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Civil and Political Rights**

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**Consideration of reports submitted by States parties
under article 40 of the Covenant**

**List of issues in relation to the fourth periodic report of the
United States of America (CCPR/C/USA/4 and Corr.1),
adopted by the Committee at its 107th session
(11–28 March 2013)**

Addendum

Replies of the United States of America to the list of issues*

[5 July 2013]

* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document has not been formally edited.

I. Introduction

1. It is with great pleasure that the Government of the United States of America presents this information in response to the questions from the Human Rights Committee. The United States is pleased to participate in this process and has, in the spirit of cooperation, provided as much information as possible in response to the questions posed by the Committee, taking into consideration the page limit, even where the questions or information provided in response to them do not bear directly on obligations arising under the International Covenant on Civil and Political Rights (ICCPR). The United States further welcomes the opportunity to appear in person before the Committee in October 2013.

II. Replies to the issues raised in the list of issues (CCPR/C/USA/Q/4)

Reply to the issues raised in paragraph 1 of the list of issues

2. *Issue 1(a)*. With respect to the scope of applicability of the ICCPR, the United States refers the Committee to ¶¶ 504 – 510 of its Fourth Periodic Report (CCPR/C/USA/4 and Corr. 1, hereinafter “2011 Report”).

3. *Issue 1(b)*. With respect to measures being taken to ensure that the ICCPR is fully implemented by state and local authorities, we refer the Committee to ¶¶ 31, 32, 215 and 216 of the U.S. Periodic Report filed with the Committee on Elimination of Racial Discrimination on June 13, 2013 (hereinafter “2013 CERD Report”) and ¶¶ 120, 129 and Annex A of the Common Core Document (CCD, contained in document HRI/CORE/USA/2011).

4. *Issue 1(c)*. The United States is committed to domestic implementation of U.S. human rights obligations, including mainstreaming human rights into domestic policy and engaging in robust dialogue with U.S. civil society partners on U.S. human rights implementation. On December 18, 1998, President Clinton issued Executive Order 13107 regarding the implementation of human rights treaties. Consistent with this order, the White House leads a policy process that assists in the coordination of action by U.S. government agencies on the domestic implementation of U.S. human rights obligations and commitments, including with regard to U.S. periodic reporting to United Nations (UN) treaty bodies and the Universal Periodic Review process. Numerous other procedures exist to support coordination of human rights matters among relevant U.S. agencies. The United States continues to evaluate possible measures to enhance coordination within the U.S. government on U.S. implementation of human rights obligations.

Reply to the issues raised in paragraph 2 of the list of issues

5. With regard to the issue of a national human rights institution, we refer the Committee to ¶ 129 of the CCD and ¶ 31 of the 2013 CERD Report.

Reply to the issues raised in paragraph 3 of the list of issues

6. At the time it became a Party to the ICCPR, the United States carefully evaluated the treaty to ensure that it could fully implement all of the obligations it would assume. The reservations taken by the United States to a few provisions of the ICCPR were crafted in

close collaboration with the U.S. Senate to ensure that the United States could fulfill its international obligations under the ICCPR. We have no current plans to review or withdraw these reservations.

Reply to the issues raised in paragraph 4 of the list of issues

7. There is continuing concern regarding unwarranted racial disparities in some aspects of the justice system; the United States is committed to addressing these disparities. Several recent steps have been taken with regard to the criminal justice system. The Fair Sentencing Act of 2010 reduced the disparity between more lenient sentences for powder cocaine charges and more severe sentences for crack cocaine charges, which are more frequently brought against members of minority groups. We refer the Committee to ¶ 66 of the 2013 CERD Report for a discussion of the effects of this Act and its retroactive application. The Department of Justice (DOJ) intends to conduct further statistical analysis and issue annual reports on sentencing disparities in the criminal justice system, and is working on other ways to increase system-wide monitoring. DOJ has pledged to work with the United States Sentencing Commission (USSC) on reform of mandatory minimum sentencing statutes and to implement the recommendations set forth in the USSC's 2011 report to Congress.

8. A recent USSC study indicates that sentence length is associated with some demographic factors such as race, but that additional analyses of all contributing factors are needed to determine whether demographic factors actually affect the length of sentences, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_E.pdf#page=1.

9. 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, authorize the Attorney General (AG) to bring civil actions to eliminate patterns or practices of law enforcement misconduct, including racial discrimination. DOJ's Civil Rights Division (DOJ/CRT) investigates police departments, prisons, jails, juvenile correctional facilities, mental health facilities, and related institutions to ensure compliance with the law and brings lawsuits to enforce the laws, where necessary. DOJ/CRT's recent investigation of the New Orleans Police Department (NOPD), for instance, found a pattern or practice of unconstitutional conduct or violations of federal law in numerous areas; in 2012, DOJ/CRT reached one of the most comprehensive reform agreements in its history with the NOPD, <http://www.justice.gov/crt/about/spl/nopd.php>. Between 2009 and 2012, DOJ/CRT opened 15 investigations of police departments and currently is pursuing more than two dozen investigations. DOJ/CRT strongly prefers to work in a cooperative fashion with local governments and police departments to address unconstitutional policing, but does not hesitate to use litigation when cooperation proves elusive, see, e.g., <http://www.justice.gov/crt/publications/accomplishments/> at pp. 61-65. DOJ/CRT's work under 42 U.S.C. 14141 and Title VI also seeks to ensure equal access to the judicial system for Limited English Proficient (LEP) persons, inter alia through its Courts Language Access Initiative. Please see ¶¶ 66 – 68 of the 2013 CERD Report.

10. The latest DOJ three-year report on the nature and characteristics of contacts between U.S. residents and the police is *Contacts between Police and the Public, 2008* (October 5, 2011), <http://www.bjs.gov/content/pub/pdf/cpp08.pdf>. DOJ's Bureau of Justice Statistics (BJS) has not conducted a specific study on the disparities between population groups.

Reply to the issues raised in paragraph 5 of the list of issues

11. Profiling in law enforcement operations is premised on the erroneous assumption that any particular individual possessing one or more irrelevant personal characteristics is

more likely to engage in misconduct than another individual who does not possess those characteristics. Profiling is generally an ineffective law enforcement technique and has a negative impact on the communities affected. Although the June 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, by its terms, addresses only the use of race or ethnicity, the Department of Justice has created a working group to undertake a comprehensive review of that Guidance, which is ongoing. In addition, we note that new agents with the Federal Bureau of Investigation (FBI) are trained in how to properly conduct investigations and interviews in accordance with the laws, regulations, and Constitution of the U.S. – which prohibit invidious racial, ethnic, and religious profiling. Numerous U.S. government departments and agencies work to combat racial profiling against Arabs, Muslims, and South Asians. The Department of Homeland Security (DHS) Office for Civil Rights and Civil Liberties (CRCL) has trained over 4,000 state and local law enforcement and other personnel on cultural awareness and best practices in community engagement through more than 75 training events. CRCL training covers religious and cultural practices of Sikh, Arab, and Muslim cultures, and effective policing without the use of ethnic or racial profiling. CRCL has also produced a training video, <http://www.dhs.gov/civil-rights-and-civil-liberties-institute>.

12. Further, through its Incident Community Coordination Team (ICCT), CRCL facilitates rapid communication between federal, state, and local authorities and communities that may have distinct civil rights and liberties concerns in the aftermath of any homeland security incident. Arab, Muslim, South Asian, Sikh, and Somali American community leaders have been frequent participants.

13. Within DHS, law enforcement agencies such as U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) are subject to strict rules and to investigations, where warranted, regarding incidents of assaults, harassment, threats, or profiling involving employees. CBP and Border Patrol Agents receive regular training in this area. DHS has also created trainings designed primarily for use by front-line state and local law enforcement agency personnel that directly address the risk of biased policing and how law enforcement officers and agencies can avoid illegal targeting of individuals based on race or ethnicity, http://www.ice.gov/secure_communities/crcl.htm.

14. With regard to the number of complaints, between October 2011 and May 2013, CRCL opened 42 complaints involving allegations of discrimination based on race, ethnicity, and/or national origin. Two complaints have been investigated and closed with recommendations for the DHS component agency or office involved and the other 40 complaints either remain pending or have been closed without recommendations. Please see ¶¶ 82 – 85 of the 2013 CERD Report for further discussion of racial profiling.

15. Through its Initiative to Combat Post 9-11 Discriminatory Backlash, DOJ/CRT has investigated over 800 incidents involving targeting of persons perceived to be Muslims or of Arab or South East Asian descent. Efforts to combat racial/ethnic profiling include increased enforcement of federal anti-profiling statutes and review of federal law enforcement policies and practices.

16. DOJ has been reviewing complaints from New York City community members regarding NYPD's stop-and-frisk program and has been closely monitoring *Floyd v. City of New York*, a case brought by private plaintiffs in the U.S. District Court for the Southern District of New York that challenges NYPD's stop-and-frisk practices on the grounds that they violate the Constitution and other laws. On June 12, 2013, DOJ filed a Statement of Interest in *Floyd* on the subject of fashioning an appropriate remedy so that, if the court does determine that NYPD's conduct is unlawful, that conduct can be effectively and sustainably corrected. As the Statement of Interest makes clear, DOJ takes no position as to whether NYPD's stop-and-frisk practices violate the law. Drawing on DOJ's extensive experience in facilitating wide-scale police reform, the Statement of Interest, among other

things, sets forth the important function that an independent monitor can serve in cases involving systemic police misconduct.

Reply to the issues raised in paragraph 6 of the list of issues

17. The 2009 Helping Families Save Their Homes Act (the 2009 Act) amended various federal laws and programs to help homeowners avoid foreclosure and otherwise assist borrowers retain their homes. The Act also reauthorized the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act, which called for the U.S. Interagency Council on Homelessness (USICH) to “develop alternatives to laws and policies that prohibit sleeping, eating, sitting, resting, or lying in public spaces when there are no suitable alternatives, result in the destruction of property belonging to people experiencing homelessness without due process, or are selectively enforced against people experiencing homelessness.” While criminalization of homelessness is driven by local measures and decisions, USICH and federal agencies provide leadership, technical assistance, and incentives urging communities to adopt alternatives.

18. “Opening Doors,” the first federal strategic plan to prevent and end homelessness, urges cities to adopt constructive approaches to reduce criminalization of homelessness. In December 2010, USICH and DOJ’s Access to Justice Initiative (DOJ/ATJ), with support from the Department of Housing and Urban Development (HUD), held a summit with local officials, law enforcement, business representatives, and advocates from around the country that resulted in recommendations for alternatives to criminalization that are detailed in a report released in April 2012, http://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf. The report suggests that a combination of solutions involving coordination among communities and institutions and a variety of social, health, law enforcement, and justice providers, can help to achieve reductions in street homelessness, <https://www.onecpd.info/resource/1966/2011-ahar-to-congress-and-supplemental-reports/>.

19. DOJ/ATJ has also produced a guide to generate greater awareness of DOJ resources available to homeless people and those at risk of homelessness who are involved in the criminal justice system, <http://www.justice.gov/atj/doj-resource-guide.pdf>.

Reply to the issues raised in paragraph 7 of the list of issues

20. The U.S. Department of Health and Human Services (HHS) provides technical assistance and investigates complaints to ensure that healthcare and human service providers that receive financial assistance from HHS comply with Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color or national origin. In 2000, HHS and the U.S. Department of Agriculture (USDA) issued policy guidance to reduce and eliminate barriers that discourage enrollment in Medicaid, the Children’s Health Insurance Program, and other assistance programs. The guidance makes clear that Medicaid coverage of emergency services is available to undocumented immigrants, <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/origin/policyguidanceregardinginquiriesintocitizenshipimmigrationstatus.html>. In 2013 HHS released its Language Access Plan, promoting meaningful access by limited English proficiency individuals to HHS programs, including Medicare and programs established under Title I of the Affordable Care Act (ACA).

21. Under the Emergency Medical Treatment and Labor Act (EMTALA), any person who seeks emergency medical care at a participating hospital is generally guaranteed an appropriate medical screening exam and stabilizing treatment or an appropriate transfer to a medical facility that can provide such treatment, regardless of his or her ability to pay or immigration status.

22. With regard to education, federal law does not prohibit undocumented students from attending institutions of higher education in the U.S. In most states, undocumented students are allowed to enroll in public institutions and are charged out-of-state tuition, although a few states do not permit enrollment by undocumented students at publicly funded institutions. More than a dozen states have laws that allow undocumented students to pay in-state tuition provided, for example, that the student attended high school in that state, among other requirements. A few states also offer state financial aid to undocumented students.

23. The Administration's "Deferred Action for Childhood Arrivals" (DACA) policy, announced in June 2012, has also already provided temporary administrative relief from deportation, as well as work authorization, to over 365,000 immigrants.

Reply to the issues raised in paragraph 8 of the list of issues

24. *Issue 8(a)*. In 2011, 13 states executed 43 inmates (through December 19, 2011), while in 2012, 9 states executed 43 inmates. As of June 19, 2013, 6 states had executed 16 inmates. With regard to the number of inmates under sentence of death, statistics are currently available through yearend 2010 at <http://www.bjs.gov/index.cfm?ty=tp&tid=18>. Corresponding statistics updated to yearend 2011 are now being completed and will be available at the same site.¹

25. All inmates were convicted of murder with statutorily-defined circumstances that made those crimes eligible for a death sentence. BJS does not collect information at a level of detail that would allow identification of the specific types of murder or the aggravating circumstances that made the murders eligible for the death penalty. For the most recent federally-compiled summary of capital offenses by state, see Table 1 of Capital Punishment 2010 – Statistical Tables, <http://bjs.gov/content/pub/pdf/cp10st.pdf>. In general, all offenders under sentence of death were 18 or older at the time their crimes were committed because the U.S. Supreme Court has ruled that execution of persons under age 18 at the time of their crimes is unconstitutional, *Roper v. Simmons*, 543 U.S. 551 (2005). With regard to ethnic origin, 55% of inmates under sentence of death at yearend 2010 were White and 42% were Black/African American – a distribution that is expected to be similar for 2011.

26. *Issue 8(b)*. The *Atkins v. Virginia* decision held that the application of the death penalty to persons with "mental retardation" (a type of intellectual disability) is unconstitutional, so no one found to be mentally retarded has been executed since that time. 536 U.S. 304 (2002).

27. *Issue 8(c)*. All capital defendants who have exhausted their state court appeals have the right to federal review of their convictions by filing the necessary form within one year of completing the state appellate process. Federal law (18 U.S.C. 3599) provides for the appointment of counsel and the furnishing of other services (e.g. investigators and experts) to aid capital defendants with federal appeals.

28. *Issue 8(d)*. Capital defendants enjoy the full range of constitutional rights afforded to all criminal defendants, plus heightened procedural protections in some areas. Please see ¶

¹ The Department of Justice year end statistics generally include the number of prisoners held by states and the Federal Bureau of Prisons, the number received under sentence of death, and the number removed from such sentence, as well as the sex, race, and Hispanic origin for each of these categories, and certain other characteristics. DOJ does not collect statistics on age at the time of offense. Other statistics may be available through the websites of the individual states. In addition, statistics are also available from non-governmental organizations, such as the Death Penalty Information Center, www.deathpenaltyinfo.org.

102 of the CCD for a description of these protections, which ensure that capital defendants receive full, fair opportunity to litigate, at trial and on appeal, issues relating to their guilt or innocence. On the federal level, capital defendants are guaranteed at least two attorneys, at least one of whom shall be “learned in the law applicable to cases, and who shall have free access to the accused at all reasonable hours.” 18 U.S.C. 3005. Additionally, federal capital defendants receive advanced notice of the witnesses against them. 18 U.S.C. 3432. Federal capital defendants also have a conditional right to post-conviction DNA testing. 18 U.S.C. 3600. Further, the federal government contracts through the Office of the Federal Public Defender with the Federal Death Penalty Resource Counsel and the Habeas Assistance and Training Counsel. The Resource Counsel monitors federal death penalty cases, helps judges recruit counsel for federal capital cases, and consults with individual assigned counsel – providing resource materials, and training on capital case defense techniques. The Habeas Assistance Counsel provides consultation and litigation support services to Federal Defenders, courts, and private defense counsel appointed in capital federal *habeas corpus* proceedings. Nationwide, both federal and state capital defendants have a right to federally-funded counsel for actions under 28 U.S.C. 2254 and 2255. See 18 U.S.C. 3599.

29. *Issue 8(e)*. In March 2010, DOJ established the Access to Justice Initiative (DOJ/ATJ) to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. In 2012, DOJ’s Office of Justice Programs awarded nearly \$3 million in grants for this purpose and has committed to approximately \$2 million additional in 2013. This includes a grant of nearly \$350,000 to the Harris County Public Defender’s Office in Texas to establish and implement a training, mentoring, and supervision program for new private lawyers to work on capital cases based on national principles, state guidelines, and best practices.

30. DOJ’s Bureau of Justice Assistance (BJA) administers the Capital Case Litigation Initiative, which provides high-quality training and technical assistance to prosecutors and defense counsel on death penalty issues to increase the number of well-trained capital litigation attorneys and ensure that counsel have the most up-to-date and comprehensive information available.

Reply to the issues raised in paragraph 9 of the list of issues

31. *Issue 9(a)*. According to the BJS Firearm Violence 1993–2011 report, <http://bjs.gov/content/pub/pdf/fv9311.pdf>, in 2011, an estimated 478,400 fatal and nonfatal violent crimes were committed with a firearm. With respect to gun violence in the context of domestic violence, of some 4.7 million nonfatal violent victimizations committed by intimate partners in the 5-year period from 2007 to 2011, offenders used firearms in about 4% of these victimizations. Across the 28-year period, the percentage of homicides committed by intimate partners that involved guns declined from 69% of all intimate homicides in 1980 to 51% in 2008.

32. With regard to self-defensive gun use, more than half the U.S. states have a form of stand your ground law. In some states, the law provides civil and criminal immunity for a person who uses force as defined and permitted by the law. According to the report mentioned in ¶ 33, victims used firearms to threaten or attack an offender in 235,700 (1%) of violent criminal victimization situations from 2007 through 2011, and in 2% of nonfatal violent victimizations from 1993 to 2011.

33. *Issue 9(b)*. Certain data available from the FBI Uniform Crime Reporting Program on the number of victims of gun violence and the use of firearms by police can be obtained

from the latest edition of Crime in the United States (CIUS). The 2011 statistics indicate that there were 393 justifiable homicides (the killing of a felon by a law enforcement officer) in the United States, down from 397 in 2010 and 414 in 2009.²

Reply to the issues raised in paragraph 10 of the list of issues

34. *Issue 10(a)*. The United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, and may also use force consistent with our inherent right of national self-defense. The United States has acknowledged that it has conducted targeted strikes with remotely piloted aircraft against specific targets outside areas of active hostilities. These strikes are conducted in a manner that is consistent with all applicable domestic and international law. Please see 2011 Report, ¶¶ 506-509.

35. Presidential Policy Guidance sets out standards for the use of lethal force outside areas of active hostilities. These standards are either already in place or will be transitioned into place over time. Under these policy standards, lethal force is used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In addition, under these standards lethal force is to be used outside areas of active hostilities only against a target that poses a continuing, imminent threat to U.S. persons. If a terrorist does not pose such a threat, the United States will not use lethal force. Importantly, these policy standards include several criteria that must be met before lethal action may be taken, including near certainty that non-combatants will not be injured or killed. This is confirmed by the content of the policy standards and procedures, key elements of which are laid out in a document recently released by the Administration, <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

36. U.S. military forces go to extraordinary lengths to avoid civilian casualties. Although the United States has used targeted air strikes with as much discrimination and care as possible, there have been instances where civilian casualties have occurred. The U.S. government takes seriously all credible reports of civilian deaths and investigates such claims to make a determination about civilian casualties.

37. As explained most recently in President Obama's May 23, 2013 address at the National Defense University, the U.S. military takes scrupulous care to ensure that uses of force – and, in this context, targeted strikes – conform to the principles of the law of war, including, importantly, the principles of proportionality and distinction, <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

38. U.S. service members receive training in the principles and rules of the law of war, including the principles of proportionality and distinction, commensurate with each individual's duties and responsibilities, throughout their service in the military. Additionally, the U.S. military makes qualified legal advisers available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations.

39. *Issue 10(b)*. The United States has several judicial means by which to hold its nationals accountable for violations of the law of war, including (1) courts-martial for offenses defined by the Uniform Code of Military Justice (UCMJ), and (2) federal courts

² See <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-14>.

for offenses under other federal law, including the War Crimes Act of 1996. Under the UCMJ, general courts-martial have jurisdiction to try persons subject to the UCMJ for a wide variety of offenses. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. Federal courts have jurisdiction to try certain persons for offenses in federal law, including those who, whether inside or outside the United States, commit a war crime, if the person committing such war crime or the victim of such war crime is a U.S. service member or a national of the United States.

40. The United States has investigated U.S. military personnel and civilian personnel, including contractors, for suspected unlawful killings committed in operations conducted outside the United States. Most of the investigations and prosecutions, including administrative and criminal inquiries and proceedings, have been carried out by DoD, DOJ, and other U.S. government components that have jurisdiction over such actions. Some of these investigations resulted in prosecutions (some resulting in conviction and others not), and some investigations were closed without initiation of prosecutions. An example of a case brought by DOJ is that of former Army soldier Steven D. Green, who was convicted on May 7, 2009 of charges brought under the Military Extraterritorial Jurisdiction Act (2000), 18 U.S.C. 3261-3267, arising out of the rape of a 14-year-old Iraqi girl and the murder of the girl and members of her family in an incident that took place in 2006. He was subsequently sentenced to life imprisonment, <http://www.justice.gov/opa/pr/2009/September/09-crm-932.html>. Green's co-conspirators in the rape and murders were convicted in courts-martial proceedings brought by U.S. military authorities under the UCMJ and were sentenced to lengthy terms of imprisonment.

41. DOJ also prosecuted U.S. government contractors, including Don Ayala for a death in Afghanistan and five other contractors in relation to the deaths of 14 and injuries of 20 civilians in Nisur Square in Baghdad, Iraq. Please see ¶¶ 534 and 544 of the 2011 Report. A sixth defendant pleaded guilty. In 2012, the Fourth U.S. Circuit Court of Appeals upheld the convictions of Christopher Drotleff and Justin Cannon, contractors in Afghanistan who were convicted in 2011 of involuntary manslaughter.

42. The concept of command responsibility is implemented within the U.S. military through training and military doctrine. Additionally, the UCMJ, 10 U.S.C. Chapter 47, and other disciplinary mechanisms with the U.S. military, as well as the Military Commissions Act of 2009, P. L. 111-84, implement the concept of command responsibility. Although the concept is well-known and established under international law and is widely used by international tribunals, not all of U.S. federal criminal law specifically incorporates the concept of command responsibility. For example, the doctrine of command responsibility has not been employed by DOJ in its prosecutions. However, under U.S. federal criminal law, the conspiracy and aiding and abetting statutes may be utilized in appropriate cases to reach senior-level offenders.

43. Robust review procedures are in place to ensure appropriate training of U.S. forces in the law of armed conflict and appropriate rules of engagement and tactics, techniques, and procedures. If DoD has reason to believe that a crime has occurred that resulted in unlawful killings, a full investigation is initiated. If the investigation reveals allegations of criminal activity, action is taken as appropriate to hold accountable those determined to be responsible, including those deemed culpable as a function of command responsibility.

Reply to the issues raised in paragraph 11 of the list of issues

44. *Issue 11(a)*. Under U.S. law, every U.S. official is prohibited from engaging in torture or in cruel, inhuman or degrading treatment or punishment, at all times, and in all places. The U.S. Armed Forces conduct prompt and independent investigations into all

credible allegations concerning mistreatment of detainees. Detention facilities are inspected on a regular basis to ensure compliance with DoD regulations and to determine if improvements in operations are necessary. In addition, the U.S. Armed Forces have several independent criminal investigative agencies, whose function is to investigate allegations of criminal behavior.

45. Regarding allegations of mistreatment of detainees in U.S. military custody outside its territory, that violates the law of war, it is DoD policy that all reportable incidents allegedly committed by any DoD personnel or DoD contractor personnel will be promptly reported in accordance with specific guidelines; promptly and thoroughly investigated by proper authorities; and remedied by disciplinary or administrative action, when appropriate. On-scene commanders and supervisors are instructed to ensure that measures are taken to preserve evidence pertaining to any reportable incident. See DoD Directive 2311.01E (DoD Law of War Program).

46. As noted in response to Issue 10, above, the U.S. government has undertaken numerous enforcement actions relating to alleged mistreatment of detainees. DOJ has investigated, charged, and prosecuted in federal civilian courts a number of cases involving alleged detainee abuse. For example, in 2004, DOJ brought criminal charges against David A. Passaro, a Central Intelligence Agency (CIA) contractor accused of brutally assaulting a detainee in Afghanistan in 2003. Please see ¶¶ 533-534 of the 2011 Report (concerning Passaro and the Ayala prosecution referenced in Issue 10 above).

47. In August 2009, the AG announced that he had ordered “a preliminary review into whether federal laws were violated in connection with interrogation of specific detainees at overseas locations,” www.justice.gov/ag/speeches/2009/ag-speech-0908241.html. On June 30, 2011, following a two-year investigation, DOJ 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, www.justice.gov/opa/pr/2011/June/11-ag-861.html. These investigations, which were in addition to the DOJ prosecution efforts referenced below, were closed in 2012 after DOJ determined that the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt, <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>.

48. The CIA has also undertaken internal reviews relating to detainee treatment, the results of which are generally nonpublic. Where those reviews indicated potential violations of U.S. criminal laws, the CIA has referred those matters to DOJ. The U.S. Congress also has conducted extensive investigations into the treatment of detainees, <http://www.levin.senate.gov/imo/media/doc/supporting/2008/Detainees.121108.pdf>.

49. *Issue 11(b)*. Conduct by officers, employees, members of the armed forces, or other agents of the U.S. government, including contractors, that constitutes torture or cruel, inhuman or degrading treatment or punishment plainly violates Article 7, subject to the U.S. ratification reservation that the United States considers itself bound by Article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the U.S. Constitution. With regard to those detained under the law of war, under Executive Order 13491, no individual in U.S. custody “shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation that is not authorized by and listed in [the] Army Field Manual.” Executive Order 13491 also expressly provides that “[i]nterrogation techniques, approaches, and treatments described in the Manual shall be implemented strictly in accord with the principles, processes, conditions, and limitations the Manual prescribes.” As for the one interrogation practice expressly referenced in the question – “water boarding” – it is explicitly prohibited in the

Army Field Manual, along with threats, coercion, and physical abuse, among other conduct. With regard to prosecution, please see the discussion of the Passaro case above.

50. On preventing the use of such techniques, please see ¶¶ 174, 177, 178 and 249 of the 2011 Report concerning President Obama's issuance of Executive Order 13491, <http://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations>, and the protections of the Detainee Treatment Act of 2005 and Military Commissions Act of 2009.

51. *Issue 11(c)*. All acts of torture are offenses under criminal law in the United States. The ICCPR does not require Parties to enact a crime specifically labeled "torture." It is left for each State Party to decide for itself as a matter of domestic law the precise manner in which it discharges this obligation. In the United States, acts of torture may be prosecuted in a variety of ways at both the federal and state levels, for example, 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. The United States also has a federal criminal torture statute (18 U.S.C. 2340A et seq.) that provides for prosecution of acts of torture committed outside the United States in certain circumstances, including by a U.S. national. Several states also have statutes criminalizing "torture" per se, but that do not apply only to state actors. Most, if not all, acts that would qualify as torture by state actors may be prosecuted in federal court under 18 U.S.C. 242 as deprivations of constitutional rights, such as the right to be free from cruel and unusual punishment, and to be free from unreasonable seizure, and the right not to be deprived of liberty without due process of law. Existing laws thus fully implement U.S. obligations in this regard, and the United States accordingly is not actively considering adopting new federal legislation.

Reply to the issues raised in paragraph 12 of the list of issues

52. As discussed in ¶¶ 285 and 554-555 of the 2011 Report, the Special Task Force made a number of recommendations to improve the United States' ability to ensure the humane treatment of individuals transferred to other countries. Please see ¶¶ 284-289 and 553-566 of the 2011 Report. The Task Force recommendations were accepted by the President and the U.S. government is implementing them. The Department of State (DOS) evaluates diplomatic assurances, including whether they include appropriate monitoring mechanisms. In order to improve its ability to provide appropriate advice to other agencies, as well as to further develop internal capacity within relevant offices, bureaus, and diplomatic posts, DOS has developed resources to ensure that relevant procedures are observed by, and information about past transfers is available to, decision makers.

53. The 2011 report (¶¶ 554-563) describes how decisions are made to seek assurances in each of the seven types of U.S. Government transfers identified by the Task Force. Since the Task Force issued its recommendations in August 2009, assurances have been determined necessary under applicable procedures and pursued in a small number of immigration and extradition cases. There have been 58 detainee transfers from Guantanamo to other countries since the issuance of the Task Force recommendations; treatment assurances generally are sought for these transfers as a matter of policy. As part of obtaining these treatment assurances, the United States has also sought, where applicable, to secure access for post-transfer humanitarian monitoring by credible, independent organizations, capable of conducting such monitoring. In Afghanistan, the United States sought and received assurances of humane treatment and access for humanitarian monitoring on multiple occasions – including prior to transferring the remaining Afghan detainees at the Detention Facility in Parwan (DFIP) to Afghan authorities in March 2013 – and routinely monitors facilities where transferred detainees are located. In addition, in appropriate cases the United States has sought and received humane treatment assurances

prior to transferring third country nationals at the DFIP out of Afghanistan. With respect to detainee transfers from U.S. facilities in Iraq to the Iraqi authorities, in certain instances where U.S. military commanders or judge advocates determined that it was necessary, they requested and received specific humane treatment assurances from relevant Iraqi authorities. The United States also sought and received general humane treatment and access assurances in 2011 with respect to transferring detainees from U.S. facilities in Iraq to the Iraqi authorities. The Task Force recommendations applicable to all types of transfers, as well as additional classified recommendations, would apply to any potential transfers conducted pursuant to intelligence authorities.

54. The Special Task Force also made several recommendations to improve U.S. monitoring of the treatment of individuals transferred to other countries pursuant to assurances. Consistent with these recommendations, the U.S. government will generally seek the foreign government's agreement to allow consistent, private access to an individual who has been transferred, with minimal advance notice to the detaining government, by U.S. government officials or non-governmental entities in that country to monitor the condition of a returned individual. As stated above, the United States has established monitoring regimes in particular cases or circumstances. The United States refrains from disclosing the content of diplomatic assurances it negotiates with foreign countries as well as the substance of any diplomatic dialogue in this regard. In appropriate situations, the United States has raised concerns regarding both treatment and the process under which prosecutions have been pursued post-transfer when concerns have been brought to its attention, whether from U.S. monitoring, monitoring by non-governmental organizations, or other sources. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

55. The United States is not aware of any cases in which humane treatment assurances have not been honored in the case of an individual transferred from the United States or Guantanamo since the Special Task Force report was issued.

56. Where individuals are transferred subject to diplomatic assurances, the United States would pursue any credible report and take appropriate action – including possible corrective steps – if it had reason to believe that those assurances would not be, or had not been, honored. Where specific concerns about the treatment could not be resolved satisfactorily, the United States has declined to transfer the individual to the country of concern.

Reply to the issues raised in paragraph 13 of the list of issues

57. *Issue 13(a)*. Many of DOJ/CRT's investigations of law enforcement agencies (see issue 4 above) involve allegations or findings of police brutality or excessive force. In addition to available civil remedies, DOJ initiates criminal investigations of the conduct of individuals acting under color of law who violate the constitutional rights of individuals under 18 U.S.C. 242. When the rights of individuals are violated by law enforcement because of, for example, the individual's race, ethnicity, national origin, gender, or lesbian, gay, bisexual, transgender (LGBT) status, it may violate the Fourteenth Amendment of the Constitution or other federal laws. DOJ/CRT has been increasingly active in ensuring protection of these constitutional rights, pursuant to the authorities referenced in issue 4.

58. Every investigation of a police department involves a thorough examination of the challenges facing the police department. DOJ/CRT meets with law enforcement officers and local officials, and works with police practice experts to review incident reports and assess agency policies and practices. DOJ/CRT also meets extensively with community members. If DOJ/CRT identifies a pattern or practice of police misconduct, it seeks to enter

into agreements changing policies, training, oversight, and accountability mechanisms so that the use of force by the police department complies with the Constitution and federal law. If an agreement cannot be reached, DOJ may bring suit in federal court. In the past several years, CRT has investigated and put into place mechanisms to correct unlawful practices in the police departments in New Orleans, Seattle, Puerto Rico and Orange County, Florida.

59. DOJ/CRT also prosecutes individual acts of misconduct by law enforcement officers, as well as engaging in training to prevent such crimes. In FY 2009 – 2012, DOJ/CRT and U.S. Attorneys' Offices charged 254 law enforcement officials in 177 criminal cases for violating individuals' constitutional rights.

60. With regard to activities on the U.S. – Mexico border, while the vast majority of DHS/CBP agents fulfill their duties professionally and responsibly, DHS and DOJ are committed to holding accountable U.S. government officers and agents who abuse their authority. Since 2008, DOJ/CRT has opened 48 matters involving allegations of civil rights abuses by CBP agents working on the border, and five such cases have been prosecuted.

61. DHS/ICE has a zero tolerance policy for law enforcement brutality or excessive use of force against any individual, including undocumented migrants or those belonging to racial, ethnic, or national minorities. ICE policy and detention standards authorize a necessary and reasonable use of force only after all reasonable efforts to otherwise resolve a situation have failed, and have rigorous documentation requirements, medical protocols, and detainee emergency grievance and complaint procedures.

62. The DHS Office of Inspector General (DHS/OIG) also investigates allegations of criminal and administrative violations, violations of civil rights, and misconduct involving DHS employees, contractors, and programs, and maintains a 24-hour secure complaint hotline for this purpose. In the first six months of FY 2013, OIG received 813 civil rights and civil liberties-related complaints. From those complaints, OIG opened 11 investigations and referred 767 complaints to CRCL, ICE, CBP or other DHS components for their review and investigation, as appropriate. Of the 11 OIG investigations, 3 have been closed and referred to CRCL or another agency for action, and 8 remain open.

63. *Issue 13(b)*. With regard to electro-muscular disruption devices (EMDs), under the Fourth Amendment of the U.S. Constitution, 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, 397 (1989). Whether use of an EMD 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, including the vulnerability of the person against whom such force is directed. U.S. federal courts have held that the use of EMDs (or Electronic Control Devices, “ECDs”) constitutes an intermediate, significant level of force that, though considered non-lethal, must be justified by a government interest that compels the employment of such force. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). Ultimately, the most important factor in determining whether the use of such force is justified is whether an individual poses an “immediate threat to the safety of the officers or others.” *Id.* at 826.

64. In determining the reasonableness of the use of ECDs, courts in the United States have also taken into account such factors as whether the subject is pregnant if known to the officers at the time, see e.g., *Mattos v. Agarano*, 661 F.3d 433, 446 (9th Cir. 2011) (en banc), or whether the subject is mentally disturbed, see *Bryan*, 630 F.3d at 829. Courts may

also consider the risk of a subject falling as a result of ECD deployment when determining the reasonableness of the use of force. DOJ/CRT has enforced the constitutional limitations on the use of electroshock devices in a number of cases including *Shreve v. Franklin County, Ohio*, No. 2:10-cv-244 (S.D. Ohio, filed Nov. 3, 2010), and in the investigation of the Orange County, Florida police department mentioned above.

65. With regard to persons in custody, the sole electroshock device used by the Federal Bureau of Prisons (BOP) is an electronic custody control belt, which may be used during community transport only after determining that an inmate requires greater security than is afforded through conventional restraints, and the inmate has no medical condition precluding its use. Activation is only authorized in circumstances where deadly force is otherwise justified, i.e., to prevent escape or death/serious bodily injury.

66. With regard to DHS, all CBP law enforcement personnel, prior to deploying any use of force device (including ECDs and/or EMDs), must consider the totality of the circumstances to determine whether the amount of force to be used is objectively reasonable and consistent with DHS and CBP policies. The ICE use of force policy does not restrict properly trained professionals at detention facilities from using EMD devices if such devices are authorized as part of their policies and procedures, the officers are appropriately trained, and the use of EMD devices meets strict standards. ICE does not however, authorize or train its Enforcement and Removal Operations officers to carry or use EMDs.

Reply to the issues raised in paragraph 14 of the list of issues

67. *Issue 14(a)*. In the United States, school discipline is largely a matter of state and local law and practice. There has been a trend away from corporal punishment in the last thirty years. In the late 1970s, only two states prohibited corporal punishment in schools, while currently 31 states and the District of Columbia do. Even in states where it is not prohibited, many schools ban its use.

68. U.S. courts have recognized and enforced a constitutionally protected right of students to be free from corporal punishment that is excessive or arbitrary under the Due Process clause of the Fifth and Fourteenth Amendments. See e.g., *Kirkland v. Greene County Board of Education*, 347 F.3d 903 (11th Cir. 2003). DOJ and the Department of Education's Office for Civil Rights (ED/OCR) have ongoing investigations of discriminatory disciplinary practices involving students of color and students with disabilities. In addition, DOJ and ED/OCR are working on policy guidance to assist school districts in ensuring non-discrimination in discipline policies and practices.

69. Many ongoing efforts support good disciplinary practices in schools. ED funds the Positive Behavioral Interventions and Supports (PBIS) Center, designed to assist schools in putting into practice research-based, effective and positive school-wide disciplinary practices. Over 19,000 schools across the country are implementing PBIS – frequently resulting in significant reductions in the behaviors that lead to disciplinary referrals, suspensions, and expulsions. DOJ recently reached settlement agreements with school districts in Palm Beach County, Florida (related to discrimination based on parents' national origin or immigration status) and Meridian, Mississippi (related to discrimination on the basis of students' race) that require the expansion of PBIS and other positive responses to student behavior. Both agreements also require collection and analysis of data on discipline, including restraints in both districts and corporal punishment in Meridian, and the districts must disaggregate and report information by students' disability, race, and other factors. <http://www.justice.gov/crt/about/edu/documents/classlist.php>.

70. ED/OCR has also intensified its enforcement activities to ensure that students are not disciplined more severely or frequently because of their race, color or national origin, and in the last four years has launched 20 proactive investigations in schools with significant racial disparities in discipline. ED requires reporting on the use of corporal punishment in public schools by race, ethnicity, sex, and disability status as part of its expanded efforts to ensure that the administration of school discipline is non-discriminatory, <http://ocrdata.ed.gov/>. ED/OCR also collects data from school districts on their use of restraints and seclusion, and in May 2012, ED issued a resource document describing 15 principles for states, school districts, schools, parents, and other stakeholders to consider when developing or revising policies and procedures on the use of restraint and seclusion.

71. *Issue 14(b)*. In 2011, ED and DOJ launched the Supportive School Discipline Initiative (SSDI), to address the “school-to-prison pipeline”³ and the disciplinary policies and practices that can push students out of school and into the justice system. Working with partners at state and local levels, this initiative encourages action, inter alia, through identifying data collection and research needs, providing technical assistance, sharing best practices, and convening groups from multiple disciplines to recommend solutions that keep students engaged in school and out of the justice system. For further discussion of “school-to-prison” pipeline issues, please see ¶¶ 74 and 151-152 of the 2013 CERD Report. DOJ/CRT is also investigating the conduct of police in arresting children for school-based offenses, and to examine whether juvenile courts and probation systems comply with due process rights, the constitutional guarantee of equal protection, and federal laws prohibiting racial discrimination. For a more detailed discussion, please see ¶¶ 73 and 74 of the 2013 CERD Report, and <http://www.justice.gov/opa/pr/2012/October/12-crt-1281.html> and <http://www.justice.gov/crt/about/spl/casesummaries.php>.

Reply to the issues raised in paragraph 15 of the list of issues

72. The U.S. Constitution constrains the government’s power to use individuals in non-consensual investigational studies, including non-consensual medical treatment and clinical investigations, and non-consensual medical treatment and investigations are permitted only in limited, carefully controlled situations. Please see ¶¶ 187 – 189 of the 2011 Report for a detailed discussion of the applicable safeguards under U.S. law, with regard to Article 7 of the ICCPR, to which the U.S. is bound to the extent that “cruel, inhuman or degrading treatment or punishment” in article 7 means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the U.S. Constitution.

73. The Protection and Advocacy for Individuals with Mental Illness Program (PAIMI), a program of the HHS Substance Abuse and Mental Health Services Administration (SAMHSA), provides legal-based advocacy services to individuals with severe mental illnesses and can assist in addressing any abuses. Each state has a PAIMI program, which served 116,499 individuals in FY 2010. Patients are also afforded protections related to the use of seclusion and restraint under the Medicare and Medicaid Conditions of Participation on Patients’ Rights for Hospitals, see e.g., 42 CFR 483.13(e), and the Children’s Health Act of 2001.

³ Student discipline policies that may require student suspension or expulsion for infractions relating to alcohol, drugs, weapons, violence, or other violations of school rules (i.e., “zero tolerance” policies) can interrupt a student’s education, lead to increased rates of students dropping out of school, and diminish students’ chances for success. In too many cases, these school-imposed sanctions may lead to students being placed in (or drawn into) the criminal justice system, a pathway sometimes referred to as the “school-to-prison pipeline.”

Reply to the issues raised in paragraph 16 of the list of issues

74. Standards of care for inmates, including those on death row, are established by federal and state law. U.S. courts have interpreted the Eighth and Fourteenth Amendments of the U.S. Constitution as prohibiting the use of solitary confinement under certain circumstances, especially with regard to inmates with serious mental illness or for juvenile detainees.⁴ Inmates, including inmates with serious mental illness or juveniles, cannot be subjected to solitary confinement absent an administrative hearing and other procedures protective of their right to due process.

75. The Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 (Rehabilitation Act) restrict and regulate the use of solitary confinement for persons with disabilities. Title II of the ADA, 42 U.S.C. 12132, applies to state actors, while the Rehabilitation Act applies to federal correctional facilities and correctional facilities receiving funds from the federal government. Both statutes prohibit the use of solitary confinement in a manner that discriminates on the basis of disability instead of making reasonable modifications to provide persons with disabilities access to services, programs, and activities, including mental health services. See *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). Moreover, a facility's failure to appropriately consider the role an inmate's mental health played in the commission of an infraction of facility rules prior to disciplining the inmate with solitary confinement may also violate requirements under the ADA and/or Rehabilitation Act. See *Clark v. California*, 739 F.Supp.2d 1168 (N.D. Cal. 2010).

76. The Prison Rape Elimination Act of 2003 (PREA) restricts the use of solitary confinement for juvenile inmates and inmates who are the victims of sexual violence. Under implementing regulations, juveniles "may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged." 28 C.F.R. 115.342. The regulations also set time limits and other limitations on the use of solitary confinement on juvenile inmates. With regard to adult inmates at high risk for sexual victimization, the regulations establish conditions on placement in segregated housing and provide that if such inmates are placed in segregated housing, they are to have access to programs, education, work opportunities, and other services to the extent possible. 28 C.F.R. 115.43(a)-(b).

77. DOJ/CRT investigates allegations of misuse of solitary confinement in violation of the constitutional and statutory provisions discussed above. Some of these laws and standards extend to private correctional facilities. Since October 2005, DOJ/CRT has authorized 24 investigations of 28 adult correctional facilities and 8 investigations of 29 juvenile detention facilities. Between 2009 and 2013, it opened seven new investigations; issued 14 findings letters, and settled at least 10 investigations; and it is currently pursuing matters related to adult correctional institutions in over 25 states, the Virgin Islands, Guam, and the Northern Mariana Islands. DOJ/CRT also recently settled a case arising from an

⁴ Specifically, under the Eighth Amendment's prohibition against "cruel and unusual punishments," correctional facility administrators may not subject inmates to solitary confinement with deliberate indifference to the resulting serious harms, including suicides, suicide attempts, and serious self-injury. See *Farmer v. Brennan*, 511 U.S. 825, 843 (1970); see also, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (using prolonged solitary confinement on prisoners with serious mental illness can be "the mental equivalent of putting an asthmatic in a place with little air to breathe"). Under the Fourteenth Amendment's Due Process Clause, prisoners have a protected liberty interest in avoiding certain types of solitary confinement. *Wilkinson v. Austin*, 545 U.S. 209, 22e-224 (2005).

investigation of a jail in Tennessee, requiring the facility to end its practice of using solitary confinement as an alternative to meaningful treatment of those with mental illness, <http://www.justice.gov/crt/about/spl>. In May 2013, DOJ/CRT issued a report finding that the Pennsylvania Department of Correction's use of prolonged solitary confinement on prisoners with serious mental illness and intellectual disabilities at the State Correctional Institution in Cresson violates the Eighth Amendment and Title II of the ADA. DOJ/CRT expanded its investigation to Pennsylvania's entire prison system to determine whether similar practices exist in other correctional facilities, <http://www.justice.gov/opa/pr/2013/May/13-crt-631.html>.

78. In immigration detention, DHS/ICE policies carefully circumscribe the use of solitary confinement, which ICE's standards call "segregation." Disciplinary segregation may be imposed only after a disciplinary hearing, followed by a written finding that a detainee violated a facility rule. Only higher-level infractions may justify disciplinary segregation of any length, and ICE's most recent national detention standards decrease the maximum disciplinary segregation period to 30 days per incident. Administrative segregation may be used only when the detainee's continued presence in the general population poses a threat to self, other detainees, staff, property, or to the security and good order of the facility, <http://www.ice.gov/detention-management/> (links to the various ICE detention standards).

79. BOP encourages visiting at all institutions and security levels to maintain the morale of inmates and to develop closer relationships between the inmates and family members or others in the community. The Warden at each facility has procedures in place to ensure that social visiting occurs in an equitable and safe manner. BOP regulations and policies also provide for social visits with minor children. In addition, BOP permits inmates to maintain contact with family members and the outside community through correspondence, e-mail, and telephone conversations. These contacts may be monitored for security and safety reasons.

80. With regard to protection of detainees from violence, including sexual violence, ¶¶ 227 and 228 of the 2011 Report described PREA's enactment and the subsequent report by the bipartisan National Prison Rape Elimination Commission (NPREC). After NPREC's report, DOJ reviewed and revised the recommended standards and, after public comment, issued implementing regulations, which took effect on August 20, 2012. Taking into account the public comments, DOJ strengthened the regulations, including, inter alia, greater protections for youthful offenders in adult facilities; minimum staffing ratios in juvenile facilities; expanded medical and mental health care (including reproductive care) for victims of prison rape; greater protections for lesbian, gay, bisexual, transgender, intersex, and gender non-conforming inmates; and independent audits of all covered facilities. The regulations are binding on BOP, and state facilities risk loss of federal funding for non-compliance. President Obama also ordered other federal agencies that operate confinement facilities to promulgate their own PREA rules and procedures. The final DOJ PREA regulations contain extensive requirements aimed at ensuring that all allegations of sexual abuse in detention centers are thoroughly investigated and referred to the proper authorities, http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

81. The recent Violence Against Women Reauthorization Act of 2013 (VAWA 2013) also amended PREA to clarify that it applies to DHS immigration detainees, and to require that DHS issue regulations adopting national standards for the detection, prevention, reduction, and punishment of sexual abuse and assault in immigration detention. DHS has issued a proposed rule applying PREA to its confinement facilities and expects to issue the final rule by the end of 2013.

82. On February 10, 2013, DoD issued Directive-type Memorandum 13-002, "Department of Defense Implementation of the Prison Rape Elimination Act", DTM 13-

002. The memorandum establishes policy for DoD correctional facilities, stating that DoD is “committed to work diligently to prevent, detect, and respond to prison rape,” <http://www.dtic.mil/whs/directives/corres/pdf/DTM-13-002.pdf>.

83. With regard to conditions of death row facilities, the U.S. Constitution and federal and state statutes establish standards of care to which all inmates are entitled, and the BOP meets these constitutional and statutory mandates.

84. BOP has contracts with fifteen private facilities, generally housing low security aliens serving criminal sentences. Contractors are required to follow all applicable local, state, and federal laws, codes, and regulations for the jurisdiction in which they operate, and also to adhere to specified BOP policies, such as those on inmate discipline, health services, inmate central files, and others. BOP uses a multi-faceted approach to monitor conditions, including two full-time BOP oversight staff at each private facility who perform scheduled and unscheduled inspections and are expected to be aware of, and resolve, any performance issues before they reach an unsatisfactory level, and two Privatization Field Administrators who provide senior level managerial supervision of BOP oversight activities. A Contract Facility Monitoring Section (CFM) also conducts comprehensive annual reviews at each private facility. BOP uses all available contractual actions when a contractor does not perform in accordance with contract requirements.

85. With regard to the shackling of pregnant detained women, both federal and state governments have announced policy changes that improve the standards for treatment of women during labor and delivery. BOP does not engage in the practice of shackling pregnant women during transportation, labor, and delivery, except in the most extreme circumstances. States are also increasingly adopting similar rules. DHS/ICE has also adopted policies prohibiting the use of restraints on pregnant women and women in post-delivery recuperation absent truly extraordinary circumstances that render restraints absolutely necessary, and outright prohibiting the use of restraints on women in active labor or delivery. Please see ¶¶ 231 to 233 and 676 of the 2011 Report.

Reply to the issues raised in paragraph 17 of the list of issues

86. The United States and its coalition partners are engaged in an armed conflict against al-Qaida, the Taliban, and their associated forces. The law of armed conflict allows parties to the conflict to capture and detain the enemy for the duration of hostilities without charging them for crimes. U.S. military detention operations are conducted in connection with this armed conflict, and in accordance with international humanitarian law, and all other applicable international and domestic laws. Please see 2011 Report, ¶¶ 506-509. The United States’ authority to hold detainees at the U.S. Naval Station Guantanamo Bay (GTMO) and at the Afghan National Detention Facility in Parwan (ANDF-P, formerly the DFIP) is under the 2001 Authorization for Use of Military Force (AUMF), P.L. 107-40, as informed by the laws of war. The United States no longer detains individuals in Iraq. The United States has transferred all Afghan detainees formerly in its custody at the DFIP to the custody and control of the Government of Afghanistan. The United States continues to hold third country nationals at the ANDF-P and is assessing potential disposition options for those individuals.

87. The Supreme Court has held that the constitutional right to petition for *habeas corpus* relief extends to individuals detained by DoD at Guantanamo Bay. *Boumediene v. Bush*, 553 U.S. 723 (2008). Guantanamo detainees accordingly have been filing *habeas* petitions in the U.S. federal district court in the District of Columbia, with a right of appeal to the D.C. Circuit Court of Appeals. These courts are part of the independent judicial branch of the U.S. government, separate from the executive branch (which includes the military). Under this process, these 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 in rare instances where required by compelling security interests, all of the evidence relied upon by the government to justify detention is disclosed to the detainees' counsel, who have been security-cleared to view the evidence, and the detainees may submit written statements and provide live testimony at their *habeas* hearings via video link.

88. The United States recognizes the importance of adequate review of detention decisions. DoD improved its review procedures in 2009 for individuals in Afghanistan held at the DFIP, which improved DoD's ability to assess whether the facts supported the detention of each individual, and enhanced a detainee's ability to challenge the detention. As the U.S. federal courts have recognized, U.S. court review is not appropriate in these cases, as *Bagramis* in the midst of an active theater of combat, *Al Maqaleh v. Gates*, 605 F. 3d 84 (D.C. Cir. 2010).

89. No detainees are "scheduled for indefinite detention." The United States has legal authority to hold detainees until the end of hostilities, but, as a policy matter, has elected to ensure that it holds detainees no longer than is absolutely necessary. In this regard, by executive order in March 2011, the President directed DoD to establish a periodic review process for Guantanamo detainees who have not been charged, convicted, or designated for transfer. This review process will consist of a comprehensive, robust review before an interagency Periodic Review Board (PRB), which is charged with determining whether continued law of war detention of a detainee subject to the periodic review process is 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 or her continued detention, the Secretaries of State and Defense are to ensure that vigorous efforts are undertaken 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. The U.S. government has made substantial progress toward meeting the directives of the executive order. The review process has not been fully implemented to date given the complexity of issues associated with building such a comprehensive interagency process. The Administration remains committed to implementing fully the PRB process as soon as practicable.

90. Regarding Military Commissions, which have been traditionally used to try law of war violations and other offenses associated with armed conflict, the U. S. government has taken great strides to ensure that those accused of criminal activity receive a fair trial by an independent, impartial, and regularly constituted court, consistent with Common Article 3 of the Geneva Conventions. Among the protections is the fact that the accused is presumed innocent until proven guilty; the prosecution bears the burden of proof; guilt must be proved beyond a reasonable doubt; the accused is entitled to be present at trial; the accused has a right to cross examine witnesses; the accused has a right to counsel and an interpreter at no cost to the accused; and the accused has protection against compulsory self-incrimination.

91. No detainees currently at Guantanamo have been "cleared for release." A U.S. Federal court granted the habeas petitions of Uighurs, i.e., members of a Chinese ethnic minority, and, in addition, the Executive Order Task Force designated them for transfer, but they cannot be returned to their home country due to treatment concerns and have not accepted offers of resettlement. In 2010, the Executive Order Task Force, which reviewed all detainees then at Guantanamo and made determinations regarding their future dispositions, determined that 126 detainees were eligible for potential transfer subject to appropriate security measures by the receiving governments. A decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism, nor does it equate to a judgment that the government lacked the legal

authority to hold the detainee. Indeed, all transfer decisions are made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented. The United States continues to assess transfer options for those detainees whose threat can be adequately mitigated through means other than continued detention by the United States. Transfers are always conducted consistent with applicable U.S. law and policy and international law.

92. With respect to President Obama's efforts to close Guantanamo, in his speech on May 23, 2013, he called on Congress to lift the restrictions on detainee transfers from Guantanamo, and announced that he had asked DoD to designate a site in the United States to hold military commissions and that he is appointing new senior envoys at DOS and DoD whose sole responsibility will be to negotiate the transfer of detainees to third countries. He also announced that the United States will transfer detainees who have been designated for transfer and, where feasible, will prosecute other detainees, including through military commissions, with judicial review remaining available for every detainee at Guantanamo. <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism>.

Reply to the issues raised in paragraph 18 of the list of issues

93. The PREA final rule provides strong limitations on the confinement of juveniles with adults, http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf. The final rule requires that in adult facilities, children under 18 cannot be housed with adult inmates; must have sight and sound separation from adult inmates, or be under direct supervision, outside of housing units; and correctional facilities must use best efforts to avoid placing youth in isolation to comply with this requirement. 28 C.F.R. 115.14.

94. In recent years, DOJ/CRT has investigated or been involved in litigation in four jurisdictions where juveniles charged or convicted as adults in state or local proceedings were held in adult prisons and jails. Its work in these cases has included advocating that youth in adult jails be kept separate from adults, and that younger prisoners sentenced as adults be placed in juvenile detention facilities or in special units separated from older inmates. In this work, DOJ has increasingly used its authority to address civil rights violations in the administration of juvenile justice. In 2012, DOJ found that the procedures used to transfer children to adult criminal court in Shelby County, Tennessee involved serious due process violations and, in some cases, deprived children of meaningful assistance of counsel. In addition, it found that these transfers violated African-American children's constitutional right to equal protection under the law. The County and court have signed an agreement requiring adherence to due process requirements in transfer cases, which, DOJ expects, will reduce the number of children held in adult facilities.

95. In the U.S. federal system, 18 U.S.C. 5039 requires that no juvenile committed, whether pursuant to an adjudication of delinquency or conviction for an offense, to the custody of the AG may be placed or retained in an adult jail or correctional institution in which he or she has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges. This law further provides that whenever possible, the AG shall commit a juvenile to a foster home or community-based facility located in or near his home community. Youth who have been adjudicated delinquent or convicted of federal crimes, even those waived into the adult federal criminal justice system, are to be separated from adult offenders until they reach the age of 18, if subject to adult waiver, or until 21, if adjudicated delinquent.

96. In the U.S. state court system, there is variation among the states in terms of the age at which juvenile jurisdiction begins and ends for purposes of state judicial systems. Most

states allow youth to remain under the jurisdiction of the juvenile court until age 20 or 21 and a few until age 24 or 25. To be eligible for federal grant funding, states must implement laws and policies prohibiting contact between adult inmates and juvenile offenders, as required by the Federal Juvenile Justice and Delinquency Prevention Act (JJDPA) of 2002, 42 U.S.C. 5633. The JJDPA does not apply to juveniles who are under the jurisdiction of the adult criminal court and charged and/or convicted of a felony.

97. DOJ/OJJDP has disseminated numerous reports on youth transfer, including “Juvenile Transfer Laws: An Effective Deterrent to Delinquency?”, which indicates that transferring youth “for trial and sentencing in adult criminal court has ... produced the unintended effect of increasing recidivism, and thereby of promoting life-course criminality,” <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>. OJJDP has shared with national audiences a report on the conclusions of the Task Force on Community Preventive Services recommending against laws or policies facilitating the transfer of juveniles to the adult criminal justice system for the purpose of reducing violence, <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

Reply to the issues raised in paragraph 19 of the list of issues

98. *Issue 19(a)*. Section 236(c) of the Immigration and Nationality Act (INA) requires mandatory detention of aliens who have committed certain criminal acts and those for whom there are reasonable grounds to believe they have engaged in or are likely to engage in terrorist activity. This requirement has been upheld under the U.S. Constitution, *Demore v. Kim*, 538 U.S. 510 (2003). Aliens may seek a hearing before an Immigration Judge of DOJ’s Executive Office of Immigration Review (EOIR) to challenge whether they are properly included in the mandatory detention categories of section 236(c), *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

99. Consistent with the requirements of INA section 236(c) and other provisions of U.S. immigration law, DHS/ICE uses a Risk Classification Assessment (RCA) tool that applies objective criteria to guide decision making regarding whether an alien should be detained or released and, if detained, the alien’s appropriate custody classification level. The criteria include review of any special vulnerability that may affect custody and classification determinations. When an alien is not subject to mandatory detention, Immigration Judges have broad discretion in whether to continue the alien’s detention or to release the alien on bond. See *Matter of Guerra*, 24 I&N Dec. 37, 39-40 (BIA 2006).

100. There are limits on the duration of immigration detention. In certain circumstances, INA section 241(a)(6) allows DHS to detain an alien for more than 90 days after entry of the final order of removal. However, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court recognized the “serious constitutional threat” posed by potentially indefinite detention, and limited the duration of such detention for removable and inadmissible aliens to only as long as “reasonably necessary” to effectuate the alien’s removal. The Court further determined that six months was a presumptively reasonable period. *Zadvydas*, 533 U.S. at 701. Therefore, an alien detained longer than six months after entry of a final removal order is eligible for conditional release if there is not a significant likelihood of removal in the reasonably foreseeable future or if release would not “pose a special danger to the public.” 8 C.F.R. 241.13; 1241.14(a)(1). Aliens who remain in custody after six months may request a new review six months later, 8 C.F.R. 1241.14(j)(3).

101. *Issue 19(b)*. Aliens who are detained in the United States pending criminal charges or prosecution have the same constitutional rights with respect to notice, prompt presentation before a judicial authority, and access to counsel as U.S. citizens who are detained pending criminal charges or prosecution. DHS does not detain aliens for the

purpose of criminal charges or prosecution other than for the short time of the initial arrest. DHS immigration detention is civil in nature, and unrelated to criminal charges or proceedings. Its sole purpose is to secure the removal of aliens who are subject to removal from the United States.

102. *Issue 19(c)*. DHS is committed to developing and implementing policies and procedures that take into account the best interests of children and provide age-appropriate care and services for these children. Two DHS component agencies, CBP and ICE, may encounter and/or repatriate noncitizen juveniles.

103. Unaccompanied alien children (UACs) who are subject to removal may be placed into removal proceedings before Immigration Judges under section 240 of the INA. DHS must, absent exceptional circumstances, transfer UACs to the care and custody of the HHS Office of Refugee Resettlement (ORR) within 72 hours of the determination that they are UACs. HHS/ORR houses UACs in children's shelters and secure facilities, and also maintains bed space in residential treatment facilities for children with exceptional needs. ORR typically places young children and UACs who are traveling with their own children in foster care. Before releasing a child to a sponsor or foster care provider, ORR conducts suitability assessments and may additionally conduct a home study in certain cases to oversee the reunification/sponsorship of the UAC. If a UAC reaches 18 years of age and is transferred from HHS to DHS custody, DHS will consider placement in the least restrictive setting available after taking into account the alien's danger to self and the community, and risk of flight. DHS will also make alternatives to detention programs available to these individuals. See 8 U.S.C. 1232(c)(2)(B) (added by VAWA 2013, section 1261).

104. As noted above, DHS may maintain physical custody of UACs for a limited time pending transfer to HHS/ORR. During that time, all UACs are separated from adult detainees both in facilities and during transport, and are typically monitored by staff of the same gender. Family groups are also separated from the general adult populations. In its enforcement and removal operations, ICE seeks to maintain family unity wherever possible. The majority of family groups – particularly those where the parents have no criminal history – are released on an alternative to detention program pending the outcome of their immigration cases. However, ICE maintains a small Family Residential Program to house family groups not eligible for release. Residents can move about freely, they are afforded a myriad of resources, and children aged five and above attend a state-certified school. If a family must be separated because the sole parent must be detained, an undocumented child would be transferred to the care and custody of ORR as noted above.

Reply to the issues raised in paragraph 20 of the list of issues

105. The U.S. government's long-standing commitment to addressing violence against women is guided by two key principles: ensuring safety for victims, and holding offenders accountable. The 1994 Violence Against Women Act (VAWA) has been reauthorized in 2000, 2005, and 2013. VAWA is designed to end violence against women by (1) increasing the availability of services for victims of violence; and (2) improving the criminal justice response to crimes of violence against women.

106. VAWA has led to significant improvements in the criminal and civil justice systems at the local level where the majority of these crimes are prosecuted. By forging state, local, and tribal partnerships among police, prosecutors, judges, victim advocates, health care providers, faith leaders, and others, federal grant programs help provide victims with the protection and services they need to pursue safe and healthy lives, while simultaneously enabling communities to hold offenders accountable for their violence. VAWA funds also support specialized domestic violence law enforcement units, training for judges, and the

development of dedicated domestic violence courts, which tend to process cases more efficiently and increase offender compliance.

107. The Family Violence Prevention and Services Act (FVPSA), administered by the Family and Youth Services Bureau (FYSB) of HHS, provides funding to support emergency shelter and related assistance for those affected by domestic violence, including basic living needs and an opportunity to assess the risks posed by offenders, and develop resources needed to achieve safety and independence. The increased availability of legal services, including those assisting women to obtain orders of protection, also appears to play a key role in reducing domestic violence. FYSB also administers a National Domestic Violence Hotline, a 24-hour, confidential, toll-free hotline that immediately connects the caller to a highly trained service provider in his or her area for support, information, safety planning, and crisis intervention. In FY 2010, FVPSA-funded programs served over 1.3 million victims and their children.

108. The HHS Centers for Disease Control and Prevention (CDC) administers a program that seeks to reduce the incidence of domestic violence in funded communities through local Coordinated Community Response Teams. In addition, under the ACA, health plan coverage guidelines for women's preventive services include screening and counseling for interpersonal and domestic violence, which help increase access to screening and counseling services for 47 million women with private health insurance.

109. DHS Secretary Napolitano recently announced the creation of the DHS Council on Combating Violence Against Women to ensure that policies and practices for combating violence against women and children are consistent throughout DHS. DHS has also taken a number of steps to prevent and combat domestic violence, including an ICE policy encouraging the use of prosecutorial discretion in removal cases to minimize the effect of immigration enforcement on the willingness and ability of victims, witnesses, or plaintiffs to serve as witnesses in criminal proceedings or pursue justice for crimes, including domestic violence.

Reply to the issues raised in paragraph 21 of the list of issues

110. *Issue 21(a)*. Human trafficking cases are prosecuted by several DOJ components, including CRT and its specialized Human Trafficking Prosecution Unit, the Criminal Division through the Child Exploitation and Obscenity Section (CEOS), and the U.S. Attorneys' Offices (USAOs). Cases are investigated by the FBI, DHS/ICE and partners at DOL and DOS.

111. Through the Federal Enforcement Working Group DOJ has worked with DOL and DHS to bring joint investigations through Pilot Anti-Trafficking Coordination Teams (ACTeam). Such partnerships have enabled successful prosecution of domestic servitude cases in jurisdictions where such cases had never before been federally prosecuted, and the initiation of complex, multi-jurisdictional, and international labor trafficking investigations. In FY 2012, DHS, DOJ, and DOL created a joint Advanced Human Trafficking Training course for investigators, prosecutors, victim assistance specialists, and other personnel participating in the ACTeam initiative. DOJ has recently secured convictions in a number of trafficking and forced labor cases, <http://www.justice.gov/crt/about/crm/selcases.php#humantrafficking>. DOJ also funds state and local law enforcement agencies and victim services organizations to support multidisciplinary, victim-centered task forces to investigate trafficking crimes and provide culturally-competent assistance to victims.

112. HHS, DHS, DOJ, and other federal agencies, including ED and DOL, have crafted a Federal Strategic Action Plan on Victim Services, which recommends a range of strategies, on a five year timeframe (2013-2017), to improve victim services. Developed with

leadership and guidance from the White House, this plan will better coordinate efforts across the U.S. Government to identify, rescue, and support victims. The Plan is currently in a 45-day comment period; once public comments have been addressed, it will go into effect across the government.

113. Other departments and agencies also actively work to eliminate trafficking and provide victim services. Protecting vulnerable workers from disparate pay, harassment, and other discriminatory policies is priority for the EEOC. ED has raised awareness and done outreach to state and local education agencies, schools, students, and parents, including helping schools and others understand how trafficking relates to teaching and learning and why it is important for schools to address the problem, and providing schools and colleges with information and resources. DHS leads the Blue Campaign, a robust, multi-sector effort aimed at educating law enforcement, government agencies, the private sector, and other communities across the nation and around the world on the crime of human trafficking, its indicators, and how they can help. DHS/ICE Homeland Security Investigations (HSI) conducts federal human trafficking investigations; in FY 2012, it initiated 894 cases and secured 381 convictions. DHS also provides both short- and long-term immigration relief for noncitizen victims through U and T visas. DOS publishes an annual report that includes an extensive narrative of the activities of the U.S. government to combat human trafficking.⁵

114. *Issue 21(b)*. DOJ's Child Exploitation and Obscenity Section (CEOS), leads the Criminal Division's campaign against the sexual exploitation of children, using its experience in investigating and prosecuting the most challenging child sexual exploitation cases to shape domestic and international policy, launch nationwide investigations against the worst offenders, and provide guidance and training to other prosecutors and agents, both within and outside the federal government. Detailed information on U.S. efforts to combat the prostitution of children can be found in the DOS Trafficking in Persons report and various other official government reports.⁶ DHS/ICE HSI also investigates cases of child pornography and child sex tourism.

Reply to the issues raised in paragraph 22 of the list of issues

115. With regard to judicial oversight of NSA, as noted in ¶ 332 of the 2011 Report, 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-Qaida or a member of an organization affiliated with al-Qaida and where one party was outside the United States. This activity thereafter was brought under the supervision of

⁵ See the Trafficking In Persons Report 2013, <http://www.state.gov/documents/organization/210742.pdf> pp. 381-387 (United States narrative is included as part of a report on what countries around the world have done to prosecute traffickers, protect trafficking victims and prevent trafficking in persons).

⁶ See the Attorney General's 2011 Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons, <http://www.justice.gov/ag/annualreports/agreporthumantrafficking2011.pdf>, pp. 33-39, 45-49, 64-66, 72-101; the National Strategy for Child Exploitation Prevention and Interdiction, <http://www.justice.gov/psc/docs/natstrategyreport.pdf>, pp. 31-35; and the United States 2010 Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography <http://www.state.gov/documents/organization/136023.pdf> ¶¶ 14-21, 58-62, 75-87, 121-123, 126-155, 206-211, 215-237, 322-343, 350-384, 392-406.

the Foreign Intelligence Surveillance Court (FISC) and, in 2008, Congress amended the Foreign Intelligence Surveillance Act (FISA) to modernize collection authorities and solidify FISC's role. Please see 2011 Report at ¶¶ 585-586. These modifications enhance judicial and Congressional oversight and protect individuals' privacy and civil liberties.

116. The FISC plays an important role in overseeing certain NSA collection activities conducted pursuant to FISA. It not only authorizes these activities, but it also plays a continuing and active role in ensuring that they are carried out appropriately. Moreover, if at any time the government discovers that an authority or approval granted by the FISC has been implemented in a manner that did not comply with the Court's authorization or approval, or with applicable law, the government must immediately notify the FISC and corrective measures must be taken.

117. With regard to roving surveillance, as noted in ¶ 586 of the 2011 Report, section 206 of the USA PATRIOT Act, which permits "roving" wiretaps in certain circumstances, was recently reauthorized through June 1, 2015. The FISA's "roving" electronic surveillance provision allows the government to continue surveillance where the target of the surveillance switches from a facility (e.g., a telephone) associated with one service provider (e.g., a telephone company) to a different facility associated with a different provider. This provision was enacted to correspond to roving authority that has applied to law-enforcement surveillance since 1986, and which has repeatedly been upheld in the U.S. courts.

118. In an ordinary FISA surveillance case, the government must demonstrate to the FISC probable cause that the target of the surveillance is a foreign power or an agent of a foreign power, and that the target is using, or about to use, a facility, such as a telephone. If the target switches to a new provider the government must submit a new application and obtain a new set of FISA orders, because the new provider will – rightly – refuse to honor an order directed at another company. However, where the government can demonstrate in advance to the FISC that the target's actions may have the effect of thwarting surveillance, such as by changing providers, FISA's roving surveillance provision allows the FISC to issue an order that the government can serve on the new provider to commence surveillance without first going back to court. The government's probable cause showing that the target is an agent of a foreign power remains the same, and the government must also demonstrate to the FISC, normally within 10 days of initiating surveillance of the new facility, probable cause that that specific agent is using, or is about to use, that new facility.

119. The intelligence community is conducting court-authorized intelligence activities pursuant to a public statute with the knowledge and oversight of Congress. As described above, there is also extensive oversight by the executive branch, including DOJ and the Office of the Director of National Intelligence and relevant agency counsels and inspectors general. For example, activities authorized under Section 702 of FISA are subject to strict controls and procedures under oversight of the DOJ, the Office of the Director of National Intelligence, and the FISC, to ensure that they comply with the Constitution and the laws of the United States and appropriately protect privacy and civil liberties. See <http://www.dni.gov/files/documents/Facts%20on%20the%20Collection%20of%20Intelligence%20Pursuant%20to%20Section%20702.pdf> and <http://www.whitehouse.gov/the-press-office/2013/06/06/press-gaggle-deputy-principal-press-secretary-josh-earnest-and-secretary>.

120. The United States welcomes a discussion of the balance between security and civil liberties. As President Obama has recently stated on this issue, "...in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are," <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

Reply to the issues raised in paragraph 23 of the list of issues

121. U.S. law and practice impose no restrictions on the right of individuals to form and join trade unions, including immigrant and undocumented workers, individuals employed as agricultural workers, domestic workers, and federal, state, and local government workers. Freedom of association is principally protected by the First Amendment of the U.S. Constitution, which has been interpreted by the Supreme Court to include an employee's right to form and join a union without interference from state actors. See *Thomas v. Collins*, 323 U.S. 516 (1945).

122. The 1935 National Labor Relations Act (NLRA) protects the rights of certain employees, acting concertedly, to self-organize; form, join, or assist labor organizations; bargain collectively through representatives of their own choosing; and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It does not in any way restrict the rights of workers not covered. The Act covers only certain employees because the power of Congress to regulate labor-management relations is limited by the commerce clause of the U. S. Constitution to activities that affect interstate commerce. Agricultural laborers were excluded from the NLRA by Congress because in 1935 many agricultural enterprises were family farms that employed only one or two people. Congress expressed concern that employment of so few persons was not "of a certain magnitude" to affect interstate commerce. Similarly, Congress exempted employment of one or a few domestic servants because this did not rise to the level of commerce necessary to invoke federal jurisdiction. Congress was further concerned that NLRA jurisdiction would inappropriately intrude into personal and individual relationships between small family businesses and their employees.

123. Jurisdictional exceptions for agricultural laborers and domestic workers, however, are not absolute. The NLRA extends coverage to some individuals in the agricultural chain, such as store clerks and slaughterhouse workers. Similarly, individuals engaged in domestic service are covered by the NLRA when employed by an enterprise in the business of providing personal care and housekeeping services, such as hotels, hospitals, or condominiums. Further, approximately eight U.S. states, including California and Arizona, have enacted agricultural labor relations laws or include agricultural laborers within their general labor provisions.

124. With regard to employment contractors, the nature of an employer's relationship with an independent contractor has been found not to fall within NLRA protection over collective bargaining regarding an employee's terms and conditions of employment. An employer generally regulates only the result to be accomplished by an independent contractor, rather than the method and manner of services, which an employer controls for its employees. See, *Steinberg & Co.*, 78 NLRB 211, 220-21 (1948).

Reply to the issues raised in paragraph 24 of the list of issues

125. Following the Supreme Court decisions in *Graham v. Florida* and *Miller v. Alabama*, DOJ conducted a review to determine whether any federal prisoner might be impacted by either of the Court's decisions and thus might have a claim for relief from the original sentence imposed, and notified the Federal Public Defender of those prisoners who were identified by the review. In addition, the United States is developing legislation to ensure that federal law complies with the requirements of both Court decisions. A court may, within its discretion, sentence a defendant to life without parole for a homicide committed as a juvenile; neither *Graham* nor *Miller* barred this sentencing option.

Reply to the issues raised in paragraph 25 of the list of issues

126. The United States has held approximately 2,500 individuals under the age of 18 at the time of their capture in detention in Iraq, Afghanistan, and at Guantanamo Bay. In a conflict where our enemies use children as belligerents, deliberately sending some to their death, the detention of juveniles becomes an unavoidable necessity. Indeed the principal rationale for detaining belligerents under the law of armed conflict is to save lives by preventing them from returning to the fight. The U.S. government recognizes the special needs of young detainees, and every effort is made to provide them a secure environment, to separate them from the adult detainee population, and to attend to the special physical and psychological care they may need. Please see the U.S. responses to Recommendations 30a - 30h of the Committee on the Rights of the Child, contained in the second periodic report of the United States on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC/C/OPAC/USA/2), January 22, 2010, ¶¶ 209-223, for further discussion of the steps taken to reduce the number of juveniles held in detention facilities, address the special needs of juvenile detainees and prepare them for reintegration, work with the International Committee of the Red Cross, and allow and encourage family contact and communication with detainees, wherever possible. The ICRC serves as an independent mechanism through which detainees held by the United States can raise complaints. In addition, the detainees can and do raise complaints directly with the U.S. military, which maintains robust internal review procedures. Additionally, the ICRC delivers mail to detainees in U.S. custody, and it has partnered with the United States to facilitate telephone and video calls between family members and detainees when practicable, consistent with operational security interests.

127. As has historically been the case in armed conflict, the overwhelming majority of individuals detained by the United States in its ongoing armed conflict, including juveniles, will not face criminal charges by the United States. Therefore, a detainee would generally not be provided legal assistance while in DoD custody, as would be done if the detainee were charged with a crime. Now that we have transferred to the Government of Afghanistan all the Afghan detainees formerly held by DoD at the DFIP, the United States will work with our Afghan partners to ensure that all detainees subject to criminal prosecution, including juveniles, have appropriate legal representation.

Reply to the issues raised in paragraph 26 of the list of issues

128. *Issue 26(a).* The U.S. Constitution generally provides that governments of the individual states, not the U.S. Congress, determine who is eligible to vote in their state. Congress has the power to regulate elections for federal offices and has constitutional authority to eradicate discrimination in voting through the Fourteenth and Fifteenth Amendments. According to the Brennan Center of NYU Law School, 48 states restrict voting by persons convicted of felony offenses in some manner, although the majority of these states provide for restoration of voting rights to felons who have been released from prison and/or are no longer on parole or probation. A few states prohibit felons from voting for life. Legal challenges alleging that state felon disenfranchisement laws violate either the U.S. Constitution's non-discrimination principle or other federal voting rights statutes have generally not succeeded absent proof of racially discriminatory purpose. For further discussion of this issue, please see ¶¶ 35 and 36 of the CCD.

129. *Issue 26(b).* With regard to state restrictions on voter registration, DOJ/CRT has in the past relied on its authority under Section 5 of the Voting Rights Act to review a number of state laws relating to voter identification requirements, voter registration requirements, and changes to early voting procedures. (As noted below, however, on June 25, 2013, the

Supreme Court invalidated the section of the Voting Rights Act that contains the formula used to identify the state and local governments that were required to submit voting-related changes for this federal review, which is known as preclearance.) In December 2011, DOJ/CRT objected to South Carolina's voter identification law, and in March 2012, DOJ/CRT objected to a photo ID requirement from Texas on the ground that the law would have a retrogressive effect on Hispanic registered voters because these voters are at least 46.5% and potentially 120% more likely than non-Hispanic registered voters to lack the required identification. The court struck down the identification requirement in the Texas case.

130. In March 2012, DOJ/CRT filed a notice in court arguing that several of Florida's recent election law changes, including to the early voting period and the procedures for third-party voter registration organizations, did not meet the Section 5 standard. A federal court agreed with DOJ/CRT's argument that reducing the number of early voting hours in advance of the 2012 election could disproportionately impact African American voters in parts of the state, and ultimately required those counties to maintain early voting hours at prior levels. On June 25, 2013, the Supreme Court struck down part of the Voting Rights Act, invalidating Section 4 of the Act that contains the formula used to identify the state and local governments that have to comply with the preclearance requirements. Other provisions of the Voting Rights Act remain intact and prohibit racial discrimination in voting. DOJ will continue to carefully monitor jurisdictions around the country for voting changes that may hamper voting rights and to protect the right to vote, free from discrimination based on race or language minority status. DOJ will also work with Congress and other elected and community leaders to formulate potential legislative proposals to address voting rights discrimination.

131. DOJ/CRT has also prioritized enforcement of the National Voter Registration Act, enacted to increase the number of eligible citizens who register to vote and to ensure accurate and current registration rolls in federal elections. A lawsuit was filed against Rhode Island in 2011 to secure the state's compliance with the requirement that voter registration opportunities be offered at state offices that provide public assistance or disability services. In just the four-month period after Rhode Island agreed to a settlement, the number of newly-registered voters at the affected offices increased more than nine-fold over the total for the previous two full years combined.

132. *Issue 26(c)*. With regard to voting for residents of Washington, D.C., please see ¶¶ 37 and 81 of the CCD.

Reply to the issues raised in paragraph 27 of the list of issues

133. With regard to the protection of indigenous sacred areas and consultation, please see ¶¶ 168 – 176 of the 2013 CERD Report, which addresses at great length the protection of indigenous sacred areas and consultation with indigenous people in the United States. As a further example of ongoing consultation practice, under EPA's 2011 policy, once a determination is made concerning consultation with tribes, EPA lists tribal consultation opportunities on its Indian Tribal Portal Consultation web page, <http://tcots.epa.gov/oita/TConsultation.nsf/TC?OpenView>. In addition to notification of tribal governments by U.S. mail, EPA has created a Listserv for tribal environmental directors and staff to provide an early alert of its intent to consult.