degrading Treatment or Punishment. The United States does not permit its personnel to engage in acts of torture or cruel, inhuman or degrading treatment of any person in its custody either within or outside U.S. territory and takes vigilant action to prevent such conduct and to hold any such perpetrators accountable for their wrongful acts. On his second full day in office, January 22, 2009, President Obama issued three Executive Orders concerning lawful interrogations, the military detention facility at Guantanamo Bay, and detention policy options. Executive Order 13491, Ensuring Lawful Interrogations, directs that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations and U.S. policy, and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States; and that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3, which explicitly prohibits threats, coercion, physical abuse, and waterboarding, among other conduct. The Order also instructed the CIA to close as expeditiously as possible any detention facilities it operated and required that all agencies of the U.S. government provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies. (For further discussion, see Part III). The Military Commissions Act of 2009 also revised the military commission procedures to prohibit the admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment in military commission proceedings, except against a person accused of torture or such treatment as evidence that the statement was made, codified at 10 U.S.C. 948r.

178. On March 7, 2011, President Obama issued Executive Order 13567, establishing periodic review for detainees at the Guantanamo Bay detention facility who have not been charged, convicted, or designated for transfer. Under this Order, continued law of war detention is warranted for a detainee subject to periodic review if it is necessary to protect

against a significant threat to the security of the United States. The Order expressly provides that the periodic review process must be implemented “consistent with applicable law including: the Convention against Torture; Common Article 3 of the Geneva Conventions; the Detainee Treatment Act of 2005; and other laws relating to the transfer, treatment, and interrogation of individuals detained in an armed conflict.”

179. On June 26, 2009, the 25<sup>th</sup> anniversary of adoption of the Convention against Torture, President Obama issued a further statement unequivocally reaffirming the principles behind the Convention, including the principle that torture is never justified. President Obama underscored the Administration’s commitment to upholding the Convention and reaffirming its underlying principles on June 26, 2010, and June 26, 2011, marking the 26<sup>th</sup> and 27<sup>th</sup> anniversaries of the adoption of the Convention against Torture. In his 2011 statement, President Obama said:

Torture and abusive treatment violate our most deeply held values, and they do not enhance our national security – they undermine it by serving as a recruiting tool for terrorists and further endangering the lives of American personnel. Furthermore, torture and other forms of cruel, inhuman or degrading treatment are ineffective at developing useful, accurate information. As President, I have therefore made it clear that the United States will prohibit torture without exception or equivocation, and I reaffirmed our commitment to the Convention’s tenets and our domestic laws.

180. Report to the Committee against Torture. The United States ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) on 27 October 1990, and deposited its instrument of ratification with the United Nations on 21 November 1994. The United States submitted its Initial Report to the Committee Against Torture on 19 October 1999, U.N. Doc. CAT/C/28/Add.5 (2000). After discussion with the United States during the course of three meetings on May 10, 11 and 15, 2000, the Committee against Torture offered its Concluding Observations, U.N. Doc. A/55/44 (2000). The United States submitted its Second Periodic Report to the Committee on 29 June 2005, with a revision to the annexes submitted on October 25, 2005. U.N. Doc. CAT/C/48/Add.3/Rev. 1. The Committee discussed the report with a United States delegation during the course of its 702<sup>nd</sup> and 705<sup>th</sup> meetings on May 5 and 8, 2006, and thereafter adopted its Concluding Observations on July 25, 2006, U.N. Doc. CAT/C/USA/CO/2. The U.S. reports and other submissions and the Committee’s Concluding Observations are available at <http://www.state.gov/g/drl/treaties/>.

181. Prosecution of torture and cruel, inhuman or degrading treatment or punishment. The following examples of United States prosecutions are included in this report to demonstrate the scope of criminal punishments that are available under U.S. law for acts of torture and cruel, inhuman and degrading treatment or punishment.

(a) On August 5, 2011, a jury convicted five officers from the New Orleans Police Department (NOPD) on 25 counts in connection with the federal prosecution of a police-involved shooting on the Danziger Bridge in the days after Hurricane Katrina and an extensive cover-up of those shootings. The incident resulted in the death of two civilians and the wounding of four others. Four officers were convicted in connection with the shootings. The four officers and a supervisor also were convicted of helping to obstruct justice during the subsequent investigations. The evidence at trial established that officers opened fire on an unarmed family on the east side of the bridge, killing a 17-year-old boy and wounding three others, including two teenagers. According to testimony, the second shooting occurred minutes later on the west side of the bridge, where officers shot at two brothers, killing one, a 40-year-old man with severe mental disabilities, who was shot in the back as he ran away. The trial followed guilty pleas by five former NOPD officers who



admitted that they participated in a conspiracy to obstruct justice and cover up what happened.

(b) In March 2011, a former NOPD Officer was sentenced to 25 years and nine months in prison in connection with the post-Katrina shooting death of Henry Glover, and a current officer was sentenced for the subsequent burning of Glover's remains and obstruction of justice. The former officer was found guilty by a federal jury of a civil rights violation, resulting in death, for shooting Glover, and for using a firearm to commit manslaughter. The current officer was sentenced to 17 years and three months in prison. Evidence presented at trial established that the first officer shot Glover, who was a floor below him and running away. Glover's brother and a friend flagged down a passing motorist, who put the wounded Glover in his car to try to get medical attention for him. However, when the group of men drove up to a makeshift police station seeking help for Glover, police officers surrounded the men at gunpoint, handcuffed them, and let Glover die in the back seat of the car. The second officer drove off with the car, with Glover's body inside, and burned both the body and the car with a traffic flare.

(c) On August 4, 2008, a former officer with the Jackson Police Department in Jackson, Mississippi, was sentenced to life imprisonment for brutally raping a teenaged woman he had detained for a traffic violation. After pulling the victim over for running a stop sign, the officer handcuffed her, placed her in the back of his patrol car, and drove her to an isolated location, where he repeatedly raped her while another officer acted as a lookout.

(d) On August 14, 2008, a federal jury in Kentucky convicted two former Grant County Detention Center Deputy jailers of federal civil rights, conspiracy, and obstruction violations. The defendants were convicted for violating the civil rights of a teenage traffic offender whom they arranged to have brutally raped by inmates. The jury convicted them on all charges, and specifically found them responsible for the aggravated sexual assault carried out by the inmates. In December 2008, one defendant was sentenced to 180 months in prison and the other to 168 months.

(e) On August 19, 2008, a former U.S. Customs and Border Protection Officer pleaded guilty in federal court in Houston, Texas of violating the civil rights (18. U.S.C. 242) of two people who had crossed the border into the United States. He admitted that he had struck a person in the head with a gun and that, in a separate incident in September 2007, he had threatened to kill another person whom he believed was an alien smuggler. In November 2008, the officer was sentenced to a prison term of one year and one day.

(f) On October 30, 2008, Roy M. Belfast, Jr., son of Charles G. Taylor, former president of Liberia, was convicted of crimes related to the torture of people in Liberia between April 1999 and July 2003, and on January 9, 2009, he was sentenced to 97 years in prison. The prosecution of the torture claims was the first under the Torture Convention Implementation Act, 18 U.S.C. 2340A. Belfast (also known as Chuckie Taylor, Charles Taylor, Jr., Charles Taylor II and Charles McArthur Emmanuel) was convicted of five counts of torture, one count of conspiracy to torture, one count of using a firearm during the commission of a violent crime, and one count of conspiracy to use a firearm during the commission of a violent crime. Belfast, who was born in the United States, was alleged to have been a commander of an armed security force in Liberia during his father's administration. According to trial testimony, the court found that he commanded a paramilitary organization known as the Anti-Terrorist Unit that was directed to provide protection for the Liberian president and additional dignitaries of the Liberian government. Between 1999 and 2002, in his role as commander of the unit, Belfast and his associates committed torture including burning victims with molten plastic, lit cigarettes, scalding water, candle wax and an iron; severely beating victims with firearms; cutting and stabbing victims; and shocking victims with an electric device. In announcing the conviction, the

U.S. Attorney General stated: “Today’s conviction provides a measure of justice to those who were victimized by the reprehensible acts of Charles Taylor Jr., and his associates. It sends a powerful message to human rights violators around the world that, when we can, we will hold them fully accountable for their crimes.”

(g) On February 4, 2006, an official at the Harrison County, Mississippi Adult Detention Center brutally assaulted arrestee Jesse Lee Williams, Jr., causing injuries that resulted in Williams’s death. A federal jury found the official guilty of federal civil rights and obstruction violations under 18 U.S.C. 242, and sentenced him to life in prison. The conviction was affirmed by the Fifth Circuit Court of Appeals. In investigating this case, DOJ also found other abuses committed by the official and fellow officers in the booking area of the jail. Nine of those officers pleaded guilty and were sentenced to jail terms between 4 and 48 months each.

182. In August 2009, the Attorney General announced that he had ordered “a preliminary review into whether federal laws were violated in connection with interrogation of specific detainees at overseas locations.” See <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>. Assistant U.S. Attorney John Durham assembled an investigative team of experienced professionals to recommend to the Attorney General whether a full investigation was warranted “into whether the law was violated in connection with the interrogation of certain detainees.” Following a two year investigation, on June 30, 2011, the Justice Department announced that it was opening a full criminal investigation into the deaths of two individuals in CIA custody overseas, and that it had concluded that further investigation into the other cases examined in the preliminary investigation was not warranted. See <http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>.

183. Civil Actions. The Civil Rights Division of DOJ (DOJ/CRD) continues to 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. This provision prohibits law enforcement agencies (LEAs) from engaging in a pattern or practice of violation of people’s civil rights. Since the enactment of 42 U.S.C. 14141 in 1994, DOJ/CRD has launched 55 investigations of LEAs and secured 19 settlements to enforce the statute. Since October 2005, it has negotiated four settlements with LEAs, including a 2009 settlement, which resolved DOJ’s police misconduct investigation of the Virgin Islands Police Department. In addition, at the request of New Orleans Mayor Mitch Landrieu, DOJ launched a civil pattern or practice investigation of the New Orleans Police Department (NOPD) – the most extensive investigation in the Division’s history. In March of 2011, the Department issued an extensive report documenting a wide range of systemic and serious challenges. The findings included a pattern or practice of unconstitutional conduct or violations of federal law in numerous areas of NOPD activities, including unconstitutional stops, searches and arrests; use of excessive force; discriminatory policing; and others. The findings also included DOJ/CRD’s first ever finding that a police department engaged in gender-biased policing -- systemic failure to investigate sexual assaults and domestic violence. CRD is now working with the City to develop a comprehensive blueprint for sustainable reform. For additional detail on this investigation, see <http://www.justice.gov/opa/pr/2011/March/11-crt-342.html>. There are currently 17 ongoing investigations of law enforcement agencies. DOJ is also monitoring seven settlement agreements involving seven other law enforcement agencies. DOJ has established a Police Misconduct Initiative involving officers from various sections of the Civil Rights Division, plus the Office of Justice Programs and the Federal Bureau of Investigations (FBI). This initiative, created at the Attorney General’s request, is designed to coordinate Department-wide enforcement efforts to combat police misconduct. The Chief of DOJ’s Civil Rights Division’s Special Litigation Section serves as Co-Chair for Civil Enforcement of the initiative.

184. 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. DOJ/CRD has utilized this statute to prosecute allegations of torture and cruel, inhuman, and degrading treatment or punishment. Since October 2005, it has opened 53 new investigations covering 111 facilities under CRIPA, and negotiated 46 settlements covering 110 facilities. For example, in May 2010, it reached a comprehensive, cooperative agreement with Cook County, Illinois, and the Cook County Sheriff to resolve findings of unconstitutional conditions at the Cook County Jail. An investigation found that the jail systematically violated inmates' constitutional rights by the use of excessive force by staff, the failure to protect inmates from harm by fellow inmates, inadequate medical and mental health care, and a lack of adequate fire safety and sanitation. This case is described in greater detail under Article 9, below. In August 2011, CRD filed a stipulated order of dismissal to resolve its lawsuit concerning conditions of confinement at the Erie County Holding Center (EHC), a pre-trial detention center in Buffalo, New York, and the Erie County Correctional Facility (ECCF), a correctional facility in Alden, New York. The lawsuit alleged that conditions at the facilities routinely and systemically deprive prisoners of constitutional rights through inadequate medical and mental health care, failures to protect prisoners from harm, and deficiencies in environmental health and safety.

185. In certain circumstances victims may also pursue civil remedies against foreign officials in U.S. courts. For instance, the Alien Tort Statute (ATS), codified at 28 U.S.C. 1350, provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." Since the decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the statute has been relied on by alien plaintiffs and interpreted by federal courts in various cases raising claims under customary international law, including torture. In 2004, the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable [] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In an amicus curiae brief filed in the Second Circuit in *Filartiga*, the United States described the ATS as one avenue through which "an individual's fundamental human rights [can be] in certain situations directly enforceable in domestic courts." Memorandum for the United States as Amicus Curiae at 21, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090). In that case, the United States recognized that acts of torture can be actionable under the ATS. *Id.*, see also Statement of Interest of the United States, *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

186. The Torture Victim Protection Act, enacted in 1992, appears as a note to 28 U.S.C. 1350. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals regardless of nationality, including U.S. nationals, who are victims of official torture or extrajudicial killing. The Torture Victim Protection Act contains a ten-year statute of limitations.

187. Medical or scientific experimentation. The United States Constitution constrains the government's power to use individuals in non-consensual experimentation, including non-consensual medical treatment and experimentation. Specifically, the Fifth and Fourteenth Amendments proscribe deprivation of life, liberty or property without due process of law (see *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio, 1995), at 810-811, stating "[t]he right to be free of state-sponsored invasion of a person's bodily integrity is protected by the [constitutional] guarantee of due process."), the Fourth Amendment proscribes unreasonable searches and seizures (including of a person's body), and the Eighth Amendment proscribes the infliction of cruel and unusual punishment.

188. Federal law also prohibits non-consensual clinical investigations of medical products on human subjects in the U.S., and in foreign clinical investigations when the data are to be used to support drug or device approvals. *See, e.g.*, 21 U.S.C. 355 (i.) (4) and 360j (g) (3) (D). As noted in the Second and Third Periodic Report, control of pharmaceutical and device products is vested by statute in the Food and Drug Administration (FDA) within HHS. The introduction of unapproved drugs and devices into interstate commerce is prohibited, *see* 21 U.S.C. 355 (a) and 360 (k), but FDA may permit their use in experimental research under certain conditions, 21 U.S.C. 355 (i), 360 j (g); 21 C.F.R. 50, 56, 312, and 812. The involvement of human beings in such research is prohibited unless the subject or the subject's legally authorized representative has provided prior informed consent, with the limited exceptions described below, 21 C.F.R. 50.20-50.27.

189. One exception to the consent requirement involves cases in which, among other things, the human subject is confronted with a life-threatening situation that requires use of the test article where legally effective consent cannot be obtained from the subject, time precludes consent from the subject's legal representative, and no comparable alternative therapy is available, 21 C.F.R. 50.23 (a)–(c). Another exception sets conditions under which the President of the United States may 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). Only the President may make this determination, and it must be based on a determination in writing that obtaining consent is not feasible, is contrary to the best interests of the military member, or is not in the interests of U.S. national security. Finally, 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 without requiring that informed consent be obtained if it finds, among other things, 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. For research regulated by HHS, but not involving pharmaceutical products regulated by FDA, waiver of informed consent is allowed in a somewhat wider set of circumstances: if the research presents no more than minimal risk to subjects, the waiver will not adversely affect subjects' right and welfare, the research could not practically be carried out without the waiver, and, when appropriate, subjects are provided with additional pertinent information after participation. 45 C.F.R. 46.116(d).

190. The Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution, as well as federal statutes and agency rules, also restrict experimentation on prisoners. Before any research intervention or interaction may begin, all HHS-conducted or supported research involving prisoners must first be reviewed under 45 C.F.R. 46 subparts A and C. Under these regulations, prisoners may consent to socio-behavioral or biomedical research if the consent is "informed," meaning the prisoner is informed about the research, is told that participation is voluntary and can be stopped at any time without penalty, is told of the risks of the research, and is aware of alternatives. Other regulations may apply; for example, the 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 (a) (3).

191. The regulatory provisions in 45 C.F.R. part 46 safeguard the rights and welfare of prisoners involved in HHS-conducted or supported research. When an IRB is asked to review and approve research involving prisoners, it must include at least one prisoner or prisoner representative who is a full voting member of the Board. The IRB must make the determinations required by 45 C.F.R. 46.305, and can only approve research that falls into

one of four limited permissible categories of research, or meets criteria for the June 20, 2003 Epidemiological Waiver. The four permitted categories are:

- (a) Study of the possible causes, effects, and processes of incarceration, and of criminal behavior, 46.306(a)(2)(i);
- (b) Study of prisons as institutional structures or prisoners as incarcerated persons, 46.306(a)(2)(ii);
- (c) Study of conditions particularly affecting prisoners as a class, 46.306(a)(2)(iii);
- (d) Study of practices, both innovative and accepted, that have the intent and reasonable probability of improving the health and well-being of the subject, 46.306(a)(2)(iv).

192. Research conducted under the first two categories must present no more than minimal risk and no more than inconvenience to the subjects. Research conducted under category (iii) can only proceed 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. Research conducted under category (iv) may also require this process in cases where the studies require the assignment of prisoners (in a manner consistent with protocols approved by the IRB) to control groups that may not benefit from the research. No proposed research has needed this level of review since 2005.

193. A lawsuit arising out of the sexually transmitted disease studies conducted by the Public Health Service (in conjunction with other entities) in Guatemala between 1946 and 1948 is currently pending in the U.S. District Court for the District of Columbia. See Manuel Gudiel Garcia, et al. v. Kathleen Sebelius, et al., Civil Action No. 1:11-cv-00527-RBW (D. D.C.). The lawsuit names eight current federal office holders as individual-capacity defendants. None of these current office holders was employed with HHS at the time the Guatemalan studies were conducted. The response to the complaint is due on January 9, 2012. For further discussion of this issue, see Part III below.

194. Remedies. In June of 2010, the Supreme Court declined to review a case holding that the drug company Pfizer could be sued in U.S. federal courts under the Alien Tort Statute for allegedly conducting non-consensual drug tests on 200 children in Nigeria in 1996; the plaintiffs and their representatives alleged that a number of the children died or were left with permanent injuries or disabilities. See *Abdullahi v. Pfizer*, 562 F3d 163 (2d Cir. 2009) (court of appeals decision). The case later settled.

## **Article 8 – Prohibition of slavery**

195. Slavery and involuntary servitude. Abolition of the institution of slavery in the United States dates from President Lincoln's Emancipation Proclamation, effective in 1863, and the Thirteenth Amendment to the U.S. Constitution adopted in 1865. The Thirteenth Amendment also prohibits the holding of a person in involuntary servitude. DOJ prosecutes involuntary servitude cases under statutes designed to implement the Thirteenth Amendment, 18 U.S.C. sections 1581 (peonage), 1584 (involuntary servitude), 1589 (forced labor), and under 18 U.S.C. 241, which criminalizes conspiracies to interfere with the exercise of constitutional rights. In this context, 18 U.S.C. 241 criminalizes conspiracies to interfere with a person's Thirteenth Amendment right to be free from involuntary servitude.

196. Current Legal Framework: involuntary servitude, forced labor, trafficking. Recognizing the fact that various forms of non-physical and psychological coercion,

including threats to victims and their families, fraud or deception, and document confiscation, are often used in forced labor and human trafficking, Congress expanded the scope of U.S. law through enactment of the Trafficking Victims Protection Act of 2000 (“TVPA”), as amended and reauthorized in 2003, 2005, and 2008. The TVPA supplemented existing criminal laws prohibiting slavery and involuntary servitude, and also provided new tools to combat human trafficking. The U.S. legal framework under which trafficking in persons, including for involuntary servitude and forced labor, is addressed includes the following:

(a) Peonage: Section 1581 of Title 18 makes it unlawful to hold a person in “debt servitude,” or peonage, which is closely related to involuntary servitude. Section 1581 prohibits using force, the threat of force, or the threat of legal coercion to compel a person to work against his/her will. In addition, the victim’s involuntary servitude must be tied to the payment of a debt.

(b) Involuntary Servitude: Section 1584 of Title 18 makes it unlawful to hold a person in a condition of involuntary servitude, i.e., a condition of compulsory service or labor against his/her will. A section 1584 conviction requires that the victim be held against his/her will with actual force, threats of force, or threats of legal coercion. Section 1584 also prohibits compelling a person to work against his/her will by creating a “climate of fear” through the use of force, the threat of force, or the threat of legal coercion, which is sufficient to compel service against a person’s will.

(c) Forced Labor: Section 1589 of Title 18, which was enacted as part of the TVPA, makes it unlawful to provide or obtain the labor or services of a person through certain prohibited means. Congress enacted section 1589 in response to the Supreme Court’s decision in *United States v. Kozminski*, 487 U.S. 931 (1988), which interpreted section 1584 to require the use or threatened use of physical or legal coercion, but held that the age, mental competency, or other specific characteristics of a victim may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that victim to involuntary servitude. *Id.* at 948.

(d) Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor: 18 U.S.C. 1590 makes it unlawful to knowingly recruit, harbor, transport, provide or obtain persons for labor or services under conditions that violate any of the offenses contained in Chapter 77 of Title 18.

(e) Sex trafficking of children by force, fraud, or coercion: Section 1591 criminalizes sex trafficking, which is defined as causing a person to engage in a commercial sex act if the person is not yet 18 years of age or through use of force, threats of force, fraud, or coercion, or any combination thereof. A commercial sex act means any sex act on account of which anything of value is given to or received by any person. The specific elements are the use of force, fraud, or coercion, or conduct involving persons under the age of 18.

(f) Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor: Section 1592 makes it illegal to seize documents in order to force others to work. By expanding its coverage to false documents as well as official documents, this section recognizes that victims are often immobilized by the withholding of whatever documents they possess, even if the documents are forged or fraudulent. This section expands the scope of federal trafficking statutes to reach those who prey on the vulnerabilities of immigrant victims, whether legal or illegal, by controlling their papers.

197. Additional provisions of the United States Criminal Code provide for mandatory restitution (18 U.S.C. 1593) and forfeiture (18 U.S.C. 1594 (b)), criminalize attempt (18 U.S.C. 1595(a)), and give victims an avenue for civil lawsuits (18 U.S.C. 1595).

198. Prosecutions. the Criminal Section of DOJ/CRD has primary enforcement responsibility for cases involving involuntary servitude, forced labor and trafficking. That section, which includes a specialized Human Trafficking Prosecution Unit, has successfully prosecuted crimes in agricultural fields, sweatshops, suburban homes, brothels, escort services, bars, and strip clubs, in partnership with U.S. Attorney's Offices. In recent years, due to enhanced criminal statutes, victim-protection provisions, and public awareness programs introduced by the Trafficking Victims Protection Act of 2000, as well as sustained dedication to combating human trafficking, the numbers of trafficking investigations and prosecutions have increased dramatically. In fiscal years 2006 through 2010, DOJ/CRD and the U.S. Attorneys' Offices prosecuted 198 trafficking cases involving 494 defendants. In fiscal year 2010, DOJ/CRD and U.S. Attorneys' Offices brought a record number of trafficking cases, including a record number of labor trafficking cases. The cases have resulted in 382 convictions and guilty pleas during the 2006 through 2010 period.<sup>5</sup>

199. The following are a few examples illustrative of some of the types of cases brought by DOJ since 2005:

(a) In September 2010, a federal grand jury charged six defendants with holding approximately 600 Thai national agricultural guest workers in forced labor, conspiring to do so, and document servitude. According to the indictment, which is only an allegation, the defendants devised a scheme to obtain the labor of Thai nationals by targeting impoverished Thai nationals and enticing them to come to the United States with false promises of lucrative jobs, and then maintaining their labor at farms in Hawaii and throughout the United States through threats of serious economic harm. The defendants arranged for the Thai workers to pay high recruitment fees, which were financed by debts secured with the workers' family property and homes. Significant portions of these fees went to the defendants themselves. After arrival in the United States, the defendants confiscated the victims' passports and failed to honor the employment contracts. The defendants maintained the victims' labor by threatening to send the victims back to Thailand if they did not work for the defendants, knowing that the victims would face serious economic harms created by the debts. In January 2011, a grand jury brought additional charges against the six defendants and two additional defendants, and increased the victim class to 600. So far in 2011, three of the eight defendants have pleaded guilty to the forced labor conspiracy. *United States v. Orian, et al.*

(b) A federal jury convicted a husband and wife in February 2010 on charges of conspiracy, forced labor, document servitude, harboring for financial gain, and lying to an FBI agent. The court sentenced the husband to twenty years in prison and the wife to nine years in prison, to be followed by her deportation back to Nigeria. The court ordered the defendants to pay the victim \$303,000 in restitution. The defendants lured the victim, an impoverished, widowed Nigerian national, on false promises to provide for her six children, including a seriously ill child, and lucrative pay, and then compelled the victim to work for them for eight years during which she worked at least six days a week for sixteen hours a day. In total, the defendants paid the victim only \$300. Defendants employed a scheme of confiscating and withholding the victim's documents, restricting her freedom of movement, isolating and controlling her communications, and verbally abusing her. The husband began sexually abusing the victim a few weeks after she arrived. *United States v. Nnaji.*

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<sup>5</sup> These statistics do not include child sex trafficking cases prosecuted by DOJ's Criminal Division's Child Exploitation and Obscenity Section.

(c) In October 2010, Abrorkhodja Askarkhodjaev pleaded guilty to charges arising from his role as the leader of a multi-defendant organized criminal enterprise that engaged in numerous criminal activities including forced labor, fraud in foreign labor contracting, visa fraud, mail fraud, identity theft, tax evasion and money laundering. As leader of the Giant Labor Solutions criminal enterprise, Askarkhodjaev arranged for the recruitment and exploitation of approximately 75 foreign national workers. Many of these workers were recruited with false promises related to the terms, conditions, and nature of their employment. Once the workers were brought to the United States, the enterprise maintained their labor through threats of deportation and other adverse immigration consequences. Co-defendant Kristin Dougherty was convicted by a jury of racketeering, racketeering conspiracy, and other offenses. Multiple co-defendants had also previously pleaded guilty in connection with the case. Askarkhodjaev was sentenced to 12 years' imprisonment and ordered to pay over \$1,000,000 in restitution. Askarkhodjaev will be deported from the U.S. following his term of imprisonment. *United States v. Askarkhodjaev, et al.*

(d) Six men were involved in a scheme to compel the labor of Mexican and Guatemalan nationals as farm workers in an area near Ft. Myers, Florida. All six defendants pleaded guilty to charges of harboring for financial gain. Additionally, two of them pleaded guilty to beating, threatening, and restraining workers to force them to work as agricultural laborers. In December 2008, two of the defendants were sentenced to 12 years in prison; they, along with the other four defendants, were ordered to pay over \$200,000 in restitution to the victims. *U.S. v. Navarrete.*

(e) Two brothers, Victor Omar Lopez and Oscar Mondragon, and co-conspirators were involved in a scheme to smuggle young Central American women into the United States and to use threats of harm to their relatives to compel them into service in bars, restaurants, and cantinas. All eight defendants pleaded guilty to various federal human trafficking and related charges. Two were sentenced to serve 180 months in prison, one was sentenced to 156 months, one to 109 months, one to 84 months, one to probation, and two to time served. The defendants were also required to pay a total of \$1.7 million in restitution to the victims. *U.S. v. Mondragon.*

(f) In October 2009, a defendant was convicted on twenty-two counts, including multiple counts of forced labor, in connection with a scheme to compel young West African girls into service in hairbraiding salons in New Jersey. *U.S. v. Afolabi et al.*

(g) In New York, an Immigration and Customs Enforcement (ICE)-led investigation, in collaboration with the Government of Mexico, targeted a trafficking organization that smuggled young Mexican women into the United States and then subjected them to commercial sexual exploitation. Twenty-four women were forced into prostitution at various brothels on the East Coast through sexual and physical assaults and threats of violence against their children. Two lead traffickers were sentenced to 50 years in prison, and a third was sentenced to 25 years. The mother of the main defendants was arrested in Mexico and later extradited to the United States, where she was sentenced to 10 years in prison for her involvement in the scheme. *U.S. v. Carreto et al.*

200. Assistance and benefits for victims. The United States has offered over 2,076 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 safe reunions. Victims of trafficking and certain family members may also be eligible for temporary immigration relief in the United States, with the possibility of eventual permanent residency through the T and U visa programs. See discussion concerning Victims of Crime under Article 6, above.



201. From October 2005 through July 2011, the United States granted T visas to trafficking victims and family members as follows:

FISCAL YEAR	VICTIMS			FAMILY OF VICTIMS			TOTALS		
	Applied	Approved*	Denied**	Applied	Approved*	Denied**	Applied	Approved*	Denied**
2005	379	113	321	34	73	21	413	186	342
2006	384	212	127	19	95	45	403	307	172
2007	269	287	106	24	257	64	293	544	170
2008	408	243	78	118	228	40	526	471	118
2009	475	313	77	235	273	54	710	586	131
2010	574	447	138	463	349	105	1,229	796	243
2011 thru July	804	437	181	622	572	116	1,426	1009	297
Total	4,154	2,475	1,176	3,233	2,394	521	7,579	4869	1697

\* Some approvals and denials are from prior fiscal year(s) filings.

\*\* Some applicants have been denied twice (i.e., filed once, denied, and then filed again).

202. A number of institutional structures exist to combat trafficking in persons, including forced labor. The TVPA authorized the President to establish the President's Interagency Task Force to Monitor and Combat Trafficking (PITF), a cabinet-level task force to coordinate federal efforts to combat human trafficking. In 2003, a senior working level group, the Senior Policy Operating Group (SPOG), was created to coordinate interagency policy, grants, research, and planning issues involving international trafficking in persons and the implementation of the TVPA. DOJ continues to fund 39 anti-trafficking task forces nationwide to engage in a proactive, coordinated outreach effort to identify more victims and strengthen trafficking investigations and prosecutions. Each task force is comprised of federal, state, and local law enforcement investigators and prosecutors, labor enforcement officials, and a nongovernmental victim service provider. The Human Smuggling and Trafficking Center (HSTC), created by the Intelligence Reform and Terrorism Prevention Act of 2004, 118 Stat. 3638, serves as an intelligence information clearinghouse for all federal agencies addressing, human trafficking, human smuggling, and the facilitation of terrorist mobility. The HSTC conducts studies and prepares strategic reports for U.S. law enforcement and U.S. policy makers.

203. Pursuant to the TVPA Reauthorization Act of 2005, DOL's Bureau of International Labor Affairs (DOL/ILAB) publishes a list of goods from countries ILAB has reason to believe are produced by forced or child labor in violation of international standards. The primary purpose of the list is to raise public awareness about the incidence of forced and child labor in the production of goods in the countries listed and, in turn, to promote efforts to eliminate such practices. When last updated in October 2011, the list included 130 goods from 71 countries.

204. Pursuant to Executive Order 13126, ILAB also publishes and maintains a list, in consultation with the Departments of State and Homeland Security, of products, by country of origin, which the three Departments have a reasonable basis to believe might have been

mined, produced or manufactured by forced or indentured child labor. Under the procurement regulations implementing the Executive Order, federal contractors who supply products on the list must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items listed. As of the last publication, October 2011, the list contains 23 countries and 31 products.

205. In addition, the U.S. Department of State's Office to Monitor and Combat Trafficking in Persons ("the TIP Office") leads the United States' global engagement against human trafficking. Through the TIP Office, the Department of State represents the United States in the global fight to address human trafficking, partnering with foreign governments, international and inter-governmental organizations, and civil society to develop and implement effective strategies for confronting trafficking in persons. The TIP Office has responsibility for bilateral and multilateral diplomacy, targeted foreign assistance, public engagement, and specific projects on trafficking in persons. The Office also issues the annual Trafficking in Persons Report, which is the most comprehensive compilation of worldwide data on the effort of governments to combat severe forms of trafficking in persons. Since 2001, the number of countries included and ranked has more than doubled to include over 180 countries in the 2011 report, including the United States, which was ranked for the first time in the 2010 report. The report encourages progress in the fight against human trafficking through its recommendations and the later development of national action plans. As of the date of the report's issuance, more than 120 countries had enacted legislation prohibiting human trafficking. Please see <http://www.state.gov/g/tip/rls/tiprpt/2011/index.htm> for more information and for a copy of the report.

206. This year the TIP Office will award approximately \$16 million in federal funds to combat trafficking around the world and currently the TIP Office oversees projects in 71 countries totaling nearly \$69 million. Other agencies also administer such programs; for example, during fiscal year 2010, the U.S. Agency for International Development spent approximately \$16.5 million in fiscal year 2010 funds on over 20 projects in 24 countries – also global, regional, national, and local in scope. In addition, DOL's Office of Forced Labor, Child Labor and Human Trafficking funds a number of programs that primarily address trafficking as one of the worst forms of child labor. Such projects include stand-alone human trafficking projects, but many include multi-faceted projects to address other worst forms of child labor in addition to trafficking.

207. More detailed information on these issues can be found in the Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2010; the United States narrative in the 2011 State Department Trafficking in Persons Report; and the January 2010 U.S. Report to the United Nations Committee on the Rights of the Child on the Optional Protocol on the sale of children, child prostitution and child pornography, [www.state.gov/drl/hr/treaties/index.htm](http://www.state.gov/drl/hr/treaties/index.htm).

## **Article 9 – Liberty and security of person**

208. Seizure and detention. Liberty and security of person is guaranteed by the U.S. Constitution and statutes. Under the Fifth and Fourteenth Amendments, no person may be deprived of liberty without due process of law; the Fourth Amendment protects all persons from unreasonable search and seizures (including seizures of persons) and provides that no warrants may issue except upon probable cause; and the Sixth Amendment provides that persons shall be informed of the nature and cause of accusations brought against them and guarantees speedy and public trials by an impartial jury in criminal cases. These protections also apply to the states under the Due Process clause of the Fourteenth Amendment. Detention pursuant to a statute believed to be unconstitutional or as a result of a procedure

that allegedly violates a constitutional right may be challenged by a writ of habeas corpus in state and/or federal court. The basic outlines of such protections are described in the U.S. Initial ICCPR Report, and updated in the Second and Third Periodic Report.

209. Since the filing of the Second and Third Periodic Report, the U.S. Supreme Court has decided several cases related to liberty and security of person. In *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009), a 13-year-old middle school student, who was suspected of having brought forbidden prescription and over-the-counter drugs to school, contested the search of her underwear by school officials as violating her Fourth Amendment rights. The Court held that while school officials had sufficient suspicion to justify searching her backpack and outer clothing, they did not have sufficient suspicion to warrant extending the search to her underwear because there was no reason to suspect that the drugs presented a danger to students or were concealed in her underwear. Since the intrusiveness of the search was not justifiably related to the circumstances, the Court held that the search violated the Constitution. In another case, *Brendlin v. California*, 551 U.S. 249 (2007), the Court held that, in constitutional terms, a traffic stop entails a “seizure” even though the purpose of the stop is limited and the resulting detention quite brief. Thus, a passenger in the automobile was “seized” under the Fourth Amendment from the moment the automobile came to a halt on the roadside, and was therefore entitled to challenge the constitutionality of the traffic stop.

210. Of defendants subject to state felony charges in the nation’s 75 most populous counties in 2006, an estimated 58 percent were released (on bail, bond, recognizance, or other conditional release) by the court prior to the disposition of their cases. Forty-two percent were detained until case disposition, including 5 % who were denied bail. Murder defendants (8 %) were the least likely to be released prior to case disposition, followed by defendants whose most serious arrest charge was robbery (39 %), burglary (44 %), or motor vehicle theft (44 %). Less than half of the defendants with an active criminal justice status, such as parole (14 %) or probation (34 %), were released, compared to 65 % of those with no active status.

211. Detention to secure the presence of a witness. Federal law permits detention of a person to secure his or her presence as a material witness at an upcoming trial, see 18 U.S.C. 3144. As noted in the Second and Third Periodic Report, the Court of Appeals for the Second Circuit has extended this authority to grand jury witnesses as well. A material witness warrant is issued by a neutral judge, only after finding that there was an adequate showing that the person would have information making him or her a material witness to the criminal case, and that without the arrest warrant the person would be unlikely to appear at trial. Material witnesses enjoy the same constitutional right to pretrial release as other federal detainees, and federal law requires release if their testimony “can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.” 18 U.S.C. 3144. In *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011), al-Kidd argued that his arrest and detention as a material witness violated his Fourth Amendment rights because he claimed the real purpose of holding him was in furtherance of a criminal investigation. The Supreme Court reversed a lower court ruling allowing the case to proceed against the former Attorney General. The Court explained that because “al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation.” If a person subject to a material arrest warrant believes the warrant is not justified, he may seek review by the judge presiding over the criminal case or attempt to seek habeas review.

212. Juvenile sentences of life without parole. Currently approximately 2,500 juveniles are serving life without parole sentences in the United States. The United States Supreme Court recently held that the Eighth Amendment prohibits the sentencing of a juvenile

offender to life in prison without parole for a crime other than a homicide-related crime, as such a sentence would constitute cruel and unusual punishment. *Graham v. Florida*, 130 S. Ct. 2011 (2010). In this case, the court used reasoning similar to that used in death penalty cases that turned on characteristics of the offender, i.e., *Roper v. Simmons*, 543 U.S. 551 (2005), which prohibited the death penalty for defendants who committed their crimes before the age of 18, and *Atkins v. Virginia*, 536 U.S. 304 (2002), which dealt with individuals with intellectual disabilities (referred to by the Court as individuals with mental retardation). The Court in *Graham* found a national consensus that established that life without parole for non-homicide-related juvenile offences was cruel and unusual punishment – noting that reportedly there were only 109 individuals serving such sentences in the United States, with 77 of those in Florida. The Court found further support for this conclusion from the fact that countries around the world overwhelmingly have rejected sentencing juveniles to life without parole. The Court observed that juvenile life imprisonment without parole is prohibited by the Convention on the Rights of the Child, to which many states are party, although the United States has signed but not ratified it. While recognizing that the judgments of other nations and the international community are not dispositive as to the meaning of the Cruel and Unusual Punishments Clause, the Court observed that in prior cases it has “looked beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual.” 130 S.Ct. at 2033.

213. Detention of aliens. As further discussed under Article 13, the Immigration and Nationality Act (“INA”) provides authority for the detention or release of aliens during immigration proceedings. Mandatory detention categories include certain criminal aliens and certain aliens who pose a threat to national security. *See* 8 U.S.C. 1226 (a), (c), 1225(b). Aliens who are not subject to 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 been admitted to the United States may challenge the Secretary’s custody determination or that they are subject to a mandatory detention category in a hearing before an immigration judge. *See* 8 U.S.C. 1226 (a); 8 C.F.R. 236.1, 1236.1, 1003.19. Once an alien has been ordered removed from the United States, detention is mandatory for a 90-day period pending removal for most criminal aliens and those who pose a national security risk. 8 U.S.C. 1231(a) (1), (2). After the initial 90-day period, an alien may be detained for an additional period on a discretionary basis, or the alien may be released on conditions if he or she does not pose a flight risk or danger to the public. 8 U.S.C. 1231(a) (3), (6). 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*, 543 U.S. 371 (2005); 8 C.F.R. 241.13-14.

214. In December 2009, Immigration and Customs Enforcement (ICE) issued new guidelines concerning the release from detention of aliens arriving in the United States at ports-of-entry who are without proper identity and entry documents, but who have a credible fear of persecution or torture. These revised guidelines state that ICE officers should “parole” arriving aliens found to have a credible fear who establish their identities, pose neither a flight risk nor a danger to the community, and have no additional factors that weigh against their release. Asylum offices disseminate the information notice, “How to Seek Release from Detention: Parole Eligibility and Process for Certain Asylum Applicants,” to arriving aliens found to have a credible fear. This notice is translated into the top eight languages spoken by credible fear port-of-entry claimants (currently, Amharic, Arabic, Chinese (Mandarin-simplified), Creole, French, Somali, Spanish, and Tigrinya). The procedures also mandate that all arriving aliens found to have a credible fear should be automatically considered for parole without having to make individual written requests for parole, and they add heightened quality assurance safeguards, including monthly reporting

by ICE field offices and headquarters analysis of parole rates and decision-making. The revisions to the parole guidelines were informed in part by recommendations from the United Nations High Commissioner for Refugees and nongovernmental organizations.

215. Habeas corpus. As noted in the Second and Third Periodic Report, and as discussed further under Article 14 in this report, under federal and state law the writ of habeas corpus can be used to collaterally 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 as unlawful confinement that does not result from a criminal conviction, such as the commitment into custody for mental incompetence or detention for immigration reasons. *INS v. St. Cyr*, 533 U.S. 289 (2001).

216. Habeas corpus relief has been held to be available to those detained outside the United States in some situations. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that constitutional habeas corpus review was available to those detained by the Department of Defense at Guantanamo Bay. This decision and the resulting habeas proceedings are discussed further in Part III, Committee Concluding Observations. In *Munaf v. Geren*, 553 U.S. 674 (2008), the Supreme Court held that the U.S. habeas corpus statute extends to U.S. citizens held overseas by U.S. forces, while also ruling that habeas relief is governed by equitable principles, and that habeas jurisdiction could not be exercised to enjoin the United States from transferring individuals to a foreign sovereign for criminal trial in the context of that case, where the individuals were detained within the territory of a foreign sovereign on behalf of that sovereign pending their criminal prosecution, and where the United States government had a firm commitment not to transfer individuals if they were more likely than not to face torture. On the other hand, in *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), a federal appellate court held that constitutional habeas corpus jurisdiction did not extend to aliens held in law of war detention in the Bagram detention facility in Afghanistan. The court relied on the facts, *inter alia*, that the United States exercises less control in Afghanistan than in Guantanamo, and that Bagram is located in an active theater of armed conflict.

## **Article 10 – Treatment of persons deprived of their liberty**

217. As discussed in paragraphs 259-299 of the Initial Report and paragraphs 174-175 of the Second and Third Periodic Report, the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as well as state constitutions and federal and state statutes, regulate the treatment and conditions of detention of persons deprived of liberty by state action. State policy regarding the medical care that will be provided to those in state custody must be made with due regard for an individual's medical needs and the medical judgment of qualified health care providers. *Fields v. Smith*, 2010 WL 1325165 (E.D. Wis. 2010); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 193 (D. Mass. 2002). When the actual practice of detention in the United States does not meet constitutional standards, individuals are held accountable. The Civil Rights of Institutionalized Persons Act (CRIPA), 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 Constitution or federal laws. In addition, criminal action under 18 U.S.C. 242 may also be pursued against officers who mistreat incarcerated individuals, and civil remedies are also available against state authorities under 42 U.S.C. 1983.

218. As some members of civil society have noted, concerns have been raised about the treatment of persons in prisons and mental health facilities. As discussed below, particular concerns include prison rape and sexual harassment of women, shackling of pregnant female prisoners, and treatment of mentally ill persons in mental health facilities. A number

of concerns have also been raised concerning detention policies and practices, including the extensive use of solitary confinement, long prison sentences, detention of juveniles, and the high percentage of the population that is incarcerated.

219. Correctional systems: federal government. As described in greater detail in paragraph 176 of the Second and Third Periodic Reports, individuals convicted of federal crimes in the United States are sentenced by courts to the custody of the U.S. Attorney General, who oversees the Federal Bureau of Prisons (BOP). BOP operates 117 correctional facilities in 96 locations throughout the nation, including 16 penitentiaries, 76 correctional institutions, 7 independent prison camps, 13 detention centers, and 6 medical referral centers. These facilities house approximately 177,600 federal prisoners. The BOP places inmates in facilities commensurate with their security and program needs through a system of classification that allows the use of professional judgment within specific guidelines. Persons being detained prior to trial or while waiting for immigration hearings are normally sent to special detention facilities or housing units within correctional institutions. These inmates are, to the extent practicable, managed separately from convicted offenders. To help manage the federal inmate population, and when it is cost effective and consistent with the agency's mission and programs, in some cases BOP contracts with privately-operated prisons and community corrections centers (or halfway houses). Offenders in these facilities are under the custody of the Attorney General, even though daily management is administered by the facility staff.

220. Rights of prisoners. Complaints about the failure of individual law enforcement officers to comply with procedural rights are made to federal and state authorities. The Criminal Section of the DOJ/CRD is charged with reviewing such complaints made to the federal government and ensuring the vigorous enforcement of applicable federal criminal civil rights statutes. There have generally been fewer allegations of the violation of procedural rights than physical abuse allegations.

221. When problems arise or allegations are raised regarding misconduct, the Attorney General may also initiate an investigation. The Office of Inspector General within DOJ conducts such investigations. In addition, the BOP also investigates allegations of staff misconduct internally through its Office of Internal Affairs. A separate branch of DOJ may become involved if there is reason to believe that prisoners' rights are being violated. Congress may also initiate an investigation of the BOP's operations where problems are brought to its attention. Several investigations of various aspects of BOP operations have been conducted in the last several years. Federal courts also become involved if litigation is initiated.

222. Under Title VI of the Civil Rights Act of 1964 and the Safe Streets Act, state and local prisons that receive federal financial assistance are prohibited from discriminating on the basis of race, color, national origin, religion, and sex in their services, programs, and activities. DOJ receives complaints alleging discrimination from prisoners, which are processed either by DOJ's Office of Justice Programs or the Civil Rights Division (DOJ/CRD).

223. Prisoner litigation. Abuses do occur in jails and prisons in the United States, and DOJ has prosecuted many cases involving federal and state prison officials. Since October, 2005, DOJ has filed charges in 255 cases of official misconduct against more than 411 law enforcement officers. Examples of specific criminal prosecutions under 18 U.S.C. 242 are provided in the discussion under Article 6 above.

224. DOJ/CRD investigates conditions in state prisons and local jail facilities pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or the prohibition on law enforcement agencies engaging in a pattern or practice of violating peoples' civil rights

(42 U.S. 14141, described above). These statutes allow suit for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement. Since October 2005, pursuant to CRIPA, DOJ/CRD has authorized 24 investigations concerning 28 adult correctional facilities and 8 investigations of 29 juvenile detention facilities. Some examples of these investigations follow:

(a) In May 2010, DOJ/CRD reached a comprehensive, cooperative agreement to resolve findings of unconstitutional conditions at the Cook County, Illinois, Jail. An investigation found that the jail systematically violated inmates' constitutional rights by the use of excessive force by staff, the failure to protect inmates from harm by fellow inmates, inadequate medical and mental health care, and a lack of adequate fire safety and sanitation. The jail is the nation's largest single-site county jail, located on 96 acres with an average daily population of more than 8,500 inmates. Under the agreement, Cook County and the sheriff will implement detailed remedial measures to ensure that jail inmates are safe and receive the services necessary to meet their constitutional rights, including by hiring more than 600 additional correctional officers over the next year.

(b) In July 2010, DOJ/CRD reached an agreement with the State of New York to resolve findings of unconstitutional conditions of four juvenile justice facilities. As a result of an investigation, CRD had concluded that the facilities systematically violated juveniles' constitutional rights in the areas of protection from harm and mental health care. The findings concluded that staff at the facilities consistently and excessively used a disproportionate degree of force to gain control of youths in nearly every type of situation, leading to concussions, spinal fractures, and other injuries. Further, staff at the facilities overused restraints often causing severe injury to youths. The investigation also found that the facilities failed to provide adequate behavioral management programs and treatment plans. Under the agreement, New York will implement detailed remedial measures to ensure that juveniles are safe and receive the services necessary to meet their constitutional rights. The agreement also severely restricts the use of force on youths, including express prohibitions on using chokeholds and "hooking and tripping" techniques.

(c) On January 14, 2009, DOJ/CRD reached a settlement with the King County Correctional Facility in a CRIPA case, *U.S. v. King County, Washington*. Based on investigations conducted in 2006 and 2007, CRD concluded that certain conditions at the facility violated the constitutional rights of individuals confined there. The settlement agreement required the facility, inter alia, to: develop and implement comprehensive use of force policies and procedures, including investigating all uses of force involving serious or unexplained injuries; develop and implement comprehensive policies and procedures for investigation of staff misconduct; implement suicide prevention policies; provide timely and appropriate medical care for inmates with serious medical needs; and develop and implement policies and practices for laundry and exchange of linens to protect inmates from the risk of exposure to communicable diseases and other pathogens.

(d) In 2009, DOJ/CRD reached a settlement agreement with the State of Hawaii concerning activities at the Oahu Community Correctional Center in Honolulu in CRIPA litigation, *U.S. v. State of Hawaii*. Based on an investigation begun in 2005, CRD concluded in 2007 that certain conditions at the facility violated the constitutional rights of detainees at the jail, particularly with regard to inmates with mental problems. The settlement agreement required the facility, inter alia, to: stop placing seriously mentally ill patients in isolation or individualized seclusion in a manner that would pose an undue risk to their health and safety; ensure that a qualified mental health professional reviews disciplinary charges against detainees with serious mental illness; develop policies and procedures for suicide watch; cease using psychotropic medications in lieu of more appropriate lesser-intrusive therapies; assess inmates for mental health needs; and develop and implement a mental health services program.

(e) With regard to a juvenile facility, on October 31, 2008, DOJ/CRD entered into an out of court Memorandum of Agreement with the Los Angeles Probation Camps after an investigation, conducted under CRIPA and 42 U.S.C. 14141, found that certain conditions violated the constitutional rights and federal statutory rights of juveniles held in those facilities. The agreement required the camps, inter alia, to: cease use of practices such as “slamming” for punitive purposes; implement a policy on use of force that ensured the least amount of force necessary for safety of staff, youth residents and visitors; develop and implement a system for review of use of force; provide orientation to all residents, including those with limited English proficiency and inmates with disabilities, including information on how to access the grievance system, medical care, and mental health services; provide rehabilitative programming for all residents; develop and implement programs addressing suicide prevention and care for self-harming youth; and develop programs for mental health screening, assessment, and care.

225. The Department of Homeland Security Office for Civil Rights and Civil Liberties (DHS/CRCL) investigates allegations of inadequate conditions of detention for ICE detainees. CRCL conducts such investigations and evaluates its findings with appropriate assistance, including from U.S. Immigration and Customs Enforcement (ICE) Health Services Corps (IHSC) and independent subject-matter experts. Some examples of these investigations follow:

(a) DHS/CRCL issued a Final Report and Recommendations to ICE regarding the treatment of a detainee at two local detention facilities in Texas. The complaint alleged that the detainee was harassed and mistreated by a medical provider, and that proper medical treatment was not provided. CRCL concluded that the detainee may not have received appropriate follow-up diagnostics or a reasonable degree of privacy. The resulting recommendation was that ICE review the facility’s management of detainee medical care requests, and assess the ability of staff to appropriately treat and interact with detainees. In addition, CRCL recommended that ICE ensure timely follow-up care and necessary diagnostics, privacy during medical assessments, and continuity of care after transfers. In response, ICE reported that the ICE Health Services Corps began aggressively recruiting additional primary care physicians, psychiatrists, dentists, mid-level providers, social workers, and pharmacists for the detention facilities in question. ICE also pointed to its Medical Care Standard to address appropriate privacy for detainees and continuity of care during transfers.

(b) An ICE detainee complained of poor conditions of detention while in ICE custody at a county corrections center in Alabama. Another detainee of the same facility alleged mistreatment by corrections officials and sexual assault by a detainee. DHS/CRCL had previously referred to ICE additional similar complaints involving five other detainees at the same facility. After conducting an investigation into all seven complaints, CRCL concluded that the facility had strong practices in place in the areas of recreation, grievance procedures, and classification. However, a number of concerns remained regarding medical care, food service, use of force, and language assistance. In addition, excessive telephone long-distance rates were referred to ICE for further review. While corrections center staff confirmed that an incident of detainee-on-detainee sexual abuse had occurred in the past, CRCL determined that appropriate procedures were in place, including separating the aggressor from the victim. CRCL continues to work with ICE to improve conditions of detention at this Alabama facility.

226. *Sexual abuse in prison.* In April 2005, the Department of Justice Office of Inspector General (DOJ/OIG) issued a report concluding that penalties under federal law for staff sexual abuse of federal prisoners with the use of threat or force were too lenient and resulted in U.S. Attorneys declining to prosecute cases. The criminal statutes at the time also did not apply to personnel working in private facilities that housed federal prisoners



pursuant to contracts with the federal government. The OIG recommended that DOJ seek legislation to address those issues and to make sexual abuse statutes applicable to personnel in privately-managed contract prisons as well as those working in BOP-managed prisons. Subsequently, two laws were enacted. The first, the Violence against Women and DOJ Reauthorization Act of 2005, increased the maximum criminal penalty for certain sexual abuse crimes, made those crimes felonies instead of misdemeanors, and extended federal criminal jurisdiction to all personnel working in private prisons under contract to the federal government. The second, the Adam Walsh Child Protection and Safety Act of 2006, further increased the maximum penalties for certain sexual abuse crimes and also required federal employees who are found guilty of any criminal sexual abuse offense involving a federal prisoner to register as sex offenders.

227. The Prison Rape Elimination Act of 2003 (PREA) continues to be actively implemented to deal with the problem of rape in public and private institutions that house adult or juvenile offenders. The bipartisan National Prison Rape Elimination Commission (NPREC) established by the Act has completed a comprehensive legal and factual study of the penological, physical, mental, medical, social and economic impacts of prison sexual assaults on government functions and on the communities and social institutions in which they operate. The NPREC's report, which was issued in June 2009, inter alia, sets forth a specific set of recommended Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails, including Supplemental Standards for Facilities with Immigration Detainees. It also includes specific recommendations for action by the Attorney General and DOJ, as well as for action by Congress to facilitate reporting of and improve enforcement against sexual abuse in confinement. The report is available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

228. DOJ is actively working to address the NPREC's recommendations. After the Commission issued its final report, DOJ reviewed and revised the recommended standards and issued a Proposed Rule, consisting of DOJ's proposed regulations, upon which DOJ sought public comment. DOJ is now reviewing the comments and making revisions as warranted for the publication of the Final Rule, which will include the final regulations. DOJ is also acting on the NPREC's other recommendations. DOJ's Office on Violence Against Women is overseeing the development of a corollary to the 2004 National Protocol for Sexual Assault Medical Forensic Examinations that is customized to the conditions of confinement. DOJ's Office for Victims of Crime intends to propose regulations to allow Victims of Crime Act funding to be used for treatment and rehabilitation services for incarcerated victims of sexual abuse. DOJ's Bureau of Justice Statistics continues to conduct studies of the incidence of such sexual assaults in a variety of detention settings. The DOJ Bureau of Justice Assistance also continues to offer aid to state and local governments in an effort to reduce sexual assault of incarcerated persons and to facilitate compliance with the forthcoming standards. Among other activities, the Bureau of Justice Assistance has entered into a three-year cooperative agreement for the development and operation of a Resource Center for the Elimination of Prison Rape. The Resource Center will provide additional training, technical assistance, and program implementation resources to the field to assist in the identification and promulgation of best practices and promising practices. Finally, as noted above, DOJ/CRD has prosecuted state and local prison guards and other law enforcement officers for sexually assaulting persons in custody and for enticing inmates to sexually assault a prisoner.

229. In 2009, the Inspector General of DOJ (DOJ/OIG) issued a further report on the issue. This report assessed the efforts of DOJ to deter staff abuse of federal prisoners, and included an analysis of the effect of the 2005 and 2006 legislation on prosecution of criminal sexual abuse cases and prison sentences for convicted staff sexual abusers. Among other elements, the report noted that allegations of criminal sexual abuse and non-criminal sexual misconduct by prison staff had more than doubled from 2001 to 2008, that

allegations had been made in all but one of the 93 prison locations, and that allegations had been made against both male and female employees. According to the report, since 2006 when new laws changed misdemeanor sexual abuse crimes to felony crimes, the percentage of cases accepted for prosecution had increased from 37 percent to 49 percent – a 12 percent increase. The percentage of convictions had also increased from 30 percent to 78 percent. Of 90 prosecutions, 83 had resulted in convictions or guilty pleas; in addition, there had been one acquittal and six dismissals. The DOJ/OIG report is available at <http://www.justice.gov/oig/reports/plus/e0904.pdf>.

230. The 2009 DOJ/OIG report made a number of recommendations. These included improved training of prison staff, establishment of a zero tolerance policy, and improved guidance for prisoners concerning how to report abuse. The report also recommended that DOJ instruct prisons to consider alternatives to automatic isolation and transfer of prisoners that allege sexual abuse, and that DOJ develop procedures to ensure that victims receive appropriate psychological and medical assessments. It further recommended institution of a program for preventing, detecting, investigating, and addressing staff sexual abuse in cellblock and transportation operations, institution of new or revised policies providing specific guidance to prison staff members on the protocol for responding to sexual abuse allegations and providing victim services, and improved training for investigators and prosecutors. DOJ has made significant progress in implementing the recommendations listed in this paragraph and expects to be able to implement all of them.

231. Shackling of pregnant female prisoners during transportation, labor, and delivery. The DOJ Bureau of Prisons (DOJ/BOP) announced in October 2008 that it would no longer engage in the practice of shackling pregnant women during transportation, labor and delivery, except in the most extreme circumstances. DHS/ICE has also adopted policies substantially limiting the use of restraints on pregnant women in immigration detention.

232. States are also increasingly adopting similar rules. A number of states have restricted the use of restraints on pregnant women who are incarcerated or detained. These include California, Colorado, Illinois, New Mexico, New York, Pennsylvania, Texas, Vermont, Washington, and West Virginia. In addition, restrictions are under consideration in other states. The American Correctional Association (ACA) has approved a prohibition on the use of restraints on pregnant inmates that is reflected in its 2010 accreditation standards manual. The ACA's guidance states that:

“Written policy, procedure and practice, in general, prohibit the use of restraints on female offenders during active labor and the delivery of a child. Any deviation from the prohibition requires approval by, and guidance on, methodology from the Medical Authority and is based on documented serious security risks. The Medical Authority provides guidance on the use of restraints on pregnant offenders prior to active labor and delivery.”

Further, a comment accompanying the standard states that:

“Restraints on pregnant offenders during active labor and the delivery of a child should only be used in extreme instances and should not be applied for more time than is absolutely necessary. Restraints used on pregnant offenders prior to active labor and delivery should not put the pregnant offender [ ] or the fetus at risk.”

233. This standard may apply to both state and federal correctional facilities – approximately 80 percent of state departments of corrections and youth services as well as facilities operated by the BOP are active participants in ACA's accreditation program. The BOP is in the process of revising its policies to incorporate this standard, has updated its 2010 annual training lesson plans to incorporate this standard, and continues to provide information to agency supervisors and to provide training concerning the standard. The

above information suggests a significant trend toward developing explicit policies banning or restricting the use of restraints on pregnant inmates and detainees at both the federal and state level. Furthermore, pregnant inmates and detainees may avail themselves of an array of remedial procedures in cases where they believe their rights have been violated. Shackling of pregnant women is an issue of concern that has been raised in consultation with civil society.

234. Segregation of prisoners. As noted in paragraph 139 of the Second and Third Periodic Report, the Supreme Court has held that a 30-day period of disciplinary segregation of prisoners from the general population does not give rise to a liberty interest that would require a full due process hearing prior to imposition of the punishment, although the Court left open the possibility that due process protections would be implicated if the confinement was “atypical and significant.” *Sandin v. Conner*, 515 U.S. 472 (1995). In 2005, the Supreme Court assessed whether confinement to a “Supermax” maximum security prison facility constituted an “atypical and significant hardship” giving rise to a liberty interest under the *Sandin* standard, *Wilkinson v. Austen*, 545 U.S. 209 (2005). The Court determined that maximum security placement does constitute an “atypical and significant” hardship because such placement cuts off almost all human contact, is indefinite and reviewed only annually (as opposed to the 30-day period involved in *Sandin*), and disqualifies an otherwise eligible inmate for consideration for parole. Nonetheless, the Court found that the State of Ohio’s revised policy for maximum security assignment provided a sufficient level of due process to meet the constitutional standard because it provided clear factors for review in making the decision, established multiple levels of review, and provided opportunity for rebuttal.

235. Reform and rehabilitation. All prison systems have as one of their goals the rehabilitation of prisoners to facilitate their successful reintegration into society. In addition to its mission of protecting society by confining offenders in controlled, safe environments, BOP 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. While BOP provides many self-improvement programs, including work in prison industries and other institutional jobs, vocational training, education, substance abuse treatment, religious observance, counseling, parenting, anger management, and other programs that teach essential life skills, the focus of BOP’s reentry efforts is moving toward a competency-based model that includes identification of core skills needed for successful reentry; an objective assessment of those skills and continual measurement of the skills acquisition, rather than simply program completion; linkage of programs to address skill deficits; allocation of resources to focus on high risk offenders; and information sharing and collaboration building for a holistic approach in transitioning offenders. The expansion of partnerships with external agencies to address reentry needs is crucial in ensuring the continuity of care and effective utilization of existing resources. *See* 28 C.F.R. parts 544, 545, 548, 550. 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 sites during the day and return to their institutional placements at night.

236. Adult aliens in immigration custody. Within DHS/ICE, Office of Enforcement and Removal Operations (ERO) is responsible for aliens who are detained in Service Processing Centers, Contract Detention Facilities and state and local facilities. The current ICE detention system consists of approximately 240 local and state facilities acquired through intergovernmental service agreements (IGSA), seven contract detention facilities, and seven ICE-owned facilities. Approximately 70 % of the ICE population is detained in IGSA facilities, 17 % in contract facilities, 11 % in ICE-owned facilities, 2 % in Bureau of Prison (BOP) facilities, and 2 % in other facilities, including, but not limited to, hospitals, holding facilities, transportation-related facilities, and/or hotels and other lodging accommodations.

237. ICE manages a robust inspections program ensuring that facilities used by ICE to house detained aliens maintain appropriate conditions of confinement in accordance with the ICE National Detention Standards or the Performance Based National Detention Standards. The standards further the goals of ICE to provide safe, secure, and humane conditions for all of the detained population. ICE's On-Site Detention and Compliance Verification component requires daily assessments at select facilities to ensure that conditions are appropriately maintained. ICE has also created the Office of Detention Oversight (ODO), within the Office of Professional Responsibility (OPR), to validate the various inspections independently. The functions of this office are described in more detail below.

238. The National Detention Standards (NDS) described in paragraphs 190 and 191 of the Second and Third Periodic Report, were originally issued in September 2000. The standards, which were the result of exchanges among DOJ, the American Bar Association, and other organizations involved in representation and advocacy for immigration detainees, provide policy and procedures for detention operations in order to ensure consistency of program operations and management expectations, accountability for non-compliance, and a culture of professionalism. Since the Second and Third Periodic Report was submitted in 2005, the standards have been revised and expanded into a performance-based format. The new 2008 Performance Based National Detention Standards (PBNDS) comprise 41 standards, including four new standards: News Media Interviews and Tours (formerly part of Visitation), Searches of Detainees, Sexual Abuse and Assault Prevention and Intervention, and Staff Training. The PBNDS can be accessed at <http://www.ice.gov/detention-standards/2008>.

239. All ICE detainees are provided detainee handbooks explaining in detail their rights and responsibilities while in ICE custody. The detainee handbook describes security and control procedures; information on access to legal material, funds, and personal property; disciplinary policy; and security inspections. The detainee handbook also includes information on detainee access to medical services and the grievance process. ICE and DHS's Office for Civil Rights and Civil Liberties are collaborating on the development of an updated handbook that will be translated into multiple languages.

240. The ICE Health Service Corps (IHSC) consists of U.S. Public Health Service Officers, civil service personnel, and contract medical professionals. It serves as the medical authority for ICE with regard to detainee health care issues. IHSC provides for the primary health care needs of detainees housed in IHSC-staffed detention centers and arranges care to ensure that medically appropriate and necessary care is accessible to individuals in ICE custody. Field Medical Coordinators (FMC) and Managed Care Coordinators (MCCs) provide case management for detainees with complicated health issues, particularly when those detainees are hospitalized and need to have coordinating continuity of care and discharge planning. In addition to case management, support is provided to Enforcement and Removal Operations (ERO) to determine the most appropriate detention housing (detainee placement), and detention facility site visits are conducted to provide orientation and guidance on IHSC Managed Care Policies. Current and future initiatives include the following: reform of the IHSC healthcare system to reflect a national unified healthcare program for all detainees; establishment of a medical classification system to identify medical and mental health needs and assure appropriate placement; development and implementation of a robust Electronic Health Record System; refinement of a comprehensive mental health program; establishment of a mental health step-down unit; recommended revision of the 2008PBNDS to include women's health initiatives; further enhancement of the telehealth program; and review and reform of the IHSC covered services program, fiscal payment system and budget process.

241. The Detention Management Compliance Program (DMCP) prescribes standards, policies, and procedures for ICE to ensure that detention facilities are operated in a safe, secure, and humane condition for both detainees and staff. ICE encourages facilities to come into compliance with the NDS or PBNDS, as appropriate. Facilities that are found to be non-compliant are removed from the ICE-authorized facility list if they are unable to comply with the NDS or PBNDS as appropriate. Through an aggressive inspections program, ICE ensures that facilities used by ICE to house detained aliens maintain appropriate conditions of confinement, in accordance with the applicable standards. The standards further the goals of ICE to provide safe, secure, and humane conditions for all detainees in ICE custody. Under the NDS and PBNDS, particular emphasis is placed on issues relating to detainee health, life, and safety to provide an evaluation of facility compliance.

242. ICE has an ongoing process for the inspection of facilities housing ICE detainees to ensure that these facilities are meeting the applicable detention standards. Within ICE, the Office of Professional Responsibility (ICE/OPR) conducts inspections of detention facilities that house ICE detainees, as well as inspections of field offices. In addition, ICE assists with audits by the Government Accountability Office, the DHS Office of the Inspector General, and the DHS Office for Civil Rights and Civil Liberties by providing access to ICE detention facilities and responding to requests for information.

243. The ICE Office of Professional Responsibility (OPR), Office of Detention Oversight (ODO) was created in fiscal year 2009 to ensure independent internal management controls over ICE, the Detention Management Compliance Program, the safe and secure operation of detention facilities, and the humane treatment of ICE detainees. ICE/OPR/ODO conducts inspections of detention facilities authorized to house ICE detainees to determine compliance with the national detention standards. ODO also investigates allegations of noncompliance with the ICE detention standards, mistreatment of detainees, and civil rights and civil liberties violations. Additionally, ODO conducts investigations into the circumstances surrounding any deaths of detainees in ICE custody. During the first half of fiscal year 2011, ODO conducted 28 inspections of detention facilities, including a detailed review of the medical standards and policies, to determine compliance with the ICE detention standards. ODO also completed three detainee death reviews and 11 investigations relating to alleged civil rights and civil liberties violations. ODO was additionally assigned 41 investigations related to allegations reported to the OPR Joint Intake Center, specifically pertaining to the mistreatment of detainees at detention facilities. ODO sends its inspection and investigation reports to ICE/ERO, which manages ICE detention facilities, on a continuous basis. These reports help ERO develop corrective action plans to address identified deficiencies and to ensure the health, safety, and welfare of all detainees.

244. For fiscal year 2011, ODO anticipates completing 61 inspections of detention facilities, including 37 inspections involving a complete medical review at the facility to evaluate compliance with ICE requirements. ODO will continue to investigate any detainee deaths that occur at ICE detention facilities, and allegations assigned to ODO for investigation regarding detainee mistreatment and civil rights and civil liberties violations.

245. The DHS Headquarters Office for Civil Rights and Civil Liberties (CRCL) is statutorily mandated to support DHS in securing the nation while preserving individual liberty, fairness, and equality under the law. CRCL works closely with ICE on immigration detention issues in order to better protect the civil and human rights of immigrant detainees. CRCL has assisted the ICE Offices of Enforcement and Removal Operations, Policy, and Detention Policy and Planning to develop and implement significant immigration detention reforms. CRCL has contributed to: the 2008 PBNDS; the creation of an online detainee locator system; a plan for expanded alternatives to detention; improved risk assessment

systems; and improved medical care and medical classification of detainees. CRCL is an active member of several internal ICE working groups established to help implement these promised reforms. CRCL has trained ICE Detention Service Managers on civil and human rights law, constitutional protections for detained persons, refugee and asylum seeker awareness, cultural and religious competency, and provisions of the Violence Against Women Act. CRCL also regularly engages in complaints investigations and emergency casework to ensure that individuals' rights are protected.

246. Psychiatric hospitals. Under CRIPA, DOJ has opened 16 investigations regarding approximately 48 psychiatric facilities and facilities housing persons with developmental disabilities since October 2005. Institutionalized persons, including patients with mental disabilities, are entitled to adequate food, clothing, shelter, medical care, reasonable safety and freedom from undue bodily restraint. CRIPA investigations and court cases have been brought concerning an array of issues relating to the health, safety and treatment of persons confined in state-run mental health facilities in a number of states. Issues addressed through CRIPA include freedom from unreasonable and abusive restraints; adequate treatment and prevention for suicidal and self-mutilating behavior; and ensuring the basic sanitation and safety of the facility itself. Cases also often involve issues concerning sufficient levels of professional staffing, adequacy of treatment planning, proper administration and monitoring of psychiatric medications, and adequacy of discharge planning and support services.

247. In 1999, the Supreme Court held that "States [can be] required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999). In a recent letter to the Governor of New Jersey resulting from a CRIPA investigation of the Ancora Psychiatric Hospital in Winslow, New Jersey DOJ/CRD set forth numerous conditions and practices at Ancora that were found to violate constitutional and statutory rights of patients. Those included inadequate discharge planning, policies and practices subjecting patients to excessive risk of harm, and segregation of far too many patients for whom a hospital setting is not the most integrated setting appropriate in violation of *Olmstead* and federal law. The letter recommended remedial measures and noted that in the event those measures were not taken, the Attorney General may initiate a lawsuit under CRIPA to correct the deficiencies. For more information on the *Olmstead* decision, please see the discussion under equal protection of persons with disabilities, above.

248. The Substance Abuse and Mental Health Services Administration (SAMHSA) of HHS funds and oversees the Protection and Advocacy for Individuals with Mental Illness Program (PAIMI) that provides legal-based advocacy services to individuals with severe mental illnesses. Services provided by the PAIMI Programs include: investigations of alleged incidents of abuse, neglect and rights violations; individual services such as short term assistance; negotiation and mediation; systemic services on behalf of groups of individuals, including group advocacy; facility monitoring; commenting on proposed legislation and regulations in facilities; and use of legal and legislative remedies to address verified incidents. Each state has a PAIMI Program within its Protection and Advocacy system to carry out these activities. In Fiscal Year 2010, the PAIMI Program served 116,499 individuals. This included responding to complaints related to inappropriate use of seclusion and restraint, physical and sexual abuse, environmental and safety issues in facilities, financial exploitation, and discrimination in housing and employment.

249. Treatment provisions relevant to individuals detained in armed conflict. As discussed in Part III, Concluding Observations, and above, in Executive Order 13491, Ensuring Lawful Interrogations, President Obama directed that, consistent with Common

Article 3 of the Geneva Conventions, individuals detained in any armed conflict shall in all circumstances be treated humanely, and that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3, which explicitly prohibits threats, coercion, physical abuse, and waterboarding. The Order also required that all agencies of the U.S. government provide the International Committee of the Red Cross with notification of and timely access to any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies.

### **Article 11 – Freedom from imprisonment for breach of contractual obligation**

250. As reported in the Initial Report and in paragraph 202 of the Second and Third Periodic Report, in the United States imprisonment is never a sanction for inability to fulfill a private contractual obligation.

### **Article 12 – Freedom of movement**

251. Right to travel. 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 heightened judicial review of constitutional questions described earlier in this report. The Supreme Court has also indicated 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). In *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-262 (1974), the Supreme Court held that an Arizona statute requiring a year’s residence in the county as a condition to receipt of non-emergency hospitalization or medical care at the county’s expense created an invidious classification that impinged on the right of interstate travel by denying newcomers basic necessities of life. Absent a compelling state interest, the Court held this law to be an unconstitutional violation of the equal protection clause.

252. Alien travel within the United States. Aliens present in and admitted to the United States generally enjoy the freedom to travel within the United States, although certain aliens present in the United States may be subject to limitations on freedom of movement. For example, travel within the United States may be restricted for aliens who are in immigration removal proceedings or subject to a removal order. As a condition of release from detention, restrictions may be placed on travel outside certain geographical areas to limit risk of flight. Travel also might be limited as a condition of parole into the United States.

253. Alien travel outside the United States. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., vests in the President broad authority to regulate aliens’ entry into and departure from the United States. See 8 U.S.C. 1182, 1185. Lawful permanent resident aliens (LPRs) are generally free to travel outside the United States, but may need special permission to return in some circumstances. For example, LPRs generally need permission to re-enter the United States for travel abroad of one year or more. The required re-entry documents should be applied for before leaving the United States, see 8 U.S.C. 1203; 8 C.F.R. 223.2(b), but departure before a decision is made on the application does not affect

the application. Aliens with pending applications for lawful status who travel abroad generally 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. For refugees and asylees, a refugee travel document is required to return to the United States after travel abroad. Although it should be applied for before travel, it may be issued to an alien who has already departed, under certain limited circumstances. 8 C.F.R. 223.2 (b)(2)(ii). Aliens who have Temporary Protected Status (TPS) and wish to travel outside the United States must also apply for travel authorization. Travel authorization for TPS is issued as an advance parole document where DHS determines it is appropriate to approve the request. 8 C.F.R. 244.15.

254. National Security Entry and Exit Registration Program. Since the creation of the National Security Entry-Exit Registration Program (NSEERS) in 2002, DHS has conducted a number of reviews of the program, including substantial consultations with the public, community leaders, and civil society. These reviews resulted initially in a narrowing of the program's application and elimination of the domestic call-in portion of the program. As a result of further review of the program and a determination that it was redundant, in April 2011 DHS removed all countries from the list of countries whose nationals were required to register under NSEERS. [http://www.ofr.gov/OFRUpload/OFRData/2011-10305\\_pl.pdf](http://www.ofr.gov/OFRUpload/OFRData/2011-10305_pl.pdf).

255. HIV Travel Ban. After 22 years, the U.S. HIV travel ban was lifted as of January 1, 2010. By law, HIV has been removed from the list of communicable diseases that make visitors ineligible for entry into the United States.

### **Article 13 – Expulsion of aliens**

256. As discussed in paragraph 206 of the Second and Third Periodic Report, responsibility for the administration and enforcement of the immigration laws now lies predominantly with DHS. In 2010, there were an estimated 160 million nonimmigrant admissions to the United States (Homeland Security, Office of Immigration Statistics, 2011). In addition, in fiscal years 2009 and 2010, the United States admitted nearly 75,000 refugees each year through its refugee resettlement program, and had admitted more than 50,000 as of August 31, 2011. In each of these years, the United States further granted asylum to tens of thousands of asylum seekers and their spouses and children who were already present in the United States. Illegal immigration to the United States, however, continues in substantial numbers. The total number of aliens in the United States without legal status was estimated to be 10.8 million as of January 2010. The United States has sought to balance its legal immigration system with increased border security and interior enforcement of immigration laws according to specific priorities.

257. Removal. Aliens who are physically present in the United States may be placed in "removal" proceedings under the INA. Aliens who were admitted (inspected and authorized by an immigration officer upon arrival) are charged as "deportable" when placed into removal proceedings. See 8 U.S.C. 1227 et seq. Aliens who have not been admitted are charged as "inadmissible." See 8 U.S.C. 1182 et seq.

258. Removal hearing. In general, proceedings before an immigration judge commence when DHS issues a Notice to Appear (NTA) charging the alien as deportable or inadmissible and thus removable from the United States. 8 U.S.C. 1229; 8 C.F.R. 239.1(a). An alien who concedes removability may apply for 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.



259. In cases where an alien was legally admitted to the United States and deportability is at issue, the burden is on the government to establish by clear and convincing evidence that the alien is deportable. 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)(B).

260. Upon issuance of the NTA, DHS may either take an alien into custody upon issuance of a warrant, or may release the alien on bond or conditional release. 8 U.S.C. 1226(a); 8 C.F.R. 236.1. DHS may revoke its authorization of conditional release or release on bond at any time as a matter of discretion. 8 U.S.C. 1226(b); 8 C.F.R. 236.1(c)(9). For a discussion of custody/release authority, see the discussion under Article 9 above.

261. DHS is obligated by statute to take into custody any alien convicted of certain criminal offenses or who has engaged in terrorist activity, 8 U.S.C. 1226(c), 1226a, but may release the alien if such release is deemed necessary to provide protection to a witness or potential witness cooperating in a major criminal investigation, and DHS decides that the alien's release will not pose a danger to the safety of people or property and that the alien is likely to appear for scheduled proceedings. *See* 8 U.S.C. 1226 (c) (2).

262. 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), 1240.11.

263. At the outset of a proceeding, the immigration judge must advise the alien of his or her right to representation, provide information on pro-bono counsel, and inform the alien that he or she will have the opportunity to examine and object to evidence and to cross-examine witnesses. 8 C.F.R. 1240.10(a)(1)-(4). The immigration judge must also place the alien under oath, read the facts alleged in the NTA to the alien, and request that the alien admit or deny each factual allegation, 8 C.F.R. 1240(b)(5), (c).

264. During the removal proceedings, the immigration judge has the authority to determine whether an alien is inadmissible or deportable, to grant relief from removal (e.g., voluntary departure, asylum, cancellation of removal), and to determine the country to which an alien should be removed. 8 C.F.R. 1240.10-12. An alien in removal proceedings retains the right to representation by qualified counsel at the alien's choosing, at no expense to the government. 8 U.S.C. 1229a (b) (2)-(4). An alien must also be afforded a competent, impartial interpreter if the alien is not able to communicate effectively in English. 8 C.F.R. 1240.5.

265. The U.S. Supreme Court held in March 2010 that an alien's Sixth Amendment right to effective assistance of counsel in criminal proceedings is violated when the alien's criminal defense attorney fails to advise the alien of the immigration consequences of a guilty plea, provided the removal consequence is "truly clear" and the alien demonstrates that he or she suffered prejudice as a result of the deficient assistance of counsel. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483-84 (2010). In situations in which the removal consequences of a particular plea are unclear or uncertain, however, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 1483.

266. Hearing in absentia. If an alien fails to appear at his or her removal hearing, he or she will be ordered removed from the United States if the government establishes by "clear, unequivocal, and convincing 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: (1) 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 (2) the alien 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).

267. Administrative appeals and federal court review. Decisions of immigration judges in removal cases may be appealed to the Board of Immigration Appeals within 30 days of the judge’s decision. 8 C.F.R. 1003.38, 8 C.F.R. 1240.15. In turn, the decisions of the Board of Immigration Appeals may be further appealed to a federal court of appeals through the filing of a “petition for review” within 30 days of the Board’s decision. 8 U.S.C. 1252 (a)(1), (b)(1).

268. 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).

269. Post-order detention. 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 likelihood of removal and the flight and safety risk attributed to the alien. 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 v. Davis*, 533 U.S. 678 (2001); 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. In *Clark v. Martinez*, 543 U. S. 371 (2005), the Supreme Court interpreted the INA to provide that the six-month presumptive detention period noted in *Zadvydas* applies equally to all categories of aliens described in 8 U.S.C. 1231(a)(6), including applicants for admission determined to be inadmissible. As a result, the post-order custody review provisions of 8 C.F.R. 241.13 and 241.14 apply to inadmissible and excludable aliens, including Mariel Cubans, alien crewmen, and stowaways.

270. Country of removal. The INA sets forth what is generally a four-step process to determine the country to which an alien will be removed. *See* 8 U.S.C. 1231(b). First, an alien normally will be removed to the country of his or her choice. If that removal option is not available, the alien generally will be removed to the country of his or her 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 or she has a lesser connection (e.g., country of birth, country from which the alien 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. *Id. See generally, Jama v. ICE*, 543 U.S. 335 (2005) (holding that the INA generally does not require foreign government’s “acceptance” of an alien in order for DHS to effect removal to that country).

271. Relief and protection from removal. A number of forms of relief are available to aliens who are subject to removal. Aliens in removal proceedings who are eligible to receive an immigrant visa have a visa immediately available to them, and those who are not inadmissible may be able to adjust status to that of an LPR in removal proceedings. 8 U.S.C. 1255(a), 1255(i). Waivers are available for some grounds of inadmissibility. For example, a discretionary waiver of inadmissibility is available under section 212(h) of the INA for certain criminal grounds of inadmissibility. 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 United States 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) (1)(b). Both lawful permanent residents (LPR) and non-permanent residents may be eligible for a form of relief called “cancellation of removal” under 8 U.S.C. 1229b. The Immigration Court 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. 8 U.S.C. 1229b(a). Cancellation of removal is also available to a non-permanent resident 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 certain criminal offenses, 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. 8 U.S.C. 1229b (b).

272. Voluntary departure. The Secretary of Homeland Security may permit an alien to depart the United States voluntarily at the alien’s own expense in lieu of being subject to removal proceedings, and both the Secretary and the Attorney General may do so prior to the completion of removal proceedings. Voluntary departure is beneficial because it allows the 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).

273. An alien 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, the following requirements need to be satisfied: (1) the alien must have been physically present in the United States for at least one year prior to service of the Notice to Appear (NTA); (2) the alien must show good moral character; (3) the alien must not be subject to the criminal or terrorist bars to such relief; and (4) the alien must establish by clear and convincing evidence that the alien has the means to depart the United States and intends to do so. The qualifying alien must depart within 60 days following completion of the removal proceedings. 8 U.S.C. 1229c (b) (2).

274. Asylum and withholding of removal in removal proceedings. If an alien has been served with a Notice to Appear, the alien must appear before an immigration judge, with whom he or she may file or renew an asylum application. The filing of an asylum application is also considered a request for withholding of removal under 8 U.S.C. 1231(b)(3). *See* 8 C.F.R. 208.3(b), 1208.3(b). 8 U.S.C. 1231 (b)(3) withholding of removal as further implemented by regulation at 8 C.F.R. 1208.16(b) is distinct from Convention against Torture withholding of removal as implemented by 8 C.F.R. 1208.16(c). 8 U.S.C. 1231(b)(3) withholding of removal serves to implement U.S. non-refoulement obligations under the 1967 Protocol relating to the Status of Refugees in the immigration removal context.

275. Withholding of removal under INA section 241(b)(3), 8 U.S.C. 1231(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, to qualify for withholding of removal, an alien must demonstrate that his or her “life or freedom would be threatened” in the proposed country of removal on account of one of five protected grounds, whereas asylum only requires the alien to demonstrate a well-founded fear of persecution on account of a protected ground. Third, withholding of removal does not provide a basis for permanent residence and family members may not be granted derivative status. By contrast, asylees are eligible to apply for permanent residence after one year and certain qualified family members may be granted derivative status. Fourth, withholding of removal is a mandatory restriction imposed on the

government while, by contrast, asylum is an immigration benefit which the government has discretion to grant or deny. Although asylum claims may be adjudicated either by an Asylum Officer or an immigration judge, withholding of removal claims made under INA section 241(b)(3), 8 U.S.C. 1231(b)(3), with rare exception, are adjudicated by immigration judges only in removal proceedings. 8 C.F.R. 1208.16 (a).

276. An alien will be denied withholding of removal under INA sec. 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 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 sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B).

277. Denial of asylum by an immigration judge could result in a final order of removal. Aliens granted withholding of removal are subject to a final order of removal and while they will not be removed to a country where they would face a threat to their life or freedom, DHS may remove these aliens to certain countries where their lives or freedom would not be threatened, INA sec. 241(b) (1)-(2), 8 U.S.C. 1231 (b) (1)-(2).

278. Temporary protected status. Under INA sec. 244, 8 U.S.C. 1254a, the Secretary of Homeland Security may designate a foreign state for Temporary Protected Status (TPS), temporarily allowing that state's nationals (and persons having no nationality who last habitually resided in that state) in the United States who apply for and are granted TPS to live and work in the United States without fear of being sent back to unstable or dangerous conditions, if one of three conditions exist: (i) there is an ongoing armed conflict within the state that would pose a serious threat to the personal safety of returned nationals; (ii) there has been an 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 TPS for its nationals; 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. 8 U.S.C. 1254a(b)(1). A country designation may last between 6 and 18 months, INA sec. 244(b)(2)(B). At least sixty days before the expiration of a TPS designation, the Secretary of Homeland Security, after consultation with appropriate federal government agencies, is to review the conditions of the designated country. If the conditions for the designation continue to be met, the Secretary of Homeland Security may extend temporary protected status for 6, 12, or 18 months. 8 U.S.C. 1254a(b) (2), (3). The Secretary of Homeland Security may choose to re-designate a country for TPS instead of merely extending it, 8 U.S.C. 1254a(b)(1).

279. An alien is ineligible for TPS if he or she has been convicted of one felony or two or more misdemeanors, or is subject to a mandatory bar to asylum. 8 U.S.C. 1254(c)(2)(B), 8 C.F.R. 244.4. An alien may also be denied TPS if certain criminal or national security grounds of inadmissibility apply and are not waived. 8 U.S.C. 1254a(c)(2)(A)(iii), 8 C.F.R. 244.3(c). The Secretary of Homeland Security must withdraw TPS from an alien who was previously granted TPS if: (i) the Secretary finds that the alien was not eligible for such status; (ii) the alien has not remained 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, without good cause. 8 U.S.C. 1254a(c)(3), 8 C.F.R. 244.14(a).

280. An alien granted TPS cannot be removed from the United States and is authorized to work while in such status. 8 U.S.C. 1254a(a)(1). The alien may also travel abroad with

advance permission. 8 U.S.C. 1254a(f)(3). A designation of a foreign state for temporary protected status does not prevent an alien from applying for any immigration benefit to which that alien may be entitled. 8 U.S.C. 1254a(a)(5). However, the granting of TPS itself is not a means to obtaining lawful permanent resident status or any other immigrant status. As of September 2011, more than 300,000 foreign nationals from seven countries had been granted TPS: El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan and South Sudan. At the same time, one country (Liberia) has been provided deferred enforced departure (DED)<sup>6</sup> by Presidential Memorandum. Haiti was designated for TPS on January 15, 2010 following an environmental disaster; in June 2011, Haiti was redesignated for another 18 months. The largest number of recipients of TPS are nationals of El Salvador (more than 200,000); Honduras is next with over 60,000.

281. Since submission of the Second and Third Periodic Report in 2005, aliens of the following countries have been eligible for TPS (authorizations may be extended by the Secretary of Homeland Security):

El Salvador ..... currently expires 9 March 2012  
 Haiti .....currently expires 22 January 2013  
 Honduras ..... currently expires 5 July 2013  
 Nicaragua .....currently expires 5 July 2013  
 Somalia .....currently expires 17 September 2012  
 Sudan ..... currently expires 2 May 2013  
 South Sudan ..... currently expires 2 May 2013

282. Immigration regulations implementing Article 3 of the 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. See 8 CFR 1208.16(c)-18. These regulations set forth a fair and rule-bound process for considering claims for protection under the Convention. Individuals routinely assert Article 3 claims before immigration judges within the Department of Justice's Executive Office for Immigration Review (EOIR), whose decisions are subject to review by the Board of Immigration Appeals, and ultimately by U.S. federal courts. Most aliens found inadmissible are removed pursuant to 8 U.S.C. 1229, which involves hearings before immigration judges and the right to appeal, as described above.

283. In implementing Article 3 of the Convention against Torture in the immigration context, the United States has provided two forms of protection for aliens subject to an order of removal. The first is "withholding of removal." See 8 C.F.R. 1208.16(c). The second form of protection is "deferral of removal." See 8 C.F.R. 1208.18. An alien who establishes that it is more likely than not that the alien would be tortured if removed to the proposed country of removal will be granted withholding of removal under 8 C.F.R. 1208.16(c) unless one of the mandatory grounds for denial applies as set forth at 8 C.F.R.

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<sup>6</sup> Deferred enforced departure (DED) is the successor to extended voluntary departure (EVD). The President determines whether to grant DED to individuals in the United States from a particular foreign state pursuant to his constitutional authority to conduct the foreign relations of the United States. If the President grants DED to foreign nationals in the United States, he does so by directing the Secretary of Homeland Security to implement a deferral of enforced departure for those foreign nationals for a particular period of time. Sometimes the President also directs the Secretary to authorize employment for such foreign nationals for that period of time. Unlike TPS, aliens who benefit from DED do not register for the status with USCIS. However, individuals covered under DED must submit applications for employment authorization and travel authorization.

1208.16(d). An alien who has been ordered removed and who has been found to be otherwise entitled to 8 C.F.R. 1208.16(c) withholding of removal but for the grounds of mandatory denial, shall be granted 8 C.F.R. 1208.17 deferral of removal. “Deferral of removal” is an important component of the U.S. protection regime as, unlike withholding of removal, there are, as required under the Convention, no criminal or security-related exceptions to protection. Claims for these forms of protection are subject to judicial review in connection with a final order of removal. *See* 8 U.S.C. 1252(a)(4). An alien granted either form of protection may be removed to a third country where it is not more likely than not that the alien will be subjected to torture. 8 C.F.R. 1208.16(f), 1208.17(a). Furthermore, protection for an alien granted a deferral of removal can be terminated when the basis for believing the alien would be tortured if removed to a particular country no longer exists. However, an alien who has been granted either form of protection can only be removed to the country to which removal has been ordered withheld or deferred if withholding of removal or deferral of removal is first formally terminated. *See* 8 C.F.R. 1208.22, 1208.24, 1208.17(d) or (e).

284. The United States may consider diplomatic assurances from the country of proposed removal that the alien will not be tortured. *See* 8 C.F.R. 1208.18(c), 1208.17(f). In the rare cases in which diplomatic assurances are used in the immigration removal context, the Secretary of Homeland Security, in consultation with the Department of State, carefully assesses the assurances obtained by the Department of State to determine their reliability as to whether the alien’s removal would be consistent with Article 3 of the Convention against Torture. 8 C.F.R. 1208.18(c) (2). The Department of Homeland Security has moved towards providing a greater degree of process to aliens subject to removal proceedings who have voiced CAT concerns, in cases in which assurances are considered. Aliens are generally provided an opportunity to review the assurances, and are allowed to present evidence on the sufficiency of the assurances. Current assurances practice in the United States involves greater transparency and improved procedural safeguards.

285. The Special Task Force on Interrogations and Transfer Policies, which was created pursuant to Executive Order 13491 of January 22, 2009, made a number of recommendations aimed at improving the United States’ ability to ensure the humane treatment of individuals transferred to other countries. These include recommendations that the State Department have a role in evaluating any diplomatic assurances, that assurances include a monitoring mechanism in cases in which the assurances are required in order for the transfer to proceed, and that the Offices of the Inspector General at the Departments of State, Defense, and Homeland Security submit a coordinated annual report on all transfers conducted by these agencies. These recommendations were adopted by the President and U.S. Government agencies have been implementing them.

286. The Offices of the Inspector General at the Departments of State, Defense, and Homeland Security have completed the first comprehensive annual reports on transfers conducted by each of these agencies in reliance on assurances, including their use in the immigration removal context, and made further recommendations to improve U.S. practice. The reports have not been published and large portions are classified or privileged. However, the Department of State’s report concludes that “[t]he Department of State is doing a good job of negotiating assurances from foreign governments and evaluating the factors that indicate the probability of torture or other harsh treatment of detainees subsequent to transfer to a foreign government’s control.”

287. In exceptional cases where an arriving alien is believed to be inadmissible on terrorism-related grounds and a full disclosure of such grounds and related information would be prejudicial to the public interest or national security, Congress has authorized, under section 235(c) of the Immigration and Nationality Act (INA), alternate removal procedures in which aliens need not appear before an immigration judge. *See* 8 U.S.C.

1225(c). However, in this context, aliens nevertheless have the opportunity to assert Article 3 claims to the Executive Branch, as removal pursuant to section 235(c) is not permitted “under circumstances that violate . . . Article 3 of the Convention against Torture.” 8 C.F.R. 235.8(b)(4). Aliens subject to removal in section 235(c) proceedings are provided a reasonable opportunity to submit a written statement and other relevant information for consideration. Section 235(c) is rarely used to exclude someone from the United States.

288. The discussion above on asylum and withholding of removal separately describes the manner in which the U.S. implements its non-refoulement obligations under the 1967 Protocol relating to the Status of Refugees in the immigration removal context.

289. As noted in paragraph 232 of the Second and Third Periodic Report, the USA PATRIOT Act amended the Immigration and Nationality Act (INA), significantly expanding 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 provide for immigration relief to non-citizen victims of the attacks on September 11, 2001. Some of these provisions, e.g., grounds for inadmissibility on terrorism grounds, were further expanded in the REAL ID Act of 2005. In addition, the Intelligence Reform and Terrorism Prevention Act of 2004 established new grounds of inadmissibility and deportability and new bars to immigration relief with respect to certain human rights abusers (i.e., aliens who have participated in genocide, torture, or extrajudicial killings).

290. In the Child Soldiers Accountability Act of 2008, 122 Stat. 3735 (2009), Congress added grounds of removability for aliens who have engaged in the recruitment or use of child soldiers. The Trafficking Victims Protection Act of 2000 amended the INA to make removable aliens who knowingly aid, abet, assist, conspire or collude in severe forms of trafficking in persons. Additionally, Presidential Proclamation 8342, signed in January 2009, authorizes the Secretary of State to suspend the entry into the United States of any foreign government officials who fail to undertake adequate efforts to combat human trafficking. The International Religious Freedom Act of 1998, codified at 8 U.S.C. 1182(a)(2)(G), amended the INA to render inadmissible and removable foreign government officials involved in particularly severe violations of religious freedom. Involvement in forced sterilization or forced abortion and participation in coerced organ and tissue transplantation are also grounds for inadmissibility.

291. Coordination with domestic state and local law enforcement. Section 287(g) of the Immigration and Nationality Act authorizes DHS/ICE to “enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision . . . may carry out [functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States] at the expense of the State or political subdivision and to the extent consistent with State and local law.” This program is described in greater detail in Part III of this report.

292. The DHS Office for Civil Rights and Civil Liberties (DHS/CRCL) also continues to assist the Department with programs involving state and local law enforcement, including the ICE 287(g) program. Since January 2006, ICE has trained and certified more than 1,500 state and local officers to enforce immigration law through the 287(g) program. As of September 2011, ICE had 287(g) agreements with 69 law enforcement agencies in 24 states. In FY 2009, CRCL helped create a new standard memorandum of agreement for the program, which expanded civil rights and civil liberties protections. CRCL provided technical assistance in the DHS Office of the Inspector General’s inspection of the 287(g) program, and CRCL has worked closely with the ICE Office for State and Local Coordination on the 287(g) program. For example, CRCL participates in the ICE Advisory Committee that recommends whether applicant jurisdictions may join the 287(g) program. In this capacity, staff members gather information from community sources and provide

input regarding civil rights and civil liberties issues within the jurisdiction applying to join the 287(g) program. Further, CRCL receives all civil rights and civil liberties complaints filed by the public with ICE regarding the 287(g) program. CRCL communicates regularly with non-governmental and civil society organizations, and has facilitated several meetings between these groups and DHS and ICE senior leadership to discuss 287(g) program. CRCL has also provided training to ICE Office of Professional Responsibility (OPR) investigators and 287(g) program managers. In response to the 2009 OIG report that reviewed the 287(g) program, ICE has enhanced both local and headquarters oversight of the program through routine OPR site reviews, a new training course for personnel who manage or oversee 287(g) partnerships, and increased numbers of local program managers.

293. CRCL also works with ICE on the Secure Communities Program, a federal information-sharing program that enables the federal government to better identify and remove criminal aliens and those who are within ICE's other civil enforcement priorities. Secure Communities is mandatory in that, once the information-sharing capability is activated for a jurisdiction, the fingerprints that state and local law enforcement voluntarily submit to the FBI for criminal justice purposes to check against the DOJ biometric identification system for criminal history records are also automatically sent to the DHS biometric system to check against immigration and law enforcement records. In FY 2011, ICE and CRCL announced plans for the enhanced civil rights monitoring of Secure Communities based on in-depth statistical analysis of the program operation. ICE and CRCL implemented new training for state and local law enforcement agencies, unveiled a new civil rights complaint process and revised the Detainer Form ICE sends to state and local jurisdictions so that it emphasizes the longstanding guidance that state and local authorities are not to detain individuals for more than 48 hours pursuant to the ICE detainer. ICE and CRCL are examining data for each jurisdiction where Secure Communities actively operates, comparing data for aliens identified by the program to relevant arrest-rate data and identifying any indications of racial profiling. This statistical review will occur four times per year to ensure fully consistent monitoring, and the assessments will be shared quarterly with DOJ. Statistical outliers will be subject to more in-depth analysis and DHS and ICE will take appropriate steps to resolve any issues.

294. DHS and ICE take allegations of racial profiling and other complaints relating to civil rights and civil liberties violations very seriously. Formal allegations lodged with ICE are referred to CRCL, which is tasked with guarding against civil rights violations in DHS programs. The CRCL complaint form is available in English, Spanish, and seven other languages. CRCL notifies the DHS Office of the Inspector General, as well as DOJ, which has jurisdiction to investigate violations of civil rights by state and local law enforcement officers. CRCL has also worked with ICE to create civil rights training for state and local law enforcement agencies and to provide additional information about the program to the public.

295. Northern Mariana Islands. In May 2008, Congress enacted the Consolidated Natural Resources Act of 2008 (CNRA). Title VII of the CNRA extended U.S. immigration laws to the Commonwealth of the Northern Mariana Islands (CNMI), an insular area of the United States which previously had implemented its own immigration regime. The provision extending U.S. immigration laws to the CNMI became effective as of November 28, 2009, and allows for a transition period for certain provisions that concludes on December 31, 2014.

#### **Article 14 – Right to fair trial**

296. Federal and state constitutions and statutory law provide for fair and public court hearings in the United States. The constitutional and statutory framework was described in



the Initial U.S. Report. An independent judiciary and an independent and active bar are dedicated to the ideal and reality of fair trials and appellate procedures. While not perfect, the court system in the United States constantly evolves and adapts in seeking to meet the standards of fairness and due process.

297. To address inequalities in the justice system, in March 2010 the Department of Justice, under Attorney General Eric Holder, initiated and is actively pursuing its Access to Justice Initiative. The Access to Justice Initiative has several distinct, but related, missions. It is charged with improving the availability and quality of indigent defense; enhancing civil legal representation for those without great wealth, including the middle class as well as the poor; promoting less lawyer-intensive and court-intensive solutions when possible; focusing with special care on the legal needs of the most vulnerable in U.S. society; working with federal, state, and tribal judiciaries in strengthening fair, impartial, and independent adjudication; exchanging information with foreign ministries of justice and judicial systems on respective efforts to improve access; and encouraging the development of more thoroughly evidence-based solutions to problems in the delivery of legal services. In January 2011, the Access to Justice Initiative and the National Institute of Justice's International Center convened an Expert Working Group on Internal Perspectives on Indigent Defense to explore domestic and international practices in indigent defense. The 40-person Expert Working Group consisted of leading experts from multidisciplinary communities, including domestic and international practitioners, researchers, government officials, and advocates from nine countries. The goals of the workshop were to help suggest federal priorities on indigent defense, help identify research in the field of indigent defense, learn about alternative and best practices in the provision of defender services for the poor from the United States and around the globe, consider the transferability of successful international practices to the United States, and forge sustained American and international collaborations in the field of criminal legal aid. DOJ attended the meetings primarily in a listening capacity. A report on the conference's proceedings was issued in October 2011.

## 1. Civil Cases

298. Fairness and openness are guaranteed 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 respected. Most importantly, the Due Process and Equal Protection Clauses of the Constitution, which are applicable to the states through the Fourteenth Amendment, mandate that judicial decision-making be fair, impartial, and devoid of discrimination.

299. Neutrality – the absence of improper bias or discrimination – is a core value. 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), “[r]ace 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.” The Court explained: “[w]hen persons are excluded from participation in our democratic processes solely because of race or gender, . . . the integrity of our judicial system is jeopardized.” *Id.* at 146. The law in this area has not changed.

300. As noted in paragraph 276 of the Second and Third Periodic Report, the Supreme Court has, in particular, recognized the importance of granting procedural rights to

individuals in civil cases involving governmental action. 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). Minimum requirements include an unbiased adjudicator; reasonable 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 held that persons have a right to notice of the detrimental action and a right to be heard by the decision maker. In the words of Justice Frankfurter: "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 opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951). See *Grannis v. Ordean*, 234 U.S. 385 (1918); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Fairness in civil proceedings is also ensured by the requirement that where the dispute might result in serious hardship to a party, adversary hearings must be provided. For instance, where a dispute between a creditor and debtor could result in repossession through state intervention, the Supreme Court has concluded that debtors should be afforded notice and a fair adversarial hearing prior to repossession. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In 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). This is true even where the citizen is a fugitive who refuses to return in person to the United States. *Degen v. United States*, 517 U.S. 820 (1996). When action is taken by a federal government agency, the Administrative Procedure Act also imposes requirements on the government, including the impartiality of the decision maker and the right of the party to judicial review of adverse action.

301. Inequalities remain, however, in part because neither the U.S. Constitution nor federal statutes provide a right to government-appointed counsel in civil cases when individuals are unable to afford it. Although inequalities in wealth distribution have an impact on individuals' access to the judicial system and to representation, the equal protection components of state and federal constitutions have helped address economic barriers to some degree. In particular, the Supreme Court has held that access to judicial proceedings cannot depend on a person'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 that conditioned a judicial decree of divorce on the claimant's ability to pay court fees and costs). See also, *N.L.B. v. S.L.J.*, 519 U.S. 201 (1996) (holding unconstitutional a state law that conditioned a parent's right to appeal from a trial court's decree terminating parental rights on the ability to pay record preparation fees). The Supreme Court has made it easier for indigent parties to afford legal representation by invalidating prohibitions in certain cases. 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). Certain statutes also require the provision of counsel in civil legal proceedings such as the federal habeas proceedings in capital cases.

302. 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). In the past 45 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. These acts enable prevailing parties in certain kinds of cases to recoup all or part of their attorneys' fees and expenses

from the losing parties. For more information in this regard, please see the discussion above, in this section on the Access to Justice Initiative. The Legal Services Corporation (LSC), a non-profit corporation created by Congress, also provides civil legal aid for the poor. LSC distributes about 95 percent of its total funding to 136 independent nonprofit legal aid programs with more than 900 offices that provide legal assistance to low-income individuals and families throughout the nation.

303. Arbitration. Courts also recognize that parties may agree to private arbitration of their disputes. Citing the Federal Arbitration Act of 1925, the Supreme Court has enforced contracts between the parties to submit disputes to arbitration. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (workers' individual claims of age discrimination are preempted by collectively bargained arbitration agreement that explicitly covers discrimination claims); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (individual worker was bound by employment agreement to arbitrate Age Discrimination in Employment Act claim). However, law enforcement agencies are not subject to private arbitration agreements and may pursue claims even though the harmed individuals consented to arbitrate the dispute. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (EEOC may sue in federal court despite arbitration agreement between employer and harmed individual). Courts also review arbitration agreements to ensure that they do not infringe on the substantive rights of a party. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality) (courts are to decide gateway matters such as whether a valid arbitration agreement exists); but cf. *Rent-A-Center v. Jackson*, No. 09-497 (U.S., June 21, 2010) (finding that where an arbitration agreement delegates the authority to decide its enforceability to an arbitrator, challenges to the delegation are for the courts to decide, but challenges to the validity of the entire arbitration agreement are for the arbitrator). The use of arbitration agreements to preempt trials of civil rights claims remains a controversial and debated practice. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (California must enforce consumer arbitration agreement prohibiting pursuit of a claim as a member of a class because the Federal Arbitration Act preempts California contract law that would have held the provision unenforceable).

## 2. Criminal Cases

304. Trial by jury. The right to trial by jury in a criminal case reflects "a profound judgment about the way in which law should be enforced and justice administered." See *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). In the United States system, the jury is the fact-finder in criminal cases. 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 or she 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, *Blakeley v. Washington*, 542 U.S. 296 (2004). But see, *Oregon v. Ice*, 129 S. Ct. 711 (2009) (holding that the Sixth Amendment does not prevent states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses).

305. Right to legal assistance in state court. The right to counsel in all federal criminal prosecutions, provided under the Sixth Amendment of the Constitution, 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 Court extended this rule to

provide for the appointment of counsel to indigent persons charged with any offense, including misdemeanors, that could result in incarceration.

306. Right to prepare defense and to communicate with counsel. The Sixth Amendment guarantees a defendant the right to counsel in criminal cases involving possible incarceration. Defendants retained in custody acquire this right when formal adversarial judicial proceedings are initiated against them. *Brewer v. Williams*, 430 U.S. 387, 398 (1977). In 2008, the Supreme Court held that the right attaches at the initial appearance before a judge when the defendant learns the charge against him, whether or not the public prosecutor is involved. *Rothgery v. Gillespie Co., Texas*, 554 U.S. 191 (2008). In addition, the Court has held that the protection against introduction of statements obtained without counsel applies only once the defendant has actually requested counsel or otherwise asserted the Sixth Amendment right to counsel; the mere reading of Miranda rights to the defendant is not enough to engage those protections. *Montejo v. Louisiana*, 129 S. Ct. 2075 (2009). A suspect's invocation of the right to counsel is specific to the offense charged 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. *Texas v. Cobb*, 532 U.S. 162, 173 (2001). 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 on a defendant's violation of the terms of probation where the defendant 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).

307. Initial Appearance. At both the federal and state levels, all persons who have been arrested or detained by law enforcement officers must be brought before a judicial officer promptly even when the arrest has been made pursuant to a warrant issued upon a finding of probable cause. Officers who arrest a person without a warrant must bring that person before a magistrate for a judicial finding of probable cause within a reasonable time. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Though "reasonable time" is undefined, the Supreme Court has held that it generally cannot be more than 48 hours, see *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Some states may apply more stringent statutory or constitutional requirements to bar detention for even that length of time. If there is "unreasonable delay" in bringing the arrested person before a magistrate or judge for this initial appearance, confessions or statements obtained during this delay period may be excluded from evidence at trial. See *Corley v. United States*, 556 U.S. 303 (2009).

308. Not all delay over 48 hours will be deemed unreasonable. For example, the Supreme Court suggested in one case that a delay of three days over a three-day holiday weekend did not violate the person's due process rights. *Baker v. McCollan*, 443 U.S. 137, 145 (1979). In other instances, for example when the police seek to check the defendant's story, delay greater than 48 hours may also be found to be reasonable. *Mallory v. United States*, 354 U.S. 449, 455 (1957).

309. In arrests for violations of federal law, Fed. R. Crim. P. 5 requires that an arresting officer bring the accused before the nearest available magistrate without unnecessary delay. If a federal magistrate or judge is not available, the person must be brought before a state or local official. See 18 U.S.C. section 3041; Fed. R. Crim. P. 5(a). At this proceeding, called an "initial appearance", the judge or magistrate informs the accused of the charges against him, informs the suspect of his right to remain silent and the consequences if he chooses to make a statement, his right to request an attorney or retain counsel of his choice, and of the general circumstances under which he may obtain pretrial release. Fed. R. Crim. P. 5(c). The magistrate will also inform the accused of his right to a preliminary hearing, assuming that the person has not yet been indicted by a grand jury, and allow reasonable time to consult with his attorney. Fed. R. Crim. P. 5(c).

310. Confrontation. Admission of out-of-court testimonial statements in the prosecution's case-in-chief violates the Sixth Amendment's Confrontation Clause unless the witnesses who made those statements are unavailable for trial and the defendant has had an opportunity to cross-examine them. *Crawford v. Washington*, 541 U.S. 36 (2004).

311. Protection against self-incrimination. The Fifth Amendment provides that "[n]o 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. 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 using in its case-in-chief statements taken from the accused against his or her 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 to pressure or coerce the defendant into confessing and, if so, whether the defendant lacked the capacity to resist the pressure. See *Colorado v. Connelly*, 479 U.S. 157 (1986). Physical coercion will generally render a confession involuntary. See *Brown v. Mississippi*, 297 U.S. 278 (1936).

312. 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 that individual gives a statement during questioning by government agents, the investigating officer conducting a custodial interrogation is obligated to inform each suspect that the suspect has a right to remain silent, that anything said can be used against the suspect, 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 also *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (Miranda announced a constitutional rule that cannot be overruled by congressional enactment).

313. Review of conviction and sentence. As discussed under Article 9, individuals who allege that their federal or state 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).

314. Convicted 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' interests in the finality of their criminal convictions. See *Coleman v. Thompson*, 501 U.S. 722 (1991); *McClesky v. Zant*, 499 U.S. 467 (1991); *Teague v. Lane*, 489 U.S. 288 (1989). In 1996, many of the judicially-created limitations were incorporated into statutory law concerning habeas corpus through enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), 110 Stat. 1214 (1996).

315. Double jeopardy protections for defendants. The Fifth Amendment to the U.S. Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." In *Smith v. Massachusetts*, 543 U.S. 462 (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. U. S. Government policy, set out in the United States Attorney's Manual section 9-2.031 (2000) (the "Petite" policy), precludes federal prosecution of a defendant after he or she 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.” Under the policy, 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; 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 policy must be approved in advance by an Assistant Attorney General. Third, the government must believe that the defendant’s conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction.

316. Procedure in the case of juvenile persons. Historically, confidentiality was one of the special aspects of juvenile proceedings; 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. 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. The United States notes in this context its reservation concerning Article 14 in its instrument of ratification of the Covenant.

317. Assistance to persons with limited English proficiency. Under Title VI of the Civil Rights Act of 1964 and Section 14141 of the Safe Streets Act, state and local criminal courts that receive federal financial assistance, which encompasses a large number of state and local criminal courts, are prohibited from discriminating on the basis of national origin and are required to provide language assistance to individuals with limited English proficiency. DOJ enforces this requirement through either the Office of Justice Programs or the Civil Rights Division.

318. Inequalities in access to justice. As noted above, the right to counsel has been extended to all criminal prosecutions – state or federal, felony or misdemeanor – that carry a sentence of imprisonment. By law, counsel for indigent defendants is provided without discrimination based on race, color, ethnicity, or other factors. Federal, state and local courts use a variety of methods for delivering indigent criminal defense services, including public defender programs, assigned counsel programs, and contract attorneys. Despite gains in provision of public defender services, however, participation in the justice system can still be difficult for persons without significant financial resources. In order to improve delivery of legal services to the poor and middle class, DOJ launched the Access to Justice Initiative in March 2010. The Initiative works within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers.

### **Article 15 – Prohibition of ex post facto laws**

319. The U.S. Constitution forbids both the federal government and the states from enacting ex post facto laws. Article I, section 9, addressing the duties of Congress, states that, “[n]o . . . ex post facto law shall be passed.” In addition, Article I section 10 provides that “[n]o state shall . . . pass any . . . ex post facto law.” An ex post facto law would retroactively make unlawful conduct that was lawful when it was committed, or would increase criminal penalties retroactively. U.S. law and practice with respect to Article 15

are described in paragraphs 508-511 of the Initial Report and paragraph 289 of the Second and Third Periodic Report, and the law in this area has not changed.

### **Article 16 – Recognition as a person under the law**

320. The law in this area has not changed since the submission of the previous report.

### **Article 17 – Freedom from arbitrary interference with privacy, family, home**

321. Right to privacy. As discussed further in paragraphs 515-544 of the Initial Report and paragraph 291 of the Second and Third Periodic Report, freedom from arbitrary and unlawful interference with privacy is protected under the Fourth and Fourteenth Amendments to the U.S. Constitution. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (due process clause of the Fourteenth Amendment held to protect the right of same sex adults to engage in private consensual sexual conduct).

322. Search and seizure. The Fourth Amendment, with certain exceptions, prohibits the government from conducting unreasonable searches and seizures. Government searches and seizures are presumptively unreasonable if conducted without a warrant, unless one of the established exceptions to the warrant requirement applies; all warrants must be based on probable cause to believe that a crime has been, will be, or is being committed. There are limited exceptions to the warrant requirement. For example, in the case of exigent circumstances, the government can seize evidence without a warrant when such evidence would be destroyed if law enforcement delayed action in order to get a warrant. The Fourth Amendment also prohibits the use of “general” warrants. All warrants must state with “particularity” the places to be searched and the things to be seized. This “particularity” requirement ensures that the government does not collect more information than it has probable cause to believe will yield evidence of a crime.

323. The Fourth Amendment’s protections are implemented through the “exclusionary rule” – the rule that evidence obtained in violation of the Fourth Amendment is excluded from use at trial. Fourth Amendment protections with regard to the home have also resulted in application of a “knock and announce” rule, which generally requires police who are executing search warrants in the home to knock and announce their presence and wait a reasonable length of time before entering. In 2006, however, the U.S. Supreme Court held that the exclusionary rule could not be invoked to exclude evidence obtained through the execution of a lawful and valid search warrant but in violation of “knock and announce” procedures, because the interests violated by the abrupt entry of police are not related to the seizure of the evidence, and the deterrence benefits of applying such an exclusionary rule in this context do not outweigh the substantial social costs of evidence suppression. See *Hudson v. Michigan*, 547 U.S. 586 (2006). In 2011, the Supreme Court held that police may make a warrantless entry based on exigent circumstances (e.g., the need to prevent destruction of evidence) as long as the police did not create the exigency by violating or threatening to violate the Fourth Amendment. See *Kentucky v. King*, 131 S. Ct. 1849 (2011).

324. Technology: movements and conversations: electronic surveillance. As discussed in paragraphs 292 – 312 of the Second and Third Periodic Report, Congress has recognized that substantial privacy infringements could occur 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 communications systems), digital “clone” pagers, and surreptitiously installed microphones. Substantial differences exist in constitutional and statutory protections afforded with regard to “content” devices, such as wiretaps, as opposed to “non-content” devices, such as pen registers.

325. No statute regulates the use of video surveillance, as discussed in paragraph 300 of the Second and Third Periodic Report, but courts have concluded that video surveillance may be conducted as long as it is done in a manner consistent with the protections provided by the Fourth Amendment. DOJ’s Criminal Resource Manual, which sets forth the procedures for obtaining approval for surveillance by law enforcement officers, includes procedures for approval of video surveillance.

326. The Electronic Communications Privacy Act of 1986 (ECPA) addresses, inter alia, access to stored wire and electronic communications and transactional records, and the use of pen registers and trap and trace devices. *See* ECPA, Titles II and III, 100 Stat. 1848. The Act generally prohibits unauthorized access to or disclosure of stored wire and electronic communications in specified cases; it also provides for legal procedures that law enforcement may use to obtain such communications and records. The pen register and trap and trace provisions prohibit the installation or use of a pen register or trap and trace device, except as provided for in the statute. Except in narrow circumstances, law enforcement may not install a pen register or a trap and trace device without a prior court order.

327. Under federal law, communications may be intercepted by a person acting under color of law if one of the parties to the communication has given prior consent, 18 U.S.C. 2511(2)(c), 2701(c)(2), 3123(b)(3) (2004). Likewise, it has been held that the Fourth Amendment’s protection of the reasonable expectation of privacy does not require that the government obtain a warrant for a consensual interception. *See Lopez v. United States*, 373 U.S. 427 (1963). Although no warrant or court order is required where one party to the conversation has consented to the interception, DOJ has issued guidelines to ensure that, in such cases, the consenting party will be present at all times and that no agent or person cooperating with the department or agency trespasses while installing a device, unless pursuant to a court order authorizing entry and/or trespass. *See* Attorney General’s Memorandum of May 30, 2002; paragraphs 303 and 304 of Second and Third Periodic Report.

328. As described in greater detail in paragraphs 305 and 306 of the Second and Third Periodic Report, a number of statutes protect the privacy of information commonly maintained on computer databases. The Privacy Act of 1974 (Privacy Act), 5 U.S.C. 552a, incorporates all of the Fair Information Practice Principles (FIPPs) that have long been a cornerstone of international instruments relating to informational privacy, including but not limited to the 1980 Organization for Economic Cooperation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. The Privacy Act requires federal agencies to provide public notice of its information collections, including the purpose and intended uses of those collections, and prevents them from using or disclosing information collected for one purpose for an incompatible purpose, unless excepted by the Act. It also requires government agencies, subject to certain exemptions, to “maintain in [their] records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order of the President.” 5 U.S.C. 552a (e) (1). The Computer Matching and Privacy Protection Act of 1988 amended the Privacy Act to regulate computer matching of federal data for federal benefits eligibility or recouping delinquent debts. The Fair Credit Reporting Act, 15 U.S.C. 1681-81 (v), regulates the distribution and use of credit information by credit agencies. The Video Privacy Protection Act, 18 U.S.C. 2710, protects the disclosure and sale of customer records regarding video rentals. The Right to Financial



Privacy Act, 12 U.S.C. 3401-22, limits access to customers' bank records by the federal government. The Privacy Protection Act, 42 U.S.C. 2000aa-2000aa-12, provides special procedures for government searches or seizures of the press and other publishers. Title V of the Gramm-Leach-Bliley Act, 113 Stat. 1338, addresses the protection and disclosure of nonpublic customer information by financial institutions. The Rehabilitation Act of 1973 and the Americans with Disabilities Act provide for confidentiality of medical information submitted to employers by employees relating to their disabilities, as well as restrictions on the types of medical information that can be requested by employers. The Equal Employment Opportunity Commission (EEOC) has issued extensive guidance on these provisions at 29 C.F.R. 1630 and in advisory opinions and guidance available at <http://www.eeoc.gov>. In addition, the Health Insurance Portability and Accountability Act, 42 U.S.C. 1320d-1320d-8, provides for protections regarding the privacy of individually identifiable health information. Except for the Privacy Act of 1974, none of these statutes generally distinguishes between U.S. and non-U.S. nationals with regard to privacy rights and access to judicial and other remedies.

329. A number of laws and regulations also protect the confidentiality of certain information specifically regarding aliens, with limited exceptions. The protected information includes asylum and TPS applications, 8 C.F.R. 208.6, 244.16, 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). Confidentiality provisions also protect victims of trafficking and other serious crimes who receive U and T visas, as well as VAWA self-petitioners, under 8 U.S.C. 1367.

330. Since the submission of the Second and Third Periodic Report, the issue of surveillance and gathering of foreign intelligence information to address terrorism has been much debated in the United States. The 1978 Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 et seq., regulates electronic surveillance and physical searches as defined by the statute. FISA allows DOJ to obtain orders from the Foreign Intelligence Surveillance Court (FISC) if, inter alia, there is probable cause to believe that the target of the electronic surveillance or the physical search is a foreign power or an agent of a foreign power, provided that no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution of the United States, 50 U.S.C. 1805 (a)(2)(A). FISA also permits other types of surveillance activities, such as the installation and use of pen register and trap and trace devices or emergency authorizations for electronic surveillance and physical searches without an order from the FISC. By law, FISA and chapters 119, 121, and 206 of title 18 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and titles II and III of ECPA) are the "exclusive" means by which electronic surveillance, as defined in that act, and the interception of domestic wire, and oral or electronic communications, may be conducted, 50 U.S.C. 1809.

331. The USA PATRIOT Act amended the electronic surveillance, physical search, and pen register provisions of FISA and added a business records provision to the statute. Among other things, it permitted "roving" surveillance authority under the FISA based on a court order; it increased the duration of authorizations for FISA surveillances and searches of certain non-U.S. persons who are agents of a foreign power; and it amended FISA to require that an application for an electronic surveillance order or search warrant must certify that a significant purpose of the surveillance or search is to obtain foreign intelligence information. When the PATRIOT Act was reauthorized in 2005, certain provisions were extended, such as the extended duration of FISA electronic surveillance and search orders and warrants involving non-U.S. person agents of a foreign power. In addition, when the PATRIOT Act was reauthorized in 2005, additional changes were made to the provision authorizing the acquisition of business records.

332. When the President acknowledged in 2005 that the U.S. National Security Agency (NSA) had been intercepting, without a court order, certain international communications where the government had a reasonable basis to conclude that one party was a member of or affiliated with Al Qaeda or a member of an organization affiliated with Al Qaeda and where one party was outside the United States, considerable congressional and public attention was brought to bear on issues regarding the authorization, review and oversight of electronic surveillance programs designed to acquire foreign intelligence information or to address international terrorism. In 2007, Congress conducted a number of hearings about the program and its constitutional and privacy implications. The program was also challenged on statutory and constitutional grounds, see *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007).

333. In 2007, Congress enacted the Protect America Act, P. L. 110-55, which excluded from the FISA definition of electronic surveillance any surveillance directed at a person reasonably believed to be located outside the United States. In particular, it allowed the Attorney General and the Director of National Intelligence to authorize, for up to one year, acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States if the Attorney General and the Director of National Intelligence determined that five criteria were met: (1) reasonable procedures are in place for determining that the acquisition concerns persons reasonably believed to be located outside the United States; (2) the acquisition did not constitute electronic surveillance as defined by FISA; (3) the acquisition involves obtaining the communications data from or with the assistance of a communications service provider, custodian or other person that has access to communications; (4) a significant purpose of the acquisition is to obtain foreign intelligence information; and (5) the minimization procedures to be used meet the requirements of the FISA. By the terms of the Act, a number of its provisions lapsed 180 days after the date of enactment.

334. Because a number of the Protect America Act provisions lapsed after six months, Congress again amended the Foreign Intelligence Surveillance Act in 2008. The final 2008 FISA amendments repealed many of the provisions of the Protect America Act, but allowed for continuation of some sections with regard to existing orders and authorizations as well as for renewal of authorizations and directives issued under these sections. The act also granted immunity to the telecommunications providers and established a framework for certain acquisitions targeting persons reasonably believed to be located outside the United States.

335. Although the following three amendments to the FISA were set to expire on December 31, 2009, Congress has reauthorized these provisions until June 1, 2015: (1) section 6001(a) of the Intelligence Reform and Terrorism Protection Act (IRTPA), which allows a non-United States person who “engages in international terrorism or activities in preparation therefore” to be considered an agent of a foreign power under FISA; (2) section 206 of the USA PATRIOT Act, which permits “roving” wiretaps in certain circumstances; and (3) section 215 of the PATRIOT Act, which, inter alia, broadens the types of business records that could be made accessible to the government under FISA.

## **Article 18 – Freedom of thought, conscience and religion**

336. The First Amendment to the U.S. Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. This amendment is made applicable to state and local governments by the Fourteenth Amendment of the Constitution. Freedom of thought and conscience is protected by the guarantee of freedom of speech and opinion. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (noting that “the right of freedom of thought

[is] protected by the First Amendment”). The U.S. Supreme Court has “identified the individual’s freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment.” *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985). Forty years later, the Supreme Court declared that the “heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.” *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

337. The right to freedom of thought and conscience, including the right to non-belief, is in many circumstances subsumed within freedom of religion. The government may not force a person to profess a belief or disbelief in a particular religion. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (Maryland requirement that to hold public office a person must state a belief in God violated the First and Fourteenth Amendments of the U.S. Constitution). Writing for the Supreme Court, Justice Stevens stated: “[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful,” *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). For more general information regarding non-discrimination on the basis of religion, please see the discussion above under Article 2.

338. By Executive Order 13498 of February 5, 2009, President Obama created an Advisory Council on Faith-based and Neighborhood Partnerships, and renamed and refocused the White House Office of Faith-based and Neighborhood Partnerships (Office). The Council is a resource for non-profits and community organizations, both secular and faith-based. The mission of the Council, as laid out in the Executive Order, is to “bring together leaders and experts in fields related to the work of faith-based and neighborhood organizations in order to: identify best practices and successful modes of delivering social services; evaluate the need for improvements in the implementation and coordination of public policies relating to faith-based and other neighborhood organizations; and make recommendations to the President, through the Executive Director [of the Office], for changes in policies, programs, and practices that affect the delivery of services by such organizations and the needs of low-income and other underserved persons in communities at home and around the world.” The Office forms partnerships between governments at all levels and non-profit voluntary organizations, both secular and faith-based, more effectively to serve Americans in need. The Office has coordinated President Obama’s national fatherhood agenda; built partnerships between federal agencies and local nonprofits on, for example, supporting the inclusion of faith-based organizations so they are a part of the government’s disaster response efforts; brought people together across religious lines (e.g., working with groups on more than 4,000 interfaith service projects in 2009); and helped to lead the Administration’s efforts on interfaith cooperation abroad. The Office has also worked to help local organizations respond to the economic crisis, from implementing foreclosure prevention programs to strengthening nonprofit capacity building. The Office coordinates 12 federal centers for faith-based and neighborhood partnerships. Each center forms partnerships between its agency and faith-based and neighborhood voluntary organizations to advance specific goals. For example, the Department of Education’s Center for Faith-based and Neighborhood Partnerships empowers faith-based and community organizations to apply for federal grants by supplying resources and training, but it does not make the decisions about which groups will be funded. Those decisions are generally made through a careful competitive process established by each grant program.

339. Charitable status for taxation and solicitation. The U.S. Constitution limits the government’s ability to regulate the activities of religious organizations. There has been no

change in the law with regard to the lack of a requirement for religious organizations to register with any federal government agency in order to operate. Likewise, the law has not changed with regard to the tax-exempt status of religious and other charitable organizations as described in paragraphs 320 – 322 of the Second and Third Periodic Report.<sup>7</sup>

340. Religious Freedom Restoration Act. As noted in paragraph 314 of the Second and Third Periodic Report, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000(b)(b), which invalidates government action that substantially burdens religious exercise unless the action is the least restrictive means of furthering a compelling government interest, applies to actions by the federal government, but not to the states. The Supreme Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the attempt by Congress to make the RFRA applicable to the states exceeded congressional authority. In response to this decision many states have adopted their own versions of the RFRA to ensure that religious exercise is not burdened by state action, including Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas.

341. In *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006), the Supreme Court held that the RFRA required the federal government to permit the importation, distribution, possession and use of a hallucinogenic controlled substance for religious purposes by the Uniao Do Vegetal church, even where Congress had found the substance to have a high potential for abuse and to be unsafe for use even under medical supervision, and where its importation and distribution would violate an international treaty. The Court held that the RFRA requires courts to examine individual religious freedom claims and to grant exceptions to generally-applicable laws (in this case, the Controlled Substances Act) where no compelling government interest in regulating the activity can be shown.

342. Religious Land Use and Institutionalized Persons Act. In response to The City of Boerne case, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 804, imposing 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 governmental interest and must be accomplished through the least restrictive means. Lower courts have continued to uphold RLUIPA against constitutional challenges. See, e.g., *Westchester Day School v. Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (upholding land use provisions of RLUIPA under the Establishment Clause, the Commerce Clause, and the Tenth Amendment); *Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009) (upholding prisoner provision of RLUIPA under the Spending Clause as valid condition imposed on states for receipt of federal funding).

343. As noted above, indigenous representatives have raised the issue of the practice of Native American religious activities in prisons. As a general matter, RLUIPA has removed barriers to the religious practices of Native Americans and others, where the prisoner demonstrates a substantial burden on religious exercise, and where the prohibition is not

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<sup>7</sup> In *United States v. Living Word Christian Center*, 103 A.F.T.R.2d 2009-714 (D. Minn. 2009), a Minnesota District Court held that the Director of Exempt Organizations, Examinations (i.e., the Examinations function within the Exempt Organizations division) is not an “appropriate high-level Treasury official” for purposes of the section 7611 procedural limitations on IRS church tax inquiries. On August 5, 2009, the Treasury Department and the IRS issued proposed regulations under section 7611 providing that the Director of Exempt Organizations is an appropriate high-level Treasury official for purposes of the section 7611 provisions regarding church tax inquiries. To date, final regulations have not been issued.

necessary and narrowly tailored to meet a compelling government interest. However, in 2008, the Ninth Circuit Court of Appeals heard a case involving a total prohibition on group worship for maximum security prisoners. *Greene v. Solano County Jail*, 513 F.3d 982 (2008). The court remanded the case for a determination whether such a total prohibition is the least restrictive means to maintain jail security, and a settlement was reached at that time.

344. Religion and public schools. State-sponsored religious speech in public schools is generally severely restricted by the Constitution, while at the same time genuinely private religious speech by students at schools is strongly protected. See, e.g., *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (student-created Bible club had constitutional right to the same access to school facilities for its meetings that other student-initiated clubs were given). As discussed above under Article 2, *Hearn and U.S. v. Muskogee Public School District* (E.D. Okla. 2004) involved an action against a school district that had barred a Muslim girl from wearing a hijab to school. The resulting consent decree protects the rights of students to wear religious garb. DOJ also obtained a settlement in a case in which another girl was harassed by a teacher and students because she was a Muslim.

345. In September 2009, DOJ/CRD opened an investigation involving an altercation between a Black student and a Muslim student in a Michigan school district. Ultimately, several other students jumped into the fight and attacked the Muslim student. During the fight, the Muslim student's hijab was snatched from her head, and the students who attacked her allegedly shouted several religious and national origin epithets. CRD entered into an agreement with the district that required the district to mediate the conflict resolution process for all students involved in the altercation and engage the services of a nonprofit dispute resolution organization to assist with addressing tensions between the Black and Muslim communities. In 2008, CRD entered into two agreements with a district in Arizona resolving a complaint from a parent alleging religious and national origin discrimination. The complaint alleged that a male student was harassed by other students for being from the Middle East and a Muslim. The agreements addressed harassment directed at the student and required the school district to revise its non-discrimination policies and procedures. In May 2007, CRD reached an agreement with a Texas school district that allows Muslim high school students to say their midday prayers at the school. The agreement stemmed from CRD's investigation of a complaint alleging that the school had denied the students' requests to pray during lunch in an unused space and had prohibited them from saying their prayers in a corner of the cafeteria, even though the school permitted other groups of students to gather during the lunch hour.

346. With regard to governmental funding, 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 or her choice, whether public or private, secular or religious, the Supreme Court has found that the non-Establishment principle of the Constitution is not violated. Second, where the government itself gives aid directly to a private or religious school, the aid will pass constitutional muster if the aid is secular in nature, is distributed in a neutral manner without regard to religion, and where the aid is not used by the recipient for religious purposes. The law in this area has not changed substantially since the submission of the Second and Third Periodic Report.

347. Federal funding of religious charities. As noted in paragraph 317 of the Second and Third Periodic Report, Congress has enacted numerous provisions permitting federal funding of religiously affiliated charities. For example, religious organizations are permitted to participate in certain welfare grant programs under Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. 2105 (1996). In addition, executive branch agencies that administer social services programs have adopted rules implementing Executive Order 13279 that prohibit discrimination against religious

organizations in the selection of grant recipients. Religious organizations are permitted to participate in systems where beneficiaries receive vouchers to redeem at any of a number of service providers regardless of whether their services are secular or religious; and are also permitted to participate in direct grant systems, as long as the religious providers do not discriminate against beneficiaries on the basis of their religious beliefs or require beneficiaries to participate in any religious activities, and as long as the programs sufficiently segregate religious and secular activities in a manner that ensures that the government funds do not subsidize religious activities. When the government itself makes decisions about which schools to send aid, it must ensure that such aid is not diverted to religious uses. *See, e.g., Mitchell v. Helms*, 530 U.S. 793 (2000). The law with regard to these areas has not changed significantly since the last report.

348. Government sponsored religious displays. As noted in paragraph 572 of the Initial Report and paragraph 318 of the Second and Third Periodic Report, the law regarding government-sponsored religious displays remains fact-specific. In *Pleasant Grove City Utah v. Summum*, 555 U.S. 460 (2009), the Supreme Court upheld Pleasant Grove's denial of a request by the Summum religious organization to erect a monument containing the seven Aphorisms of Summum in a public park in which a Ten Commandments monument already stood. The Court held that the placement of privately donated, permanent monuments in a public park is a form of government speech not subject to scrutiny under the Free Speech Clause of the Constitution. The Court did not resolve whether the city's display of the Ten Commandments violated the Establishment Clause. In *Salazar v. Buono*, 130 S.Ct. 1803 (2010), the Supreme Court ordered a federal appeals court to reconsider an order that would have forced removal of a large cross placed on land in the Mojave National Preserve 75 years earlier, following World War I. A plurality of the court found that the intent of the cross was not to set the state's imprimatur on a particular creed, but rather to honor fallen soldiers, a cause that had become entwined in the public consciousness.

349. Religion and employment. Title VII of the Civil Rights Act of 1964 requires employers to accommodate the sincerely held religious observances and practices of their employees so long as the accommodation does not impose an undue hardship. The law also contains exceptions for religious employers so that, for example, a church may prefer coreligionists in hiring. Although it is not an expressly stated exception in the statute, courts have often held that individuals employed by religious institutions in a clergy or "ministerial" capacity cannot bring EEO claims. However, the scope and application of this exemption is the subject of a case currently pending before the U.S. Supreme Court, which will be decided in the 2011-12 term. *See EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F. 3d 769 (6th Cir. 2010), cert. granted, 131 S. Ct. 1783 (2010). The EEOC investigates allegations of religious discrimination in employment and occasionally files lawsuits to protect the rights of those who are harmed. Workers also may file their own lawsuits. Examples of recent lawsuits include: a complaint by a Muslim worker about harassment that included slurs and questions about whether he was a terrorist because of his faith, *EEOC v. Sunbelt Rentals, Inc.*, No. PJM 04-cv-2978 (D. Md.) (settled Oct. 16, 2009 for \$46,641 to the employee); and a lawsuit challenging an employer's refusal to grant leave to, and eventual termination of, a worker who sought time off to observe his Sabbath, *EEOC v. Staybridge Suites*, No. A:08-cv-02420 (W.D. Tenn.) (settled Sept. 14, 2009 for \$70,000). Further description of EEOC enforcement against employment discrimination based on religion is contained in the discussion of Article 20, below.

350. Religious Freedom within the Armed Forces. Within the United States Armed Forces, service members are allowed free access to any and all religious denominations of their choosing, as are all persons under U.S. authority. The military goes to great lengths to accommodate these religious needs. Title 10 of the U.S. Code prescribes chaplains for each

of the Military Departments for the function of providing religious services to meet the needs of the Military Members of that Department.

351. The 202 Department of Defense-approved Ecclesiastical Endorsing Agencies, supporting Chaplains from around 200 different religious denominations, indicate the strength of support to the broad diversity of religions in the U. S. military. Through the process of “Appointment of Chaplains for the Military Departments” (Department of Defense Instruction (DoDI) 1304.19), any given Ecclesiastical Endorsing Agency that meets IRS section 501(c)(3) exempt status, and a few additional basic uniform support standards, can establish a Chaplainship for a military officer in its faith. Minority faiths often have a high ratio of chaplain support. In September 2009, 180 Catholic Priests supported the nearly 284,000 Catholics in the U. S. military, for a ratio of 1 Chaplain to every 1,578 Catholics. There are three Chaplains for the U. S. military’s 5,358 Buddhists (a ratio of 1 to 1,786), eight Chaplains serving the military’s 3,540 Muslims (a ratio of 1 to 443), and 17 rabbis serving the 4,712 Jews (a ratio of 1 to 277). These numbers of believers are based on self reporting by servicemembers.

352. Military Chaplains are charged with leading those of their own faith. They also are mandated “to advise and assist commanders in the discharge of their responsibilities to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution.” Chaplains also must be willing to “support directly and indirectly the free exercise of religion by all members of the Military Services, their family members, and other persons authorized to be served by the military chaplaincies,” without proselytizing to them. As well, they must “perform their professional duties as Chaplains in cooperation with Chaplains from other religious traditions.” (DoDI 1304.28). For individuals within the military seeking to exercise their religious freedom, “[i]t is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.” (DoDI 1300.17, “Accommodation of Religious Practices Within the Military Services”).

353. International Religious Freedom. The International Religious Freedom Act of 1998, as amended, provides that United States policy is to promote, and to assist other governments in the promotion of, religious freedom. That Act requires the President annually to designate countries of particular concern for religious freedom; it also amended the Immigration and Nationality Act to make foreign government officials who have committed severe violations of religious freedom ineligible to receive visas or be admitted into the United States. 8 U.S.C. 1182(a)(2)(G). In September 2011, the following countries were listed as countries of particular concern: Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan and Uzbekistan. Following designation, the United States will seek to work with the designated countries to bring about change through various means, possibly including negotiation of bilateral agreements or application of sanctions. The United States Report on Religious Freedom for July – December 2010, released on September 13, 2011, can be accessed at: [www.state.gov/g/drl/rls/irf/2010\\_5/index.htm](http://www.state.gov/g/drl/rls/irf/2010_5/index.htm).

## **Article 19 – Freedom of opinion and expression**

354. 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 and paragraphs 327 – 329 of the Second and Third Periodic Report describe how freedom of opinion and expression are zealously guarded in the United States, and also describe the constitutional limitations on freedom of expression. That basic legal framework has not changed. In the recent case of *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), which involved a church congregation that picketed near a soldier’s funeral to communicate

its view that God hates the United States for its tolerance of homosexuality, the Supreme Court ruled that the picketers on a public street, acting in compliance with police guidance, had a First Amendment right to express their views on a matter of public concern. On that basis, the Court set aside a jury verdict awarding tort damages to the soldier's father for intentional infliction of emotional distress. In another recent free speech case, *Brown v. Entertainment Merchants*, 131 S. Ct. 2729 (2011), the Court struck down a California law restricting the sale or rental of violent video games to minors. The Court found that video games qualify for First Amendment protection as protected speech and that the law was invalid unless it was justified by a compelling governmental interest and was narrowly tailored to achieve that interest. The Court ruled that California could not meet that standard in part because (1) California had not demonstrated a direct causal link between exposure to violent video games and harmful effects on children; (2) California had not placed restrictions on other violent media, such as Saturday morning cartoons; and (3) there were other, less speech-restrictive ways to shield children from violent video games, e.g., the industry's voluntary rating system.

355. Political Speech. Freedom of expression includes political speech, and the Supreme Court has ruled on several campaign finance reform laws on political expression grounds in recent years. In 2006, the Court struck down Vermont's low mandatory limits on political candidate expenditures as violating freedom of speech under the First Amendment, and also struck down Vermont's limits on political contributions as unconstitutionally low. *Randall v. Sorrel*, 548 U.S. 230 (2006). In 2010, the Supreme Court struck down federal laws prohibiting corporations and labor unions from using their general treasury funds to make expenditures, uncoordinated with any candidate, on communications related to federal elections. See *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). For further discussion of the case, see Article 25, below.

356. In several other recent cases, however, the Supreme Court has upheld state regulation of conduct in the face of First Amendment claims. In *Davenport v. Washington Education Association*, 551 U.S. 177 (2007), the Court held that it is not a violation of the First Amendment for a state to require its public sector unions to receive affirmative authorization from non-members before spending the agency fees contributed by those non-members for election-related purposes. In the Court's view, because the state of Washington could have restricted public sector agency fees to the portion of union dues devoted to collective bargaining, or could even have eliminated them entirely, Washington's far less restrictive limitation on authorization to use government employees' funds for certain purposes was not of constitutional concern. In *Beard v. Banks*, 548 U.S. 521 (2006), the Court held that a prison rule that kept newspapers and magazines out of the hands of disruptive Pennsylvania inmates did not violate the First Amendment. The Court found that the policy was rationally related to a legitimate penological goal of motivating good behavior, that accommodating the prisoners could result in negative consequences, and that there was no alternative means of accomplishing the goal.

357. Freedom of expression in schools. Freedom of expression extends to students at public elementary and secondary schools, who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969) (holding that school district violated the First Amendment by suspending students for wearing armbands to school in protest of the Vietnam War). In *Morse v. Frederick*, 551 U.S. 393 (2007), however, the Supreme Court held that because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, school officials did not violate the First Amendment when they confiscated a pro-drug banner reading, "Bong Hits 4 Jesus" that was unfurled by a student at a school event, or when they suspended the student because of the incident.



358. *Freedom of speech and national security (material support for terrorist organizations)*. In 2010, in a 5-4 decision, the Supreme Court upheld 18 U.S.C. 2339B(a)(1), the federal law that makes it a crime to “knowingly provide material support or resources to a foreign terrorist organization,” against a challenge brought by plaintiffs, who asked the Court to hold the statute unconstitutional as it applied to specified types of support to foreign terrorist organizations. *Holder v. Humanitarian Law Project, et al*, 130 S. Ct. 2705 (2010). The Court held (1) that the terms of the law are clear in their meaning and application to plaintiffs and therefore are not void for vagueness; and (2) that given the sensitive interests in national security and foreign affairs at stake, and given that the political branches have adequately substantiated their determination that prohibiting material support in the form of training, expert advice, personnel and service to foreign terrorist groups serves the Government’s interest in preventing terrorism, application of the law to the particular activities at issue here did not violate the complainants’ First Amendment rights to freedom of speech and association, even if those providing the support intend to promote only the group’s non-violent ends. The Court noted that under the material support statute, plaintiffs may engage in independent advocacy of any kind, speaking or writing freely about the terrorist organizations, human rights, or international law; the Court concluded that Congress therefore did not seek to suppress ideas or opinions in the form of “pure political speech, but rather to prohibit” material support, which most often does not take the form of speech at all, and even when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. The Court made clear that its decision was limited to the particular facts of this case and could not be read as a decision that any other statute relating to speech and terrorism would satisfy the First Amendment, or that this statute would do so as applied in a different set of facts. The Court concluded that any limitation the law imposed on freedom of association was justified for the same reasons.

## **Article 20 – Prohibition of propaganda relating to war or racial, national or religious hatred**

### **1. National or religious hatred**

359. The United States has a reservation to Article 20, given its potential to be interpreted and applied in an overly broad manner. There remain constitutional means by which the goals of Article 20 of the International Covenant on Civil and Political Rights have been addressed in the United States.

360. As reflected in paragraphs 596 - 598 of the Initial Report, the U.S. Government believes there are methods short of prohibiting speech that can mitigate the effects of hate speech, and that are more effective than government bans on speech. These methods include robust protections for human rights, including freedom of expression, for all, including minority individuals, robust anti-discrimination laws and enforcement of these laws, and governmental outreach to members of minority communities.

361. Speech intended to cause imminent violence may constitutionally be restricted in certain narrow circumstances. Further, as discussed below, DOJ enforces several criminal statutes which prohibit acts of violence or intimidation motivated by racial, ethnic, or religious hatred and which are directed against those participating in certain protected activities such as housing, employment, voting, and the use of public services. In addition, conspiracies to deprive persons of rights granted by statute or the Constitution may be prosecuted as separate crimes.

362. Hate crimes. As reported in paragraphs 599 – 606 of the Initial Report and paragraphs 332 – 338 of the Second and Third Periodic Report, DOJ/CRD enforces a number of criminal statutes that prohibit acts of violence or intimidation motivated by racial, ethnic, or religious hatred and directed against participation in certain activities. These statutes include: 18 U.S.C. 241 (conspiracy to injure, threaten, oppress or intimidate against the free exercise of rights); 18 U.S.C. 245 (interference with federally-protected activities); 18 U.S.C. 247(c) (damage to religious property); 42 U.S.C. 3631 (criminal interference with right to fair housing); and 42 U.S.C. 1973 (criminal interference with voting rights). In addition, 47 of the 50 states enforce state laws prohibiting hate crimes, and organizations to combat hate crimes exist in a number of states. Among other things, hate crimes can include violent acts of racial and ethnic hatred (such as cross-burnings, arson, vandalism, shootings and assault) that interfere with various federally protected rights (such as housing, employment, education, and public accommodations) of victims.

363. One of the issues of concern raised by civil society in recent years has been addressed by the 2009 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. Among other things, this act expands current federal hate crimes laws to include crimes motivated by a victim's actual or perceived gender, disability, sexual orientation or gender identity. *See* 18 U.S.C. 249. It also requires the FBI to track hate crimes against transgender individuals. The act covers attacks causing bodily injury and attempts to cause such injury through fire, a firearm, a dangerous weapon, or an incendiary or explosive device. It does not criminalize speech, and is consistent with the First Amendment.

364. The Administration, which strongly supported enactment of this law, recognizes that most hate crimes are prosecuted by other levels of government. The new law will provide funds and technical assistance to state, local, and tribal governments to give them the tools to investigate and prosecute hate crimes more effectively. In addition to state hate crimes laws covering violent acts undertaken because of actual or perceived race, color, religion, or national origin, twelve states and the District of Columbia have laws that address hate or bias crimes based on sexual orientation and gender identity, and 31 states have laws that address hate or bias crimes based on sexual orientation.

365. DOJ/CRD has taken the lead in training federal prosecutors regarding the requirements of the new law. In February 2010, approximately 100 CRD attorneys received training on the new law at DOJ's National Advocacy Center. In addition, DOJ has been working closely with the FBI to plan trainings and conferences in locations throughout the country to discuss implementation of the new law. In May 2010, DOJ held its first large conference since the enactment of the Act. Held on the campus of Georgia State University, the conference brought together 310 people, 75 percent of whom were federal, state, and local law enforcement officials and the remainder of whom were representatives of a diverse array of non-governmental community organizations. Police officers from throughout the Northern District of Georgia came to Atlanta for the conference. A key focus of this training is identifying ways that NGO and law enforcement, and especially first responders, can work together to facilitate the reporting, investigation, and prevention of hate crimes. CRD has also participated in dozens of trainings with hundreds of federal and local law enforcement personnel and community members on the new law in cities that include Los Angeles, Seattle, Boston, Omaha, Little Rock, Cheyenne, and other locations throughout the country.

366. On August 18, 2011, in the first case to be charged under the new Mathew Shepard and James Byrd Jr. Hate Crimes Prevention Act, two men pleaded guilty in Albuquerque, New Mexico, to federal hate crime charges related to a racially-motivated assault on a 22-year-old developmentally disabled man of Navajo descent. The men were indicted by a federal grand jury in November 2010.

367. Prosecution of hate crimes is a high priority. Examples of recent cases involving hate crimes follow. Unless otherwise specified, further descriptions of these cases can be found at <http://www.justice.gov/crt/crim/selcases.php>.

(a) In October 2010, two men were found guilty of charges arising out of a fatal, racially motivated beating and related police corruption in Shenandoah, Pennsylvania. The first indictment alleged that, on July 12, 2008, the defendants and others encountered the victim, a Latino male, as they were walking home from a local festival, and then attacked him in a public street while members of the group yelled racial slurs. He died two days later from his injuries. The indictment also alleged that, immediately following the beating, the defendants and others, including members of the Shenandoah Police Department, participated in a scheme to obstruct the investigation of the fatal assault.

(b) On June 14, 2007, a federal jury in the Southern District of Mississippi convicted former Klansman James Ford Seale on federal conspiracy and kidnapping charges for his role in the 1964 abduction and murder of two 19-year-old Blacks/African Americans, Henry Dee and Charles Moore. Seale and several fellow members of the White Knights of the Ku Klux Klan kidnapped Dee and Moore, brutally beat them, bound them, and transported them across state lines. Seale and his co-conspirators then tied heavy objects to the victims and threw the men, still alive, into the Old Mississippi River. In August 2007, Seale was convicted and sentenced to serve three life terms in prison. In September 2008, the Fifth Circuit Court of Appeals reversed the conviction on statute of limitations grounds. In a subsequent hearing en banc in 2009, however, the Fifth Circuit, by reason of an equally divided court, affirmed the conviction. The prosecutors in this case were awarded highest honors by the Department of Justice for their work on the case. *U.S. v. Seale*.<sup>8</sup>

(c) In September 2008, Christopher Szaz pleaded guilty to federal civil rights charges for threatening employees of the National Council of La Raza (NCLR), an organization dedicated to furthering the civil rights of Latinos, and the Council on American Islamic Relations (CAIR), an organization focused on issues affecting Muslim persons, because of their race and national origin. Szaz admitted sending two email messages threatening to bomb the CAIR office in Washington, D.C., and another email to the NCLR office in Washington, D.C., stating that he would kill employees of that organization. Szaz was sentenced to 45 days in prison. *U.S. v. Szaz* (Washington, D.C., 2008).

(d) On April 20, 2007, three members of the National Alliance, a notorious White supremacist organization, were convicted for assaulting James Ballesteros, a Mexican American bartender, at his place of employment, and conspiring to assault non-Whites in public places in Salt Lake City, Utah. On August 16, 2007, Shaun Walker, the lead defendant, who was chairman of the National Alliance at the time of his indictment, was sentenced to 87 months imprisonment. Two other defendants were sentenced, respectively, to 57 months and 42 months in prison. The Anti-Defamation League praised DOJ/CRD's efforts in successfully prosecuting this important hate crimes case. *U.S. v. Walker et al* (Utah, 2007).

368. In addition, the Community Relations Service (CRS) of DOJ is available to state, local and tribal jurisdictions to help prevent and resolve racial and ethnic conflict and to employ strategies to prevent and respond to alleged violent hate crimes committed on the

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<sup>8</sup> 542 F.3d 1033 (5th Cir. Miss, September 9, 2008); 550 F.3d 377 (5th Cir. Miss, Nov. 14, 2008) (granting rehearing en banc); 570 F.3d 650 (5th Cir. Miss, June 5, 2009, rehearing en banc); 577 F.3d 566 (5th Cir. Miss July 30, 2009, certifying question); 130 S. Ct. 12 (Mem) (2009) (certified question declined); petition for certiorari filed (June 4, 2010).

basis of actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion or disability. From years of experience on a wide range of cases, CRS has developed a set of “best practices” to assist localities in preventing hate crimes and restoring harmony in communities. For example, with regard to church burnings, CRS staff members have worked directly with hundreds of rural, suburban, and urban governments to help eliminate racial distrust and polarization, promote multiracial programs, conduct race relations training for community leaders and law enforcement officers, conduct community dialogues, and provide assistance to bring together law enforcement agencies and members of minority neighborhoods.

369. Post-September 11 efforts to counter harassment and other improper conduct targeted at Muslim, Arab, Sikh and South Asian Americans. Since 2001, DOJ, and in particular, CRS has directed substantial efforts to assessing and addressing racial and ethnic tensions in communities with concentrations of Arab, Muslim, and South Asian populations. These efforts involve contacts with local police departments, school districts, colleges and universities, city and state governments, Muslim and Arab American groups, and civil rights organizations. As reports of violence against Arabs, Muslims and Sikhs in the United States intensified, CRS deployed its staff to promote tolerance. Forums have been held for Arab, Muslim, and Sikh community members to provide information, education, and resources, and to identify and discuss the various laws and enforcement agencies that serve their communities and how each could be of assistance. Among CRS’s activities is the presentation of the Arab, Muslim, and Sikh Awareness and Protocol Seminar – a series of educational law enforcement protocols for federal, state, and local officials addressing racial and cultural conflict issues between law enforcement and Arab American, Muslim American and Sikh American communities. CRS also created a law enforcement roll-call video entitled “The First Three to Five Seconds,” which helps police officers reduce tension by differentiating between threats and cultural norms in non-crisis situations involving Arabs, Muslims, and Sikhs. CRS has also responded to reports of vandalism and arson involving mosques and Sikh gurdwaras to ease community concerns. CRS has brought Arab, Muslim, and Sikh students and parents together with local law enforcement, government, and school officials to address allegations of discrimination and harassment in schools through cultural professionalism programs and CRS’ Student Problem Identification and Resolution of Issues Together (SPIRIT) program.

370. DOJ/CRD has prioritized prosecuting bias crimes and incidents of discrimination against Muslims, Sikhs, and persons of Arab and South-Asian descent, as well as persons perceived to be members of these groups. The Division also has engaged in extensive outreach efforts to these communities to educate people about their rights and available government services.

371. Since 9/11, DOJ has investigated more than 800 bias crimes against Muslims, Sikhs, and persons of Arab and South-Asian descent, as well as persons perceived to be members of these groups, resulting in the prosecution of 48 defendants on federal civil rights charges, as well as a number of prosecutions pursued by state and local authorities. These incidents have consisted of telephone, internet, mail, and face-to-face threats; minor assaults as well as assaults with dangerous weapons and assaults resulting in serious injury and death; vandalism, shootings, arson, and bombings directed at homes, businesses, and places of worship. Examples of prosecutions in cases involving bias against Muslim or Arab Americans or persons perceived to fall into those categories are as follows:

(a) On August 10, 2011, a former employee of the Transportation Security Administration (TSA), George Thompson, pleaded guilty to federal hate crime charges for assaulting an elderly Somali man in May 2010. Thompson admitted that he assaulted the man because he believed that the man was Muslim and Somali, and that he yelled to the victim during the assault that he should go back to Africa.

(b) On February 23, 2011, Henry Clay Glaspell pleaded guilty to violating the Church Arson Prevention Act by setting fire to a playground outside a mosque in July 2010. Glaspell was to be sentenced on September 19, 2011.

(c) Three Tennessee men, Jonathan Edward Stone, Michael Corey Golden, and Eric Ian Baker, pleaded guilty to spray-painting swastikas and “White power” on a mosque in Columbia, Tennessee, and then starting a fire that completely destroyed the mosque. In 2009, Golden and Baker were sentenced to more than 14 and 15 years in prison, respectively. On April 22, 2010, Stone was sentenced to more than 6 years in prison for his role in the crime.

(d) On June 12, 2008, Patrick Syring pleaded guilty to interfering with federally protected employment rights because of race and national origin and sending threatening communications. On July 11, 2008, defendant Syring was sentenced to 12 months in prison and 100 hours of community service and fined \$10,000. Syring, a Foreign Service Officer at the time, sent several ethnically derogatory email and voice mail threats to the director of the Arab American Institute, as well as to staff members at their office in Washington, D.C. in July 2006. *U.S. v. Syring* (D.D.C. 2008; see <http://www.justice.gov/crt/crim/selcases.php>).

372. DHS/CRCL also conducts public outreach and engagement initiatives with groups including American Arab, Muslim, Sikh, Somali, South Asian, and Middle Eastern communities. CRCL conducts regular community leader roundtables in eight cities, youth roundtables around the country, and many more ad hoc events, as needed. These engagement efforts encourage community members to take an active role in their government, and ensure that the government is responsive to and protects the rights of all Americans. Engaging communities – soliciting their views, explaining policies, and seeking to address any complaints or grievances they may have – is a basic part of good and responsible government. CRCL engagement efforts focus on civil rights. They build crucial channels of communication, both educating government about the concerns of communities affected by DHS activities and giving those communities reliable information about policies and procedures. They build trust by facilitating resolution of legitimate grievances; they reinforce a sense of shared American identity and community; and they demonstrate the collective ownership of the homeland security project. Individual sessions have addressed, among other subjects: immigration and naturalization policy; language access rights; roles and responsibilities of law enforcement; detention of national security suspects; redress mechanisms; services for newly-arrived refugees; how communities can work with government, including law enforcement, to counter violent extremism; protection of civil rights; and border searches. CRCL also conducts training for law enforcement personnel and intelligence analysts in an effort to increase communication, build trust, and encourage interactive dialogue. Topics of discussion during trainings include addressing misconceptions and stereotypes of Islam and Muslims; a how-to guide for community interaction; effective policing that actively prohibits racial or ethnic profiling; and federal approaches to engagement and outreach. In FY 2010, CRCL trained 1,300 international, federal, state, and local law enforcement officers and intelligence analysts. In addition, CRCL has distributed training posters on Muslim and Sikh religious head-coverings and the Sikh kirpan, as well as a DVD on Arab and Muslim culture, to build the cultural competency of DHS personnel.

373. CRCL’s Incident Communication Coordination Team (ICCT) facilitates rapid federal government engagement with American communities in the aftermath of homeland security incidents. This conference call mechanism connects DHS officials, including representatives of TSA, ICE, CBP, USCIS, the Office of Public Affairs, and the Office of Intelligence and Analysis with key leaders from American Arab, Muslim, Sikh, South Asian, Middle Eastern, and Somali communities across the United States. DHS officials are often joined by personnel from the White House Office of Public Engagement, DOJ/CRD,

the FBI, the National Counterterrorism Center (NCTC), and the Department of State, among others.

374. The U.S. Equal Employment Opportunity Commission (EEOC) and DOJ/CRD also have aggressively pursued employers who discriminated against employees based on their religion or national origin in the aftermath of September 11. These efforts have included outreach to the affected communities; EEOC guidance, fact sheets, and Q&A documents for employers on their obligations with respect to the treatment of Muslim, Arab, South Asian, and Sikh employees; and rigorous enforcement efforts by both agencies. Between 2001 and 2008, the EEOC received over 1,000 charges alleging discrimination in relation to 9/11, found cause to believe that discrimination occurred in 137 of those charges, obtained benefits in excess of \$4.2 million through administrative means, and procured an additional \$1.95 million for 28 individuals through lawsuits. Some examples of government lawsuits on behalf of Muslim, Arab, South Asian, and Sikh workers include:

(a) A worker who had worn the hijab at work during Ramadan in 1999 and 2000 was ordered to remove her head scarf in December 2001 and, when she refused, was disciplined and ultimately terminated, even though she offered to wear the company logo scarf. EEOC sued alleging religious discrimination; the court granted partial summary judgment for EEOC on liability, and a jury awarded the woman \$267,000 in damages. See *EEOC v. Alamo Rent-a-Car*, 432 F. Supp. 2d 1006 (D. Az. 2007) (granting summary judgment).

(b) After a Muslim cruise ship worker asked for the location of the security office, engine room, and bridge, a coworker alerted authorities that this worker and six other Muslim crew members posed a threat to the ship's security. The Joint Terrorism Task Force boarded the ship, conducted an investigation, and found that the workers posed no threat and that there was no probable cause to hold them. Nonetheless, the company fired six of the men immediately and the seventh quit. The EEOC brought a lawsuit, which was settled on May 15, 2008 for \$485,000 to the fired crew members. See *EEOC v. NCL America, Inc.*, 536 F. Supp. 2d 1216 (D. Hawaii 2008) (detailing facts of claim, granting summary judgment for EEOC on affirmative defenses to claim, and allowing EEOC to pursue class action type injunctive relief without certifying a class).

(c) CRD is suing the New York Metropolitan Transit Authority (MTA) under Title VII of the Civil Rights Act of 1964, alleging discrimination against Muslim and Sikh employees. The suit alleges that the MTA discriminates against Muslim and Sikh employees by refusing to permit them to wear headscarves and turbans while working as bus and subway operators and other public-contact positions. The MTA began enforcing this policy against non-regulation headcoverings in 2002, and has taken various actions against Muslim and Sikhs wearing headcoverings, including transferring them to positions where they would not have contact with the public. The suit alleges that the MTA has failed to meet its obligation to provide a reasonable accommodation of religious observances and practices of employees, and has discriminated against the Muslim and Sikh employees by banning their religious headcoverings while permitting other employees to wear other non-regulation headcoverings such as ski caps and baseball caps. The case is pending.

(d) In June 2009, CRD filed suit against Essex County, New Jersey, alleging that it discriminated against a Muslim corrections officer in violation of Title VII when it refused to allow her to wear a religiously mandated headscarf. The United States' complaint alleges that the Essex County Department of Corrections first suspended the officer, then terminated her, for wearing her headscarf, and that the county failed to provide her with reasonable accommodation to its uniform policy. The United States reached a consent decree with the county on November 12, 2010, requiring implementation of a procedure for religious accommodation of all employees.

(e) In December 2010, CRD filed suit against the Berkeley School District (US v. Berkeley School District, Illinois), alleging that it discriminated against a Muslim woman in violation of Title VII when it denied her request for an unpaid leave of absence as a religious accommodation to perform Hajj, a pilgrimage required by her religion. Berkeley School District summarily denied her accommodation request, without any discussion of a possible accommodation that would enable her to observe her religious practice without imposing an undue hardship on Berkeley School District. After the District denied her a religious accommodation, she was forced to resign in order to perform Hajj. On October 24, 2011, the Court approved and entered a consent decree filed by the parties. The relief that the District is required to provide under the decree included backpay and a requirement to adopt an appropriate policy designed to address requests from employees and prospective employees for religious accommodations, as well as compensatory damages.

## Article 21 – Freedom of assembly

375. As noted in paragraphs 607-612 of the Initial Report and Paragraph 339 of the Second and Third Periodic Report, the First Amendment to the United States Constitution prohibits Congress from making any law abridging “the right of the people peaceably to assemble.” This right has been interpreted broadly. Thus, for example, more than 70 years ago the Supreme Court held that participation in a Communist Party political meeting could not be made criminal. *DeJonge v. Oregon*, 299 U.S. 353 (1937). Assembly for marches, demonstrations, and picketing is also protected, see *Hague v. CIO*, 307 U.S. 496 (1939), as is the right to conduct labor organization meetings. *Thomas v. Collins*, 323 U.S. 516 (1945).

376. The basic law concerning freedom of assembly is set forth in paragraphs 607 – 612 of the Initial U.S. Report. The right to assemble is subject to reasonable time, place, and manner restrictions when exercised in a traditional or government-created public forum, see *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and may be subject to reasonable non-content-based restrictions in other forums. In fully public areas, such as streets, parks, and other places traditionally used for public assembly and debate, the government may not prohibit all communicative activity and must justify any content-neutral, time, place, and manner restrictions as narrowly tailored to serve a legitimate state interest. In a limited public forum area where the government has opened property for communicative activity and thereby created a public forum, the government may limit the forum to use by certain groups, *Wider v. Vincent*, 454 U.S. 263 (1981) (student groups) or to discussion of certain subjects, *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (school board business), although content-based restrictions must be justified by a compelling state interest. In an area that the government has reserved for intended purposes, assembly may be limited as long as the limitation is reasonable. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

377. With regard to public forum areas that may have multiple, competing uses, the U.S. Supreme Court has upheld a regulation limiting the time when a public park can be used, even when that limitation restricted the ability to demonstrate against homelessness by sleeping in symbolic “tent cities” in the park. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). Similarly, governments may impose permit requirements on those wishing to hold a march, parade, or rally. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). The power to regulate is at its greatest when more limited forums, such as military bases or airports, are at issue. See, e.g., *International Society of Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

378. There are, however, important constitutional limits to governmental regulation of assembly, and courts will closely scrutinize the intent of government regulation relating to the right of assembly and require that intrusive regulations on assembly in a public forum be narrowly tailored. *Boos v. Barry*, 485 U.S. 312 (1988) (striking down portion of law prohibiting three or more persons from congregating within 500 feet of an embassy as statute was not narrowly tailored to those cases that threaten the security or peace of the embassy). A law limiting certain types of picketing or demonstrations but not others would be an impermissible content-based restriction. See, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). Moreover, licensing or permit systems may not delegate overly broad licensing discretion to government officials, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

379. The ability of governments to limit assembly may depend on the primary activity of the locale in question, along with the type of regulation. For example, the government may prohibit the distribution of leaflets inside, but not outside, a courthouse. Outside, the government is limited to reasonable time, place, or manner restrictions because streets and sidewalks are generally considered public forums appropriate for public demonstration or protest. See *United States v. Grace*, 461 U.S. 171 (1983). However, demonstrations or assemblies near a jail may be entirely prohibited, *Adderly v. Florida*, 385 U.S. 39 (1966), and the government may prohibit demonstrations within a defined proximity to a courthouse when the purpose of the demonstration is to influence judicial proceedings. *Cox v. Louisiana*, 379 U.S. 559 (1965).

## **Article 22 – Freedom of association**

380. United States Constitution. Although 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 petition. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 898 (1982); *Healy v. James*, 408 U.S. 169 (1972). Taken together, the provisions of the First, Fifth and Fourteenth Amendments guarantee freedom of association in many 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). The outlines of the constitutional right of freedom of association in the United States are described in paragraphs 613 - 654 of the Initial Report, paragraphs 340 – 346 of the Second and Third Periodic Report, and in the paragraphs below concerning recent case law.

381. As noted in paragraph 341 of the Second and Third Periodic Report, the right to associate for purpose 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. See, e.g., *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (expression within a group); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (expression by group to wider public). In 2006, the U. S. Supreme Court decided a case concerning this right in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). That case involved the Solomon Amendment, a statutory provision preventing institutions of higher education from receiving certain federal funds unless they granted military recruiters the same access to their campuses and students as other employers permitted to recruit on campus. An association of law schools and faculties challenged the provision, asserting that it violated their First Amendment rights by preventing them from restricting on-campus military recruitment out of opposition to the then-existing law regarding gays and lesbians in the military. The Court rejected the challenge, holding that the Solomon



Amendment did not impermissibly affect the schools' right of expressive association because it simply required schools to permit military recruiters to enter their campuses for the limited purpose of recruiting students if they wished to receive federal funding – it did not require schools to permit those recruiters to become part of the school's community, or prevent students and faculty from voicing their disapproval of the military's message.

382. On December 18, 2010, Congress passed a law to repeal 10 U.S.C. 654, the law prohibiting gay and lesbian service members from openly serving in the military, commonly referred to as "Don't Ask Don't Tell." Don't Ask, Don't Tell Repeal Act of 2010. Under the Repeal Act, the repeal takes effect 60 days following delivery to Congress of a certification by the President, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff stating that the statutory conditions for repeal have been met, including that implementation of repeal "is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces". In July 2011, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff made the certification and delivered it to Congress. The repeal became effective on September 20, 2011.

383. Political parties. Since the submission of the previous report, the Supreme Court has rendered opinions in a number of cases concerning political parties and the political system. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Supreme Court struck down a Vermont law that placed stringent limits on contributions to political candidates, including contributions from political parties. The Court held that these contribution limits imposed impermissibly severe burdens on various First Amendment interests. In the course of its analysis, the Court specifically noted that the Vermont law's requirement that political parties abide by exactly the same low contribution limits as other contributors threatened to harm the right to associate in a political party by "reduc[ing] the voice of political parties in Vermont to a whisper." *Id.* at 259 (internal quotation marks omitted). In *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), the Court ruled on a challenge to the "millionaires amendment" of the Bipartisan Campaign Reform Act (BCRA), which relaxed the limitations for contributions to opponents of self-financed (i.e., "millionaire") candidates for the U.S. Congress, allowing the opposing candidates to receive individual contributions at three times the normal limit and to accept coordinated party expenditures without limit. The Court held that this provision violated the First Amendment because it burdened candidates' right to spend their own money on campaign speech and because leveling of electoral opportunities for candidates of different personal wealth was not a legitimate government objective – let alone an interest that would justify such a restriction on speech.

384. In 2010, the Supreme Court held in a five to four decision that because communications related to candidate elections that are funded by corporations, unions, and other organizations constitute "speech" under the First Amendment to the U.S. Constitution, the government may not ban or place a ceiling on such spending. *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). The Court held that such expenditures may be regulated through disclosure and disclaimer requirements, which do not have the effect of suppressing speech. Since that time, legislation (the "DISCLOSE" Act) was introduced in the 111th Congress to require disclosure of such election contributions in order to provide transparency for the American public. (See Article 25, below).

385. In *Washington State Grange v. Washington State Republic Party*, 552 U.S. 442 (2008), the Supreme Court considered a challenge to the State of Washington's blanket primary system, under which all candidates identified themselves on the primary ballot by designating their party preference, voters could then vote for any candidate, and the two top vote-getters, regardless of party preference, would advance to the general election. Several political parties argued that this provision on its face violated their associational rights by

usurping their right to nominate their own candidates for office and forcing them to associate with candidates they did not endorse. The Court disagreed, concluding that Washington could operate its primary system in a way that made clear that candidates' self-designations did not represent endorsements by political parties themselves, and that if the system were so operated, it would not impose a serious burden on the parties' associational rights. The Court therefore rejected the parties' facial challenge. *Clingman v. Beaver*, 544 U.S. 581 (2005) involved a challenge by a political party and registered members of two other political parties to an Oklahoma state statute creating a semi-closed primary election system. Under this system a political party could invite only its own registered members and voters registered as independents to vote in its primary. The Court held that because the system only affected the (minimal) associational interests of those persons who were unwilling to affiliate with a party in order to vote in its primary, it did not severely burden the associational rights of the state's citizens, and further concluded that any burden it imposed was justified by the state's legitimate interests in preserving political parties as viable and identifiable interest groups, aiding parties' electioneering efforts, and preventing "party raiding." As a result, the Court concluded that the system did not violate the First Amendment.

386. The case of *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008), involved a challenge to the party-based system used in New York to select candidates for positions as New York Supreme Court judges (i.e., state trial court judges). The challengers alleged that the system violated their First Amendment rights by making it too difficult for candidates not supported by party leaders to win the party's nomination. The U.S. Supreme Court, however, held that the party-based nomination system did not unconstitutionally infringe judicial candidates' associational rights, despite the party leaders' success in using the system to get their candidates selected by party members.

387. Labor associations. As noted above, the First Amendment protects the right of workers to establish and join labor organizations of their choosing without previous authorization by or interference from the federal or state governments. The statutory framework providing for the right to organize is set forth in the Initial U.S. Report at paragraphs 617 – 634. This framework includes the National Labor Relations Act (NLRA), which provides for employees' rights to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other mutual aid and protection. The NLRA applies, with specified exceptions, to all employers engaged in an industry affecting interstate commerce (the vast majority of employers), and thus to their employees. In *Davenport v. Washington Education Association*, 551 U.S. 177 (2007), the Supreme Court held that it is not a violation of the First Amendment for a state to require its public sector unions to receive affirmative authorization from non-members before spending those non-members' agency fees -- fees paid by nonmembers to unions authorized to bargain on their behalf, which may be required under "agency shop" provisions of collective bargaining agreements -- for election related purposes. The Court viewed the requirement as a "reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees," including those who chose not to join the unions. *Id.* at 189. In addition, in *Locke v. Karass*, 555 U.S. 207 (2009), the Supreme Court held that the First Amendment permits local unions to charge nonmembers for national litigation expenses as long as (1) the subject matter of the national litigation would be chargeable if the litigation were local (e.g., it is appropriately related to collective bargaining rather than political activities); and (2) the charge is reciprocal in nature (e.g., other locals can reasonably be expected to contribute to such litigation costs).

388. Trade union structure and membership. The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) currently has 56 national and international union affiliates. Another labor affiliation, Change to Win, comprises five large unions with

approximately 6 million members, including, inter alia, the Service Employees International Union, the United Farm Workers of America and the International Brotherhood of Teamsters. There are also other national unions in the United States not affiliated with the AFL-CIO or Change to Win. Overall, there are approximately 29,000 unions at the local, intermediate body and national levels that represent private sector employees and federal government employees.

389. A January 21, 2011 U.S. Department of Labor, Bureau of Labor Statistics news release indicates that:

(a) In 2010, union members accounted for 11.9 percent of all employed wage and salary workers, down from 12.3 percent a year earlier. The number of workers belonging to unions in 2010 was 14.7 million.

(b) The union membership rate for public sector workers (36.2 percent) was substantially higher than the rate for private industry workers (6.9 percent). Within the public sector, local government workers had the highest union membership rate at 42.3 percent. This includes a number of highly-unionized professions, such as teaching, law enforcement, and firefighting. Private sector industries with high unionization rates included transportation and utilities (21.8 percent), telecommunications (15.8 percent), and construction (13.1 percent). In 2010, unionization rates were relatively low in agriculture and related industries (1.6 percent) and financial activities (2.0 percent).

(c) Among occupational groups, education, training and library occupations (37.1 percent) and protective service occupations (34.1 percent) had the highest unionization rates. Farming, fishing, and forestry occupations (3.4 percent) and sales and related occupations (3.2 percent) had the lowest unionization rates.

(d) The union rate was higher for men (12.6 percent) than for women (11.1 percent). This gap, however, has narrowed since 1983 when the rate for men was 10 percentage points higher than for women. Black or African American workers were more likely to be union members than White workers (13.4 percent to 11.7 percent), Asian (10.9 percent) or Hispanic (10.0 percent) workers. Black men had the highest union membership rate (14.8 percent), while Asian men had the lowest (9.4 percent).

(e) Full-time workers were about twice as likely as part-time workers to be union members (13.2 percent compared to 6.4 percent).

(f) In addition to the estimated 14.7 million wage and salary employees belonging to unions in 2009, approximately 1.6 million workers were represented by a union or labor association in their main jobs, but were not union members themselves. Nearly half of these were employed in government.

### **Article 23 – Protection of the family**

390. Right to marry. United States law has long recognized the importance of marriage as a social institution that 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). Marriage involves a contractual relationship creating certain right and responsibilities, but a contractual relationship that is unique in its structure, dignity, and status.

391. In the United States, civil marriage is governed by state law; each state is free to set the conditions for marriage, subject to the limits set by its own constitution and by the U. S. Constitution, such as due process and equal protection. In a few circumstances, the United States Congress has regulated marriage for purposes of federal law.

392. Same-sex marriage. Same sex marriage is a much debated issue in the United States. The legal status of same-sex marriage differs from state to state, as does states' treatments of civil unions and domestic partnerships. Six states and the District of Columbia now permit same-sex marriage. The states include: Massachusetts, New Hampshire, Vermont, Iowa, Connecticut, and New York. Three of these states permit same-sex marriages through judicial rulings. For example, 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). The Connecticut Supreme Court overruled Connecticut's law permitting civil unions but not marriages for gay and lesbian couples, holding that law unconstitutional under the equal protection provisions of the state constitution because it failed to give same sex couples the full rights, responsibilities and title of marriage provided to other couples, *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008). Likewise, the Iowa Supreme Court held that barring same sex couples from marriage violated the equal protection provisions of the Iowa state constitution, *Varnum v. Brien*, 763 N.W.2d 862 (2009). Three states – New Hampshire, Vermont, and New York – and the District of Columbia passed legislation permitting same-sex marriage. In addition, same-sex marriage is permitted by the Coquille Indian Tribe in Oregon. In Maine, the legislature passed a law permitting same-sex marriage, which was signed by the Governor on May 6, 2009. However, that law was rejected by voters in the state in a referendum held in November of that same year. California recognizes marriages entered between June 16, 2008 and November 4, 2008, representing the period of time between the effective date of a state Supreme Court decision recognizing same-sex marriage and a voter-approved initiative limiting marriage to opposite-sex couples. Finally, Maryland recognizes same-sex marriage performed in other jurisdictions; legislation providing for same-sex marriage in Maryland passed the state Senate in 2011, but stalled in the House of Delegates.

393. A number of states allow same sex couples to enter into civil unions or domestic partnerships that provide some of the rights and responsibilities of marriage under state law. States and local jurisdictions, such as Colorado, Hawaii, Maine, Maryland, New Jersey, Nevada, Oregon, Washington, and Wisconsin grant varying subsets of the rights and responsibilities of marriage to same-sex couples in civil unions, domestic partnerships, and relationships with similar legal status.

394. More than 30 states have state laws or state constitutional amendments that restrict marriage to persons of the opposite sex. Nebraska's amendment was held to be rationally related to a legitimate government interest. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Some of the states that have these legal restrictions nonetheless permit civil unions.

395. In May 2008, the California Supreme Court struck down California's prohibition on same-sex marriage as violating the California state constitution, *In re Marriage Cases*, 183 P. 3d 384 (2008), thereby making same-sex marriage legal in California. In November 2008, however, the citizens of California enacted the California Marriage Protection Act, amending the California constitution to provide that only marriage between a man and a woman is valid and recognized in California. Thus, same-sex marriages were permitted in California for a short time in 2008, but thereafter were no longer permitted. As noted above, California still recognizes same-sex marriages that were performed in the state during the period in 2008 when such marriages were legal under California law. California also provides for domestic partnerships for same-sex couples, which provide rights and responsibilities substantially similar to those of marriage. In October 2009, the Governor of California signed into law a requirement that California recognize same-sex marriages performed in other states where such marriages are legal. The law fully recognizes same-

sex marriages performed in other states during the time same-sex marriage was legal in California. For same-sex marriages performed in other states while such marriages were not legal in California, the law requires that same-sex couples receive the legal protections afforded to married couples in California, but does not actually recognize them as “married” under California law. In August 2010, the Federal District Court for the Northern District of California struck down the California Marriage Protection Act as unconstitutional, *Perry v. Schwarzenegger*, No. C 09-2292 (N.D.CA 2010). That decision was stayed, pending appeal to the Ninth Circuit. Arguments were heard in the Ninth Circuit Court of Appeals in December 2010. The Ninth Circuit did not rule on the merits, but certified a question to the California Supreme Court regarding whether the initiative proponents had legal standing to defend the Marriage Protection Act; the California Supreme Court heard oral argument on that question in September 2011 and will issue a decision in 90 days, after which the Ninth Circuit may take further action.

396. With regard to federal employment, on June 2, 2010, President Obama signed a Presidential Memorandum extending a wide range of benefits to the same-sex partners of eligible federal workers. These include family assistance services, hardship transfers, and relocation assistance. The Memorandum also called for any new benefits provided to opposite-sex spouses also to be provided to same-sex domestic partners to the extent permitted by law. This measure builds upon the President’s 2009 announcement, which permitted same-sex domestic partners to access the government’s long term care insurance and certain other benefits. In extending these benefits, President Obama noted that existing federal law prevents same-sex domestic partners from enjoying the same range of benefits as opposite-sex married couples. The President renewed his call for swift enactment of the Domestic Partnership Benefits and Obligations Act, which would extend to the same-sex domestic partners of federal employees the full range of benefits currently enjoyed by federal employees’ opposite-sex partners. In addition, the United States Census Bureau announced in June 2009 that married same-sex couples would be counted as such in the 2010 Census, changing the way such couples were treated during the 2000 Census.

397. At the federal level, in 1996, Congress passed and President Clinton signed the Defense of Marriage Act (“DOMA”), Pub. L. 104-199, 110 Stat. 2419. DOMA Section 3 provides that, for purposes of federal law, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.” *Id.* President Obama has long stated that he does not support DOMA as a matter of policy, believes it is discriminatory, and supports its repeal. On February 23, 2011, Attorney General Holder announced in a letter to the Speaker of the House of Representatives that, after careful consideration, including a review of the recommendation of the Attorney General, the President had concluded that “classifications based on sexual orientation should be subject to a heightened standard of scrutiny” under the Constitution, and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional. The Attorney General’s letter also announced that the President had instructed the Department of Justice not to defend the statute in cases then pending in federal district courts, but that Section 3 would continue to be enforced by the Executive Branch, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. DOJ has argued in three recent cases that Section 3 should be subject to heightened scrutiny and that, under that standard, Section 3 is unconstitutional as applied to legally married, same-sex couples. See *Golinski v. Office of Personnel Mgmt.*, No. C 3:10-00257 (N.D.Ca.); *Windsor v. United States*, No. 10-CV-8435 (S.D.N.Y.); *Lui v. Holder*, No. CV 11-01267 (C.D.Ca.). In addition, the President has voiced his support for the Respect for Marriage Act, a bill that would repeal DOMA, which is currently pending

before both Houses of Congress. More information on marriage and family life protections is contained in the discussion of Article 23 above.

398. Treatment of patients receiving hospital care. To ensure equal treatment of all patients in receiving hospital care, on April 15, 2010, President Obama directed the Secretary of Health and Human Services (HHS) to draft rules requiring all hospitals participating in Medicare and Medicaid to respect the rights of patients to designate visitors, and to ensure that all such hospitals are in full compliance with regulations promulgated to guarantee that all patients' advance directives, such as durable powers of attorney and health care proxies, are respected, and that patients' representatives otherwise have the right to make informed decisions regarding patients' care. This will assist same-sex partners in visiting and being involved in decisions concerning loved ones in the hospital.

399. Housing for LGBT families. On January 24, 2011, HUD published a rule that proposes regulatory changes to further ensure that LGBT families have equal access to HUD funded and insured housing. Among the proposed changes is clarification of "family," the term used in HUD regulations to define persons eligible for many of its programs. The rule provides that family includes persons regardless of the sexual orientation, gender identity, or marital status of the family members. This will allow, for example, an otherwise eligible individual to be added to his or her partner's housing voucher because that couple clearly meets the definition of family. HUD received approximately 376 public comments on the rule, the vast majority of which were supportive, and anticipates publication of the final rule by the end of the year.

400. HUD has taken important steps in the past two years to further LGBT equal access to housing and HUD programs. First, through its notice of funding availability, HUD now requires recipients of approximately \$3.5 billion in HUD funding to comply with state and local laws that prohibit sexual orientation and gender identity housing discrimination. Second, HUD recognized that under the Fair Housing Act's prohibition of sex discrimination, HUD has authority to pursue complaints from LGBT persons alleging housing discrimination because of non-conformity with gender stereotypes. In light of this recognition, HUD has accepted 114 complaints involving possible LGBT housing discrimination, which is almost three times more than HUD had pursued in the prior two years. HUD and its state and local fair housing partners have proceeded with appropriate enforcement actions on these complaints, ensuring recourse under current law. Third, HUD has launched a webpage that includes resources for LGBT victims of housing discrimination. Fourth, HUD has designed and implemented Live Free, a multi-media outreach campaign that raises awareness about housing discrimination against LGBT persons. Finally, HUD has initiated the first nationwide study of LGBT housing discrimination that will provide national data on the nature and extent of housing discrimination against same sex couples.

401. Parenting. Recent laws in Delaware and the District of Columbia have moved to secure the rights of gay, lesbian and transgender parents. Same-sex couples may jointly petition to adopt children in ten states (California, Connecticut, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon and Vermont) and the District of Columbia. In addition, same-sex couples may jointly adopt in some jurisdictions in Nevada and New Hampshire. A Florida ban on gay adoption was struck down as unconstitutional by a Florida appellate court in November 2010.

402. In the United States, parents have a well established liberty interest in making decisions concerning the "companionship, care, custody, and management of [their] children." See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). In *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), the Supreme Court noted that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic

importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." (internal citations omitted).

403. Procedures for marriage – blood tests, waiting periods, common law marriage. Paragraphs 354 – 356 of the Second and Third Periodic Report discuss the procedures for marriage in the United States, including blood tests, waiting periods, and common law marriage. As of 2009, only seven states required blood tests. Waiting periods are generally shorter than mentioned in the 2005 report; the longest waiting period for marriage is six days, many are shorter (3 days or less), and a large number of states have no waiting period at all. The law concerning common law marriage as described in the Second and Third Periodic Report has not changed.

404. Custody and visitation. There have been no new Supreme Court interpretations of federal constitutional law concerning custody and visitation since the filing of the Second and Third Periodic Report in 2005.

405. 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 party to the Hague Convention on the Civil Aspects of International Child Abduction, and has taken the necessary legislative steps to ensure that the provisions of the Convention are binding in U.S. courts. See, e.g., *Abbott v. Abbott*, 130 S. Ct. 1983 (2010). Additional information can be obtained at the Department of State Bureau of Consular Affairs webpage, [http://www.travel.state.gov/abduction/abduction\\_580.html](http://www.travel.state.gov/abduction/abduction_580.html). <http://>

406. Child support and enforcement of decrees. The United States child support enforcement program is a federal/state/tribal/local partnership. Established under Title IV-D of the Social Security Act, 42 U.S.C. 651-669b, the program is administered by the Office of Child Support Enforcement in the Department of Health and Human Services (HHS). All states and several territories run child support enforcement programs, and Native American tribes can operate culturally appropriate child support programs with federal funding. Families seeking government child support services apply directly through their state or local agencies or one of the tribes running a program. Services available include locating non-custodial parents, establishing paternity, establishing support orders, collecting support payments, securing health care coverage, and services to assist non-custodial parents in meeting their obligations. States and territories are required to establish child support guidelines, and to provide efficient enforcement procedures, such as liens, capture of tax refunds for overdue support, automatic income withholding, and direct interstate income withholding. Other available enforcement mechanisms include suspension of the non-custodial parent's driver's license or other professional or occupational licenses; bank account levies; and interception of lottery winnings, unemployment compensation, retirement and other payments.

407. All states and territories have enacted and implemented the Uniform Interstate Family Support Act, which is designed to improve interstate enforcement of child support and related orders. When more than one state is involved in the enforcement or modification of a child or spousal support order, the act helps determine the jurisdiction and authority of the tribunals in different states and which state's law will be applied. HHS recently issued a revised rule governing intergovernmental enforcement of child support. The rule governs how state child support agencies process interstate and intrastate cases, and Tribal IV-D cases under section 455 of the Act, and international cases under sections 454 (32) and 459A of the Act. As noted in the previous report, notwithstanding these extensive programs, more needs to be done to address the problem of interstate enforcement of child support orders throughout the United States.

408. In addition, the Personal Responsibility and Work Opportunity Reconciliation Act recognized federal responsibility for international child support enforcement and gave the

Secretary of State, with the concurrence of the Secretary of Health and Human Services, the authority to declare any foreign country, or political subdivision thereof, to be a foreign reciprocating country. Once a declaration is made, child support agencies in jurisdictions in the United States participating in the program established by Title IV-D of the Social Security Act must provide enforcement services under that program to such reciprocating countries as if the request for these services came from a U.S. state. To date, 14 countries and 11 Canadian Provinces/Territories have been declared to be foreign reciprocating countries. In addition, the United States signed the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance in 2007, and the Senate has provided its advice and consent to ratification of the treaty. Once appropriate U.S. federal and state legislation has been enacted, the United States should be in a position to deposit its instrument of ratification.

## **Article 24 – Protection of children**

409. Children in the United States are entitled to the constitutional and statutory protections against discrimination described in this report. As described in this report, the Fifth and Fourteenth Amendments to the Constitution, together with state constitutions and numerous federal and state statutes, ensure that persons are protected against discrimination on the basis of race, color, sex, language, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In the context of the equal protection doctrine generally, U.S. law provides some special protections aimed at providing protection for children and preventing discrimination against classes of children. Many of these are described in the Initial U.S. Report and the Second and Third Periodic Report. In the U.S. federal system, state law also establishes many protections for children. This report focuses on protection under federal law.

410. United Nations Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. As noted in the Second and Third Periodic Report, the United States became a party to the Optional Protocol on the involvement of children in armed conflict in 2003. The United States filed its initial report with the Committee on the Rights of the Child on 22 June 2007, CRC/C/OPAC/USA/1, and met with the Committee to discuss the report on 22 May 2008. The Committee's Concluding Observations were issued on 25 June 2008, CRC/C/OPAC/USA/CO/1. The United States filed its First Periodic Report with the Committee on 23 January 2010. These reports are available at <http://www.state.gov/g/drl/hr/treaties/>.

411. United Nations Optional Protocol on the sale of children, child prostitution and child pornography. As noted in the Second and Third Periodic Report, the United States became a party to the Optional Protocol on the sale of children, child prostitution and child pornography in 2003. The United States filed its initial report with the Committee on the Rights of the Child on 16 June 2007, CRC/C/OPSC/USA/1, and met with the Committee to discuss the report on 22 May 2008. The Committee issued its Concluding Observations on 25 June 2008, CRC/C/OPSC/USA/CO/1. The United States filed its First Periodic Report with the Committee on 23 January 2010. These reports are available at <http://www.state.gov/g/drl/hr/treaties/>.

412. Education. Public education is primarily provided at the state and local levels. At the federal level, the U.S. Department of Education's Office for Civil Rights (ED/OCR) is responsible for ensuring equal access to education through the enforcement of civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age. Specifically, ED/OCR enforces the following statutes:



(a) Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin in all programs or activities that receive federal financial assistance;

(b) Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in all programs or activities that receive federal financial assistance;

(c) Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in all education programs or activities that receive federal financial assistance;

(d) The Age Discrimination Act of 1975, which generally prohibits discrimination on the basis of age in all programs or activities that receive federal financial assistance;

(e) Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public institutions;

(f) Boy Scouts Equal Access Act of 2003, which provides equal access to meet in schools for the Boy Scouts of America and other youth groups designated as “patriotic societies.” See also, discussion under Article 26 below.

413. These laws apply, inter alia, to all public and private education institutions receiving financial assistance from the Department of Education, including state education agencies, elementary and secondary schools, colleges and universities, vocational schools, proprietary schools, and libraries and museums. Thus, 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. As of 2010, ED/OCR’s enforcement jurisdiction covers:

(a) 99,000 public elementary and secondary schools;

(b) 18,000 public elementary and secondary educational agencies;

(c) 4,400 colleges and universities; and

(d) Thousands of institutions conferring certificates below the associate degree level, such as training schools for truck drivers and cosmetologists, and other entities, such as libraries, museums, and vocational rehabilitation agencies.

Within the context of these institutions, OCR protects the rights of:

(e) 49 million elementary and secondary students;

(f) 20 million students attending institutes of higher education; and

(g) Millions of individuals who are employed by, or seeking employment at educational institutions.

414. Education of non-citizen children. School children at the elementary and secondary level in the United States cannot be denied a free public education on the basis of immigration status. See *Plyler v. Doe*, 457 U.S. 202 (1982). In May 2011, ED and DOJ issued a joint “Dear Colleague” letter providing guidance on this topic. The letter discussed enrollment policies and procedures that comply with civil rights laws, as well as *Plyler*, and reminded school districts that prohibiting or discouraging children from enrolling in schools because they or their parents/guardians are not U.S. citizens or are undocumented violates federal law. Moreover, all federally-funded education programs for elementary and secondary school students provide services without regard to immigration status. One such program is the federal Migrant Education Program (MEP), run by the U.S. Department of Education, which provides educational and support services to children and youth who are

themselves, or whose parents are, migrant farmworkers or fishers. Under the MEP, the Department provides formula grants to states to ensure high quality educational programs for migratory children. Working typically through school districts or other local agencies, states use these funds to identify eligible children and provide educational and support services, including academic instruction, remedial and compensatory instruction, bilingual and multicultural instruction, vocational instruction, career education, counseling and testing, health services and preschool services. California, Texas and Florida are the largest recipients of grants under this program.

415. The Plyler decision does not apply to education at the college or university level; eligibility to receive federally-funded student financial assistance for education at this level is governed by different statutory criteria, which generally limit eligibility to citizens or nationals, permanent residents, or persons present in the United States for other than a temporary purpose with the intention of becoming a U.S. citizen or national. ED offers some postsecondary programs without regard to immigration status, however. For instance, ED operates a College Assistance Migrant Program (CAMP) that provides financial aid, counseling, tutoring and encouragement to approximately 2,000 migrant farmworkers or their children, annually, in their first year of college.

416. Discipline. Schools should be learning environments where children, including children with disabilities, are supported and encouraged to maximize their academic and social potential. It is important that students and school personnel be protected from practices that are traumatizing and potentially physically and psychologically harmful. The use of restraint and seclusion in some settings has provided an impetus for the institution of reform measures to reduce or eliminate them. Although health care settings have established rules and regulations on restraint and seclusion (see below), considerable concern has been expressed by some members of civil society about the use of restraints in public schools to deal with challenging behavior of some children, including children with intellectual disabilities. In 2009, the Government Accountability Office (GAO) issued a report and Congress held a hearing on the subject. ED also published a review of state laws and policies regarding use of restraint and seclusion, which can be found at <http://www2.ed.gov/policy/seclusion/seclusion-state-summary.html>.

417. Restraint and seclusion in schools is relatively infrequently used and is currently generally governed by state laws. The federal government is actively working to ensure that students are safe and protected from being unnecessarily or inappropriately restrained or secluded. In July 2009, the Secretary of Education sent a letter to each state's Chief State School Officer concerning this issue, which stated as follows:

“I urge each of you to develop or review and, if appropriate, revise your State policies and guidelines to ensure that every student in every school under your jurisdiction is safe and protected from being unnecessarily or inappropriately restrained or secluded. I also urge you to publicize these policies and guidelines so that administrators, teachers, and parents understand and consent to the limited circumstances under which these techniques may be used; ensure that parents are notified when these interventions do occur; and provide the resources needed to successfully implement the policies and hold school districts accountable for adhering to the guidelines.

I encourage you to have your revised policies and guidance in place prior to the start of the 2009-2010 school year to help ensure that no child is subjected to the abusive or potentially deadly use of seclusion or restraint in a school.”

418. ED has also provided significant support to state and local efforts to adopt research-based positive approaches for establishing the social culture and behavior supports needed for all children in schools to achieve both social and academic success, primarily through

funding research, technical assistance, and professional development activities. For example, ED funds the Positive Behavioral Interventions and Supports (PBIS) Center, which is designed to provide capacity-building information and technical assistance to states, school districts and schools to identify, adopt, and sustain effective positive school-wide disciplinary practices. For more information, see <http://www.pbis.org>. ED also provides technical assistance to assist state and local educational agencies for these purposes, encourages states and school districts in the use of conflict resolution techniques, and promotes the use of early intervention services. OCR collects data from school districts on their use of restraints and seclusion.

419. Children with disabilities. The Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act of 2004, continues to be implemented to improve the educational opportunities for children with disabilities. The IDEA seeks to improve results for children with disabilities through early identification of disabilities, early provision of services, meaningful access to the general curriculum, and the setting of high performance goals for such children. For children with disabilities from age three through secondary school, schools must provide a free appropriate public education that includes specially designed instruction and related services required to meet the individual needs of a student with a disability. Related services include education-related therapies and support services. These services are provided free of charge. For infants and toddlers with disabilities and their families, states must provide early intervention services designed to meet the developmental needs of the infant or toddler. As of 2009, nearly 6,960,000 children were receiving services under the IDEA. The IDEA provides formula grants to states to assist in the provision of early intervention and special education services. In addition, it provides for discretionary grants to institutions of higher education and other organizations to support research, technical assistance, technology and personnel development, and parent-training and information centers. The U.S. Supreme Court held in *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009), that the IDEA authorizes reimbursement for private special education services when a public school district fails to provide a free appropriate public education and the private school placement is appropriate, regardless of whether the child had previously received special education services through the public school district.

420. The IDEA is administered by ED's Office of Special Education and Rehabilitative Services. That office develops and disseminates federal policy; administers the formula grants and discretionary programs; and promotes training of personnel, parents, and volunteers to assist in the education of children and youth with disabilities. It also monitors and enforces states' compliance with the IDEA and reports on the effectiveness of federal policy and programs.

421. The 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. In addition, under the Supplemental Security Income (SSI) program, low-income individuals who are blind or have another disability are provided with cash income payments from the federal government. Children are eligible if they have a disability and if their family income and resources fall below a certain level. As of December 2007, 1,121,017 children were receiving these benefits, approximately 15 percent of overall recipients. Many of these children also receive additional payments from state supplementary programs.

422. The Children's Health Act of 2000, P.L. 106-31, sec. 1004, established safeguards regarding the misuse of seclusion and restraint on individuals in healthcare facilities and children in residential settings. HHS has initiated a number of activities to reduce the use of these practices in health and mental healthcare settings.

423. Financial support programs for parents and families. The federal and state governments administer a number of programs that provide temporary assistance to parents in finding and succeeding at employment to support their families. The Temporary Assistance for Needy Families (TANF) program provides grants to states that administer the nation's primary temporary cash assistance for low-income families with dependent children. Administered by HHS' Administration for Children and Families, TANF is structured to provide temporary cash assistance and services intended to help parents pursue the 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 individuals with disabilities who are unable to hold gainful employment. Low-income families with children may also be eligible for the Earned Income Tax Credit (EITC), a federal tax credit that offsets Social Security payroll taxes by supplementing wages. Some states also offer an additional state EITC for these families. The law in this area has not changed since submission of the last report.

424. Child labor laws. As discussed in paragraphs 717 – 720 of the Initial Report and paragraphs 373 – 375 of the Second and Third Periodic 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.* Violators of the FLSA's child labor provisions may be charged with administrative civil money penalties of up to \$11,000 for each violation and may incur criminal fines of up to \$10,000 for willful violations. For a second conviction for a willful violation, the penalties can involve a criminal fine of up to \$10,000 or imprisonment for up to 6 months, or both. A 2008 amendment to the FLSA authorizes the Department of Labor to assess Civil Money Penalties up to \$50,000 for each violation causing death or serious injury of an employee under the age of 18. Such Civil Money Penalties may increase up to \$100,000 when a violation is willful or repeated.

425. ILO Convention 182 on the Worst Forms of Child Labour. As noted in the Second and Third Periodic Report, the United States has been a party to the International Labour Organization (ILO) Convention on the Worst Forms of Child Labour (Convention 182) since 2000. This Convention requires parties to take immediate and effective action to prohibit and eliminate the worst forms of child labor, including, for all those under 18 years of age, all forms of slavery or practices similar to slavery, prostitution, pornography, forced recruitment for use in armed conflict, and use of children in illicit or hazardous activities. Before ratifying Convention 182, the Tripartite Advisory Panel on International Labor Standards (TAPILS), a sub-group of the President's Committee on the International Labour Organization, which includes 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 in the United States was sufficient to give effect to the terms of the Convention, and that there was no need to enact or modify U.S. law as a consequence of U.S. ratification of the Convention.

426. As a result of ratification of Convention 182, the United States continually reviews its legislation and regulations that give effect to the Convention and considers the views of the ILO supervisory bodies with a view to enhancing protections against the worst forms of child labor. Recent legislative changes and government activities augment the U.S. legal framework that gives effect to the provision of Convention 182. On May 21, 2008, legislation was enacted to amend the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, by increasing the civil monetary penalties that may be imposed for certain child labor violations. The legislation raised the maximum penalty to \$50,000 for each such violation that causes the death or serious injury to any employee under the age of 18 years. In cases where the employer's violation that caused the death or serious injury is repeated or willful,

the maximum penalty was raised to \$100,000. *See* section 302 of the Genetic Information Nondiscrimination Act of 2008 (GINA), codified at 29 U.S.C. 216(e)(1)(A)(ii).

427. DOL has taken steps to improve protections for child workers. As part of the Administration's focus on good jobs for all workers, since 2009 DOL's Wage and Hour Division (WHD) has hired more than 300 additional wage and hour investigators. Every on-site investigation – complaint driven or directed – performed by WHD investigators includes an inspection for compliance with the FLSA's child labor provisions and the Secretary of Labor's Hazardous Occupation Orders (HOs). Every low wage initiative, whether targeted for child labor compliance or other reasons, requires that investigators examine child labor compliance. Child labor complaints, although not numerous, are given the highest priority within the agency.

428. Pursuant to recommendations of the National Institute for Occupational Safety and Health (NIOSH) after its comprehensive review to assess workplace hazards and the adequacy of the current youth employment hazardous occupation orders (HOs), on May 20, 2010, DOL published a Final Rule concerning the nonagricultural child labor provisions expanding the list of dangerous non-agricultural jobs that children are not permitted to perform. Examples of new prohibitions affecting the employment of youth under the age of 18 years include: working at poultry slaughtering and packaging plants; riding on a forklift as a passenger; working in forest fire fighting, forestry services, and timber tract management; operating power-driven hoists and work assist vehicles; operating balers and compacters designed or used for non-paper products; and operating power-driven chain saws, wood chippers, reciprocating saws, and abrasive cutting discs. The rule was effective as of July 19, 2010. DOL is also carefully examining the NIOSH recommendations on child farm work and actively exploring additional regulatory changes to bolster protections for children in the fields. On September 2, 2011, the Department of Labor published a Federal Register notice requesting public comments on a proposed rule to revise the Federal Child Labor standards applicable to agriculture, on which comments were to be accepted for 90 days.

429. Armed conflict. As noted in the Second and Third Periodic Report, under U.S. law, a person must be at least 18 years of age to serve in any branch of the U.S. military, or be at least 17 years of age and have parental consent to do so. Even prior to U.S. ratification of the Optional Protocol to the Convention on the Rights of the Child on the involvement of 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 Army, 1 December 1988, Chapter 2. Further, coincident with ratification of the Optional Protocol in 2002, each branch of the U.S. Armed Forces 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 direct part in hostilities. Further discussion of these issues can be found in the U.S. Report on the Optional Protocol on the involvement of children in armed conflict, [www.state.gov/g/drl/hr/treaties/index.htm](http://www.state.gov/g/drl/hr/treaties/index.htm).

430. Sexual exploitation of children. Sexual exploitation of children is a criminal offense under both federal and state law. *See*, e.g., 18 U.S.C. 2251. In 2003, Congress enacted the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act ("PROTECT Act"), Pub. L. 108-21 (2003), which strengthened law enforcement's ability to prosecute and punish violent crimes committed against children. This act served three primary purposes. First, it provided additional tools to help locate missing children and prosecute offenders, *inter alia*, through the AMBER alert program and new investigative tools. Second, it strengthened penalties for those who would harm children. Third, it strengthened the laws and penalties against child pornography in ways that can survive

constitutional review. The United States Supreme Court has ruled that the manufacture, distribution, sale, and possession of child pornography (limited to depictions of actual minors) may be prohibited, consistent with the First Amendment, see *New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990). In 2008, the Supreme Court upheld the constitutionality of the PROTECT Act's provisions criminalizing the pandering or solicitation of child pornography, finding that those provisions were not overbroad under the First Amendment or impermissibly vague under the due process clause of the Constitution. *U.S. v. Williams*, 553 U.S. 285 (2008). More detailed discussion of these issues can be found in the U.S. Report on the Optional Protocol on the sale of children, child prostitution, and child pornography, [www.state.gov/g/drl/hr/treaties/index/htm](http://www.state.gov/g/drl/hr/treaties/index/htm).

431. Trafficking in children. Sex trafficking in children is illegal under federal and many state laws. 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, which was enacted as part of the Trafficking Victims Protection Act of 2000, criminalizes the sex trafficking of children where an interstate commerce jurisdictional element is satisfied. Specifically, this statute makes it a crime to recruit, entice, harbor, transport, provide, or obtain a minor to engage in a commercial sex act, or to benefit financially from a minor engaging in a commercial sex act. The statute does not require that the minor be moved across state lines, or that force, fraud, or coercion was used against the minor. The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 altered the burden of proof with respect to the defendant's knowledge of a minor victim's age. In instances where the defendant had a reasonable opportunity to observe the minor, there is no need for any proof concerning a defendant's knowledge of the victim's age. In all other situations, proof that the defendant recklessly disregarded the fact that the victim was a minor is sufficient for a conviction.

432. All minors deemed victims under the TVPRA of 2005 are also eligible for certain protections and services, including immigration relief and access to refugee benefits in the case of foreign victims; and crime victim funds and certain federal benefits in the case of U.S. citizen victims and permanent residents. The TVPRA of 2005 strengthened protections for juvenile victims of trafficking, specifically by mandating the Secretary of Health and Human Services to establish a pilot program of residential treatment facilities in the United States for juveniles subjected to trafficking. On July 27, 2006, Congress passed the Adam Walsh Act, which among other innovations, removed the statute of limitations for sex crimes against children and established a comprehensive program for the registry of convicted sex offenders. As an additional tool in the arsenal to combat the sexual exploitation of children 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. More detailed discussion of these issues can be found in the U.S. Report on the Optional Protocol on the sale of children, child prostitution and child pornography, [www.state.gov/g/drl/hr/treaties/index.htm](http://www.state.gov/g/drl/hr/treaties/index.htm).

433. Section 235 of the TVPRA of 2008 has a wide-ranging impact on children who are found within the United States and are not accompanied by a parent or legal guardian. Once DHS determines that these children are, in fact, unaccompanied, DHS is required (with limited exceptions for children residing in contiguous countries) to transfer these children to the custody of HHS within 72 hours of finding them. See TVPRA of 2008, sec 235(a) (2) (A), 8 U.S.C. 1232 (a) (2) (A). As a result, authority to release unaccompanied children to a sponsor (other than a parent or legal guardian) now rests solely with HHS. Moreover, under the TVPRA, unaccompanied alien children receive special consideration for any asylum applications they file and are not subject to the abbreviated removal mechanisms that DHS may use for other aliens (e.g., the expedited removal process).

434. Publicly funded health care. One of President Obama's highest priorities from the moment he took office was enactment of comprehensive health insurance reform legislation. After decades of trying but failing to reform our health care system, the United States was spending more on health care than any other developed nation and getting poorer results. With the leadership of the President and the leaders of Congress, the Affordable Care Act became law in March 2010. Among its other benefits, this Act is projected to put the U.S. economy and budget on a more stable path by reducing the deficit by more than \$100 billion in the first 10 years and nearly \$1 trillion in the following decade by eliminating wasteful spending and combating fraud and abuse of public and private insurance programs. The major goals are:

(a) To make health insurance more affordable to tens of millions of Americans who have been priced out of coverage by providing tax credits and subsidies to individuals, families, and small business owners to buy coverage; it is estimated that approximately 32 million more Americans will be covered under this Act;

(b) To create a more competitive, patient-centered insurance system that allows millions of Americans to choose their health insurance plan from the same list that Members of Congress use;

(c) To eliminate most of the egregious insurance industry practices that discriminate against people living with medical conditions and those who are at risk of becoming ill; and

(d) To permit children to be covered on their parents' policies up to the age of 26.

435. The federal government administers a number of health care programs designed to ensure that all children in the United States receive adequate care, free of charge if necessary. The primary financing mechanism for publicly funded health care in the United States is the Medicaid program, 42 U.S.C. 1396 *et seq.* Operated by the states under broad federal guidelines, Medicaid provides health benefits coverage for 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, it has a preventive component, the Early and Periodic Screening Diagnosis and Treatment (EPSDT) benefit, which requires that states provide coverage that includes screening, diagnostics and treatment to most Medicaid-eligible individuals under the age of 21.

436. In addition, the 1997 State Children's Health Insurance Program (now referred to as CHIP, and previously as SCHIP), a federal-state partnership, represented the largest single expansion of health insurance coverage for children in the United States in more than 30 years. SCHIP was 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 CHIP law authorized \$40 billion in federal funds over ten years to improve children's access to health insurance. HHS Centers for Medicare and Medicaid Services (CMS) enrollment data indicate that approximately 7.4 million children who otherwise would not have had health coverage were enrolled in CHIP at some point during fiscal year 2008, compared to 7.1 million in fiscal year 2007. During fiscal year 2008, there were also 334,616 adults covered with CHIP funds.

437. In February 2009, President Obama signed into law the Children's Health Insurance Reauthorization Act of 2009. This law authorized continued funding for CHIP at an increased level, and amended the CHIP statute to make it easier for certain groups to access health care under the program, including uninsured children from families with higher incomes and uninsured low-income pregnant women. The law authorized expenditure of \$32.8 billion to expand the program to cover approximately 4 million additional children

and pregnant women, and also included, for the first time, authorization for states to cover legal immigrants without a waiting period.

438. In addition to Medicaid and CHIP, HHS manages three principal programs for delivery of public medical care in the United States. One is the Title V Maternal and Child Health Block Grant program, which makes federal funds available to 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 and local jurisdictions must match every \$4 of Title V funds received with at least \$3 of state/local money for maternal and child health programs at the state and local levels.

439. The second initiative is the Community Health Center program, overseen by the HHS Health Resources and Services Administration (HRSA), which finances community, migrant, homeless, and public housing health centers in medically underserved communities around the nation. These health centers deliver preventive and primary care services to patients regardless of ability to pay; charges are set according to income. As of 2010, there were more than 1,100 health center grant recipients operating more than 8,100 community-based clinics in every state and territory, including in geographically isolated and economically distressed areas. These health centers served nearly 19.5 million persons in 2010, about 40 percent of whom had no health insurance, and one-third of whom were children. In fact, according to HHS, as of 2010, one of every 16 people living in the United States relied on a HRSA-funded clinic for primary care.

440. The third principal program is the 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. In 2010, approximately 8,000 clinicians cared for more than 7 million people through this program.

441. The Mental Health Parity and Addiction Equity Act of 2008 provided for individuals who already have benefits under mental health and substance use disorder coverage parity with benefits limitations under their medical/surgical coverage. This will assist in correcting disparities experienced by individuals in behavioral healthcare access. See [http://www.cms.gov/HealthInsReformforConsume/04\\_TheMentalHealthParityAct.asp](http://www.cms.gov/HealthInsReformforConsume/04_TheMentalHealthParityAct.asp)

442. The Title X Family Planning program, administered by HHS, 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.

443. Finally, the Supplemental Food Nutrition Program for Women, Infants and Children (WIC), 42 U.S.C. 1786, administered by the Department of Agriculture Food and Nutrition Service, continues to contribute significantly to the well-being of low-income women and children. This program provides nutritious foods, including medical foods where indicated, nutrition education, and health care referrals and screenings, such as anemia testing and immunization and screenings and semi-annual physical exams, to low-income, high-risk pregnant and post-partum women, infants and children under five years of age. 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.

444. 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 a combination of state and federal



funds administered by the National Center for Immunizations and Respiratory Diseases within the HHS Centers for Disease Control and Prevention. Vaccines are provided to Medicaid eligible children through the Early and Periodic, Screening, Diagnosis and Treatment benefit. CMS has developed an initiative to encourage states to meet their obligations to provide or arrange for this benefit, and, as a result of this initiative, the rate of fully immunized preschool children has improved. Some states are now requiring their Managed Care organizations 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. In order to ensure equal access to immunizations, the Vaccines for Children Program (VFC), established in 1994, is a state-operated program funded through the Medicaid program to provide children with free vaccines with nominal or no vaccine administration fees to ensure that vaccine costs will not be a barrier to immunization for the neediest children. VFC provides immunizations for uninsured children, Medicaid recipients, and Native Americans and Alaska Natives. States may also use the VFC structure to purchase vaccines for state-defined populations of children. Another source of immunizations for vulnerable children is the Immunization Grant Program (also called the “317 grant program”) administered by the Centers for Disease Control within HHS. In 2009, \$300 million in additional “317” funds from the American Recovery and Reinvestment Act were made available for grants to state, local, and territorial public health agencies under this program.

445. 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* INA sec. 262, 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* INA sec 265(a), 8 U.S.C. 1305 (a). In addition, DHS may prescribe special registration and fingerprinting requirements for selected classes of aliens not lawfully admitted for permanent residence. INA sec. 263(a), 8 U.S.C. 1303 (a), and may require, upon 10 days notice, that natives of specified foreign countries notify DHS of their current addresses and furnish additional specified information. INA sec. 265(b), 8 U.S.C. 1305 (b).

446. Nationality. Acquisition of United States citizenship is governed by the United States Constitution and by federal immigration laws. 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. As discussed in the Second and Third Periodic Report, a child born abroad out of wedlock acquires at birth the nationality of a U.S. citizen mother who meets specified residency requirements. 8 U.S.C. 1409(c). The Supreme Court has upheld the requirement that where a child is born abroad out of wedlock to a U.S. citizen father and a non-citizen mother, 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* INA sec. 309(a)(4). 8 U.S.C. 1409 (a)(4) (2005); *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001) (upholding constitutionality of statute against equal protection challenge). Recently, the U.S. Supreme Court affirmed by an equally divided court a Court of Appeals ruling that it is constitutional to impose a different physical presence requirement for unmarried U.S. citizen mothers and fathers with regard to the ability of their children born abroad to acquire U.S. citizenship, in view of the objective to reduce

statelessness of children of unmarried U.S. citizen mothers. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011).

447. Federal immigration law also provides a mechanism for certain children to acquire U.S. citizenship after birth. The Child Citizenship Act of 2000, which became effective on February 27, 2001, provides that foreign-born children, including adopted children, automatically acquire citizenship if they meet the following requirements: 1) have at least one US citizen parent; 2) are under 18 years of age; 3) are currently residing permanently in the US in the legal and physical custody of the US citizen parent; 4) have been lawfully admitted for permanent residence to the United States; and 5) if an adopted child, also meets the requirements applicable to adopted children under U.S. immigration law.

448. Care and placement of unaccompanied alien children. Responsibility for care and placement of unaccompanied alien children rests with the Division of Unaccompanied Children's Services (DUCS) in the Office of Refugee Resettlement (ORR) in the Administration for Children and Families (ACF) of HHS. The mission of DUCS is to provide a safe and appropriate environment for unaccompanied alien children (UAC) from the time they are placed in ORR custody until they are reunified with family members or sponsors in the United States or removed to their home countries by DHS immigration officials. ORR takes into consideration the unique nature of each child's situation and child welfare principles when making placement, case management and release decisions that are in the interests of the child. The TVPRA of 2008 included provisions, implemented primarily by DHS and HHS, to promote the identification and protection of unaccompanied alien children who are trafficking victims, at risk of being trafficked, or may be seeking asylum or other forms of immigration relief. The legislation set standards for care and services for alien children in custody, with regard to age determinations, repatriation, placement, suitability assessments, access to counsel and legal orientation, and child advocates.

449. ORR takes care of approximately 7,000 to 8,000 unaccompanied alien children a year, with an average length of stay of approximately 65 days each. During fiscal year 2010 (October 2009 through September 2010), the numbers of children ranged from 1,215 to 1,952 at any time. Of these, 74 percent were male, 26 percent female, and 22 percent below the age of 14. There are 41 ORR-funded care facilities in 10 states. These facilities must be licensed and must meet ORR standards. Facilities provide children with classroom education, health care, socialization, recreation, vocational training, mental health services, family reunification, access to legal services and case management. Care provider facilitation case management teams use effective screening tools to assess children for mental health problems and trafficking issues.

450. Unaccompanied alien children who enter into a state juvenile court system may be eligible for special immigrant relief, called "Special Immigrant Juvenile (SIJ) Status." This relief is available when a state juvenile court has declared the child dependent on a state juvenile court or has appointed an individual or state entity as guardian. The state juvenile court must also find that it is not viable for the child to reunify with one or both parents due to abuse, abandonment or neglect and that it is not in the child's best interest to be returned to his or her home country. If granted, SIJ status will allow the child to remain in the United States and to become a lawful permanent resident, with no waiting period. Petitions for SIJ status are processed by the DHS U.S. Citizenship and Immigration Services.

## Article 25 – Access to the political system

### 1. Voting

451. The United States political system is generally open to all adult citizens. 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 the limitations of the U.S. Constitution and federal laws that guarantee the right to vote. Over the course of the nation's history, various amendments to and interpretations of the Constitution have marked the progress toward universal suffrage. In particular, the Supreme Court's interpretations of the Equal Protection Clause of the Fourteenth Amendment, as well as the Nineteenth Amendment, have expanded voting rights in a number of areas.

452. The administration of elections in the United States is decentralized, and is entrusted primarily to local governments. The Voting Rights Act of 1965, 42 U.S.C. 1973-1973aa-6, prohibited discriminatory voting practices and established federal oversight of the administration of elections in certain "covered jurisdictions" that had a history of discriminatory voting practices. As noted in the Second and Third Periodic Report, in response to issues that arose concerning balloting in the 2000 election, in 2002 Congress enacted the Help America Vote Act (HAVA), 42 U.S.C. 15301 – 15545. That Act provides funds for the purchase of new voting equipment to assist in the administration of federal elections, and establishes minimum federal election administration standards. HAVA's requirements include provisional balloting, identification for new voters, voter education, voting equipment for voters with disabilities, and statewide computerized voter registration lists.

453. In keeping with commitments made by the United States and the other 54 States that participate in the Organization for Security and Cooperation in Europe (OSCE), the United States has invited the OSCE to observe every presidential and midterm election since 1996, including the elections of 2000, 2004, 2006 and 2008. The OSCE deployed an Election Observation Mission (EOM) in 2002, an EAM in 2004, an EAM in 2006, and a Needs Assessment Mission (NAM) and a Limited Election Observation Mission (LEOM) in 2008. OSCE's reports have in essence found that U.S. elections are conducted in an environment that reflects a long democratic tradition, including institutions governed by the rule of law, free and professional media, and civil society involved in all aspects of the election process. With respect to the 2008 presidential election, the OSCE found that the November 4 general election "demonstrated respect for fundamental freedoms, the rule of law and transparency" and that the regulatory framework guaranteed equal opportunity to the candidates and facilitated an open, competitive, and freely debated campaign. The OSCE noted further, however, that "concerns that arose during the recent elections have yet to be fully addressed in some states, and the continuation of efforts to further enhance public confidence in the election process would be appropriate." The types of concerns involved inconsistencies among election standards, possible conflicts of interest arising from the way election officials are appointed in some cases, and allegations of electoral fraud and voter suppression in the pre-election period. Through the Voting Rights Act, HAVA and other relevant federal and state laws, the federal government and the states continue to work actively to ensure that elections in the United States are open and fair and that the public can have confidence in that fact.

454. Disability. The right to vote is guaranteed to citizens who are blind or have another disability 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 (ADA), 42 U.S.C. 12131 *et seq.* (prohibiting discrimination against persons with disabilities in all programs of state and local governments). Section 301 of HAVA, 42 U.S.C. 15481, also sets forth new

requirements that voting systems be accessible for voters with disabilities so that they are able to vote with the same opportunity for privacy and independence as other voters. Given the fundamental importance of voting as a civil right, DOJ conducted a large-scale compliance review to evaluate the accessibility of polling places in the fifth largest American city, Philadelphia, Pennsylvania. On April 16, 2009, the City of Philadelphia entered into a settlement agreement with DOJ pursuant to Title II of the ADA that will give people with mobility disabilities a greater opportunity to vote in person at the polls, rather than voting by alternative ballot because of inaccessible polling places. In addition to creating a far greater number of polling places that are accessible to individuals with mobility disabilities, DOJ's expectation is that this compliance review and the related settlement will also serve as a model for other cities as they seek to ensure that individuals with disabilities are able to exercise this crucial civil right.

455. 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.

456. 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. 1973ff et seq.

457. Criminal conviction and mental incompetence. The Fourteenth 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 inability to vote is terminated by the end of a term of incarceration or by the granting of pardon or restoration of rights.

458. Felony disenfranchisement is a matter of continuing debate in the states of the United States. It has been criticized as weakening our democracy by depriving citizens of the vote, and also for its disproportionate affects on racial minorities. As noted in the Second and Third Periodic Report, 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. At the time of the previous report, a number of states had moved to reduce the scope of felony disenfranchisement or otherwise to facilitate the recovery of voting rights for those who can regain them.

459. Since the submission of the Second and Third Periodic Report in 2005, modification of state laws and procedures has continued. For example, in 2005, the Governor of Iowa issued an executive order eliminating lifetime disenfranchisement for persons convicted of an "infamous crime" and making restoration of voting rights automatic for persons completing their sentences. This order, however, was revoked by a successor Governor in 2011. Also in 2005, the legislature in Nebraska repealed its lifetime ban on voting for all felons and replaced it with a 2-year post-sentence ban. In 2006, Rhode Island voters approved a referendum to amend the state's constitution to restore voting rights to persons currently serving a sentence of probation or parole. In 2006, the Tennessee legislature amended its complex restoration system to provide a more straightforward procedure under which all persons convicted of felonies (except electoral or serious violence offenses) are now eligible to apply for a "certificate of restoration" upon completion of their sentences. In 2007, the Maryland legislature repealed all provisions of the state's lifetime voting ban and instituted an automatic restoration policy for all persons upon completion of a sentence.

In 2009, the Washington state legislature enacted the Washington Voting Rights Registration Act, which eliminates the requirement that persons who have completed their felony sentences pay all fees, fines and restitution before being allowed to vote. Florida, however, toughened its laws in March 2011, banning automatic restoration of voting rights for all convicted felons. Currently 48 states restrict voting by persons convicted of felonies in some manner; further information on felony disenfranchisement can be found in the Common Core Document.

460. In July 2009, a bill entitled the Democracy Restoration Act of 2009 was introduced in both the Senate (S. 1516) and the House of Representatives (H.R. 3335). This bill would establish uniform standards restoring voting rights in elections for federal office to Americans who are no longer incarcerated but continue to be denied their ability to participate in such elections. A hearing on H.R. 3335 was held in the House of Representatives on March 16, 2010, but the bills did not proceed further. This legislation has been reintroduced in the House in the 112th Congress (H.R. 2212).

461. 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, sec 8. The right of residents of the District of Columbia (D.C.) to vote for the President and Vice President is guaranteed by the 23<sup>rd</sup> Amendment. D.C. residents are represented in the House of Representatives by a Delegate, who sits, votes and participates in debate in House committees. In some Congresses in the past, the District of Columbia delegate has also had a vote in the Committee of the Whole of the House. This vote was eliminated in a revision of House rules at the beginning of the 112<sup>th</sup> Congress, H.Res. 5, January 5, 2011. D.C. does not have representation in the Senate.

462. The issue of full representation in the U.S. Congress for residents of the District of Columbia has been under active discussion during the last several years and is currently under consideration by Congress. Currently, although residents of the District of Columbia may vote in Presidential elections, they cannot vote to elect a Member of the U.S. House of Representatives or of the U.S. Senate who has full voting rights in the Congress. Since submission of the Second and Third Periodic Report in 2005, several bills have been introduced in both houses of Congress, including the District of Columbia House Voting Rights Act of 2009, H.R. 157 and S. 160. This bill was passed by the Senate in February 2009, but was made subject to an amendment modifying D.C. gun control laws. Because of complications raised by this amendment, the bill did not come up for a vote in the House of Representatives. The bill has been reintroduced in the House in the 112th Congress. This is also an issue about which some civil society representatives have expressed particular concern.

463. 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 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, but these provisions have been interpreted to 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). Residents of each of these insular areas do elect a delegate to the House of Representatives

who, like the representative for the District of Columbia, sits and votes in individual committees and participates in debate but cannot vote in the Committee of the Whole in the House. (See Common Core Document.)

464. Removal from office. Article II, section 4 of the Constitution provides that “[t]he 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 I, the House of Representatives has the sole power to impeach, and the Senate has the sole power to try impeachments. In addition, each House of Congress has the power to judge the qualifications of its members and (by a two-thirds vote) to expel members. Similar procedures are generally available at the state and local level. Legal safeguards exist to protect office holders from abuse of these processes. *Powell v. McCormack*, 395 U.S. 486 (1969) (Congress cannot exclude a member for failure to satisfy any qualifications beyond those prescribed by 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.

465. Two impeachments have occurred since the submission of the previous report in 2005. First, after having been arrested for corruption (fraud and influence peddling) in December 2008, Illinois Governor Rod Blagojevich was impeached by a vote of the Illinois General Assembly and thereafter removed from office by the Illinois State Senate in January 2009. Blagojevich was convicted of making false statements to the FBI in August 2010, and was retried on some counts of corruption. In June 2011, a jury found Blagojevich guilty on 17 or 20 counts of public corruption. Second, on January 20, 2009, the U.S. House of Representatives voted to impeach Federal Judge Samuel Kent for high crimes and misdemeanors on the grounds that he had abused his power and lied to cover up sexual assaults on two women who worked for him in Galveston, Texas. Avoiding an impeachment trial in the Senate, he resigned from office effective June 30. Because federal judges hold their offices “during good Behaviour,” only Congress can remove a federal judge from office.

466. Corporate and other Political Contributions. In January 2010, the Supreme Court held that because communications related to candidate elections that are funded by corporations, unions, and other organizations constitute “speech” under the First Amendment to the U.S. Constitution, the government may not ban or place a ceiling on such spending. See *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). The Court held that such expenditures may be regulated through disclosure and disclaimer requirements, which do not have the effect of suppressing speech. In April 2010, a bill entitled the DISCLOSE Act (Democracy is Strengthened by Casting Light on Spending in Elections) was introduced in both the Senate and House of Representatives in the 111th Congress to blunt the effects of the *Citizens United* case with regard to the role corporations and other large entities can play in elections. The bill would impose comprehensive new disclosure requirements on corporations, labor unions, trade associations and non-profit advocacy groups that spend funds for elections. Although the bill failed to achieve sufficient votes to overcome a filibuster in the Senate, its proponents intend to continue pushing for passage.

## **2. Access to public service**

467. The U.S. Government employs approximately 2,756,000 civilian workers in the executive and legislative branches, located in the 50 states, the District of Columbia and various territories. 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, age, or other non-merit-based factors, including but not limited to sexual orientation and gender identity. The statutory mandate for the federal civil service provides that:

(a) 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).

(b) In addition to the hiring process, advancement within the federal system is also competitive, based on performance and merit. 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.

468. The 1978 Civil Service Reform Act created a federal equal opportunity recruitment program to meet the 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, 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 biased and do not artificially eliminate from consideration otherwise qualified members of underrepresented groups. National policy in this area has been codified in various federal, state and local civil rights laws designed to ensure that employment decisions at all levels of government are free from bias based on race, sex, religion, national origin, disability and age. It is also the policy of the federal government not to discriminate in employment on the basis of other non-merit factors, including political affiliation, sexual orientation, gender identity, marital status, genetic information, or membership in an employee organization. Various laws also provide aggrieved individuals access to independent and impartial tribunals to adjudicate alleged violations of their rights.

469. In 2002, Congress strengthened the protections for civil service workers by enacting the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (NoFEAR Act), P. L. 107-174. This Act makes federal agencies directly accountable for violations of anti-discrimination and whistleblower protection laws. Under the Act, agencies must pay out of their own budgets for settlements, awards, or judgments against them in whistleblower and discrimination cases. In addition, they must engage in substantial outreach to employees concerning their rights, training of managers and supervisors concerning non-discrimination, improvement of complaint processes, and data collection.

470. The federal civil service and many state and local civil service programs have taken steps to protect their employees from political influence. The Hatch Act, enacted in 1939 and subsequently amended, limits the ways in which federal employees can actively participate 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 generally does not prohibit federal employees from registering, voting, making financial contributions to political candidates, and expressing their personal opinions on political candidates and questions. In addition, federal and state governments continue to address actual and apparent attempts to influence government officials in official matters. President Obama, through Executive Order 13490 of January 21, 2009 and related measures, has taken historic steps to close the “revolving door” that carries special interest influence in

and out of government by prohibiting former lobbyists from working on issues on which they lobbied or in agencies they previously lobbied and barring them altogether from holding future positions on advisory boards and commissions.

### 3. Women in government

471. 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. Although women and minorities are still overrepresented at the lower levels of pay and authority in the public sector, their status in public sector employment generally exceeds their status in private sector employment. In fiscal year 2008, women constituted 44.2 percent of the federal civilian workforce. The number of women appointed to high-level government positions in federal, state and local government (including the judiciary), and on special advisory commissions on a wide range of specialized subjects continues to increase. Despite gains of the type noted here, however, the systematic inclusion of women at all levels of the policy-making and planning processes is far from complete.

472. National executive offices. President Obama appointed seven women to serve in Cabinet or Cabinet-level posts, including the Secretary of State, the Secretary of Homeland Security, the Secretary of Health and Human Services, the Secretary of Labor, the head of the Council of Economic Advisers, the Administrator of the U.S. Environmental Protection Agency and the U.S. Ambassador to the United Nations. This is the highest number of women ever to serve in Cabinet or Cabinet-level posts at the outset of a presidential administration.

473. United States Congress. According to a report by the Congressional Research Service, 91 women serve in the 112th United States Congress (2011-2013) – 17 in the Senate and 74 in the House of Representatives (including 3 Delegates from Guam, the Virgin Islands and Washington, D.C.). See <http://www.senate.gov/reference/resources/pdf/R41647.pdf>.

474. According to the House of Representatives website, Women in Congress, 26 (27.9 percent) of the women in Congress are women of color. A total of 15 Black or African American women, 7 Hispanic or Latino women and 5 Asian/Pacific American women are currently serving in Congress. Women make up approximately 18 percent of Congress overall. Nancy Pelosi, the first woman to serve as Speaker of the House, held the highest position in the House and was second in the Presidential line of succession, after the Vice President. Three other women also hold other leadership positions in Congress.

475. Women appointed to the Supreme Court. The first Justice nominated and confirmed for the Supreme Court in President Obama's administration is a Hispanic/Latina woman, Justice Sonia Sotomayor. Because Justice Sotomayor replaced a male Justice, Justice Souter, her appointment brought the number of women on the Supreme Court back to two of 9 (22 percent). In addition, a second woman, Elena Kagan, has since been confirmed for a seat on the Supreme Court to replace a male justice, Justice Stevens. With her confirmation, there are now three women on the Court, constituting one-third of the justices.

476. State elective executive offices. As of January 2009, seven women were serving as Governors of states in the United States. In addition, eight women are serving as Lieutenant Governors of states. In three states that do not have Lieutenant Governors, women hold positions such as Attorney General, Senate President or Secretary of State, which put them second in line to the Governor.

477. State legislatures. According to the National Conference of State Legislatures, as of May 2011, 1,739 women were serving in the 50 state legislatures, representing 23.6 % of all state legislators nationwide. This is a slight decrease from the 2010 session's ratio of



24.5 % female legislators. One state – Colorado – had 41 % female legislators. Six other states – Washington, Vermont, Minnesota, Maryland, Hawaii, and Arizona – had over 30 % female legislators. <http://www.ncsl.org/default.aspx?tabid=21606>.

#### **4. Members of minority groups in government.**

478. The representation of minority groups at all levels of the public sector continues to increase. However, there is still considerable room for further growth.

479. U.S. Congress. Like women, members of minority groups made gains in Congressional representation as a result of the 2008 elections. The 112th Congress, which began in 2011, includes 44 Black or African American members in the House of Representatives (including 2 delegates); 28 Hispanic/Latino members (26 in the House, including the Resident Commissioner, and 2 in the Senate); and 13 Asian-American/Pacific Islander members (11 in the House, including 2 Delegates, and 2 in the Senate). CRS Report, Membership of the 112<sup>th</sup> Congress: A Profile,” <http://www.senate.gov/reference/resources/pdf/R41647.pdf>. There are also five members of the House who identify themselves as Arab American, and four openly gay or lesbian members of Congress.

480. Executive office appointments. President Obama’s Cabinet and Cabinet-level positions include four Blacks or African Americans, three Asian Americans and two Hispanics/Latinos. Thirteen of the 21 persons in Cabinet and Cabinet-level positions (62 percent) are either women, members of minority groups or both. The President has also appointed many openly lesbian, gay, bisexual, or transgender (LGBT) Americans to various executive and judicial positions, including the Director of the Office of Personnel Management.

### **Article 26 – Equality before the law**

481. As treated in depth under Article 2, all persons in the United States enjoy the equal protection of the laws. The Initial Report and the Second and Third Periodic Reports indicated that under the Due Process and Equal Protection Clauses of the U.S. Constitution, 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, all persons are equally entitled to all the rights specified in the Covenant. Any distinction must at a minimum be rationally related to a legitimate governmental objective, and certain distinctions, such as those based on an individual’s race, must be narrowly tailored to achieve a compelling governmental interest. The vast array of legislation protecting against non-discrimination and guaranteeing equal protection of the law in the United States is addressed in detail under Article 2 and in the Common Core Document.

482. Despite the many protections available under law, there is continuing concern about unwarranted racial disparities in some aspects of the justice system. Concerns relate to issues such as racial profiling, as well as disproportionate rates of incarceration in communities of color. A proposed bill entitled the Justice Integrity Act was introduced in the House of Representatives in 2008 to establish a process to analyze and assess unwarranted disparities. The bill has been reintroduced in the House in the 112th Congress. In addition, the Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing on these issues in October 2009 at which a number of civil society organizations testified. While these issues involve complex sets of factors and causal relationships that warrant careful analysis, the Administration is committed to addressing such unwarranted racial disparities.

483. DOJ/CRD, along with other agencies, such as the DHS, actively pursues programs designed to end invidious racial profiling and other causes of unwarranted disparities. The Fair Sentencing Act was enacted in August 2010, reducing the disparity between more lenient sentences for powder cocaine charges and more severe sentences for crack cocaine charges, which are more frequently brought against minorities. These changes are predicted to have a significant impact on sentencing disparities. DOJ also intends to conduct further statistical analysis and issue annual reports on sentencing disparities, and is working on other ways to implement increased system-wide monitoring steps.

484. DOJ conducts investigations of law enforcement agencies regarding allegations of a pattern or practice of constitutional violations, including allegations of racial profiling. For example, DOJ has recently launched investigations of discriminatory policing and pursued effective remedies in jurisdictions including East Haven, Connecticut; Suffolk County, New York, Maricopa County, Arizona; New Orleans, Louisiana; and the Commonwealth of Puerto Rico. If such a violation is determined to exist, DOJ works with the law enforcement agency to revise policies, procedures and training to ensure the constitutionality of police practices. In addition, DOJ components are working to revise and update the "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," which prohibits racial profiling in federal law enforcement activities. DOJ also works with organizations that develop national standards regarding law enforcement, such as the International Association of Chiefs of Police (IACP). This group meets to discuss civil rights issues affecting the law enforcement community and is working on a guideline to be published by the IACP offering technical assistance in policing areas such as use of force and training.

### **Article 27 – The rights of members of minorities to culture, religion and language**

485. The rights of members of minorities to thought, conscience, and religion is discussed above under Article 18. The special treatment of Native Americans under the U.S. Constitution and laws, and the issues that arise as a result of historical policies concerning of Native Americans are discussed under Article 1.

486. 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. Under the Civil Rights Act of 1964, covered entities are required to take reasonable steps to ensure meaningful access to their programs and activities by limited English proficient persons.

487. Voting. Under sections 203 and 4 (f) of the Voting Rights Act, 42 U.S.C. 1973b and 1973aa-1a, U.S. 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 % 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, Alaska Natives, Asian American, or of Spanish Heritage. 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.

488. Education and access to information. DOJ enforces section 204 of 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 students in its instructional programs.

489. ED/OCR enforces Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit discrimination based on race, color, or national origin by recipients of federal financial assistance. Discrimination against English learner (EL) students is a form of national origin discrimination. In *Lau v. Nichols*, 414 U.S. 563 (1974), the U.S. Supreme Court upheld a 1970 policy of the former Department of Health, Education and Welfare Office for Civil Rights, which directed school districts to take affirmative steps to help EL students overcome language barriers and to ensure that they can participate meaningfully in each district's educational program. In addition to the May 1970 memorandum, OCR has issued three other policy memoranda that continue to guide its work today. These documents outline the standards and procedures used to evaluate school district for compliance with Title VI in this area. In evaluating the adequacy of a district's program to educate national origin minority group children with limited English proficiency, OCR evaluates whether a district's program is: 1) based on a sound educational theory; 2) adequately supported with staff and resources so that the program has a realistic chance of success; and 3) periodically evaluated and revised, if necessary. In summary, a school district must identify which of its national-origin minority students are EL students, and provide them with an effective program that affords them meaningful access to the district's educational program.

490. As an example of OCR's work in this area, a complainant alleged that the district subjected EL students to discrimination on the basis of national origin by offering an English as a Second Language (ESL) program that was insufficient to meet each student's English language development needs and was provided by classroom aides rather than qualified ESL teachers; by failing to provide adequate content area instruction; and by failing to provide EL parents with information about their children's education placement and school activities in a language they could understand. In its agreement with OCR, the district agreed to provide equal educational opportunities to EL students by adopting new procedures to improve the staffing and design of its English language assistance program and to ensure effective parental communication. Over the course of the past year, OCR determined that the district had fully implemented this agreement and that over 300 EL students who were receiving services under the program in fiscal year 2009 benefited from these improvements.

491. DOJ/CRD coordinates compliance with Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency." The Executive Order requires that all departments and agencies of the U.S. government examine the services they provide, identify any need for services to persons with limited English proficiency (LEP), and develop in writing and implement a system to provide those services so that LEP persons can have meaningful access to them. Agency plans are to provide for meaningful access consistent with, and without unduly burdening, the agency's fundamental mission. The Executive Order also requires that U.S. government agencies work to ensure that recipients of federal financial assistance provide meaningful access to their LEP applicants and beneficiaries. DOJ issued policy guidance that sets forth the compliance standards that recipients of federal financial assistance must follow to ensure that their programs and activities normally provided in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI's prohibition against national origin discrimination. CRD is responsible for government-wide coordination with respect to Executive Order 13166.

492. Title III of the Elementary and Secondary Education Act (ESEA), which was described in greater detail in paragraphs 439-442 of the Second and Third Periodic Report, simplified federal support for English language instruction by combining categorical grant

programs for English learners and immigrant education into a state formula program. This formula program, which is administered by the Department of Education's Office of Elementary and Secondary Education, assists states and school districts in doing the comprehensive planning needed to implement programs for EL students to help these students learn English as quickly and effectively as possible so that they can achieve the same high academic standards as other students. The formula program also increases flexibility and accountability for states and districts in addressing the needs of EL students. In addition, under Title I, Part A of the ESEA, all EL students must be tested annually for English language proficiency. As discussed above, EL students must be held to the same academic content and achievement standards as all other public elementary and secondary students and must be assessed, with appropriate accommodations, in reading and language arts (with a limited exception for recently arrived EL students), mathematics, and science. In addition, schools and school districts must be held accountable for the achievement of EL students as one of several specific subgroups.

493. As noted above, in 2010, the Obama Administration announced a proposal to re-tool the ESEA to promote the use of academic standards that prepare students to succeed in college and the workplace, and to create an accountability system that recognizes student growth and school progress toward meeting that goal. More recently, in September 2011, President Obama announced that, while Congress continues its work on ESEA reauthorization, ED will provide, pursuant to the Secretary's waiver authority under the ESEA, flexibility to states, districts, and schools to support state and local reform efforts in critical areas such as transitioning to college- and career-ready standards and assessments; developing systems of differentiated recognition, accountability, and support; and evaluating and supporting teacher and principal effectiveness. In order to help states and districts move forward with reforms in these areas, ED has offered states the opportunity to request flexibility regarding certain requirements of the ESEA that may be barriers to such efforts in exchange for states' meeting four principles aimed at increasing the quality of instruction and improving student academic achievement. States receiving flexibility will continue to hold schools accountable for improving the achievement of EL students, and must include EL students in all aspects of their reform efforts.

494. ED's Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students (ED/OELA) provides national leadership in promoting high-quality education for the nation's population of EL students, and administers a number of grant programs under the ESEA. To help meet its mission, OELA builds partnerships between parents and their communities. For these purposes, OELA distributes and manages \$80 million in federal grant funds to institutions of higher education, state educational agencies, district, schools, and community-based organizations.

495. Health care and social services. HHS's Office for Civil Rights (HHS OCR) enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin (including limited English proficiency) by recipients of federal financial assistance. The failure of recipients, such as state and local social service agencies and health care providers, to take reasonable steps to provide LEP persons with a meaningful opportunity to participate in HHS funded programs may constitute a violation of Title VI.

496. As an example of HHS OCR's enforcement work, a complainant with limited English proficiency alleged that the Hawaii Department of Human Services (HDHS) denied her an interpreter during her application for social service benefits. As a result of HHS OCR's investigation and compliance review, HDHS signed a Voluntary Resolution Agreement to notify individuals with LEP of the availability of free language assistance, provide interpreters upon request, translate vital program documents, and train HDHS staff

on policies and procedures for communicating with and serving persons with LEP. This agreement covers all services and benefits provided by HDHS to a state with a population of more than 1.2 million.

497. HHS OCR also provides technical assistance on preventing and addressing discrimination on the basis of race, color, national origin, disability, sex, religion, and age to health care entities and providers nationwide who fall under its jurisdiction. In fiscal year 2009, HHS OCR engaged in partnerships with 17 hospital associations in 16 states to provide outreach and technical assistance on federal nondiscrimination laws. HHS also provides information and training on federal civil rights statutory protections to major organizations and stakeholders within the healthcare industry. It has developed video training modules and a medical school curriculum entitled "Stopping Discrimination Before it Starts: The Impact of Civil Rights Laws on Healthcare Disparities." The curriculum is the first of its kind -- a scenario-based course on health disparities, cultural and linguistic competency, language access services, and other civil rights obligations for future physicians.

498. HHS's Office of Minority Health (OMH) is charged with improving the health of racial and ethnic minority populations through the development of health policies and programs that will help eliminate health disparities. In response to persistent disparities for racial and ethnic minority populations in the United States, including Blacks or African American, Hispanics/Latinos, Asian Americans, Pacific Islanders, American Indians, and Alaska Natives, OMH established and coordinates the National Partnership for Action to End Health Disparities (NPA). NPA's objective is to increase the effectiveness of programs that target the elimination of health disparities through the coordination of partners, leaders, and stakeholders committed to action. In April 2011, HHS released the National Stakeholder Strategy for Achieving Health Equity, a product of the NPA. The Strategy provides a common set of goals and objectives for public and private sector initiatives and partnerships to help racial and ethnic minorities -- and other underserved groups -- reach their full health potential. Also in April 2011, HHS released its Action Plan to Reduce Racial and Ethnic Health Disparities, outlining the goals and actions HHS will take to reduce health disparities among racial and ethnic minorities. The Action Plan builds on the provisions of the Affordable Care Act related to expanded insurance coverage and increased access to health care by increasing the number of students from populations underrepresented in the health professions; training more people in medical interpretation to help patients who are limited English proficient; and improving collection and analysis of race, ethnicity and other demographic data. Both plans call for federal agencies and their partners to work together on social, economic, and environmental factors that contribute to health disparities.

499. Housing opportunity. The HUD Office of Fair Housing and Equal Opportunity (HUD/FHEO) enforces the Fair Housing Act of 1968 as amended and its implementing regulations, which make it illegal to discriminate on the basis of race, color, religion, national origin, sex, disability or familial status in most housing sales or rentals and other residential real estate related transactions. HUD also enforces Title VI of the Civil Rights Act of 1964 and its implementing regulations in all programs and activities that receive HUD funding including HUD assisted housing providers, state and local housing authorities, and activities funded through Community Development Block Grants. Failure of recipients of HUD federal financial assistance to take reasonable steps to provide LEP persons with meaningful access to their services may constitute a violation of Title VI.

500. As steps towards ensuring LEP persons have meaningful access to HUD programs, HUD has translated over 100 of its documents considered vital to accessing HUD programs into 16 different languages. These documents are available through HUD and are distributed to local government and community partners that provide HUD funded services.

FHEO also provides persons calling its offices with access to language interpretation services available over the phone. This program is being expanded in fiscal year 2012 to include telephonic language interpretation for all HUD offices.

501. HUD also partners with local government and private organizations to provide resources, technical assistance, and training on preventing and addressing housing and lending discrimination on the basis of race, color, national origin, religion, sex, disability and familial status. Each year, HUD provides grants through its Fair Housing Assistance Program (FHAP) and its Fair Housing Initiatives Program (FHIP) for state organizations to assist in enforcing the Fair Housing Act and for private organizations to conduct outreach and advocacy on behalf of victims of housing discrimination. Further description of these programs is found in Annex A to the Common Core Document. Additionally, in 2011 FHEO signed partnerships with both the National Association of Hispanic Real Estate Professionals (NAHREP) and the Asian Real Estate Association of America (AREAA) to commit to ending housing discrimination and to coordinate joint training sessions and town hall events. FHEO has also launched an initiative specifically aimed at combating national origin and cultural discrimination which has included a nationwide “Live Free” public service ad campaign in multiple languages, partnering with Mexican and other consulates around the U.S., and conducting outreach seminars in cities with growing immigrant and ethnic minority communities. In 2011 FHEO also provided grants to private organizations in support of their efforts to increase meaningful access to HUD funded programs for LEP persons.

### **III. Committee concluding observations**

502. The Committee recommended in paragraph 10 of its Concluding Observations that the United States review its approach to interpretation of the Covenant and, in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction, but outside its territory, as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee.

503. This set of observations and recommendations involves the interpretation of Article 2(1) of the Covenant, the question of the relationship between the Covenant and the international law of armed conflict, and the United States government’s consideration of the views of the Committee with respect to the interpretation and application of the Covenant.

#### **A. Territorial Scope**

504. 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.”

505. The United States in its prior appearances before the Committee has articulated the position that article 2(1) would apply only to individuals who were both within the territory of a State Party and within that State Party’s jurisdiction.<sup>9</sup> The United States is mindful that

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<sup>9</sup> See *Summary record of the 1405<sup>th</sup> meeting: United States of America*, U.N. ESCOR Hum. Rts. Comm., 53<sup>rd</sup> Sess., 1504<sup>th</sup> mtg. at 7, 20, U.N. Doc. CCPR/C/SR 1405 (1995). In its Second and Third periodic report, submitted in 2005, the United States government reiterated the view that “the obligations assumed by a State Party to the International Covenant on Civil and Political Rights

in General Comment 31 (2004) the Committee presented the view that “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” The United States is also aware of the jurisprudence of the International Court of Justice (“ICJ”), which has found the ICCPR “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,” as well as positions taken by other States Parties.

## **B. Applicable law**

506. With respect to the application of the Covenant and the international law of armed conflict (also referred to as international humanitarian law or “IHL”), the United States has not taken the position that the Covenant does not apply “in time of war.” Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application. To cite but two obvious examples from among many, a State Party’s participation in a war would in no way excuse it from respecting and ensuring rights to have or adopt a religion or belief of one’s choice or the right and opportunity of every citizen to vote and to be elected at genuine periodic elections.

507. More complex issues arise with respect to the relevant body of law that determines whether a State’s actions in the actual conduct of an armed conflict comport with international law. Under the doctrine of *lex specialis*, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in international humanitarian law, including the Geneva Conventions of 1949, the Hague Regulations of 1907, and other international humanitarian law instruments, as well as in the customary international law of armed conflict. In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing. These two bodies of law contain many similar protections. For example prohibitions on torture and cruel treatment exist in both, and the drafters in each area have drawn from the other in developing aspects of new instruments; the Commentaries to Additional Protocol II to the Geneva Conventions make clear that a number of provisions in the Protocol were modeled on comparable provisions in the ICCPR. Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts occurring within a State’s own territory.

508. The United States understands, as it emphasized in its consultations with civil society organizations, that there have been concerns about a lack of adequate international legal protections for those the United States engages with overseas, particularly in armed conflict situations. In part to address these concerns, President Obama has taken a number of actions, which are discussed in more detail in response to the Committee’s other Concluding Observations. Along with other actions, on January 22, 2009, President Obama issued three Executive Orders relating to U.S. detention and interrogation policies broadly and the Guantanamo Bay detention facility specifically. For example, Executive Order 13491 on Ensuring Lawful Interrogations, 74 Fed. Reg. 4894 (2009), which was adopted,

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(Covenant) apply only within the territory of the State Party.” The United States stated this view again in the 2006 responses to the List of Issues To Be Taken Up in Connection With the Consideration of the Second and Third Periodic Reports of the United States of America and in its 2007 Observations regarding the Human Rights Committee’s General Comment 31.

inter alia, “to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions,” provides that:

“Consistent with the requirements of . . . the Convention against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person . . . whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.”

Id., Preamble and Sec. 3(a).

509. In addition, the United States Supreme Court has recognized the applicability of Common Article 3 of the Geneva Conventions to the conflict with Al Qaeda, *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-631 (2006), and the United States has recently announced that it supports the principles set forth in Article 75 of Additional Protocol I to the Geneva Conventions of 1949 as a set of norms that it follows out of a sense of legal obligation in international armed conflict. It has also urged the U.S. Senate to provide advice and consent to ratification of Additional Protocol II to the Geneva Conventions, which contains detailed humane treatment standards and fair trial guarantees that apply to any criminal proceeding associated with the conduct of non-international armed conflict. The United States has recently conducted an extensive review and concluded that current U.S. military practices are consistent with Protocol II, as well as with Article 75 of Protocol I, including the rules within these instruments that parallel the ICCPR. The United States has continued to work to address concerns of the international community and civil society in regards to its actions abroad.

### **C. Coordination with the Committee**

510. The United States appreciates its ongoing dialogue with the Committee with respect to the interpretation and application of the Covenant, considers the Committee’s views in good faith, and looks forward to further discussions of these issues when it presents this report to the Committee.

511. The Committee recommended in paragraph 11 of its Concluding Observations that the United States should ensure that its counter-terrorism measures are in full conformity with the Covenant, and in particular that the definitions of terrorism adopted under 8 U.S.C. 1182 (a)(3)(B) and Executive Order 13224 are limited to crimes that would justify being assimilated to terrorism, and the grave consequences associated with it.

512. The terms of the Immigration and Nationality Act (INA) relating to “terrorist activities” do not directly apply to criminal proceedings. The definition used in 8 U.S.C. 1182(a)(3)(B) is primarily used in the immigration context and is different from the definition found under U.S. criminal law (*see, e.g.*, 18 U.S.C. 2331). Much of the conduct described in 8 U.S.C. 1182 is conduct covered under international conventions and protocols related to terrorism (*e.g.*, hijacking, kidnapping, violent attacks on international protected persons, bombings). Furthermore, the INA authorizes the Executive to grant discretionary relief, in appropriate cases, to overcome some of the terrorism-related bars.

513. Executive Order 13224 provides legal authority for the United States to block the property of and freeze transactions with persons who commit, threaten to commit, or support terrorism. Section 3(d) of Executive Order 13224 defines the term “terrorism” as used in the Executive Order to mean an activity that:



(i) involves a violent act or an act dangerous to human life, property, or infrastructure; and

(ii) appears to be intended –to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

While the United States notes that there is no single definition of terrorism that has been accepted by the international community, the definition found in Executive Order 13224 is consistent with definitions found in the laws of other nations, the offenses covered in international counter-terrorism instruments (*see, e.g.*, Article 2 of the International Convention for the Suppression of the Financing of Terrorism), and pertinent UN resolutions on combating terrorism (*see, e.g.*, UN Security Council Resolution 1566, OP 3).

514. The Committee recommended in paragraph 12 of its Concluding Observations that the United States should immediately cease its practice of secret detention and close all secret detention facilities, grant the International Committee of the Red Cross prompt access to any person detained in connection with an armed conflict, and ensure that detainees, regardless of their place of detention, always benefit from the full protection of the law.

515. On January 22, 2009, President Obama issued three Executive Orders relating to U.S. detention and interrogation policies broadly and the Guantanamo Bay detention facility specifically. One of those orders, Executive Order 13491, Ensuring Lawful Interrogations, *inter alia*, directed the Central Intelligence Agency (CIA) to close as expeditiously as possible any detention facilities it operated, and not to operate any such detention facilities in the future (section 4 (a) of E.O. 13491). Consistent with the Executive Order, CIA does not operate detention facilities. The Department of Defense (DoD) operates transit and screening facilities that are distinct from theater detention facilities. Consistent with the laws of war, the armed forces use these facilities to remove individuals from the immediate dangers of the battlefield so that appropriate military officials can determine who the detained persons are and whether they should be detained further. The majority of individuals are released from these facilities after the screening process determines that further detention is unnecessary. The small number of individuals not released shortly after capture are subsequently transferred to a theater internment facility structured for longer-term detention. Transit and screening sites are operated consistent with international legal obligations and U.S. law and policy, including Common Article 3 of the Geneva Conventions, the Detainee Treatment Act, and DoD Directive 2310.01.

516. Executive Order 13491 further provides, *inter alia*, that individuals detained in any armed conflict shall in all circumstances be treated humanely (section 3(a)); and that such individuals in U.S. custody or effective control “shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3” (section 3(b)).

517. The Executive Order additionally requires that:

(a) All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross (ICRC) with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies. (section 4(b)).

(b) Department of Defense (DoD) Directive 2310.01E (“The Department of Defense Detainee Program”) states that the ICRC “shall be allowed to offer its services

during an armed conflict, however characterized, to which the United States is a party.”<sup>10</sup> Consistent with E.O. 13491 and DoD policy, the United States assigns internment serial numbers to all detainees held in U.S. custody in connection with armed conflict as soon as practicable and in all cases within 14 days of capture, and grants the ICRC access to such detainees. The ICRC is made aware of and has access to all U.S. law of war detention facilities.

518. The Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-631 (2006), determined that Common Article 3 to the 1949 Geneva Conventions protects “individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict ‘in the territory of’ a signatory,” and thus establishes a minimum standard applicable to the conflict with al Qaeda. Consistent with this ruling, and regardless of where an individual is detained, DoD Directive 2310.01E states that it is Department of Defense policy that “[a]ll detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.”<sup>11</sup> “All persons subject to this Directive [DoD Directive 2310.01E] shall observe the requirements of the law of war, and shall apply, without regard to the detainee’s legal status, at a minimum the standards articulated in Common Article 3 of the Geneva Conventions of 1949...”<sup>12</sup> Furthermore, Congress and the President have unambiguously declared that the United States shall not engage in torture or inhuman treatment. *See e.g.*, Detainee Treatment Act, 42 U.S.C. 2000dd (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”).

519. Guantanamo. Another of the three Executive Orders, Executive Order 13492, requires that “[n]o individual currently detained at Guantanamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions.”<sup>13</sup> This Executive Order directed the Secretary of Defense to undertake a comprehensive review of the conditions of confinement at Guantanamo to assess compliance with Common Article 3 of the Geneva Conventions. Admiral Patrick Walsh, then Vice Chief of Naval Operations, assembled a team of experts from throughout the Department of Defense to conduct an assessment that considered all aspects of detention operations and facilities at Guantanamo. The review concluded that the conditions of detention at Guantanamo were in conformity with Common Article 3 of the Geneva Conventions.<sup>14</sup> The United States has continued to ensure that the Guantanamo facility comports with Common Article 3 and all other applicable laws.

520. Afghanistan. The United States has strengthened the procedural protections for law of war detainees in Afghanistan, under a detention authority which includes those persons

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<sup>10</sup> DOD Directive 2310.01E (September 5, 2005), para. 4.11.

<sup>11</sup> *Id.*, at ¶ 4.1.

<sup>12</sup> *Id.* at ¶ 4.2.

<sup>13</sup> 74 FR 4669, January 26, 2009; Executive Order 13492, Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities (January 22, 2009), § 6.

<sup>14</sup> Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement, February 2009 [hereinafter the Walsh Report], found at: [http://www.defense.gov/pubs/pdfs/REVIEW\\_OF\\_DEPARTMENT\\_COMPLIANCE\\_WITH\\_PRESIDENTS\\_EXECUTIVE\\_ORDER\\_ON\\_DETAINEE\\_CONDITIONS\\_OF\\_CONFINEMENTa.pdf](http://www.defense.gov/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf).

who “planned authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks” as well as “persons who were part of, or substantially supported, Taliban, al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.” In July 2009, the Department of Defense improved its review procedures for individuals held at the Detention Facility in Parwan (DFIP) at Bagram airfield, Afghanistan. The basis for the detainee’s detention is reviewed 60 days after transfer to the DFIP, six months later, and periodically thereafter. These robust procedures improve the ability of the United States to assess whether the facts support the detention of each individual, and enhance a detainee’s ability to challenge the basis of detention as well as the determination that continued internment is necessary to mitigate the threat posed by the detainee. For example, each detainee is appointed a personal representative, who is required to act in the best interests of the detainee and has access to all reasonably available information (including classified information) relevant to review board proceedings. Detainees can present evidence and witnesses if reasonably available, and the United States helps facilitate witness appearances in person, telephonically, or by video conferencing. The unclassified portions of review board proceedings are generally open, including to family, nongovernmental observers, and other interested parties. Determinations that a detainee meets the criteria for continued detention are reviewed for legal sufficiency by a Judge Advocate.

521. In paragraph 13 of its Concluding Observations, the Committee recommended that the United States ensure that any revision of the Army Field Manual provide only for interrogation techniques in conformity with the international understanding of the scope of the prohibition contained in article 7 of the Covenant; that the current interrogation techniques or any revised techniques are binding on all agencies of the United States Government and any others acting on its behalf; that there are effective means to file suit against abuses committed by agencies operating outside the military structure and that appropriate sanctions be imposed on its personnel who used or approved the use of now prohibited techniques; that the right to reparation of the victims of such practices is respected; and that the United States inform the Committee of any revisions of the interrogation techniques approved by the Army Field Manual.

522. The Army Field Manual is consistent with Article 7 of the Covenant. As noted above, in Executive Order 13491, the President ordered that, “[c]onsistent with the requirements of . . . the Convention against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict,” individuals detained in any armed conflict:

“shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.” (section 3(a)).

The President further ordered that:

“an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2–22.3.” (section 3(b)).

The Order provided that in relying on the Army Field Manual, “officers, employees, and other agents of the United States Government”. . . “may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation -- including interpretations of Federal criminal laws, the Convention against Torture, Common Article 3, Army Field Manual 2–22.3, and its predecessor document, Army Field Manual 34–52 -- issued by the Department of Justice between September 11, 2001, and January 20, 2009.” (Section 3(c)).

523. Executive Order 13491 also revoked Executive Order 13440 (2007), which had interpreted Common Article 3 of the Geneva Conventions as applied to CIA detention and interrogation practices. The Order further provided that all executive directives, orders, and regulations inconsistent with Executive Order 13491, including but not limited to those issued to or by the CIA from September 11, 2001 to January 20, 2009 concerning detention or the interrogation of detained individuals, were revoked to the extent of their inconsistency with that order.

524. Interrogations undertaken in compliance with Army Field Manual 2-22.3 are consistent with U.S. domestic and international law obligations. For example, the Army Field Manual states that “[a]ll captured or detained personnel, regardless of status, shall be treated humanely, and in accordance with the Detainee Treatment Act of 2005 and DoD Directive 2310.1E . . . and no person in the custody or under the control of DoD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in U.S. law.” The Field Manual provides specific guidance, including a non-exclusive list of actions that are prohibited when used in conjunction with interrogations. Techniques that are not addressed in the Field Manual are considered prohibited. The Field Manual also provides guidance to be used while formulating interrogation plans for approval. It states: “[i]n attempting to determine if a contemplated approach or technique should be considered prohibited . . . consider these two tests before submitting the plan for approval:

- If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?
- Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.

If you answer yes to either of these tests, the contemplated action should not be conducted.”

525. The Army Field Manual authorizes appropriate interrogation techniques for use by all U.S. agencies for detention in armed conflict. Executive Order 13491 established a Special Interagency Task Force on Interrogation and Transfer Policies to evaluate whether the Army Field Manual’s interrogation techniques provided non-military U.S. agencies with an appropriate means of acquiring necessary intelligence and, if warranted, to recommend different guidance for those agencies. On August 24, 2009, the Attorney General announced that the Task Force had concluded that the Army Field Manual provides appropriate guidance on interrogation for military interrogators, and that no additional or different guidance was necessary for other agencies. The Task Force reaffirmed that, in the context of any armed conflict, interrogations by all U.S. agencies must comply with the techniques, treatments, and approaches listed in the Army Field Manual (without prejudice to authorized non-coercive techniques of law enforcement agencies). These conclusions rested on the Task Force’s unanimous assessment, including that of the Intelligence Community, that the practices and techniques identified by the Army Field Manual or currently used by law enforcement provide adequate and effective means of conducting interrogations.

526. The Task Force concluded, moreover that the United States could improve its ability to interrogate the most dangerous terrorists by forming a specialized interrogation group, or High Value Detainee Interrogation Group (HIG), that would bring together the most effective and experienced interrogators and support personnel from law enforcement, the U.S. Intelligence Community, and the Department of Defense to conduct interrogations in a manner that will continue to strengthen national security consistent with the rule of law. The Task Force recommended that this specialized interrogation group develop a set of best practices and disseminate these for training purposes among agencies that conduct interrogations. In addition, the Task Force recommended that a scientific research program for interrogation be established to study the comparative effectiveness of interrogation approaches and techniques, with the goal of identifying the existing techniques that are most effective and developing new lawful techniques to improve intelligence interrogations.

527. U.S. obligations under the law of war do not mandate payment of reparations to individuals; however, the U.S. Government may, in certain circumstances, provide monetary payments or other forms of assistance to persons who suffer loss or injury due to combat or other operations. Such discretionary payments, often called “condolence” or “solatia” payments, do not constitute an admission of legal liability or settlement of any claim. In some circumstances, a claim based on one of several statutory authorities, including the Foreign Claims Act, 10 U.S.C. 2734, and the Military Claims Act, 10 U.S.C. 2733, may provide compensation to detainees for damage, loss, or destruction of personal property while detained.

528. Private suits for civil damages have been brought against private contractors by alleged victims of detainee abuse. *See, e.g., Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), cert. denied 131 S. Ct.3055 (2011) (dismissing claims against private contractor companies whose employees had worked as interrogators and translators at Abu Ghraib prison); *Al Shimari v. CACI international, Inc.*, 658 F.3d 413 (4<sup>th</sup> Cir. 2011) (reversing and instructing district court to dismiss claims against private contractor); *Al-Quraishi v. L-3 Services, Inc.*, 657 F.3d 201 (4th Cir. 2011)(same); *Abbass v. CACI Premier Tech., Inc.*, No. 09-229 (D.D.C.) (case voluntarily dismissed). Former detainees and/or their families have also brought civil actions seeking damages from current or former government officials. Such claims, when asserted by aliens held outside the United States, have been repeatedly rejected by the courts. *See, e.g., Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.), cert. denied, 130 S. Ct. 1013 (2009). Some courts, however, have suggested, over the government’s opposition, that such claims when brought by citizens may proceed. *See Vance v. Rumsfeld, et al.*, Nos. 10-1687, 10-2442 (7th Cir. Aug. 8, 2011); *Padilla v. Yoo*, 633 F. Supp 2d 1005 (N.D. Cal. 2009), appeal pending. As noted above, detainees can attempt to seek monetary redress through an administrative claims process, under the Military Claims Act and the Foreign Claims Act. Investigations and prosecutions conducted by the U.S. government relating to claims of detainee abuse are addressed below.

529. The Committee recommended in paragraph 14 of the Concluding Observations that the United States should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations; that the United States should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime; that the United States should adopt all necessary measures to prevent the recurrence of such behaviors, in particular by providing adequate training and clear guidance to personnel (including commanders) and contract employees, about their respective obligations and responsibilities in line with article 7 and 10 of the Covenant; and that during the course of any legal proceedings, the United States

should also refrain from relying on evidence obtained by treatment incompatible with article 7. The Committee has asked to be informed about the measures taken by the United States to ensure the respect of the right to reparation for the victims.

530. The United States does not permit its personnel to engage in acts of torture or cruel, inhuman or degrading treatment of people in its custody, either within or outside U.S. territory. This principle is embodied in multiple U.S. laws and has been forcefully reaffirmed by President Obama with respect to all situations of armed conflict, as discussed above.

531. The Obama Administration has released, in whole or in part, more than 40 OLC opinions and memoranda concerning national security matters as a result of litigation under the Freedom of Information Act. These include four previously classified memoranda released on April 16, 2009, which addressed the legality of various techniques used to interrogate terrorism suspects detained by the CIA and which President Obama revoked to the extent that they were inconsistent with Executive Order 13491.

532. The government of the United States, in various fora, has undertaken numerous actions relating to the alleged mistreatment of detainees. The bulk of the investigation and prosecution of allegations of mistreatment of detainees held in connection with counterterrorism operations, including administrative and criminal inquiries and proceedings, have been carried out by the Department of Defense and other U.S. government components that have jurisdiction to carry out such actions.

533. Department of Justice. The Department of Justice has successfully prosecuted two instances of detainee abuse in federal civilian court. In 2003, the U.S. Department of Justice brought criminal charges against David Passaro, a CIA contractor accused of brutally assaulting a detainee in Afghanistan in 2003. The CIA described his conduct as “unlawful, reprehensible, and neither authorized nor condoned by the Agency.” The then Attorney General stated that “the United States will not tolerate criminal acts of brutality and violence against detainees.” And the U.S. Attorney noted that the extraterritorial jurisdiction exercised by the United States is “[n]ot only vital to investigating and prosecuting terrorists, but also it is instrumental in protecting the civil liberties of those on U.S. military installations and diplomatic missions overseas, regardless of their nationality.” See press release at [http://www.justice.gov/opa/pr/2004/June/04\\_crm\\_414.htm](http://www.justice.gov/opa/pr/2004/June/04_crm_414.htm). Following a jury trial, Passaro was convicted of felony assault. On August 10, 2009, the United States Court of Appeals for the Fourth Circuit upheld the conviction, holding that a U.S. federal court has jurisdiction over the trial of an American citizen for committing assaults on the premises of U.S. military missions abroad. In February 2010, the U.S. Supreme Court refused to hear an appeal by Passaro. Passaro was sentenced to 8 years and 4 months in prison.

534. In a second case, on February 3, 2009, Don Ayala, a U.S. contractor in Afghanistan, was convicted in U.S. federal court of voluntary manslaughter in the death of an individual whom he and U.S. soldiers had detained. See U.S. Attorney’s Office Press Release at <http://www.justice.gov/usao/vae/Pressreleases/02-FebruaryPDFArchive/09/20090203ayalanr.html>.

535. The United States Attorney’s Office for the Eastern District of Virginia continues to investigate various allegations of abuse of detainees. In addition, the Attorney General announced on August 24, 2009, that he had ordered “a preliminary review into whether federal laws were violated in connection with interrogation of specific detainees at overseas locations.” See <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>. Assistant U.S. Attorney John Durham assembled an investigative team of experienced professionals to recommend to the Attorney General whether a full investigation was warranted “into whether the law was violated in connection with the interrogation of certain detainees.” Following a two-year investigation, on June 30, 2011, the Justice Department announced

that it was opening a full criminal investigation into the deaths of two individuals in CIA custody overseas, and that it had concluded that further investigation into the other cases examined in the preliminary investigation was not warranted.

536. U.S. law provides several avenues for the domestic prosecution of U.S. Government officials and contractors who commit torture and other serious crimes overseas. For example, 18 U.S.C. 2340A makes it a crime to commit torture outside the United States. The War Crimes Act, 18 U.S.C. 2441, makes it a crime for any member of the U.S. armed forces or U.S. national to commit a “war crime,” defined as, *inter alia*, “a grave breach in any of the international conventions signed at Geneva 12 August 1949” or certain enumerated breaches of common Article 3, whether inside or outside the United States. Similarly, under the provisions of the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. 3261-3267, persons employed by or accompanying the Armed Forces outside the United States may be prosecuted domestically if they commit a serious criminal offense overseas. The MEJA specifically covers all civilian employees and contractors directly employed by the Department of Defense and, as amended in October 2004, those employed by other U.S. Government agencies, to the extent that such employment relates to supporting the mission of the Department of Defense overseas. *See, e.g.*, 18 U.S.C. 3261(a) (criminal jurisdiction over felonies committed “while employed by or accompanying the Armed Forces outside the United States”); *see also* 10 U.S.C. 802(10) (military jurisdiction over “persons serving with or accompanying an armed force in the field” “[i]n time of declared war or a contingency operation”); National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (2005 Act), Section 1206 Report at 10-13 (describing criminal and contractual remedies in detail).

537. In addition, U.S. nationals who are not currently covered by MEJA are still subject to domestic prosecution for certain serious crimes committed overseas if the crime was committed within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. 7 (e.g., including, among others, U.S. diplomatic and military missions overseas, and Guantanamo). These crimes include murder under section 1111 of title 18, assault under section 113, and sexual abuse under section 2241.

538. Finally, in 2006 the Uniform Code of Military Justice (UCMJ) was amended to provide court-martial jurisdiction over persons serving with or accompanying an armed force in the field not only in time of declared war, but during a contingency operation.

539. Department of Defense. It is the Department of Defense’s policy that any possible, suspected, or alleged violation of the law of war, for which there is credible information, committed by or against U.S. personnel, enemy persons, or any other individual is reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.

540. This policy applies to allegations of mistreatment of detainees held in connection with counterterrorism operations. *See* Department of Defense Directive 2310.01E, The Department of Defense Detainee Program, September 5, 2006, available at <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>. The Department of Defense has required that all its detention operations meet a high standard of humane care and custody, and its policy is to seek continually to exceed, when possible, international standards for conditions of detention. The Department of Defense does not tolerate the abuse of detainees, and credible allegations are thoroughly investigated, and appropriate disciplinary action taken if allegations are substantiated.

541. DoD Directive 3115.09 (DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning) provides that “[a]ll reportable incidents allegedly committed by any DoD personnel or DoD contractor personnel shall be . . . [p]romptly reported . . . [p]romptly and thoroughly investigated by proper authorities . . . and . . . [r]emedied by disciplinary or administrative action, when appropriate” (paragraph 3b). A reportable

incident in this directive is defined as “[a]ny suspected or alleged violation of DoD policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning for which there is credible information.”

542. The Directive states further that “DoD intelligence interrogations shall be conducted only by personnel properly trained and certified to DoD standards” (paragraph 3 d(1)). Congress has now effectively barred civilian contractors from performing interrogation functions, and has required private translators involved in interrogation operations to undergo substantial training and to be subject to substantial oversight. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1038, 123 Stat. 2451-2452 (2009); 75 Fed. Reg. 67,632-67,634 (2010). Section 1038 of the National Defense Authorization Act for fiscal year 2010 (Public Law 111-84, October 28, 2009) prohibits contractor personnel from interrogating enemy prisoners of war, civilian internees, retained personnel, other detainees, or any other individual who is in the custody or under the effective control of the Department of Defense or otherwise under detention in a DoD facility in connection with hostilities, unless the Secretary of Defense determines that a waiver to this prohibition is vital to the national security interests of the United States and waives the prohibition for a period of up to 60 days or renews the waiver for one additional 30-day period. The Department does not currently employ contract interrogators, but in the event the Secretary of Defense grants a waiver, the contract interrogators would have to be properly trained and certified to DoD standards and monitored by trained and certified DoD interrogators. All interrogations by contract interrogators at theater detention facilities must be videotaped.

543. Under DoD Directive 2311.01E (DoD Law of War Program), “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DoD Component shall report reportable incidents through their chain of command. Contracts shall require contractor employees to report reportable incidents to the commander of the unit they are accompanying or the installation to which they are assigned, or to the “Combatant Commander.” DoD Directive 2311.01E, paragraph 6.3. Paragraph 3.2 of this Directive defines “reportable incident” as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.” Further, it is DoD policy that “[a]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action” (paragraph 4.4).

544. The United States Government has supported a number of efforts to help ensure that the conduct of private contractors complies with applicable laws and is consistent with respect for human rights, and to ensure that they are held accountable in the event that they violate the law. In that regard, the United States Government recently successfully appealed the dismissal of an indictment charging five contractors with voluntary manslaughter and weapons violations in relation to the deaths of 14 and injuries of 20 civilians in Nisur Square in Baghdad, Iraq. The case has been remanded to the trial court for further proceedings. In addition, domestic legislative efforts continue to pass a Civilian Extraterritorial Jurisdiction Act (CEJA) that provides clear and unambiguous jurisdiction to prosecute non-Department of Defense personnel for overseas misconduct. On the international level, the U.S. Government actively engaged in the development of the Montreux Document (2008), and the International Code of Conduct for Private Security Service Providers (Code). The latter initiative has the potential to improve private security contractor (PSC) compliance with applicable laws and respect for human rights, and to provide additional tools for identifying, avoiding, and remediating impacts that PSCs may have on communities and other stakeholders. The Department of State, along with other



federal agencies including the Department of Defense, is actively engaged in ongoing efforts to establish a credible governance and oversight mechanism for the Code.

545. Other Executive Branch Agencies. The Central Intelligence Agency (CIA) has also undertaken internal reviews relating to detainee treatment; the results of such reviews are generally nonpublic. Where those reviews indicated potential violations of U.S. criminal laws, the CIA has referred those matters to the Department of Justice.

546. Congress. The Congress of the United States also has conducted extensive investigations into the treatment of detainees. See, e.g., the 2008 Report of the Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody, which can be found at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>. More recently, on October 6, 2009, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice addressed the U.S. Senate, Committee on the Judiciary, Subcommittee on Human Rights and the Law, in a hearing entitled “No Safe Haven: Accountability for Human Rights Violators, Part II.” The Assistant Attorney General stated: “The prosecutions that the Department of Justice, in cooperation with its law enforcement partners, mounts against perpetrators of human rights and law of war violations represent a foundational aspect of the Department’s unwavering commitment to the pursuit of justice.” A copy of the statement can be found at <http://www.justice.gov/criminal/icitap/pr/2009/10-06-09breuer-testimony.pdf>.

547. Prohibition on use of Evidence from Mistreatment. Information obtained by the use of torture or cruel, inhuman or degrading treatment cannot be introduced into a federal criminal proceeding under the Fifth Amendment of the United States Constitution.

548. The Military Commissions Act of 2009, which was enacted as part of the National Defense Authorization Act for fiscal year 2010 (P. L. 111-84) contained a provision, codified at 10 USC 948r, prohibiting admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment, as defined by the Detainee Treatment Act, in a military commission proceeding, except against a person accused of torture or such treatment as evidence that the statement was made.

549. In paragraph 15 of the Concluding Observations, the Committee recommended that the United States should amend section 1005 of the Detainee Treatment Act so as to allow detainees in Guantanamo Bay to seek review of their treatment or conditions of detention before a court.

550. The United States complies with the standards of Common Article 3 to the Geneva Conventions and the Convention against Torture, at a minimum, in its detention operations, including those at Guantanamo. As noted, the President’s Executive Order 13491, Ensuring Lawful Interrogations, provides that individuals detained in any armed conflict shall in all circumstances be treated humanely. As noted above, the United States has recently conducted an extensive review and concluded that current U.S. military practices are consistent with the requirements of Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions.

551. In addition, as discussed above, in Executive Order 13492, the President directed the Secretary of Defense to review the conditions of detention at Guantanamo to ensure full compliance with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Department of Defense’s review found that “the conditions of confinement in Guantanamo are in conformity with Common Article 3 of the Geneva Conventions.”<sup>15</sup> The review team noted “that the chain of

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<sup>15</sup> Walsh Report, supra note 5.

command responsible for the detention mission at Guantanamo seeks to go beyond a minimalist approach to compliance with Common Article 3, and endeavors to enhance conditions in a manner as humane as possible consistent with security concerns.”<sup>16</sup>

552. In paragraph 16 of its Concluding Observations, the Committee recommended that the United States should review its position, in accordance with the Committee’s general comments 20 (1992) on article 7 and 31 (2004) on the nature of the general legal obligation imposed on States parties; that the United States should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of, *inter alia*, their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. The Committee further recommended that the United States should conduct thorough and independent investigations into the allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment, modify its legislation and policies to ensure that no such situation will recur, and provide appropriate remedy to the victims; that the United States should exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures with adequate judicial mechanisms for review before individuals are deported, as well as effective mechanisms to monitor scrupulously and vigorously the fate of the affected individuals; and that the United States should recognize that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be.

553. The United States will not transfer any person to a country where it determines it is more likely than not that the person will be tortured.

554. In Executive Order 13491, President Obama ordered the establishment of the Special Interagency Task Force on Interrogations and Transfer Policy Issues to ensure that U.S. transfer practices comply with the domestic laws, U.S. international obligations, and policies of the United States and do not result in the transfer of individuals who would be more likely than not to be tortured. The Task Force considered seven types of transfers conducted by the U.S. Government: extradition, removals pursuant to immigration proceedings, transfers pursuant to the Geneva Conventions, transfers from Guantanamo Bay, military transfers within or from Afghanistan, military transfers within or from Iraq, and transfers pursuant to intelligence authorities. The work of the Task Force was informed, *inter alia*, by the record in past cases, including the 2008 report issued by the Office of the Inspector General of the Department of Homeland Security regarding the Maher Arar case.

555. On August 24, 2009, the Task Force made recommendations to the President with respect to all scenarios in which the United States transfers or facilitates the transfer of a person from one country to another or from U.S. custody to the custody of another country. The Task Force made several recommendations aimed at clarifying and strengthening U.S. procedures for obtaining and evaluating diplomatic assurances from receiving countries for those transfers in which such assurances are obtained.<sup>17</sup> These included a recommendation that the State Department be involved in evaluating all diplomatic assurances, and a recommendation that the Inspectors General of the Departments of State, Defense, and Homeland Security prepare annually a coordinated report on all transfers involving diplomatic assurances conducted by each of their agencies. The Task Force also made

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<sup>16</sup> *Id.*

<sup>17</sup> See “Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President,” *available at* <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html> (Aug. 24, 2009).

several recommendations aimed at improving the United States' monitoring of the treatment of individuals transferred to other countries. These included a recommendation that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, to ensure consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government, unless there are compelling reasons not to do so. In addition, the Task Force made recommendations that are specific to military transfer scenarios, and classified recommendations designed to ensure that, in cases where the Intelligence Community participates in or otherwise supports a transfer, affected individuals are provided proper treatment. The Task Force recommendations were accepted by the President. The United States has been implementing the Task Force recommendations across the range of government transfers.

556. Removals. In the immigration context, regulations implementing Article 3 of the Convention against Torture permit aliens to raise non-refoulement claims during the course of removal proceedings before an immigration judge. *See* 8 CFR 1208.16-18. These regulations set forth a fair and rule-bound process for considering claims for protection. Individuals routinely assert protection claims before immigration judges within the Department of Justice's Executive Office for Immigration Review (EOIR), whose decisions are subject to review by the Board of Immigration Appeals, and ultimately by U.S. federal courts. In cases where an arriving alien is believed to be inadmissible on terrorism-related grounds and a full disclosure of such grounds would be prejudicial to the public interest or national security, Congress has authorized, under section 235(c) of the Immigration and Nationality Act (INA), alternate removal procedures that do not require full hearing and review. *See* 8 U.S.C. 1225(c). However, these cases are exceedingly rare and removal pursuant to section 235(c) is nonetheless not permitted "under circumstances that violate Article 3 of the Convention against Torture." 8 C.F.R. 235.8(b) (4). To improve procedures for implementing Article 3 in the section 235(c) context, U.S. Immigration and Customs Enforcement (ICE) issued guidance providing that aliens subject to removal in section 235(c) proceedings are generally allowed a reasonable opportunity to submit a written statement and other relevant information for consideration. Section 235(c) is rarely used to exclude someone from the United States.

557. In some cases involving Article 3 claims in the removal context, the U.S. Government will obtain diplomatic assurances. *See* 8 C.F.R. 1208.17(f), 1208.18(c). In *Khouzam v. Attorney General*, 549 F.3d 235, 259 (3d Cir 2008), the United States Court of Appeals for the Third Circuit suggested that aliens subject to removal on the basis of diplomatic assurances have the opportunity to present evidence and arguments challenging the reliability of the assurances, and be provided with an individualized determination based on a record disclosed to the alien. The Department of Homeland Security has taken measures to increase transparency and process with respect to diplomatic assurances. Upon receipt and evaluation of diplomatic assurances from a destination country, DHS provides notice and, absent exceptional circumstances, copies of the assurances to the alien to whom the assurances relate. The alien has the opportunity to challenge the reliability of the assurances and present additional information and arguments that are factored into the eventual determination by senior DHS officials whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention. The State Department participates in obtaining any diplomatic assurances and in assessing the adequacy of any diplomatic assurances obtained. Although immigration removals pursuant to diplomatic assurances are very rare, the United States recently successfully negotiated a detailed monitoring regime for such an immigration removal.

558. Extraditions. Whenever allegations relating to torture are brought to the State Department's attention by the extraditable fugitive or other interested parties, appropriate policy and legal offices within the Department, including the Bureau of Democracy,

Human Rights and Labor, the Office of the Legal Adviser, and the relevant regional bureau in consultation with post, review and analyze information relevant to the particular case in preparing a recommendation to the Secretary of State. The Department will consider any information provided by the individual, other information concerning judicial and penal conditions and practices of the requesting State, information regarding human rights practices of that State, and the relevance of that information to the individual whose surrender is at issue. The Secretary of State will not approve an extradition if she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition. In some cases, the Secretary might condition the extradition on the requesting State's provision of diplomatic assurances related to torture, fair and humane treatment, or aspects of the requesting State's criminal justice system that protect against mistreatment. In addition to assurances related to torture and humane treatment, such assurances may include, for example, that the fugitive will have regular access to counsel and the full protections afforded under that State's constitution or laws. Whether assurances are sought is decided on a case-by-case basis.

559. Pursuant to the longstanding Rule of Non-Inquiry and statutes adopted by Congress, the Secretary of State's decision whether or not to extradite a fugitive certified as extraditable by a court has generally been treated as final and not subject to judicial review. This includes the decision whether to seek diplomatic assurances in any particular case and whether to extradite a fugitive subject to such assurances. These determinations result from a process that includes extensive State Department review of the human rights conditions in a country before an extradition relationship is established with it, Senate review and approval of all U.S. extradition partners, the strong incentives for countries to treat extradited individuals appropriately so as not to jeopardize their ongoing extradition relationship with the United States, the complex, delicate and confidential judgments concerning conditions in foreign countries that the Secretary must make in assessing torture claims, and the established and extensive procedures in place to address allegations of torture detailed above.

560. Guantanamo. With respect to transfers from the Guantanamo Bay detention facility, in a November 2009 declaration filed in habeas litigation brought by detainees at Guantanamo, Ambassador Daniel Fried, the U.S. Special Envoy for the Closure of Guantanamo, explained that as Special Envoy he is guided by the U.S. Government's policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured. In light of these policies, there are certain individuals who have been (or will be) approved for transfer out of U.S. custody but who the U.S. Government determines cannot be safely and/or responsibly returned to their home countries. (Available at <http://www.state.gov/documents/organization/153570.pdf>.)

561. In every Guantanamo transfer case in which security measures or detention are foreseen, the U.S. Government seeks assurance of humane treatment, including treatment in accordance with the international obligations of the destination country, in particular under the Convention against Torture. In every decision to transfer such a detainee, the U.S. Government takes into account the totality of relevant factors relating to the individual and the government in question, including but not limited to any diplomatic assurances that have been provided. For example, in its opposition brief in the case of *Mohammed v. Obama*, 131 S. Ct. 32 (2010), the U.S. Government stated the following with respect to a Guantanamo detainee's claim that he would be tortured by non-state actors if returned to Algeria:

That the government's stated policy focuses on treatment by the receiving government does not mean that the government ignores or excludes from

consideration the likelihood of serious mistreatment by non-state actors in assessing the appropriateness of transfer. Here, however, applicant raised no credible allegations of harm from non-government actors that warranted further consideration.

Under the current administration, twenty-seven detainees have been safely repatriated to their home countries and 40 detainees who could not be transferred to their countries of nationality because of humane treatment concerns have been resettled in third countries.

562. Afghanistan and Iraq. The United States is committed to ensuring that individuals detained by U.S. forces and transferred to local custody are not mistreated. The United States has consistently monitored and assessed the conditions of Afghan and Iraqi prisons. The United States works closely with Iraqi and Afghan officials to ensure that they comply with their international legal obligations, and provides significant amounts of assistance toward that end, including for the construction and improvement of detention facilities, training and mentoring of police and detention authorities, and support for governmental oversight authorities and non-governmental monitors.

563. In Afghanistan, the United States sought and received assurances from the Government of Afghanistan that it will treat transferred detainees humanely. In response to a specific recommendation of the Task Force report, the United States has also begun to establish a program to systematically monitor the treatment and conditions of detainees transferred from U.S. to Afghan custody. As a matter of both policy and law, the United States takes very seriously the need to address credible reports of detainee abuse and/or gross violations of human rights. The U.S. Government's priority with respect to credible allegations of detainee abuse and/or gross violations of human rights is to ensure the Afghan government takes immediate action to address the allegations, consistent with U.S. and Afghan commitments to human rights and the humane treatment of prisoners. In the event that the host government were to fail to take appropriate action, the U.S. would suspend transfers to the facility in question until necessary corrective steps have been implemented, as it recently did in connection with the UNAMA report.

564. The United States recognizes that a country's human rights record, and particularly, its record for respecting its obligations to prohibit torture and cruel, inhuman or degrading treatment or punishment, is relevant to an assessment of its willingness and ability to honor treatment commitments, and that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by assurances. Multiple components of the State Department are involved in evaluating the adequacy of any diplomatic assurances, including the Bureau of Democracy, Human Rights and Labor, the Office of the Legal Adviser, and the relevant regional bureau in consultation with post. When evaluating such assurances, State Department officials consider, inter alia, the foreign government's capacity to fulfill its assurances, its human rights record, its record in complying with prior diplomatic assurances, if any, relevant political or legal developments in the foreign country concerned, and U.S. diplomatic relations with that country, which will impact the country's willingness and interest in complying.

565. Consistent with the recommendations of the Transfer Task Force, in appropriate cases, the U.S. Government will seek the foreign government's agreement to allow access by U.S. Government officials or non-governmental entities in the country concerned to monitor the condition of an individual returned to that country. In instances in which the United States transfers an individual subject to diplomatic assurances, it would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been honored. The United States takes seriously past practice by foreign governments. In an instance in which specific concerns about the treatment of an

individual may receive in a particular country cannot be resolved satisfactorily, the United States would seek alternative arrangements.

566. In December 2010, the Offices of the Inspector General of the Departments of State and Defense submitted their first annual report on transfers pursuant to assurances. Although the reports are not public, the Inspector General for the State Department made recommendations, which the Department accepted. The report concludes that “[t]he Department of State is doing a good job of negotiating assurances from foreign governments and evaluating the factors that indicate the probability of torture or other harsh treatment of detainees subsequent to transfer to a foreign government’s control.... The Department has devoted similar close attention [similar to that devoted to Guantanamo detainees] to other cases involving extradition and immigration removal that present a risk of torture.”

567. The Committee recommended in paragraph 17 of its Concluding Observations that the United States should ensure that the “material support to terrorist organizations” bar under the Patriot Act and the 2005 REAL ID Act is not applied to bar from asylum and withholding of removal those who acted under duress.

568. Pursuant to section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), the Secretary of Homeland Security or the Secretary of State, in consultation with each other and with the Attorney General, may conclude in such Secretary’s sole, unreviewable discretion that certain terrorism-related grounds of inadmissibility in section 212(a)(3)(B) of the INA shall not apply to certain aliens. The Secretary of Homeland Security has exercised this authority to allow exemptions to be granted to eligible aliens who provided, while under duress, material support to, received military-type training from, or solicited funds or membership for terrorist organizations as described in INA section 212(a)(3)(B)(vi), when warranted in the totality of the circumstances. In determining whether an alien warrants an exemption, the Department of Homeland Security (DHS) considers numerous factors, including the degree of threat faced by the alien and the nature and circumstances of the involvement with the terrorist organization. To date, DHS has adjudicated approximately 14,000 exemptions from terrorism-related grounds of inadmissibility. Approximately 4,000 cases remain on hold, for the majority of which exemptions are already pending at the interagency level. Exemptions can be, and have been exercised for applicants for refugee resettlement, applicants for asylum and withholding of removal, and applicants for adjustment of status to lawful permanent residence. DHS and U.S. Citizenship and Immigration Services (USCIS) remain committed to the goal of releasing all cases from hold, and are doing everything they can to achieve that goal.

569. The Committee recommended in paragraph 18 of its Concluding Observations that the United States should ensure, in accordance with article 9 (4) of the Covenant, that persons detained in Guantanamo Bay are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard.

570. In 2008, the Supreme Court held that the constitutional right to petition for habeas corpus relief extends to individuals detained by the Department of Defense at Guantanamo Bay. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (striking down as unconstitutional the provision of the Military Commissions Act of 2006 that denied federal courts habeas corpus jurisdiction over claims of aliens detained at Guantanamo). The U.S. Government has stated that it derives its authority to detain the individuals at Guantanamo from Congressional grant of authority—the 2001 Authorization for Use of Military Force—as informed by the laws of war, and as such may detain, inter alia, “persons who were part of,

or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or coalition partners.” Since the decision in *Boumediene*, detainees have been challenging the legality of their detention via habeas corpus petitions in the U.S. federal district court in the District of Columbia, a court that is part of the independent judicial branch of the U.S. Government, and separate from the Executive Branch (which includes the military).

571. The federal courts have worked assiduously to ensure appropriate process and protections for these proceedings. Detainees have access to counsel of their choice and to appropriate evidence, and are assured a means of challenging the lawfulness of their detention before an independent court. Except where rarely required by compelling security interests, all of the evidence relied upon by the government to justify detention in habeas proceedings is disclosed to the detainees’ counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees by a preponderance of the evidence.

572. Habeas is a robust and effective right. Since *Boumediene*, all of the detainees at Guantanamo Bay who have prevailed in habeas proceedings under orders that are no longer subject to appeal have either been repatriated or resettled, or have received offers of resettlement. Approximately twenty-five detainees had been released after winning their habeas cases in the federal courts.

573. Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, announced the Administration’s intention to close the detention facility at Guantanamo Bay, and created a task force comprised of six U.S. Government entities to review the status of those individuals detained there. The task force assembled and thoroughly reviewed available information from across the U.S. Government regarding each detainee, and made recommendations for the proper disposition of each. The Guantanamo Review Task Force Final Report is available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>. During this Administration, the United States has transferred 67 detainees to numerous destinations, including the transfer of 40 detainees to third countries, and is in ongoing discussions with a number of foreign partners regarding repatriation and resettlement options for other detainees.

574. On March 7, 2011, President Obama issued Executive Order 13567 establishing a regime of periodic review for the detainees at Guantanamo. The periodic review established by this order will help to ensure that individuals whom the U.S. Government has determined will be subject to long-term detention will continue to be detained only when both lawful and necessary to protect against a significant threat to the security of the United States. If a final determination is made that a detainee no longer constitutes a significant threat to U.S. national security requiring his continued detention, the Executive Order provides that the Secretaries of State and Defense are to identify a suitable transfer location outside the United States, consistent with the national security and foreign policy interests of the United States and applicable law.

575. In paragraph 19 of its Concluding Observations, the Committee recommended that the United States should review its practice with a view to ensuring that the Material Witness Statute and immigration laws are not used to detain persons suspected of terrorism or any other criminal offenses with fewer guarantees than in criminal proceedings. The United States should also ensure that those improperly so detained receive appropriate reparation.

576. Individuals who are charged with removability from the United States and are placed into civil immigration proceedings may generally request release on bond pursuant to 8 U.S.C. 1226(a), unless the alien has committed an offense or offenses that render the alien's detention mandatory under 8 U.S.C. 1226(c). The U.S. Supreme Court has upheld such "mandatory" pre-removal detention as constitutional. *See Demore v. Kim*, 538 U.S. 510 (2003). Aliens subject to mandatory detention under the immigration laws, however, may file petitions for writs of habeas corpus to challenge the legality of their detention. The U.S. Supreme Court has indicated that a period of detention of up to six months after an order of removal becomes administratively final is presumptively reasonable for the United States to accomplish an alien's removal. *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005). With limited exceptions (e.g., on national security grounds), after six months the continued detention of an alien ordered removed is no longer presumptively lawful, and the alien must be released under terms of supervision if the alien can show that there is no significant likelihood of removal in the reasonably foreseeable future. The Department of Homeland Security codified this standard in implementing regulations published in 8 C.F.R. § 241.13-14.

577. Federal law permits detention of a person to secure his or her presence as a material witness at an upcoming trial, *see* 18 U.S.C. 3144. A material witness warrant is issued by a neutral judge, only after finding that there was an adequate showing that the person would have information making him or her a material witness to the criminal case, and that without the arrest warrant the person would be unlikely to appear at trial. Material witnesses enjoy the same constitutional right to pretrial release as other federal detainees, and federal law requires release if their testimony "can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice." 18 U.S.C. 3144. If a person subject to a material arrest warrant believes the warrant is not justified, he may seek review by the judge presiding over the criminal case or attempt to seek habeas review. In *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011), al-Kidd argued that his arrest and detention as a material witness violated his Fourth Amendment rights, because he claimed the real purpose of holding him was in furtherance of a criminal investigation. The Supreme Court reversed a lower court allowing the case to proceed against the former Attorney General. The Supreme Court explained that because "al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation."

578. In paragraph 20 of its Concluding Observations, the Committee requested the United States to provide information on the implementation of the *Hamdan v. Rumsfeld* decision.

579. In response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), which invalidated the military commissions set up under President Bush without legislation, Congress passed the 2006 Military Commissions Act, 120 Stat. 2600 (2006 MCA), authorizing the use of military commissions by the Executive Branch. On January 22, 2009, President Obama ordered the Secretary of Defense to take steps to ensure that no charges would be sworn and/or referred to new military commissions, and to halt pending military commission proceedings and appellate proceedings before the United States Court of Military Commission Review, pending review of all Guantanamo detainees. *See* Executive Order 13492.

580. Subsequently, the Military Commissions Act of 2009 (2009 MCA), enacted in October 2009, made many significant changes to the system of military commissions, including: prohibiting the admission at trial of statements obtained by use of torture or cruel, inhuman, or degrading treatment, except against a person accused of torture or such treatment as evidence that the statement was made; strengthening the restrictions on admission of hearsay evidence; stipulating that an accused in a capital case be provided



with counsel “learned in applicable law relating to capital cases”; providing the accused with greater latitude in selecting his or her own military defense counsel; enhancing the accused’s right to discovery; and establishing new procedures for handling classified information.

581. After the Supreme Court’s decision in *Hamdan*, military commissions convicted two detainees under the 2006 MCA: Salim Hamdan, who was convicted of material support and acquitted of conspiracy and sentenced to five and a half years; and Ali Hamza al-Bahlul, who was convicted of conspiracy, solicitation, and providing material support for terrorism and sentenced to life in prison. Since the enactment of the 2009 MCA, there have been three further convictions: Ibrahim al Qosi pleaded guilty to conspiracy and providing material support to al Qaeda; he was sentenced to 14 years in confinement, but his sentence is limited by the terms of his pre-trial agreement to two years confinement. Omar Khadr pleaded guilty to murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying; he was sentenced to 40 years in confinement, but his sentence is limited by the terms of his pre-trial agreement to eight years confinement. Noor Uthman Muhammed pleaded guilty to charges of conspiracy and providing material support to al-Qaeda; he was sentenced to 14 years in confinement but his sentence is limited by the terms of his pre-trial agreement to 34 months in confinement.

582. On March 7, 2011, the Secretary of Defense issued an order rescinding his prior suspension of the swearing and referring of new charges in the military commissions. On April 4, 2011, the United States announced that it would bring charges against Khalid Sheikh Mohammed and his four alleged co-conspirators in the September 11 attacks before military commissions at the U.S. Naval Base in Guantánamo Bay, Cuba.

583. Noting concerns about certain provisions in the Patriot Act, as well as NSA monitoring of phone, email and fax communications of individuals both within and outside the United States, without judicial or other independent oversight, the Committee recommended in paragraph 21 of its Concluding Observations, that the United States should review sections 213, 215, and 505 of the Patriot Act to ensure full compatibility with article 17 of the Covenant. The Committee also recommended that the United States should ensure that any infringement on individual rights to privacy is strictly necessary and duly authorized by law, and that the rights of individuals to follow suit in this regard are respected.

584. As noted in the discussion of Article 17 in this report, sections 213, 215, and 505 of the PATRIOT Act expanded intelligence collection authorities. Each of these authorities is subject to robust privacy protections involving all three branches of the government. Federal courts must approve the use of two of these authorities, and may review the use of all three. The executive branch is required to report to Congress regarding the use of the authorities. In addition, the Justice Department has developed and implemented (and will continue to develop and implement) policies and procedures to mitigate the effect these authorities may have on individual privacy and civil liberties. (Congress directed the Justice Department to adopt some of these policies; the Administration adopted others without a congressional mandate.)

585. This report refers to the wiretapping program that was the subject of much media attention in 2005 and 2006. That program has since been brought under the supervision of the Foreign Intelligence Surveillance Court (FISC). In 2008, Congress amended the Foreign Intelligence Surveillance Act (FISA), which regulates the conduct of electronic surveillance to acquire foreign intelligence information.

586. The FISA Amendments Act solidifies the role of the FISC in approving electronic surveillance and modernizes collection authorities to ensure that recent technological

advancements do not impede the government's ability to protect national security. Three amendments to FISA were set to expire on December 31, 2009: (1) section 6001(a) of the Intelligence Reform and Terrorism Protection Act (RTPA), which allows a non-United States person who "engages in international terrorism activities" to be considered an agent of a foreign power under FISA; (2) section 206 of the USA PATRIOT Act, which permits "roving" wiretaps in certain circumstances; and (3) section 215 of the PATRIOT Act, which broadens the types of business records that could be made accessible to the government under FISA. Congress reauthorized these provisions on a temporary basis, and they are now set to expire on June 1, 2015.

587. In paragraph 22 of its Concluding Observations, the Committee expressed concern that some 50 percent of homeless people are African American although they constitute only 12 percent of the United States population. The Committee recommends that the United States should take measures, including adequate and adequately implemented policies, to bring an end to such de facto and historically generated racial discrimination.

588. The Obama Administration is committed to combating racial discrimination in this and other contexts. The Administration has formed a government-wide Interagency Council on Homelessness, consisting of the Secretaries of Housing and Urban Development (HUD) (chair), Labor (DOL), Agriculture, Commerce, Education (ED), Energy, Health and Human Services (HHS), Homeland Security (DHS), Interior, Transportation, and the Veterans Administration (VA), as well as the Attorney General and Commissioner for Social Security, to address this critical issue. The United States is extremely concerned that members of racial minority groups, and particularly Blacks or African Americans, are over-represented among homeless populations. This issue has been raised by civil society representatives as a matter of particular concern. A large number of federal programs, most authorized by the McKinney-Vento Homeless Assistance Act, P. L. 100-77, serve the homeless. These programs basically provide assistance to states and localities to address homelessness in their jurisdictions. States and localities run their own programs, as well. Federal programs include the following: Education for Homeless Children and Youth Program (ED); Emergency Food and Shelter Program (DHS); Health Care for the Homeless Program (HHS); Projects for Assistance in Transition from Homelessness (PATH) Program (National Institutes of Health (NIH)); Consolidated Runaway and Homeless Youth Programs (HHS); Street Outreach Program; Supportive Housing Program (HUD); Shelter Plus Care Program (HUD); Section 8 – Moderate Rehabilitation of Single-Room Occupancy Dwellings Program (HUD); the Emergency Shelter Grants Program (HUD); the Homeless Veterans Reintegration Program (DOL Veterans' Employment and Training Service); Health Care for Homeless Veterans (VA); and a number of other federal programs for homeless veterans.

589. The United States is well aware that the problem of homelessness cannot be addressed solely by providing education, housing and healthcare for homeless persons, but must be addressed in a larger societal context by ensuring that all persons in the United States are afforded equal opportunities for education, employment, healthcare (including mental health care) and social services, in order to prevent the conditions that lead to homelessness. Moreover, racial disparities in homelessness must also be addressed through programs designed to ensure equal opportunities for all, regardless of race. The federal government, states, and local jurisdictions in the United States have in place myriad programs and legal enforcement measures to address racial discrimination in education, housing, health services, employment and other areas. Because these programs are too numerous to detail here, the United States would respectfully refer the Committee to its 2007 report to the Committee on the Elimination of Racial Discrimination (CERD Committee), CERD/C/USA/6 (1 May 2007). While much work has been done to address issues of racial discrimination in the United States, much more work continues at the present time and will be necessary in the future.

590. In paragraph 23 of its Concluding Observations, the Committee reminded the State party of its obligation under articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis. In particular, it expressed its concern about de facto racial segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which school districts are created, funded and regulated. In this regard, the Committee recommended that the United States should conduct in-depth investigations into this de facto segregation, and take remedial steps, in consultation with affected communities.

591. The United States recognizes and supports the importance of prohibiting and eliminating racial discrimination in all its forms. Matters concerning the organization of political subdivisions of states, such as school districts, are controlled by state law, subject to federal constitutional and statutory laws regarding discrimination on the basis of race. For example, Title VI of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, or national origin by state and local governments and any private entities receiving federal financial assistance.

592. The United States rigorously enforces the Title VI prohibition on school districts that receive federal funds segregating students on the basis of race, color, or national origin. At the same time, the population distribution of a school district enrolling large numbers of minority and nonminority students may result in schools with disproportionate enrollments of students of one race, and the law does not require that each school within a district have a racial composition that equals the district-wide average. The United States aids school districts in voluntarily ending minority isolation and promoting diversity by 1) providing technical assistance in achieving these compelling government interests in ways that comply with the non-discrimination laws; and 2) providing financial incentives to school districts for programs like magnet schools -- schools with specialized courses or curricula that attract substantial numbers of students from different areas of the city or town, and with different school, economic, ethnic and racial backgrounds.

593. In paragraph 24 of its Concluding Observations, the Committee recommended that the United States should continue and intensify its efforts to put an end to racial profiling by federal as well as state law enforcement officials. The Committee indicated that it wishes to receive more detailed information about the extent to which such practices still persist, as well as statistical data on complaints, prosecutions and sentences in such matters.

594. The United States is continuing and intensifying its efforts to end racial profiling -- the invidious use of race or ethnicity as the basis for targeting suspects or conducting stops, searches, seizures and other law enforcement investigative procedures -- by federal as well as state law enforcement officials. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits any state from denying any person the equal protection of laws. The Due Process Clause of the Fifth Amendment, which has been interpreted to contain an equal protection guarantee, extends this principle to the federal government. Under equal protection principles, government action is subject to strict scrutiny when it makes classifications based on race, national origin, lineage or religion. *See, e.g., Chavez v. Illinois State Police*, 251 F.3d 612, 635 (7<sup>th</sup> Cir. 2001) (stating that if "officers utilize impermissible racial classifications in determining whom to stop, detain, and search . . . it would amount to a violation of the Equal Protection Clause of the Fourteenth Amendment.")

595. U.S. actions to put an end to racial profiling take numerous forms. First, the Attorney General has announced that DOJ is undertaking an internal review of the 2003 Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies ("DOJ Guidance"). This review is being undertaken with an eye to making the

guidelines more effective. See [http://usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://usdoj.gov/crt/split/documents/guidance_on_race.htm). It will take account of the comments and concerns raised by non-governmental organizations and others.

596. Second, the U.S. Department of Justice (DOJ) enforces the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141, the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d, and Title VI of the Civil Rights Act, 42 U.S.C. 2000d. These statutes authorize the Attorney General to bring civil actions to eliminate law enforcement misconduct, including allegations of discriminatory conduct based on race, color, national origin, religion, or sex. Pursuant to this authority, the Department of Justice receives and investigates allegations of a pattern or practice of racial profiling by a law enforcement agency. If a pattern or practice of unconstitutional policing is detected, the Department will typically seek to work with the local agency to revise its policies, procedures, training, and protocols to ensure conformity with the Constitution and federal laws. The Department's enforcement efforts have included court orders and settlement agreements that prohibit racial profiling and require the collection of statistical data. For example, the governing consent decree in *United States v. Los Angeles*, No. 00-11768 (C.D. Cal. 2001), requires the Los Angeles Police Department to collect statistical data regarding traffic stops. Since 2001, the Department of Justice has actively monitored to ensure compliance by the Los Angeles police department. Reports from the Independent Monitor established under the consent decree and statistical data compiled by the LAPD can be found at <http://www.lapdonline.org>.

597. Recently, DOJ has undertaken critical investigations of particular programs or law enforcement agencies in response to concerns expressed from stakeholders about racial profiling. For example, in March 2009, DOJ announced an investigation into the Maricopa County, Arizona Sheriff's Office to determine whether law enforcement officials have engaged in "patterns or practices of discriminatory police practices and unconstitutional searches and seizures." The Sheriff of Maricopa County had been the subject of a number of complaints, including some from local city mayors and members of the U.S. Congress. In September 2009, the Department of Justice initiated an investigation of the police department of East Haven, Connecticut, considering "discriminatory police practices, unlawful searches and seizures, and excessive use of force" after receiving a complaint from advocates and a faith-based group that documented allegations of racial profiling from January 2008. In addition, at the request of New Orleans Mayor Mitch Landrieu, DOJ launched a civil pattern or practice investigation of the New Orleans Police Department (NOPD) – the most extensive investigation in the Division's history. In March of 2011, the Department issued an extensive report documenting a wide range of systemic and serious challenges. The findings included a pattern or practice of unconstitutional conduct or violations of federal law in numerous areas of NOPD activities, including unconstitutional stops, searches and arrests; use of excessive force; discriminatory policing; and others. The Civil Rights Division is now working with the City to develop a comprehensive blueprint for sustainable reform. For additional detail on this investigation, see <http://www.justice.gov/opa/pr/2011/March/11-crt-342.html>.

598. DOJ also produces national statistical information on contacts between the police and public, allowing some analysis for patterns of profiling. Every three years, the Department's Bureau of Justice Statistics (BJS) reports data on the nature and characteristics of contacts between residents of the United States and the police over a 12-month period. Based on a nationally-representative sample of more than 60,000 residents age 16 or older in 2005, BJS provided detailed information on face-to-face contacts with the police. For both the 2002 and 2005 surveys, BJS reported that Whites, Blacks/African Americans, and Hispanics/Latinos experienced traffic stops at similar rates, but that Black/African American and Hispanic/Latino drivers were more likely to be searched if stopped than were White drivers. Because the study did not take into account other factors

that might explain these disparities, the reason for these disparities (i.e., whether they reflect different treatment based on race) is not certain. The 2008 survey report released in October of 2011 is available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2229>.

599. The Community Relations Service (CRS) of DOJ also offers a program entitled “Responding to Allegations of Racial Profiling.” Trained CRS conciliators provide racial profiling training to law enforcement officials and community leaders around the country. The program’s objectives include teaching about racial profiling, analyzing appropriate police action, discussing the history of racial profiling, recognizing competing perceptions of the community and the police, and addressing racial profiling concerns of police departments and communities throughout the country. CRS’s racial profiling program is offered free of charge to those communities or departments who have experienced tension or conflict associated with allegations of racial profiling.

600. The Department of Homeland Security (DHS) is also committed to ending racial profiling. To ensure thorough implementation of the DOJ Guidance, the DHS Office for Civil Rights and Civil Liberties (CRCL) worked with the Federal Law Enforcement Training Center (FLETC) to strengthen the training provided to all initial entry trainee federal law enforcement officers. DHS also developed training materials for in-service personnel entitled, “Guidance Regarding the Use of Race for Law Enforcement Officers.” These training materials, which are provided to all employees in web-based and CD-ROM format, provide a tutorial on DOJ guidance and DHS policy, as well as practical tips drawn from real life situations on how law enforcement personnel can avoid engaging in racial profiling. In addition, U.S. Immigration and Customs Enforcement (ICE) trains all basic officers and agents through Integrity Reinforcement Training provided by the ICE Office of Professional Responsibility (OPR). Among the DHS components that interact with the public and received this training are the Transportation Security Agency (TSA), which screens roughly 2 million air travelers daily; the U.S. Coast Guard (USCG); U.S. Customs and Border Protection (CBP), which admits roughly 1.1 million individuals into the United States per day; and U.S. Immigration and Customs Enforcement (ICE).

601. The DHS Office of the Inspector General (OIG) initiated a review of the 287(g) program in 2009, pursuant to Congressional mandate. The OIG review determined that the 287(g) program needed more effective training and oversight procedures and that it was missing protections necessary to prevent racial profiling and other civil rights abuses. ICE is responsible for the 287(g) delegation of authority program, which cross-designates state and local law enforcement officers to enforce immigration law as authorized under section 287(g) of the Immigration and Nationality Act, 8 U.S.C. 1357(g). 287(g) partnerships are formed through memoranda of agreement (MOA). All law enforcement officers authorized to perform 287(g) functions must attend and graduate from a 4-week training course at the ICE Academy. This training includes courses in civil rights and civil liberties and racial profiling. ICE has also instituted a process to ensure that complaints of racial profiling are investigated and tracked by the ICE OPR and CRCL offices. Other safeguards to prevent racial profiling and civil rights violations have been incorporated in the 287(g) program, including: comprehensive training (during the academy and thereafter) for 287(g) officers; vigorous oversight and supervision of all 287(g) programs; a new MOA which incorporates a DHS/ICE pre-approval oversight requirement, to which 287(g) officers must adhere when using solely administrative authority; deployment of additional staff dedicated solely to the management and oversight of 287(g) programs; and OPR site reviews. DHS continues to add and incorporate safeguards, which will aid in the prevention of racial profiling and civil rights violations and improve accountability for protecting human rights under the program.

602. ICE recently implemented a training course for personnel who manage or oversee 287(g) partnerships throughout the country. The new Immigration Authority Delegation Program Oversight (IADPO) training course is held at the ICE Academy within the Federal

Law Enforcement Training Center in Charleston, SC, and addresses deficiencies cited in the GAO and DHS OIG audits. The course provides ICE personnel with a comprehensive understanding of the 287(g) program and their related duties and responsibilities. ICE also implemented a 287(g) Advisory Board to review all pending requests for Delegation of Authority. The DHS Office for Civil Rights and Civil Liberties (CRCL) participates as a board member to address concerns related to prospective partnering agencies. ICE continues to make progress in implementing recommendations regarding additional training and increased supervisory oversight of 287(g) officers and related activities.

603. The Obama Administration also announced in April of 2010 that it would modify Transportation Security Administration (TSA) airline screening standards issued after the attempted bomb attack on board a flight bound for Detroit, Michigan on Christmas Day 2009. As modified, the standards select passengers for screening based on “real-time, threat-based” intelligence information, rather than basing searches and physical inspections on persons from a list of specific countries.

604. Individual states have also enacted legislation to prohibit racial profiling and have imposed data collection requirements on police officers. In 2006, Maryland extended a study of information on traffic stops to determine the extent and severity of racial profiling within that state. In 2005, Arkansas, Florida, Kansas, Montana, New Jersey and Tennessee adopted or strengthened their respective racial profiling laws. Twenty-seven states now have laws requiring law enforcement agencies to collect information, including the race and gender of each driver stopped by police, and what actions were taken. In addition, governors in Kentucky, Wisconsin and Wyoming have issued executive orders that ban racial profiling, and police in other states collect traffic stop data voluntarily. *See* “Policy Brief: Racial Profiling” by Center for Policy Alternatives, citing data from the Racial Profiling Data Collection Resource Center at Northeastern University.

605. In paragraph 25 of its Concluding Observations, the Committee recommended that the United States should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation. The Committee further recommended that the United States should ensure that its hate crime legislation, both at the federal and state levels, addresses sexual orientation-related violence and that federal and state employment legislation outlaws discrimination on the basis of sexual orientation.

606. The United States recognizes “a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes” in the United States. Letter from Attorney General Eric Holder to the Honorable John A. Boehner, Speaker of the House of Representatives, dated February 23, 2011. As discussed further below, all three branches of the federal government have taken important steps to combat this discrimination and further protect the human rights of lesbian, gay, bisexual and transgender people (“LGBT people”). State and local governments have also made significant strides in this regard. In *Lawrence v. Texas*, 539 U.S. 558 (2003), a watershed case in the advancement of the human rights of LGBT people, the U.S. Supreme Court held that the due process clause of the Fourteenth Amendment protects the rights of same sex adults to engage in private, consensual sexual conduct. Congress recently enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which strengthens federal protections against crimes based on gender identity and sexual orientation, and took the pivotal step of repealing “Don’t Ask Don’t Tell,” the law which prohibited LGBT service members from openly serving in the military. The Obama Administration also has pursued several key initiatives to enhance the human rights of LGBT persons, including extending additional benefits to the same-sex partners of federal workers. It has also notified Congress and the courts of its assessment

that discrimination on the basis of sexual orientation is entitled to heightened constitutional scrutiny and that Section 3 of the Defense of Marriage Act (“DOMA”) and its definition of marriage as a relationship between one man and one woman, is unconstitutional. The Administration is committed to building on these critical advances. As President Obama stated in commemoration of LGBT Pride Month in June 2011: “Every generation of Americans has brought our Nation closer to fulfilling its promise of equality. While progress has taken time, our achievements in advancing the rights of LGBT Americans remind us that history is on our side, and that the American people will never stop striving toward liberty and justice for all.”

607. As discussed in relation to Article 2 in this Report, in October 2009, Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. This legislation, which was signed into law by President Obama on October 28, 2009, expands U.S. federal hate crimes law to prohibit certain crimes of violence motivated by a victim’s actual or perceived gender, sexual orientation, gender identity or disability. It also gives federal authorities greater ability to engage in hate crimes investigations that local authorities choose not to pursue; provides funding to help state and local agencies investigate and prosecute hate crimes; and requires the Federal Bureau of Investigation (FBI) to track statistics on hate crimes against transgender persons. Statistics on other groups are already tracked under the Hate Crime Statistics Act of 1990, 28 U.S.C. 534, which requires the Attorney General to collect data on crimes committed because of the victim’s race, religion, disability, sexual orientation or ethnicity. In addition, the Campus Hate Crimes Right to Know Act of 1997, 20 U.S.C. 1092, requires campus security authorities to collect and report data on hate crimes committed on the basis of race, gender, religion, sexual orientation, ethnicity or disability.

608. Through its Uniform Crime Reporting Program, the Federal Bureau of Investigation (FBI) collects hate crimes statistics that include both federal and state crimes. In 2009, 6,604 criminal incidents were reported involving 7,789 offenses. Of these, 6,598 were single bias incidents – 48.5 % motivated by racial bias, 19.7 % motivated by religious bias, 18.5 % by sexual orientation bias, 11.8 % by ethnicity/national origin bias, and 1.5 % motivated by disability bias. Of the 4,793 hate crimes against persons, 45 % involved intimidation, 35.3 % involved simple assault, 19.1 % involved aggravated assault, and other offenses constituted the remainder. Of the 2,970 hate crimes against property, most (83 %) involved acts of destruction, damage, and vandalism. The remaining 17 % involved robbery, burglary, vehicle theft, arson or other offenses. The number of offenders in 2009 was 6,225; of those 62.4 % were White, 18.5 % were Black or African American, 7.3 % were of multiple races, 1.0 % were American Indian/ Alaska Native, and .7 % were of Asian Pacific ancestry. Race was unknown for the remainder. (Source: FBI, Uniform Crime Report, <http://www2.fbi.gov/ucr/hc2009/documents/incidentsandoffenses.pdf>).

609. Beyond prosecution of these offenses, there is recognition that specialized support, advocacy, and follow-up services should be made available to victims of sexual orientation-related violence. Under the Victims of Crime Act, the DOJ Office for Victims of Crime makes grants to states and U.S. territories to support services for all crime victims, including culturally-competent professional services for LGBT victims of sexual orientation-related and other crimes. In addition to services to victims of these crimes, grant funding also addresses the corresponding need for requisite training for professionals who respond to victims in these types of crimes.

610. More than half of U.S. states have hate crimes laws that cover sexual orientation. Approximately 20 states plus the District of Columbia also have laws that prohibit employment discrimination on the basis of sexual orientation and/or gender identity in public and private employment or in public workplaces only.

611. In addition, the Civil Service Reform Act of 1978, which applies to federal employees, is interpreted to prohibit employment discrimination on the basis of sexual orientation and other non-merit factors, which include gender identity. Federal workers may file claims under the Civil Service Reform Act with the Office of Special Counsel, which may pursue their claims in court on their behalf. Alternatively, claims may be filed with the Merit Systems Protection Board, which rules on civil service matters. Executive Order 13087, signed by President Clinton on May 28, 1998, also directs federal agencies to make employment decisions without regard to sexual orientation. Some U.S. courts have recognized that because discrimination against lesbian, gay, bisexual, and transgender people often centers on the ways in which they do not conform to traditional gender stereotypes, such discrimination may be actionable under Title VII's prohibition on sex discrimination, as construed by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination resulting from stereotypical notions about appropriate gender norms (i.e., "gender stereotyping") is discrimination "because of sex" within the meaning of Title VII). The EEOC's Commissioners recently voted to approve filing an amicus brief in support of this theory on behalf of a fired transgendered worker who filed a Title VII sex discrimination claim, *Pacheco v. Freedom Buick* (W.D. Tx.), and while the district court denied the EEOC's October 13, 2011 motion for leave to file, the motion and brief reflect the EEOC's litigation position on the issues it addressed.

612. The U.S. Congress is considering the Employment Nondiscrimination Act, which would prohibit discrimination in public and private employment on the bases of sexual orientation and gender identity in much the same way as Title VII of the Civil Rights Act of 1964 prohibits race discrimination, among other things. As of August 2011, the Employment Non-Discrimination Act had 152 cosponsors in the House of Representatives and 40 cosponsors in the Senate. President Obama supports the Employment Non-Discrimination Act and believes that our anti-discrimination employment laws should be expanded to include sexual orientation and gender identity.

613. In June 2009, President Obama issued a memorandum clarifying that it is unlawful to discriminate against federal employees or applicants for federal employment on the basis of factors not related to job performance. Gender identity is one such non-merit factor, and in May 2011, the Office of Personnel Management issued guidance to all agencies that discrimination on the basis of gender identity is not permitted in the federal workplace.

614. As discussed in Paragraph 307 of this report, on December 18, 2010, Congress passed a law to repeal 10 U.S.C. 654, the law prohibiting gay and lesbian service members from openly serving in the military, commonly referred to as "Don't Ask Don't Tell." Don't Ask Don't Tell Repeal Act of 2010. In accordance with the Repeal Act, the repeal took effect on September 20, 2011, 60 days following a certification by the President, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff that the statutory conditions for repeal had been met, including that implementation of the repeal "is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces".

615. With regard to federal employment, on June 2, 2010, President Obama signed a Presidential Memorandum extending a wider range of benefits to the same-sex partners of eligible federal workers. These include family assistance services, hardship transfers, and relocation assistance. The Memorandum also called for any new benefits provided to opposite sex spouses also to be provided to same-sex domestic partners to the extent permitted by law. This measure builds upon the President's June 17, 2009, Memorandum to the Office of Personnel Management, which requested that it extend certain benefits, such as long term care insurance, to same-sex domestic partners of Federal employees consistent with Federal law. In extending these additional benefits, President Obama noted that he is prevented by existing federal law from providing same sex domestic partners with the full



range of benefits enjoyed by heterosexual married couples. He renewed his call for swift enactment of the Domestic Partnership Benefits and Obligations Act, which would extend to the same sex domestic partners of federal employees the full range of benefits currently enjoyed by spouses of married federal employees.

616. In 1996, Congress passed and President Clinton signed the Defense of Marriage Act (“DOMA”), Pub. L. 104-199, 110 Stat. 2419. This act provides that, for purposes of federal law, “the word ‘marriage’ means “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.” *Id.* The act also provides that “[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” *Id.* President Obama has long stated that he does not support DOMA as a matter of policy, believes it is discriminatory, and supports its repeal.

617. On February 23, 2011, Attorney General Holder announced in a letter to the Speaker of the House of Representatives that, after careful consideration, including a review of the recommendation of the Attorney General, the President had concluded that “classifications based on sexual orientation should be subject to a heightened standard of scrutiny” under the Constitution, “and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.” The Attorney General’s letter also announced that the President had instructed the Department of Justice not to defend the statute in cases then pending in federal district courts, but that Section 3 would continue to be enforced by the Executive Branch and that Executive Branch agencies would comply with its requirements, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. The Department of Justice has argued in three recent cases that Section 3 should be subject to heightened scrutiny and that, under that standard, Section 3 is unconstitutional as applied to legally married, same-sex couples. *See Golinski v. Office of Personnel Mgmt.*, No. C 3:10-00257 (N.D.Ca.); *Windsor v. United States*, No. 10-CV-8435 (S.D.N.Y.); *Lui v. Holder*, No. CV 11-01267 (C.D.Ca.). In addition, the President has voiced his support for the Respect for Marriage Act, a bill that would repeal DOMA, which is currently pending before both Houses of Congress. More information on marriage and family life protections is contained in the discussion of Article 23 above.

618. In paragraph 26 of its Concluding Observations, the Committee recommended that the United States should review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect, as well as of the United Nations Guiding Principles on Internal Displacement, in matters related to disaster prevention and preparedness, emergency assistance and relief measures. In the aftermath of Hurricane Katrina, the Committee recommended that the United States increase its efforts to ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration in the construction plans with regard to access to housing, education and healthcare. The Committee wishes to be informed about the results of the inquiries into the alleged failure to evacuate prisoners at the Parish prison, as well as the allegations that New Orleans residents were not permitted by law enforcement officials to cross the Greater New Orleans Bridge to Gretna, Louisiana.

619. U. S. practices with regard to disaster prevention and preparedness, emergency assistance and relief measures are designed to protect life and prohibit discrimination, direct

or indirect. The United States has aggressively moved forward to implement the lessons learned from the horrific destruction of Hurricane Katrina, which severely strained and initially even overwhelmed federal, state, and local capabilities. These lessons include the need to improve procedures to enhance the protection of, and assistance to, economically disadvantaged members of our society, along with providing relief assistance to all disaster victims as soon as possible, without discrimination. Measures related to New Orleans law enforcement officials are discussed in Part II of this report under Articles 3 and 7.

620. The legislative mandate of the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) prohibits discrimination on the basis of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status in all disaster assistance programs. FEMA, in coordination with the DHS Office for Civil Rights and Civil Liberties (CRCL), has developed standard operating procedures to assure that response and recovery activities respect the civil rights and civil liberties of all persons and do not result in discrimination.

621. FEMA and CRCL have developed policies regarding three civil rights issues related to Hurricane Katrina lessons learned. One area involves individuals with limited English proficiency, the second involves individuals with disabilities, and the third involves broader equal access issues that are referenced in the Concluding Observations, specifically Black or African American populations impacted by Hurricane Katrina. DHS notes that some of these populations overlap.

622. Legislation addressed some of the issues affecting non-English speaking individuals and individuals with disabilities after a catastrophic disaster: following the problems brought to light during Hurricane Katrina, Congress passed the Post-Katrina Emergency Management Reform Act (PKEMRA), Title VI of Public Law 109-295, in 2006. That Act addressed several policy areas that direct federal disaster assistance to individuals and families with specific circumstances or additional needs in the disaster environment. PKEMRA integrated disability related considerations into FEMA's planning, response, and recovery operations, established a Disability Coordinator position reporting directly to the FEMA Administrator, and called for the development of guidelines for accommodating individuals with disabilities in mass care operations. In 2010, FEMA created an office specifically devoted to integrating and coordinating the needs of this population. FEMA also has retained a language assistance contractor to provide interpretation and translation services for FEMA programs and activities, and is working on a detailed language access plan.

623. FEMA has also piloted initiatives that address problems that low income survivors may face after a disaster. FEMA partnered with the Department of Housing and Urban Development (HUD) to establish the Disaster Housing Improvement Program (DHAP). FEMA's experience has been that after catastrophic events, some displaced families may have housing needs that extend beyond the time and scope of assistance that the FEMA temporary housing program is designed and equipped to provide. DHAP was intended to facilitate and streamline the transition from FEMA temporary housing assistance to the HUD Housing Choice Voucher (HCV) program or other HUD-assisted housing programs. Approximately \$66 million in foreign aid was received by FEMA, which was put into a program for case management for Katrina survivors. The money was given to the United Methodist Committee on Relief, which then funded nine non-governmental entities that directed the Katrina Aid Today (KAT) program. KAT then selected many other NGOs to help deliver case management in all states with Katrina survivors who had been relocated. FEMA's case management program is intended to provide disaster survivors with referrals to a full array of support services, including human, social, employment, legal, mental health, and medical services. FEMA has continued to pilot a disaster case management program, and with authority provided in PKEMRA, FEMA currently partners with the

Department of Health and Human Services Administration for Children and Families, to provide these services when requested by the state.

624. One lesson learned in the aftermath of Hurricane Katrina was to include background on the communities on the ground in standard operating procedures for individuals deployed to the field. For instance, in the aftermath of the BP Deepwater Horizon Oil Spill (which has affected many of the same Gulf Coast communities as Hurricane Katrina), the President asked DHS to deploy individuals to the ground to communicate information and conduct outreach to communities. DHS' standard operating procedures on equal access to programs included background information on the history of poverty, racial tension, barriers to transportation, economic and educational disparities in Louisiana, Mississippi, and Alabama. There were many Black/African American shrimpers, oyster workers, and boat owners impacted by the BP Deepwater Horizon Oil Spill, and FEMA has internally incorporated the lessons learned and Gulf Coast history into its training and policy development.

625. The preparedness and response activities of the Department of Health and Human Services (HHS) were also affected by Congressional enactment of the 2006 Pandemic and All-Hazards Preparedness Act (PAHPA). The Act authorized a new Assistant Secretary for Preparedness and Response (ASPR), tasked with new authorities for a number of programs, and a new Director of At-Risk Individuals within the Assistant Secretary's office. PAHPA directs the Assistant Secretary to take into account the needs of at-risk individuals in areas such as HHS grantee guidance, the Strategic National Stockpile, novel and best practices of outreach to and care of at-risk individuals, and curriculum development of public health and medical response training programs.

626. For the purposes of implementing this legislation, at-risk individuals are defined as those who, before, during, and after a disaster, may have additional needs in one or more of the following functional areas: communication, medical care, and maintaining independence, supervision, and transportation. In addition to those individuals specifically recognized as at-risk in PAHPA (i.e., children, senior citizens, and pregnant women), individuals who may need additional response assistance include those who have disabilities, live in institutionalized settings, are from diverse cultures, have limited English proficiency (LEP) or are non-English speaking, are transportation disadvantaged, have chronic medical disorders, and have pharmacological dependency.

627. Since the enactment of PAHPA, HHS has developed new tools to ensure the effective incorporation of at-risk individuals into all existing policy, planning, and programmatic documents. HHS has been an active participant on the Federal Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities, which ensures that the federal government supports safety and security for individuals with disabilities in disaster situations.

628. HHS's Office of Minority Health (OMH) has developed National Standards for Culturally and Linguistically Appropriate Services in Health Care to improve access to care, quality of care, and health outcomes for all patients. To this end, OMH created a Cultural Competency Curriculum for Disaster Preparedness and Crisis Response, which provides in-depth information on models and approaches for delivering culturally competent services; effective communication techniques and tools for delivering language access services; and tools for internal and external organizational supports for culturally and linguistically competent services in disaster preparedness, response, and recovery. In addition, the Division of At-Risk Individuals, Behavioral Health, and Community Resilience assists internal and external partners to ensure that behavioral health issues and the needs of at-risk individuals are integrated in public health and medical emergency planning and activities. Through these actions, HHS and the federal government will be better prepared to account for the needs of at-risk individuals in future emergencies.

629. The HHS Office for Civil Rights (HHS OCR) works to ensure the protection of the civil rights of persons with disabilities and other underserved populations in emergency preparedness, response, and recovery activities. OCR has provided policy guidance on all aspects of the emergency planning framework at the federal, state, and local levels, to help ensure that the needs of persons with disabilities and persons from diverse cultural origins (including persons with limited English proficiency (LEP)) will be met in emergencies. OCR provides subject matter expertise on emergency preparedness, response, and recovery guidance documents, including the following:

(a) Revisions to the National Response Plan, a reference guide to supplement the National Response Framework, the National Disaster Recovery Framework, and the National Health Security Strategy;

(b) HHS Playbooks for hurricanes and emergencies related to radiological dispersal devices and anthrax;

(c) A Memorandum of Understanding with the American Red Cross and a first-of-its-kind Initial Intake and Assessment Tool to aid shelter workers across the country in screening and placing persons with disabilities and with limited English proficiency, which is now being used in all Red Cross general population shelters;

(d) An assessment tool for FEMA and HHS to triage people for evacuation in the event of emergencies, to help ensure that transportation plans and activities take into account the needs of persons with disabilities and persons with LEP; This assessment tool is now in use by FEMA and HHS and will apply to all their evacuation activities;

(e) Technical input for Section 689 of federal guidelines, which set out all Federal civil rights standards that apply to persons with disabilities in the emergency context, and serve as a useful resources for state and local emergency planners;

(f) The first National Consensus Statement and Guiding Principles on Emergency Preparedness and Cultural Diversity, which provides guidance on integrating racially and ethnically diverse communities into emergency preparedness activities and a subsequent Emergency Preparedness Toolkit for Diverse Populations;

(g) A Community Planning Toolkit for State Emergency Preparedness Managers to assist emergency planners to plan for a range of potential hazards affecting people with disabilities and other functional needs and the HHS Office of Minority Health's Cultural Competency Curriculum for Disaster Preparedness and Crisis Response.

630. In addition, the U.S. Administration on Aging oversees a nationwide Aging Network of state and local aging programs that provide home- and community-based supportive services for the elderly who need assistance to remain in their own homes and their caregivers. These services are especially targeted towards those who are socially or economically underserved. The Aging Network in the coastal states affected by Katrina was already serving many of the low-income, minority and LEP elderly in the area with disabilities. Given the magnitude of Katrina's aftermath, the state and area agencies on aging and local supportive services providers throughout the affected area were fully integrated into all aspects of response, evacuation, and recovery efforts, providing staff, supplies and various types of relief efforts.

631. In paragraph 27 of its Concluding Observations, the Committee expressed concerns about undocumented migrants in the United States and the increased level of militarization on the southwest border with Mexico. The Committee recommended that the United States provide the Committee with more detailed information on these issues, in particular on the concrete measures adopted to ensure that only agents who have received adequate training on immigration issues enforce immigration laws, which should be compatible with the rights guaranteed by the Covenant.

632. U.S. Customs and Border Protection (CBP) is one of the Department of Homeland Security's largest and most complex components, with a priority mission of keeping terrorist threats from harming the United States. It also has a responsibility for securing and facilitating trade and travel while enforcing hundreds of U.S. regulations, including immigration and drug laws. CBP must enforce U.S. laws and secure the nation while preserving individual liberty, fairness, and equality under the law. U.S. immigration laws require that individuals entering the United States must be admissible, and CBP is charged with enforcing the admissibility provisions of the Immigration and Nationality Act at and between our ports of entry. CBP has also deployed resources dedicated to the humanitarian rescue of unauthorized aliens at the southwest border and continues to look for ways to advance its mission while being mindful of the rights of those at the border. The CBP Office of Border Patrol, through its Border Safety Initiative (BSI), continues to expand its border safety and security efforts. The BSI was implemented in June 1998, building on longstanding CBP Border Patrol humanitarian practice.

633. The BSI is composed of four key components: Prevention, Search and Rescue, Identification, and Tracking and Recording. The primary objective and goal of the BSI is the reduction of injuries and prevention of deaths in the southwest border region. For example, CBP Border Patrol participates in the Mexican Interior Repatriation Program (MIRP) to remove aliens at risk from environmental distress to the interior of Mexico. Border Patrol has also installed rescue beacons in remote and high risk areas of the border. Subjects in distress may activate these beacons to notify Border Patrol of their location and their need for assistance. CBP Border Patrol has collaborated with other DHS entities to develop standard operating procedures pertaining to federal Emergency Medical Services (EMS). CBP trains and assigns Border Patrol Search Trauma and Rescue (BORSTAR) agents and Emergency Medical Technicians to high risk areas along the border. Further, BORSTAR has trained Mexican law enforcement officers in First-Aid, CPR, search and rescue techniques, aquatic safety, and numerous other skill sets. CBP also deploys Forward Operating Bases to mitigate the danger involved in unauthorized border crossings. CBP continues to support humanitarian efforts through media campaigns and public safety announcements that raise awareness of dangers in the southwest border region with the goal of reducing injuries, saving lives and creating a safer border environment.

634. With regard to militarization concerns on the border, the Administration has pursued a comprehensive, multi-layered, targeted approach to law enforcement and security. Such an approach, rather than simply deploying an arbitrary number of National Guard personnel to the border, is essential to meeting the evolving border-related challenges, complementing our strong security partnership with Mexico. The Administration is committed to a strategic approach with respect to enforcement on the southwest border, consisting of a requirements-based, temporary utilization of up to 1,200 additional National Guard personnel to bridge to longer-term enhancements in border protection and law enforcement personnel from the Departments of Homeland Security and Justice, who will be properly trained to target illicit networks trafficking in people, drugs, illegal weapons, money, and the violence associated with these illegal activities. National Guard personnel will not be conducting immigration enforcement activities.

635. DHS takes the training of federal law enforcement officials very seriously. CBP requires that all Border Patrol Agents receive 55 days of training, and Field Operations Officers receive 73 days of initial training, both of which include modules on constitutional law, prior to beginning their jobs. The DHS Office for Civil Rights and Civil Liberties has also begun working with CBP on reviewing human rights content within the Border Patrol Academy and the Field Operations Academy, and long term, both components will develop enhancements to this curriculum if needed.

636. In April 2010, the state of Arizona enacted Senate Bill 1070 (S.B. 1070), a law which, among other things, required state and local police to make a reasonable attempt, when practicable, to determine the immigration status of a person when in the course of a lawful stop, detention, or arrest, the officer has a reasonable suspicion that the person is an alien who is unlawfully present in the United States, unless the attempt to verify immigration status might hinder or obstruct an investigation. On July 6, 2010 the Department of Justice (DOJ) filed a legal challenge to S.B. 1070 in the United States District Court for the District of Arizona on grounds that it is preempted under the Constitution and federal law because it unconstitutionally interferes with the federal government's authority to set and enforce immigration policy. In particular, DOJ argued that the Arizona law sets a state-level immigration policy that interferes with federal administration and enforcement of the immigration laws. The suit, which requested that the court issue a preliminary injunction to block enforcement of the law, was filed on behalf of DOJ, DHS, and the Department of State, which share responsibilities in administering federal immigration law. On July 28, 2010, a federal judge issued an injunction blocking sections of the law, including those that raised some of the concern about potentially discriminatory effects. The injunction was upheld by the U.S. Court of Appeals for the Ninth Circuit on April 11, 2011. Arizona filed a petition for writ of certiorari seeking review by the United States Supreme Court, on August 12, 2011. On November 10, 2011, DOJ filed a brief in opposition, and Arizona filed a reply brief on November 21, 2011. On December 12, the Supreme Court granted review of this case.

637. The United States remains concerned about other similar state immigration laws and their possible impact. On August 1, 2011, DOJ joined a number of private plaintiffs in challenging several provisions of the Alabama immigration law, H.B. 56, on preemption grounds and seeking a preliminary injunction. The law was scheduled to go into effect on September 1, 2011. More expansive than the Arizona law, Alabama's law is designed to affect virtually every aspect of an unauthorized immigrant's daily life, from employment to housing to transportation to entering and enforcing contracts. On September 28, 2011, the district court issued an order enjoining the law in part, but denying DOJ's request that six additional provisions of the law be prevented from taking effect. On October 7, 2011, DOJ filed in a motion in the U.S. Court of Appeals for the Eleventh Circuit for injunction pending appeal and temporary injunction pending full consideration and for expedited briefing and argument. On October 14, 2011, the Eleventh Circuit granted in part and denied in part DOJ's request for an injunction pending appeal. The Eleventh Circuit set the case on an expedited schedule, and DOJ filed its opening brief on November 14, 2011. Briefing is expected to continue into the new year, with oral argument to be scheduled shortly after all briefs have been submitted.

638. On October 31, DOJ likewise joined a number of private plaintiffs in challenging several provisions of the South Carolina immigration law, Act. No. 69, on preemption grounds and seeking a preliminary injunction. The South Carolina law, which is scheduled to go into effect on January 1, 2012, was modeled in part on the Arizona law and contains a similar mandatory verification requirement, among other provisions. Briefing in this case is ongoing, and the district court has scheduled oral argument on the motion for preliminary injunction on December 19, 2011.

639. On November 22, 2011, after consultation with the Utah attorney general and Utah law enforcement officials, DOJ filed suit against Utah's immigration law, H.B. 497, which mandates immigration enforcement measures that interfere with the immigration priorities and practices of the federal government and could lead to harassment and detention of foreign visitors and legal immigrants. In addition, DOJ notified Utah state officials that Utah's Immigrant Guest Worker statutes, H.B. 116 and H.B. 469, are preempted by federal law. Those provisions do not take effect until 2013 and DOJ continues to have constructive conversations with Utah officials about those provisions, pursuant to DOJ's policy of

exploring resolution short of litigation before filing suit against a state. DOJ filed a motion for preliminary injunction against H.B. 497 on December 15, 2011 and a hearing on that motion and the motion of the private plaintiffs will be held on February 10, 2012.

640. At this writing, DOJ is currently reviewing other immigration-related laws passed in Indiana and Georgia. In reviewing these laws, DOJ is proceeding consistently with the process followed and legal principles established in *United States v. Arizona*, *United States v. Alabama*, *United States v. South Carolina*, and *United States v. Utah*.

641. In paragraph 28 of its Concluding Observations, the Committee recommended that the United States should take all steps necessary, including at the state level, to ensure the equality of women before the law and equal protection of the law, as well as effective protection against discrimination on the ground of sex, in particular in the area of employment.

642. One of President Obama's first acts in January 2009 was to sign the Lilly Ledbetter Fair Pay Act of 2009 into law. The Ledbetter Fair Pay Act ensures that workers may challenge pay discrimination by resetting the 180-day time frame for filing a pay discrimination charge each time they receive a discriminatory paycheck. This law overturns a 2007 Supreme Court decision, *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), involving Lilly Ledbetter, who discovered late in her career that she had, for years, received lower pay than her male counterparts, including those with less work experience. The 2007 Supreme Court decision barred Ms. Ledbetter from challenging her pay as discriminatory because she had not filed her administrative charge of sex discrimination within 180 days of the original pay decision – i.e., at a time when she did not even know a pay discrepancy existed.

643. In the United States, women are accorded equal protection of laws and equality before the law by the United States Constitution and federal laws, as well as by state constitutions and laws. Federal statutes that protect the rights of women in the workplace include Title VII of the Civil Rights Act of 1964, which prohibits employers with 15 or more employees from discriminating on the basis of race, color, religion, sex or national origin in the terms and conditions of employment; and the Equal Pay Act of 1963, which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination. Title VII covers employment practices, including hiring and firing; compensation; transfer, promotion and layoffs; recruitment; testing; use of company facilities; training and apprenticeship; retirement; and any other terms and conditions of employment. Executive Order 11246 prohibits discrimination on the basis of race, color, sex, religion or national origin by companies that have covered contracts and subcontracts with the federal government, and requires that such federal contractors and subcontractors take affirmative action to ensure equal employment opportunity for women and minorities. Executive Order 11246 is enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which, among other responsibilities, conducts audits of covered contractors' and subcontractors' employment practices to ensure compliance. When an audit uncovers discrimination, OFCCP seeks appropriate relief for the affected class, and, if necessary, may bring a lawsuit. Notable recent cases of sex discrimination include:

(a) On February 3, 2011, OFCCP announced that federal contractor Green Bay Dressed Beef would pay \$1.65 million in back wages, interest and benefits to 970 women who were subjected to systemic hiring discrimination by the company. The settlement followed an investigation by OFCCP, which found that the women were rejected for general laborer positions at the company's Green Bay plant in 2006 and 2007. In addition to financial compensation, the company agreed to extend 248 offers of employment to affected women as positions become available. Two of the company's largest clients are the U.S. Department of Agriculture and the U.S. Department of Defense.

(b) On June 6, 2011, OFCCP announced a settlement in a major pay discrimination case with AstraZeneca, one of the largest pharmaceutical companies in the world. The company agreed to pay \$250,000 to 124 women who were subjected to pay discrimination while working at the corporation's Philadelphia Business Center. The company also agreed to work with OFCCP to conduct a statistical analysis of the base pay of 415 individuals employed as sales specialists in several states throughout the country. If the analysis concludes that female employees continue to be underpaid, the company will adjust salaries.

(c) On June 16, 2011, OFCCP announced a settlement in a hiring discrimination case with ThyssenKrupp Elevator Manufacturing, a global producer of elevators. OFCCP's investigation revealed that female job applicants were systematically rejected for positions at the company's facility in Middleton, Tennessee. In addition to paying more than \$288,000 in back wages and interest, ThyssenKrupp also agreed to extend job offers to 23 of the 248 women in the original class.

644. The Civil Rights Act of 1991 provides compensatory damages to victims of intentional employment discrimination under Title VII, including discrimination based on sex. In extreme cases, punitive damages also are available. Recovery under the Equal Pay Act provides harmed workers with back pay for the wages lost as a result of the unequal treatment, and, in cases of "willful" violations, "liquidated" damages that double the back-pay award. These laws are enforced by the Equal Employment Opportunity Commission (EEOC), which, among other responsibilities, takes enforcement action in cases of discrimination. In fiscal year 2010 (Oct. 1, 2009 – September 30, 2010), the EEOC received 29,029 charges involving sex discrimination, resolved 30,914 charges, and procured \$129.3 million in benefits through administrative actions. The EEOC litigation program made additional strides to stop sex-based discrimination. Notable recent lawsuits include:

(a) The EEOC obtained a substantial settlement for a class of female workers who were systemically denied jobs in a warehouse based on stereotypes that women were unsuitable for such physically demanding work. The five-year consent decree, approved in court on March 1, 2010, requires the employer, a major retail chain, to pay \$11.7 million in back wages and compensatory damages for class members, pay employer taxes for all back-pay awards, provide up to \$250,000 for costs of a settlement administrator, train all workers involved in screening or hiring workers at the facility, post a notice regarding non-discrimination, keep applicant flow data for the duration of the settlement, and participate in affirmative action hiring. With respect to affirmative action hiring, the consent decree requires the employer to hire women class members to the first 50 vacancies that arise, hire women class members to every other position for the next 50 vacancies, and thereafter fill one out of every three positions with a woman class member for the duration of the consent decree. *EEOC v. Wal-Mart Stores, Inc.*, No. 01-339 (E.D. Ky, settled Mar. 1, 2010).

(b) The EEOC obtained a \$200,000 settlement for four women, one of whom worked as a flagger for a construction company and was repeatedly denied higher-paid laborer jobs while being told that women could not perform the work. The lawsuit also alleged that female workers were not provided adequate toilet facilities, forcing them to urinate outside in public. When they complained about this treatment, managers drastically reduced their hours and stopped giving them new assignments. *EEOC v. Danella Constr.*, 08-3349 (E.D. Pa., settled Nov. 4, 2009).

(c) The EEOC settled a large class action lawsuit for \$1.7 million and significant equitable relief for workplace sexual harassment that included sexual assault and sexual propositions of young workers in exchange for promotions. The three-year consent decree requires the employer to provide comprehensive training to all management, non-management, and human resources employees on what constitutes harassment and retaliation, and also on the obligation to provide a discrimination-free work environment



and not to harass and retaliate. Human resources staff must receive additional training on how to institute policies and practices to correct discrimination, prevent future occurrences, and inform complainants of internal investigation outcomes. The company is required to revise its harassment and anti-retaliation policies, revise its method for tracking harassment complaints, and regularly to report its internal complaints of harassment to the EEOC for the term of the consent decree. *EEOC v. Lowes Home Improvement Warehouse, Inc.*, No. CV08-331 JCC (W.D. Wash. Aug. 21, 2009).

645. Data compiled by the Department of Labor's Bureau of Labor Statistics show that women have made strides in the workforce with regard to some, but not all, indicators. For example, between 2005 and 2010, the employment of women in management, professional and related occupations, as a percentage of their total employment, grew from 38 to 41 percent. Women are now 52 percent of all employees in management, professional, and related occupations. However, a gender gap still exists with regard to salary. In 2010, for instance, the median weekly income for women in management, professional and related occupations was \$923 per week, while it was \$1,256 per week for men. President Obama has created a National Equal Pay Enforcement Task Force comprised of leaders from OFCCP, EEOC and other agencies to identify the reasons for the persistent wage gap and ways to close it.

646. Recently, the EEOC issued guidance concerning discrimination against workers with caregiving responsibilities. This type of discrimination typically involves sex discrimination against women or men with respect to child or eldercare responsibilities. The EEOC first addressed this subject in an April 2007 meeting on Work/Family Balance and Job Discrimination, where panelists discussed workplace demographics and how caregivers, particularly women, are wrongly stereotyped as less available or committed to the workplace and as a result are discriminated against in employment in violation of Title VII. A separate meeting was held in May 2007 to identify employer best practices for achieving work/family balance while avoiding violations of law. Subsequently, the EEOC issued guidance that identifies how caregiver discrimination may violate anti-discrimination laws, particularly Title VII's prohibition against sex discrimination. ("Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" (<http://www.eeoc.gov/policy/docs/caregiving.html>)). In April 2009, the EEOC issued a second document entitled "Best Practices to Avoid Discrimination Against Caregivers" (<http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>).

647. In the wake of disturbing sexual harassment cases involving teens, particularly young women working in their first jobs, the EEOC also created a robust program, Youth@Work, to inform young people about their rights and responsibilities, and to create partnerships with industries and companies that employ many young workers. Detailed information about this program is available at <http://www.eeoc.gov/youth/>.

648. On March 11, 2010, EEOC Acting Chairman Stuart Ishimaru testified before the Senate Health, Education, Labor and Pensions Committee in favor of the Paycheck Fairness Act, a bill that passed the House of Representatives on January 9, 2009 but was not acted on by the Senate. The bill has been reintroduced in both houses of Congress in the 112th Congress. Most significantly, this bill would forbid employers from disciplining workers who discuss pay issues – disciplinary action that makes it difficult for employees to know whether they are being underpaid relative to their colleagues. The bill also would expand protections, increase penalties, and limit the defenses for gender-based differences in pay. To defend claims of sex-based wage disparity, the bill would require employers to show that any wage differences are based on a "bona fide factor other than sex, such as education, training or experience," meaning that the factors used to set wages are "not based on or derived from a sex-based differential," are "job related," and are "consistent with business necessity." Further, the bill would allow plaintiffs to overcome this defense

by proving “that an alternative employment practice exists that would serve the same business purpose without producing such a differential and that the employer refused to adopt [the] alternative practice.”

649. Most states and many localities have civil rights or human rights commissions or offices that administer and enforce state or local laws prohibiting discrimination based on sex in employment (in addition to other areas, such as education, housing and access to public accommodations). A large number of complaints are received and investigated by state and local authorities, and states often have work-sharing agreements with federal authorities, for example the EEOC, to ensure that complainants’ rights are protected under both state and federal law, regardless of where the complainants choose to bring their complaints. These issues are discussed in more detail in Annex A to the Common Core Document, which discusses state and local civil rights authorities and programs.

650. In paragraph 29 of its Concluding Observations, the Committee recommended that the United States should review federal and state legislation with a view to restricting the number of offences carrying the death penalty, and that the United States assess the extent to which the death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the Committee recommended that the United States place a moratorium on capital sentences, bearing in mind the desirability of abolishing the death penalty.

651. As noted in the discussion of Article 6 in this Report, the U.S. Supreme Court has recently further narrowed the categories of defendants against whom the death penalty may be applied under the U.S. Constitution. For example, *Kennedy v. Louisiana*, 554 U.S. 407 (2008), invalidated imposition of the death penalty for the rape of a minor where the crime did not result, and was not intended to result, in the minor’s death. *Roper v. Simmons*, 543 U.S. 551 (2005), invalidated application of the death penalty in cases involving criminal defendants who were under the age of eighteen at the time of the crime, and *Atkins v. Virginia*, 536 U.S. 304 (2002), invalidated application of the death penalty to mentally retarded criminal defendants. As a consequence of the Supreme Court’s holding in *Roper*, the United States now implements Article 6(5) in full, though the United States submitted a reservation with respect to juvenile offenders at the time of ratification. With respect to the decision in *Atkins*, mental illnesses and incapacities falling short of mental retardation can exist in myriad forms, from mild to severe, and are thus best suited for consideration on a case by case basis. Defendants in criminal trials frequently present evidence that a mental illness or incapacity prevented the formation of the criminal intent to be convicted of the charged crime. If convicted of a capital offense, defendants are also permitted to present evidence of any mental illness or incapacity to mitigate their culpability for a capital or other sentence.

652. In 2006 the Supreme Court decided that death row inmates may, under civil rights laws, challenge the manner in which death by lethal injection is carried out, *Hill v. McDonough*, 547 U.S. 573 (2006). Subsequently, in *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court reiterated that a method of execution does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment unless it creates an “objectively intolerable” and “significant” risk that severe pain will be inflicted on the condemned inmate and held that the State of Kentucky’s three-drug lethal injection protocol – which mirrored the protocols followed by most States and the Federal Government at the time *Baze* was decided – did not constitute cruel and unusual punishment under that standard. In the wake of *Baze*, the lower courts have generally rejected challenges to lethal injection protocols, including challenges to recently-adopted protocols that rely upon new drug combinations or on a single drug. In 2006, the Supreme Court ruled that new evidence, including DNA evidence concerning a crime committed

long ago, raised sufficient doubt about who had committed the crime to merit a new hearing in federal court for a prisoner who had been on death row in Tennessee for 20 years, *House v. Bell*, 547 U.S. 518 (2006).

653. Current practice. The number of states that have the death penalty and the size of the population on death row have all declined in the last decade. As of December 2011, 34 states had laws permitting imposition of the death penalty – down from 38 states in 2000. In New York, the death penalty was declared unconstitutional under the New York State Constitution in 2004; New Jersey officially removed the death penalty from its books in 2007; and in March of 2009, the Governor of New Mexico signed a law repealing the death penalty in New Mexico for offenses committed after July 2009. On March 9, 2011, Illinois became the 16<sup>th</sup> state to abolish the death penalty. On November 22, 2011, the Governor of Oregon declared a moratorium on its use in that state. In a number of other states, although capital punishment remains on the books, it is rarely, if ever, imposed. Nine states that retain the death penalty, for example, have not conducted an execution in the last decade.

654. Since 2005, when the Second and Third Periodic Report was submitted, there have been no federal executions. In 2010, 46 inmates were executed by states in the United States, and 114 new death sentences were imposed. In 2009, 52 inmates were executed, and 112 new sentences were imposed (including three federal death sentences). The 2010 figures represent a more than 45 % reduction from the 85 executions that occurred in 2000. The number of new inmates on death row also declined to 114 in 2010, from 234 in 2000, and the size of the death row population declined to 3,261 in 2010, from 3,652 in 2000.

655. The death penalty continues to be an issue of extensive debate and controversy in the United States. One of the serious areas of concern relates to the overrepresentation of minority persons, particularly Blacks/African Americans, in the death row population (approximately 41.5 % of the 2009 death row population was Black or African American, a much higher percentage than the general representation in the population). Attorney General Eric Holder authorized a study of racial disparities in the federal death penalty during his tenure as Deputy Attorney General during the Clinton Administration. That study found wide racial and geographic disparities in the federal government's requests for death sentences. The study was done in connection with a new system requiring all U.S. Attorneys to obtain the Attorney General's approval before requesting death sentences. In July 2011, DOJ implemented a new capital case review protocol based on comments received from the judiciary, prosecutors, and the defense bar regarding ways to improve DOJ's decision-making process for death penalty cases.

656. In regards to consular notification and capital punishment, the Administration has worked closely with Senator Patrick Leahy to develop the Consular Notification Compliance Act of 2011, S. 1191, introduced in the Senate on June 14, 2011, and fully supports its prompt enactment by the U.S. Congress. This legislation would give the defendants on death row at the time of enactment who were entitled to but did not receive consular notification the right to judicial review and reconsideration of their convictions and sentences to determine if they were actually prejudiced by the failure to follow consular notification and access procedures in the Vienna Convention on Consular Relations and comparable bilateral agreements. Please see the discussion of consular notification under Article 6 above for more information on this topic.

657. Under the U.S. Constitution and laws, the use of the death penalty is restricted to only the most serious offenses, such as murder committed during a drug-related shooting, civil rights offenses resulting in murder, murder related to sexual exploitation of children, murder related to a carjacking or kidnapping, and murder related to rape. Under federal law, there are also a few very serious non-homicide crimes that may result in a death sentence, e.g., espionage and treason, although this sentence has not been imposed for these crimes

since the 1950s. Congress has also enacted several carefully circumscribed capital offenses intended to combat the threat of terrorist attacks resulting in widespread loss of life.

658. These exceptionally grave criminal acts all have catastrophic effects on society. Even for these most serious offenses, prosecutors generally seek capital punishment only when aggravating circumstances are present in the commission of the crime, such as multiple victims, rape of the victim, or murder to eliminate a government witness. As noted in the text of this Report, all criminal defendants in the United States, especially those in potential capital cases, enjoy extensive procedural guarantees, which are well respected and enforced by the courts.

659. In paragraph 30 of its Concluding Observations, the Committee recommended that the United States should increase significantly its efforts towards the elimination of police brutality and excessive use of force by law enforcement officials. It further recommended that the United States should ensure that EMDs and other restraint devices are only used in situations where greater or lethal force would otherwise have been justified, and in particular that they are never used against vulnerable persons. The Committee also recommended that the United States should bring its policies into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

660. Federal law prohibits the use of excessive force by any law enforcement officer against any individual in the United States. The laws prohibiting excessive force and official misconduct protect members of racial, ethnic, and national minorities to the same extent that they protect every other individual. U.S. law provides various avenues through which victims of police brutality may seek legal remedies such as criminal punishment of the perpetrator or damages in a civil lawsuit. Depending on the location of the conduct, the actor, and other circumstances, any number of the following remedies may be available:

(a) Criminal charges, which can lead to investigation and possible prosecution (under 18 U.S.C. 242, the Department of Justice can prosecute any person who, under color of law, subjects a victim in any state, Territory, Commonwealth, Possession, or District to the deprivation of any rights or privileges secured or protected by the Constitution or laws of the United States);

(b) Civil actions in federal or state court under the federal civil rights statute, 42 U.S.C. 1983, directly against state or local officials for money damages or injunctive relief;

(c) Suits for damages for negligence of federal officials and for negligence and intentional torts of federal law enforcement officers under the Federal Tort Claims Act, 28 U.S.C. 2671 et. seq., or of other state and municipal officials under comparable state statutes;

(d) Suits against federal officials directly for damages under provisions of the U.S. Constitution for "constitutional torts," see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979);

(e) Challenges to official action or inaction through judicial procedures in state courts and under state law, based on statutory or constitutional provisions;

(f) Suits for civil damages from participants in conspiracies to deny civil rights under 42 U.S.C. 1985;

(g) Claims for administrative remedies, including proceedings before civilian complaints review boards, for the review of alleged police misconduct;

(h) Federal civil proceedings under the pattern or practice provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141, to eliminate patterns or practices of misconduct by law enforcement officers of any governmental authority; similarly, the federal government may institute administrative and civil

proceedings against law enforcement agencies receiving federal funds that discriminate on the basis of race, sex, national origin, or religion;

(i) Individual administrative actions and civil suits against law enforcement agencies receiving federal financial assistance that discriminate on the basis of race, sex, national origin, or religion, under the federal civil rights laws, see 42 U.S.C. 2000d (Title VI); 42 U.S.C. 3789d (Safe Streets Act);

(j) In the case of persons in detention or other institutionalized settings, federal proceedings under the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. 1997, to eliminate a pattern or practice that violates the U.S. Constitution or any federal statute.

661. In order to address the incidence of brutality and discriminatory actions, the United States has stepped up its training of law enforcement officers with a view to combating prejudice that may lead to violence. In the aftermath of 9/11, one of the focus areas for such training has been the increased bias against Muslims and persons of Arab descent and people who are perceived to be Arab or Muslim, such as Sikh Americans. The Department of Justice Community Relations Service has established dialogues between government officials and Arab and Muslim communities as well as Sikh communities in the United States and has also created cultural professionalism training videos for law enforcement officers. CRS has worked with Arab, Muslim, and Sikh communities as well as state and local law enforcement, government, and school officials to provide services addressing alleged discrimination against students in schools. The Department of Homeland Security (DHS) – the largest federal law enforcement agency in the United States – has emphasized training for DHS employees, particularly by its Office for Civil Rights and Civil Liberties (CRCL). The Federal Bureau of Investigation (FBI) also expanded cultural sensitivity training to all Special Agents.

662. Since 2005, the Department of Justice (DOJ) has convicted, or obtained pleas from, more than 165 officers and public officials for criminal misconduct related to police brutality and excessive force. Many of these defendants were convicted for abusing minority victims. According to statistics compiled by DOJ's Bureau of Justice Statistics, in 2002 there were 6.6 complaints of police use of force per 100 full-time sworn officers among large state and local law enforcement agencies. Overall, rates were highest among large municipal police departments, with 9.5 complaints per 100 full-time sworn officers, and lowest among state police and state highway patrol agencies, with 1.3 complaints per 100 full-time sworn officers. *See* Bureau of Justice Statistics Special Report, Citizen Complaints about Police Use of Force, June 2006, available at <http://bjs.gov/content/pub/pdf/ccpuf.pdf>.

663. The Fourth Amendment of the U. S. Constitution forbids unreasonable seizures. Under this provision, “deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others,” *Tennessee v. Garner*, 471 U.S. 1 (1985), and all uses of force, whether lethal or non-lethal, must be “objectively reasonable in light of the facts and circumstances confronting” the officer. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The determination of whether use of an Electro-Muscular-Disruption (EMD) device is justifiable under this standard requires balancing the amount of force applied against the need for that force. *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2001). Many factors must be taken into account in making this determination, but one important factor is the vulnerability of the person against whom such force is directed. This sort of analysis has been recently applied to the use of tasers. *See Bryan v. McPherson*, 608 F.3d 614 (10th Cir. 2010). With regard to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the United States notes that those principles are non-binding recommendations. The United States notes, however, that its

laws and policies concerning use of force by law enforcement are generally consistent with the UN Principles.

664. In paragraph 31 of its Concluding Observations, the Committee recommended that the United States should ensure that it meets its obligation under article 7 of the Covenant not to subject anyone without his/her free consent to medical or scientific experimentation. In this regard, the Committee recalls the non-derogable character of this obligation under article 4 in times of public emergency. The Committee states that when there is doubt as to the ability of a person or a category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual.

665. The United States Constitution protects individuals against non-consensual experimentation. For more information see the discussion under Article 7 above. Specific rules concerning consent, including those applicable to prisoners, are set forth in the discussion of Article 7. Since the submission of the Second and Third Period Report, there have been no declarations of emergency in the United States involving derogation from any U.S. obligations under the Covenant.

666. In 2010 Secretary of State Hillary Clinton and Secretary of Health and Human Services Kathleen Sebelius issued a joint statement discussing a recently discovered U.S. government experiment in Guatemala in the 1940s in which individuals were infected with sexually transmitted diseases. The statement said:

“The sexually transmitted disease inoculation study conducted from 1946-1948 in Guatemala was clearly unethical. Although these events occurred more than 64 years ago, we are outraged that such reprehensible research could have occurred under the guise of public health. We deeply regret that it happened, and we apologize to all the individuals who were affected by such abhorrent research practices. The conduct exhibited during the study does not represent the values of the United States, or our commitment to human dignity and great respect for the people of Guatemala.... Today, the regulations that govern U.S.-funded human medical research prohibit these kinds of appalling violations. The United States is unwavering in our commitment to ensure that all human medical studies conducted today meet exacting U.S. and international legal and ethical standards.”

667. President Obama contacted Guatemalan President Colom to express deep regret for the studies and extend an apology to all those infected. President Obama reaffirmed the United States’ unwavering commitment to ensure that all human medical studies meet the highest standards of ethics in medical research and confirmed the importance of the relationship between the United States and Guatemala.

668. By Executive Order 13521, issued November 24, 2009, President Obama established the Presidential Commission for the Study of Bioethical Issues (“the Commission”). *See* 74 Fed. Reg. 62671 (Nov. 30, 2009). The Commission’s goal is to identify and promote policies and practices that ensure that scientific research, health care delivery, and technological innovation are conducted in an ethically responsible manner. In response to the 2010 discovery of the U.S. Public Health Service Sexually Transmitted Diseases Inoculation Study conducted in Guatemala, President Obama wrote to the head of the Commission requesting a review of protections for human subjects to “determine if Federal regulations and international standards adequately guard the health and well-being of participants in scientific studies supported by the Federal Government.” *See* Memorandum from President Barack Obama to Amy Gutmann, Ph.D. (Nov. 24, 2010). President Obama further requested that the Commission conduct an investigation into the specifics of the Guatemala studies. The Commission began its investigation in January 2011. It held a two-day public meeting to address the studies on August 29-30, 2011 in

Washington, D.C. and is expected to report its findings and recommendations by December 2011.

669. A lawsuit arising out of the Guatemala studies conducted by the Public Health Service (in conjunction with other entities) in Guatemala between 1946 and 1948 is currently pending in the U.S. District Court for the District of Columbia. See *Manuel Gudiel Garcia, et al. v. Kathleen Sebelius, et al.*, Civil Action No. 1:11-cv-00527-RBW (D. D.C.). The lawsuit names eight current federal office holders as individual-capacity defendants. None of these current office holders was employed with HHS at the time the Guatemalan studies were conducted.

670. The Committee recommended in paragraph 32 of its Concluding Observations that the United States should scrutinize conditions of detention in prisons, in particular in maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

671. The United States Constitution, along with federal and state laws, establishes standards of care to which all inmates are entitled, which are consistent with the United States obligations under Article 10 and which seek to promote the basic principles underlying the non-binding recommendations with respect to good principles and practices set forth in the UN Standard Minimum Rules for the Treatment of Prisoners. The Federal Bureau of Prisons (BOP) meets its constitutional and statutory mandates by confining inmates in prisons and community-based facilities that are safe, humane, and appropriately secure. For certain violent inmates, maximum security facilities may be necessary, for among other reasons, to protect the safety of the community at large and of other members of the prison population.

672. The United States is taking action to address concerns regarding the conditions in U.S. maximum security prisons. As described under Article 9 in this report, prisons or prison officials who fail to follow applicable rules are subject to prosecution or other enforcement action under applicable laws and regulations. In particular, the Civil Rights Division of the U.S. Department of Justice (DOJ) is charged with reviewing complaints concerning violations of civil rights in prisons and ensuring the vigorous enforcement of applicable federal criminal and civil rights statutes. Where enforcement is warranted, DOJ brings civil actions for equitable and declaratory relief pursuant to the pattern or practice of police misconduct provisions of the Crime Bill of 1994, 42 U.S.C. 14141. DOJ also investigates conditions in state prisons and jails and state juvenile detention facilities pursuant to the Civil Rights of Institutionalized Persons Act, CRIPA, 42 U.S.C. 1997 et seq. Where conditions in those facilities warrant enforcement, DOJ institutes civil law enforcement actions under CRIPA or section 14141. For example, the Department of Justice conducted an investigation of the Cook County, Illinois Jail, which includes three maximum security units. The Department found that the unlawful conditions in these units included risk of harm due to inmate-on-inmate violence, risk of harm to staff due to inadequate security procedures, inadequate suicide prevention, and inadequate sanitation and environmental conditions. In May 2010, the Department secured a comprehensive, cooperative agreement with Cook County to resolve these and other findings of unlawful conditions.

673. In paragraph 33 of its Concluding Observations, the Committee reiterated its recommendation that male officers should not be granted access to women's quarters, or at least be accompanied by women officers. The Committee also recommended that the United States prohibit the shackling of detained women during childbirth.

674. It is not the practice of the Federal Bureau of Prisons (BOP) or of most state corrections departments to restrict corrections officers to work only with inmates of the

same sex. The BOP's position on cross-gender supervision is that the qualifications of the correctional worker, not the sex of the worker, determine the assignment of work. However, same sex supervision is required for visual inspection of body surfaces and body cavities (except where circumstances are such that delay would mean the likely loss of contraband), digital searches, and urine surveillance. Because requiring female officers always to be present during male officers' access to women's quarters would be extremely burdensome on limited prison resources, appropriate measures are taken to protect female prisoners. The privacy interests of female inmates are accommodated when it does not significantly affect either security or employment rights by taking measures such as staffing each work shift with at least one male and one female on duty at institutions where there are both male and female inmate populations. BOP staff members are trained to respect inmates' 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. Upon hiring, BOP staff members are trained on the Standards of Employee Conduct and the Prevention and Intervention of Sexual Abuse of Inmates. Refresher training is mandatory on an annual basis. All staff members assigned to work at female institutions are also required to complete the training course, *Managing Female Offenders*. Upon arrival at the institution, all federal inmates are also trained on BOP's zero-tolerance policy on sexual abuse and the complaint procedures.

675. As noted in this report, considerable attention is being given to the issue of sexual abuse in confinement. The 2003 Prison Rape Elimination Act (PREA) established a national clearinghouse for information on this issue, provided for improved training of corrections staff on sexual abuse in confinement and how to prevent it, created the National Prison Rape Elimination Commission to develop recommended standards for correctional facilities nationwide, and instructed the Attorney General to review the Commission's proposals and promulgate regulations accordingly. After the Commission issued its final report, the Department of Justice reviewed the recommended standards and issued a Proposed Rule seeking public comment on the Department's proposed regulations. The Department is now reviewing the comments and making revisions as warranted for the publication of the Final Rule, which will include the final regulations. PREA training is mandatory within the BOP's annual training curriculum for all staff, new supervisors and special investigative lieutenants.

676. With regard to shackling of pregnant women (which is described in the discussion under Article 3 in this report), this is an issue that has been raised by some members of civil society as an issue of particular concern. A 2008 BJS study found that 4% of state and 3% of female federal inmates reported they were pregnant when they were admitted. (Source: Bureau of Justice Statistics, *Medical Problems of Prisoners*, <http://www.bjs.gov/content/pub/pdf/mpp.pdf>). In 2008, BOP revised its policy for shackling pregnant inmates for federal institutions. The new policy, put in place in October of 2008, bars such activity, except in the most extreme circumstances. *See* Program Statement 5538.05, *Escorted Trips*, Section 9, page 10, [http://www.bop.gov/policy/progstat/5538\\_005.pdf](http://www.bop.gov/policy/progstat/5538_005.pdf). Some states also restrict the shackling of pregnant female prisoners, including California, Colorado, Illinois, New Mexico, New York, Pennsylvania, Texas, Vermont, Washington, and West Virginia. The U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) has also adopted policies substantially limiting the use of restraints on pregnant women.

677. In paragraph 34 of its Concluding Observations, the Committee recommended that the United States should ensure that no child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.



678. This is an issue that has been raised by civil society in the United States as an issue of particular concern. Under a May 17, 2010, Supreme Court decision, persons under the age of 18 at the time of the crime may not be sentenced to life in prison without the possibility of parole in the United States unless they have been convicted of homicide offenses. The Court held that sentencing juveniles to life without parole for a non-homicide offense violates the bar on cruel and unusual punishment in the Eighth and Fourteenth Amendments. *Graham v. Florida*, 130 S.Ct. 2011 (2010). In this case, Graham had been sentenced to life without the possibility of parole for participating in a home invasion robbery when he was 17 and on probation for armed burglary and another crime.

679. Under U.S. law, the imposition of the sentence of life in prison without parole is accompanied by important safeguards. Following the Supreme Court's decision in *Graham*, a person under the age of 18 at the time of the crime who has been sentenced to life in prison without parole will have been tried and convicted, pursuant to law and procedures ensuring due process of law, of a homicide offense, and determined through formally constituted judicial proceedings to be an extreme danger to society. Whether a juvenile offender is prosecuted as an adult depends on a number of factors that are weighed by a court, such as, inter alia, the age or background of the juvenile, the type and seriousness of the alleged offense, the juvenile's role in committing the crime, and the juvenile's prior record/past treatment records. Courts look at these factors to determine whether the juvenile is amenable to the treatment and rehabilitative nature of juvenile justice systems. Sentencing patterns at the state level vary, but generally once a juvenile who has been tried as an adult has been found guilty of a serious crime punishable by life in prison without parole, a sentencing court may impose a term of imprisonment similar to other adult defendants. Juvenile offenders are separated from adult prisoners to the extent possible, taking into account factors such as the security risk that they pose to other prisoners, the risk of harm to themselves, their need for medical and/or mental health treatment options, and the danger they pose to others and to the community. For additional information on this issue, see the discussion under Article 9, Liberty and security of person.

680. In paragraph 35 of its Concluding Observations, the Committee recommended that the United States should adopt appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole. The Committee also recommended that the United States review regulations relating to deprivation of votes for felony conviction to ensure that they always meet the reasonableness test of article 25. The Committee further recommended that the United States assess the extent to which such regulations disproportionately impact on the rights of minority groups and provide the Committee detailed information in this regard.

681. Recent developments concerning felony disenfranchisement are reported in the discussion under article 25 of this report.

682. In paragraph 36 of its Concluding Observations, the Committee recommended that the United States should ensure the right of residents of the District of Columbia to take part in the conduct of public affairs, directly or through freely chosen representatives, in particular with regard to the House of Representatives.

683. This issue is the subject of debate in the United States, and legislation addressing the issue is pending in the United States Congress. It is discussed in more detail in this report under Article 25, Access to the Political System.

684. In paragraph 37 of its Concluding Observations, the Committee recommended that the United States should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress, and grant them the same degree of judicial protection that is available to the non-indigenous population. The Committee further recommended that the United States should take steps to

secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.

685. In the past, some indigenous and civil society representatives have expressed concern about the U.S. position on the U.N. Declaration of the Rights of Indigenous Peoples. During President Obama's first year in office, tribal leaders encouraged the United States to reexamine its position on this Declaration. In April 2010 the United States Ambassador to the United Nations announced that the United States had decided to review its position regarding that Declaration, noting that for many around the world, this Declaration provides a framework for addressing indigenous issues. After a formal interagency review, which included substantial consultations with tribal leaders and outreach to other stakeholders, President Obama announced on December 16, 2010, U.S. support for the Declaration. He also noted the release of a more detailed statement about U.S. support for the Declaration and the Administration's ongoing work in Indian Country (available at <http://www.state.gov/documents/organization/153223.pdf>).

686. During its first hundred years of existence, the United States dealt with Indian tribes concerning land occupancy and property rights through federal treaties and legislation. Although treaty making between the federal government and the Indian tribes ended in 1871, many treaties retain their full force and effect today and have the force of federal law. Further, unlike treaties with foreign governments, treaties with Indian tribes are subject to special canons of construction that tend to favor Indian interests. Notably, Indian treaties are interpreted, to the extent that such original intention is relevant, as they would have been understood by the Indians at the time of their signing, as opposed to by the federal authors of the treaties; and where the treaty is ambiguous as to its interpretation, courts will interpret it to favor the Indians specifically because it was not written by them or in their language. *Tulee v. Washington*, 315 U.S. 681 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930). Importantly, in the United States, indigenous individuals are United States citizens who live freely within the borders of the United States. Indigenous individuals have recourse to domestic institutions for the resolution of disputes, including domestic judicial and political processes. Indian tribes can also bring claims to protect tribal property rights as against third parties and, in certain circumstances, against the United States.

687. Historically, the U.S. recognized Indian tribes as holding their land in "aboriginal title," which consisted of a right of use and occupancy. Over time, Congress and the Executive Branch have acted to recognize tribal property rights through treaties, statutes, and executive orders. Today, the more than 560 federally recognized tribes hold virtually all their land in fee simple or in trust (with the United States as trustee holding legal title and the tribe exercising all rights to occupation or use). In either case, such tribal holdings of land are fully protected by law.

688. Once Congress has acted to recognize Indian property rights, such as through treaty or statute, any impairment of such rights may be compensable under the Fifth Amendment of the U.S. Constitution. Although the Supreme Court long ago held that Congress had authority to alter treaty obligations of the United States, including with Indian tribes, see *Chinese Exclusion Case*, 130 U.S. 581 (1889) (international treaties); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (Indian treaties), alterations that affect property rights may give rise to a Fifth Amendment claim for compensation. *United States v. Sioux Nation*, 448 U.S. 571 (1980). It should also be noted that, even where the occupancy right based on aboriginal title has been found to be not compensable, compensation in fact has often been paid by the United States for many Indian land cessions. One particularly notable measure of this type is the Alaska Native Claims Settlement Act of 1971, which provided a comprehensive mechanism for resolving the claims of Alaska Natives based on aboriginal title. Congress continues the practice of enacting legislation to compensate Indians and

Indian tribes for past wrongs or inequities to the present. *See, e.g.*, Cheyenne River Sioux Equitable Compensation Act, P. L. 106-511, 114 Stat. 2365 (2000) (providing additional compensation for tribe for taking of lands for flood control purposes in the 1950s). Indian tribes can also purchase land in fee for consolidation with other lands.

689. In 1946, Congress adopted the Indian Claims Commission Act, which provided for a quasi-judicial body, the Indian Claims Commission (ICC), to consider unresolved Indian claims that had accrued against the United States, a large portion of which involved historical (pre-1946) claims for compensation for taken lands. The act authorized claims to be brought on behalf of “any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska” (which was not yet a state) with respect to “claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant. . . .” Moreover, in addition to claims sounding in law or equity, the Act permitted claims asserting lack of “fair and honorable dealings” by the United States, even if such claims were “not recognized by any existing rule of law or equity.” Under the Act, recovery of compensation did not depend on proof of recognized title; compensation was available even if a tribe’s property interest was aboriginal only. The ICC represented the exclusive remedy for tribes in suits against the United States, which ordinarily would have been barred by statutes of limitations and sovereign immunity laws. The ICC also recognized lower burdens of proof on claimants, more favorable rules of evidence, and broad, equitable bases of relief in order to help American Indians and Alaska Natives establish their historic claims, including claims involving loss of aboriginal lands or other rights. Thus, the ICC provided to Indian claimants more favorable claimant procedures than would have been available to other claimants under regular court rules. The remedy provided for by the ICC was monetary damages. In certain other circumstances, the Congress specially authorizes tribes to bring claims against the United States that might otherwise be barred by legal impediments, such as the expiration of limitations periods. In still other cases, including ones for which compensation might not be available in court, Congress has enacted legislation to compensate tribes for past wrongs or claims.

690. In the context of employment, Indian tribes and their members enjoy special privileges not available to others. Consistent with Title VII, Indian tribes and tribally-owned businesses may prefer indigenous people in hiring. Other businesses operating on or near Indian reservations may also give preferential treatment in hiring to Indians living on or near a reservation. Finally, the Indian Preference Act of 1934 requires the federal government to prefer Indians in hiring for vacancies that concern “the administration of functions or services affecting any Indian Tribe.” 25 U.S.C. 472 (a).

691. With regard to the issue of participation and influence in decision-making, the United States provides for consultation with Indian tribes in numerous areas. Several executive orders direct federal agencies to consult with tribes regarding certain federal actions that are likely to have a direct effect on tribes. For example, Executive Order 13175 requires federal agencies to have a process for meaningful input from tribes in the development of certain policies that have tribal implications. On November 5, 2009, during the first White House Tribal Nations Conference, President Obama issued a memorandum to all federal agency heads directing them to prepare detailed plans of actions that the agencies will take to implement the policies and directives of Executive Order 13175. Other examples include executive orders requiring consultation on protecting Indian sacred sites and on tribal colleges and universities. Additionally, there are numerous federal statutes that require consultation with tribal governments and Native Hawaiian organizations, such as the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and the American Indian Religious Freedom Act.

692. Moreover, legislation entitled the Native Hawaiian Government Reorganization Act has been introduced in both houses of the U.S. Congress. This legislation is designed to provide a process for the formation and recognition of a Native Hawaiian governing entity that would have a government-to-government relationship with the United States.

693. Under United States law, the U.S. Government recognizes Indian tribes as political entities with inherent powers of self-government. The federal government therefore has a government-to-government relationship with Indian tribes. In this domestic context, this means promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means of financing these autonomous functions.

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