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REPORT ON THE ACTIVITIES

OF THE

COMMITTEE ON THE JUDICIARY

OF THE

HOUSE OF REPRESENTATIVES

DURING THE

ONE HUNDRED EIGHTH CONGRESS

PURSUANT TO

CLAUSE 1(d) RULE XI OF THE RULES OF THE HOUSE OF REPRESENTATIVES

JANUARY 3, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, January 3, 2005.

Hon. JEFF TRANDAHL,
Clerk of the House of Representatives,
Washington, DC.

DEAR MR. TRANDAHL: Pursuant to clause 1(d) of rule XI of the Rules of the House of Representatives, I am transmitting the report on the activities of the Committee on the Judiciary of the U.S. House of Representatives in the 108th Congress.

Sincerely,

F. JAMES SENSENBRENNER, Jr., *Chairman.*

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Union Calendar No. 490

108TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 108–805

REPORT ON THE ACTIVITIES OF THE COMMITTEE ON THE JUDICIARY

JANUARY 3, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

Jurisdiction of the Committee on the Judiciary

The jurisdiction of the Committee on the Judiciary is set forth in Rule X, 1.(k) of the rules of the House of Representatives for the 108th Congress:

* * * * * * *

RULE X.—ESTABLISHMENT AND JURISDICTION OF STANDING COMMITTEES

THE COMMITTEES AND THEIR JURISDICTION

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned to it by this clause and clauses 2, 3, and 4. All bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees listed in this clause shall be referred to those committees, in accordance with clause 2 of rule XII, as follows:

* * * * * * *

(k) Committee on the Judiciary

(1) The judiciary and judicial proceedings, civil and criminal.
(2) Administrative practice and procedure.
(3) Apportionment of Representatives.
(4) Bankruptcy, mutiny, espionage, and counterfeiting.
(5) Civil liberties.
(6) Constitutional amendments.

(7) Federal courts and judges, and local courts in the Territories and possessions.

(8) Immigration and naturalization.

(9) Interstate compacts, generally.

(10) Claims against the United States.

(11) Meetings of Congress, attendance of Members and their acceptance of incompatible offices.

(12) National penitentiaries.

(13) Patents, the Patent Office, copyrights, and trademarks.

(14) Presidential succession.

(15) Protection of trade and commerce against unlawful restraints and monopolies.

(16) Revision and codification of the Statutes of the United States.

(17) State and Territorial boundaries.

(18) Subversive activities affecting the internal security of the United States.

Tabulation of Legislation and Activity

LEGISLATION REFERRED TO COMMITTEE

Public Legislation:	
House bills	733
House joint resolutions	67
House concurrent resolutions	27
House resolutions	48
	875
Senate bills	42
Senate joint resolutions	1
Senate concurrent resolutions	4
	47
Subtotal	922
Private Legislation:	
House bills (claims)	12
House bills (copyrights)	0
House bills (immigration)	73
House resolutions (claims)	1
	86
Senate bills (claims)	0
Senate bills (immigration)	7
	7
Subtotal	93
Total	1015

ACTION ON LEGISLATION NOT REFERRED TO COMMITTEE

Held at desk for House action:	
Senate bills	10
	10
Conference appointments:	
House bills	6
Senate bills	0
	6
Total	16

FINAL ACTION

House concurrent resolutions approved (public)	1
House resolutions approved (public)	11
Public legislation vetoed by the President	0
Public Laws	59
Private Laws	4

Printed Hearings

Serial No. and Title

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1. Balanced Budget Amendment. Subcommittee on the Constitution. March 6, 2003. (H.J. Res. 22).
2. Peer-to-Peer Piracy on University Campuses. Subcommittee on Courts, the Internet, and Intellectual Property. February 26, 2003.
3. Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003. Committee on the Judiciary. March 4, 2003. (H.R. 5).
4. New York City's "Sanctuary" Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration. Subcommittee on Immigration, Border Security, and Claims. February 27, 2003.
5. Piracy Prevention and the Broadcast Flag. Subcommittee on Courts, the Internet, and Intellectual Property. March 6, 2003.
6. Standards Development Organization Advancement Act of 2003. Task Force on Antitrust. April 9, 2003. (H.R. 1086).
7. Copyright Royalty and Distribution Reform Act of 2003. Subcommittee on Courts, the Internet, and Intellectual Property. April 1, 2003. (H.R. 1417).
8. Nonimmigrant Student Tracking: Implementation and Proposed Modifications. Subcommittee on Immigration, Border Security, and Claims. April 2, 2003.
9. International Copyright Piracy: A Growing Problem with Links to Organized Crime and Terrorism. Subcommittee on Courts, the Internet, and Intellectual Property. March 13, 2003.
10. Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. March 11, 2003. (H.R. 1104 and H.R. 1161).
11. Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement. Subcommittee on Immigration, Border Security, and Claims. April 10, 2003.
12. United States Patent and Trademark Fee Modernization Act of 2003. Subcommittee on Courts, the Internet, and Intellectual Property. April 3, 2003. (H.R. 1561).
13. Internet Tax Nondiscrimination Act. Subcommittee on Commercial and Administrative Law. April 1, 2003. (H.R. 49).
14. Partial-Birth Abortion Ban Act of 2003. Subcommittee on the Constitution. March 25, 2003. (H.R. 760).
15. House Military Naturalization Bills. Subcommittee on Immigration, Border Security, and Claims. May 6, 2003. (H.R. 1685, H.R. 1714, H.R. 1799, H.R. 1275, H.R. 1814, and H.R. 1850).
16. Protection of Lawful Commerce in Arms Act. Subcommittee on Commercial and Administrative Law. April 2, 2003. (H.R. 1036).
17. Sports Agent Responsibility and Trust Act. Subcommittee on Commercial and Administrative Law. May 15, 2003. (H.R. 361).
18. John Allen Muhammad, Document Fraud, and the Western Hemisphere Passport Exception. Subcommittee on Immigration, Border Security, and Claims. May 13, 2003.
19. Youth Smoking Prevention and State Revenue Enforcement Act. Subcommittee on Courts, the Internet, and Intellectual Property. May 1, 2003. (H.R. 1839).
20. Flag Protection Amendment. Subcommittee on the Constitution. May 7, 2003. (H.J. Res. 4).
21. War on Terrorism: Immigration Enforcement Since September 11, 2001. Subcommittee on Immigration, Border Security and Claims. May 8, 2003.
22. Direct Broadcast Satellite Service in the Multichannel Video Distribution Market. Committee on the Judiciary. May 8, 2003.
23. Class Action Fairness Act of 2003. Committee on the Judiciary. May 15, 2003. (H.R. 1115).
24. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, and the Need for Bankruptcy Reform. Subcommittee on Commercial and Administrative Law. March 4, 2003. (H.R. 975).
25. Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act. Subcommittee on Crime, Terrorism, and Homeland Security. April 29, 2003. (H.R. 21 and H.R. 1223).
26. Reauthorization of the Civil Rights Division of the United States Department of Justice. Subcommittee on the Constitution. May 15, 2003.

27. Bankruptcy Judgeship Act of 2003. Subcommittee on Commercial and Administrative Law. May 22, 2003. (H.R. 1428).

28. Reauthorization of the U.S. Department of Justice: Executive Office for U.S. Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for U.S. Trustees, and Office of the Solicitor General. Subcommittee on Commercial and Administrative Law. April 8, 2003.

29. Deadly Consequences on Illegal Alien Smuggling. Subcommittee on Immigration, Border Security, and Claims. June 24, 2003.

30. Federal Judiciary: Is There a Need for Additional Federal Judges? Subcommittee on Courts, the Internet, and Intellectual Property. June 24, 2003.

31. Consular Identification Cards. Subcommittee on Immigration, Border Security, and Claims. June 19, 26, 2003.

32. Intellectual Property Protection Restoration Act of 2003. Subcommittee on Courts, the Internet, and Intellectual Property. June 17, 2003. (H.R. 2344).

33. Cooperative Research and Technology Enhancement (CREATE) Act of 2003. Subcommittee on Courts, the Internet, and Intellectual Property. June, 10 2003. (H.R. 2391).

34. Immigration Relief Under the Convention Against Torture for Serious Criminals and Human Rights Violators. Subcommittee on Immigration, Border Security, and Claims. July 11, 2003.

35. Anti-Terrorism Investigations and the Fourth Amendment After September 11, 2001. Subcommittee on the Constitution. May 20, 2003.

36. Prison Rape Reduction Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. April 29, 2003. (H.R. 1707).

37. Piracy Deterrence and Education Act of 2003. Subcommittee on Courts, the Internet, and Intellectual Property. July 17, 2003. (H.R. 2517).

38. Patent Quality Improvement. Subcommittee on Courts, the Internet, and Intellectual Property. July 24, 2003.

39. Unborn Victims of Violence Act of 2003 or Laci and Conner's Law. Subcommittee on the Constitution. July 8, 2003. (H.R. 1997).

40. Personal Responsibility in Food Consumption Act. Subcommittee on Commercial and Administrative Law. June 19, 2003. (H.R. 339).

41. Hometown Heroes Survivors Benefits Act. Subcommittee on Crime, Terrorism, and Homeland Security. June 26, 2003. (H.R. 919).

42. Reduction in Distribution of SPAM Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. July 8, 2003. (H.R. 2214).

43. Reauthorization of the United States Department of Justice: Criminal Law Enforcement. Subcommittee on Crime, Terrorism, and Homeland Security. May 6, 14, 2003.

44. Anti-Hoax Terrorism Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. July 10, 2003. (H.R. 1678).

45. Defense of Privacy Act and Privacy in the Hands of the Government. Subcommittee on Commercial and Administrative Law jointly with the Subcommittee on the Constitution. July 22, 2003. (H.R. 338).

46. Advancing Justice Through Forensic DNA Technology. Subcommittee on Crime, Terrorism, and Homeland Security. July 17, 2003.

47. Should There be a Social Security Totalization Agreement with Mexico? Subcommittee on Immigration, Border Security, and Claims. September 11, 2003.

48. Potential Congressional Responses to the Supreme Court's Decision in State Farm Mutual Automobile Ins. Co. v. Campbell: Checking and Balancing Punitive Damages. Subcommittee on the Constitution. September 23, 2003.

49. Crime Victims Constitutional Amendment. Subcommittee on the Constitution. September 30, 2003. (H.J. Res. 48).

50. Internet Domain Name Fraud—The U.S. Governments Role in Ensuring Public Access to Accurate Whois Data. Subcommittee on Courts, the Internet, and Intellectual Property. September 4, 2003.

51. Database and Collections of Information Misappropriations. Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary jointly with the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce. September 23, 2003. (Committee on Energy and Commerce Serial No. 108–46).

52. Visa Overstays: A Growing Problem for Law Enforcement. Subcommittee on Immigration, Border Security, and Claims. October 16, 2003.

53. GAO's Recent Report on the Implementation of Exectutive Order 12630 and the State of Federal Agency Protections of Private Property Rights. Subcommittee on the Constitution. October 16, 2003.

54. Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003. Subcommittee on Courts, the Internet, and Intellectual Property. October 21, 2003. (H.R. 2723).

55. Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission. Task Force on Antitrust. July 24, 2003.

56. Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR ACT). Subcommittee on Immigration, Border Security and Claims. October 1, 2003. (H.R. 2671).

57. Streamlined Sales and Use Tax Agreement: States' Efforts to Facilitate Sales Tax Collection from Remote Vendors. Subcommittee on Commercial and Administrative Law. October 1, 2003.

58. Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series. Committee on the Judiciary. September 4, 2003.

59. United States Department of Justice. Committee on the Judiciary. June 5, 2003.

60. Prospects for American Workers: Immigration's Impacts. Subcommittee on Immigration, Border Security, and Claims. October 30, 2003.

61. Anti-Counterfeiting Amendments of 2003. Subcommittee on Courts, the Internet, and Intellectual Property. February 12, 2004. (H.R. 3632).

62. Saving the Savings Clause: Congressional Intent, the Trinko Case, and the Role of Antitrust Laws in Promoting Competition in the Telecom Sector. Committee on the Judiciary. November 19, 2003.

63. Fraudulent Online Identity Sanctions Act. Subcommittee on Courts, the Internet, and Intellectual Property. February 4, 2004.

64. Terrorist Threat Integration Center (TTIC) and Its Relationship with the Departments of Justice and Homeland Security. Committee on the Judiciary jointly with the Select Committee on Homeland Security, July 22, 2003.

65. Homeland Security: The Balance Between Crisis and Consequence Management through Training and Assistance. Subcommittee on Crime, Terrorism, and Homeland Security. November 20, 2003. (H.R. 2512, H.R. 3266, H.R. 3158).

66. Civil Rights Division of the U.S. Department of Justice. Subcommittee on the Constitution. March 2, 2004.

67. Appropriate Role of Foreign Judgements in the Interpretation of American Law. Subcommittee on the Constitution. March 25, 2004. (H. Res. 568).

68. Funding for Immigration in the President's 2005 Budget. Subcommittee on Immigration, Border Security, and Claims. February 25, and March 11, 2004.

69. Reauthorization of the Satellite Home Viewer Improvement Act. Subcommittee on the Courts, the Internet, and Intellectual Property. February 24, 2004.

70. Defense of Marriage Act. Subcommittee on the Constitution. March 30, 2004.

71. Anabolic Steroid Control Act of 2004. Subcommittee on Crime, Terrorism, and Homeland Security. March 16, 2004. (H.R. 3866).

72. Committee Print to Amend the Federal Trademark Dilution Act. Subcommittee on Courts, the Internet, and Intellectual Property. April 22, 2004.

73. Alien Removals Under Operation Predator. Subcommittee on Immigration, Border Security, and Claims. March 4, 2004.

74. Identity Theft Penalty Enhancement Act, and the Identity Theft Investigation and Prosecution Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. March 23, 2004. (H.R. 1731, H.R. 3693).

75. Section 115 of the Compliance Act: In Need of an Update? Subcommittee on Courts, the Internet, and Intellectual Property. March 11, 2004.

76. Legal Threats to Traditional Marriage: Implications for Public Policy. Subcommittee on the Constitution. April 22, 2004.

77. U.S.–VISIT—A Down Payment on Homeland Security. Subcommittee on Immigration, Border Security, and Claims. March 18, 2004.

78. How Would Millions of Guest Workers Impact Working Americans and Americans Seeking Employment? Subcommittee on Immigration, Border Security, and Claims. March 24, 2004.

79. Reauthorization of the U.S. Department of Justice: Executive Office for U.S. Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for U.S. Trustees, and Office of the Solicitor General. Subcommittee on Commercial and Administrative Law. March 9, 2004.

80. Operations of the U.S. Copyright Office. Subcommittee on Courts, the Internet, and Intellectual Property. June 3, 2004.

81. To Prescribe the Oath of Reunification and Allegiance for Purposes of the Immigration and Nationality Act. Subcommittee on Immigration, Border Security, and Claims. April 1, 2004. (H.R. 3191).

82. Diversity Visa Program and Its Susceptibility to Fraud and Abuse. Subcommittee on Immigration, Border Security, and Claims. April 29, 2004.
83. Law Enforcement Efforts Within the Department of Homeland Security. Subcommittee on Crime, Terrorism, and Homeland Security. February 3, 2004.
84. Business Activity Tax Simplification Act of 2003. Subcommittee on Commercial and Administrative Law. May 13, 2004. (H.R. 3220).
85. Privacy in the Hands of the Government: The Privacy Officer for the Department of Homeland Security. Subcommittee on Commercial and Administrative Law. February 10, 2004.
86. Progress in Consolidating Terrorist Watchlists—The Terrorist Screening Center (TSC). Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary jointly with the Subcommittee on Intelligence and Counterterrorism of the Select Committee on Homeland Security. March 25, 2004.
87. Terrorist Penalties Enhancement Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. April 21, 2004. (H.R. 2934).
88. Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives. Subcommittee on Immigration, Border Security, and Claims. May 18, 2004.
89. Private Security Officer Employment Authorization Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. March 30, 2004. (S. 1743).
90. Federal Marriage Amendment (The Musgrave Amendment). Subcommittee on the Constitution. May 13, 2004. (H.J. Res. 56).
91. Patent Quality Improvement: Post Grant Opposition. Subcommittee on Courts, the Internet, and Intellectual Property. June 24, 2004.
92. Limiting Federal Court Jurisdiction to Protect Marriage for the States. Subcommittee on the Constitution. June 24, 2004.
93. Derivative Rights, Moral Rights, and Movie Filtering Technology. Subcommittee on Courts, the Internet, and Intellectual Property. May 20, 2004.
94. Family Movie Act of 2004. Subcommittee on Courts, the Internet, and Intellectual Property. June 17, 2004. (H.R. 4586).
95. Safeguarding Americans From a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse. Committee on the Judiciary. June 22, 2004.
96. Families and Businesses in Limbo: The Detrimental Impact of the Immigration Backlog. Subcommittee on Immigration, Border Security, and Claims. June 17, 23, 2004.
97. Law Enforcement Officers Safety Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. June 15, 2004. (H.R. 218).
98. Mentally Ill Offender Treatment and Crime Reduction Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. June 22, 2004. (S. 1194).
99. Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters. Subcommittee on Courts, the Internet, and Intellectual Property. July 15, 2004.
100. Legal Services Corporation: Inquiry into the Activities of the California Rural Legal Assistance Program and Testimony Relating to the Merits of Client Co-pay. Subcommittee on Commercial and Administrative Law. March 31, 2004.
101. Child Custody Protection Act. Subcommittee on the Constitution. July 20, 2004. (H.R. 1755).
102. Regulatory Aspects of Voice Over Internet Protocol (VoIP). Subcommittee on Commercial and Administrative Law. July 23, 2004.
103. Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004. Subcommittee on Crime, Terrorism, and Homeland Security. July 6, 2004. (H.R. 4547).
104. Anti-Terrorism Intelligence Tools Improvement Act of 2003. Subcommittee on Crime, Terrorism, and Homeland Security. May 18, 2004. (H.R. 3179).
105. Constitution Restoration Act of 2004. Subcommittee on Courts, the Internet, and Intellectual Property. September 13, 2004. (H.R. 3799).
106. Due Process and the NCAA. Subcommittee on the Constitution. September 14, 2004.
107. Good Samaritan Volunteer Firefighter Assistance Act of 2003, the Nonprofit Athletic Organization Protection Act of 2003, and the Volunteer Pilot Organization Protection Act. Committee on the Judiciary. July 20, 2004. (H.R. 1787, H.R. 3369, and H.R. 1084).
108. Status of the Implementation of the Pigford v. Glickman Settlement. Subcommittee on the Constitution. September 28, 2004.
109. Reauthorization of the Administrative Conference of the United States. Subcommittee on Commercial and Administrative Law. May 20, 2004 and June 24, 2004.
110. Presidential Secession Act. Subcommittee on the Constitution. October 6, 2004.

111. Should Congress Extend the October 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports? Committee on the Judiciary. April 21, 2004.

112. Peer-to-Peer Piracy on University Campuses: An Update. Subcommittee on Courts, the Internet, and Intellectual Property. October 5, 2004.

113. Privacy and Civil Liberties in the Hands of the Government Post-September 11, 2001: Recommendations of the 9/11 Commission and the U.S. Department of Defense Technology and Privacy Advisory Committee. Subcommittee on Commercial and Administrative Law jointly with the Subcommittee on the Constitution. August 20, 2004.

114. Administration of Large Business Bankruptcy Reorganizations: Has Competition for Big Cases Corrupted the Bankruptcy System? Subcommittee on Commercial and Administrative Law. July 21, 2004.

115. Recommendations of the 9/11 Commission. Subcommittee on Crime, Terrorism, and Homeland Security. August 23, 2004.

116. Federal Offender Reentry and Protecting Children from Criminal Recidivists. Subcommittee on Crime, Terrorism, and Homeland Security. October 7, 2004.

117. "Notice" Provision in the Pigford v. Glickman Consent Decree. Subcommittee on the Constitution. November 18, 2004.

Committee Prints

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1. Federal Rules of Appellate Procedure. December 1, 2003.
2. Federal Rules of Civil Procedure. December 1, 2003.
3. Federal Rules of Criminal Procedure. December 1, 2003.
4. Federal Rules of Evidence. December 1, 2003.

House Documents

H. Doc. No. and Title

108–37. Legislative Proposal for the Millennium Challenge Act of 2003. Communication from the President of the United States transmitting a legislative proposal to establish the Millenium Challenge Account and the Millennium Challenge Corporation. Referred jointly to the Committees on International Relations, Ways and Means, the Judiciary, Resources, and Government Reform. February 11, 2003. (Executive Communication No. 644).

108–56. Amendments to the Federal Rules of Civil Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Civil Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072. March 27, 2003. (Executive Communication No. 1493).

108–57. Amendments to the Federal Rules of Evidence. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Evidence that have been adopted by the Court, pursuant to 28 U.S.C. 2072. March 27, 2003. (Executive Communication No. 1494).

108–58. Amendments to the Federal Rules of Bankruptcy Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2075. March 27, 2003. (Executive Communication No. 1495).

108–59. Amendments to the Federal Rules of Appellate Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Appellate Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072. March 27, 2003. (Executive Communication No. 1496).

108–89. Notification of the Required Changes to the United States-Singapore Free Trade Agreement. Communication from the President of the United States transmitting notification of changes to existing law required to bring the United States into compliance with obligations under the United States-Singapore Free Trade Agreement, pursuant to Pub. L. 107–210, Sec. 2105(a)(1)(B). Referred jointly to the Committees on Ways and Means and the Committee on the Judiciary. July 7, 2003. (Executive Communication No. 3007).

108–90 Notification of the Required Changes to the United States-Chile Free Trade Agreement. Communication from the President of the United States transmitting notification of changes to existing law required to bring the United States into compliance with obligations under the United States-Chile Free Trade Agreement, pursuant to Pub. L. 107–210, Sec. 2105(a)(1)(B). Referred jointly to the Committee on Ways and Means and the Committee on the Judiciary. July 7, 2003. (Executive Communication No. 3006).

108–100. The United States-Singapore Free Trade Agreement. Message from the President of the United States transmitting a draft proposed legislation and supporting documents to implement the United States-Singapore Free Trade Agreement (FTA), pursuant to 19 U.S.C. 3805(a)(1)(A) and (B). Referred jointly to the Committee on Ways and Means and the Committee on the Judiciary. July 16, 2003. (Presidential Message No. 40).

108–101. The United States-Chile Free Trade Agreement. Message from the President of the United States transmitting a draft proposed legislation and supporting documents to implement the United States-Chile Free Trade Agreement (FTA), pursuant to 19 U.S.C. 3805(a)(1)(A) and (B). Referred jointly to the Committee on Ways and Means and the Committee on the Judiciary. July 16, 2003. (Presidential Message No. 41).

108–131. Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, pursuant to Pub. L. 107–296, Sec. 428(e)(8)(A). Referred jointly to the Committee on the Judiciary and the Select Committee on Homeland Security. October 1, 2003. (Presidential Message No. 46).

108–181. Amendments to the Federal Rules of Bankruptcy Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2075. April 28, 2004. (Executive Communication No. 7864).

108–182. Amendments to the Federal Rules of Criminal Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting the Federal Rules of Criminal Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072. April 28, 2004. (Executive Communication No. 7865).

Summary of Activities of the Committee on the Judiciary

LEGISLATION ENACTED INTO LAW

A variety of legislation within the Committee's jurisdiction was enacted into law during the 108th Congress. The public and private laws, along with approved resolutions, are listed below and are more fully detailed in the subsequent sections of this report recounting the activities of the Committee and its individual subcommittees.

PUBLIC LAWS

Public Law 108–6—To authorize salary adjustments for Justices and judges of the United States for fiscal year 2003. (H.R. 16) (Approved February 13, 2003).

Public Law 108–20—To provide benefits and other compensation for certain individuals with injuries resulting from administration of smallpox countermeasures, and for other purposes. "Smallpox Emergency Personnel Protection Act of 2003". (H.R. 1770) (Approved April 30, 2003; effective date November 25, 2002, for tort liability provisions).

Public Law 108–21—To prevent child abduction and the sexual exploitation of children, and for other purposes. "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003", or "PROTECT Act", "Code Adam Act of 2003", "Secure Authentication Feature and Enhanced Identification De-

fense Act of 2003" or "SAFE ID Act", "Illicit Drug Anti-Proliferation Act of 2003". (S. 151) (Approved April 30, 2003; effective dates vary).

Public Law 108–29—To further the protection and recognition of veterans' memorials, and for other purposes. "Veterans' Memorial Preservation and Recognition Act of 2003". (S. 330) (Approved May 29, 2003).

Public Law 108–38—Expressing the sense of Congress with respect to raising awareness and encouraging prevention of sexual assault in the United States and supporting the goals and ideals of National Sexual Assault Awareness and Prevention Month. (S.J. Res. 8) (Approved June 26, 2003).

Public Law 108–61—To sanction the ruling Burmese military junta, to strengthen Burma's democratic forces and support and recognize the National League of Democracy as the legitimate representative of the Burmese people, and for other purposes. "Burmese Freedom and Democracy Act of 2003". (H.R. 2330) (Approved July 28, 2003; effective date thirty days after enactment for ban against trade provision).

Public Law 108–68—To amend the PROTECT Act to clarify certain volunteer liability. (S. 1280) (Approved August 1, 2003).

Public Law 108–73—To extend for six months the period for which chapter 12 of title 11 of the United States Code is reenacted. "Family Farmer Bankruptcy Relief Act of 2003". (H.R. 2465) (Approved August 15, 2003; effective date July 1, 2003).

Public Law 108–77—To implement the United States-Chile Free Trade Agreement. (H.R. 2738) (Approved September 3, 2003).

Public Law 108–78—To implement the United States-Singapore Trade Agreement. "United States-Singapore Free Trade Agreement Implementation Act". (H.R. 2739) (Approved September 3, 2003; effective dates vary).

Public Law 108–79—To provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape. "Prison Rape Elimination Act of 2003". (S. 1435) (Approved September 4, 2003).

Public Law 108–99—To amend the Immigration and Nationality Act to extend for an additional 5 years the special immigrant religious worker program. (H.R. 2152) (Approved October 15, 2003; effective date October 1, 2003).

Public Law 108–105—To prohibit the procedure commonly known as partial-birth abortion. "Partial-Birth Abortion Ban Act of 2003". (S. 3) (Approved November 5, 2003; effective date November 6, 2003).

Public Law 108–136—To authorize appropriations for fiscal year 2004 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe strengths for such fiscal year for the Armed Forces, and for other purposes. "National Defense Authorization Act for Fiscal Year 2004". "Randolph-Sheppard Act", "Services Acquisition Reform Act of 2003", "Military Construction Authorization Act for Fiscal Year 2004", "Maritime Security Act of 2003", "Nuclear Security Initiative Act of 2003". (H.R. 1588) (Approved November 24, 2003; effective dates vary).

Public Law 108–148—To improve the capacity of the Secretary of Agriculture and the Secretary of the Interior to plan and conduct hazardous fuels reduction projects on National Forest System lands and Bureau of Land Management lands aimed at protecting communities, watersheds, and certain other at-risk lands from catastrophic wildfire, to enhance efforts to protect watersheds and address threats to forest and rangeland health, including catastrophic wildfire, across the landscape, and for other purposes. "Healthy Forests Restoration Act of 2003". (H.R. 1904) (Approved December 3, 2003).

Public Law 108–156—To extend and expand the basic pilot program for employment eligibility verification, and for other purposes. "Basic Pilot Program Extension and Expansion Act of 2003". (S. 1685) (Approved December 3, 2003).

Public Law 108–157—To provide for Federal court proceedings in Plano, Texas. (S. 1720) (Approved December 3, 2003).

Public Law 108–167—To authorize salary adjustments for Justices and judges of the United States for fiscal year 2004. (H.R. 3349) (Approved December 6, 2003).

Public Law 108–174—To reauthorize the ban on undetectable firearms. (H.R. 3348) (Approved December 9, 2003).

Public Law 108–176—To amend title 49, United States Code, to reauthorize programs for the Federal Aviation Administration, and for other purposes. (H.R. 2115) (Approved December 12, 2003).

Public Law 108–178—To improve the United States Code. (H.R. 1437) (Approved December 15, 2003; effective date August 21, 2002).

Public Law 108–182—To ensure that a public safety officer who suffers a fatal heart attack or stroke while on duty shall be presumed to have died in the line of duty for purposes of public safety officer survivor benefits. "Hometown Heroes Survivors Benefits Act of 2003". (S. 459) (Approved December 15, 2003).

Public Law 108–187—To regulate interstate commerce by imposing limitations and penalties on the transmission of unsolicited commercial electronic mail via the Internet. "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" or the "CAN–SPAM Act of 2003". (S. 877) (Approved December 16, 2003; effective date January 1, 2004, except for section 9).

Public Law 108–188—To approve the Compact of Free Association, as amended, between the Government of the United States of America and the Government of the Federated States of Micronesia, and the Compact of Free Association, as amended, between the Government of the United States of America and the Government of the Republic of the Marshall Islands, and to appropriate funds to carry out the amended Compacts. "Compact of Free Association Amendments Act of 2003". (H.J. Res. 63) (Approved December 17, 2003; effective dates vary).

Public Law 108–193—To authorize appropriations for fiscal years 2004 and 2005 for the Trafficking Victims Protection Act of 2000, and for other purposes. "Trafficking Victims Protection Reauthorization Act of 2003". (H.R. 2620) (Approved December 19, 2003).

Public Law 108–198—To prohibit the offer of credit by a financial institution to a financial institution examiner, and for other pur-

poses. "Preserving Independence of Financial Institution Examinations Act of 2003". (S. 1947) (Approved December 19, 2003).

Public Law 108–212—To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes. "Unborn Victims of Violence Act of 2004" or "Laci and Conner's Law". (H.R. 1997) (Approved April 1, 2004).

Public Law 108–237—To encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards, and for other purposes. "Standards Development Organization Advancement Act of 2004". (H.R. 1086) (Approved June 22, 2004).

Public Law 108–238—To authorize assistance for the National Great Blacks in Wax Museum and Justice Learning Center. "National Great Black Americans Commemoration Act of 2004". (S. 1233) (Approved June 22, 2004).

Public Law 108–275—To amend title 18, United States Code, to establish penalties for aggravated identity theft, and for other purposes. "Identity Theft Penalty Enhancement Act". (H.R. 1731) (Approved July 15, 2004).

Public Law 108–277—To amend title 18, United States Code, to exempt qualified current and former law enforcement officers from State laws prohibiting the carrying of concealed handguns. "Law Enforcement Officers Safety Act of 2004". (H.R. 218) (Approved July 22, 2004).

Public Law 108–281—To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference. (H.R. 1303) (Approved August 2, 2004).

Public Law 108–299—To modify certain deadlines pertaining to machine-readable, tamper-resistant entry and exit documents. (H.R. 4417) (Approved August 9, 2004).

Public Law 108–304—To designate certain conduct by sports agents relating to the signing of contracts with student athletes as unfair and deceptive acts or practices to be regulated by the Federal Trade Commission. "Sports Agent Responsibility and Trust Act". (H.R. 361) (Approved September 24, 2004).

Public Law 108–326—To clarify the tax treatment of bonds and other obligations issued by the Government of American Samoa. (H.R. 982) (Approved October 16, 2004).

Public Law 108–333—To promote human rights and freedom in the Democratic People's Republic of Korea, and for other purposes. "North Korean Human Rights Act of 2004". (H.R. 4011) (Approved October 18, 2004).

Public Law 108–344—To revise and extend the Boys and Girls Clubs of America. (S. 2363) (Approved October 18, 2004).

Public Law 108–347—To provide for the promotion of democracy, human rights, and rule of law in the Republic of Belarus and for the consolidation and strengthening of Belarus sovereignty and independence. "Belarus Democracy Act of 2004". (H.R. 854) (Approved October 20, 2004).

Public Law 108–356—To extend certain authority of the Supreme Court Police, modify the venue of prosecutions relating to

the Supreme Court building and grounds, and authorize the acceptance of gifts to the United States Supreme Court. (S. 2742) (Approved October 21, 2004).

Public Law 108–357—To amend the Internal Revenue Code of 1986 to remove impediments in such Code and make our manufacturing, service, and high-technology businesses and workers more competitive and productive both at home and abroad. "American Jobs Creation Act of 2004". (H.R. 4520) (Approved October 22, 2004; effective dates vary).

Public Law 108–358—To amend the Controlled Substances Act to clarify the definition of anabolic steroids and to provide for research and education activities relating to steroids and steroid precursors. "Anabolic Steroids Control Act of 2004". (S. 2195) (Approved October 22, 2004; effective dates vary).

Public Law 108–369—To extend for eighteen months the period for which chapter 12 of title 11, United States Code, is reenacted. "Family Farmer Bankruptcy Relief Act of 2004". (S. 2864) (Approved October 25, 2004; effective date January 1, 2004).

Public Law 108–370—To amend the International Child Abduction Remedies Act to limit the tort liability of private entities or organizations that carry out responsibilities of the United States Central Authority under that Act. "Prevention of Child Abduction Partnership Act". (S. 2883) (Approved October 25, 2004).

Public Law 108–371—To modify and extend certain privatization requirements of the Communications Satellite Act of 1962. (S. 2896) (Approved October 25, 2004).

Public Law 108–372—To reauthorize the State Justice Institute. "State Justice Institute Reauthorization Act of 2004". (H.R. 2714) (Approved October 25, 2004).

Public Law 108–375—To authorize appropriations for fiscal year 2005 for military activities of the Department of Defense, to prescribe military personnel strengths for fiscal year 2005, and for other purposes. "Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005". (H.R. 4200) (Approved October 28, 2004; effective dates vary).

Public Law 108–390—To amend section 274A of the Immigration and Nationality Act to improve the process for verifying an individual's eligibility for employment. (H.R. 4306) (Approved October 30, 2004; effective dates vary).

Public Law 108–401—To amend title 5, United States Code, to authorize appropriations for the Administrative Conference of the United States for fiscal years 2005, 2006, and 2007, and for other purposes. "Federal Regulatory Improvement Act of 2004". (H.R. 4917) (Approved October 30, 2004).

Public Law 108–405—To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes. "Justice for All Act". (H.R. 5107) (Approved October 30, 2004).

Public Law 108–414—To foster local collaborations which will ensure that resources are effectively and efficiently used within the criminal and juvenile justice systems. "Mentally Ill Offender Treatment and Crime Reduction Act of 2004". (S. 1194) (Approved October 30, 2004).

Public Law 108–419—To amend title 17, United States Code, to replace copyright arbitration royalty panels with Copyright Royalty Judges, and for other purposes. "Copyright Royalty and Distribution Reform Act of 2004". (H.R. 1417) (Approved November 30, 2004).

Public Law 108–441—To improve access to physicians in medically underserved areas. (S. 2302) (Approved December 3, 2004).

Public Law 108–446—To reauthorize the Individuals with Disabilities Act, and for other purposes. "Individuals with Disabilities Education Improvement Act of 2004". (H.R. 1350) (Approved December 3, 2004).

Public Law 108–449—To amend and extend the Irish Peace Process Cultural and Training Program Act of 1998. (H.R. 2655) (Approved December 10, 2004).

Public Law 108–453—To amend title 35, United States Code, to promote cooperative research involving universities, the public sector, and private enterprises. "Cooperative Research and Technology Enhancement (CREATE) Act of 2004". (S. 2192) (Approved December 10, 2004).

Public Law 108–455—To extend the authority of the United States District Court for the Southern District of Iowa to hold court in Rock Island, Illinois. (S. 2873) (Approved December 10, 2004).

Public Law 108–458—To reform the intelligence community and the intelligence and intelligence-related activities of the United States Government, and for other purposes. (S. 2845) (Approved December 17, 2004).

Public Law 108–482—To prevent and punish counterfeiting of copyrighted copies and phonorecords, and for other purposes. "Intellectual Property Protection and Courts Amendments Act of 2004". (H.R. 3632) (Approved December 23, 2004).

Public Law 108–491—To authorize salary adjustments for Justices and judges of the United States for fiscal year 2005. (H.R. 5363) (Approved December 23, 2004).

PRIVATE LAWS

Private Law 108–1—For the relief of Lindita Idrizi Heath. (S. 103) (Approved July 22, 2004).

Private Law 108–3—For the relief of Richi James Lesley. (H.R. 712) (Approved October 30, 2004).

Private Law 108–4—For the relief of Durreshahwar Durreshahwar, Nida Hasan, Asna Hasan, Anum Hasan, and Iqra Hasan. (H.R. 867) (Approved October 30, 2004).

Private Law 108–5—For the relief of Tanya Andrea Goudeau. (H.R. 530) (Approved December 23, 2004).

CONCURRENT AND SIMPLE RESOLUTIONS APPROVED

H. Con. Res. 414.—Expressing the sense of the Congress that, as Congress recognizes the 50th anniversary of the Brown v. Board of Education decision, all Americans are encouraged to observe this

anniversary with a commitment to continuing and building on the legacy of Brown. Agreed to by the House May 13, 2004; agreed to by the Senate May 19, 2004.

H. Res. 56.—Supporting the goals of the Japanese American, German American, and Italian American communities in recognizing a National Day of Remembrance to increase public awareness of the events surrounding the restriction, exclusion, and internment of individuals and families during World War II. Agreed to by the House March 4, 2004.

H. Res. 132.—Expressing the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in Newdow v. United States Congress is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned, and for other purposes. Agreed to by the House March 20, 2003.

H. Res. 180.—Supporting the goals and ideals of "National Correctional Officers and Employees Week" and honoring the service of correctional officers and employees. Agreed to by the House May 20, 2003.

H. Res. 234.—Condemning bigotry and violence against Arab-Americans, Muslim-Americans, South Asian-Americans, and Sikh-Americans. Agreed to by the House October 7, 2003.

H. Res. 389.—Honoring the young victims of the Sixteenth Street Baptist Church bombing, recognizing the historical significance of the tragic event, and commending the efforts of law enforcement personnel to bring the perpetrators of this crime to justice on the occasion of its 40th anniversary. Agreed to by the House October 6, 2004.

H. Res. 412.—Honoring the men and women of the Drug Enforcement Administration on the occasion of its 30th Anniversary. Agreed to by the House March 4, 2004.

H. Res. 423.—Recognizing the 5th anniversary of the signing of the International Religious Freedom Act of 1998 and urging a renewed commitment to eliminating violations of the internationally recognized right to freedom of religion and protecting fundamental human rights. Agreed to by the House November 19, 2003.

H. Res. 662.—Recognizing that Flag Day originated in Ozaukee County, Wisconsin. Agreed to by the House June 14, 2004.

H. Res. 676.—Recognizing and honoring the 40th anniversary of congressional passage of the Civil Rights Act of 1964. Agreed to by the House June 24, 2004.

H. Res. 757.—Expressing the sense of the House of Representatives on the anniversary of the terrorist attacks launched against the United States on September 11, 2001. Agreed to by the House September 9, 2004.

H. Res. 853.—Recognizing the Boy Scouts of America for the public service the organization performs for neighborhoods and communities across the United States. Agreed to by the House November 20, 2004.

CONFERENCE APPOINTMENTS

Members of the Committee were named by the Speaker as conferees on the following bills which were not referred to the Committee but which contained legislative language within the Committee's Rule X jurisdiction:

H.R. 6 (S. 14)—To enhance energy conservation and research and development, to provide for security and diversity in the energy supply for the American people, and for other purposes. "Energy Policy Act of 2003". Passed the House April 11, 2003 (247 ayes; 175 noes). Passed the Senate, amended, July 31, 2003 (84 yeas; 14 nays). The Senate requested a conference July 31, 2003. The Senate appointed conferees September 4, 2003. The House agreed to a conference September 4, 2003. The House appointed conferees September 5, 2003 (including from the Committee on the Judiciary). Conference report filed in the House November 18 (leg. day 17), 2003 (H. Rept. 108–375). The House agreed to the conference report November 18, 2003 (246 yeas; 180 nays).

H.R. 1350 (S. 1248)—To reauthorize the Individuals with Disabilities Education Act, and for other purposes. "Improving Education Results for Children With Disabilities Act of 2003". Passed the House, amended, April 30, 2003 (251 ayes; 171 noes). Passed the Senate, amended, May 13, 2004 (95 yeas; 3 nays). The House requested a conference October 8, 2004. The House appointed conferees October 8, 2004 (including from the Committee on the Judiciary). The Senate agreed to a conference October 11, 2004. The Senate appointed conferees October 11, 2004. Conference report filed in the House November 17, 2004 (H. Rept. 108–779). The House agreed to the conference report November 19, 2004 (397 yeas; 3 nays). The Senate agreed to the conference report November 19, 2004 (unanimous consent). Approved by the President December 3, 2004—Public Law 108–446.

H.R. 1588 (S. 1050)—To authorize appropriations for fiscal year 2004 for military activities of the Department of Defense, to prescribe military personnel strengths for fiscal year 2004, and for other purposes. "National Defense Authorization Act for Fiscal Year 2004". Passed the House, amended, May 22, 2003 (361 ayes; 68 noes). Passed the Senate, amended, June 4, 2003. The Senate requested a conference June 4, 2003, and appointed conferees. The House agreed to a conference July 16, 2003, and appointed conferees (including from the Committee on the Judiciary). Conference report filed in the House November 7 (leg. day November 6), 2003 (H. Rept. 108–354). The House agreed to the conference report November 7, 2003 (362 yeas; 40 nays, 2 "present"). The Senate agreed to the conference report November 12, 2003 (95 yeas; 3 nays). Approved by the President November 24, 2003—Public Law 108–136.

H.R. 2115 (S. 824)—To amend title 49, United States Code, to reauthorize programs for the Federal Aviation Administration, and for other purposes. "Flight 100—Century of Aviation Reauthorization Act". Passed the House, amended, June 11, 2003 (418 yeas; 8 nays). Passed the Senate, amended, June 12, 2003. The Senate requested a conference June 12, 2003, and appointed conferees. The House agreed to a conference July 15, 2003, and appointed conferees (including from the Committee on the Judiciary). Conference report filed in the House July 25, 2003 (H. Rept. 108–240). Further conference report filed in the House October 29, 2003 (H. Rept. 108–334). The House agreed to the further conference report (H. Rept. 108–334) October 30, 2003. (211 ayes; 207 noes). The Senate agreed to the further conference report (H. Rept. 108–334) Novem-

ber 21, 2003. Approved by the President December 12, 2003—Public Law 108–176.

H.R. 4200 (S. 2400)—To authorize appropriations for fiscal year 2005 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes. "National Defense Authorization Act for Fiscal Year 2005". Passed the House, amended, May 20, 2004 (391 yeas; 34 nays). Passed the Senate, amended, June 23, 2004. The Senate requested a conference and appointed conferees June 24, 2003. The House agreed to a conference and appointed conferees September 28, 2004 (including from the Committee on the Judiciary). Conference held September 29, 2004. Conference report filed in the House October 8, 2004 (H. Rept. 108–676). The House agreed to the conference report October 9, 2004 (359 yeas; 14 nays). The Senate agreed to the conference report October 9, 2004 (unanimous consent). Approved by the President October 28, 2004—Public Law 108–375.

H.R. 4520 (S. 1637)—To amend the Internal Revenue Code of 1986 to remove impediments in such Code and make our manufacturing, service, and high-technology businesses and workers more competitive and productive both at home and abroad. "American Jobs Creation Act of 2004". Passed the House, amended, June 17, 2004 (251 yeas; 178 nays). Passed the Senate, amended, July 15, 2004 by voice vote. The Senate requested a conference and appointed conferees July 15, 2004. The House agreed to a conference and appointed conferees September 29, 2004 (including from the Committee on the Judiciary). Conference held September 29, October 4, 5, 6, 2004. Conference report filed in the House October 7, 2004 (H. Rept. 108–755). The House agreed to the conference report October 7, 2004 (280 yeas; 141 nays). The Senate agreed to the conference report October 11, 2004 (69 yeas; 17 nays). Approved by the President October 22, 2004—Public Law 108–357.

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wicsonsin, *Chairman* [1]

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
MELISSA A. HART, Pennsylvania
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
JOHN R. CARTER, Texas
TOM FEENEY, Florida
MARSHA BLACKBURN, Tennessee

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SANCHEZ, California

[1] F. James Sensenbrenner, Jr., Wisconsin, elected to the Committee as Chairman pursuant to House Resolution 24, approved by the House January 8, 2003.

Republican Members elected to the Committee pursuant to House Resolution 33, approved by the House January 28, 2003.

[2] John Conyers, Jr., elected to the Committee as ranking minority Member pursuant to House Resolution 22, approved by the House January 8, 2003.

Democratic Members elected to the Committee pursuant to House Resolution 35, approved by the House January 28, 2003.

Tabulation of activity on legislation held at the full Committee

Legislation held at the full Committee	77
Legislation failed to be ordered reported to the House	1
Legislation reported favorably to the House	25
Legislation reported adversely to the House	2
Legislation discharged from the Committee	8
Legislation pending in the House	9
Legislation failed passage by the House	2
Legislation passed by the House	25
Legislation pending in the Senate	17
Legislation enacted into public law as part of another measure	17
Legislation enacted into public law	8
House concurrent resolutions approved	1
House resolutions approved	1
Legislation on which hearings were held	5
Days of legislative hearings	3
Days of oversight hearings	7

FULL COMMITTEE ACTIVITIES

During the 108th Congress the full Committee on the Judiciary Committee maintained its original jurisdiction with respect to a number of legislative and oversight matters. This included exclusive jurisdiction over antitrust and liability issues, including med-

ical malpractice and product liability, legal reform generally, and such other matters as determined by the Chairman.

LEGISLATIVE ACTIVITIES

ANTITRUST

The Committee on the Judiciary has jurisdiction over all laws relating to antitrust. United States antitrust laws are tailored to ensure the competitive functioning of the marketplace—*i.e. competition in the marketplace and not the protection of any individual competitor.* There are two principal antitrust laws in the United States—the Sherman Act and the Clayton Act. Both are enforceable by the Antitrust Division of the Department of Justice (DOJ), the Federal Trade Commission (FTC), and private persons. Other federal agencies have authority to examine competitive aspects of market transactions within their jurisdiction. During the 108th Congress, the full Judiciary Committee retained original jurisdiction over antitrust legislative and oversight matters.

H.R. 1073, To repeal section 801 of the Revenue Act of 1916

Summary.—H.R. 1073 repeals the Antidumping Act of 1916 as enacted in Section 801 of the Revenue Act of 1916.[2] The 1916 Act has never formed the basis of a final ruling on the merits in any federal case. Nonetheless, on September 26, 2000, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) held that the 1916 Act violated United States obligations under the General Agreement on Tariffs and Trade (GATT), the Antidumping Agreement, and the WTO

Decisions by the WTO are not self-executing. As a result, on March 4, 2003, Chairman Sensenbrenner and Committee on Ways and Means Chairman Thomas introduced H.R. 1073 in order to bring the United States into conformity with the WTO ruling by repealing the 1916 Act. H.R. 1073 does not affect legal claims filed after the WTO decision or pending before enactment of the legislation. In addition, H.R. 1073 does not disturb existing antidumping remedies contained in U.S. trade law that survived the WTO ruling. As a result, U.S. industry may continue to avail itself of the comprehensive and internationally-compliant antidumping remedies enacted by the United States.

Under the 1916 Act, the importation of an article from a foreign country into the United States constitutes unlawful dumping if three elements are met. First, the price in the United States must be "substantially less" than the "actual market price or wholesale price of such articles * * * in the principal markets of the country of their production."[3] Second, the international price discrimination must be "common and systematic."[4] Third, the price discrimination must occur "with the intent of destroying or injuring an industry in the United States, or preventing the establishment of an industry in the United States, or of restraining or monopolizing

[2] Revenue Act of 1916, ch. 463, § 801, 39 Stat. 756, 798–99 (1916) (codified at 15 U.S.C. § 72 (2004)).
Agreement.
[3] 15 U.S.C. § 72 (2002).
[4] Id.

any part of trade and commerce in such articles in the United States."[5] If any person is held to have violated all three elements, the 1916 Act allows for the implementation of both criminal and civil penalties, including imprisonment of up to one year and treble damages.

The significance of the 1916 Act was largely eclipsed by subsequent antidumping legislation. Five years after passing the 1916 Act, Congress enacted more comprehensive Antidumping Act of 1921 which was repealed by the Trade Agreements Act of 1979 which provided a new set of remedies.[6] These antidumping remedies remain unaffected by the September 26, 2000 WTO decision. As a result, U.S. industry may continue to avail itself of the more comprehensive and internationally- compliant antidumping remedies contained in the 1979 Act and other United States trade legislation.

Legislative History.—H.R. 1073 was introduced by Chairman Sensenbrenner on March 4, 2003. Committee on Ways and Means Chairman Thomas co-sponsored the legislation. On January 28, 2003, the Judiciary Committee reported H.R. 1073 by voice vote (H. Rept. No. 108–415). H.R. 1073 was subsequently incorporated into H.R. 1047, the "Miscellaneous Trade and Technical Corrections Act of 2004," which was signed into law by the President on December 3, 2004 and became Public Law No. 108–429.

ESTABLISHMENT OF THE TASK FORCE ON ANTITRUST

The Committee on the Judiciary Task Force on Antitrust was created by a Judiciary Committee Resolution adopted on March 26, 2003. The resolution establishing the Task Force on Antitrust read as follows: "The Task Force will conduct hearings and investigations relating to the Committee's jurisdiction under clause 1(k)(15) of House Rule X—Protection of trade and commerce against unlawful restraints and monopolies—and other related matters as directed by the Chairman. Its purpose is to facilitate the consideration of antitrust matters before the Committee.

All House and Committee rules concerning hearing procedures will apply. Chairman Sensenbrenner and Ranking Member Conyers are the Chairman and Ranking Member of the Task Force and may designate a Member of the Committee to preside over its hearings. All Members of the Judiciary Committee are also members of the Task Force. This Task Force will be effective for six (6) months or until September 26, 2003."

The Task Force on Antitrust conducted a legislative hearing on H.R. 1086, the "Standards Development Organization Advancement Act of 2004" on April 9, 2003, and an oversight hearing titled "The Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission" on July 24, 2003.

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[5] Id.
[6] Id.

H.R. 1086, the "Standards Development Organization Advancement Act of 2004"

Summary.—Standard development organizations play a pivotal role in promoting free market competition. Technical standards form the basis of product competition by ensuring a common interface between technically-substitutable products. "Voluntary consensus standards" are technical standards written by hundreds of non-profit standard developing organizations such as the American Society of Mechanical Engineers, the American Society for Testing and Materials, and the National Fire Protection Association. While in most countries standards are promulgated by government agencies, the United States has shifted toward a model whereby standard development organizations (SDOs) develop voluntary consensus standards for use by industry and various levels of government. These standards are then codified in industry and government codes.

While standards are widely viewed to enhance competition, standard-setting activities might give rise to legitimate antitrust concerns if anticompetitive conduct such as output restrictions upon horizontal competition, market divisions, vertical restraints, or exclusionary conduct occur.[7] As the Supreme Court has recognized: "[An] agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products * * * Accordingly, private standard-setting organizations have traditionally been objects of antitrust scrutiny.[8]

Antitrust challenges to standard-setting activities are currently evaluated under the "rule of reason"—a judicially-created doctrine that seeks to balance the pro-competitive and anticompetitive market effects of a challenged practice before determining whether a violation of the antitrust laws has occurred.[9] The rationale for the application of this relatively lenient antitrust standard is that SDOs, as non-profits that serve a cross-section of an industry, are unlikely to engage in anticompetitive conduct to create market dominance. Potential anticompetitive conduct is also mitigated by the manner in which voluntary consensus standards are developed and implemented. In order to be utilized by Federal agencies, the process of developing voluntary standards must adhere to principles of openness, voluntariness, balance, cooperation, transparency, consensus, and due process. These requirements were most recently articulated in OMB Circular A–119 (February 19, 1998).[10]

Notwithstanding these safeguards, treble damages may still be awarded against SDOs if their conduct is determined to be anticompetitive under the rule of reason. Until recently, standard-setting activities were largely directed and managed by government entities that were completely immune from antitrust scrutiny. Beginning in the 1990s, Congress concluded that government could no longer keep pace with rapid technological and market change, and

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[7] Samuel Miller, Antitrust and Standard-Setting, Prac. L. Inst., July 21, 2001.

[8] *Allied Tube and Conduit Corp.* v. *Indian Head, Inc.* 486 U.S. 492, 500 (1988).

[9] See Northwest Wholesale Stationers, Inc. v. *Pacific Stationery and Printing Company,* 472 U.S. 284 (1985).

[10] Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8545 (February 19, 1998); available at http://www.whitehouse.gov/omb/circulars/a119/a119.html.

that government-directed, standard-setting activity was often cumbersome, duplicative, and inefficient. To address this concern, Congress passed the National Technology Transfer and Advancement Act of 1995[11] (NTTAA). NTTAA's express goal was to encourage government agencies to assist in the development of voluntary consensus standards and to adopt such standards in favor of often outmoded government standards whenever possible.[12] While the NTTAA has been successful by almost every measure, SDOs continue to be vulnerable to litigation even after its passage.

H.R. 1086, the "National Cooperative Standards Development Act of 2004," amends the National Cooperative Research Act (NCRA) to extend that Act's limited antitrust protections to specified activities of standard development organizations relating to the development of voluntary consensus standards. These amendments preserve and promote the ability of SDOs to issue standards by: (1) codifying the "rule of reason" for antitrust scrutiny of their activities; (2) eliminating the threat of treble damages for specified standards development activity if SDOs disclose the scope and nature of this activity to the Department of Justice and Federal Trade Commission; and (3) providing for the recovery of attorney fees to substantially prevailing parties.

As enacted, H.R. 1086 also contains important, bipartisan amendments that deter antitrust violations while strengthening antitrust enforcement efforts. Title II harmonizes the treatment of criminal antitrust offenders and white collar criminals by increasing maximum prison terms for criminal antitrust violations from three to ten years while increasing maximum individual fines for antitrust violations from $350,000 to $1 million. These enhancements serve to deter anticompetitive misconduct.

Title II also increases maximum corporate fines for antitrust violations from $10 million to $100 million. This considerable increase sends a clear signal to corporate officers and board rooms that a decision to violate the antitrust laws can rarely if ever be considered a profitable one. Title II of the legislation also contains important modifications to the antitrust leniency program utilized by the Department of Justice to facilitate the detection and prosecution of antitrust violations. Under existing law, parties that cooperate with federal antitrust authorities to uncover antitrust violations may not be subject to government prosecution, but remain liable for civil claims brought by private parties. H.R. 1086 creates an additional incentive for corporations to disclose antitrust violations by limiting their antitrust liability in related civil claims to actual damages. Furthermore, while a cooperating party would be liable only for damages attributable to that party's conduct, non-cooperating conspirators will remain jointly and severally liable for actual and treble damages for their misconduct. As a result, the full scope of antitrust remedies against non-participating parties will remain available to the government and private antitrust plaintiffs.

Finally, H.R. 1086 clarifies the Tunney Act. The Tunney Act gives federal district courts some authority to review the merits of civil antitrust settlements with the United States before entering

[11] Pub. L. No. 104–113, 110 Stat. 775 (1995).
[12] H.R. Rept. No. 104–390 (1995).

final consent decrees. Specifically, district courts in which the antitrust suit was brought must assess whether these decrees are "in the public interest." H.R. 1086 provides legislative guidance to district courts by listing specific factors to be considered during this analysis. In addition, this legislation facilitates the transmission of comments received during Tunney Act proceedings by allowing federal judges to order their publication by electronic or other means.

On Wednesday, April 9, 2003, the Committee's Task Force on Antitrust held a legislative hearing on H.R. 1086. The following witnesses testified: the Honorable James M. Shannon, President, National Fire Protection Association; David Karmol, Vice President, Public Affairs, American National Standards Institute; Earl Everett, Director, Department of Labor, Division of Safety Engineering, State of Georgia.

Legislative History.—H.R. 1086 was introduced by Chairman Sensenbrenner on March 5, 2003. Original cosponsors included: Ranking Member Conyers, Science Committee Chairman Boehlert, and Science Committee Ranking Member Hall. On May 22, 2003, H.R. 1086 was reported from the Committee on the Judiciary by voice vote (H.R. Rept. No.108–125). On June 4, 2003, the Judiciary Committee filed a supplemental report (H.R. Rept. No.108–125 Part II). On June 10, 2003, the House passed, as amended, H.R. 1086 by voice vote. On November 6, 2003, the Senate Judiciary Committee reported H.R. 1086 with an amendment in the nature of a substitute (without report). On April 2, 2004, the Senate passed H.R. 1086 as amended by unanimous consent. H.R. 1086 was signed by the President on June 22, 2004, and became Public Law No. 108–237.

OVERSIGHT HEARING ACTIVITY BY THE TASK FORCE ON ANTITRUST

Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and Bureau of Competition of the Federal Trade Commission, July 24, 2003 (Serial No. 55)

On Thursday, July 24, 2003, the Committee's Task Force on Antitrust held an oversight hearing titled "The Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission." The hearing focused on antitrust enforcement activities, priorities, and recent developments at both agencies. The following witnesses testified: the Honorable R. Hewitt Pate, Assistant Attorney General, Antitrust Division; and the Honorable Timothy J. Muris, Chairman, Federal Trade Commission.

Federal antitrust enforcement agencies

The antitrust laws are enforced by both the FTC's Bureau of Competition and the Antitrust Division of the Department of Justice. In order to prevent duplication of effort, the two agencies seek to coordinate their activities before opening any case.

Antitrust Division—Department of Justice

Although the Department of Justice was the primary antitrust enforcement agency following passage of the Sherman Act, the Antitrust Division was not formally established until 1933. The

DOJ Antitrust Division prosecutes serious and willful violations of the antitrust laws by filing criminal suits that can lead to large fines and jail sentences. When criminal prosecution is not appropriate, the Division institutes a civil action seeking a court order forbidding future violations of the law and requiring steps to remedy the anticompetitive effects of past violations. The Division provides guidance to the business community, much of it jointly with the Federal Trade Commission. This guidance takes the form of new and subsequently revised and expanded joint statements of policy that relate to the health care industry, guidelines for the licensing of intellectual property, and guidelines on international operations, and other matters.

Last year, the Antitrust Division had an annual budget of $133.13 million, and over 700 full time employees. For Fiscal Year 2004, the President has requested $141,898,000 for the Division. In Fiscal Year 2002, the Division conducted 107 Sherman Act investigations, 129 Clayton Act merger investigations, received nearly 1,200 Hart-Scott-Rodino premerger notifications, initiated 178 criminal, civil, non-merger, and merger inquiries, issued 573 civil investigation demands (CIDs), and filed 7 civil and 33 criminal antitrust cases.

Federal Trade Commission

Established in 1914, the Federal Trade Commission (FTC) enforces a variety of federal antitrust and consumer protection laws. The Commission seeks to ensure that the nation's markets function competitively and free of undue restrictions. The Commission also works to enhance the smooth operation of the marketplace by attempting to eliminate acts or practices that are unfair or deceptive. In general, the Commission's efforts are directed toward stopping actions that threaten consumers' opportunities to exercise informed choice. The FTC's antitrust arm, the Bureau of Competition, seeks to prevent business practices that restrain competition.

The Bureau carries out this mission by investigating alleged law violations and, when appropriate, recommending formal enforcement action. If the Commission does decide to take action, the Bureau will help to implement that decision through litigation in federal court or before administrative law judges. The Bureau also serves as a research and policy resource on competition issues. Unlike the DOJ Antitrust Division, the FTC has no power to convene grand juries or initiate criminal investigations, but it can and does refer possible criminal violations to the Antitrust Division.

The Bureau of Competition seeks to prevent anticompetitive mergers and other anticompetitive business practices in the marketplace. The Bureau reviews proposed mergers and other business practices for possible anticompetitive effects, and, when appropriate, recommends formal law enforcement action. The Bureau also serves as a research and policy resource on competition topics and provides guidance to business on complying with the antitrust laws. Over the last several years, the FTC has focused on segments of the economy that have the greatest impact on behalf of consumers, such as: prescription drugs and health care, energy, food, and utilities.

The Commission's merger enforcement activity focuses primarily on mergers between direct competitors ("horizontal" mergers), because these are most likely to harm consumers. The Commission also examines mergers involving firms at different levels of the same industry ("vertical" mergers) and those involving firms that exert a procompetitive influence because of the possibility of their entering a market ("potential competition" mergers). The Bureau also investigates antitrust complaints that do not involve mergers. These arrangements involve direct competitors ("horizontal" restraints, e.g. price fixing, non-competition arrangements), as well as suppliers and customers ("vertical" arrangements, e.g. tie-ins), and attempts at monopolization.

The FTC also organizes public workshops to examine emerging issues, such as competition and pricing on the Internet, the pricing of gasoline and other refined petroleum products, intellectual property and antitrust, health care and antitrust, and other current issues. For example, the FTC issued a comprehensive generic drug report in 2002, [13] and conducted a series of 24 public meetings with the Antitrust Division concerning examining antitrust implications of intellectual property law.[14]

The FTC's Bureau of Competition employs over 500 employees. The President has requested $81,433,000 for FY 2004, a $3 million increase over last year's request. Last year, the Commission received $173,000,000 in HSR filing fees. In Fiscal Year 2002, the FTC opened 59 nonmerger investigations. In Fiscal Year 2001, more than 4,900 merger notifications were filed during the year, the largest number ever. This continued a ten-year trend in which the number of filings more than tripled since 1991. The total value of reported transactions in FY 2000 exceeded $3 trillion—more than a tenfold increase over the past decade.

Over the last several years, the agency successfully challenged the proposed acquisition of the loose leaf chewing tobacco business of National Tobacco Company, L.P., by Swedish Match North America Inc. This acquisition would have combined the nation's largest and third-largest makers and sellers of loose leaf chewing tobacco, giving Swedish Match approximately 60 percent of sales and creating a market in which two firms would control 90 percent of sales. The parties dropped the transaction after the district court issued a preliminary injunction. The FTC also challenged Heinz's proposed acquisition of Beech-Nut, a merger of the second and third largest manufacturers of baby food, and the proposed acquisition of Winn Dixie supermarkets by Kroger Foods.

Antitrust issues raised at the hearing

Telecommunications and the triennial review

On February 2, 2003, the Federal Communications Commission (FCC) adopted new rules for telecommunications network unbundling obligations for incumbent local phone carriers. Among other things, the FCC established a new impairment standard to

[13] See Generic Drug Entry Prior to Patent Expiration, an FTC Study, July, 2002, available at http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

[14] See Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, available at http://www.ftc.gov/opp/intellect/.

help determine when competitive local exchange carriers (CLECs) are deprived access to an incumbent local exchange carrier (ILEC) platform and market-specific variations, including considerations of customer class, geography, and service. The Commission eliminated earlier obligations which permitted broadband line sharing via fiber loops. While the FCC's Triennial Review proceedings radically changed the competitive landscape of the telecommunications market, the Antitrust Division and FTC did not submit formal antitrust analyses to the FCC during its proceedings.

Section 271

Section 271 of the Telecommunications Act of 1996 requires the Antitrust Division to review competitive conditions in regional telephone markets before granting authority to Regional Bell Operating Companies (RBOCs) to compete in the long distance telephone market. These market- opening provisions have served to advance competition and are designed to ensure that RBOCs do not abuse their former monopoly status in an anticompetitive manner.

Biennial Review (Media Ownership)

On June 2, 2003, the FCC voted to substantially relax media ownership rules pursuant to its Biennial Review authority under the Telecommunications Act of 1996. These new rules represent the most comprehensive reform of media ownership limitations in the last several decades. The proposed media ownership rules would raise the present 35 percent national audience cap to allow the nation's four national television networks and other station owners to buy enough television stations to reach 45 percent of the national audience. These rules also permit greater cross-ownership of television stations and newspaper outlets, but preserve existing limitations on consolidation of existing networks. Notwithstanding the antitrust implications of media ownership proceedings, the Telecommunications Act contains no formal statutory role for the Antitrust Division to examine the competitive aspects of Biennial Review proceedings.

LIABILITY

H.R. 5—the "Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003"

Summary.—Medical professional liability insurance rates have soared, causing major insurers to either drop coverage or raise premiums to unaffordable levels. Doctors and other health care providers are being forced to abandon patients and practices, particularly in high-risk specialties such as emergency medicine, brain surgery, and obstetrics and gynecology. H.R. 5 is modeled after California's quarter-century old health care litigation reforms. The reforms of California's Medical Injury Compensation Reform Act ("MICRA"), which are included in the HEALTH Act, include a $250,000 cap on noneconomic damages; limits on the contingency fees lawyers can charge; and authorization for defendants to introduce evidence showing the plaintiff received compensation for losses from outside sources (to prevent double recoveries). The HEALTH Act also includes provisions creating a "fair share" rule,

by which damages are allocated fairly, in direct proportion to fault; reasonable guidelines—but not caps—on the award of punitive damages; and a safe harbor from punitive damages for products that meet applicable FDA safety requirements.

Legislative History.—H.R. 5, the "Help Efficient, Accessible, Low-cost Healthcare (HEALTH) Act of 2003," was introduced by Rep. James C. Greenwood on February 5, 2003. On March 4, 2003, the Committee held a hearing on H.R. 5 at which testimony was received from the following witnesses: Sherry Keller, Conyers, Georgia; Leanne Dyess, Member, Coalition for Affordable and Reliable Health Care; Donald J. Palmisano, MD, JD, President-elect, American Medical Association; and Lawrence E. Smarr, President, Physician Insurers Association of America. On March 5, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 5 with an amendment by a recorded vote of 15 to 13, a quorum being present. (H. Rept. No. 108–32, Part I). On March 13, 2003, H.R. 5 passed the House by a vote of 229 to 196, and 1 voting present. No further action was taken on the bill.

H.R. 1036—the "Protection of Lawful Commerce in Arms Act of 2003"

Summary.—H.R. 1036, the "Protection of Lawful Commerce in Arms Act," provides protections for those in the firearms industry from lawsuits arising out of the criminal or unlawful acts of people who criminally or unlawfully misuse their products. In the last several years, lawsuits have been filed against the firearms industry on theories of liability that would hold them liable for the actions of others who use their products in a criminal or unlawful manner.

H.R. 1036 provides that a "qualified civil liability action" cannot be brought in any State or Federal court. "Qualified civil liability action" is defined as a civil action brought by any person against a manufacturer or seller of firearms or ammunition for damages or injunctive relief resulting from the criminal or unlawful misuse of such products. However, a "qualified civil liability act" does not include: an action against a person who transfers a firearm or ammunition knowing that it will be used to commit a crime of violence or a drug trafficking crime, or a comparable or identical State felony law; an action brought against a seller for negligent entrustment or negligence per se; actions in which a manufacturer or seller of a qualified product violates a State or Federal statute applicable to sales or marketing when such violation was a proximate cause of the harm for which relief is sought; actions for breach of contract or warranty in connection with the purchase of a firearm or ammunition; and actions for damages resulting directly from a defect in design or manufacture of a firearm or ammunition.

Legislative History.—H.R. 1036, the "Protection of Lawful Commerce in Arms Act of 2003," was introduced by Rep. Cliff Stearns on February 27, 2003. On April 2, 2003, the Subcommittee on Commercial and Administrative Law held a hearing on H.R. 1036 at which testimony was received from the following witnesses: Carlton Chen, General Counsel, Colt Manufacturing Company, Inc.; Walter Olson, Senior Fellow, the Manhattan Institute; David Lemongello, Nutley, New Jersey; and Lawrence G. Keane, Vice President and General Counsel of the National Shooting Sport Foundation. On

April 3, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 1036 with amendment by a recorded vote of 21 to 11, a quorum being present. (H. Rept. No. 108–59). On April 9, 2003, H.R. 1036 passed the House by a vote of 285 to 140. No further action was taken on the bill.

H.R. 1084, the "Volunteer Pilot Organization Protection Act"

Summary.—H.R. 1084 amends the Volunteer Protection Act of 1997 to include volunteer pilots and volunteer pilot organizations within the scope of its protections. Under present law, nonprofit volunteer pilot organizations and their pilots that provide life-saving medical flights without compensation, and institutions that refer patients to volunteer pilot organizations are presently subject to legal jeopardy.

H.R. 1084 amends §4 of the VPA to ensure that volunteer pilot organizations and their employees, officers, and volunteer pilots acting within the scope of the mission of such organizations are explicitly covered by the VPA.

Legislative History.—H.R. 1084 was introduced by Rep. Ed Schrock, Rep. Randy Forbes, and four other co-sponsors on March 5, 2003 and referred to the Committee on the Judiciary. The full Committee on the Judiciary held one day of hearings on H.R. 1084 and two related bills, on July 20, 2004. On September 8, 2004, the full Committee on the Judiciary met in open session and ordered favorably reported the bill H.R. 1084, with an amendment, by a voice vote. The Committee's report on H.R. 1084 was filed on September 13, 2004 as H. Rept. No. 108–679 and the bill was placed on the Union Calendar. On September 14, 2004, Chairman Sensenbrenner moved that the House consider and pass H.R. 1084, as amended, under suspension of the rules. H.R. 1084 then passed the House under suspension of the rules on a roll call vote of 385–12. The bill was received in the Senate and placed on the legislative calendar, but H.R. 1084 had no further consideration by the Senate before the end of the 108th Congress.

H.R. 1787, the "Good Samaritan Volunteer Firefighter Assistance Act of 2004"

Summary.—H.R 1787 exempts a person who donates fire control or fire rescue equipment to a volunteer fire company (defined as at least 30% of members receiving little or no compensation) from liability for civil damages for injuries, damages, or losses proximately caused by the donated equipment. The bill creates two exceptions from the general protection if the donor is either the manufacturer of the equipment or engages in gross negligence or intentional misconduct.

Legislative History.—H.R. 1787 was introduced by Rep. Mike Castle, and 25 other co-sponsors on April 11, 2003 and referred to the Committee on the Judiciary. The full Committee on the Judiciary held one day of hearings on H.R. 1787 and two related bills, on July 20, 2004. On September 8, 2004, the full Committee on the Judiciary met in open session and ordered favorably reported the bill H.R. 1787, with an amendment, by a voice vote. The Committee's report on H.R. 1787 as amended was filed on September 13, 2004 as H. Rept. No. 108–680 and the bill was placed on the Union

Calendar. On September 14, 2004, Chairman Sensenbrenner moved that the House consider and pass H.R. 1787, as amended, under suspension of the rules. H.R. 1787 then passed the House under suspension of the rules on a roll call vote of 397–3. The bill was received in the Senate and placed on the legislative calendar, but H.R. 1787 enjoyed no further consideration by the Senate before the end of the 108th Congress. The text of H.R. 1787 was also later added as a floor amendment to H.R. 10, the "9/11 Recommendations Implementation Act" by Rep. Castle. This provision was not included in the final House-Senate conferenced version of intelligence reform legislation, S. 2845.

H.R. 3369, the "Non-profit Athletic Organization Protection Act"

Summary.—H.R. 3369 Exemps non-profit athletic organizations and their officers and employees acting in their official capacity from liability for harm caused by an act or omission of such organization in the adoption of rules for sanctioned or approved athletic competitions or practices. The general protection preempts inconsistent State laws but makes exceptions for certain State laws requiring adherence to risk management and training procedures, State general *respondeat superior* laws, or State laws waiving liability limits in cases brought by an officer of the State or local government. The language mirrors provisions of the "Volunteer Protection Act" ("VPA").[15]

Legislative History.—H.R. 3369 was introduced by Rep. Mark Souder, and 4 other co-sponsors on October 21, 2003 and referred to the Committee on the Judiciary. The full Committee on the Judiciary held one day of hearings on H.R. 3369 and two related bills, on July 20, 2004. On September 8, 2004, the full Committee on the Judiciary met in open session and ordered favorably reported the bill H.R. 3369 without amendment, by a roll call vote of 14 to 7. The Committee's report on H.R. 3369 was filed on September 13, 2004 as H. Rept. No. 108–681 and the bill was placed on the Union Calendar. On September 14, 2004 Chairman Sensenbrenner moved that the House consider and pass H.R. 3369, as amended, under suspension of the rules. On the subsequent roll call vote H.R. 3369 received a majority of votes but failed to garner the necessary 2/3 vote required under a motion to suspend the rules by a roll call vote of 217–176. The House took no further action on H.R. 3369 and the Senate failed to act on any companion legislation during the 108th Congress.

H.R. 4280, the "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2004"

Summary.—H.R. 4280 is almost identical to H.R. 5. See H.R. 5 for further details.

Legislative History.—On May 5, 2004, H.R. 4280 was introduced by Rep. James C. Greenwood. On May 5, 2004, H.R. 4280 was referred to the Committee but no action was taken there. On May 12, 2004, H.R. 4280 passed the House by a vote of 229 to 197.

[15] 42 U.S.C. §14501 et. seq. (2003)

MATTERS HELD AT FULL COMMITTEE

H. Res. 287, Directing the Attorney General to transmit records related to the use of Federal agency resources in tasks relating to Members of the Texas Legislature.

Summary.—Congressman Gene Green introduced H. Res. 287 on June 19, 2003. This resolution directed the Attorney General to transmit to the House of Representatives within 30 days after the adoption of this resolution all physical and electronic records and documents in his possession related to any use of agency resources, the theft of any records, and the use of U.S. congressional staff in any task or action involving or relating to Members of the Texas Legislature between May 11, 2003 and May 16, 2003, with the exception of any information that, upon disclosure, would harm U.S. national security interests.

Legislative History.—On June 19, 2003, H. Res. 287 was referred to the House Judiciary Committee. The Committee held a markup on July 9, 2003 and ordered the resolution reported adversely as amended by a vote of 19 yeas to 15 nays. (H. Rept. No. 108–215)

H. Res. 499, Requesting the President and directing the Secretary of State to transmit records relating to disclosures regarding Valerie Plame

Summary.—Congressman Rush D. Holt introduced H. Res. 499 on January 21, 2004. This resolution requested the President and directed the Secretary of State, the Secretary of Defense, and the Attorney General to transmit to the House of Representatives no later than 14 days after the date of the adoption of this resolution documents in the possession of the President and those officials relating to the disclosure of the identity and employment of Ms. Valerie Plame.

Legislative History.—H. Res. 499 was referred to the House Judiciary Committee on January 21, 2004. On February 25, 2004, the Judiciary Committee held a markup and ordered the bill reported adversely by a vote of 17 yeas to 8 nays (H. Rept. No. 108–413). H. Res 499 was also referred to the committees on Intelligence, International Relations, and Armed Services. Each committee filed a report in conjunction with the resolution.

H. Res. 662, Recognizing that Flag Day originated in Ozaukee County, Wisconsin

Summary.—H. Res. 662 declares that the House of Representatives: (1) urges the people of the United States to study, reflect on, and celebrate the importance of the flag of the United States; (2) encourages them to display the U.S. flag; and (3) recognizes that Flag Day originated in Ozaukee County, Wisconsin.

Legislative History.—H. Res. 662 was introduced on June 3, 2204 by Representative F. James Sensenbrenner, Jr. and had 4 cosponsors. On June 14, 2004 the resolution was passed under the suspension of the rules by voice vote.

H. Res. 700, Directing the Attorney General to transmit to the House of Representatives documents in the possession of the Attorney General relating to prisoners, and detainees in Iraq, Afghanistan, and Guatanamo Bay

Summary.—Congressman John Conyers, Jr. introduced H. Res. 700 on June 25, 2004. This resolution directed the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, all physical and electronic records and documents in his possession relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay.

Legislative History.—H. Res. 700 was referred to the House Judiciary Committee on June 25, 2004. On July 21, 2004, the Judiciary Committee held a markup and ordered H. Res. 700 reported adversely, as amended, by a vote of 15–12. (H. Rept. 108–658).

H.R.10/S. 2845, the "9/11 Commission Implementation Act of 2004"

Summary.—House Speaker J. Dennis Hastert introduced H.R. 10 on September 24, 2004. The terrorist attacks of September 11, 2001 took the lives of more than 3,000 Americans and represented the most catastrophic terrorist attack on the United States in its history. The terrorists exploited deficiencies in America's law enforcement, immigration, and intelligence agencies, which limited the dissemination of information that might have protected the nation against the attack. In the wake of the attacks, the Committee has conducted 39 hearings and markups to examine proposals to remedy legislative, procedural, and structural vulnerabilities to terrorism in our nation's immigration system. The Committee has also conducted 46 hearings and markups to strengthen federal law enforcement and antiterrorism efforts, and it has taken firm steps to ensure that security efforts do not transgress cherished civil liberties. Furthermore, the Committee has conducted rigorous oversight of antiterrorism reform efforts at the Departments of Justice and Homeland Security, and enacted antiterrorism legislation including the USA PATRIOT Act and the Homeland Security Act.

On November 27, 2002, President Bush signed legislation creating the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission" or "Commission"). The Commission's principal responsibility was to examine and report on the facts and causes relating to the terrorist attacks of September 11, 2001, and to suggest measures to better secure the nation. On July 22, 2004, the Commission delivered its unanimous recommendations to Congress. During August and September, 2004, a variety of congressional committees held hearings on the recommendations. On September 29, 2004, Speaker Hastert introduced H.R. 10, the "9/11 Recommendations Implementation Act." The legislation consisted of five titles entitled: Reform of the Intelligence Community; Terrorism Prevention and Prosecution; Border Security and Terrorist Travel; International Cooperation and Coordination; and Government Restructuring. Several provisions within the legislation fall within the jurisdiction of the Committee on the Judiciary. The Subcommittee on Crime, Terrorism, and Homeland Security dealt primarily with the law enforcement provisions contained in

Title II of H.R. 10. (This became Title VI in the conference report of S. 2845). H.R. 10 contained provisions that would have enhanced penalties for terrorism hoaxes, increased penalties for supporting, financing, or cooperating with terrorist organizations, and expanded the scope of laws that prohibit the shipment or use of weapons of mass destruction. Additional sections would have provided additional funding to combat terrorist financing and would have enhanced the use of biometric technology to reduce terrorist threats against air travel. At the Committee's markup of H.R. 10, amendments were adopted requiring that threat be the primary determining factor in distributing homeland security grants (Rep. Weiner), reauthorizing COPS and allowing COPS funds to be used to hire "terrorism cops" (Rep. Weiner), and authorizing funding for non-profits threatened by terrorism (Rep. Nadler and Rep. Weiner).)

During the conference on H.R. 10 and the Senate companion bill, S. 2845, certain law enforcement and immigration provisions were removed. The final conference report contains, among other things, the following sections that were considered by the Subcommittee: the improvement of the FBI's intelligence capabilities; individual terrorists as agents of foreign powers; money laundering and terrorist financing; criminal history background checks; grand jury information sharing; providing material support to terrorism; the "Stop Terrorist and Military Hoaxes Act of 2004;" the "Weapons of Mass Destruction Prohibition Improvement Act of 2004;" the "Prevention of Terrorist Access to Destructive Weapons Act of 2004;" and the pretrial detention of terrorists.

H.R. 10 also included nationally applicable "mutual aid provisions" that would enable party states to enter into mutual aid agreements to allow their first responders to carry with them into other states the liability regime of their home states. Other provisions in H.R. 10 allow states nationwide to enter into "litigation management agreements" in which they could agree that, in the event first responders from several states respond to a terrorist attack in another state, they could decide on the liability regime that would apply in that circumstance to claims brought against their first responders, including putting any such claims in federal court, a ban on punitive damages, and a collateral source offset rule.

Summary of immigration provisions of bill as passed the house.

H.R. 10 as passed by the House contained the following immigration provisions:

1. Section 3001. Verification of Returning Citizens. Regulations implementing the Immigration and Nationality Act allow U.S. citizens to reenter the United States from countries in the Western Hemisphere (other than Cuba) without passports. The bill would have required that by October 2006 all U.S. citizens returning from the Western Hemisphere other than Canada and Mexico must present U.S. passports. In the interim, U.S. citizens would have to present a document designated by the Secretary of Homeland Security. For U.S. citizens returning from Canada and Mexico, the Secretary of Homeland Security would have to designate documents that are sufficiently secure.

2. Section 3002. Documents Required by Aliens from Contiguous Countries. Foreign visitors usually need passports or U.S. visas or border crossing cards to enter the United States. However, the Immigration and Nationality Act allows the Administration to waive this requirement for nationals of contiguous countries—which it has done for Canadians. Therefore, U.S. inspectors at northern ports-of-entry can allow persons identifying themselves as Canadians to enter the U.S. without having to show any documents whatsoever. The bill would require that by the beginning of 2007, aliens claiming to be Canadian who seek to enter the U.S. must present a passport or other secure identification.

3. Section 3003. Strengthening the Border Patrol. The bill would have authorized an increase in the Border Patrol of 2,000 agents a year for each of the next five years.

4. Section 3004. Increase in Immigration Enforcement Investigators. The Bureau of Immigration and Customs Enforcement only has about 2,000 investigators nationwide. The bill would increase the number of ICE investigators enforcing our immigration laws by 800 a year for each of the next five years. One half of the new investigators would have been dedicated to enforcing employer sanctions and removing illegal aliens from the workplace.

5. Section 3005. Increase in Detention Bed Space. The bill would have increased detention bed space for immigration detention and removal operations by not less than 2,500 beds in 2006 and 2007.

6. Section 3006. Prevention of Improper Use of Foreign Identification Documents. The bill would have barred all federal employees from accepting identification cards presented by aliens other than a document issued by the Attorney General or the Secretary of Homeland Security under the authority of the immigration laws, a domestically-issued document that the Secretary of Homeland Security designates as reliable and that cannot be issued to an alien unlawfully present in the U.S., or an unexpired foreign passport.

7. Section 3007. Expedited Removal for Illegal Aliens. Under expedited removal, a DHS officer at a port-of-entry can immediately return an alien lacking proper documents to his or her country of origin unless the alien asks for asylum and can establish a "credible fear" of persecution. The Administration has the authority to utilize expedited removal in the case of any alien who had entered the U.S. illegally and had not been present here for two years. Until recently, the INS and DHS never made use of this power.

The bill would have required DHS to utilize expedited removal in the case of all aliens who have entered the U.S. illegally and have not been present here for five years.

8. Section 3008. Limit Asylum Abuse by Terrorists. The bill would have overturned certain precedents of the Ninth Circuit. The bill would have provided a nonexhaustive list of factors that an immigration judge could consider in assessing credibility, such as the demeanor, candor, or responsiveness of the applicant or witness, the consistency between the applicant's or witness's written and oral statements, the internal consistency of each such statement, and any inaccuracies or falsehoods in such statements. Also, aliens who allege they would be persecuted because of terrorist ties would no longer have been presumed to fear persecution on account of political opinion. Rather, such applicants would have had to establish

that race, religion, nationality, membership in a particular social group, or political opinion was or will be a central reason for their claimed persecution. Finally, the bill would have reasserted that the burden of proof in an asylum case is on the applicant and that the testimony of the applicant may be sufficient to sustain such burden without corroboration, but only if it is credible, is persuasive, and refers to specific facts that demonstrate that the applicant is a refugee.

Where it is reasonable that an applicant would present corroborating evidence (without having to leave the U.S.), such evidence would have had to be provided unless a reasonable explanation is given as to why such information is not provided.

9. Section 3009. Revocation of Visas. The State Department may revoke visas after they have been issued. Revocation is problematic, however, when the alien has entered the U.S. by the time the visa has been revoked because there is no provision that allows DHS to remove an alien whose visa has been revoked. This policy is a particular problem in terrorism cases because information linking an alien to terrorism is often classified, and classified information cannot be used to prove deportability. The bill would have allowed the government to deport a nonimmigrant alien whose visa has been revoked. The section will prevent an alien whose visa has been revoked to challenge the underlying revocation in court, where the government might again be placed in a position of either exposing its sources or permitting a potentially dangerous alien to remain in the United States.

10. Section 3010. Streamlined Removal Process. For criminal aliens and aliens who are not permanent residents, review of immigration orders would have been in the circuit court and the scope of review would have been limited to: (1) whether the individual was an alien; (2) whether he was deportable under the INA; (3) whether he was ordered removed under the INA; and (4) whether he met the criteria for withholding of removal or Torture Convention protection.

11. Sections 3031–32. Detention of Terrorists and Criminal Aliens. The Convention Against Torture prohibits the return of an alien to a country where there are substantial grounds for believing that he would be in danger of being tortured. The bill would have provided that aliens who were barred from receiving asylum and who were ordered removed could be detained pending removal, in the Secretary of Homeland Security's nonreviewable discretion. In making this determination, the Secretary should have considered the length of sentence and severity of the offense, the loss and injury to the victim and the future risk the alien poses to the community. To the extent that a federal judge found this provision unconstitutional and ordered the release of any such detained alien, the Secretary of State was required to seek assurances from the home government that the alien will not be tortured upon deportation.

12. Section 3033. Removal of Aliens. The bill would have allowed DHS to remove an alien to a country of which the alien was a citizen or national unless the country prevented the alien from entering.

13. Sections 3034–35. Inadmissibility and Deportability of Aliens Due to Terrorist-Related Activities. Not all terrorism-related

grounds of inadmissibility are also grounds of deportability. This means that some terrorists and their supporters can be kept out of the United States, but as soon as they set foot in the U.S. on tourist visas, we cannot deport them for the very same offenses. The bill would have made aliens deportable for these offenses to the same extent that they would be inadmissible to the United States. Under current law, if an alien provides funding or other material support to a terrorist organization that has not yet been designated by the Secretary of State, the alien can escape deportation if he can show that he did not know that the funds or support would further the organization's terrorist activity, i.e., his donation did not immediately go to buying explosives. The bill would have stated that an alien who provided funds or other material support to a terrorist organization would be deportable unless he did not know, and should not reasonably have known, that the organization was a terrorist organization.

14. Section 3041. Bringing in and Harboring Certain Aliens. The bill would have increased criminal penalties for alien smuggling.

15. Section 3082. Expanded Pre-Inspection at Foreign Airports. Currently, DHS inspects passengers who are traveling to the U.S. at 14 foreign airports. The bill would have expanded this program to include up to an additional 25 airports. Section 3082 stated that the selection criteria for airports should also have included the objective of preventing the entry of potential terrorists.

16. Section 3083. Immigration Security Initiative. The Immigration Security Initiative is a DHS-operated program that assists airline personnel at foreign airports in identifying fraudulent travel documents. The program's objective is to identify passengers, including potential terrorists, who seek to enter the U.S. using fraudulent documents, prior to these passengers being allowed to board flights for the United States. Currently, the program is in place in only two foreign airports. This section would have expanded the program to at least 50 foreign airports.

17. Section 3084. Responsibilities and Functions of Consular Officers. The bill would have improved the operation of U.S. consular offices in preventing the entry of terrorists. First, it would have increased the number of consular officers by 150 per year for fiscal years 2006 to 2009. Second, it would have placed limitations on the use of foreign nationals to screen nonimmigrant visa applicants. Third, it would have required that the training program for consular officers include training in detecting fraudulent documents. Lastly, this section would have required the Secretary of State to place antifraud specialists in the one hundred posts that have the greatest frequency of presentation of fraudulent documents.

18. Section 3090. Biometric Entry and Exit Data System. This section called on the Secretary of Homeland Security to develop a plan to accelerate the full implementation of the requirement of an automated entry and exit data system at U.S. ports of entry. The section also called for the Secretary of DHS to implement a plan to expedite the processing of registered travelers at ports of entry.

19. Sections 3121–26. Treatment of Aliens Who Commit Acts of Torture, Extrajudicial Killings, or Other Atrocities Abroad. The bill would have made aliens who have participated in genocide or who

have committed torture or extrajudicial killings inadmissible and deportable.

20. Section 3131. Security Barriers. In 1996, Congress required the building of a 14 mile border fence in San Diego. The bill would have required DHS to waive certain federal laws, including environmental and Native American sovereignty laws, necessary to ensure construction of the fence.

21. Section 4051. Designation of Foreign Terrorist Organizations. The Secretary of State is authorized in consultation with the Treasury Secretary and the Attorney General to designate an entity as a "foreign terrorist organization". Designations last for two years, and may be renewed by the Secretary. An organization placed on the FTO list is subject to financial and immigration sanctions, including the blocking of assets, the prosecution of supporters who provide funds, refusal of visas, and deportation of members. An FTO may seek judicial review of the designation. Designations require a detailed administrative record, often based on classified information. Each redesignation requires interagency review and preparation of a voluminous administrative record that can take months. Further, certain FTOs reconstitute themselves and change their names often, and that current law requires a burdensome redesignation to reflect these changes. It would have permitted a designation to remain in effect until revoked by Congress or the Secretary, or set aside by the D.C. Circuit. It would have provided a specified procedure by which groups could petition the Secretary for review every two years, as well as with a simplified procedural requirement by which the Secretary would review each group every five years.

Summary of immigration provisions of bill as enacted in the conference report (H. Conf. Rept. 108–796)

The following immigration provisions were included in the final conference report that became law:

1. Sections 5101–05. Advanced Technology Northern Border Security Pilot Program. The Secretary of Homeland Security may carry out a pilot program to test various advanced technologies that would improve border security between ports of entry along the northern border of the U.S.

2. Section 5201. Border Surveillance. The Secretary of Homeland Security shall submit a comprehensive plan for the systematic surveillance of the southwest border by remotely piloted aircraft.

3. Section 5202. Increase in Border Patrol Agents. The conference report provides a numerical increase equal to that contained in the bill as passed the House, with an additional provision that an additional number of agents shall be assigned to the northern border equal to not less than 20% of the net increase in agents in each fiscal year.

4. Section 5203. Increase in ICE Investigators. The conference report provides a numerical increase equal to that contained in the bill as passed the House, but no number of agents is required to enforce employer sanctions.

5. Section 5204. Increase in Detention Beds. The conference report increases the number of DHS immigration detention beds by not less than 8,000 in each of fiscal years 2006 through 2010 above

the number for which funds were allotted for the preceding fiscal years.

6. Sections 5301–03. In Person Interviews of Visa Applicants. The conference report requires every alien who is seeking a nonimmigrant visa to be interviewed by a consular officer (with certain exceptions and available waivers).

7. Section 5304. Revocation of Visas. The conference report allows aliens to seek judicial review of a revocation in the context of a removal proceeding where such revocation provides the sole ground of removal.

8. Section 5401. Criminal Penalties for Alien Smuggling. This provision is similar to the House-passed version.

9. Section 5402. Deportation of Aliens Who Have Received Military Type Training from Terrorist Organizations. This provision, creating a ground of deportability for aliens who have received military-type training from or on behalf of terrorist organizations designated as such by the federal government, is a more limited version of section 3034 of the House-passed bill.

Section 5403. Study and Report on Terrorists in the Asylum System. The GAO shall conduct a study to evaluate the extent to which weaknesses in the U.S. asylum system have been or could be exploited by terrorists.

10. Sections 5501–06. Treatment of Aliens who Commit Acts of Torture, Extrajudicial Killings, or Other Atrocities Abroad. These provisions are identical to those in the House-passed bill.

Section 7118. Designation of Foreign Terrorist Organizations. These provisions are similar to those in the House-passed bill.

11. Section 7203. Responsibilities and Functions of Consular Officers. The provision of the conference report is similar to the provision of the House-passed bill. It also provides that all immigrant visa applications shall be reviewed and adjudicated by a consular officer and that anti-fraud specialists be placed at those diplomatic and consular posts at which visas are issued that experience the greatest frequency of presentation of fraudulent documents by visa applicants (as opposed to a set number of posts).

12. Section 7206. Immigration Security Initiative. The provision is identical to that of the House-passed bill.

13. Section 7207. Certification Regarding Technology for Visa Waiver Participants. No later than October 26, 2006, the Secretary of State shall certify which visa waiver program countries are developing a program to issue to persons seeking to enter such countries pursuant to a visa, a machine readable visa that is tamper-resistant and contains biometric features verifiable at its ports of entry.

14. Section 7208. Biometric Entry and Exit Data System. This provision is similar to the provision in the House-passed bill.

15. Section 7209. Travel Documents. This provision is similar to §§ 3001 and 3002 of the House-passed bill. The Secretary of State shall develop and implement a plan to require biometic passports or other identification at least as secure, for all travel into the U.S. by U.S. citizens, to be implemented no later than January 2008, and to develop and implement a plan to require biometic passports or other identification at least as secure, for all travel into the U.S. by Canadians, to be implemented no later than January 2008. In

addition, the provision bars a resumption of the transit without visa program until the Secretary of State completely implements a security plan to fully ensure secure transit passage areas to prevent aliens proceeding in immediate and continuous transit through the U.S. from illegally entering the U.S.

16. Section 7210. Exchange of Terrorist Information and Increased Preinspection at Foreign Airports. As to preinspection, the provision is similar to that of the House-passed bill. It requires the establishment of preinspection stations in at least 25 additional foreign airports.

17. Section 7220. Identification Standards. The provision provides that within six months of enactment, the Secretary of Homeland Security shall propose minimum standards for identification documents required of domestic commercial airline passengers for boarding purposes, and may propose modifications in the future. Any proposed standards must be approved by both the House and the Senate under specified expedited procedures before they can go into effect. If the proposed standards are not approved by Congress, then within one year after rejection by a vote of either House of Congress, adult domestic airline passengers seeking to board an aircraft shall present (1) a valid, unexpired passport, (2) a domestically issued document that the Secretary of Homeland Security designates as reliable for identification purposes, (3) any immigration document issued by the Attorney General or the Secretary of Homeland Security, or (4) a document issued by the country of nationality of any alien not required to possess a passport for admission to the U.S. that the Secretary of Homeland Security designates as reliable for identification purposes.

Privacy Provisions

The 9/11 Commission recognized that enhanced law enforcement and antiterrorism efforts should be balanced. In its final report, the Commission cautioned that while protecting our homeland, "Americans should be mindful of threats to vital personal and civil liberties."[16] It continued: "This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life."[17]

To this end, the Commission made the following three recommendations intended to protect our citizens' privacy:

As the President determines the guidelines for information sharing among government agencies and by those agencies with the private sector, he should safeguard the privacy of individuals about whom information is shared.[18]

The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protec-

[16] The 9/11 Commission Report—Final Report of the National Commission on Terrorist Attacks Upon the United States, at 394 (2004).
[17] Id.
[18] Id.

tion of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.[19]

At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.[20]

S. 2845 contains two privacy-related provisions. Section 1061 of the bill requires the appointment of a Privacy and Civil Liberties Oversight Board within the Executive Office of the President. In addition, § 1062 sets forth a sense of the Congress that an executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.

Legislative History.—H.R. 10 was favorably reported out of the House Judiciary Committee on September 29, 2004, and subsequently passed the House by a vote of 282–134. The Senate passed similar legislation, S. 2845, the "National Intelligence Reform Act of 2004," by a vote of 96–2 on October 6, 2004. Conferees were appointed, and the conference report was filed on December 7, 2004. That same day, the House agreed to the conference report by a vote of 336–75. On December 8, 2004, the Senate agreed to the report by a vote of 89–2. The bill was signed by the President on December 17, 2004, and became Public Law No. 108–458.

H.R. 16, A bill to authorize salary adjustments for Justices and judges of the United States for fiscal year 2004

Summary.—Introduced by Representative F. James Sensenbrenner, Jr., H.R. 16 addresses the statutory mandate of § 140 of Pub. L. No. 97–92 by specifically authorizing a cost-of-living adjustment (COLA) for federal judges in advance of, or concurrent with, an appropriation.

Legislative History.—On January 7, 2003, H.R. 16 was referred to the House Committee on the Judiciary. The following day the House passed H.R. 16, without amendment, by voice vote. On January 30, 2003, the Senate passed H.R. 16, without amendment, by unanimous consent. On February 13, 2003, the President signed the bill into law. (Public Law No. 108–6)

H.R. 534, the "Human Cloning Prohibition Act of 2003"

Summary.—Congressman Dave Weldon introduced H.R. 534 on February 5, 2003. H.R. 534, the "Human Cloning Prohibition Act of 2003," amended Title 18 of the United States Code by establishing a comprehensive ban on human cloning and prohibiting the importation of a cloned embryo, or any product derived from such embryo. Any person or entity convicted of violating this prohibition on human cloning would be subject to a fine or imprisonment of not more than 10 years, or both. In addition, H.R. 534 provided civil penalties of not less than $1,000,000 for any person who received a pecuniary gain from cloning humans. H.R. 534 did not prohibit the use of cloning technology to produce molecules, DNA, cells, tissues, organs, plants, or animals other than humans.

[19] Id. at 394–395.
[20] Id. at 395.

Legislative History.—H.R. 534 was referred to the House Judiciary Committee on February 5, 2003. On February 12, 2003, the Committee marked up H.R. 534, ordering the bill reported to the House, without amendment, by a vote of 19 yeas to 12 nays. (H. Rept. No. 108–18) On February 27, 2003, the House passed H.R. 534, as amended, by a vote of 241 to 155. There was no further action taken during the 108th Congress.

H.R. 1115, the "Class Action Fairness Act of 2003"

Summary.—H.R. 1115: (1) allows Federal courts to hear large interstate class actions; and (2) establishes new rules for consumers against abusive class action settlements.

The class action device is one of the most important procedural mechanisms within our civil justice system. It can promote efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding. The device also enables the adjudication of claims when a large number of people suffer small harms, claims that might otherwise go unredressed because the expense of individual litigation would far exceed any possible benefit.

H.R. 1115 has three core components: First, it amends the current Federal diversity-of-citizenship jurisdiction statute (28 U.S.C. § 1332) to allow large interstate class actions to be adjudicated in Federal courts. Currently, Federal courts have jurisdiction over (a) lawsuits dealing with a Federal question, and (b) cases meeting current diversity jurisdiction requirements (i.e., matters in which all plaintiffs are citizens of jurisdictions different from all defendants, and each claimant has an amount in controversy in excess of $75,000). H.R. 1115 would change the diversity jurisdiction requirement for class actions, generally permitting access to Federal courts in class actions where there is "minimal diversity" (that is, any member of the proposed class is a citizen of a State different from any defendant), and the aggregate amount in controversy among all class members exceeds $2 million.

Second, H.R. 1115 implements a "Consumer Class Action Bill of Rights." The bill of rights would: (1) enhance judicial scrutiny of coupon settlements; (2) provide judicial scrutiny over settlements that would result in a net monetary loss to plaintiffs; (3) prohibit unjustified payments, also known as bounties, to class representatives; and (4) protect out-of-State class members against settlements that favor class members based upon geographic proximity to the courthouse.

Third, H.R. 1115, as amended, immediately puts into effect upon enactment of the bill several critical amendments to Rule 23 of the Federal Rules of Civil Procedure proposed by the Supreme Court that are intended to ensure the clarity of class notice and prevent abuse of the class action device.

Legislative History.—H.R. 1115 was introduced by Rep. Bob Goodlatte, Chairman F. James Sensenbrenner, Jr. and 10 other cosponsors on March 6, 2003 and referred to the House Judiciary Committee. The full Committee held a hearing on H.R. 1115 on May 15, 2003. On May 21, 2003, the Committee favorably reported the bill H.R. 1115, as amended, by a vote of 20 to14. and the Committee report on the legislation was filed on June 9, 2004 as H. Rept. No. 108–144. On June 12, 2004, the full House considered

H.R. 1115 as reported by the Committee under a Rule (H. Res. 269) along with amendments. Chairman Sensenbrenner, the manager of the legislation, and Rep. Boucher offered one amendment on the floor that was accepted, other floor amendments were rejected. The House then passed H.R. 1115 by a roll call vote of 253–170. H.R. 1115 was received in the Senate but was not acted upon by the Senate. Several successive versions of companion legislation were introduced in the Senate by Senator Grassley (S. 274, S. 1751 and S. 2062) and the first version was reported out of the Senate Judiciary Committee. The Senate attempted to invoke cloture to proceed to S. 1751 on October 22, 2003 which failed by a vote of 59–39. The Senate attempted to invoke cloture to proceed to S. 2062 on July 8, 2004 which failed by a vote of 44–43. The Senate took no further action on any version of class action reform legislation in the 108th Congress.

H.R. 1437, To improve the United States Code

Summary.—The purpose of H.R. 1437 is to improve the United States Code by making necessary technical changes without making any substantive change in existing law. Public Law No. 107–217, which was enacted on August 21, 2002, revised, codified, and enacted without substantive change certain general and permanent laws related to public buildings, property, and works as title 40, United States Code, "Public Buildings, Property, and Works." This bill makes technical changes to Public Law No. 107–217 and related provisions.

Legislative History.—On March 25, 2003 Chairman F. James Sensenbrenner, Jr, introduced H.R. 1437. On May 7, 2003 the Committee reported H.R. 1437 by voice vote and, on May 15, 2003, it filed H.R. Rept. No. 108–103. On July 21, 2003, the bill was passed the House under the suspension of the rules and referred to the Senate Committee on the Judiciary. On November 21, 2003 the Senate passed H.R. 1437 by unanimous consent. The President signed the bill into law on December 15, 2003. (Public Law No. 108–178)

H.R. 1904, the "Healthy Forests Restoration Act of 2003"

Summary.—The purpose of H.R. 1904, the "Healthy Forests Restoration Act of 2003," is to: (1) allow the Secretary of Agriculture and the Secretary of the Interior to implement hazardous fuel reduction projects on National Forest System lands designated protect communities and watersheds from catastrophic wildfire; and (2) promote other efforts regarding watersheds and address threats to forest and range land health, such as wildfire and insect infestation. The following sections of the legislation were among those within the jurisdiction of the Committee on the Judiciary.

Sec. 104. Environmental Analysis: Pursuant to §104(a) and (b), the Secretary concerned must plan and conduct authorized hazardous fuels reduction projects in accordance with the National Environmental Policy Act of 1969, but she is not required to develop any alternative to the proposed agency action in the environmental assessment or impact statement which is otherwise required by the Act. Subsections (c) through (e) enumerate public notice and meeting requirements imposed on the concerned Secretary that are de-

signed to encourage public participation and to facilitate collaboration among governments and interested parties in the development of authorized hazardous fuels reduction projects. Subsection (f) requires the Secretary concerned to sign a decision document for each authorized hazardous fuels reduction project while subsection (g) states that the Secretary monitor implementation of each project.

Sec. 105. Special Forest Service Administrative Review Process: Subsection (a) states that the Secretary of Agriculture, 90 days after the date of enactment, must issue final regulations to establish an administrative process that will serve as the sole means by which a person can seek administrative redress regarding an authorized hazardous fuels reduction project. Subsection (b) creates standing for a person seeking such redress by requiring that she must have submitted substantive and specific written comments during the preparation stage of the project. Subsection (c) makes clear that the Appeals Reform Act of 1993 pertaining to Forest Service administrative appeals does not apply for those projects contemplated by H.R. 1904.

Sec. 106. Special Requirements Regarding Judicial Review of Authorized Hazardous Fuels Reduction Projects: Subsection (a) mandates that any legal challenge to an authorized hazardous fuels reduction project must be filed before the end of the 15-day period beginning on the date on which the Secretary concerned publishes in the local paper of record notice of the final agency action on the matter.

This time limit supersedes any other filing deadline under law and may not be waived by a district court. Subsection (b) states that any preliminary injunction granted regarding an authorized hazardous fuels reduction project shall be limited to 45 days. Pursuant to subsection (c), a court may renew a preliminary injunction, taking into account congressional intent that the court expedite, to the maximum extent practicable, the ongoing legal proceedings with the goal of rendering a final determination on jurisdiction, and if jurisdiction exists, a final determination on the merits, within 100 days from the date the proceeding is filed.

Finally, parties are required to submit relevant updates on any changes that may have occurred during the period of injunction to a court that is considering a request to renew the injunction. If the injunction is renewed, the Secretary concerned must notify the House Committee on Resources and the House Committee on Agriculture as well as the Senate Committee on Energy and Natural Resources and the Senate Committee on Agriculture, Nutrition, and Forestry.

Sec. 107. Standard for Injunctive Relief for Agency Action to Restore Fire-Adapted Forest or Rangeland Ecosystems: Section 107 states that when an aggrieved person seeks a prohibitory or mandatory injunction against agency action governing restoration of a fire-adapted forest or rangeland ecosystem, including an authorized fuels reduction project, the court reviewing the request must: (1) consider the public interest in avoiding long-term harm to the ecosystem; and (2) give deference to any agency finding that the balance of harm and the public interest in avoiding the short-term effects of the agency action is outweighed by the public interest in avoiding long-term harm to the ecosystem.

Sec. 108. Rules of Construction: Unless otherwise indicated in Title I, and per § 104 of the bill, the planning and conducting of authorized hazardous fuels reduction projects must be done in accordance with the National Environmental Policy Act of 1969. Subsection (a) states that nothing in Title I shall be construed to affect or bias a Secretary's use of other statutory or administrative authorities to plan or conduct a hazardous fuels reduction project on federal land. There is ongoing litigation within the 9th Circuit regarding the "Roadless Area Conservation Rule" and the potential prohibition of road construction in approximately one-third of the National Forest System. Subsection (b) states that nothing in Title I of the bill shall prejudice or otherwise affect the consideration or disposition of this action.

Legislative History.—H.R. 1904 was introduced by Representative Scott McInnis on May 1, 2003. After being reported by the House Committee on Resources on May 9, 2003, H.R. 1904 was referred to the Committee on the Judiciary for consideration of provisions within its jurisdiction. On May 16, 2003, the Committee on the Judiciary reported H.R. 1904 by a vote of 18–13 (H.R. Rept. No. 108–96, Part II). On May 20, 2003, H.R. 1904 passed the House with an amendment by a vote of 256–170. On October 30, 2003, the legislation passed the Senate with an amendment by a vote of 80–14. On November 21, 2003, the House passed the conference report and the Senate did the same by unanimous consent on the same day. President Bush signed the legislation on December 3, 2003, and it became Public Law No.108–148.

H.R. 2738, the "United States-Chile Free Trade Agreement"

Summary.—On June 6, 2003, the United States and Chile entered into a Free Trade Agreement (FTA). H.R. 2738 approves the U.S.-Chile FTA submitted to Congress on July 15, 2003 and makes changes to United States law necessary to ensure compliance with the agreement. The legislation contains four titles: Title I, "Approval of and General Provisions Relating to the Agreement;" Title II, "Customs Provisions;" Title III, "Relief from Imports;" and Title IV, "Temporary Entry of Business Persons." The Committee's consideration of H.R. 2738 was limited to Title IV of the legislation. Title IV establishes 1,400 annual professional worker visas for Chilean citizens to enter the United States on a temporary basis.

H.R. 2738 was considered pursuant to the "Bipartisan Trade Promotion Authority Act of 2002"[21] and the Trade Act of 1974.[22] As a result, the legislation was considered on an expedited basis which did not permit committees of jurisdiction to amend the legislation after its formal introduction. However, the Committee made several changes to draft implementing legislation transmitted to the Committee for a pre-introduction "mock markup" on July 10, 2003. These changes were substantially reflected in H.R. 2738.

Summary of U.S.-Chile FTA Provisions Pertaining to the Jurisdiction of the Committee on the Judiciary. Although the Committee's formal legislative consideration of H.R. 2738 was limited to Title IV of the legislation, which implemented changes to United

[21] 19 U.S.C. § 3805 et. seq. (2002).
[22] 19 U.S.C. § 2191 et. seq. (2002).

States immigration law, the U.S.-Chile FTA contained intellectual property and competition chapters that also fall within the jurisdiction of the Committee.

Intellectual property rights (IPR)

Chile is a signatory to the Trade Related Intellectual Property Rights (TRIPS), but has not yet ratified its implementing provisions. In addition, Chile has signed two World Intellectual Property Organization (WIPO) treaties, but has also not fully complied with these obligations. The U.S.-Chile FTA reaffirms obligations under TRIPS and adds another layer of protection which would potentially increase revenues to a number of industries including: motion picture, sound recording, business software, book publishing, pharmaceuticals, and agricultural chemicals.

Chapter 17 of the Agreement requires Chile to ratify or accede to several international IPR agreements, including the International Convention for the Protection of New Varieties of Plants (UPOV 1991), the Trademark Law Treaty, the Brussels Convention relating to the Distribution of Program-Carrying Satellite Signals, and the Patent Cooperation Treaty. The FTA also enhances enforcement of intellectual property rights. Non-discrimination obligations apply to all types of intellectual property. The FTA ensures government involvement in resolving disputes between trademarks and Internet domain names (important to prevent "cyber-squatting" of trademarked domain names). It also applies the principle of "first-in-time, first-in-right" to trademarks and geographical indicators (place-names) applied to products.

The Agreement streamlines the trademark filing process by allowing applicants to use their own national patent and trademark offices for filing trademark applications. The FTA ensures that only authors, composers, and other copyright owners have the right to make their works available online. Copyright owners maintain rights to temporary copies of their works on computers. Copyrighted works and phonograms are protected for extended terms, consistent with U.S. standards and international trends. The FTA also contains anti-circumvention provisions aimed at preventing tampering with technologies (such as embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet. It also ensures that governments use only legitimate computer software (in order to set a positive example for private users). Chile is to prohibit the production of optical discs (CDs, DVDs or software) without a source identification code unless authorized by the copyright holder in writing.

Under the FTA, protection for encrypted program-carrying satellite signals extends to the signals themselves as well as the programming. This is designed to prevent piracy of satellite television programming. Both sides agreed to criminalize unauthorized reception and redistribution of satellite signals. The Agreement also contains limited liability for Internet Service Providers (ISPs)—reflecting the balance struck in the U.S. Digital Millennium Copyright Act between legitimate ISP activity and the infringement of copyrights. In essence, both sides are to provide immunity to Internet service providers for complying with notification and take-down procedures when material suspected to be infringing on copyright

is hosted on their servers. The FTA provides for a patent term to be extended to compensate for up-front administrative or regulatory delays in granting the original patent, consistent with U.S. practice. The grounds for revoking a patent are limited to the same grounds required to originally refuse a patent.

The Agreement provides further protections for patents covering biotech plants and animals. Chile is to accede to the International Convention for the Protection of New Varieties of Plants. It also provides for protection against imports of pharmaceutical products without a patent-holder's consent by allowing lawsuits when contracts are breached. Under the FTA, test data and trade secrets submitted to a government for the purpose of product approval are to be protected against disclosure for a period of 5 years for pharmaceuticals and 10 years for agricultural chemicals. The FTA also closes potential loopholes to these provisions and is designed to ensure that government marketing-approval agencies will not grant approval to patent-violating products.

In addition, the Agreement provides for criminal penalties for companies that make pirated copies from legitimate products. The Chilean government guarantees that it has authority to seize, forfeit, and destroy counterfeit and pirated goods and the equipment used to produce them. IPR laws are to be enforced against traded goods, including trans-shipments, to deter violators from using U.S. or Chilean ports or free-trade zones to traffic in pirated products. The FTA mandates both statutory and actual damages under Chilean law for IPR violations (as a deterrent against piracy) and provides that monetary damages be awarded even if actual economic harm (retail value, profits made by violators) cannot be determined. Chile is to cooperate in preventing pirated and counterfeit goods from being imported into the United States. Finally, the FTA sharply restricts Chile from using compulsory licenses to copy patented drugs and sets up new barriers to the import of patented drugs sold at lower prices in third countries.

Competition policy and antitrust

H.R. 2738 contains no changes to United States antitrust law. However, a summary of provisions related to competition and antitrust contained in the U.S.-Chile FTA is set forth below. Chapter 16 of the Agreement helps ensure that the opportunities created by trade liberalization are supported by healthy competitive domestic markets, allowing the firms of each country to compete unhampered by anticompetitive business conduct in either country's territory. Firms that are subject to antitrust enforcement action will be guaranteed some basic procedural safeguards. Since these protections already exist in the United States, no changes to United States law are necessary. While state monopolies and state enterprises do not account for a significant portion of either country's economy, the provisions governing these entities will help eliminate the potential for either party to favor domestic firms in the sale or purchase of goods and services.

Specifically, Chapter 16 ensures that both countries:

1. Enforce domestic antitrust law that prohibits anticompetitive business conduct.

2. Cooperate in the enforcement of antitrust law.

3. Ensure that any private or public monopolies designated by either country, and any state enterprises, be subject to disciplinary action for abusing their status or otherwise discriminating in a manner that harms the interests of the other country.

4. Explicitly recognize that anticompetitive conduct threatens the free flow of bilateral trade and investment, and seek to secure the benefits of the FTA by prohibiting such conduct, encouraging economically sound competition policies, and furthering transparency and cooperation.

5. Expand NAFTA's competition provisions by affirming that antitrust laws be enforced in a neutral manner that do not discriminate on the basis of nationality.

6. Ensure basic procedural rights for firms that are subject to antitrust enforcement actions: each country will provide a right to be heard and to present evidence before imposing a sanction or remedy.

7. Provide for consultations and further transparency by allowing either country to request from the other specific public information regarding antitrust enforcement activity, official monopolies and state enterprises, and any exemptions from their antitrust laws.

8. Finally, it is important to note that the provisions regarding antitrust law and enforcement are not subject to dispute settlement.

Temporary entry

Title IV of the pre-introduction draft implementing legislation for the U.S.-Chile FTA that the Administration forwarded to the Committee for its "mock markup" on July 10, 2003, effectuated U.S. commitments under Chapter 14 of the U.S.-Chile FTA pertaining to the temporary entry of business persons. However, this draft legislation was considerably amended during the Committee's "mock markup" on July 10, 2003. These Committee recommendations were then incorporated into the introduced version of H.R. 2738. These changes are highlighted in the "Pre-Introduction 'Mock Markup' of U.S.-Chile FTA Implementing Legislation and Committee Amendments Incorporated Into H.R. 2738" section of this report.

In general, Chapter 14 of the U.S.-Chile FTA is consistent with existing provisions of the Immigration and Nationality Act (INA). The four categories of persons eligible for admission under the Agreement's expedited procedures correspond to existing INA nonimmigrant and related classifications. In order to provide for the admission of business visitors and intra-company transferees, no changes in U.S. statutes are required. Limited technical changes are needed to provide for the admission of traders and investors and professionals. Legislation is also required to implement Article 14.3(2) of the Agreement regarding labor disputes.

Traders and investors

Under Section B of Annex 14.3 of the Agreement, citizens of Chile are eligible for temporary entry as traders and investors. This category provides for admission under requirements identical to those governing admission under INA § 101(a)(15)(E) (8 U.S.C. § 1101(a)(15)(E)), which permits entry for persons to carry on sub-

stantial trade in goods or services or to develop and direct investment operations.

Section 101(a)(15)(E) of the INA currently conditions admission into the United States upon authorization pursuant to a treaty of commerce and navigation. Since the Agreement is not a treaty of commerce and navigation, and no such treaty exists between the United States and Chile, legislation is necessary to accord treaty trader and investor status to Chilean citizens qualifying for entry under Section B.

Section 401 of the draft legislation does not amend section 101(a)(15)(E). Instead, it used a mechanism similar to that provided in § 341(a) of the North American Free Trade Agreement Implementation Act, which in turn was based upon the Act of June 18, 1954 (68 Stat. 264, 8 U.S.C. § 1184(a)). The Act of June 18, 1954 conferred treaty trader and investor status upon nationals of the Philippines on a reciprocal basis secured by an agreement entered into by the President of the United States and the President of the Philippines.

Professionals

Section 402(a) of the draft bill amended § 101(a)(15) of the INA (8 U.S.C. § 1101(a)(15)), which defines categories of persons entitled to enter the United States as nonimmigrants. Section 402(a) of the bill inserted a new subparagraph (W) at the end of INA § 101(a)(15). Subparagraph (W) would have established a new category of aliens entitled to enter the United States temporarily as nonimmigrants. These aliens would have been citizens of countries with which the United States had entered into free trade agreements and who sought to come to the United States temporarily to engage in business activities at the professional level. Entry into the United States under subparagraph (W) would have been subject to regulations issued by the Secretary of Homeland Security implementing numerical limitations provided for in the applicable agreement, as set forth in new paragraph (8) of INA § 214(g), as added by the bill. The Department of Labor would have issued regulations governing temporary entry of professionals under this proposed provision of law. This amendment to the INA would have implemented Section D of Annex 14.3 of the Agreement.

New INA § 101(a)(15)(W) also provided for the entry of spouses and children accompanying or following to join business persons entering under this category. The purpose of this provision was to grant express authorization for current Immigration and Naturalization Service practice, which is to admit such persons, but not allow them to be employed in the United States unless they independently met all applicable INA requirements.

Persons seeking temporary entry into the United States under § 101(a)(15)(W) would have been:

1. Considered to be seeking nonimmigrant status.

2. Subject to general requirements relating to admission of nonimmigrants, including those pertaining to the issuance of entry documents and the presumption set out in INA § 214(b) (8 U.S.C. § 1184(b)), and accorded nonimmigrant status on admission.

It should be noted that while there are many similarities in the way professionals would have been treated under § 101(a)(15)(W) of

the INA, as proposed by the bill, and the way H–1B professionals are treated, a determination of admissibility under subparagraph (W) would have neither foreclosed nor established eligibility for entry as an H–1B professional. Further, § 101(a)(15)(W) would not have authorized a professional to establish a business or practice in the United States in which the professional will be self-employed.

Numerical limitations

Paragraph six of Section D of Annex 14.3 of the Agreement permits the United States to establish an annual numerical limit on temporary entries under the Agreement of Chilean professionals. Under the proposed paragraph (8) of INA § 214(g) that would have been added by § 402(a) of the draft bill, the Secretary of Homeland Security would have issued regulations establishing an annual limit of up to 1,400 new temporary entry applications from Chilean professionals, as provided in Appendix 14.3(D)(6) of the Agreement.

Labor attestations

Under § (D)(5) of Annex 14.3 of the Agreement, the United States may require that an attestation of compliance with labor and immigration laws be made a condition for the temporary entry of Chilean professionals. This provision allows U.S. labor and immigration officials to ensure that U.S. employers are not hiring Chilean professionals as a way to put pressure on U.S. employees to accept lower wages or less favorable terms and conditions of employment.

Section 402(b) of the draft legislation would have implemented the attestation requirement under the Agreement. Section 402(b) of the draft bill would have amended § 212 of the INA (8 U.S.C. § 1182) by adding a new subsection (s) to the end of that section. INA § 212(s)(1), which would have been added by § 402(b) of the bill, required a U.S. employer seeking a temporary entry visa for a Chilean professional to file an attestation with the Secretary of Labor. The attestation would have consisted of four core elements similar to those required for attestations under the "H–1B" visa program. See 8 U.S.C. § 1182(n)(1)(A)–(C). Thus, an employer would have been required to attest that:

1. It would pay the employee the higher of (a) the actual wage paid to all other individuals with similar experience and qualifications for the specific employment in question, or (b) the prevailing wage level for the occupational classification in the area of employment.
2. It will provide working conditions for the employee that will not adversely affect the working conditions of workers similarly employed.
3. There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.
4. The employer has provided notice of its attestation to its employees' bargaining representative in the occupational classification in the area for which the employee is sought or, absent such a representative, has otherwise notified its employees.

The remainder of new INA § 212(s) contains provisions for enforcing the labor attestation requirement. Like the contents of the attestation itself, the enforcement requirements are based on require-

ments under the "H–1B" visa program. INA § 212(s)(2)(A) requires an employer to make copies of labor attestations (and such accompanying documents as are necessary) available for public examination at the employer's principal place of business or worksite. INA § 212(s)(2)(B) requires the Secretary of Labor to compile a list of all labor attestations filed including, with respect to each attestation, the wage rate, number of alien professionals sought for employment, period of intended employment, and date of need. INA § 212(s)(2)(C) provides that the Secretary of Labor shall accept a labor attestation within seven days of filing and issue the certification necessary for an alien to enter the United States as a nonimmigrant under INA § 101(a)(15)(W), unless the attestation is incomplete or obviously inaccurate.

INA § 212(s)(3)(A) requires the Secretary of Labor to establish a process for the receipt, investigation, and disposition of complaints respecting an employer's failure to meet a condition specified in a labor attestation or an employer's misrepresentation of material facts in such an attestation. Section 212(s)(3) also sets forth penalties that may be imposed for violation of the labor attestation requirements, including monetary fines and denial of applications for visas under INA section 101(a)(15)(W) for specified periods. INA § 212(s)(4) defines certain terms used in INA § 212(s).

Labor disputes

Article 14.3(2) of the Agreement establishes an important safeguard for the domestic labor force in the United States and Chile, respectively. It permits either government to refuse to issue an immigration document authorizing employment where the temporary entry of a business person might affect adversely the settlement of a labor dispute or the employment of a person involved in such dispute. Article 14.3(2) thus allows the United States to deny temporary entry to a Chilean business person whose activities in the United States require employment authorization if admission might interfere with an ongoing labor dispute. If the United States invokes Article 14.3(2), it must inform the business person in writing of the reasons for its action and notify Chile.

Section 403 of the draft bill implements Article 14.3(2) of the Agreement by amending INA § 214(j) (8 U.S.C. § 1184(j)), designating current subsection (j) as paragraph (1) and inserting a new paragraph (2). New paragraph (2) of INA § 214(j) provides authority to refuse nonimmigrant classification under specified circumstances to a Chilean business person seeking to enter the United States under and pursuant to the Agreement. In particular, nonimmigrant classification must be refused if there is a strike or lockout affecting the relevant occupational classification at the Chilean business person's place of employment or intended place of employment in the United States, unless that person establishes, pursuant to regulations issued by the Secretary of Homeland Security after consultations with the Secretary of Labor, that the business person's entry will not adversely affect the settlement of the strike or lockout or the employment of any person involved in the strike or lockout.

New paragraph (2) also requires the provision of notice to the affected Chilean business persons and to Chile of a determination to

deny nonimmigrant classification, as required under Article 14.3(3) of the Agreement. INA § 214(j)(2) as inserted by the bill applies only to requests for temporary entry by traders and investors, intra-company transferees, and professionals—-i.e., the categories of nonimmigrants that require employment authorization under U.S. law (corresponding to Sections B, C, and D of Annex 14.3 of the Agreement). Employment in the U.S. labor market is not permitted for business visitors, as defined in INA § 101(a)(15)(B) (8 U.S.C. § 1101(a)(15)(B)) (corresponding to Section A of Annex 14.3 of the Agreement); violations of status under that provision that involve labor disputes are fully redressable under existing law.

Section 214(j)(2) is similar to existing INA provisions that prohibit admission in certain circumstances where interference with a labor dispute may result. For example, under INA § 212(n)(1)(B) (8 U.S.C. § 1182(n)(1)(B)), the U.S. employer sponsoring an alien for admission must certify that there is no strike or lockout in the occupational classification at the place of employment. Additionally, § 214(j)(2) will supplement INA § 237(a)(1)(C) (8 U.S.C. § 1227(a)(1)(C)) and related INA provisions that now authorize deportation of an alien admitted under a particular nonimmigrant category if the alien ceases to perform the type of work permitted under that category or misrepresented the nature of the work at the time of admission. The Department of Labor will provide strike certifications to the Department of Homeland Security, as it has provided to the Immigration and Naturalization Service under existing provisions, pursuant to 8 C.F.R. 214.2(h)(17).

Administrative action

Chile will be added to the list of countries, maintained by the Department of State, whose citizens are eligible for treaty trader and treaty investor status under INA § 101(a)(15)(E). With respect to professionals provided for under Section D of Annex 14.3 of the Agreement, in all cases where a state license is required to engage in a particular activity in the United States, such professionals will be required to obtain the appropriate state license. Pursuant to INA § 101(a)(15)(W) as added by § 402(a) of the bill, the Secretary of Homeland Security will issue regulations implementing the numerical limits set forth in Appendix 14.3(D)(6) of the Agreement. The Secretary of Labor will issue regulations implementing the labor attestation provisions in new subsection (s) of INA § 212. The administrative agencies responsible for administering the other amendments to the INA described above will promulgate regulations to implement those amendments.

Summary of immigration provisions

Under Section B of Annex 14.3 of the Free Trade Agreement, citizens of Chile are eligible for temporary entry as traders and investors. The Immigration and Nationality Act currently conditions admission into the United States upon authorization pursuant to a treaty of commerce and navigation. Since the Agreement is not a treaty of commerce and navigation, and no such treaty exists between the United States and Chile, legislation is necessary to accord treaty trader and investor status to Chilean citizens qualifying for entry under Section B. Section 401 of H.R. 2738 accomplishes

this by relying on a mechanism similar to that provided in § 341(a) of the North American Free Trade Agreement Implementation Act, which in turn was based upon the Act of June 18, 1954 (68 Stat. 264, 8 U.S.C. § 1184(a)). The Act of June 18, 1954 conferred treaty trader and investor status upon nationals of the Philippines on a reciprocal basis secured by an agreement entered into by the President of the United States and the President of the Philippines.

Section 402(a) of H.R. 2738 implements Section D of Annex 14.3 of the Free Trade Agreement by creating a new "H–1B1" nonimmigrant visa category for aliens who are citizens of countries with which the United States has entered into free trade agreements and who seek to come to the United States temporarily to engage in business activities at the professional level. Section 402(a) of the bill establishes an annual limit of up to 1,400 new temporary entry applications from Chilean professionals, as provided in Appendix 14.3(D)(6) of the Agreement.

Under Sec. (D)(5) of Annex 14.3 of the Agreement, the United States may require that an attestation of compliance with labor and immigration laws be made a condition for the temporary entry of Chilean professionals. Section 402(b) of H.R. 2738 implemented the attestation requirement under the Agreement, requiring a U.S. employer seeking a temporary entry visa for a Chilean professional to file an attestation with the Secretary of Labor consisting of four core elements similar to those required for attestations under the H–1B visa program.

Like the contents of the attestation itself, the enforcement requirements are based on requirements under the H–1B visa program. Unlike the H–1B program, the period of authorized admission for H–1B1 aliens is one year, and may be extended in one year increments.

Article 14.3(2) of the Agreement establishes an important safeguard for the domestic labor forces of the United States and Chile, respectively. It permits either government to refuse to issue an immigration document authorizing employment where the temporary entry of a business person might affect adversely the settlement of a labor dispute or the employment of a person involved in such dispute. Article 14.3(2) thus allows the United States to deny temporary entry to a Chilean business person whose activities in the United States require employment authorization if admission might interfere with an ongoing labor dispute. If the United States invokes article 14.3(2), it must inform the business person in writing of the reasons for its action and notify Chile. Section 403 implemented article 14.3(2) of the Agreement by providing that nonimmigrants can be refused entry if there is a labor dispute affecting the relevant occupational classification at the Chilean business person's place of employment or intended place of employment in the United States, unless that person establishes, pursuant to regulations issued by the Secretary of Homeland Security after consultations with the Secretary of Labor, that the business person's entry would not adversely affect the settlement of the labor dispute or the employment of any person involved in the labor dispute.

Pre-Introduction "mock markup" of U.S.-Chile FTA implementing legislation and committee amendments incorporated into H.R. 2738

On July 10, 2003, the Committee held a pre-introduction "mock markup" of draft implementing legislation submitted by the Administration to the Committee. The Committee's consideration of this draft legislation was limited to Title IV of the draft implementing legislation.

Judiciary Committee amendments to draft implementing legislation

The Committee reported several amendments to the immigration provisions by voice vote. The amendments were reflected in the final version of H.R. 2738 enacted into law.

First, the Committee reported an amendment by Representative King to transfer the new "W" professional worker visa category for citizens of Chile to §101(a)(15)(H)(i)(b)(1) of the Immigration and Nationality Act, rather than §101(a)(15)(W) as provided for in the draft implementing legislation. Representative King's amendment also ensured that in future years, the national H–1B visa cap will be reduced in two situations. First, the number of H–1B visas available in a fiscal year will be reduced by the number of Chilean citizens granted extensions of H–1B1 status in that fiscal year after having previously been granted five or more consecutive prior extensions. Second, the number of H–1B visas available in a fiscal year will be reduced by the number of H–1B1 visas allocated (1,400 for citizens of Chile). However, if at the end of a fiscal year, the 6,800 slots reserved for citizens of Chile and Singapore have not been exhausted, the number of H–1B visas available for that fiscal year will be adjusted upwards by the number of unused Chile and Singapore visas. These newly available H–1B visas may be issued within the first 45 days of the next fiscal year to aliens who had applied for such visas during the fiscal year for which the adjustment was made.

The Committee also reported an amendment offered by Representatives Berman and Conyers requiring that an application for every second extension for an H–1B1 visa be accompanied by a new employer attestation. This will have the effect of requiring the employer to update the prevailing wage determination at such time. The amendment also requires that an employer pay a fee when H–1B1 status is initially granted and after every second extension of that status. The fee shall be the same as the fee an employer must pay when petitioning for an H–1B visa. However, if no fee is being assessed under the H–1B program, no fee shall be imposed under the H–1B1 program. Finally, the implementing legislation now clarifies that an employer generally cannot sponsor an alien for an E, L, or H–1B1 visa if there is any labor dispute occurring in the occupational classification at the place of employment, regardless of whether the labor dispute is classified as a strike or lockout. In this regard, worker protections in H.R. 2738 are broader than those contained in the H–1B visa category.

Following the Committee's markup consideration of H.R. 2738, Chairman Sensenbrenner and Ranking Member Conyers sent a bipartisan letter co-signed by several Members of the Committee ex-

pressing strong Committee opposition to the inclusion of immigration-related provisions requiring changes to existing U.S. law in any subsequent free trade agreements submitted to Congress for its consideration. The Committee continues to closely monitor the negotiation of international trade agreements to ensure that no immigration provisions requiring changes to United States immigration law are presented.

Legislative History.—H.R. 2738 was introduced on July 15, 2003, by House Majority Leader Delay. On July 16, 2003, the Judiciary Committee ordered H.R. 2738 reported (H.R. Rept. No. 108–224, Part II). On July 24, 2003 the House passed H.R. 2738 by a vote of 270 yeas to 156 nays. On July 31, 2003, the Senate passed H.R. 2738 without amendment by a vote of 65 yeas to 32 nays. H.R. 2738 was signed by the President on September 3, 2003, and became Public Law No. 108–77.

H.R. 2739, the "United States-Singapore Free Trade Agreement"

Summary.—On May 26, 2003, United States and Singapore entered into a bilateral Free Trade Agreement (FTA), concluding a negotiation process that began in December of 2000. H.R. 2739 approves the U.S.-Singapore FTA submitted to Congress on July 15, 2003 and makes changes to United States law necessary to ensure compliance with the agreement. The legislation contains four titles: Title I, "Approval of and General Provisions Relating the Agreement;" Title II, "Customs Provisions;" Title III, "Relief from Imports;" and Title IV, "Temporary Entry of Business Persons." The Committee's consideration of H.R. 2739 was limited to Title IV of the legislation. Title IV establishes 5,400 annual professional worker visas for Singaporean citizens to enter the United States on a temporary basis.

H.R. 2739 was considered pursuant to the "Bipartisan Trade Promotion Authority Act of 2002"[23] and the Trade Act of 1974.[24] As a result, the legislation was considered on an expedited basis which did not permit committees of jurisdiction to amend the legislation after its formal introduction. However, the Committee made several changes to draft implementing legislation transmitted to the Committee for a pre-introduction "mock markup" on July 10, 2003. These changes were substantially reflected in the final version of H.R. 2739 enacted into law.

Summary of U.S.-Singapore FTA provisions pertaining to the jurisdiction of the Committee on the Judiciary

Although the Committee's formal legislative consideration of H.R. 2739 was limited to Title IV of the legislation, which implemented changes to United States immigration law, the U.S.-Singapore FTA also contained intellectual property and competition chapters that fall within the jurisdiction of the Committee.

Intellectual property rights (IPR)

Chapter 16 of the U.S.-Singapore FTA contains several provisions which enhance protections for IPR. The FTA requires Singa-

[23] 19 U.S.C. § 3805 et. seq. (2002).
[24] 19 U.S.C. § 2191 et. seq. (2003).

pore to more aggressively enforce laws prohibiting piracy of intellectual property and establishes that non-discrimination obligations apply for all types of intellectual property. The FTA ensures government involvement in resolving disputes between trademarks and Internet domain names (important to prevent "cyber-squatting" of trademarked domain names). It also applies the principle of "first-in-time, first-in-right" to trademarks and geographical indicators (place-names) applied to products.

The Agreement streamlines the trademark filing process by allowing applicants to use their own national patent and trademark offices for filing trademark applications. The FTA ensures that only authors, composers, and other copyright owners have the right to make their works available online. Copyright owners maintain rights to temporary copies of their works on computers. (This was aimed at protecting music, videos, software, or text from widespread unauthorized sharing via the Internet). Copyrighted works and phonograms are protected for extended terms, consistent with U.S. standards and international trends. The FTA also contains anti-circumvention provisions aimed at preventing the tampering with technologies (such as embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet. It also ensures that governments use only legitimate computer software (in order to set a positive example for private users). Singapore is to prohibit the production of optical discs (CDs, DVDs or software) without a source identification code unless authorized by the copyright holder in writing.

Under the FTA, protection for encrypted program-carrying satellite signals extends to the signals themselves as well as the programming. This is designed to prevent piracy of satellite television programming. Both sides agreed to criminalize unauthorized reception and re-distribution of satellite signals. The Agreement also contains limited liability for Internet Service Providers (ISPs)—reflecting the balance struck in the U.S. Digital Millennium Copyright Act between legitimate ISP activity and the infringement of copyrights. In essence, both sides are to provide immunity to Internet service providers for complying with notification and take-down procedures when material suspected to be infringing on copyright is hosted on their servers. The FTA provides for a patent term to be extended to compensate for up-front administrative or regulatory delays in granting the original patent, consistent with U.S. practice. The grounds for revoking a patent are limited to the same grounds required to originally refuse a patent.

In addition, the Agreement requires the government of Singapore to establish criminal penalties for pirated copies from legitimate products. The Singaporean government guarantees that it has authority to seize, forfeit, and destroy counterfeit and pirated goods and the equipment used to produce them. IPR laws are to be enforced against traded goods, including trans-shipments, to deter violators from using U.S. or Singaporean ports or free-trade zones to traffic in pirated products. The FTA mandates both statutory and actual damages under Singaporean law for IPR violations (as a deterrent to piracy) and provides that monetary damages be awarded even if actual economic harm (retail value, profits made by violators) cannot be determined. Singapore is to cooperate in

preventing pirated and counterfeit goods from being imported into the United States. The FTA sharply restricts Singapore from using compulsory licenses to copy patented drugs and establishes barriers to the import of patented drugs sold at lower prices in third countries.

Competition policy and antitrust

Chapter 12 of the U.S.-Singapore FTA commits Singapore to enact a law regulating anti-competitive business conduct and to create a competition commission by January 2005. Specific conduct guarantees are imposed to ensure that commercial enterprises in which the Singapore government has effective influence will operate on the basis of commercial considerations and that such enterprises will not discriminate in their treatment of U.S. firms. Singapore thus commits to maintain its existing policy of not interfering with the commercial decisions of Government Linked Companies (GLCs) and to provide annual information on GLCs with substantial revenues or assets. This requirement is particularly important because GLCs comprise a relatively large part (nearly 40 percent) of Singapore's economy. A summary of provisions related to competition and antitrust contained in the U.S.-Singapore FTA is set forth below.

Chapter 12 of the Agreement helps ensure that the opportunities created by trade liberalization are supported by healthy competitive domestic markets, allowing the firms of each country to compete freely and unhampered by anticompetitive business conduct in either country's territory. Firms that are subject to antitrust enforcement action will be guaranteed basic procedural safeguards. Since these protections already exist in the United States, no changes to United States law are necessary. While state monopolies and state enterprises do not account for a significant portion of either country's economy, the provisions governing these entities will help eliminate the potential for either party to favor domestic firms in the sale or purchase of goods and services.

Specifically, Chapter 12 ensures that both countries:

1. Enforce domestic antitrust law that prohibits anticompetitive business conduct.
2. Cooperate in the enforcement of antitrust law.
3. Ensure that any private or public monopolies designated by either country, and any state enterprises, be subject to disciplinary action for abusing their status or otherwise discriminating in a manner that harms the interests of the other country.
4. Explicitly recognize that anticompetitive conduct threatens the free flow of bilateral trade and investment, and seeks to secure the benefits of the FTA by prohibiting such conduct, encouraging economically sound competition policies, and furthering transparency and cooperation.
5. Expand NAFTA's competition provisions by affirming that antitrust laws be enforced in a neutral manner that does discriminate on the basis of nationality.
6. Ensure basic procedural rights for firms that are subject to antitrust enforcement actions: each country will provide a right to be heard and to present evidence before imposing a sanction or remedy.

7. Provide for consultations and furthers transparency by allowing either country to request from the other specific public information regarding antitrust enforcement activity, official monopolies and state enterprises, and any exemptions from their antitrust laws.

8. It is important to note that the provisions regarding antitrust law and enforcement are not subject to dispute settlement under the Agreement.

Temporary entry

Title IV of the U.S.-Singapore Free Trade Agreement draft implementing legislation forwarded to the Committee by the Administration for its July 10, 2003 "mock markup" reflected U.S. commitments under Chapter 14 of the U.S.-Singapore FTA pertaining to the temporary entry of business persons. However, this draft legislation was considerably amended during the Committee's "mock markup" on July 10, 2003. These Committee recommendations were subsequently incorporated into the introduced version of H.R. 2739. These changes are highlighted in the "Pre-Introduction "Mock Markup" of U.S.-Singapore FTA Implementing Legislation and Committee Amendments Incorporated Into H.R. 2739" section of this report.

In general, Chapter 14 is consistent with existing provisions of the Immigration and Nationality Act ("INA"). The four categories of persons eligible for admission under the Agreement's expedited procedures correspond to existing INA nonimmigrant and related classifications. To provide for the admission of the first two categories, business visitors and intra-company transferees, no changes in U.S. statutes are required. Limited technical changes are needed to provide for the admission of traders and investors and professionals. Legislation is also required to implement Article 14.3(2) of the Agreement regarding labor disputes.

Traders and investors

Under Section B of Annex 14.3 of the Agreement, citizens of Singapore are eligible for temporary entry as traders and investors. This category provides for admission under requirements identical to those governing admission under INA § 101(a)(15)(E) (8 U.S.C. § 1101(a)(15)(E)), which permits entry for persons to carry on substantial trade in goods or services or to develop and direct investment operations.

Section 101(a)(15)(E) currently conditions admission into the United States upon authorization pursuant to a treaty of commerce and navigation. Since the Agreement is not a treaty of commerce and navigation, and no such treaty exists between the United States and Singapore, legislation is necessary to accord treaty trader and investor status to Singaporean citizens qualifying for entry under Section B.

Section 401 of the draft legislation would not have amended § 101(a)(15)(E). Instead, it relied on a mechanism similar to that provided in § 341(a) of the North American Free Trade Agreement Implementation Act, which in turn was based upon the Act of June 18, 1954 (68 Stat. 264, 8 U.S.C. § 1184(a)). The Act of June 18, 1954 conferred treaty trader and investor status upon nationals of

the Philippines on a reciprocal basis secured by an agreement entered into by the President of the United States and the President of the Philippines.

Professionals

Section 402(a) of the draft bill would have amended §101(a)(15) of the INA (8 U.S.C. § 1101(a)(15)), which defines categories of persons entitled to enter the United States as nonimmigrants. Section 402(a) of the draft bill would have inserted a new subparagraph (W) at the end of INA § 101(a)(15). Subparagraph (W) would have established a new category of aliens entitled to enter the United States temporarily as nonimmigrants. These aliens would have been citizens of countries with which the United States has entered into free trade agreements and who sought to come to the United States temporarily to engage in business activities at the professional level. Entry into the United States under subparagraph (W) would have been subject to regulations issued by the Secretary of Homeland Security implementing numerical limitations provided for in the applicable agreement, as set forth in new paragraph (8) of INA § 214(g), as added by the bill. The Department of Labor would have issued regulations governing temporary entry of professionals under this proposed provision of law. This amendment to the INA would have implemented Section D of Annex 14.3 of the Agreement.

New INA § 101(a)(15)(W) also would have provided for the entry of spouses and children accompanying or following to join business persons entering under this category. The purpose of this provision was to grant express authorization for current Immigration and Naturalization Service practice, which is to admit such persons, but not allow them to be employed in the United States unless they independently met all applicable INA requirements.

Persons seeking temporary entry into the United States under § 101(a)(15)(W) would have been:

1. Considered to be seeking nonimmigrant status.
2. Subject to general requirements relating to admission of nonimmigrants, including those pertaining to the issuance of entry documents and the presumption set out in INA § 214(b) (8 U.S.C. § 1184(b)).
3. Accorded nonimmigrant status on admission.

It should be noted that while there are many similarities in the way professionals would have been treated under § 101(a)(15)(W) of the INA, as proposed by the draft bill and the way H–IB professionals are treated, a determination of admissibility under subparagraph (W) would have neither foreclosed nor established eligibility for entry as an H–1B professional. Further, § 101(a)(15)(W) would not have authorized a professional to establish a business or practice in the United States in which the professional will be self-employed.

Numerical limitations

Paragraph six of Section D of Annex 14.3 of the Agreement permits the United States to establish an annual numerical limit on temporary entries under the Agreement of Singaporean professionals.

Under the proposed new paragraph (8) of INA § 214(g), that would have been added by § 402(a) of the bill, the Secretary of Homeland Security will issue regulations establishing an annual limit of up to 5,400 new temporary entry applications from Singaporean professionals, as provided in Appendix 14.3(D)(6) of the Agreement.

Labor attestations

Under § (D)(5) of Annex 14.3 of the Agreement, the United States may require that an attestation of compliance with labor and immigration laws be made a condition for the temporary entry of Singaporean professionals. This provision allows U.S. labor and immigration officials to ensure that U.S. employers are not hiring Singaporean professionals as a way to put pressure on U.S. employees to accept lower wages or less favorable terms and conditions of employment.

Section 402(b) of the draft legislation would have implemented the attestation requirement under the Agreement. Section 402(b) of the draft bill would have amended § 212 of the INA (8 U.S.C. § 1182) by adding a new subsection (s) to the end of that section. INA § 212(s)(1), which would have been added by § 402(b) of the bill, required a U.S. employer seeking a temporary entry visa for a Singaporean professional to file an attestation with the Secretary of Labor. The attestation would have consisted of four core elements similar to those required for attestations under the "H–1B" visa program. See 8 U.S.C. § 1182(n)(1)(A)–(C). Thus, an employer would have attested that:

1. It would pay the employee the higher of (a) the actual wage paid to all other individuals with similar experience and qualifications for the specific employment in question, or (b) the prevailing wage level for the occupational classification in the area of employment.
2. It would provide working conditions for the employee that would not adversely affect the working conditions of workers similarly employed.
3. There was no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.
4. The employer had provided notice of its attestation to its employees' bargaining representative in the occupational classification in the area for which the employee was sought or, absent such a representative, has otherwise notified its employees.

The remainder of the proposed new INA § 212(s) contained provisions for enforcing the labor attestation requirement. Like the contents of the attestation itself, the enforcement requirements were based on requirements under the "H–1B" visa program. INA § 212(s)(2)(A) required an employer to make copies of labor attestations (and such accompanying documents as are necessary) available for public examination at the employer's principal place of business or worksite. INA § 212(s)(2)(B) required the Secretary of Labor to compile a list of all labor attestations filed including, with respect to each attestation, the wage rate, number of alien professionals sought for employment, period of intended employment, and date of need. INA § 212(s)(2)(C) provided that the Secretary of Labor would accept a labor attestation within seven days of filing

and issue the certification necessary for an alien to enter the United States as a nonimmigrant under INA § 101(a)(15)(W), unless the attestation was incomplete or obviously inaccurate.

INA § 212(s)(3)(A) required the Secretary of Labor to establish a process for the receipt, investigation, and disposition of complaints respecting an employer's failure to meet a condition specified in a labor attestation or an employer's misrepresentation of material facts in such an attestation. Section 212(s)(3) also set forth penalties that may be imposed for violation of the labor attestation requirements, including monetary fines and denial of applications for visas under INA section 101(a)(15)(W) for specified periods. INA § 212(s)(4) defined certain terms used in INA § 212(s).

Labor disputes

Article 14.3(2) of the Agreement establishes an important safeguard for the domestic labor forces of the United States and Singapore, respectively. It permits either government to refuse to issue an immigration document authorizing employment where the temporary entry of a business person might affect adversely the settlement of a labor dispute or the employment of a person involved in such dispute. Article 14.3(2) thus allows the United States to deny temporary entry to a Singaporean business person whose activities in the United States require employment authorization if admission might interfere with an ongoing labor dispute. If the United States invokes Article 14.3(2), it must inform the business person in writing of the reasons for its action and notify Singapore.

Section 403 of the draft bill implemented Article 14.3(2) of the Agreement by amending INA § 214(j) (8 U.S.C. § 1184(j)), designating current subsection (j) as paragraph (1) and inserting a new paragraph (2). New paragraph (2) of INA § 214(j) provided authority to refuse nonimmigrant classification under specified circumstances to a Singaporean business person seeking to enter the United States pursuant to the Agreement. In particular, nonimmigrant would have been refused if there was a strike or lockout affecting the relevant occupational classification at the Singaporean business person's place of employment or intended place of employment in the United States, unless that person established, pursuant to regulations issued by the Secretary of Homeland Security after consultations with the Secretary of Labor, that the business person's entry would not have adversely affected the settlement of the strike or lockout or the employment of any person involved in the strike or lockout.

New paragraph (2) also required the provision of notice to the affected Singaporean business persons and to Singapore of a determination to deny nonimmigrant classification, as required under Article 14.3(3) of the Agreement. INA § 214(j)(2) as inserted by the draft legislation applies only to requests for temporary entry by traders and investors, intra-company transferees, and professionals—i.e., the categories of nonimmigrants that require employment authorization under U.S. law (corresponding to Sections B, C, and D of Annex 14.3 of the Agreement). Employment in the U.S. labor market would not have been permitted for business visitors, as defined in INA § 101(a)(15)(B) (8 U.S.C. § 1101(a)(15)(B)) (corresponding to Section A of Annex 14.3 of the Agreement); violations

of status under that provision that involve labor disputes are fully redressable under existing law.

Section 214(j)(2) would have been similar to existing INA provisions that prohibit admission in certain circumstances where interference with a labor dispute may result. For example, under INA § 212(n)(1)(B) (8 U.S.C. § 1182(n)(1)(B)), the U.S. employer sponsoring an alien for admission must certify that there is no strike or lockout in the occupational classification at the place of employment. Additionally, § 214(j)(2) would have supplemented INA § 237(a)(1)(C) (8 U.S.C. § 1227(a)(1)(C)) and related INA provisions that now authorize deportation of an alien admitted under a particular nonimmigrant category if the alien ceased to perform the type of work permitted under that category or misrepresented the nature of the work at the time of admission. The Department of Labor would have provided strike certifications to the Department of Homeland Security, as it has provided them to the Immigration and Naturalization Service under existing provisions, pursuant to 8 C.F.R. § 214.2(h)(17).

Administrative action

Singapore would have been added to the list of countries, maintained by the Department of State, whose citizens are eligible for treaty trader and treaty investor status under INA § 101(a)(15)(E). With respect to professionals provided for under Section D of Annex 14.3 of the Agreement, in all cases where a state license is required to engage in a particular activity in the United States, such professionals would have been required to obtain the appropriate state license. Pursuant to INA § 101(a)(15)(W) as proposed by section 402(a) of the draft bill, the Secretary of Homeland Security would have issued regulations implementing the numerical limits set forth in Appendix 14.3(D)(6) of the Agreement. The Secretary of Labor would have issued regulations implementing the labor attestation provisions in new subsection (s) of INA § 212. The administrative agencies responsible for administering the other amendments to the INA described above would have promulgated regulations to implement those amendments.

Summary of immigration provisions

Under Section B of Annex 14.3 of the Free Trade Agreement, citizens of Singapore are eligible for temporary entry as traders and investors. This category provides for admission under requirements identical to those governing admission as E visa nonimmigrants, which permits entry for persons to carry on substantial trade in goods or services or to develop and direct investment operations. The Immigration and Nationality Act currently conditions admission into the United States upon authorization pursuant to a treaty of commerce and navigation. Since the Agreement is not a treaty of commerce and navigation, and no such treaty exists between the United States and Singapore, legislation is necessary to accord treaty trader and investor status to Singaporean citizens qualifying for entry under Section B. Section 401 of H.R. 2739 accomplishes this by relying on a mechanism similar to that provided in section 341(a) of the North American Free Trade Agreement Implementation Act, which in turn was based upon the Act of June 18, 1954

(68 Stat. 264, 8 U.S.C. 1184(a)). The Act of June 18, 1954 conferred treaty trader and investor status upon nationals of the Philippines on a reciprocal basis secured by an agreement entered into by the President of the United States and the President of the Philippines.

Section 402(a) of H.R. 2739 implements Section D of Annex 14.3 of the Free Trade Agreement by creating a new "H–1B1" nonimmigrant visa category for aliens who are citizens of countries with which the United States has entered into free trade agreements and who seek to come to the United States temporarily to engage in business activities at the professional level. Section 402(a) of the bill establishes an annual limit of up to 5,400 new temporary entry applications from Singaporean professionals, as provided in Appendix 14.3(D)(6) of the Agreement.

Under Sec. (D)(5) of Annex 14.3 of the Agreement, the United States may require that an attestation of compliance with labor and immigration laws be made a condition for the temporary entry of Singaporean professionals. Section 402(b) of H.R. 2739 implements the attestation requirement under the Agreement, requiring a U.S. employer seeking a temporary entry visa for a Singaporean professional to file an attestation with the Secretary of Labor consisting of four core elements similar to those required for attestations under the H–1B visa program. Thus, an employer would have to attest that:

It would pay the employee the higher of: (a) the actual wage paid to all other individuals with similar experience and qualifications for the specific employment in question, or (b) the prevailing wage level for the occupational classification in the area of employment.

It would provide working conditions for the employee that would not adversely affect the working conditions of workers similarly employed. There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. The employer has provided notice of its attestation to its employees' bargaining representative in the occupational classification in the area for which the employee is sought or, absent such a representative, has otherwise notified its employees. Like the contents of the attestation itself, the enforcement requirements are based on requirements under the H–1B visa program. Unlike the H–1B program, the period of authorized admission for H–1B1 aliens is one year, and may be extended in one year increments.

Pre-Introduction "mock markup" of U.S.-Singapore FTA implementing legislation and committee amendments incorporated into H.R. 2739

On July 10, 2003, the Committee held a pre-introduction "mock markup" of draft implementing legislation submitted by the Administration to the Committee. The Committee's consideration of this draft legislation was limited to Title IV of the draft implementing legislation. During this meeting, Chairman Sensenbrenner, Ranking Member Conyers, and several Members of the Committee made it clear that they opposed the inclusion of immigration provisions in H.R. 2739 and that they would not support any future FTA that included substantive changes to United States immigration law.

Judiciary Committee amendments to draft implementing legislation

The Committee reported several amendments to the immigration provisions by voice vote. The amendments were reflected in H.R. 2739.

First, the Committee reported an amendment by Representative King to transfer the new "W" professional worker visa category for citizens of Singapore to § 101(a)(15)(H)(i)(b)(1) of the Immigration and Nationality Act, rather than § 101(a)(15)(W) as provided for in the draft implementing legislation. Representative King's amendment also ensured that in future years, the national H–1B visa cap will be reduced in two situations. First, the number of H–1B visas available in a fiscal year will be reduced by the number of Singaporean citizens granted extensions of H–1B1 status in that fiscal year after having previously been granted five or more consecutive prior extensions. Second, the number of H–1B visas available in a fiscal year will be reduced by the number of H–1B1 visas allocated (5,400 for citizens of Singapore). However, if at the end of a fiscal year, the 6,800 slots reserved for citizens of Chile and Singapore have not been exhausted, the number of H–1B visas available for that fiscal year will be adjusted upwards by the number of unused Chile and Singapore visas. These newly available H–1B visas may be issued within the first 45 days of the next fiscal year to aliens who had applied for such visas during the fiscal year for which the adjustment was made.

The Committee also reported an amendment offered by Representatives Berman and Conyers requiring that an application for every second extension for an H–1B1 visa be accompanied by a new employer attestation. This will have the effect of requiring the employer to update the prevailing wage determination at such time. The amendment also requires that an employer pay a fee when H–1B1 status is initially granted and after every second extension of that status. The fee shall be the same as the fee an employer must pay when petitioning for an H–1B visa. However, if no fee is being assessed under the H–1B program, no fee shall be imposed under the H–1B1 program. Finally, the implementing legislation now clarifies that an employer generally cannot sponsor an alien for an E, L, or H–1B1 visa if there is any labor dispute occurring in the occupational classification at the place of employment, regardless of whether the labor dispute is classified as a strike or lockout. In this regard, worker protections in H.R. 2739 are broader than those contained in the H–1B visa category.

Following the Committee's markup consideration of H.R. 2739, Chairman Sensenbrenner and Ranking Member Conyers sent a bipartisan letter co-signed by several Members of the Committee expressing strong Committee opposition to the inclusion of immigration-related provisions requiring changes to existing U.S. law in any subsequent free trade agreements submitted to Congress for its consideration. The Committee continues to closely monitor the negotiation of international trade agreements to ensure that no immigration provisions requiring changes to United States immigration law are presented.

Legislative History.—H.R. 2739 was introduced on July 21, 2003 by Tom DeLay, the House Majority Leader and referred to the com-

mittee. On July 16, 2003, the Judiciary Committee ordered H.R. 2738 reported. On July 22, 2003, the Judiciary Committee reported H.R. 2738 (H. Rept. No. 108–225, Part II). On July 24, the House passed H.R. 2738 with a vote of 272 yeas to 155 nays. On July 31, 2003, the Senate passed H.R. 2738 without amendment by a vote of 66 Yeas to 32 Nays. H.R. 2738 was signed by the President on September 3, 2003, and became Public Law No. 108–78.

H.R. 3036, the "Department of Justice Appropriations Authorization Act, FY 2004 to 2006"

Summary.—Chairman F. James Sensenbrenner, Jr. introduced H.R. 3036 on September 9, 2003. H.R. 3036 would authorize appropriations for the Department of Justice for Fiscal Years 2004 through 2006. The bill as introduced contained three titles. Title I would provide the authorizations for appropriations for the various activities of the Department. Title II would make various reforms to the Department's grant programs to assure accountability and evaluation of these programs. Title III would make miscellaneous changes to various Department authorizing statutes. At the Committee's markup, Title IV, relating to DNA database enhancement, and Title V, relating to the Koby Mandell Act, were added.

Congressional authorization of appropriations for the Justice Department is required by law. (Public Law No. 94–503, Title II, Sec. 204, 90 Stat. 2427 (1976)) Title I contained authorizations of appropriations for the Department's various programs for Fiscal Years 2004 through 2006. These authorizations followed the President's budget request for the Department for Fiscal Year 2004. For Fiscal Year 2005, the authorizations represented the President's budget request plus a 2% increase. For Fiscal Year 2006, the authorizations represented the Fiscal Year 2005 authorization plus a 2% increase. The Committee went beyond the Administration's request in one respect. The Committee provided for additional funds for the Office of the Inspector General. The Committee expects the OIG to use these additional funds in fulfilling its duties under Sec. 1001 of the "U.S.A. PATRIOT Act," Public Law 107–56. In addition, the authorization for the Federal Bureau of Investigation in all three years included language limiting the FBI's participation in the Terrorist Threat Integration Center ("TTIC") to the analysis of intelligence information.

Title II would generally reform the Department's grant programs, most of which are run through the Office of Justice Programs ("OJP") or the Community Oriented Policing Services ("COPS") Office. The Committee believes that many of the programs that these two offices administer are worthwhile and should be continued. The Committee also believes that the Department has made many administrative reforms in the last several years that have greatly increased the efficiency of these programs. The reforms in H.R. 3036 were intended to build on that progress and should not be interpreted to indicate any lack of support for that work. In fact, most of the measures included in Title II originated from a proposal formally submitted to the Congress by the Administration on June 4, 2003.

Title III would make a number of miscellaneous technical changes to statutes involving the Department. It would also make

several more substantive changes. Section 304 was intended to ensure that the Justice Department uses the most cost-effective training and meeting facilities for its employees. Section 305 would establish a statutory privacy officer within the Department to ensure that the Department safeguards personally identifiable information and complies with fair information practices pursuant to 5 U.S.C. Sec. 552a. Section 306 was intended to ensure the United States Trustee Program (a component of the Justice Department) actively identifies matters warranting criminal referrals and undertakes efforts to prevent bankruptcy fraud and abuse. Section 307 would require the Attorney General to submit an annual report to Congress specifying the number of United States persons or residents detained on suspicion of terrorism and specifying the standards developed by the Department of Justice for recommending or determining that a person should be tried as a criminal defendant or should be designated as an enemy combatant.

Title IV was added by an amendment offered by Representative Schiff and adopted by the Committee. It contains several provisions relating to enhancing DNA databases. First, it would amend the "DNA Analysis Backlog Elimination Act of 2000" to require any state that receives grants under that Act to include every person convicted of a violent felony under its state law within its DNA database. Second, it would amend the provisions of the "Violent Crime Control and Law Enforcement Act of 1994" so that the DNA of persons arrested for crimes and the DNA of persons from whom DNA samples have been lawfully taken under state law may be included in the DNA database authorized under that Act. Third, it would amend the "DNA Analysis Backlog Elimination Act of 2000" to require any state that receives grants under that Act not to prohibit or limit its law enforcement officers from comparing lawfully obtained DNA samples with the information in the Combined DNA Index System. Finally, it would permanently reauthorize such sums as may be necessary to fund the DNA Backlog Grant Programs first authorized under the "DNA Analysis Backlog Elimination Act of 2000."

Title V was added by an amendment offered by Representative Weiner and adopted by the Committee. It would establish an office within the Department of Justice to undertake specific steps to facilitate the capture of terrorists who have harmed American citizens overseas and to ensure that all American victims of overseas terrorism are treated equally. It would require the President to establish within the Department of Justice an office to carry out the following activities: (1) create a Bringing Terrorists to Justice program that will offer rewards to capture terrorists involved in harming American citizens overseas; (2) establish a program to provide notification for American victims of overseas terrorism or their immediate family to update them on the status of efforts to capture the terrorists who harmed them; (3) work with other agencies to expand legal restrictions on terrorists to reap profits from books or movies concerning their crimes; (4) determine if terrorists who have harmed American citizens overseas are serving in police or security forces and request other agencies involved in providing assistance to those forces to halt assistance until such terrorists are removed from their positions; (5) undertake an assessment of the

pattern of indictments of terrorists who have harmed American citizens overseas to determine the reasons for the absence of indictments in some regions; (6) monitor public actions by governments and regimes overseas to honor terrorists who have harmed American citizens overseas and encourage other agencies to halt their assistance to such governments and regimes; and (7) coordinate with other agencies to seek the transfer to United States custody of terrorists who have harmed American citizens overseas if they are released from the custody of other governments. It also authorizes such sums as may be necessary to carry out the purposes of Title V for Fiscal Year 2003 and subsequent Fiscal Year and makes amounts appropriated under the section available until expended.

At the markup, Members of the Committee, including Chairman Sensenbrenner and Rep. Weiner, agreed in principle to consolidate a variety of programs within the COPS office into one single grant program encompassing all of the grant purposes that these programs currently encompass. As with the Byrne-LLEBG merger, this consolidation would allow state and local governments more flexibility to spend the money for programs that work in their locality while easing the administrative burden of applying to a different program for each different purpose. This language was later negotiated and included in the bill as part of the manager's amendment adopted during house floor consideration.

Legislative History.—H.R. 3036 was referred to the House Judiciary Committee on September 9, 2003. The Committee held a markup and reported the bill to the House, as amended, by a voice vote on September 10, 2003 (H. Rpt. No. 108–426). On March 30, 2004, Chairman Sensenbrenner moved to suspend the rules and pass the bill as amended, and the motion was agreed to by a voice vote. The bill was received in the Senate on March 31, 2004 and no further action was taken on the bill.

H.R. 3247, the "Trail Responsibility and Accountability for the Improvement of Lands (TRAIL) Act"

Summary.—Congressman Thomas Tancredo introduced H.R. 3247 on October 2, 2003. H.R. 3247 attempted to provide consistent enforcement authority to each of the four major land management agencies that respond to violations of regulations regarding the management, use, and protection of public lands under the jurisdiction of these agencies. Additionally, the bill would clarify the purposes for which collected fines may be used and would also incorporate the amended text of H.R 1038, the "Public Lands Fire Regulations Enforcement Act of 2003," as it relates to increasing the criminal penalties that may be imposed for a violation of fire regulations applicable to the public lands. (The Judiciary Committee favorably reported H.R. 1038, with an amendment, by voice vote on September 15, 2003).

Currently, each of the four major federal land management agencies (the Bureau of Land Management, the U.S. Forest Service, the National Park Service, and the U.S. Fish and Wildlife Service) have different penalties for similar violations of laws that protect public lands. This legislation would provide consistent penalties for violations under each of their organic acts or any regulation issued under those acts.

H.R. 3247 would apply two general classes of fines and penalties, under 18 U.S.C. §§ 3571 and 3581, for those who are guilty of certain crimes on federal lands. H.R. 3247 would also designate the use of all collected fines to cover the cost of any improvement, protection, or rehabilitation work needed because of the action leading to the fine. Collected fines could also be used to increase public awareness of regulations or to cover administrative or legal expenses rendered necessary by the actions which lead to the fine. Any excess funds would be returned to the U.S. Treasury.

H.R. 3247 would establish a minimum fine of $500 for a violation of fire rules and regulations on lands under the jurisdiction of the Bureau of Land Management, National Park System Lands, and National Forest System Lands, if the violation of the rule or regulation was the result of reckless conduct, occurred in an area subject to a complete ban on open fires, and resulted in damage to public or private property.

Legislative History.—On May 20, 2004, H.R. 3247 was sequentially referred to the House Judiciary Committee for a period ending not later than June 30, 2004. On June 23, 2004, the Committee held a markup and ordered the bill reported as amended by a voice vote.[25] On September 28, 2004, the bill was considered under suspension and passed the House by a voice vote. The bill was received in the Senate on September 29, 2004. The Resources Committee reported H.R. 3247 with an amendment and filed H. Rept No. 108–511, Part I on May 20, 2004.

H.R. 3313—the "Marriage Protection Act of 2004"

Summary.—H.R. 3313 would prevent federal courts from striking down the provision of the Defense of Marriage Act (28 U.S.C. § 1738C) ("DOMA") that provides that no state shall be required to accept same-sex marriage licenses granted in other states. At least 38 states specifically reject by statute the recognition of same-sex marriage licenses granted out-of-state. Congress passed in DOMA by a vote of 342–67 in the House and 85–14 in the Senate.

Legislative History.—H.R. 3313, the "Marriage Protection Act of 2004," was introduced by Rep. John Hostettler on October 16, 2003. On June 24, 2004, the Constitution Subcommittee held a hearing on H.R. 3313 and the subject of "Limiting Federal Court Jurisdiction to Protect Marriage for the States" at which testimony was received from the following witnesses: Phyllis Schlafly, Founder and President, Eagle Forum; Michael Gerhardt, Arthur B. Hanson Professor of Law, William & Mary Law School; Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern Law School; and William E. Dannemeyer, Former U.S. Representative. On July 14, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 3313 with an amendment by a recorded vote of 21 to 13, a quorum being present. (H. Rept. No. 108–614). On July 22, 2004, H.R. 3313 was passed by the House by a vote of 233 to 194.

[25] H. Rep. No. 108–511 (2004).

H.R. 4319, Title 46 Codification Act of 2004

Summary.—H.R. 4319 is a joint product of the Department of Transportation and the Office of the Law Revision Counsel of the House of Representatives. On November 10, 2002, the Secretary of Transportation transmitted to Congress proposed legislation to complete the codification of title 46, United States Code. The Secretary's transmittal was referred to the Committee on the Judiciary of the House of Representatives. The Committee in turn requested the Office of the Law Revision Counsel, which has responsibility for preparing codification legislation pursuant to § 285b of Title 2, United States Code, to review the Secretary's proposed legislation and to work with the Department of Transportation in preparing a bill for introduction. This bill is the product of that cooperative effort.

Legislative History.—On May 12, 2004, H.R. 4319 was introduced by Chairman F. James Sensenbrenner, Jr. and Ranking Member John Conyers, Jr. On September 8, 2004 the committee reported the bill with an amendment by voice vote and filed H. Rept. No. 108–690. On September 28, 2004, H.R. 4319 passed the House under the suspension of the rules as amended, by a voice vote. H.R. 4319 was received in the Senate on September 29, 2004. No further action was taken on the bill.

H.R. 4661, the "Internet Spyware Prevention (I–SPY) Act of 2004"

Summary.—H.R. 4661 enhances existing fraud and computer crime law with strong criminal penalties targeting the most egregious abuses perpetrated upon Internet users by persons who maliciously employ various covert software applications, programs, applets, or code commonly known as "spyware." H.R. 4661, as amended, also provides resources and guidance to the Department of Justice for the dedicated prosecution of these offenses as well as fraudulent online identity theft ("phishing") offenses, and similar computer crimes.

Legislative History.—H.R. 4661 was introduced by Rep. Bob Goodlatte, Rep. Zoe Lofgren, and Rep. Lamar S. Smith on June 23, 2003 and referred to the Committee on the Judiciary. On September 9, 2004 the full Committee on the Judiciary met in open session and ordered favorably reported the bill H.R. 4661, with an amendment, by a voice vote. The Committee's report on H.R. 4661, as amended, was filed on September 23, 2004 as H. Rept. No. 108–698 and the bill was placed on the Union Calendar. On October 6, 2004 Rep. Goodlatte on behalf of Chairman Sensenbrenner moved that the House consider and pass H.R. 4661 as amended under suspension of the rules. H.R. 4661 then passed the House under suspension of the rules on a roll call vote of 415–0. The bill was received in the Senate and placed on the legislative calendar, but H.R. 4661 had no further consideration by the Senate before the end of the 108th Congress.

H.R. 5107, the "Justice for All Act of 2004"

Summary.—Chairman Sensenbrenner introduced H.R. 5107 on September 21, 2004. This legislation incorporated the text of H.R. 3214 as passed by the House and legislation similar to the Senate-passed Victims'rights bill, S. 2329.

H.R. 5107 enhanced the rights and protections for all persons involved in the criminal justice system through two different, but complementary mechanisms: (1) a new set of rights for victims of crime, which are both enforceable in a court of law and supported by fully-funded victims' assistance programs; and (2) a comprehensive DNA bill that seeks to ensure that the true offender is caught and convicted for the crime. Title I enumerated eight rights for crime victims and provided an enforcement mechanism for those rights. It also authorized $155 million in funding over the next 5 years for victims' assistance programs at the Federal and state level.

Titles II, III, and IV addressed three interrelated DNA problems. Title II provided for the elimination of the large backlog of DNA evidence that has not been analyzed. It also provided resources to remedy the lack of training, equipment, technology, and standards for handling DNA and other forensic evidence. Title II addressed the backlog by reauthorizing and expanding the DNA Analysis Backlog Elimination Act of 2000. It increased the authorized funding levels for the DNA Analysis Backlog Elimination program to $151 million annually for the next 5 years. Title III authorized funding for training for law enforcement, correctional, court, and medical personnel on the use of DNA evidence. Title III also authorized grant programs to reduce other forensic science backlogs, research new DNA technology, and promote the use of DNA technology to identify missing persons. Lastly, Title III provided funds to the Federal Bureau Investigation ("FBI") for the administration of its DNA programs.

Title IV established rules for post-conviction DNA testing of Federal prison inmates and required the preservation of biological evidence in Federal criminal cases while the defendant remains incarcerated. It provided incentive grants to States that adopt adequate procedures for providing post-conviction DNA testing and preserving biological evidence. Additionally, it authorized funding to help States provide competent legal services for both the prosecution and the defense in death penalty cases and provided funds for post-conviction DNA testing.

Legislative History.—The House Judiciary Committee held a markup of H.R. 5107 on September 22, 2004 and ordered the bill reported to the House by a voice vote (H. Rpt. No. 108–711). On October 6, 2004, Chairman Sensenbrenner introduced an amendment to the bill, and the bill passed as amended, by a vote of 393–14. On October 9, 2004, the bill passed the Senate by unanimous consent and became Public Law No. 108–405 on October 30, 2004.

H.R. 5363, A bill to authorize salary adjustments for Justices and judges of the United States for fiscal year 2005

Summary.—Introduced by Representative F. James Sensenbrenner, Jr., H.R. 5363 addresses the statutory mandate of §140 of Pub. L. No. 97–92 by specifically authorizing a cost-of-living adjustment (COLA) for federal judges in advance of or concurrent with an appropriation.

Legislative History.—On November 16, 2004, H.R. 5363 was referred to the House Committee on the Judiciary. The following day the House passed the bill, without amendment, by voice vote. On

December 8, 2004, the Senate passed H.R. 5363, without amendment, by unanimous consent. The President signed H.R. 5363 on December 23, 2004, which became Public Law No. 108–491. The text of H.R. 5363 was also included in H.R. 4818, the "Consolidated Appropriations Act of 2005" (both houses of Congress agreed to the accompanying conference report to H.R. 4818, H. Rept. 108–792, on November 20, 2004). On December 8, 2004 the President signed the bill into law. (Public Law No. 108–447)

H.J. Res. 106—Federal Marriage Amendment

Summary.—H.J. Res. 106 is a slightly modified form of H.J. Res. 56 that amends the Constitution to state that marriage is the union of one man and one woman.

Legislative History.—H.J. Res. 106 was introduced by Rep. Marilyn Musgrave on September 23, 2003. It was referred to the Committee on September 23, 2004. No action was taken on H.J. Res. 106 in Committee. On September 30, 2004, H.J. Res. 106 failed to pass the House by a vote of 227–186, a two-thirds vote being necessary to pass an amendment to the Constitution.

H. Con. Res. 414—Expressing the sense of the Congress, that as Congress recognizes the 50th anniversary of the Brown v. Board of Education decision, all Americans are encouraged to observe this anniversary with a commitment to continuing and building on the legacy of Brown

Summary.—The purpose of this concurrent resolution was to commemorate the 50th anniversary of the United States Supreme Court's decision in *Brown* v. *Board of Education,* which held that "separate but equal" educational institutions were unconstitutional. The resolution recognized the bravery of the four plaintiffs who brought the cases that were consolidated into Brown, as well as the pioneering role that Mexican-American plaintiffs played in developing the case law to overturn *Plessy* v. *Ferguson.* The resolution also recognizes the importance of the Brown decision in the fight against discrimination in the United States.

Legislative History.—Congressman Conyers of Michigan introduced H. Con. Res. 414 on May 4, 2004, and it was subsequently referred to the Committee on the Judiciary. On May 12, 2004, the Committee met in open session and ordered the concurrent resolution reported, without amendment, by a vote of 27 to 0. The Committee filed the report, H. Rept. No. 108–485, on May 12, 2004. On May 13, 2004, the House of Representatives considered H. Con. Res. 414 and passed it by 406 to 1. The resolution subsequently was referred to the Senate Committee on the Judiciary. On May 19, 2004, the Senate Judiciary Committee discharged the resolution by unanimous consent, and the full Senate agreed to it without amendment by unanimous consent.

H.J. Res. 63—the "Compact of Free Association Amendments of 2003"

Summary.—In 1982, the U.S. government and the government of the Federated States of Micronesia concluded a Compact of Free Association, which would make the Federated States an independent nation in free association with the U.S. In 1983, this com-

pact was approved by the people of Micronesia in a plebiscite. In 1983, the U.S. government and the government of the Marshall Islands concluded a Compact of Free Association, which would make the Marshall Islands an independent nation in free association with the U.S. Later that year, this compact was approved by the people of the Marshall Islands in a plebiscite. The Compacts provided that the U.S. would support the new nations economically with the goal of making them self-sufficient. As to defense matters, the Compacts provided that the U.S. would defend the nations against attack. The U.S. would also be able to establish by agreement military bases in their territory, foreclose access to, or use of, the nations by military personnel or for the military purposes of third countries (military denial), and bar the nations from taking actions that were incompatible with U.S. defense interests (defense veto). As to the Marshall Islands, a major subsidiary agreement allowed the U.S. continued use of the Kwajalein missile test range.

The current Compacts provide that most citizens of the Federated States of Micronesia and the Marshall Islands "may enter into, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States." In recent years, the U.S. government has expressed a number of concerns regarding the immigration provisions of the current Compacts. First, the ability of aliens claiming to be citizens of the nations to enter the U.S. without having to have passports is an open invitation for abuse by terrorists. Second, the government of the Marshall Islands has in the past sold citizenship and passports to non-native "investors". Third, Americans have taken advantage of the ability of citizens of the nations to enter the U.S. without visas to bring in adopted children without having to meet the requirements of the Immigration and Nationality Act regarding foreign adoptions that are designed to safeguard the interests of the child and his or her biological parents. Fourth, labor recruiters who arrange jobs in the United States for citizens of the nations have been abusing these workers, such as by not revealing the real nature of the jobs they will perform, charging prohibitive liquidated damages if the workers leave employment before the end of their employment contracts, and by leaving workers with no ability to return home at the conclusion of their jobs.

H.J. Res. 63 amends the Compacts pursuant to these negotiated agreements:

1. Passports will be required to enter the U.S.

2. No person who has been granted citizenship in the Federated States of Micronesia or the Marshall Islands, or has been issued a Federated States of Micronesia or Marshall Islands passport pursuant to any investment, passport sale, or similar program, shall be eligible for admission as a nonimmigrant under the Compacts.

3. A naturalized citizen of the Federated States of Micronesia or the Marshall Islands is only eligible for the benefits of nonimmigrant entry into the U.S. under the Compacts if he is (1) the spouse or unmarried minor child of a citizen of the Federated States of Micronesia or the Marshall Islands (who was a citizen of the Trust Territory of the Pacific Islands before the effective date of the relevant Compact or who was born in the islands after the effective date of the relevant Compact) and has been an actual resi-

dent of the Federated States of Micronesia or the Marshall Islands for not less than five years after being naturalized and who holds a certificate of actual residence, and, if a spouse, has been married to the citizen for at least five years, or (2) an actual resident for not less than five years after being naturalized (as of April 30, 2003), who continues to be an actual resident and who holds a certificate of actual residence and whose name is included on a list furnished by the government of the Federated States of Micronesia or the Marshall Islands not later than the effective date of the relevant amended Compact. In addition, no naturalized citizen is eligible for the rights under the Compacts if the circumstances associated with the naturalization are such as to allow a reasonable inference on the part of appropriate officials of the United States that the naturalization was acquired primarily in order to obtain entry rights into the United States.

4. Any child who is coming to the U.S. pursuant to an adoption outside the country or for the purpose of adoption in the U.S., is ineligible for admission as a nonimmigrant under the Compacts. The child would have to be brought to the U.S. pursuant to the applicable provisions of the Immigration and Nationality Act.

5. In order to address the U.S. government's concerns regarding labor recruitment practices, separate agreements, which shall come into effect simultaneously with the Compacts, shall govern requirements relating to labor recruitment practices.

Legislative History.—On July 8, 2003, Representative James A. Leach introduced H.J. Res. 63 (by request). H.J. Res. 63 was referred to the Committees on International Relations, Resources, and the Judiciary. The Committee on International relations filed a legislative report H. Rept. No. 108–262, Part I. The Committee on Resources filed a legislative report H. Rept. 108–262, Part II. On September 15, 2003, reported out with an amendment H.J. Res. 63 by voice vote. The resolution was passed by the House on October 28, 2003 by a voice vote. On November 6, 2003 the Senate passed the resolution by unanimous consent, with amendments to the title and text. On November 20, 2003 the House passed the amendments from the Senate by a 417–2 vote. The President signed the resolution on December 17, 2003 and it became Public Law No. 108–188.

S. 1233, the "National Great Black Americans Commemoration Act of 2004"

Summary.—Senator Barbara Mikulski introduced S. 1233, the "National Great Black Americans Commemoration Act" on June 11, 2003. The purpose of S. 1233 was to authorize assistance for the National Great Blacks in Wax Museum and Justice Learning Center. The Great Blacks in Wax Museum, Inc. in Baltimore, Maryland, a nonprofit organization, was founded in 1983 by Drs. Elmer and Joanne Martin, two Baltimore educators who used their personal savings to purchase wax figures, which they displayed in schools, churches, shopping malls, and festivals in the mid-Atlantic region. It is the nation's first wax museum presenting the history of great Black Americans, including those who have served in Congress, in senior executive branch positions, in the law, the judiciary

and other fields, as well as others who have made significant contributions to benefit the Nation.

The museum plans to expand its existing facilities to establish a 120,000 square foot National Great Blacks in Wax Museum and Justice Learning Center, which is intended to serve as a national museum and center for presentation of wax figures and related interactive educational exhibits portraying the history of great Black Americans. The committee agreed to amend the legislation to provide for $5 million and to limit the use of funds to education on civil rights and juvenile justice.

Legislative History.—The Senate passed S. 1233 by unanimous consent on July 14, 2003. S. 1233 was discharged from the House Judiciary Committee on April 2, 2004. On June 1, 2004, the bill was amended by the House and passed under suspension of the rules. On June 3, 2004, the Senate agreed to the House amendment by unanimous consent, and the bill became Public Law No. 108–238 on June 22, 2004.

S. 2363, To Revise and Extend the Boys and Girls Clubs of America

Summary.—Senator Orrin G. Hatch introduced S. 2363, to revise and extend the Boys and Girls Clubs of America on April 29, 2004. The Economic Espionage Act of 1996 (42 U.S.C. §13751 note) established a program to provide Department of Justice grant support for starting new Boys and Girls Clubs in distressed areas. When the bill was introduced, the law called for the establishment of 1,200 new clubs by the end of 2005. S. 2363 increased this number by 300 for a total of 1,500. Previous law also called for a goal of 4,000 total clubs by January 1, 2007. S. 2363 increased that goal to at least 5,000 such facilities in operation by January 1, 2010. Additionally, the bill extended through FY 2010 the authority of the Director of the Bureau of Justice Assistance of the Department of Justice to make grants to the organization to establish such facilities. It authorized appropriations for FY 2006 through FY 2010, beginning with $80 million in FY 2006 and increasing each year by increments of $5 million, reaching $100 million in FY 2010.

Legislative History.—S. 2363 was introduced by Senator Hatch and Senator Leahy on April 29, 2004. On June 3, 2004, the Senate Committee on the Judiciary reported S. 2363 favorably, and the same day, the Senate passed the bill without amendment by unanimous consent. The bill was referred to the House Committee on the Judiciary on June 4, 2004. On June 3, 2004, the Senate passed S. 2363 by unanimous consent. On June 4, 2004, the bill was referred to the House Judiciary Committee. On July 7, 2004, the Committee held a markup and ordered the bill reported to the House by a voice vote (H. Rept. No. 108–601). On September 28, 2004, Chairman Sensenbrenner moved to suspend the rules and pass the bill. This motion was agreed to by a vote of 374–19. The bill became Public Law No. 108–344 on October 18, 2004.

OTHER MATTERS HELD OF THE FULL COMMITTEE

H.R. 6, the "Energy Policy Act of 2003"

Summary.—H.R. 6 represents comprehensive energy reform legislation. The legislation consists of ten broad titles, many of which

were similar to H.R. 4, which passed the House during the 107th Congress. These titles are: Title I, Energy Conservation; Title II, Oil and Gas; Title III, Hydroelectric Relicensing; Title IV, Nuclear Matters; Title V, Vehicles and Fuels; Title VI, DOE Programs; Title VII, Electricity; Title VIII, Coal; Title IX, Renewable Fuels Standards; and Title X, Automobile Efficiency.

There were several provisions in Senate-passed H.R. 6 for which members of the Committee were appointed as conferees. Section 206 would provide a more clearly defined standard of antitrust review for electric utilities to develop, implement, and enforce reliability standards. Section 253 would have established a Department of Consumer Advocacy within the Department of Justice to represent the interests of energy customers on matters concerning the rates or services of public utilities and natural gas companies.

Section 532 of the Senate Amendment consists of three components. The first component amends the Bankruptcy Code to exempt from any creditor claims (with certain exceptions) funds or other assets held by a Nuclear Regulatory Commission (NRC) licensee or any other person intended to be used to comply with an NRC regulation or order regarding the decontamination and decommissioning of a nuclear power reactor licensed under certain provisions of the Atomic Energy Act, until the decontamination and decommissioning of the nuclear power reactor is completed to NRC's satisfaction. The second component of § 532 provides that an obligation of a licensee, former licensee, or other person to use funds or other assets to satisfy a responsibility (as described in the preceding paragraph) may not be rejected, avoided, or discharged in bankruptcy or in any liquidation, reorganization, receivership, or other insolvency proceeding under Federal or State law. The third component prohibits private insurance premiums and standard deferred premiums maintained pursuant to § 170b of the Atomic Energy Act of 1954 from being used to satisfy the claim of a creditor in a bankruptcy case until the indemnification agreement executed in accordance with § 170(c) of such Act is terminated. At the Committee's request, these provisions were deleted from the legislation in conference.

Section 708 of Senate-passed H.R. 6 contains language intended to expedite the "approval, construction, and initial operation of an Alaska natural gas transportation project." Section 708 would create expedited judicial review of claims related to construction of the pipeline and make the D.C. Circuit Court of Appeals the court of original jurisdiction for legal challenges to construction of this pipeline. Section 767 enhances fines for willful destruction of oil or gas pipelines, while § 783 enhanced criminal penalties for destroying pipeline facilities. Section 105(c)(1) requires participating entities to establish a baseline for greenhouse emissions and to annually report to appropriate agencies their direct and indirect greenhouse gas emissions beginning on April 1 of the third calendar year after enactment. Finally, § 1109 of the Senate amendment would permit the Attorney General, at the request of designated agencies such as the Environmental Protection Agency and the Department of Transportation, to bring a civil action against a party for failing to comply with the greenhouse gas emission limitations contained in the bill. Finally, the Committee worked closely on provisions per-

taining to liability standards for the design, manufacture, and distribution of MTBE.

Legislative History.—H.R. 6 was introduced by Committee on Energy and Commerce Chairman Billy Tauzin on April 7, 2003. On April 11, 2003, the House passed H.R. 6 by a recorded vote of 247 yeas to 175 nays. On July 31, 2003, the Senate passed H.R. 6 by a vote of 84 yeas to 14 nays. On November 18, 2003, the Conference Report was agreed to by the House by a vote of 246 yeas to 180 nays. However, the Senate could not overcome a filibuster of the legislation, and it was not enacted into law.

H.R. 1588, the "National Defense Authorization Act for Fiscal Year 2004"

Summary.—Congressman Duncan Hunter introduced H.R. 1588 on April 3, 2003. This bill authorized appropriations for Fiscal Year 2004 for, among other things, the Department of Defense's military activities; for the Department of Energy's defense activities; and for military construction.

Section 852 of the bill provided Federal support through the establishment of a program for State and local governments to purchase anti-terrorism technology or services and a program to make "SAFER" grants to hire firefighters for local communities. Subsection 852(a) through section 852(e) addressed the procurement procedures for state and local governments that wish to participate. Section 852(f) established a program almost identical to the COPS program for firefighters called the "SAFER" grant program to be administered by the Department of Homeland Security to provide grants to local communities to increase the number of permanent positions for firefighters. In the original legislation, the grants would have provided for four equal annual installments with the eligible entity matching 25% of the grant in the second year, 50% in the third year, and 75% in the fourth year. To take advantage of the grants, an eligible entity should provide a plan regarding how it will continue to fund the positions after the four years. Entities smaller than 50,000 would not be subject to the plan requirements. Preferential treatment could be given to an entity that agreed to provide more funds than the federal match requires.

Representative Weldon offered an amendment to replace § 852(f). The Weldon amendment required the grant program to be administered by FEMA and the grants to be made directly to the fire departments. The Weldon amendment required the entity receiving the grant to provide less of a match than in the original bill–10% in the first year; 20% in the second year; 50% in the third year; and 70% in the fourth year. The Weldon amendment authorized appropriations from FY 2004 through FY 2010 beginning with $1 billion and increasing each year. It capped the funding for any one firefighter at $100,000 over four years indexed annually for inflation. The Weldon amendment was agreed to in the conference report.

Legislative History.—On July 16, 2003, the Speaker appointed conferees from the Committee on the Judiciary for consideration of § 661–665 and 851–853 of the Senate amendment and modifications committed to conference. On November 7, 2003, the House agreed to the conference report by a vote of 362–40, and on Novem-

ber 12, 2003, the Senate agreed to the conference report by a vote of 95–3. The bill became Public Law No. 108–136 on November 24, 2003.

H.R. 2115, the "Flight 100—Century of Aviation Reauthorization Act"

Summary.—H.R. 2115 would authorize appropriations for programs administered by the Federal Aviation Administration. Most of the bill's authorizations would extend for four years: the 2004–2007 period. Members of the Committee were appointed as conferees on several provisions within its jurisdiction, including those pertaining to antitrust, law enforcement, and administrative law. Specifically, § 301, Delay Reduction Meetings, permits the Secretary of the Department of Transportation to request that air carriers meet with Administrator of the Federal Aviation Administration to discuss flight reductions at severely congested airports. This section also authorizes the Secretary of the Department of Transportation to establish a pilot program to authorize discussions and agreements between two or more air carriers for the purpose of reducing flight delays during periods of inclement weather. During the conference, at the Committee's request, the criteria under which these discussions may take place were limited, as was the duration of the program. In addition, the Secretary of Transportation is required to review this temporary program to ensure against any collusive activity or anticompetitive misconduct. These provisions became § 423 of the conference report. Finally, § 405 of the Senate-passed version of H.R. 2115 provides authority for pilots of cargo aircraft to carry firearms: This language was included in § 609 of the conference report.

Legislative History.—H.R. 2215 was introduced on May 15, 2003 by Transportation and Infrastructure Committee Chairman Young. It was reported by the Transportation Committee on June 6, 2003 (H.R. Rept. No. 108–143). On June 11, 2003, it passed the House by a vote of 418–8. It passed the Senate on June 12, 2003 by a vote of 94–0. The House passed the Conference Report for H.R. 2215 on October 30, 2003 by a vote of 211–207. The Senate passed the Conference Report by unanimous consent on November 21, 2003. The legislation was signed into law by the President on December 12, 2003 and became Public Law No. 108–176.

H.R. 2731, the "Occupational Safety and Health Small Employer Access to Justice Act of 2003"

Summary.—Introduced by Representative Charlie Norwood, H.R. 2731 amends the Occupational Safety and Health Act of 1970 to provide for the award of attorney's fees and costs to very small employers when they prevail in litigation prompted by the issuance of citations by the Occupational Safety and Health Administration.

Legislative History.—On May 5, 2004, the House Committee on Education and the Workforce ordered favorably reported H.R. 2731, with an amendment, by a roll call vote of 24–20 (H. Rept. 108–489, Part I). On May 13, 2004, the bill was referred sequentially to the House Committee on the Judiciary for a period ending not later than May 17, 2004. On May 17, 2004, the Committee on the Judiciary discharged itself from consideration of H.R. 2731. On May 18,

2004, the House passed H.R. 2731, with an amendment, by a roll call vote of 233–194. That same day the bill was laid on the table and its text appended to H.R. 2728, the "Occupational Safety and Health Small Business in Court Day Act of 2004," pursuant to H. Res. 645, the rule by which H.R. 2731 was considered. The House passed H.R. 2728, with an amendment, by a roll call vote of 251–177 on May 18, 2004. The Senate received the measure and placed the bill on the Senate Legislative Calendar. The Senate took no further action on this bill.

H.R. 3550, the "Transportation Equity Act"

Summary.—H.R. 3550 would authorize funds for Federal-aid highways, highway safety, truck safety, public transportation, transportation research, transportation planning and project delivery, hazardous materials transportation, and other surface transportation programs carried out by the United States Department of Transportation, to be financed primarily through the Federal Highway Trust Fund.

There were several provisions of this legislation for which members of the Committee were appointed as conferees. Chairman Sensenbrenner and Representative Lamar S. Smith were appointed conferees for the following sections: Sections 105, 1207, 1602, 1812, 2011, 3023, 4105, 4108, 4201, 4202, 4204, 5209, 5501, 6001, 6002, 7012, 7019–7022, and 7024 of the House bill, and sections 1512, 1513, 1802, 3006, 3022, 3030, 4104, 4110, 4174, 4226, 4231, 4234, 4265, 4307, 4308, 4315, 4424, 4432, 4440–4442, 4445, 4447, 4462, 4463, 4633, and 4661 of the Senate amendment.

Legislative History.—H.R. 3550 was introduced by Transportation and Infrastructure Committee Chairman Young on November 20, 2003. On March 29, 2004, H.R. 3550 was referred sequentially to, and discharged by, the Judiciary Committee. On April 2, 2004, the House passed H.R. 3550 by a vote of 357–65. On May 19, 2004, the Senate passed H.R. 3550 with an amendment by unanimous consent. However, the House-Senate conference could not resolve outstanding differences between the House and Senate-passed versions of the legislation, and it was not enacted into law.

H.R. 4200, the "National Defense Authorization Act for Fiscal Year 2005"

Summary.—H.R. 4200 was introduced by Representative Duncan Hunter on April 22, 2004. The Senate counterpart, S. 2400, included § 3401–10, which added a new hate crime provisions to Title 18 and provided for DoJ grants and other means to address hate crimes. These provisions were stripped out during the House and Senate conference of these bills.

Additionally, the FY 2005 Defense Authorization bill contained significant amendments to the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). The language as passed by the House only contained minor improvements to the portion of the program that addressed Department of Energy assistance to workers in obtaining state workers' compensation. The Senate language was much more expansive and included removing administration of the workers compensation section from DOE and placing in under the Department of Labor as well as restructuring

that section to change it from an assistance program to assistance and potential federal payment program should compensation through other means be unavailable.

In conference, the whole program was revamped in several major ways. First, it created a new Part E of EEOICPA, administered by DOL, which will make federal payments to eligible individuals instead of state workers' compensation assistance. That benefit was also extended to uranium workers covered by the Radiation Exposure Compensation Act. All monies for the payments necessary to satisfy the claims of RECA workers were also transferred to the funding mechanism under EEOICPA, and therefore, no longer subject to appropriations. Workers who worked at private facilities formally used by DOE are now able to pursue a claim under EEOICPA if the facility was listed as contaminated in a 2003 report by NIOSH or if listed in a new follow up report this legislation requires of NIOSH.

Employees covered under this amended program will receive $2,500 for each one percent permanent impairment caused by covered conditions, based on AMA Impairment Guides. They may also be compensated for wage-loss based upon a lump- sum amount for each year (prior to reaching the Social Security retirement age) where their earnings fell below the average of their last three years' earnings before they suffered a wage loss as a result of a covered illness. If they made less than 50% of the average 3 year earnings as a result of a covered illness, they receive $15,000. If they made more than 50% but less than 75% of their calculated average as a result of a covered illness, they receive 10,000 for each of those years. Survivors (spouses and children who meet the dependency criteria) are entitled to $125,000 if a covered condition caused or contributed to the employee's death. Substantial periods of wage-loss before retirement age (an aggregate ten or twenty years) suffered by the employee can qualify a survivor for an extra $25,000 or $50,000. If a claim has been filed, but an employee dies from a cause other than a covered condition before getting benefits, the survivors can get either the benefits the employee would have received or survivor benefits.

Legislative History.—On May 20, 2004, the House passed H.R. 4200 by a vote of 391–34. On June 6, 2004, the Senate struck all after the enacting clause and substituted the text of S. 2400, which passed by unanimous consent. Conferees were appointed, and the conference report was filed on October 8, 2004.[26] On October 9, 2004, the House agreed to the conference report by a vote of 359–14, and the Senate agreed to the report by unanimous consent. On October 28, 2004, the act became Public Law No. 108–375.

H.R. 4341, the "Postal Accountability and Enhancement Act"

Summary.—The "Postal Accountability and Enhancement Act" reflects the Bush Administration's principles for postal reform, and incorporates nearly all of the seventeen legislative recommendations made by the President's Commission on the U.S. Postal Service. The legislation mandates transparency in the Service's finances, costs, and operations. The legislation creates a modern sys-

[26] H. Rep. No. 108–767 (2004).

tem of rate regulation, establishes fair competition rules and a powerful new regulator, addresses the Postal Service's universal service obligation and the scope of the mail monopoly, and improves the collective bargaining process. However, unlike the unlimited and unfettered pricing flexibility recommended for the Postal Service by the President's Commission for competitive product offerings, the bill imposes important controls to protect the public interest from unfair competition.

H.R. 4341 was reported by unanimous consent by the Committee on Government Reform and Oversight on May 12, 2004 (H.R. Rep. No. 108–672). The Committee on the Judiciary received a sequential referral to consider provisions within the Committee's subject matter jurisdiction. A summary of these provisions follows:

1. Section 205 revises the complaint and appellate review of the Postal Regulatory Commission—which is charged with setting postage rates and helping define activities in which the Postal Service may compete with private industry. Section 301 establishes an off-budget fund within the Treasury Department for revenues and expenditures associated with services offered by the Postal Service on a competitive basis. Section 303 prohibits the Postal Service from issuing regulations that preclude competition or compel the disclosure of protected intellectual property.

2. Section 304 ensures that laws regulating the conduct of private commercial activities also apply to competitive activities undertaken by the Postal Service, including the antitrust laws, bankruptcy laws, the Federal Trade Commission Act, and laws pertaining to sovereign immunity. During markup consideration of H.R. 4341, the Committee reported an amendment offered by Chairman Sensenbrenner and Ranking Member Conyers to strike language that would have defined the Postal Service, to the extent it engages in competitive activity, as a "person" for purposes of the bankruptcy laws.

3. Section 502 provides authority for the Postal Regulatory Commission to issue subpoenas to compel disclosure of evidence in its proceedings, and to refer failures to adhere to Commission directives to federal district court. Section 703 requires the Federal Trade Commission to prepare a report detailing how federal and state laws apply differently to competitive activities of the Postal Service and private companies. Section 801 provides permanent authority for the Postal Service to employ postal police to protect property and persons on Postal Service property, and gives the Attorney General authority to collect penalties and clean up costs associated with the unlawful mailing of hazardous materials. Finally, section 809 prohibits the mailing of hazardous materials and clarifies penalties for their shipment. Finally, the Committee reported an amendment offered by Crime, Terrorism, and Homeland Security Subcommittee Chairman Coble to place these changes to existing law in Title 18 of the United States Code.

Legislative History.—H.R. 4341 was introduced on May 12, 2004 by Representative McHugh, and sequentially referred to the Judiciary Committee. On September 23, 2004, the Committee reported H.R. 4341 as amended by voice vote (H.R. Rept. No. 108–672, Part II). The legislation did not receive a floor vote.

H.R. 4818, the "Omnibus Consolidated Appropriations Act of FY 2005"

Summary.—H.R. 4818, the "Omnibus Consolidated Appropriations Act of FY 2005" sets forth certain limits and prohibitions on the use of appropriations for specified activities of the Federal Government. H.R. 4818 set forth the appropriations for many agencies under the oversight of the Judiciary Committee, including but not limited to the Department of Justice. Among the other matters contained in the bill that are a part of the Judiciary's Committee jurisdiction are, but are not limited to: the Satellite Home Viewer Extension Act, the Patent and Trademark Modernization Act, H–1B and L Visa reform, and naming the Oak tree as the national tree. Also language was included to add to each agency to designate a chief privacy officer to assume primary responsibility for privacy and data protection policy.

Legislative History.—H.R. 4818 was introduced and referred to the Committee on Appropriations on July 13, 2004. On November 11, 2004, a conference report was filed H. Conf. Report No. 108–792. The conference report contained 8 of the spending bills approved by Congress annually. The President signed the bill on December 8, 2004. (Pub. L. No. 108–447)

OVERSIGHT ACTIVITIES

Pursuant to Rule X, Clause 2(d), the Committee adopted an oversight plan for the 108th Congress. The oversight plan incorporated the matters which the Committee deemed, at the beginning of the Congress, to be worthy of its attention. Some of the matters contained in the oversight plan were addressed in the context of legislative hearings. The following is a list of the oversight hearings held by the full committee. The oversight activities of the subcommittee will be discussed separately in their respective sections.

List of oversight hearings

Direct Broadcast Satellite in the Multichannel Video Distribution Market, May 8, 2003 (Serial No. 22)

United States Department of Justice, June 5, 2003 (Serial No. 59)

The Terrorist Threat Intergration Center (TTIC) and its Relationship with the Departments of Justice and Homeland Security, July 22, 2003 (Serial No. 64)

Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series, September 4, 2003 (Serial No. 58)

Savings the Savings Clause: Congressional Intent, the Trinko Case, and the Role of the Antitrust Laws in Promoting Competition in the Telecom Sector, November 19, 2003 (Serial No. 62)

Should the Congress extend the October, 2004 Statutory Deadline for requiring Foreign visitors to Present Biometric Passports?, April 21, 2004 (Serial No. 111)

Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse, June 22, 2004 (Serial No. 95)

FULL COMMITTEE ANTITRUST OVERSIGHT HEARINGS

Direct satellite broadcast competition in the mulitchannel video programming distribution market

On Thursday, May 8, 2003, the Committee held a hearing on "Direct Broadcast Satellite Service Competition in the Multichannel Video Programming Distribution Marketplace." The following witnesses testified: K. Rupert Murdoch, Chairman and Chief Executive Officer, News Corporation; Kevin Arquit, Partner, Simpson, Thacher & Bartlett, Former Director, Bureau of Competition, Federal Trade Commission; Neal Schong, President Uvision, Vice Chairman, American Cable Association; Gene Kimmelman, Director, Consumers Union.

Multichannel video programming distribution (MVPD) refers to the transmission of video services through cable television outlets, multichannel multipoint distribution services (such as line-of-sight microwave stations), and space-based satellites. DBS (Direct Broadcast Service) is a satellite service that allows operators to transmit entertainment content over the high power, high frequency (Ku Band) portion of the radio spectrum. DBS offers subscribers high density programming options, small receiving dishes, and CD-quality digital audio and video. DBS providers are also capable of delivering satellite-based broadband service. Other DTH satellite providers operate at a lower portion of the radio spectrum (C-band). As a result, they transmit less data, and require much larger receiving dishes. With the commercial emergence of DBS in 1994, the number of C-Band DTH subscribers has rapidly declined. The largest C-band operator, PrimeStar, was absorbed by DBS provider DirecTV in 1999.

Market features of the multichannel video programming distribution market

Approximately 85 percent of all U.S. television households have cable, DBS, or another multi-channel video programming service. There are over 70 million U.S. cable subscribers. The number of digital cable subscribers reached 19.2 million during the last quarter of 2002. The last several years have seen tremendous consolidation in the cable industry. Presently, more than 50 percent of the U.S. cable market is dominated by two companies. Over the last few years cable rates have increased well above the rate of inflation. There are currently over 20 million DBS subscribers in the U.S. The FCC has issued nine licenses to DBS providers since 1994. These companies include Advanced Communications, Continental, Satellite Corp., Direct Broadcast Satellite Corp. (DSBC), DirectSat, DirecTV, Dominion Video Satellite, EchoStar, Tempo Satellite Inc. (TSI), and United States Satellite Broadcasting (USSB). Since 1994, the number of licensed DBS providers has fallen steadily. Presently there are only two "facilities-based" DBS providers: DirecTV, a subsidiary of the General Motors Hughes Corporation; and Littleton, Colorado-based, EchoStar Communications, which initiated its DISH Network service in 1996. As a result, over 90 percent of the DBS market is controlled by two providers. The remaining DBS providers, which include the National Rural Telecommunications Cooperative (NRTC) and Pegasus Communica-

tions, retransmit DirecTV signals to some rural areas. In 2003, DirecTV had about 11.1 million subscribers, while EchoStar had approximately 6.5 million subscribers.

The battle for DirecTV

In early 1999, General Motors announced plans to sell its Hughes DirecTV subsidiary. News Corp. was viewed as the leading contender for the asset. Because it possessed no American DTH holdings, few regulatory hurdles were expected. Over the next eighteen months, News Corp. arranged financing and finalized plans for a merger. EchoStar entered the contest for DirecTV with an unsolicited bid in September of 2000. In late October, after nearly eighteen months of negotiation, News Corp. made a final offer to acquire DirecTV for $26–29 billion. After General Motor's board declined to accept the offer, News Corp. withdrew from negotiations. On October 29, 2001, EchoStar's bid for DirecTV, valued at approximately $25 billion, was accepted by General Motors. The DirecTV/EchoStar merger would have created a U.S. satellite distribution monopoly, but EchoStar contended that a merger would strengthen competition in the broader multichannel video distribution market by creating a stronger competitor to cable. The Judiciary Committee held a hearing on competition in the multichannel video distribution market on December 1, 2001, at which EchoStar's CEO, consumer groups, and antitrust authorities testified.[27] On October 10, 2002, the FCC unanimously rejected the merger; on October 31, 2002, the Antitrust Division filed suit to block the merger. After a final effort to tailor the merger to satisfy antitrust scrutiny, EchoStar relinquished its efforts to acquire DirecTV.

Following EchoStar's failure to acquire DirecTV, a new bidding war for the DBS provider emerged. News Corp. quickly emerged as the leading bidder.

Potential competitive issues presented by News Corp.'s acquisition of DirecTV

News Corp.'s acquisition of DirecTV raises vertical integration questions. News Corp. is one of the world's largest media organizations. In addition to the Fox television network and regional sports channels, News Corp. owns the 20th Century Fox movie studio, Fox News Channel, the FX cable channel, Sky News, Fox Sports, and other assets. News Corp. presently lacks any U.S.-based DBS assets. Unlike the proposed merger between EchoStar and DirecTV, which would have created a horizontally-integrated monopoly in the DBS market and reduced the number of competitors in the multichannel video distribution market, the News Corp./DirecTV merger creates a vertically-integrated firm in which News Corp. has a controlling interest in programming and distribution assets. Present media companies are vertically-integrated. For example, AOL Time Warner owns significant programming (Warner Brothers Studios, CNN, New Line Cinema, etc.) and distribution (Time Warner Cable, TBS, TNT, TCM, etc.) assets.

[27] Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market: Hearing Before the House Committee on the Judiciary, 107th Cong. (2001).

At the Committee's May 8, 2003 hearing, News Corp. President and CEO K. Rupert Murdoch made a number of commitments to address concerns about its potential to withhold programming from competing multichannel video programming distributors. News Corp. agreed to adhere to current FCC program access requirements, and committed to providing its programming to competitors on a nondiscriminatory basis. Specifically, News Corp. agreed to abide by FCC program access rules, which apply to companies that control and distribute programming. News Corp. further agreed to aggressively expand local-into-local services to DirecTV subscribers and committed to programming on a nondiscriminatory basis. News Corp. committed to reinvigorating digital and broadband interactive services offered by DirecTV.

On December 19, 2003, the Department of Justice announced that it would not challenge News Corp.'s acquisition of a controlling interest in DirecTV. On the same day, the FCC approved the acquisition. However, the FCC imposed several unique conditions designed to curb News Corp.'s ability to discriminate against broadcast and cable competitors by either raising fees for access to certain programs, or favoring its Fox broadcasting network and its cable channels. The Committee continues to monitor the state of competition in the MVPD marketplace.

"Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series"

On September 4, 2003, the Committee on the Judiciary held an oversight hearing on: "Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series." The following witnesses testified: Myles Brand, President, National Collegiate Athletic Association; James E. Delany, Commissioner, Big Ten; Dr. Scott Cowen, President, Tulane University and Chairman, Presidential Coalition for Athletics Reform; and Steve Young, NFL Super Bowl championship quarterback, former Division I–A college football player, and ABC Sports commentator. Donna Shalala, the President of the University of Miami, was invited to the hearing but declined to testify.

The NCAA is not immune from antitrust scrutiny. The National Collegiate Athletic Association (NCAA) has a role in establishing eligibility requirements for member participation in athletic programs and for preserving the integrity and fairness of intercollegiate athletic competition. However, the NCAA does not determine which teams compete for Division I–A national college football championship or post-season major bowls. Division I–A college football is the only sport that does not have a playoff system to determine national championships. Rather, eligibility to compete for the national football championship and other high profile national match-ups are determined by variables including membership in certain athletic conferences, a team's number of wins and losses, the strength of its schedule, private arrangements between athletic conferences and independent bowls, coaches' and media polls, and economic considerations.

Last year, the college conference system for Division I–A football was thrown into disarray after the defection of the University of Miami from the Big East to the Atlantic Coast Conference (ACC.)

Several observers contended that the rationale for this defection was financially motivated, and a lawsuit has been filed against the defecting schools and the ACC. This defection has heightened concern that Division I–A college football has become a financially-driven enterprise rather than a forum for amateur athletes to compete in the best tradition of college athletics. Some have contended that the Bowl Championship Series (BCS) exemplifies the financially-driven, anticompetitive nature of intercollegiate athletics. The BCS was established in 1997 with the intent to create a more objective basis for selecting national champions and other bowl participants. Notwithstanding this development, the Division I–A bowl selection process for college football has led some to question the legitimacy and fairness of this process. Post-season college football generates hundreds of millions for participating conferences and institutions, much of it derived from exclusive television broadcast licensing agreements. Over 90 percent of revenue derived from BCS bowl games is distributed to BCS-affiliated institutions. The current bowl selection process has anti-competitive, exclusionary features that raise substantial antitrust questions. The antitrust aspects of the current bowl system were the focus of the Committee's hearing.

Bowl Championship Series (BCS)

The BCS was created in 1997 and became effective at the commencement of the 1998 athletic season. It was established to address several concerns that had been raised about the fairness of the College Bowl Alliance and was designed to produce a true Division I–A college football championship. The BCS shares many features of the Bowl Alliance. The principal difference is the inclusion of the Rose Bowl, and the termination of the Rose Bowl's exclusive tie-in with the Big Ten and Pacific Ten. Under the terms of the BCS, the two teams that finish as the two top-ranked teams in the BCS's official rankings meet in either the Rose, Fiesta, Sugar, or Orange Bowls, with the championship game rotated among each of the bowls. BCS rankings are derived from: poll rankings (an average of the Associated Press media poll and the USA Today/ESPN coaches poll; computer rankings (consisting of weighting of the Jeff Sagarin poll, as well as the Seattle Times and New York Times rankings); a team's won/lost record; strength of schedule (comprised of the won/lost records of a team's opponents as well as won/lost records of a team's opponent's opponents); and additional computer analysis.[28]

Four months after the Committee's hearing, representatives from the NCAA, and BCS and non-BCS-affiliated institutions agreed on a revised framework for Division I–A postseason football. This new framework, announced on February, 29, 2004, permits increased opportunities for Division IA colleges to participate in BCS bowl games, adjusts revenue distribution formulas to recognize the participation of those institutions not presently in the BCS conferences, and broadens the involvement of all Division I–A conferences in the design and administration of the BCS. Finally, an agreement was reached to establish a fifth BCS bowl game, pro-

[28] http://anccfb.go.com/road/rules/asp See BCS Rules—About the BSC.

vided sufficient market interest exists. The Committee will continue to monitor market conditions in this field.

"Saving the Savings Clause: Congressional Intent, the Trinko Case, and the Role of the Antitrust Laws in Promoting Competition in the Telecom Sector"

On November 19, 2003, the Committee held a hearing titled "Saving the Savings Clause: Congressional Intent, the Trinko Case, and the Role of the Antitrust Laws in Promoting Competition in the Telecom Sector." The following witnesses testified at the hearing; the Honorable R. Hewitt Pate, Assistant Antitrust General, Antitrust Division, United States Department of Justice; Alfred C. Pfeiffer, Jr., Partner, Bingham McCutchen, on Behalf of the Association for Local Telecommunications Services and the Competitive Telecommunications Association; John Thorne, Executive Vice President & Deputy General Counsel, Verizon; Christopher Wright, Partner, Harris, Wiltshire & Grannis LLP, Former General Counsel, Federal Communications Commission.

Antitrust Law and Competition in the Telecommunications Marketplace

The House Committee on the Judiciary and the antitrust laws have played a critical role in fostering competition in the telecommunications industry. Antitrust law formed the legal basis for the historic divestiture of AT&T in 1982. However, even after the break up of AT&T, local service was still largely the province of Regional Bell Operating Companies (RBOCS). The Telecommunications Act of 1996 represented the most decisive expression of congressional resolve to bring local competition to the telecom sector.[29] The Act contained several market-opening provisions designed to provide competitive opportunities for nonincumbent carriers that lacked access to the physical infrastructure built by decades of government-created monopoly control of the local exchange.

When considering the 1996 Act, Congress recognized the continued vitality of the antitrust laws in preserving competition in this marketplace. As a result, the 1996 Act contained an explicit savings clause that preserved the application of the antitrust laws in this field. The savings clause states: "* * * Nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[30]

To reaffirm the centrality of the antitrust laws in the liberalized regulatory regime established by the 1996 Act, the Judiciary Committee and Congress preserved an explicit antitrust savings clause in the legislation. In legislative language that provides clear congressional guidance to both regulators and judges, the antitrust savings clause contained in § 601(c)(1) of the 1996 Act provided that: "* * * Nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." In order to further ensure that the plain language of the Act could not be ignored or misinterpreted, the 1996 Act also contained a general savings clause that

[29] Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.) (hereinafter "1996 Act" or "Act").

[30] *Id.* at § 601(c)(1).

stated: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such act or amendments."[31] The legislative record surrounding consideration of the 1996 Act left no doubt that Congress intended to preserve the application of the antitrust laws in the telecommunications sector.

For example, the Senate Report accompanying the 1996 Act states: [T]he provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill."[32] In addition, Congress concluded that the savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws."[33] Several Members also affirmed the continued application of the antitrust laws. Senator Thurmond stated: "[The Act contains an] unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation that it fosters, can flourish to benefit consumers and the economy.[34] Ranking Member Conyers observed: "[T]he bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities * * * by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers."[35] Senator Leahy stated: "Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry."[36]

When signing the legislation, President Clinton stated that: "The Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully."[37] In addition, the FCC formally acknowledged that its regulations did not provide the "exclusive remedy" for anticompetitive conduct.[38] The FCC expressly concluded that: "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252 * * * "[W]e clarify * * * that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws."[39] As late as 2001, FCC Chairman Powell concluded that "[g]iven the vast resources of many of the nation's ILECs," the FCC's current fining authority of $1.2 million per of-

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[31] See *supra*, note. 12.

[32] S. Rep. No. 104–23, at 17 (1995).

[33] Joint Explanatory Statement of the Committee of Conference, S. 652, H. Rep. No. 104–458, S. Rep. No. 104–230, at 201 (1996) ("Conference Report").

[34] 142 Cong. Rec. S687–01 (daily ed. February 1, 1996) (statement of Sen. Thurmond).

[35] 142 Cong. Rec. H1145–06 (daily ed. February 1, 1996) (statement of Rep. Conyers).

[36] 141 Cong. Rec. S18586–06 (daily ed. December 14, 1995) (statement of Sen. Leahy).

[37] Statement of President William J. Clinton upon signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996).

[38] First Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, ¶ 124 (Aug. 8, 1996) (R2–7–A174).

[39] Id. at ¶ 129 (R2–7–A175).

fense "is insufficient to punish and deter violations in many instances."[40]

Notwithstanding the clarity of this congressional directive and its considerable legislative history, some courts have concluded that the pervasiveness of the regulatory scheme created by the 1996 Act displaced the application of the antitrust laws. For example, in *Goldwasser* v. *Ameritech Corp.,* the Seventh Circuit held that an RBOC's failure to comply with the provisions of the 1996 Act was not subject to a remedy under the antitrust laws.[41] In Law Offices of Curtis Trinko v. Verizon, the Second Circuit overturned a lower court decision that held that a complaint alleging sustained anticompetitive conduct partly predicated on violations of the 1996 Act could not be categorized as a violation of the antitrust laws. The Supreme Court granted certiorari on March 3, 2003, and oral arguments took place on October 14, 2003.[42]

The Committee's November 19, 2003 hearing on this subject examined the role of the antitrust laws in preserving competition in the telecom sector, the intent of Congress when it included an antitrust savings clause in the 1996 Act, the relationship between the antitrust laws and the 1996 Act in promoting competition in the telecommunications marketplace, and possible legislative remedies to judicial circumvention of the antitrust savings clause contained in the 1996 Act. On January 13, 2004, in Supreme Court held that Trinko's alleged breach of Verizon's Telecommunication Act duties to share its network with competitors did not state a claim under the Sherman Act.[43] The Court reasoned that the 1996 Act did not alter antitrust law nor add new claims and that Verizon did not violate preexisting antitrust standards. The Court held that "we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors."

While the Court upheld the antitrust savings clause on its face, the decision made it nearly impossible to state an antitrust claim for anticompetitive conduct within the regulatory ambit of the 1996 Act. In reaching its conclusion, the Court looked to the perceived institutional capacity of regulators to remedy anticompetitive misconduct. Specifically, the majority decision stated: "One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. * * *" The Court also stated that the "regulatory framework that exists in this case demonstrates how, in certain circumstances, 'regulations significantly diminished the likelihood of major antitrust harm.'" The Court concluded that "against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs." This judicial analysis constitutes precisely what the antitrust savings clause in the Telecom Act precluded.

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[40] Letter from Chairman Powell to House and Senate Appropriations Committees of May 4, 2001.

[41] 222 F.3d 390 (7th Cir. 2000).

[42] 305 F.3d 89 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003).

[43] 540 U.S. 398 (2004).

On May 20, 2004, Chairman Sensenbrenner introduced H.R. 4412, the "Clarification of Antitrust Remedies in Telecommunications Act of 2004." The legislation merely provides that unlawful monopolistic behavior that may also violate the regulatory obligations of the Telecom Act may constitute an antitrust violation. The legislation provides an antitrust remedy for these violations irrespective of the existence of regulations that apply to this industry. In so doing, the legislation merely reiterates the plain meaning of the antitrust savings clause and the broad bipartisan intent of Congress to preserve the application of the antitrust laws in the telecommunications field irrespective of the existence of the Telecom Act.

Over the last five decades, the Committee on the Judiciary has played a central role promoting competition in the telecommunications market. It will continue to closely monitor competition in the telecommunications marketplace, and will be an active player in legislative consideration of amendments to the Telecom Act during the 109th Congress.

Oversight of the Department of Justice and the conduct of the "War Against Terrorism" and implementation of the USA PATRIOT Act

On Thursday, June 5, 2003, the Committee on the Judiciary held an oversight hearing on the Department of Justice. The sole witness at the hearing was Attorney General John D. Ashcroft. The hearing focused on the Department of Justice's conduct of the "War Against Terrorism" and its implementation of the USA PATRIOT Act. The hearing reflected the Committee's continuing commitment to monitor the implementation of antiterrorism legislation, to conduct active oversight of the Department of Justice, and to ensure that Federal law enforcement authorities are provided with the resources to effectively assess, prevent, and respond to terrorist threats while preserving fundamental liberties. Following the hearing, Chairman Sensenbrenner submitted 83 multi-tiered follow up questions to Attorney General Ashcroft on behalf of Committee Members. Attorney General Ashcroft provided a 35-page list of responses and an 84 page attachment in response to the Committee request.

The USA PATRIOT Act and Federal Antiterrorism Initiatives in the War Against Terrorism. To better equip Federal law enforcement with the resources necessary to confront these modern threats, Chairman Sensenbrenner introduced H.R. 2975 (107th), to "Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," (PATRIOT Act) on October 2, 2001. H.R. 2975 was unanimously reported by the Judiciary Committee. After informal negotiations, the House and Senate incorporated two versions of the PATRIOT Act into H.R. 3162 (107th), the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," (USA PATRIOT Act). This legislation incorporated provisions of H.R. 3004 (107th), the "Financial Anti-Terrorism Act," which increased penalties for money laundering and financing terrorist organizations; and H.R. 3160 (107th), the "Bioterrorism Prevention Act of 2001," which provided law enforcement personnel greater resources to assess and

prevent biological attacks on American soil. The USA PATRIOT Act was signed into law by President Bush on October 26, 2001.[44]

In addition to the USA PATRIOT Act, Congress passed the "Homeland Security Act of 2002" to better safeguard Americans against terrorist attacks. This legislation incorporated several bills which have assisted the Federal government's war against terrorism. These include: H.R. 3482 (107th), the "Cyber Security Enhancement Act of 2002," which increased penalties for cybercrimes and cyberterrorism; H.R. 4864 (107th), the "Anti-Terrorism Explosives Act," which strengthened penalties for the unlawful possession of explosive materials and required all persons who wish to obtain explosives, even for limited use, to obtain a permit. The "Homeland Security Act of 2002," was signed into law by President Bush on November 25, 2002.[45] Finally, the events of September 11 lent impetus to the passage of legislation to tighten security at America's airports,[46] fundamentally reform the Immigration and Naturalization Service,[47] and to enhance border security.[48]

Summary of criminal provisions contained in the USA PATRIOT Act[49]

The PATRIOT Act provides enhanced investigative tools to Federal law enforcement authorities and improves information sharing between law enforcement and intelligence communities. In addition, the legislation amended several outdated Federal criminal statutes which had undermined the effective prevention, investigation, and prosecution of increasingly sophisticated criminal and terrorist threats. The legislation increases penalties for Federal terrorism offenses, eliminates the statute of limitations for terrorism-related crimes, and extends post-incarceration supervised release for persons convicted of these offenses. The legislation also amends Federal money laundering laws to deprive potential terrorists of financial support, establishes additional terrorism offenses, updates bioterrorism laws, and establishes revised criminal procedures for the prosecution of terrorism.

Criminal investigations

Federal communications privacy law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 supplies the first level. It prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications in

[44] Pub. L. No. 107–56, 115 Stat 272 (codified as amended in scattered sections of 18 U.S.C (2003)).

[45] Pub. L. No. 107–296, 116 Stat 2135 (codified as amended in scattered sections of 18 U.S.C. (2003)).

[46] Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, 115 Stat. 230 (2001).

[47] Barbara Jordan Immigration Reform and Accountability Act, 107th Cong. (2002)(enacted as part of the Homeland Security Act).

[48] Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107–173, 116 Stat. 543 (2002).

[49] This section derived from: Charles Doyle, The USA PATRIOT Act: A Legal Analysis, American Law Division, Congressional Research Service, April 15, 2002, available at: http://www.congress.gov/erp/rl/pdf/RL31377.pdf.

most instances. Title III gives authorities a narrowly defined process for electronic surveillance to be used in serious criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to monitor conversations concerning any of a statutory list of offenses (predicate offenses). Title III court orders contain instructions describing the permissible duration and scope of the monitoring, a description of the conversations which may be monitored, and a discussion of efforts taken to minimize the potential for monitoring noncriminal conversations. The court notifies the parties to any conversations seized under the order after the order expires.

The USA PATRIOT Act modifies these procedures in the following ways:

1. Updates the criminal code to reflect new technology by providing statutory authority for pen register and trap and trace (noncontent information) orders for electronic communications (e.g., e-mail).
2. Sanctions court ordered access to any "tangible item" rather than only business records held by lodging, car rental, and locker rental businesses.
3. Authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records.
4. Treats stored voice mail like stored e-mail (rather than like telephone conversations).
5. Permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system's owner).
6. Adds terrorist and computer crimes to the present predicate offense list for wiretap authority.
7. Encourages cooperation between law enforcement and foreign intelligence investigators.
8. Establishes a claim against the U.S. for certain communications privacy violations by government personnel.
9. Terminates the authority found in many of these provisions and several of the foreign intelligence amendments with a sunset provision of December 31, 2005.

Foreign intelligence investigations

The USA PATRIOT Act affords the U.S. intelligence community greater access to information obtained during a criminal investigation, and establishes and expands safeguards against official abuse. In addition, the legislation:

1. Increases the number of judges on the Foreign Intelligence Surveillance Act (FISA) court from 7 to 11.
2. Allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason.
3. Expands the prohibition against FISA orders based solely on the exercise of a citizen's First Amendment rights.

Money laundering

Federal authorities utilize regulations, criminal sanctions, and forfeiture to stem money laundering. The USA PATRIOT Act bolsters Federal efforts in each of these areas.

Treasury regulations

The legislation expands the authority of the Secretary of the Treasury to regulate the activities of U.S. financial institutions, particularly their relations with foreign individuals and entities. The Act requires the Treasury Secretary to promulgate regulations which:

1. Require securities brokers and dealers as well as commodity merchants, advisors and pool operators to file suspicious activity reports (SARs).
2. Require businesses, which were only to report cash transactions involving more than $10,000 to the IRS, to file SARs as well.
3. Impose additional "special measures" and "due diligence" requirements to combat foreign money laundering.
4. Prohibit U.S. financial institutions from maintaining correspondent accounts for foreign shell banks.
5. Prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions' concentration account practices.
6. Establish minimum new customer identification standards and recommending an effective means to verify the identity of foreign customers.
7. Encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities.
8. Require financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.

Enhanced penalties

The USA PATRIOT Act also contains a number of new money laundering crimes, as well as amendments and increased penalties for earlier crimes. Specifically, the legislation:

1. Outlaws laundering (in the U.S.) any of the proceeds from foreign crimes of violence or political corruption.
2. Prohibits laundering the proceeds from cybercrime or supporting a terrorist organization.
3. Increases the penalties for counterfeiting.
4. Provides explicit authority to prosecute overseas fraud involving American credit cards.
5. Permits prosecution of money laundering in the place where the predicate offense occurs.

Forfeiture

The Act creates two types of forfeitures and modifies several confiscation-related procedures. It allows confiscation of the property of any individual or entity that participates in or plans an act of domestic or international terrorism; it also permits confiscation of

property derived from or used to facilitate domestic or international terrorism. Specifically, the legislation:

1. Establishes a mechanism to acquire long arm jurisdiction, for purposes of forfeiture proceedings, over individuals and entities.
2. Allows confiscation of property located in this country for a wider range of crimes committed in violation of foreign law.
3. Permits U.S. enforcement of foreign forfeiture orders.
4. Calls for the seizure of correspondent accounts held in U.S. financial institutions for foreign banks who are in turn holding forfeitable assets overseas.
5. Denies corporate entities the right to contest a confiscation if their principal shareholder is a fugitive.

Summary of immigration provisions in the USA PATRIOT Act[50]

The USA PATRIOT Act contains several immigration-related provisions. The legislation contains a number of provisions designed to: prevent alien terrorists from entering the United States; enable authorities to detain and deport alien terrorists and those who support them; and to preserve immigration relief for lawfully present alien victims of the attacks of September 11, 2001.

Border Protection

Border Protection provisions in the USA PATRIOT Act:

1. Authorize appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border.
2. Authorize appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States.
3. Instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system for overseas consular posts and points of entry into the United States.
4. Direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken.
5. Express the sense of the Congress that the Administration should fully implement the integrated entry and exit data system created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as expeditiously as possible.
6. Require the Attorney General to fully implement and expand the foreign student visa monitoring program.

Detention and removal

The USA PATRIOT Act enhances the authority of the Federal Government to detain and remove aliens:

1. Expands the terrorist activity ground of inadmissibility to bar aliens who: support terrorist activities; are immediate family members of inadmissible terrorists; and associate with terrorist organizations.

[50] See Charles Doyle, The USA PATRIOT Act: A Legal Analysis, American Law Division, Congressional Research Service, April 15, 2002, available at: <http://www.congress.gov/erp/rl/pdf/RL31377.pdf>.

2. Requires the Attorney General to place an alien terrorist in removal proceedings and detain alien terrorist suspects for up to seven days after certifying that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition.

3. The Attorney General's determinations are subject to review only under writs of habeas corpus issued by a Federal district court but appealable only to the United States Court of Appeals for the District Columbia. These provisions are contained in §412 of the USA PATRIOT Act.

Immigration enforcement initiatives since September 11, 2001

NSEERS (National Security Entry Exit Registration System)

NSEERS was formally initiated on September 11, 2002. It involves registration for two different groups of aliens—certain aliens arriving at U.S. ports of entry, and certain aliens already present in the United States. At ports of entry, inspectors are required to register aliens from specified terrorist-sponsoring countries along with aliens who meet certain security criteria. During the registration process, the alien's photograph and fingerprints are taken and the alien's personal data are entered into IDENT, the immigration database.

With respect to aliens already present in the United States, the Attorney General has required aliens from certain countries, based on information provided by U.S. intelligence agencies, to report to their immigration field office to verify their address and their basis for visiting the United States.

Absconder Apprehension Initiative

In January 2002, the investigation, detention and removal components of the former INS launched the Absconder Apprehension Initiative. This program is designed to apprehend and remove aliens who have been found in violation of U.S. immigration laws, been ordered deported, and subsequently absconded before the court order could be carried out. The first phase of the initiative targeted some 5,900 aliens. The second phase focuses on the apprehension and removal of more than 300,000 aliens with un-executed final orders of removal. To facilitate locating these aliens, the Bureau of Immigration and Customs Enforcement (BICE, now at DHS) enters their names into the FBI's National Crime Information Center (NCIC) so that other Federal, state, and local law enforcement officers can hold an alien whose name comes up in the database during other types of law enforcement activity such as traffic stops.

Anti-Smuggling

Available information indicates terrorist organizations often use smuggling rings to move around the globe. For domestic security, the Administration has focused anti-smuggling resources in "Operation Southern Focus," which was launched in January 2002. It targets large-scale smuggling organizations specializing in the

movement of U.S.-bound aliens from countries of concern. Since the beginning of the operation, eight significant alien smugglers have been arrested and charged with alien smuggling violations.

Privacy issues and the USA PATRIOT Act

Library records

Several of the September 11 terrorists frequently used computers at public libraries to access the Internet.[51] Easier access to library records for appropriate law enforcement purposes may be necessary because when a suspect uses a public computer in a library, it becomes more difficult to isolate and trace evidence of criminal activity to that individual. It becomes even more difficult if the library does not require its clients to sign in with their name, date, and time before they are allowed to use a computer. Thus, a person who uses a library's public computer in support of criminal activity may be afforded greater anonymity than someone who uses his or her own computer. The USA PATRIOT Act was tailored to update Federal surveillance laws to make it more difficult for terrorists to use public places, including public libraries, to plot and carry out terrorist attacks. However, even before passage of this legislation, Federal prosecutors were permitted to subpoena library records under the Federal Rules of Criminal Procedure or obtain Title III search warrants.

Following enactment of the USA PATRIOT Act, "any tangible items" (which presumably could include library loan records and library computer use records) can be obtained by the government "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution."[52] The amendments expanding FISA authority to include the collection of "any tangible things" expire on December 31, 2005.[53]

The Justice Department's revised investigative guidelines

Prior to the issuance of the revised Guidelines by Attorney General Ashcroft on March 30, 2002, FBI investigations were covered by Guidelines approved by Attorney General Thornburgh on March 21, 1989.[54] The 1989 Guidelines provided that "[u]ndisclosed participation in the activities of an organization by an undercover employee or cooperating private individual in a manner that may influence the exercise of rights protected by the First Amendment must be approved by FBI [Headquarters], with notification to Department of Justice."[55]

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[51] See David Fallis and Ariana Eunjung Cha, "Agents Following Suspects' Lengthy Electronic Trail; Web of Connections Used to Plan Attack," The Washington Post (October 4, 2001), at A24 ("The [September 11 terrorist] suspects used public computer terminals at libraries in Florida. In Del Ray Beach, two of the suspected hijackers glared at a librarian as she watched them surf the Web for an hour.").

[52] 50 U.S.C. §1861(a)(1).

[53] See Pub. L. No. 107–56, Title II, §224 (October 26, 2001), 115 Stat. 295.

[54] The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations" (March 21, 1989) ("1989 Guidelines").

[55] Id. at 17.

According to Attorney General Ashcroft:

> FBI men and women in the field [were] frustrated because many of our own internal restrictions have hampered our ability to fight terrorism * * * Under the [old] guidelines, FBI investigators cannot surf the web the way you or I can. Nor can they simply walk into a public event or a public place to observe ongoing activities. They have no clear authority to use commercial data services that any business in America can use. These restrictions are a competitive advantage for terrorists who skillfully utilize sophisticated techniques and modern computer systems to compile information for targeting and attacking innocent Americans.[56]

The revised Guidelines now provide the following:

FBI access to public events: "For the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally. No information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activity."[57]

Utilization and Analysis of Publicly Available Information: "The FBI is authorized to operate and participate in identification, tracking, and information systems for the purpose of identifying and locating terrorists, excluding or removing from the United States alien terrorists and alien supporters of terrorist activity as authorized by law, assessing and responding to terrorist risks and threats, or otherwise detecting, prosecuting, or preventing terrorist activities. Systems within the scope of this paragraph may draw on and retain pertinent information from any source permitted by law, including information derived from past or ongoing investigative activities; other information collected or provided by governmental entities, such as foreign intelligence information and lookout list information; publicly available information, whether obtained directly or through services or resources (available nonprofit or commercial) that compile or analyze such information; and information voluntarily provided by private entities. Any such system operated by the FBI shall be reviewed periodically for compliance with all applicable statutory provisions, Department regulations and policies, and Attorney General Guidelines."[58]

Research conducted on the Internet: "For the purpose of detecting or preventing terrorism or other criminal activities, the FBI is authorized to conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally."[59]

Safeguarding Americans from a legal culture of fear: Approaches to limiting lawsuit abuse

On June 22, 2004, the full Committee held an oversight hearing on "Safeguarding Americans from a Legal Culture of Fear: Ap-

[56] Remarks of Attorney General John Ashcroft on Attorney General Guidelines (May 30, 2002).
[57] Supra, note 19 at 22.
[58] Id. at 21–22.
[59] Id. at 22.

proaches to Limiting Lawsuit Abuse." Witnesses included: Karen R. Harned, Executive Director, National Federation of Independent Business; Philip Howard, Chair, Common Good; Victor Schwartz, General Counsel, American Tort Reform Association; and Theodore Eisenberg, Professor of Law, Cornell Law School.

Karen Harned testified, among other things, that hundreds of thousands of small businesses across the country do not have human resource specialists, compliance officers, or attorneys on staff. These businesses cannot pass on to consumers the costs from taxes, regulations, and liability insurance without suffering losses. For small-business owners, even the threat of a lawsuit can mean significant time away from their business, time that could be better spent growing their enterprise and employing more people.

Philip Howard testified, among other things, that according to a Harris Poll, five out of six doctors do not trust the system of justice. As a result, doctors are ordering billions of dollars worth of unnecessary tests and procedures—not to address the health of their patients but to protect themselves from potential lawsuits. In schools, teachers are unable to maintain discipline in their classrooms, fearful that they may be sued by students or parents. A recent Public Agenda poll, sponsored by Common Good, found that 78% of teachers have been threatened with legal proceedings by their students.

Victor Schwartz testified, among other things, that slightly more than ten years ago, the Federal Rules Advisory Committee, an extension of the federal judiciary which has the primary responsibility to formulate the Federal Rules of Civil Procedure, announced an amended and weakened Rule 11. The Advisory Committee recommended weakening the rule despite the result of a survey it conducted of federal court judges, those who deal with the problem of lawsuit abuse on a day-to-day basis. That survey found that 95% of judges believed that the now abandoned version of Rule 11 had not impeded development of the law. Eighty percent found that the prior rule had an overall positive effect and should not be changed. Three-quarters of those judges surveyed felt that the former Rule 11's benefits in deterring frivolous lawsuits and compensating those victimized by such claims justified the use of judicial time.

Theodore Eisenberg testified, among other things, that tort reform proposals are based on questionable views of the operation of the tort system; that the United States is not the most litigious country; that estimates of tort system costs supplied to Congress and the media are deeply flawed; and that Rule 11's experiment with fee-shifting revealed the tort system to have a low rate of abuse compared to other areas of law and fell particularly hard on civil rights claimants.

Oversight hearing on compliance with the Enhanced Border Act

On April 21, 2004, the Committee on the Judiciary held an oversight hearing entitled "Should the Congress Extend the October, 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports?" The Honorable Colin Powell, Secretary of State, and the Honorable Tom Ridge, Secretary of Homeland Security, testified at the hearing.

The hearing examined whether the deadlines set by the Enhanced Border Security and Visa Reform Act of 2002, also known

as the Border Security Act, and the USA PATRIOT Act could be met by the United States Government and by key foreign trading partners. The Secretary of State testified about diplomatic initiatives to educate foreign countries about the pending deadlines and the possible need to extend those deadlines to prevent an interruption of international travel to the United States. The Secretary of Homeland Security testified with regard to the level of technical preparation required to electronically validate biometric passports as well as the schedule for installing chip readers at international airports and ports of entry.

Oversight on the problem of visa overstays

On June 3, 2004, Chairman F. James Sensenbrenner, Jr. released a report from the General Accounting Office (GAO) which found that the number of foreign visitors who overstay their visas exceeds 2.3 million and that the Department of Homeland Security's (DHS) estimates of visa overstays is probably low. The GAO study also documents that DHS interior enforcement to identify and deport people overstaying their visas is virtually non-existent.

Oversight of consular identification cards

Committee oversight of the use of consular cards began in April 2002, when staff approached the INS to determine what steps the agency planned to take in response to foreign-government efforts to seek local acceptance of consular identification cards, which at least one foreign government was publicly promoting for identification purposes. At that time, INS stated that it lacked jurisdiction over foreign missions in the United States, asserting that such authority was probably vested in the State Department.

After determining that the Office of Foreign Missions was the most likely component of the State Department to oversee these activities, staff contacted State to determine what steps the department was planning to take in response to foreign-government efforts to seek domestic acceptance of consular cards.

In June 2002, State informed staff that it would establish an interagency group to promulgate a policy on the domestic acceptance of consular identification cards. This group did not actually meet for the first time, however, until January 7, 2003. Staff met with State Department on January 8, 2003, to discuss issues raised at the meeting the day before.

On January 21, 2003, a press report appeared indicating that the General Services Adminstration (GSA) had commenced a project to accept the Mexican consular identification card, the matricula consular, on a pilot basis for admission to the Philip Burton Federal Building in San Francisco. On January 22, 2003, GSA stated that it was suspending the pilot, explaining:

> The matter of foreign consular identification cards is under discussion both within the State Department and among federal government agencies, including the General Services Administration. * * * While this matter is under deliberation, GSA has suspended the trial acceptance of consular identification cards for admittance to certain federal facilities. * * * GSA will no longer accept consular-

issued identification cards as a means of identification, pending further study.

Staff continued to meet regularly with State Department and other executive branch representatives to discuss consular card issues and the status of the deliberations of the interagency working group.

In response to an article in the April 17, 2003 edition of the San Bernadino County Sun, the Subcommittee on Immigration, Border Security, and Claims began to undertake its own collection of information on the issuance and domestic acceptance of consular identification cards in the United States.

To assess (1) whether Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) had additional information on aliens who were arrested with multiple valid matriculas and (2) whether DHS had presented that information to the interagency working group on consular cards, on April 28, 2003, Chairman Sensenbrenner sent a letter to the DHS. In that letter, Chairman Sensenbrenner requested that CBP and ICE provide the Committee "no later than May 12, 2003, with a list of all incidents in which aliens, both legal and illegal, were encountered by those respective bureaus in possession of more than one facially valid matricula, including the date of the encounter and the number of documents each alien possessed." CBP and ICE were also directed to "provide the Committee with copies of all written, and descriptions of all oral, guidance that the Department has provided to States and localities that are considering recognizing the matricula as a valid identification document, and if no such guidance has been issued, why it has not issued such guidance."

In response to a subsequent Committee request, in August 2004 the GAO issued a report on the issuance and acceptance of consular identification cards. The report found that from 2002 through 2003, Mexico issued 2.2 million consular identification cards, while Guatemala issued about 89,000. In addition, Argentina now issues cards to its citizens in the United States and other nations are considering similar programs.

The GAO report pointed to weaknesses in U.S. government policy regarding foreign governments' issuance of consular identification cards to aliens illegally present in the United States. GAO recommended that the Homeland Security Council "direct its task force to develop and implement consistent guidance that would reconcile potential conflicts among federal agencies and complete their efforts to develop policy to enable state and local governments, financial institutions, and others to assess the authenticity of [consular identification] cards issued by foreign governments."

Committee oversight of this matter has continued, leading to the Committee's contribution of § 3006 to H.R. 10, the 9/11 Recommendations Implementation Act. This provision limited the documents that an alien could present for purposes of establishing identity to a federal employee to domestically issued documents and foreign passports. In the conference report for that bill, this requirement was pared down to a direction to the Secretary of Homeland Security to propose standards for documents that could be presented to board an airliner in the United States, a designation that is to be submitted to the Congress for an approval resolution.

If not approved, only domestically issued documents and foreign passports can be presented for such purpose.

Oversight of the implementation of Title III of the USA PATRIOT Act

The Committee and Subcommittee on Immigration, Border Security, and Claims have rigorously monitored the implementation of sections of the USA PATRIOT Act dealing with money laundering and terrorist financing.

In a February 28, 2003, letter to the Attorney General, Chairman Sensenbrenner and Ranking Member Conyers pointed out that there were serious problems with Treasury Department regulations to implement Title III of the USA PATRIOT Act, which is captioned "International Money Laundering Abatement and Antiterrorist Financing Act of 2001." Section 326 of the USA PATRIOT Act added a new subsection (l) to 31 U.S.C. § 5318 of the Bank Secrecy Act that requires the Secretary of the Treasury to prescribe regulations "setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at a financial institution." Section 326 of that Act provides that the regulations must require, at a minimum, financial institutions to implement reasonable procedures for: (1) verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency. The provisions in Title III of the USA PATRIOT Act are intended to facilitate the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

The letter explained that the interim regulations published by the Treasury Department, through the Financial Crimes Enforcement Network (FinCEN), actually reduced existing safeguards with regard to money laundering by illegal aliens, including both illegal entrants and alien visa overstays (such as three of the 9/11 terrorists). Under prior Treasury regulations, aliens were required to obtain Social Security numbers or Taxpayer Identification Numbers (TINS) before opening an account at a federally insured bank. This meant that aliens had to obtain identifying numbers through government agencies that would also apply tests to confirm that they had a legitimate reason to be in the United States.

Upon inquiry, the Committee was informed in a meeting with officials of the Treasury Department that neither the Justice Department nor the State Department had provided any written objection to this broad enfranchisement of foreign government identification documents. If the Justice Department officials responsible for liaison with the Department of Treasury concurred with this understanding of the effect of these regulations, the Committee suggested that the Department's views be provided in writing to the Treasury Department, as soon as possible.

On May 23, 2003, Chairman Sensenbrenner sent a letter to Dr. Richard Falkenrath, Assistant Director of the Homeland Security Council in the Executive Office of the President. In that letter, the Chairman explained the concerns with the May 9, 2003, Treasury Department regulation implementing § 326 of the USA PATRIOT Act, which was to take effect on June 9, 2003. He requested that the Executive Office of the President direct that the final date of that regulation be postponed for six months until scrutiny by law enforcement officials can be more intensively applied to modify it.

In brief, the Chairman stated that the intent of the Congress in directing the Treasury to write new regulations was to raise the bar on the difficulty with which terrorists can move money through the U.S. banking system. This regulation instead appeared to lower the bar. That letter identified two specific regulatory conditions of greatest concern. The new Treasury regulation would eliminate the requirement that a bank retain copies of the documents used to verify the identity of the customer. This would eliminate evidence essential to successful investigation of the "money trail" to organizations supporting terrorism. In § 326 of the USA PATRIOT Act, Congress directed the Secretary of the Treasury to issue regulations prescribing minimum standards for financial institutions regarding customer identity in connection with the opening of accounts. Pursuant to the final regulation, however, a bank could open an account for an alien who presented only an alien identification card number, or "number and country of issuance" of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

On July 1, 2003, the Treasury Department issued a notice of inquiry seeking additional comments "on two discrete issues relating to final regulations issued recently pursuant to section 326," specifically (1) "whether and under what circumstances financial institutions should be required to retain photocopies of identification documents relied on to verify customer identity," and, (2) "whether there are situations when the regulations should preclude reliance on certain forms of foreign government-issued identification to verify customer identity."

In response, Chairman Sensenbrenner sent a comment letter responding to each of these questions to the Treasury on July 24, 2003. Those letters addressed in detail the shortcomings of the regulations. The Treasury Department terminated the inquiry on September 25, 2003, having "determined that no changes to the final rules are warranted."

On November 20, 2003, Chairman Sensenbrenner and Subcommittee Chairman Hostettler sent a request to the GAO to evaluate compliance with the changes to federal anti-money laundering regulatory regimes in Title III of the USA PATRIOT Act. The letter requested that GAO review how the Treasury and associated regulators would implement and enforce the regulations implementing § 326 of that Act. The Committee's oversight of implementation of Title III of the USA PATRIOT Act continues.

Oversight of DHS budget shortfalls

On March 26, 2004, Chairman Sensenbrenner requested information about budget shortfalls that were reportedly facing the three

bureaus within DHS charged with enforcing the immigrations laws, CBP, ICE, and Citizenship and Immigration Services (CIS). Those shortfalls had apparently led to a hiring freeze within CBP and ICE.

On May 5, 2004, the Committee received a formal response from DHS Undersecretary Asa Hutchinson, which described a budget reconciliation effort among the three bureaus that was organized to address the perceived shortfall. As Hutchinson explained, that reconciliation effort resulted "in an immediate internal realignment of $212 million with possible subsequent internal realignment of approximately $270 million pending final documentation and billing."

In August 2004, the Committee received further reports about shortfalls in funding for critical programs in ICE, prompting the Chairman to request additional information on ICE's budget difficulties. Staff has subsequently been briefed on the agency's preliminary efforts to address its shortfalls. The Committee's oversight of this matter will continue until ICE's shortfalls have been eliminated.

Oversight of Social Security benefits fraud

On September 11, 2003, the Immigration, Border Security, and Claims Subcommittee, Rep. John Hostettler, (R–Ind.), Chairman, held an oversight hearing entitled, "Should There Be a Social Security Totalization Agreement with Mexico?"

A Social Security totalization agreement coordinates the payment of Social Security taxes and benefits for workers who divide their careers between two countries. "Totalization" refers to combining the SSA taxes paid into Social Security in the U.S. with the equivalent taxes paid into the system of a foreign country so that people who have earned retirement credits under both systems receive benefits due from each.

Totalization agreements entered into the realm of international treaties in the 1970s, as countries began to organize geographical and cultural trade alliances. Section 233 of the Social Security Act authorizes the President to enter into bilateral agreements with other nations that have social security programs that are actuarially based and of general application. Unlike bi-lateral trade agreements, the Congress need not act on totalization agreements for them to come into effect. Rather, the agreements are submitted to Congress for "60 session days when at least one house is in session" during which one House of Congress must either require changes to the agreement or oppose the agreement by resolution. The United States has concluded 20 such agreements, the most recent of which were with Australia, Chile, and South Korea.

Noncitizens who work in Social Security-covered employment must pay Social Security payroll taxes, including those who are in the U.S. working temporarily and those who may be illegally working in the U.S. The Social Security Act does not explicitly prohibit illegal aliens from receiving Social Security benefits. However, the 1996 immigration reform legislation prohibits the payment of Social Security benefits to illegal aliens in the U.S., unless nonpayment would be contrary to a totalization agreement or the alien nonpayment provision of the Social Security Act.

Because Social Security is an earned entitlement, some argue that workers who pay into the system should receive benefits regardless of employment authorization or immigration status. Others contend that paying benefits based on unauthorized work in the U.S. "rewards" individuals who violate immigration law. Media articles earlier this year estimated a potential totalization agreement with Mexico to cost the Social Security Trust Fund at least $345 billion, as benefits will be paid to illegal workers as well as legal workers from Mexico.

The hearing examined whether the Social Security Administration (SSA) has completed the necessary financial projections and ordinary due diligence regarding the legal and administrative prerequisites appropriate to a treaty agreement of such financial magnitude. It also considered whether the benefits to be provided by the proposed agreement will become a beacon of inducement so that the rate of illegal immigration will actually increase over already historically high levels. The Subcommittee sought to determine the specific merits in concluding a totalization agreement and whether the U.S. benefits will be equivalent to those received by the other country.

Jo Anne B. Barnhart, the Commissioner of the Social Security Administration, testified on the direct definition of totalization agreements and provided an overview on totalization including the process for their approval. She also outlined the ongoing negotiations regarding the totalization agreement with Japan and provided a status report on U.S. discussions with Mexico on a possible agreement. Barbara Bovjberg, Director of Education, Workforce and Income Security at the General Accounting Office, testified next with regard to shortcomings of the SSA in negotiating the totalization agreement with Mexico. Director Bovjberg testified that the proposed agreement will likely increase the number of unauthorized Mexican workers and family members eligible for social security benefits. Mexican workers who ordinarily could not receive social security retirement benefits because they lack the required 40 coverage credits for U.S. earnings could qualify for partial Social Security benefits with as few as 6 coverage credits. In addition, under the proposed agreement, more family members of covered Mexican workers would become newly entitled because the agreements usually waive rules that prevent payments to noncitizens' dependents and survivors living outside the United States. Joel Mowbray, a syndicated columnist and investigative reporter, testified that his original analysis was that the cost of totalization appeared to be as high as $345 billion over the next two decades. He also testified that taxpayers could actually be on the hook for even more money if fraud becomes rampant and is not reined in.

The final witness, Ken Apfel, SSA Commissioner under President Clinton, testified on how the Social Security Act authorizes the President to enter into totalization agreements with other countries. The process is often a very complex and lengthy one. As examples, agreements signed by the Bush administration in 2001 with South Korea and Chile were both negotiated in part during the Clinton administration, and agreements signed in 1993 by the Clinton administration with Ireland and Greece were both negotiated in part during the first Bush administration. He explained

that the agreements eliminate dual Social Security taxation, which saves workers and their employers from having to pay duplicative taxes. And second, the agreements help to fill gaps in benefit protection for individuals who have worked parts of their careers in the U.S. and part in another country, but who have not worked enough in either or in both to qualify for benefits. Workers may combine earnings credits to qualify for benefits under either or both systems, with benefits prorated to reflect the number of years that workers paid into each system. Mr. Apfel concluded that a totalization agreement between the U.S. and Mexico would move the countries "one step closer to strengthening worker protections, eliminating duplicative taxes and fostering economic interdependence."

On March 2, 2004, the Social Security Protection Act of 2004, H.R. 743, was signed into law by President George W. Bush and became Public Law No. 108–203. The Subcommittee hearing on this issue, and the public debate that followed, led directly to provisions in §211 of the Social Security Protection Act which prohibit providing Social Security benefits to illegal alien workers. House Judiciary Chairman F. James Sensenbrenner, Jr. and Subcommittee Chairman John N. Hostettler also followed up on this issue with a letter to SSA Commissioner Jo Anne Barnhart. Subsequently, the SSA sent a short letter advising foreign governments of the Act, but without providing any guidance or specific details of § 211 or the effects on existing totalization agreements. Notwithstanding assurances to Chairman Sensenbrenner and Chairman Hostettler in a letter from Commissioner Barnhart on August 16, 2004, the actual procedures addressing the changes in benefits awards have yet to be implemented within the SSA.

Oversight letter to Jo Anne Barnhart, Commissioner of the Social Security Administration

Congressman F. James Sensenbrenner, Jr., Chairman of the House Judiciary Committee, and Congressman John N. Hostettler, Chairman of the Subcommittee on Immigration, Border Security, and Claims wrote a letter to Social Security Administration Commissioner Jo Anne Barnhart on July 20, 2004 discussing § 211 of the Social Security Protection Act of 2004.

The letter described Congress's intent to prevent—in most cases—individuals from receiving Social Security retirement or disability benefits on the basis of work illegally performed by aliens in the United States. The letter stated:

> The Social Security program should not reward those who violate our immigration laws. The Social Security Trust Fund will face enough challenges to its solvency in future decades without its being dissipated by payments based on work performed illegally in the United States. Additionally, there is no greater magnet for illegal immigration to the U.S. than the availability of jobs, and allowing illegal work to qualify for Social Security retirement and disability benefits only adds to the allure of such work and our difficulty in controlling the Nation's borders. * * *
>
> Given section 211's importance in the context of Congressional hearings (at which you have testified) where

Members have expressed strong criticism of existing SSA practices that do not differentiate between illegal earnings and legal earnings, we find it surprising that revised instructions in the policy operation manual or new regulations have not already been published. Section 211 should help to reduce the problem of unmatched earnings, and contribute to a reduction in the fraudulent use of Social Security numbers by illegal aliens. In this regard, we want to reiterate the importance of section 211 and stress the proper interpretation of this section consistent with clear congressional intent. It is extremely important that SSA revise procedures to implement section 211 and issue public notice that SSA will begin scrutiny and enforcement actions to implement section 211.

However, most aliens working illegally in the U.S. meet the documentation requirement of section 274A of the Immigration and Nationality Act by presenting their employers with bogus Social Security numbers or steal the identities (and Social Security numbers) of work-authorized individuals. Such an alien (or his or her spouse or children) may approach SSA and seek to receive benefits based on work in the U.S. performed on the bogus or stolen numbers. As you know, if the applicant qualifies for benefits, the SSA will then issue a valid Social Security number. In any case where SSA issued or issues a number after January 1, 2004, to an alien in such a circumstance, the prohibition of section 211 will apply, even if the illegally-performed work took place before 2004. We must emphasize that the Congressional intent was that SSA apply the effective date contained in the legislation in this manner. We expect that SSA's revised policy operation manual or new regulations implementing section 211 will adhere to this reading.

On June 29, 2004, you and Mexican Social Security Institute Director Santiago Levy signed a Totalization Agreement in Guadalajara, Mexico. We have seen an earlier draft of this agreement that omits any mention or discussion of segregating earnings from Mexican or American wage earners working legally versus those working illegally. It is extremely important that the Totalization Agreement with Mexico be amended to incorporate language that addresses section 211's prohibition, so that there will be no misunderstanding with this important neighbor, and so that social security benefits, even on a pro-rata basis, are not provided in violation of federal law.

Finally, we expect SSA to notify the countries with whom we have in the past entered into Totalization Agreements (Australia, Austria, Belgium, Canada, Chile, Finland, France, Germany, Greece, Ireland, Italy, South Korea, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom) regarding the impact that section 211 will have on their nationals who might have worked illegally in the United States.

The letter requested that GAO respond with specific information regarding the steps SSA is taking to implement § 211, address § 211 in the totalization agreement with Mexico, and notify countries with which Totalization Agreements are in force of the effect of § 211. As previously mentioned, SSA Commissioner Barnhart wrote a letter on August 16, 2004 outlining the actions the SSA has taken to implement the Social Security Protection Act of 2004. She stated: "In April, we alerted our field offices to the new provisions and asked them to hold any affected cases pending release of new instructions. * * * On May 18, 2004, we wrote to the governments of each of the 20 countries with which the United States currently has a Totalization Agreement in force to advise them of the requirements of the SSPA (copy enclosed). This notification included a discussion of the Section 211 provision." " The U.S.-Mexican Social Security Totalization Agreement, which I signed on June 29, 2004, is substantively identical to all other Totalization Agreements with respect to U.S. benefit eligibility, computations and payments. Prior to my signing the agreement, our negotiators made it very clear to their Mexican counterparts that this agreement would be fully subject to the requirements of Section 211. We have asked the State Department to deliver a formal diplomatic communication to the Mexican Government to document this understanding."

GAO report on totalization

In response to a request from Congressman F. James Sensenbrenner, Jr., Chairman of the House Judiciary Committee, and Congressman E. Clay Shaw, Jr., Chairman of the House Ways and Means Subcommittee on Social Security, GAO completed a report in September of 2003 titled, "SOCIAL SECURITY Proposed Totalization Agreement with Mexico Presents Unique Challenges."

GAO states: "Totalization agreements foster international commerce and protect benefits for persons who have worked in foreign countries in two ways. First, the agreements eliminate dual social security taxes that multinational employers and their employees must pay when they operate and reside in countries with parallel social security programs. Second, the agreements help to fill gaps in benefit protection for persons who have worked in different countries for portions of their careers."

The Results in Brief report that:

> SSA has no written policies or procedures outlining the specific steps it follows when entering into Totalization Agreements, and the actions it took to assess the integrity and compatibility of Mexico's social security system were limited and neither transparent nor well-documented. SSA said the process it used to develop the proposed Totalization Agreement with Mexico was the same as for prior Totalization Agreements. SSA officials told us that they briefly toured Mexican facilities, observed how their automated systems functioned, and identified the type of data maintained on Mexican workers. However, SSA provided no information showing that it assessed the reliability of Mexican earnings data and the internal controls Mexico uses to ensure the integrity of information that SSA will

rely on to pay social security benefits. This report recommends that SSA establish formal processes for entering into Totalization Agreements that include mechanisms to assess the risks associated with such agreements and to document the range of analyses SSA conducts. The report also recommends that reports of proposed agreements be enhanced to make them more consistent and informative and that SSA establish a regular process to reassess the accuracy of its actuarial estimates. SSA and the OCACT commented on this report. SSA said that the report did not sufficiently discuss the benefits of Totalization Agreements and that its current process for evaluating whether to enter into negotiations for Totalization Agreements was sufficient to identify and assess risks. Our report specifically notes that such agreements foster international commerce, protect benefits for persons who have worked in foreign countries, eliminate dual social security taxes, and foster enhanced diplomatic relations. With regard to SSA's current processes, we could find no specific references to SSA examining data reliability and program integrity. We are hopeful that SSA will conduct such examinations of the Mexican social security system before submitting a proposed agreement to the Congress for its review. OCACT [Office of the Chief Actuary] generally agreed with our recommendations and noted that they are consistent with current practices. OCACT, however, took exception to the implication of our statement that its estimated cost was more likely to be understated than overstated. Our intent was not to imply that the OCACT estimate was biased. Accordingly, we have revised our report to state the very large difference between estimated and potential beneficiaries underscores the uncertainty of the estimate, and the potential costs of an agreement could be higher than OCACT projects. The full text of SSA's and OCACT's comments appears in appendix II. The State Department was also provided a copy of the draft report for review and advised us that it had no comments.

Oversight of relationships between FBI agents and confidential informants

Certain activities within the Boston field office of the Federal Bureau of Investigation (FBI) from the 1970s through the 1990s have been shown to be highly suspect. As a result of investigative reporting, judicial action, and research by the Committee on Government Reform of the United States House of Representatives, this period has been demonstrated to be full of malfeasance and corruption. The handling of two "Top Echelon" informants, James "Whitey" Bulger and Stephen Flemmi, by the FBI, most notably Agent John Connolly and Supervisor John Morris, proved to be arguably one of the most embarrassing and darkest chapters in the history of law enforcement in the United States. The Judiciary Committee conducted oversight of the FBI's handling of confidential informants with the goal of determining whether internal changes in policy have sufficiently and effectively addressed reported problems. The

Committee's oversight into this activity is on-going and anticipated to continue into the 109th Congress. On August 4, 2003, Chairman F. James Sensenbrenner, Jr., traveled on an investigatory trip to Boston. During this trip, the Chairman met with Martin G. Weinberg, a criminal defense attorney who represented confidential informant John Martorano; Gerald O'Neill, former editor of the Boston Globe and author of the book Black Mass: The Irish Mob, the FBI, and a Devil's Deal; Robert Long, former Detective Lieutenant of the Massachusetts State Police; and John Kivlan, former First Assistant District Attorney for Norfolk County. Based upon this visit, Chairman Sensenbrenner directed further Committee investigation.

On May 6, 2004, Chairman F. James Sensenbrenner, Jr., Ranking Member John Conyers Jr., Congressman Chris Cannon, and Congressman William D. Delahunt sent a joint letter to Attorney General John Ashcroft, posing nine questions regarding requests for additional information regarding various guidelines and procedures in effect between the Department of Justice (DOJ) and the FBI in their respective relationships with confidential informants. The Committee's letter requested a response by May 20, 2004.

On July 6, 2004, Chairman F. James Sensenbrenner, Jr., Ranking Member John Conyers, Jr., Congressman Chris Cannon, and Congressman William D. Delahunt sent a joint letter to Dan Rosenblatt, Executive Director of the International Association of Chiefs of Police, requesting feedback about the level of cooperation between state and local law enforcement and the FBI in regards to confidential informants or potential criminal activity by those informants. Despite several efforts by the Committee, Mr. Rosenblatt did not respond to the Committee's invitation to provide information.

On July 7, 2004, Chairman F. James Sensenbrenner, Jr., Ranking Member John Conyers, Jr., Congressman Chris Cannon, and Congressman William D. Delahunt sent a joint letter to FBI Director Robert S. Mueller, III, asking for information relating to complaints filed with the FBI's Office of Professional Responsibility regarding relationships between confidential informants and agents. The Committee's letter requested a response by July 28, 2004.

On July 8, 2004, DOJ submitted a response to the May 6th letter from the Committee. Accompanying this letter were: three versions of the Attorney General's Guidelines Regarding the Use of Confidential Informants; Resolution 18, regarding the utilization of cooperating individuals and confidential informants; and several versions of the FBI's Manual of Investigative Operations Guidelines regarding the Bureau's Confidential Informant Program.

On September 15, 2004, Chairman F. James Sensenbrenner, Jr., Ranking Member John Conyers, Jr., Congressman Chris Cannon, and Congressman William D. Delahunt sent a joint letter to all 50 State attorneys general individually, asking for input regarding the level of cooperation demonstrated between state and local law enforcement and the FBI concerning information about confidential informants and their potential criminal activity. The Committee's letter requested a response by November 9, 2004.

On December 6, 2004, Chairman F. James Sensenbrenner, Jr., Ranking Member John Conyers, Jr., Congressman Chris Cannon,

and Congressman William D. Delahunt sent a joint letter to Ralph Grunewald, Executive Director of the National Association of Criminal Defense Lawyers, seeking information relating to any problems which may have arisen dealing with misconduct or unethical behavior by FBI agents relating to confidential informants. The Committee's letter requested a response by January 17, 2005.

On December 8, 2004, Chairman F. James Sensenbrenner, Jr., Ranking Member John Conyers, Jr., Congressman Chris Cannon, and Congressman William D. Delahunt sent a joint letter to Paul Walsh, President of the National District Attorneys Association, seeking input as to communication effectiveness between member offices and the FBI and overall effectiveness of FBI guidelines and procedures.

Oversight of allegations of misconduct in the Sixth Circuit

This inquiry began in the summer of 2002, after the Committee became aware of the allegations of misconduct by then-Chief Judge Martin set forth in Judge Boggs's procedural appendix in the affirmative action case, *Grutter* v. *Bollinger,* 288 F.3d 732 (6th Cir. 2002). In his procedural appendix, Judge Boggs suggests that: (1) the membership of the panel was deliberately and inappropriately assembled and (2) then-Chief Judge Martin inappropriately ordered a petition for initial hearing en banc withheld from circulation to the full court for the purpose of influencing the make up of the panel that heard the case. The Committee began conducting oversight on the process by which the panel came to sit on the case in the 107th Congress. The Committee continued the investigation into the 108th Congress. The work conducted during the 108th Congress includes:

On June 11, 2003, the Committee, by letter, notified Judge Martin of the oversight being initiated by the Committee. Staff traveled to cities in Ohio and Michigan in July, September, and October of 2003 and interviewed witnesses, including judges and court staff.

In October 2003, Committee staff invited Judges Moore and Daughtrey to discuss the matters subject to the investigation. Both declined to be interviewed. In December 2003, the oversight became a bipartisan investigation. Minority staff conducted interviews of witnesses previously interviewed by majority staff. In June 2004, bipartisan staff conducted interviews in Cincinnati, Ohio. On July 12, 2004, Chairman Sensenbrenner sent a letter to the Chief Judge of the Circuit asking for non-deliberative documents. The court has partially responded to this request. On July 12, 2004, Chairman Sensenbrenner sent a letter to each judge who is a subject of the Committee's inquiry, inviting each to speak with Committee staff about the subject of the investigation, but each judge has declined the request. The Committee plans to continue its oversight of the Sixth Circuit into the 109th Congress.

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY [1]

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[1] Subcommittee chairmanship and assignments approved February 12, 2003.

Tabulation of subcommittee legislation and activity

Public:	
Legislation referred to the Subcommittee	91
Legislation on which hearings were held	11
Legislation reported favorably to the full Committee	15
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	4
Legislation pending before the full Committee	1
Legislation reported to the House	15
Legislation discharged from the Committee	2
Legislation pending in the House	5
Legislation passed by the House	14
Legislation pending in the Senate	8
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	6
Legislation enacted into Public Law as part of other legislation	2
Days of legislative hearings	11
Days of oversight hearings	15
Private:	
Legislation referred to the Subcommittee	1
Legislation on which hearings were held	0
Legislation reported favorably to the full Committee	0
Legislation discharged from the Subcommittee	0
Legislation pending before the full Committee	0
Legislation reported to the House	0
Legislation discharged from the Committee	0
Legislation pending in the House	0
Legislation passed by the House	0
Legislation pending in the Senate	0
Legislation enacted into Private Law	0

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Courts, the Internet, and Intellectual Property shall have jurisdiction over the following subject matters: copyright, patent and trademark law, information technology, administration of U.S. courts, Federal Rules of Evidence and Appel-

late Procedure, judicial ethics, other appropriate matters as referred by the Chairman, and relevant oversight.

LEGISLATIVE ACTIVITIES

COURTS

H.R. 29, A bill to convert a temporary judgeship for the district of Nebraska to a permanent judgeship, and for other purposes

Summary.—Introduced by Representative Doug Bereuter, H.R. 29 converts a temporary U.S. district judgeship for the district of Nebraska to a permanent judgeship.

Legislative History.—Subsequent to the bill's introduction, the temporary judgeship expired, but an authorization to create a new district judgeship in its place was included in S. 878, a bill to authorize an additional permanent judgeships in the district of Idaho, which was later amended to include numerous temporary and permanent district judgeships as well as new circuit judgeships. See S. 878 for further action.

H.R. 112, To amend title 28, United States Code, to provide for an additional place of holding court in the district of Colorado

Summary.—Introduced by Representative Joel Hefley, H.R. 112 designates Colorado Springs, Colorado, as a place of holding federal court in the district of Colorado.

Legislative History.—On June 24, 2004, the Subcommittee met in open session and ordered favorably reported H.R. 112, without amendment, by voice vote. On July 21, 2004, the full Committee met in open session and ordered favorably reported H.R. 112, without amendment, by voice vote (H. Rept. No. 108–625). The text of H.R. 112 was later incorporated in H.R. 3632, the "Anti-counterfeiting Amendments Act of 2004," as part of a manager's floor amendment. The House passed H.R. 3632, as amended, on November 21, 2004, by voice vote. The Senate passed H.R. 3632 by unanimous consent on December 8, 2004. H.R. 3632 was signed by the President on December XX, 2004 and became Public Law No. 108–XXX. The text of H.R. 112 was also included in section 5 of S. 2873, which the Senate passed by unanimous consent on November 19, 2004, and the House passed by unanimous consent the following day. S. 2873 was signed by the President on and became Public Law No. 108–455.

H.R. 1302, the "Federal Courts Improvement Act of 2003"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 1302 contains several provisions to improve the Federal court system. The bill addresses judicial financial administration, judicial process improvements, judiciary personnel administration, and benefits and protections.

Legislative History.—On March 20, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 1302, without amendment, by voice vote. Section 111 of the bill, which designates Plattsburgh, New York, as a place of holding federal court, was later introduced as a freestanding measure (H.R. 4646) by Representative McHugh and incorporated in H.R. 3632, the "Anti-counterfeiting Amendments Act of 2004," as part of a manager's floor

amendment. The House passed H.R. 3632, as amended, on November 21, 2004, by voice vote. The Senate passed H.R. 3632 by unanimous consent on December 8, 2004. H.R. 3632 was signed by the President on December 23, 2004 and became Public law No. 108–482. In addition, the text of H.R. 4646 was included in section 4 of S. 2873, which the Senate passed by unanimous consent on November 19, 2004, and the House passed by unanimous consent. Finally, §102 of H.R. 1302, which clarifies that court for the Eastern District of Texas and the Western District of Arkansas may be held anywhere in the Federal Courthouse which sits astride the Texas-Arkansas state line.

H.R. 1303, A bill to amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference

Summary.—Introduced by Representative Lamar S. Smith, H.R. 1303 authorizes the Supreme Court to prescribe rules to address privacy and security concerns regarding the electronic filing of and public access to documents under the E-Government Act.

Legislative History.—On March 20, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 1303, without amendment, by voice vote. On July 16, 2003, the full Committee met in open session and ordered favorably reported H.R. 1303, with an amendment, by voice vote (H. Rept. No. 108–239). On October 7, 2003, the House passed H.R. 1303, as amended, by voice vote. The bill was received in the Senate, read twice, and referred to the Committee on Governmental Affairs on October 14, 2003. On July 7, 2004, Senator Collins of the Committee on Governmental Affairs reported H.R. 1303, without amendment. On July 9, 2004, the Senate passed H.R. 1303, without amendment, by unanimous consent. On July 13, 2004, the Senate requested the return of papers with respect to H.R. 1303 by unanimous consent. The following day the House returned the papers and the Senate vitiated its previous passage and reporting of the bill. On July 15, 2004, the Senate Committee on Governmental Affairs discharged H.R. 1303 by unanimous consent and the Senate passed the bill, without amendment, by unanimous consent, the same day. On August 2, 2004, the President signed H.R. 1303. (Public Law No. 108–281).

H.R. 1768, the "Multidistrict Litigation Restoration Act of 2003"

Summary.—Introduced by Representative F. James Sensenbrenner, Jr., H.R. 1768 permits a specially-designated "transferee court" under the federal multidistrict litigation statute to retain jurisdiction over referred cases for trial, for the purposes of determining liability and punitive damages, or to refer them to other districts, as it sees fit.

Legislative History.—On July 22, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 1768, without amendment, by voice vote. On January 28, 2004, the full Committee met in open session and ordered favorably reported H.R. 1768, with an amendment, by voice vote (H. Rept. No. 108–416). On March 24, 2004, the House passed H.R. 1768 as amended by a roll call vote of 418–0. The Senate took no further action on the bill.

H.R. 1839, the "Youth Smoking Prevention and State Revenue Enforcement Act"

Summary.—Introduced by Representative Mark Green, H.R. 1839 amends the Jenkins Act by prescribing record-keeping and other reporting requirements on persons engaged in the interstate sale and distribution of cigarettes. The bill also authorizes the U.S. Attorney General to bring criminal and civil actions against transgressors to enforce its terms.

Legislative History.—On May 1, 2003, the Subcommittee held a legislative hearing on H.R. 1839. The following witnesses appeared and submitted statements for the record: Paul L. Jones, Director, Homeland Security and Justice, General Accounting Office; Henry "Hank" O. Armour, Chairman of the Board, National Association of Convenience Stores; Matthew Myers, President, National Center for Tobacco-Free Kids; and Patrick Fleenor, Chief Economist, Fiscal Economics. No further action was taken on H.R. 1839, but the subject of interstate tobacco sales was later addressed in H.R. 2824, also introduced by Representative Mark Green.

H.R. 2714, the "State Justice Institute Reauthorization Act of 2003"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 2714 authorizes the operations of the State Justice Institute for four fiscal years at $7 million annually. The Institute endeavors to improve judicial administration in State courts. It accomplishes this goal by providing funds to State courts and other national organizations or non-profits that support State courts.

Legislative History.—On July 22, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 2714, without amendment, by voice vote. On September 10, 2003, the full Committee met in open session and ordered favorably reported H.R. 2714, with an amendment, by voice vote (H. Rept. No. 108–285). On March 10, 2004, the House passed H.R. 2714 as amended by voice vote. The following day the bill was read twice and referred to the Senate Committee on the Judiciary. On September 30, 2004, the Senate Committee on the Judiciary discharged the bill by unanimous consent. That same day the Senate passed H.R. 2714, with an amendment regarding the extension of a bulletproof vest grant program, by unanimous consent. On October 8, 2004, Representative Chris Cannon moved that the House agree to the Senate amendment to H.R. 2714. The motion was agreed to the same day without objection. On October 25, 2004, the President signed H.R. 2714. (Public Law No. 108–372)

H.R. 2723, the "Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003"

Summary.—Introduced by Representative Michael K. Simpson, H.R. 2723 reconfigures the present Ninth Circuit Court of Appeals by creating a new Ninth comprised of Arizona, California and Nevada; and a Twelfth Circuit comprised of Alaska, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, and Washington.

Legislative History.—On October 21, 2003, the Subcommittee held a legislative hearing on H.R. 2723. The following witnesses appeared and submitted written statements for the record: the

Honorable Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit; the Honorable Diarmuid E. O'Scannlain, Judge, U.S. Court of Appeals for the Ninth Circuit; the Honorable Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit; and Arthur D. Hellman, Professor of Law, Pittsburgh University School of Law. No further action was taken on H.R. 2723; however, the House later approved an amendment to another bill (S. 878) that reconfigures the Ninth Circuit based on the text of S. 2278. This amendment to S. 878 was offered by Representative Michael K. Simpson. As introduced, S. 878 authorizes an additional permanent judgeship in the district of Idaho. It was also amended to include numerous temporary and permanent district judgeships as well as new circuit judgeships. See S. 878 for further action.

H.R. 2824, the "Internet Tobacco Sales Enforcement Act"

Summary.—Introduced by Representative Mark Green, H.R. 2824 amends the Jenkins Act by prescribing record-keeping and other reporting requirements on persons engaged in the interstate sale and distribution of cigarettes. The bill also authorizes the U.S. Attorney General to bring criminal and civil actions against transgressors to enforce its terms.

Legislative History.—On October 2, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 2824, with an amendment, by voice vote. On January 28, 2004, the full Committee met in open session and ordered favorably reported H.R. 2824, as amended, by voice vote. No House Report was filed, and no further action was taken on the bill.

H.R. 3486, A bill to create 4 new permanent judgeships for the eastern district of California

Summary.—Introduced by Representative William M. Thomas, H.R. 3486 creates four new permanent U.S. judgeships for the eastern district of California.

Legislative History.—No action was taken on the bill, although its contents were included in S. 878, a bill to authorize an additional permanent judgeship in the district of Idaho, which was later amended to include numerous temporary and permanent district judgeships as well as new circuit judgeships. See S. 878 for further action.

H.R. 3799, the "Constitution Restoration Act of 2004"

Summary.—Introduced by Representative Robert B. Aderholt, H.R. 3799 prohibits the U.S. Supreme Court or any federal court from reviewing subject matter regarding "relief * * * sought against * * * an element * * * or an officer of * * * government * * *, by reason of that element's or officer's acknowledgment of God as the sovereign source of law, liberty, or government." Judges who violate this prohibition are subject to impeachment. The bill also prohibits a court from invoking "foreign" sources of guidance when "interpreting and applying the Constitution."

Legislative History.—On September 13, 2004, the Subcommittee conducted a legislative hearing on H.R. 3799. The following witnesses appeared and submitted written statements for the record: the Honorable Roy S. Moore, Chairman, Foundation for Moral Law,

Inc.; the Honorable William E. Dannemeyer, Member of Congress, 1979–1992; Arthur D. Hellman, Professor of Law, Pittsburgh University School of Law; and Michael J. Gerhardt, Professor of Law, William & Mary School of Law. No further action was taken on the bill.

H.R. 3851, A bill to authorize an additional permanent judgeship for the district of Hawaii

Summary.—Introduced by Representative Neil Abercrombie, H.R. 3851 creates an additional permanent district judgship for the district of Hawaii.

Legislative History.—No action was taken on the bill, but its contents were included in S. 878, a bill to authorize an additional permanent judgeship in the district of Idaho, which was later amended to include numerous temporary and permanent district judgeships as well as new circuit judgeships. See S. 878 for further action.

S. 878, A bill to authorize an additional permanent judgeship in the district of Idaho, and for other purposes

Summary.—Introduced by Senator Larry E. Craig, S. 878 authorizes an additional permanent judgeship in the District of Idaho. The bill was later amended to include numerous temporary and permanent district judgeships as well and new circuit judgeships for the Federal judiciary and to include a plan to reorganize and split the Ninth Circuit Court of Appeals.

Legislative History.—On May 20, 2003, Senator Orrin Hatch of the Senate Committee on the Judiciary ordered reported S. 878 with an amendment in the nature of a substitute. On May 22, 2003, the Senate passed S. 878, with an amendment, by unanimous consent. On June 2, 2003, the bill was referred to the House Committee on the Judiciary. On June 25, 2003, Representative F. James Sensenbrenner, Jr., referred S. 878 to the Subcommittee. On September 3, 2004, the Subcommittee was discharged from consideration of the bill. On September 9, 2004, the full Committee ordered favorably reported S. 878, with an amendment, by voice vote (H. Rept. No. 108–708). On October 5, 2004, the House passed S. 878, with an amendment, by voice vote. No further action was taken on the bill.

H.R. 4247, the "Ninth Circuit Judgeship and Reorganization Act of 2004"

Summary.—Introduced by Representative Rick Renzi, H.R. 4247 reconfigures the present Ninth Circuit Court of Appeals by creating a new Ninth comprised of California, Guam, Hawaii, and Northern Mariana Islands; a Twelfth Circuit comprised of Arizona, Nevada, Idaho, and Montana; and a Thirteenth Circuit comprised of Alaska, Oregon, and Washington.

Legislative History.—No action was taken on the bill, but its contents, identical to that of S. 2278, were incorporated in an amendment offered by Representative Michael K. Simpson to S. 878, a bill to authorize an additional permanent judgeship in the district of Idaho. In addition to the Simpson amendment, the bill was later amended to include numerous temporary and permanent district

judgeships as well as new circuit judgeships. See S. 878 for further action.

H.R. 4301, A bill to authorize an additional district judgeship for the district of Nebraska

Summary.—Introduced by Representative Lee Terry, H.R. 4301 authorizes an additional district judgeship for the district of Nebraska.

Legislative History.—No action was taken on H.R. 4301, but its contents were included in S. 878, a bill to authorize an additional permanent judgeship in the district of Idaho. S. 878 was also amended to include numerous temporary and other permanent district judgeships as well as new circuit judgeships. See S. 878 for further action.

H.R. 4571, the "Lawsuit Abuse Reduction Act of 2004"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 4571 amends Rule 11 of the Federal Rules of Civil Procedure by requiring judges to impose attorney sanctions for violations of its terms. The bill also applies Rule 11 to State actions pertaining to interstate commerce.

Legislative History.—On September 3, 2004, the Subcommittee was discharged from consideration of H.R. 4571. On September 8, 2004, the full Committee met in open session and ordered favorably reported H.R. 4571, with an amendment, by a roll call vote of 18–10 (H. Rept. No. 108–682). On September 14, 2004, the House passed H.R. 4571 as amended by a roll call vote of 229–174. H.R. 4571 was referred to the Senate Committee on the Judiciary on September 15, 2004 and no further action was taken on the bill.

H.R. 4646, A bill to amend title 28, United States Code, to provide for the holding of Federal district court in Plattsburgh, New York, and for other purposes

Summary.—Introduced by Representative John M. McHugh, H.R. 4646 designates Plattsburgh, New York, as a place of holding federal court in the Northern District of New York.

Legislative History.—The text of H.R. 4646 was included as §111 of H.R. 1302, the "Federal Court Improvements Act of 2003," which the Subcommittee ordered favorably reported on March 20, 2003. On July 19, 2004, the Subcommittee was discharged from consideration of H.R. 4646. On July 21, 2004, the full Committee met in open session and ordered favorably reported H.R. 4646, with an amendment, by voice vote (H. Rept. No. 108–626). The text of H.R. 4646 was later incorporated in H.R. 3632, the "Anti-counterfeiting Amendments Act of 2004," as part of a manager's floor amendment. The House passed H.R. 3632, as amended, on November 21, 2004, by voice vote. The Senate passed H.R. 3632 by unanimous consent on December 8, 2004. H.R. 3632 was signed by the President on December 23, 2004 and became Public Law No. 108–482. The text of H.R. 4646 was also included in §4 of S. 2873, which the Senate passed by unanimous consent on November 19, 2004, and the House passed by unanimous consent the following day. S. 2873 was signed by the President on December 10, 2004 and became Public Law 108–455.

H.R. 5273, A bill to convert certain temporary judgeships to permanent judgeships, to create an additional judgeship for the district of Nebraska and for the eastern district of California, and for other purposes

Summary.—Introduced by Representative William M. Thomas, H.R. 5273 creates an additional U.S. district judgeship each for the Eastern District of California and the District of Nebraska, and converts temporary judgeships to permanent status in the Districts of Hawaii, Kansas, and the Eastern District of Missouri.

Legislative History.—No action was taken on the bill, but its contents were included in S. 878, a bill to authorize an additional permanent judgeship in the District of Idaho, which was later amended to include numerous temporary and permanent district judgeships as well as new circuit judgeships. See S. 878 for further action.

H.R. 5274, A bill to create an additional judgeship for the Eastern District of California, and for other purposes

Summary.—Introduced by Representative William M. Thomas, H.R. 5274 creates an additional U.S. district judgeship for the Eastern District of California.

Legislative History.—No action was taken on the bill, but its contents were included in S. 878, a bill to authorize an additional permanent judgeship in the District of Idaho, which was later amended to include numerous temporary and permanent district judgeships as well as new circuit judgeships. See S. 878 for further action.

S. 1720, A bill to provide for Federal Court proceedings in Plano, Texas

Summary.—Introduced by Senator John Cornyn, S. 1720 implements the March 1991 Judicial Conference proposal to designate Plano, Texas, as a place of holding court in the Eastern District of Texas. It also realigns the divisions of the U.S. District Court for the Eastern District of Texas to reflect the closing of the courthouse in Denton County. The Paris division is eliminated and its counties redistributed among the other divisions of the court. Plano is the largest city in the Eastern District of Texas. Of the 93 judicial districts in the United States, the Eastern District of Texas is the only one in which its largest city cannot hold federal court.

Legislative History.—On October 30, 2003, Senator Orrin Hatch of the Senate Committee on the Judiciary ordered reported S. 1720 with an amendment in the nature of a substitute (there was no accompanying report). On November 4, 2003, the Senate passed S. 1720 with an amendment by unanimous consent. The bill was referred to the House Committee on the Judiciary the following day. On November 19, 2003, the House passed S. 1720, as amended, by voice vote. The President signed the bill on December 3, 2003. (Public Law No. 108–157)

S. 2742, A bill to extend certain authority of the Supreme Court Police, modify the venue of prosecutions relating to Supreme Court building and grounds, and authorize the acceptance of gifts to the United States Supreme Court

Summary.—Introduced by Senator Orrin Hatch, S. 2742 allows the Supreme Court police to escort the Justices to functions in the Washington, D.C., area for security purposes; permits the U.S. District Court for the District of Columbia (in addition to D.C. Superior Court) to prosecute criminal offenses occurring on Court grounds or in the Court building; and permits the Chief Justice to accept gifts pertaining to the history of the Court.

Legislative History.—On September 21, 2004, Senator Orrin Hatch reported S. 2742 without amendment (there was no accompanying Report). On September 28, 2004, the Senate passed S. 2742 with an amendment by unanimous consent. The following day the bill was referred to the House Committee on the Judiciary. On October 6, 2004, the House passed S. 2742, as amended by voice vote. The President signed the bill on October 21, 2004. (Public Law No. 108–356)

INTELLECTUAL PROPERTY

Copyrights

H.R. 1417, the "Copyright Royalty and Distribution Reform Act of 2004"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 1417 replaces the existing administrative construct within the U.S. Copyright Office that determines copyright royalty rates and the distribution of related royalties under various compulsory licenses.

Legislative History.—On April 1, 2003, the Subcommittee conducted a legislative hearing on H.R. 1417. The following witnesses appeared and submitted a written statement for the record: the Honorable Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Copyright Office of the United States, the Library of Congress; Robert A. Garrett, Attorney-at-Law and Partner, Arnold & Porter; R. Bruce Rich, Attorney-at-Law, Weil, Gotschal & Manges, LLP; and Michael J. Remington, Attorney-at-Law and partner, Drinker Biddle & Reath, LLP. On May 20, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 1417, with an amendment, by voice vote. On September 24, 2003, the full Committee met in open session and ordered favorably reported H.R. 1417, with an amendment, by voice vote (H. Rept. 108–408). On March 3, 2004, the House passed H.R. 1417, as amended, by a roll call vote of 406–0. The following day the bill was read twice and referred to the Senate Committee on the Judiciary. On September 29, 2004, Senator Hatch ordered favorably reported H.R. 1417 with an amendment in the nature of a substitute (without a written report). On October 6, 2004, the Senate passed H.R. 1417 with an amendment by unanimous consent. On November 16, 2004, the Senate passed S. Con. Res. 145, without an amendment and by unanimous consent (this was an enrolling resolution to correct technical errors in H.R. 1417). On November 17, 2004, the House passed S. Con. Res. 145, without

amendment, by voice vote. Later that same day the House agreed to the Senate amendment to H.R. 1417 by a roll call vote of 407–0. The President signed the bill on November 30, 2004. (Public Law No. 108–419)

H.R. 2344, the "Intellectual Property Protection Restoration Act of 2003"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 2344 prevents the award of damages for infringement of intellectual property owned by a State if that State has not waived its immunity under the Eleventh Amendment. The bill addresses the inequity of States that defend their intellectual property rights in federal court while asserting the Eleventh Amendment as a defense when they are sued for infringement by third-party copyright, patent, and trademark holders.

Legislative History.—On June 17, 2003, the Subcommittee conducted a legislative hearing on H.R. 2344. The following witnesses appeared and submitted a written statement for the record: the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, the Library of Congress; Leslie Winner, General Counsel and Vice President, University of North Carolina at Chapel Hill; Mark Bohannon, General Counsel and Senior Vice President for Public Policy, on behalf of The Software and Information Industry Association; and Paul Bender, Professor of Law, Arizona State University School of Law. No further action was taken on the bill.

H.R. 2517, the "Piracy Deterrence and Education Act of 2003"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 2517 requires the Federal Bureau of Investigation to create a deterrence program that prevents online piracy and facilitates the sharing of information concerning piracy among law enforcement, Internet service providers, and copyright owners; requires the Attorney General to ensure that any unit within the Department of Justice responsible for investigating computer hacking or piracy has at least one agent dedicated to investigating such crimes; establishes within the Office of the Associate Attorney General an "Internet Use Program" to educate the public about copyright law, privacy, and security with respect to Internet use; and clarifies that the U.S. Customs Service has the authority to seize infringed copyrighted works regardless of whether the work has been registered with the Copyright Office or recorded with the Customs Service.

Legislative History.—On July 17, 2003, the Subcommittee conducted a legislative hearing on H.R. 2517. The following witnesses appeared and submitted a written statement for the record: Jana D. Monroe, Assistant Director of Cyber Division, Federal Bureau of Investigation; David P. Trust, Chief Executive Officer, Professional Photographers of America; Linn Skinner, Proprietor, Skinner Sisters; and Maren Christensen, Senior Vice President, Intellectual Property Counsel, Universal Studios. No further action was taken on the bill, but portions of it were included in H.R. 4077, the "Piracy Deterrence and Education Act of 2004." See H.R. 4077 for further action.

H.R. 2752, the "Author, Consumer, and Computer Owner Protection and Security (ACCOPS) Act of 2003"

Summary.—Introduced by Representative John Conyers, Jr., H.R. 2752 prescribes new criminal copyright reporting requirements for the Department of Justice, requires the sharing of evidence regarding copyright infringement between the Attorney General and foreign nations, and proscribes the acts of submitting false domain name registration information and surreptitious "camcording" in public theaters.

Legislative History.—No formal action was taken on the bill, but portions of it were included in H.R. 4077, the "Piracy Deterrence and Education Act of 2004" and H.R. 3754, the "Fraudulent Online Identity Sanctions Act" (H.R. 3754 was included in H.R. 3632, the "Anti-counterfeiting Amendments Act of 2004," which the House passed on September 21, 2004, and the Senate passed on December 8, 2004 and the President signed on December 23, 2004. (Public Law No. 108–482). See H.R. 4077, H.R. 3754, and H.R. 3632 for further action.

H.R. 3261, the "Database and Collections of Information Misappropriation Act"

Summary.—Introduced by Representative Howard Coble, H.R. 3261 prohibits the making available to others of a quantitatively substantial part of the information in a database, with knowledge that the making available is without the database producer's authorization, if: the database was generated, gathered or maintained through a substantial expenditure of financial resources or time; the making available occurs in a time sensitive manner; the making available inflicts injury on the database by serving as a functional equivalent in the same market as the database in a manner that causes displacement of sources of revenue; and the ability of parties to free ride on others threatens the existence or quality of the database.

Legislative History.—On September 23, 2003, the Subcommittee conducted a legislative hearing on H.R. 3261. The following witnesses appeared and submitted a written statement for the record: David Carson, General Counsel, Copyright Office of the United States, the Library of Congress; Thomas J. Donohue, President and Chief Executive Officer, Chamber of Commerce; Keith Kupferschmid, Vice President, Intellectual Property Policy & Enforcement, Software & Information Industry Association on behalf of the Coalition Against Database Piracy; and William Wulf, President, National Academy of Engineering and Vice Chairman, National Research Council. On October 16, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 3261, with an amendment, by a roll call vote of 10–3. On January 21, 2004, the full Committee met in open session and ordered reported H.R. 3261, with an amendment, by a vote of 16–7 (H. Rept. No. 108–421, Part I). On February 11, 2004, H.R. 3261 was referred sequentially to the House Committee on Energy and Commerce. On March 3, 2004, the Committee on Energy and Commerce ordered reported unfavorably H.R. 3261 by voice vote (H. Rept. No. 108–421, Part II). No further action was taken on the bill.

H.R. 3569, the "National Film Preservation Act of 2003"

Summary.—Introduced by Representative John Conyers, Jr., H.R. 3569 reauthorizes the National Film Preservation Board and the National Film Preservation Foundation for seven years at $7 million annually. The Board and Foundation preserve older films and develop film access activities for the public.

Legislative History.—No action was taken on H.R. 3569, but its text was included in S. 3021, a bill to provide for the protection of intellectual property rights, and for other purposes, which the Senate passed, with an amendment, by unanimous consent on November 20, 2004. No further action was taken on S. 3021.

H.R. 3632, the "Anti-counterfeiting Amendments Act of 2004"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 3632 creates criminal and civil sanctions against persons who knowingly traffic in genuine "authentication components," and in the case of computer software, components that have been knowingly altered to falsify the number or type of authorized users or the version or edition of the relevant software program. H.R. 3632 amends 18 U.S.C. § 2318 to expand its existing scope to include physical authentication components such as holograms and labels. Existing law does not penalize those who traffic in such authentication components without actually making counterfeit copies or selling counterfeit goods.

Legislative History.—On February 12, 2004, the Subcommittee conducted a legislative hearing on H.R. 3632. The following witnesses appeared and submitted a written statement for the record: Richard LaMagna, Senior Manager-Worldwide Investigations, Microsoft; Emery Simon, Counselor, Business Software Alliance (BSA); Brad Buckles, Executive Vice President, Anti-Piracy, Recording Industry Association of America, Inc. (RIAA); and David Green, Vice President and Counsel, Technology and New Media, Motion Picture Association of America (MPAA). On March 31, 2004, the Subcommittee met in open session and ordered favorably reported H.R. 3632, with an amendment, by voice vote. On June 23, 2004, the full Committee met in open session and ordered favorably reported H.R. 3632, with an amendment, by voice vote (H. Rept. No. 108–600). On September 21, 2004, the House passed H.R. 3632, as amended, by voice vote. The Senate passed H.R. 3632 by unanimous consent on December 8, 2004. The President signed H.R. 3632 into law on December 23, 2004. (Public law No. 108–482) The text of H.R. 3632 was also included in S. 3021, a bill to provide for the protection of intellectual property rights, and for other purposes, which the Senate passed, with an amendment, by unanimous consent on November 20, 2004. No further action was taken on S. 3021.

H.R. 3754, the "Fraudulent Online Identity Sanctions Act"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 3754 creates penalties for those who submit materially false contact information in connection with a domain name used to commit a crime or engage in online infringement.

Legislative History.—On February 4, 2004, the Subcommittee conducted a legislative hearing on H.R. 3754. The following wit-

nesses appeared and submitted a written statement for the record: Timothy P. Trainer, President, International AntiCounterfeiting Coalition, Inc. (IACC); J. Scott Evans, President, Intellectual Property Constituency; Rick Wesson, Chief Executive Officer, Alice's Registry; and Mark Bohannon, General Counsel and Senior Vice President for Public Policy on behalf of Copyright Coalition on Domain Names (CCDN). On March 31, 2004, the Subcommittee met in open session and ordered favorably reported H.R. 3754, with an amendment, by voice vote. On May 12, 2004, the full Committee ordered favorably reported H.R. 3754, with an amendment, by voice vote (H. Rept. No. 108–536). Pursuant to a manager's floor amendment, the text of H.R. 3754 was included in H.R. 3632, the "Anti-counterfeiting Amendments Act of 2004," which the House passed on September 21, 2004. The Senate passed H.R. 3632 by unanimous consent on December 8, 2004. The President signed H.R. 3632 on December 23, 2004 and it became Public Law No. 108–482. The text of H.R. 3754 was also included in S. 3021, a bill to provide for the protection of intellectual property rights, and for other purposes, which the Senate passed, with an amendment, by unanimous consent on November 20, 2004. No further action was taken on S. 3021.

H.R. 4077, the "Piracy Deterrence and Education Act of 2004"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 4077 contains funding to educate the public about intellectual property law, increases cooperation among federal agencies and intellectual property owners concerning piracy, and assists the Department of Justice in its efforts to prosecute online intellectual property theft by creating a new criminal cause of action in Section 506 of Title 17.

Legislative History.—On March 31, 2004, the Subcommittee met in open session and ordered favorably reported H.R. 4077, with an amendment, by voice vote. On September 8, 2004, the full Committee met in open session and ordered favorably reported H.R. 4077, with an amendment, by voice vote (H. Rept. No. 108–700). On September 28, 2004, the House passed H.R. 4077, as amended, by voice vote. Portions of H.R. 4077 (the text of H.R. 4586, the "Family Movie Act of 2004") were included in S. 3021, a bill to provide for the protection of intellectual property rights, and for other purposes, which the Senate passed, with an amendment, by unanimous consent on November 20, 2004. No further action was taken on S. 3021.

H.R. 4518, the "Satellite Home Viewer Extension and Reauthorization Act of 2004"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 4518 extends the "distant-signal" compulsory license that allows satellite systems to operate for an additional five years, provides a process that will enable copyright holders to receive fair compensation for the use of their creative works, ensures that satellite subscribers are able to continue to receive distant and local network and super-station signals to which they are entitled, and makes other necessary improvements to the satellite compulsory license.

Legislative History.—On May 6, 2004, the Subcommittee met in open session and ordered favorably reported the Committee Print on the "Satellite Home Viewer Extension and Reauthorization Act of 2004." The Committee print became the basis for H.R. 4518 which Representative Lamar S. Smith introduced on June 4, 2004. On July 1, 2004, the Subcommittee was discharged from consideration of H.R. 4518. On July 7, 2004, the full Committee met in open session and ordered favorably reported H.R. 4518, with an amendment, by voice vote (H. Rept. No. 108–660). On October 6, 2004, the House passed H.R. 4518 as amended, by voice vote. Most of the contents of H.R. 4518 were included in H.R. 4818, the "Consolidated Appropriations Act of 2005" (both houses of Congress agreed to the accompanying conference report to H.R. 4818, H. Rept. No. 108–792, on November 20, 2004). The President signed H.R. 4818 into law on December 8, 2004. (Public Law No. 108–447)

H.R. 4586, the "Family Movie Act of 2004"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 4586 provides that it is not copyright or trademark infringement for allows companies to offer technologies and services to filter out content from movies, usually on DVDs. Several companies are offering various technologies and services to enable consumers to watch edited versions of major motion pictures that have content removed by muting dialogue or lyrics and skipping over visual content.

Legislative History.—The Subcommittee conducted a legislative hearing on H.R. 4586 on June 17, 2004. The following witnesses appeared and submitted a written statement for the record: the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, the Library of Congress; Dr. Amitai Etzioni, Founder and Director, The Institute for Communitarian Policy Studies, The George Washington University; Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America; and Penny Nance, President, Kids First Coalition. On July 8, 2004, the Subcommittee met in open session and ordered favorably reported H.R. 4586, with an amendment, by a roll call vote of 11–5. On July 21, 2004, the full Committee met in open session and ordered favorably reported H.R. 4518, as amended, by a roll call vote of 18–9 (H. Rept. No. 108–670). Pursuant to a manager's floor amendment, the text of H.R. 4586 was included in H.R. 4077, the "Piracy Deterrence and Education Act of 2004," which the House passed on September 28, 2004, by voice vote. Portions of H.R. 4077 (specifically, the text of H.R. 4586) were included in S. 3021, a bill to provide for the protection of intellectual property rights, and for other purposes, which the Senate passed, with an amendment, by unanimous consent on November 20, 2004. No further action was taken on S. 3021.

H.R. 5136, the Preservation of Orphan Works Act"

Summary.—Introduced by Representative Howard L. Berman, H.R. 5136 broadens the Copyright Act to permit libraries and archives to reproduce, distribute, perform, and display all orphan copyrighted works in the course of their preservation, scholarly, research activities.

Legislative History.—No action was taken on the bill, but the text of H.R. 5136 was included in S. 3021 which no action was taken in the House on S. 3021.

S. 1932, the "Artists' Rights and Theft Prevention Act of 2004"

Summary.—Introduced by Senator John Cornyn, S. 1932 proscribes the act of "camcording" movies in public theaters and creates new civil and criminal penalties for copyright infringement of works that are being prepared for commercial distribution, such as "new release" feature films.

Legislative History.—On April 29, 2004, Senator Orrin Hatch of the Senate Committee on the Judiciary reported S. 1932 with an amendment in the nature of a substitute. On June 25, 2004, the Senate passed S. 1932, with an amendment, by unanimous consent. Portions of S. 1932 (the "camcording" text) were also a component of H.R. 4077, the "Piracy Deterrence and Education Act of 2004," which the House passed on September 28, 2004. The "camcording" text of H.R. 4077 was also included in S. 3021, a bill to provide for the protection of intellectual property rights, and for other purposes, which the Senate passed, with an amendment, by unanimous consent on November 20, 2004. No further action was taken on S. 3021.

Patents and Trademarks

H.R. 1561, the "United States Patent and Trademark Fee Modernization Act of 2003"

Summary.—Introduced by Representative Lamar S. Smith, H.R. 1561 creates a new patent and trademark fee schedule to generate greater revenue for the U.S. Patent and Trademark Office. The bill as amended on the House floor prevents appropriations "diversion" by creating a refund mechanism that returns money to individuals and companies when user-fee revenue exceeds estimated collections at PTO in a given fiscal year.

Legislative History.—On April 3, 2003, the Subcommittee conducted a legislative hearing on H.R. 1561. The following witnesses appeared and submitted a written statement for the record: the Honorable James Rogan, Undersecretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office; Michael K. Kirk, Executive Director, American Intellectual Property Law Association; John K. Williamson, President, Intellectual Property Owners; and Ronald J. Stern, President, Patent Office Professional Association. On May 22, 2003, the Subcommittee met in open session and ordered favorably reported H.R. 1561, with amendment, by voice vote. On July 9, 2003, the full Committee ordered reported favorably H.R. 1561, as amended, by voice vote (H. Rept. No. 108–241). On March 3, 2003, the House passed H.R. 1561, with an amendment, by a roll call vote of 379–28. The bill was referred the following day to the Senate Committee on the Judiciary. On April 29, 2004, Senator Orrin Hatch reported H.R. 1561, without an amendment and without a written Report. No further action was taken on H.R. 1561, but the new fee schedule set forth in the bill was included in H.R. 4818, the "Consolidated Appropriations Act of 2005" (both houses of Congress agreed to the

accompanying conference report to H.R. 4818, H. Rept. No. 108–792, on November 20, 2004). The President signed H.R. 4818 into law on December 8, 2004. (Public Law No. 108–447) Language regarding fee diversion (the refund mechanism) and other text from H.R. 1561 were omitted.

H.R. 2391, the "Cooperative Research and Technology Enhancement (CREATE) Act of 2003"

Summary.—Introduced by Representative Lamar S. Smith, the CREATE Act gives the same statutory protection to inventive collaborators who are members of multiple organizations that is currently available to inventive collaborators employed by a single entity. The CREATE Act extends to collaborative researchers who work in multiple organizations the "safe harbor" that patent law currently provides to inventive collaborators who are employed in a single organization by prohibiting the use of "secret prior art" to defeat an otherwise valid patent or patent application.

Legislative History.—On June 10, 2003, the Subcommittee conducted a legislative hearing on H.R. 2391. The following witnesses appeared and submitted a written statement for the record: Jon Soderstrom, Ph.D., Director of Technology Transfer, Yale University; Eric Steffe, Sterne Kessler Goldstein & Fox; Jeffrey P. Kushan, Esq., Sidley Austin Brown & Wood on behalf of Genentech; and John R. Thomas, Professor, Georgetown University Law Center. On July 22, 2003, the Subcommittee ordered favorably reported H.R. 2391, with an amendment, by voice vote. On January 21, 2004, the full Committee ordered favorably reported H.R. 2391, with an amendment, by voice vote (H. Rept. No. 108–425). On March 10, 2004, the House passed H.R. 2391, with an amendment, by voice vote. The following day the bill was referred to the Senate Committee on the Judiciary. On October 7, 2004, Senator Hatch reported H.R. 2391 with an amendment in the nature of a substitute, without written report. The text of H.R. 2391 as passed by the House was also included in S. 2192, which Senator Orrin Hatch introduced and the Senate passed by unanimous consent on June 25, 2004. On November 20, 2004, the House passed S. 2192 by unanimous consent. The President signed S. 2192 into law on December 10, 2004. (Public law No. 108–453)

OVERSIGHT ACTIVITIES

Summary of the Committee's oversight plan and the Subcommittee's response thereto

Pursuant to its obligation under Rule X of the House Rules, the Committee submitted the following subject matter as part of its oversight plan for the 108th Congress:

The Federal judicial system

The Subcommittee has jurisdiction over the Federal judicial system, including the operations of all district and circuit courts, the Judicial Conference of the United States, the Administrative Office of the U.S. Courts, and the Federal Judicial Center. The oversight plan noted the Committee's interest in ascertaining federal judge-

ship needs as well as monitoring the operations of the Federal judicial misconduct statute (28 U.S.C. § 351 et seq.).

On June 24, 2003, the Subcommittee conducted an oversight hearing on Federal judgeship needs. Testimony received at this time from the Federal bar and entreaties from other Members and judges compelled the Committee to favorably report S. 878, an omnibus judgeship bill that incorporated every U.S. district and circuit judgeship recommendation made by the U.S. Judicial Conference, but did not include bankruptcy judgeships which were included in the omnibus bankruptcy legislation. On October 5, 2004, the bill was further revised when Representative Michael K. Simpson offered a floor amendment (adopted by the House) to reconfigure the existing Ninth Circuit Court of Appeals into three new circuits.

In addition, the Subcommittee and full Committee have had a longstanding interest in ensuring that the Federal judiciary maintain the highest standard of ethical behavior. The Subcommittee rewrote portions of the judicial misconduct statute in the 107th Congress. As a result of continuing conversations between the Committee and the federal judiciary on May 25, 2004, the Chief Justice announced the creation of a judicial commission, headed by Justice Stephen Breyer, to examine the operations of the statute.

The U.S. copyright system

The Subcommittee has jurisdiction over the Copyright Act (Title 17 of the U.S. Code) and the operations of the Copyright Office, which registers copyrighted works, collects and distributes certain royalties, and offers policy advice to the Congress on copyright issues.

During the 108th Congress, the Subcommittee conducted a number of copyright oversight hearings in response to issues identified in the Committee oversight plan as well as concerns expressed by the Copyright Office, copyright holders, and Members of Congress. For example, the oversight plan detailed the necessity to maintain adequate funding for the Copyright Office. The Subcommittee conducted an oversight hearing on the operations of the Office on June 3, 2004. The Register of Copyrights ably defended the Office's budget request for FY 2005, and the Subcommittee noted its continued interest in monitoring the development of a Deposit Facility in Fort Meade, Maryland, that will house certain registered works, as well as the Office's ongoing feasibility plan to convert its analog records to digital form.

Copyright law often evolves in response to technological innovation, such as the piano roll, photocopying machine, and videocassette recorder. The Subcommittee's oversight and legislative work on copyright issues is currently dominated by the theme of piracy, which largely reflects the latest technological development to affect the interests of copyright holders and users—the Internet, or the digital environment by which copyrighted works are transmitted and duplicated. The oversight plan specifically noted the Subcommittee's interest in the "broadcast flag" as one method to inhibit digital piracy, as well as hardware piracy, mostly of music and movies, that flourishes world-wide.

The Subcommittee conducted a number of oversight hearings in response to this concern over piracy. Its hearing agenda for the 108th Congress began and ended with an exploration of peer-to-peer piracy (P2P) on university campuses. Representative Lamar S. Smith, Chairman of the Subcommittee, worked closely with university officials over the past two years to develop strategies designed to curtail P2P infringement among college students.

In addition, the Subcommittee conducted oversight hearings on the link between piracy and organized crime and terrorism; the development of the broadcast flag; and the proliferation of domain-name fraud on the Internet. Coupled with the general concern over the prevalence of digital piracy, these hearings led to the drafting of H.R. 3754 (domain-name fraud) as well as H.R. 2517 and H.R. 4077 (piracy deterrence and education). The Subcommittee's oversight hearing and related negotiations over copyright compensation under the Satellite Home Viewer Improvement Act led to a major rewrite of the law (H.R. 4518, the bulk of which was included in H.R. 4818, the "Consolidated Appropriations Act of 2005").

The U.S. patent and trademark systems

The Subcommittee has jurisdiction over the U.S. Patent and Trademark Office, which is responsible for granting patents and trademarks and administratively reviewing their validity and scope when appropriate. The Subcommittee also oversees the development of American patent and trademark policy.

Given the increasing importance of intellectual property to the United States as a source of jobs, exports, and wealth, the oversight plan emphasizes the imperative of modernizing the PTO. Former PTO Director James Rogan produced a five-year "21st Century Business Plan" in furtherance of this goal, which is predicated, in part, on securing greater revenue for the agency. For the better part of a decade, the Subcommittee and full Committee have protested the diversion of user fees from the PTO to non-agency endeavors by congressional appropriators. The oversight plan also cites specific patent policy issues—global harmonization and the issuance of business method patents—that PTO can more effectively address with greater resources, including improved computer systems and more and better trained examiners.

The Subcommittee followed up with hearings and legislation to address the needs of the PTO. Most conspicuously, this work resulted in passage of H.R. 1561, which creates a new PTO user fee schedule that should generate more than $190 million in additional revenue for the agency. Importantly, the House adopted an amendment to the bill that creates a refund mechanism to return excessive collections to inventors and trademark holders, thereby eliminating the incentive to divert fees for non-PTO purposes. Other policy issues that were the subject of oversight hearings, such as patent post-grant opposition and other "quality" reform ideas, are based on the goal of making the patent and trademark application and issuance process fairer and less expensive, while enhancing the overall integrity of the patents and trademarks granted.

Finally, the oversight plan specifically noted a Supreme Court decision *(Victor's Little Secret* v. *V Secret Catalogue)* that affects future application of the trademark dilution statute, enacted in 1995.

The Subcommittee conducted a hearing on the matter and developed a Committee Print that responds to the decision.

List of oversight hearings

Peer-to-Peer Piracy on University Campuses, February 26, 2003 (Serial No. 2)

Copyright Piracy Prevention and the Broadcast Flag, March 6, 2003 (Serial No. 5)

International Copyright Piracy: Links to Organized Crime and Terrorism, March 13, 2003 (Serial No. 9)

The Federal Judiciary: Is there a Need for Additional Federal Judges?, June 24, 2003 (Serial No. 30)

Patent Quality Improvement, July 24, 2003 (Serial No. 38)

Reauthorization of the Satellite Home Viewer Improvement Act, February 24, 2004 (Serial No. 69)

Section 115 of the Copyright Act: In Need of an Update?, March 11, 2004 (Serial No. 75) Committee Print to Amend the Federal Trademark Dilution Act, April 22, 2004 (Serial No. 72) Derivative Rights, Moral Rights, and Movie Filtering Technology, May 20, 2004 (Serial No. 93) Oversight of the Operations of the U.S. Copyright Office, June 3, 2004 (Serial No. 80) Patent Quality Improvement: Post-Grant Opposition, June 24, 2004 (Serial No. 91)

Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters, July 15, 2004 (Serial No. 105)

Peer-to-Peer (P2P) Piracy on University Campuses: an Update, October 5, 2004 (Serial No. 112)

Peer-to-Peer Piracy on University Campuses, February 26, 2003 (Serial No. 2)

The hearing focused on the extent to which university-based piracy contributes to digital copyright infringement generally. The Subcommittee also explored whether the affected schools have implemented policies to educate students about online piracy of digital works and developed programs to thwart the practice.

The following witnesses appeared and submitted a written statement for the record: Hilary Rosen, Chairman and Chief Executive Officer, Recording Industry Association of America; Graham Spanier, President, The Pennsylvania State University; Robyn Render, Vice President for Information Resources and Chief Information Officer, University of North Carolina; and Dr. John Hale, Center for Computer Security, University of Tulsa.

Copyright Piracy Prevention and the Broadcast Flag, March 6, 2003 (Serial No. 5).

The hearing explored the arguments for and against implementation of the broadcast flag solution, broadcast flag technology itself, and how copyright law affects the debate. Digital television broadcasts, if not encrypted or otherwise protected, are extremely susceptible to unauthorized redistribution over the Internet. "Broadcast flag" refers to a technology embedded in a digital broadcast transmission which can be read by consumer electronics products to prevent its unauthorized redistribution.

The following witnesses appeared and submitted a written statement for the record: the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, the Library of Congress; W. Kenneth Ferree, Bureau Chief, Media Bureau, Federal Communications Commission; Fritz Attaway, Executive Vice President Government Relations and Washington General Counsel, Motion Picture Association of America; and Edward J. Black, President and CEO, Computer & Communications Industry Association.

International Copyright Piracy: Links to Organized Crime and Terrorism, March 13, 2003 (Serial No. 9)

The purpose of the hearing was to highlight the exponential growth of international copyright piracy; review the extreme degree of organization by which institutional and individual pirates operate; and investigate the extent to which copyright piracy helps to subsidize organized crime and terrorist activity.

The following witnesses appeared and submitted a written statement for the record: John G.

Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice; Rich LaMagna, Senior Manager-Worldwide Investigations, Microsoft; Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America; and Joan Borsten Vidov, President, Film by Jove, Inc.

The Federal Judiciary: Is there a Need for Additional Federal Judges?, June 24, 2003 (Serial No. 30)

The hearing reviewed the proposal of the Judicial Conference of the United States for the creation of new federal judgeships and the methodology upon which the proposal is based. The Conference's latest proposal recommends that Congress establish 11 new judgeships in four courts of appeals and 46 new judgeships in 24 district courts. The Conference also recommends that five temporary district court judgeships created in 1990 be established as permanent positions. For many of these courts, the recommendations represent needs developed since 1990.

The following witnesses appeared and submitted a written statement for the record: the Honorable Dennis Jacobs, Judge, United States Court of Appeals for the Second Circuit; William O. Jenkins, Jr., Director, Homeland Security and Justice Issues, General Accounting Office; and Professor Arthur D. Hellman, Professor of Law, University of Pittsburgh.

Patent Quality Improvement, July 24, 2003 (Serial No. 38)

The purpose of the hearing was to explore the merits of six legislative policy ideas to improve patent quality. While the Subcommittee has documented the steady increase in application pendency and backlogs at the U.S. Patent and Trademark Office, the consensus view among PTO officials and the inventor community is that efforts to address these problems should not take precedence over improving patent quality. Patents of questionable scope or validity waste valuable resources by inviting third-party challenges and ultimately discourage private-sector investment.

The following witnesses appeared and submitted a written statement for the record: Charles E. Van Horn, Partner, Finnegan, Hen-

derson, Farabow, Garrett & Dunner, on behalf of the American Intellectual Property Law Association; Mark Kesslen, Managing Director and Associate General Counsel, J.P. Morgan Chase & Company, on behalf of the Financial Services Roundtable and BITS; David M. Simon, Chief Patent Counsel, Intel Corporation; and John R. Thomas, Professor of Law, Georgetown University.

Reauthorization of the Satellite Home Viewer Improvement Act, February 24, 2004 (Serial No. 69)

Enacted in 1999, the Satellite Home Viewer Improvement Act created a copyright compulsory license (§ 122) authorizing satellite carriers to deliver local television broadcast signals to subscribers who reside in the local markets of those stations. This license to permit distant signal retransmission, codified in § 119 of the Copyright Act, is comparable to the license that governs cable operations (§ 111). The distant network and copyright compulsory provisions of SHVIA will expire on December 31, 2004. The hearing explored the merits of reauthorizing the compulsory license and other related issues.

The following witnesses appeared and submitted a written statement for the record: the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, the Library of Congress; Fritz Attaway, Executive Vice President for Government Relations and Washington General Counsel, Motion Picture Association of America; David K. Moskowitz, Board Chairman, Senior Vice President and General Counsel, EchoStar Communications Corporation, on behalf of Satellite Broadcasting & Communications Association; and Robert G. Lee, President and General Manager, WDBJ Television, Inc., on behalf of the National Association of Broadcasters.

Section 115 of the Copyright Act: In Need of an Update?, March 11, 2004 (Serial No. 75)

The purpose of the hearing was to review the operation of § 115 and related sections of the Copyright Act that affect the online music business. In 1995, the Subcommittee expanded § 115 to cover compulsory licenses for digital phonorecord deliveries. Royalty fees for §115 licenses are established by Copyright Arbitration Royalty Panels (CARP) overseen by the Copyright Office if private parties are unable to agree among themselves on the rates.

The following witnesses appeared and submitted a written statement for the record: the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, the Library of Congress; Jonathan Potter, Executive Director, Digital Media Association; Carey R. Ramos, Counsel, Paul, Weiss, Rifkind, Wharton & Garrison, on behalf of the National Music Publishers Association; and Cary Sherman, President and General Counsel, Recording Industry Association of America.

Committee Print to Amend the Federal Trademark Dilution Act, April 22, 2004 (Serial No. 72)

The purpose of the hearing was to explore the merits of a Committee Print to determine whether the Federal Trademark Dilution Act should be amended in the wake of a recent Supreme Court de-

cision and conflicting circuit case law on the matter. The Committee Print is based on a submission by the International Trademark Association.

The following witnesses appeared and submitted a written statement for the record: Jacqueline A. Leimer, President, International Trademark Association; Robert W. Sacoff, Chair, Intellectual Property Law Section, American Bar Association; Marvin J. Johnson, Legislative Counsel, American Civil Liberties Union; and David C. Stimson, Chief Trademark Counsel, Eastman Kodak Company.

Derivative Rights, Moral Rights, and Movie Filtering Technology, May 20, 2004 (Serial No. 93)

The purpose of the hearing was to review the legal status of technologies and services designed to filter out content from movies, usually on DVDs. Several companies are offering various technologies and services to enable consumers to watch modified versions of major motion pictures that have content removed.

The following witnesses appeared and submitted a written statement for the record: Joanne Cantor, Professor Emerita, University of Wisconsin Madison; Jeff McIntyre, Senior Legislative and Federal Affairs Officer, American Psychological Association; Bill Aho, Chief Executive Officer, ClearPlay, Inc.; and Marjorie Heins, Fellow, Brennan Center for Justice at New York University Law School and Founding Director of the Free Expression Policy Project.

Oversight of the Operations of the U.S. Copyright Office, June 3, 2004 (Serial No. 80)

The hearing allowed the Register of Copyrights to review and defend the Office's FY 2005 budget request. More importantly, the forum allowed members to acquire a status report on planned and ongoing efforts to modernize the Office's operations, especially those that will lessen its reliance upon paper files and documents.

The following witness appeared and submitted a written statement for the record: the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, the Library of Congress.

Patent Quality Improvement: Post-Grant Opposition, June 24, 2004 (Serial No. 91)

The primary administrative procedure for a challenge to the validity of a U.S. patent is "reexamination," which may be initiated by any party during the life of the patent. A more elaborate and adversarial procedure for challenging the validity of patents in the immediate aftermath of their issuance is the European "opposition" proceeding. The purpose of the hearing was to explore whether the adoption of such a system in the United States would improve patent quality. As a result of this hearing, Representative Berman introduced H.R. 5299, the "Patent Quality Assistance Act of 2004".

The following witnesses appeared and submitted a written statement for the record: James A. Toupin, General Counsel, U.S. Patent and Trademark Office; Jeffrey P. Kushan, Esq., Sidley Austin Brown & Wood, on behalf of Genentech; Michael K. Kirk, Executive

Director, American Intellectual Property Law Association; and Karl Sun, Senior Patent Counsel, Google Inc.

Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters, July 15, 2004 (Serial No. 105)

The purpose of the hearing was to explore the concerns of broadcasters, webcasters, sound recording copyright owners, and others as they relate to the application of provisions of the Digital Performance Right in Sound Recordings Act of 1995 as amended by the Digital Millennium Copyright Act, which govern the "streaming" of digital transmissions of sound recordings over the Internet. The Subcommittee reviewed the underlying statutes, the Copyright Office's March 11, 2004, interim record-keeping regulations, and the Third Circuit Court of Appeals recent *Bonneville* decision as part of an inquiry into whether changes to 17 U.S.C. § 114 are warranted to promote the "streaming" of radio broadcasts over the Internet.

The following witnesses appeared and submitted a written statement for the record: David Carson, General Counsel, Copyright Office of the United States, the Library of Congress; Dan Halyburton, Senior Vice President/General Manager, Group Operations for Susquehanna Radio Corporation, on behalf of the National Association of Broadcasters; Steven Marks, General Counsel, Recording Industry Association of America, Inc.; and Jonathan Potter, Executive Director, Digital Media Association.

Peer-to-Peer (P2P) Piracy on University Campuses: an Update, October 5, 2004 (Serial No. 112)

The hearing was an update to one held in February 2003 that focused on the extent to which university-based piracy contributes to digital copyright infringement generally. The Subcommittee explored how schools have implemented policies and programs to educate students about online piracy of digital works and developed programs to thwart the practice.

The following witnesses appeared and submitted a written statement for the record: Graham Spanier, President, The Pennsylvania State University, and Co-Chair, Joint Committee of the Higher Education and Entertainment Communities; Cary Sherman, President, Recording Industry Association of America, and Co-Chair, Joint Committee of the Higher Education and Entertainment Communities; Dr. Jim Davis, Associate Vice Chancellor, Information Technology, Professor of Chemical Engineering, University of California, Los Angeles; and Alan McGlade, President and Chief Executive Officer, MusicNet, Inc.

SUBCOMMITTEE ON THE CONSTITUTION [1]

STEVE CHABOT, Ohio, *Chairman*

STEVE KING, Iowa
WILLIAM L. JENKINS, Tennessee
SPENCER BACHUS, Alabama
JOHN N. HOSTETTLER, Indiana
MELISSA A. HART, Pennsylvania
TOM FEENEY, Florida
J. RANDY FORBES, Virginia

JERROLD NADLER, New York
JOHN CONYERS, JR., Michigan
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ADAM B. SCHIFF, California

[1] Subcommittee chairmanship and assignments approved February 12, 2003.

Tabulation of subcommittee legislation and activity

Legislation referred to the Subcommittee	151
Legislation on which hearings were held	9
Legislation reported favorably to the full Committee	6
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	8
Legislation pending before the full Committee	2
Legislation reported to the House	12
Legislation discharged from the Committee	1
Legislation pending in the House	1
Legislation failed passage by the House	1
Legislation passed by the House	11
Legislation pending in the Senate	4
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	2
Days of legislative hearings	9
Days of oversight hearings	13

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on the Constitution shall have jurisdiction over the following subject matters: constitutional amendments, constitutional rights, federal civil rights laws, ethics in government, other appropriate matters as referred by the Chairman, and relevant oversight.

LEGISLATIVE ACTIVITIES

H. Res. 132—Expressing the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in Newdow v. United States Congress is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned, and for other purposes

Summary.—H. Res. 132 expresses the sense of the House of Representatives that the phrase, "one Nation, under God," should remain in the Pledge of Allegiance; that the Ninth Circuit Court of Appeals ruling in *Newdow* v. *U.S. Congress,* which struck down the phrase "under God" in the Pledge, is inconsistent with the Supreme Court's interpretation of the First Amendment; that the Attorney

General of the United States should appeal the Ninth Circuit's ruling; and that the President should nominate, and the Senate should confirm, Federal circuit court judges who will interpret the Constitution consistent with the Constitution's text. It also praises the Elk Grove School District for its defense of the Pledge of Allegiance against this constitutional challenge.

Legislative History.—H. Res. 132 was introduced by Rep. Doug Ose on March 6, 2003. No hearings were held on H. Res. 132. On March 12, 2003, the Committee met in open session and ordered favorably reported H. Res. 132 without amendment by a recorded vote of 22 to 2, a quorum being present. (H. Rept. No. 108–41). On March 20, 2003, H. Res. 132 was passed by the House by a vote of 400 to 7.

H. Res. 568—Appropriate Use of Foreign Judgments in American Court Decisions

Summary.—H. Res. 568 provides that "it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States." In several recent cases, the U.S. Supreme Court has cited decisions by foreign courts and treaties not ratified by this country to support interpretations of the United States Constitution.

Legislative History.—H. Res. 568 was introduced by Rep. Tom Feeney March 17, 2004. On March 25, 2004, the Constitution Subcommittee held a hearing on H. Res. 568 at which testimony was received from the following witnesses: Jeremy Rabkin, Professor of Government, Cornell University, Ithaca, New York; Vicki Jackson, Professor of Law, Georgetown Law Center, Washington, D.C.; Michael D. Ramsey, Professor of Law, University of San Diego Law School, San Diego, California; and John Oldham McGinnis, Professor, Northwestern University School of Law, Chicago, Illinois. On May 13, 2004, the Constitution Subcommittee met in open session and ordered favorably reported H. Res. 568, with an amendment, by a vote of 7 to 3, a quorum being present. No further action was taken on H. Res. 568.

H. Res. 676—Recognizing and honoring the 40th anniversary of congressional passage of the Civil Rights Act of 1964

Summary.—The purpose of this resolution was to recognize the 40th anniversary of the passage of the Civil Rights Act of 1964. The resolution recognized the contributions of civil rights groups in the passage of that historic act. The resolution also recognized the importance the Civil Rights Act played in helping to fight discrimination in the United States.

Legislative History.—Delegate Eleanor Holmes Norton introduced H. Res. 676 on June 15, 2004, and it was subsequently referred to the Committee on the Judiciary and the Subcommittee on the Constitution as well as the Committee on Education and the Work-

force. The committees took no further action on the resolution. The House of Representatives considered H. Res. 676 under suspension of the rules on June 23, 2004, and on June 24, 2004 the resolution was agreed to by a vote of 414 to 1.

H. Res. 853—Recognizing the Boy Scouts of America for the public service the organization performs for neighborhoods and communities across the United States

Summary.—The purpose of H. Res. 853 was to express that the House of Representatives recognizes the Boy Scouts of America ("BSA") for the public service the organization performs and to commend the BSA for the Good Turn for America program and the work the BSA has accomplished while partnering with other community and civic organizations across the United States to address critical issues facing communities in the United States.

Legislative History.—H. Res. 853, "Recognizing the Boy Scouts of America for the public service the organization performs for neighborhoods and communities across the United States," was introduced by Rep. Darrell Issa on November 16, 2004. On November 20, 2004, H. Res. 853 was passed by the House by a vote of 391 to 3.

H.R. 760—the "Partial Birth Abortion Ban Act of 2003"

Summary.—H.R. 760 bans the procedure known as "partial birth abortion" and subjects those who violate the ban to fines or a maximum of two years imprisonment, or both. The bill also establishes a civil cause of action for damages against a doctor who violates the ban.

Legislative History.—H.R. 760, the "Partial Birth Abortion Ban Act of 2003," was introduced by Constitution Subcommittee Chairman Steve Chabot on February 13, 2003. On March 25, 2003, the Constitution Subcommittee held a hearing on H.R. 760 at which testimony was received from the following witnesses: Dr. Mark G. Neerhof, D.O.; Professor Gerard V. Bradley, Professor of Law, University of Notre Dame; and Mr. Simon Heller, Of Counsel, Center for Reproductive Rights. On March 25, 2003, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 760, without an amendment, by a vote of 8 to 4, a quorum being present. On March 26, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 760 without amendment by a recorded vote of 19 to 11, a quorum being present. (H. Rept. No. 108–58). On June 4, 2003, H.R. 760 was passed by the House by a vote of 282 to 139. On March 3, 2003, a companion bill in the Senate, S. 3, passed the Senate with an amendment by a vote of 64 to 33. On June 4, 2003, the Speaker appointed the following conferees from the Committee on the Judiciary for consideration of the Senate bill and the House amendment, and modifications committed to conference: Reps. Sensenbrenner, Hyde, and Nadler. On September 22, 2003, the Senate appointed as conferees Sens. Hatch, DeWine, Santorum, Feinstein, and Boxer. On September 25, 2003, the Speaker appointed additional conferees: Reps. Chabot and Lofgren. On September 30, 2003, the conference report, H. Rept. No. 108–288 was filed. On October 2, 2003, conference report was brought up for consideration

in the House and the House agreed to the conference report by a vote of 281 to 142. On October 21, 2003, the conference report was considered in the Senate and the Senate agreed to the conference report by a vote of 64 to 34. On October 28, 2003, the conference report was presented to the President, and signed into law on November 5, 2003, which became Pub. L. No. 108–105.

H.R. 1755—the "Child Custody Protection Act"

Summary.—H.R. 1755, the "Child Custody Protection Act," makes it a federal offense to knowingly transport a minor across a state line, with the intent that she obtain an abortion, in circumvention of a state's parental consent or parental notification law. A violation of the Act is a Class One misdemeanor, carrying a fine of up to $100,000 and incarceration of up to one year. H.R. 1755 would prevent the interstate transportation of minors in order to circumvent valid, existing state laws.

Legislative History.—H.R. 1755, the "Child Custody Protection Act," was introduced by Rep. Ileana Ros-Lehtinen on April 10, 2003. The Subcommittee on the Constitution held a hearing on H.R. 1755 on July 20, 2004, at which testimony was received from the following witnesses: Ms. Joyce Farley, Victim, Dushore, Pennsylvania; Professor Mark Rosen, Associate Professor of Law (with Tenure), Chicago-Kent College of Law; Reverend Lois M. Powell, United Church of Christ; and Ms. Teresa S. Collett, Professor of Law, University of St. Thomas School of Law. Additional material was submitted by Rep. Ileana Ros-Lehtinen; the American Academy of Pediatrics; Rep. Steve Chabot, including a statement by Professor John Harrison, Professor of Law, University of Virginia School of Law; and Rep. Jerrold Nadler, including statements from Diana Philip, Jane's Due Process, Inc., and the Reverend Doctor Katherine Hancock Ragsdale, Episcopal Priest. No further action was taken on the measure.

H.R. 1775—To amend title 36, United States Code, to designate the oak tree as the national tree of the United States

Summary.—The purpose of H.R. 1775 was to designate the oak tree as the national tree of the United States. The resolution affirms the choice of the American people, who selected the oak as the national tree in an online poll in 2001.

Legislative History.—Congressman Bob Goodlatte introduced H.R. 1775 on April 11, 2003, and it was subsequently referred to the Committee on the Judiciary and the Subcommittee on the Constitution. The Subcommittee on the Constitution conducted a markup of H.R. 1775 on May 13, 2004, and the bill was forwarded to full Committee by voice vote. The Judiciary Committee held a markup of the bill on September 8, 2004, and ordered it reported by voice vote. The bill was reported by the Committee on September 17, 2004. (H. Rept. No. 108–689). No further consideration of H.R. 1775 took place.

The provisions of H.R. 1775 were included as Title II of H.R. 4077, which passed the House of Representatives on September 28, 2004 by voice vote. The provisions of H.R. 1775 were included in Division J, Title I, Section 109 of the conference report on H.R. 4818, the Consolidated Appropriations Act, 2005. The conference

report was approved by the House of Representatives by a vote of 344 to 51, with 1 Present on November 20, 2004. The Senate approved the Conference Report on the same day by a vote of 65 to 30. The President signed the Conference Report on December 8, 2004 and it became Public Law No. 108–447.

H.R. 1997—the "Unborn Victims of Violence Act of 2004" or "Laci and Conner's Law"

Summary.—H.R. 1997, the Unborn Victims of Violence Act, provides that if a fetus is injured or killed during the commission of crimes of violence already defined under federal law, prosecutors can bring two charges: one on behalf of the mother, the other on behalf of the fetus.

Legislative History.—H.R. 1997, the "Unborn Victims of Violence Act of 2003," was introduced by Rep. Melissa Hart on May 7, 2003. On July 8, 2003, the Constitution Subcommittee held a hearing on H.R. 1997 at which testimony was received from the following witnesses: Tracy Marciniak, Mosinee, Wisconsin; Juley Fulcher, Public Policy Director, National Coalition Against Domestic Violence; Serrin M. Foster, President, Feminists for Life of America; and Professor Gerard V. Bradley, University of Notre Dame School of Law. On July 15, 2003, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 1997, without amendment, by a vote of 6 to 3, a quorum being present. On January 21, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 1997 with an amendment by a recorded vote of 20 to 13, a quorum being present. (H. Rept. No. 108–420, Part I). On February 26, 2004, H.R. 1997 was passed by the House by a vote of 254 to 163. On March 25, 2003, H.R. 1997 passed the Senate without an amendment by a vote of 61 to 38. On March 31, 2004, H.R. 1997 was presented to the President and on April 1, 2004, it was signed into law by the President, becoming Pub. L. No. 108–212.

H.R. 2028—the "Pledge Protection Act of 2004"

Summary.—The Pledge of Allegiance reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." Although the United States Supreme Court recently reversed and remanded the Ninth Circuit's latest holding striking down the Pledge as unconstitutional, the Supreme Court did so on the grounds that the plaintiff lacked the legal standing to bring the case. The dissenting Justices concluded that the Court in its decision "erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim." H.R. 2028 would reserve to the state courts the authority to decide whether the Pledge is valid within each state's boundaries and place final authority over Pledge policy in the hands of the states.

Legislative History.—H.R. 2028, the "Pledge Protection Act of 2003," was introduced by Rep. Todd Akin on May 8, 2003. No hearings were held on H.R. 2028. On September 15, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 2028 with an amendment by a recorded vote of 17 to 10, a

quorum being present. (H. Rept. No. 108–691). On September 23, 2004, H.R. 2028 was passed by the House by a vote of 247 to 173.

H.R. 2844—the "Continuity in Representation Act of 2004"

Summary.—H.R. 2844, the "Continuity in Representation Act of 2004," would provide for the expedited special election of new Members to fill seats left vacant in "extraordinary circumstances." "Extraordinary circumstances" occur when the Speaker of the House announces that vacancies in the representation from the States in the House exceed 100. When such "extraordinary circumstances" occur, a special election must be called within 45 days, unless a regularly scheduled general election for the office involved is to be held within 75 days. Within 10 days of such an announcement by the Speaker, the political parties of the state that are authorized to nominate candidates by state law may each nominate one candidate to run in the election. Additional provisions provide that each State shall ensure to the greatest extent practicable (including through the use of electronic means) that absentee ballots for the election are transmitted to absent uniformed services voters and overseas voters (as such terms are defined in the Uniformed and Overseas Citizens Absentee Voting Act) not later than 15 days after the Speaker of the House of Representatives announces that the vacancy exists. In the case of an individual who is an absent uniformed services voter or an overseas voter (as such terms are defined in the Uniformed and Overseas Citizens Absentee Voting Act), H.R. 2844 provides that a State shall accept and process any otherwise valid ballot or other election material from the voter so long as the ballot or other material is received by the appropriate State election official not later than 45 days after the State transmits the ballot or other material to the voter.

Legislative History.—H.R. 2844, the "Continuity in Representation Act of 2004," was introduced by Judiciary Committee Chairman F. James Sensenbrenner, Jr. on July 24, 2003. No Judiciary Committee hearings were held on H.R. 2844. On July 24, 2003, H.R. 2844 was referred to the House Administration Committee which had primary jurisdiction over the bill. On September 24, 2003 the Committee on House Administration had a hearing. On November 19, 2003 the bill was reported with an amendment by a 4 to 3 vote. The House Administration Committee filed H. Rept. No. 108–404, Part 1 on December 8, 2003. On January 28, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 2844 with an amendment by a vote of 18 to 10, a quorum being present. (H. Rept. No. 108–404, Part II). On April 22, 2004, H.R. 2844 was passed by the House by a vote of 306 to 97.

H.R. 3095—the "Community Recognition Act of 2004"

Summary.—The purpose of H.R. 3095 was to ensure that the rules of etiquette for flying the flag of the United States do not preclude the flying of flags at half mast when ordered by city and local officials. The legislation would have authorized the chief elected leader of a city or other locality, in the event of the death of a present or former official of that particular locality, to proclaim that the national flag be flown at half staff.

Currently, 4 U.S.C. § 7(m) grants authority to the President of the United States or the Governor of any State, territory, or possession to order that the national flag be flown at half staff in recognition of the death of a current or former official of the government under which they preside. Local officials may order the national flag flown at half mast only with the direct permission of the President or their Governor. Permission sought is not always timely, which results in the missed opportunity to properly honor the individual in question. H.R. 3095 would have permitted the chief elected official of local government entities, such as cities, towns, counties, or other like traditional political subdivisions, to honor those leaders or public servants who either died in the line of duty or passed away following a distinguished career in public service by ordering the national flag flown at half staff.

Legislative History.—Representative John T. Doolittle introduced H.R. 3095 on September 16, 2003, and it was subsequently referred to the Committee on the Judiciary and the Subcommittee on the Constitution. The Subcommittee on the Constitution discharged H.R. 3095 on January 15, 2004. The Committee on the Judiciary conducted a markup of H.R. 3095 on January 28, 2004 and ordered it reported by a voice vote. On February 3, 2004, the Committee filed the report, H. Rept. No. 108–411. On March 24, 2004, the House considered the bill under suspension of the rules and passed it by a vote of 374–2, on March 25, 2004. The bill subsequently was referred to the Senate Judiciary Committee, which took no further action.

H.J. Res. 4—Proposing an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States

Summary.—H.J. Res. 4 states: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." The purpose of the proposed amendment is to give Congress the constitutional authority to prohibit the physical desecration of the flag. In *Texas* v. *Johnson,* the U.S. Supreme Court held that the burning of an American flag as part of a political demonstration was expressive conduct protected by the First Amendment to the United States Constitution. Congress responded by passing a federal statute to outlaw flag desecration, but the Supreme Court ultimately ruled this statute unconstitutional on the same grounds in a 5–4 decision in *United States* v. *Eichman* in 1990.

Legislative History.—H.J. Res. 4 was introduced by Rep. Randy (Duke) Cunningham on January 7, 2003. On May 7, 2003, the Constitution Subcommittee held a hearing on H.J. Res. 4 at which testimony was received from the following witnesses: Major General Patrick H. Brady, USA (Ret.); Citizens Flag Alliance; Lieutenant Antonio J. Scannella, Port Authority Police Department; Mr. Gary May, Veterans Defending the Bill of Rights; and Dr. Richard Parker, Professor of Law, Harvard Law School. On May 7, 2003, the Constitution Subcommittee met in open session and ordered favorably reported H.J. Res. 4 to the Full Committee by voice vote. On May 21, 2003, the Committee met in open session and ordered favorably reported H.J. Res. 4 without amendment by a vote of 18

to 13, a quorum being present. (H. Rept. No. 108–131). On June 3, 2003, H.J. Res. 4 passed the House by a vote of 300 to 125, a two-thirds majority being required to pass an amendment to the Constitution.

H.J. Res. 22—Proposing a balanced budget amendment to the Constitution of the United States

Summary.—The Balanced Budget Amendment, H.J. Res. 22, requires that Congress pass a budget in which total outlays do not exceed total receipts for any fiscal year unless approved by a three-fifths majority of each House. The proposed amendment would allow the President to submit, and Congress to pass, an unbalanced budget for a fiscal year if there was a declaration of war in effect for that year or if Congress passes a joint resolution declaring that the United States is engaged in a military conflict.

Legislative History.—Representative Ernest Istook of Oklahoma introduced H.J. Res. 22 on February 13, 2003, and it was subsequently referred to the Committee on the Judiciary and the Subcommittee on the Constitution. On March 6, 2003, the Subcommittee on the Constitution held a hearing on H.J. Res. 22 at which testimony was received from Dr. John Berthoud, President, National Taxpayers Union; Dr. Kent Smetters, Assistant Professor, the Wharton School; Richard Kogan, Senior Fellow, Center on Budget and Policy Priorities; and William W. Beach, Director, Center for Data Analysis. The Constitution Subcommittee met in open session on May 1, 2003, and reported H.J. Res. 22 favorably, without an amendment, by a vote of 5 to 3, a quorum being present. On September 22, 2004, the Committee met in open session to consider H.J. Res. 22. The resolution was not reported and no further action was taken on the resolution.

H.J. Res. 48—An amendment to the Constitution of the United States to define rights for victims of crime

Summary.—The Victims Rights Amendment, H.J. Res. 48, grants victims the right to reasonable and timely notice of any public proceeding involving the crime committed against them and of any release or escape of the accused. The victim has the right to attend public proceedings against the accused and a right to make a statement at public release, plea, sentencing, reprieve and pardon proceedings. A court must give consideration to the victim's safety interest, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. The amendment includes exceptions where there is a substantial interest in public safety, or the administration of criminal justice or by compelling necessity. The amendment does not grant victims grounds for a new trial or authorize any claims for damages.

Legislative History.—H.J. Res. 48 was introduced by Constitution Subcommittee Chairman Steve Chabot on April 10, 2003. On September 30, 2003, the Constitution Subcommittee held a hearing on H.J. Res. 48 at which testimony was received from the following witnesses: Mr. Steven Twist, General Counsel, National Victims Constitutional Amendment Project; Mr. Douglas E. Beloof, Director, National Crime Victim Law Institute; Lewis & Clark Law School; Mrs. Sharon Nolan, Milford, Ohio; and Mr. James

Orenstein, New York, New York. No further action was taken on H.J. Res. 48.

H.J. Res. 56—the "Federal Marriage Amendment"

Summary.—H.J. Res. 56, the Federal Marriage Amendment, ensures that no governmental entity—whether in the legislative, executive or judicial branch, at any level of government—shall have the legal authority to alter the definition of marriage such that it is anything other than a union of one man and one woman. H.J. Res. 56 also prevents any court from construing the federal Constitution, or a state constitution, to require any legislative body or executive agency to enact—or to recognize under the Full Faith and Credit Clause—so-called "civil union" or domestic partnership laws.

Legislative History.—H.J. Res. 56 was introduced by Rep. Marilyn Musgrave on May 21, 2003. On May 13, 2004, the Constitution Subcommittee held a hearing on H.J. Res. 56 at which testimony was received from the following witnesses: Honorable Marilyn Musgrave, Congresswoman, 4th District, Colorado; Judge Robert Bork, McLean, Virginia; Honorable Barney Frank, Congressman, 4th District, Massachusetts; and Jay Sekulow, The American Center for Law and Justice, Inc. No further action on H.J. Res. 56 was taken by the Judiciary Committee.

H.J. Res. 83—Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives

Summary.—This amendment requires House Members, prior to taking the oath of office, to submit a list of names to the Governor that the Governor can draw from in appointing that Member's replacement.

Legislative History.—H.J. Res. 83 was introduced by Rep. Brian Baird on December 8, 2003. No hearings were held on H.J. Res. 83. On May 5, 2004, the Committee met in open session and ordered adversely reported H.J. Res. 83 by a recorded vote of 17 to 12, a quorum being present. (H. Rept. No. 108–503). On June 2, 2004, H.J. Res. 83 failed to pass the House by a vote of 63 to 353, a two-thirds majority being required to pass an amendment to the Constitution.

OVERSIGHT ACTIVITIES

SUMMARY OF OVERSIGHT PLAN

The Oversight Plan for the Constitution Subcommittee for the 108th Congress includes the following issues: the death penalty; the United States Commission on Civil Rights; the Civil Rights Division, U.S. Department of Justice; the Community Relations Service; Congressional authority under the Commerce Clause; the Office of Government Ethics; athletic opportunities under Title IX; school admissions policies under affirmative action plans; property rights; religious liberty; abortion; civil liberties in the war on terrorism; DNA technologies; environmental justice under Title VI of the Civil Rights Act of 1964 by the U.S. Environmental Protection Agency, Office of Civil Rights; the Freedom of Access to Clinic En-

trances (FACE) Act; and the enforcement of the Violence Against Women Act in light of the U.S. Supreme Court precedents.

Oversight list of hearings

Reauthorization of the Civil Rights Division of the United States Department of Justice. May 15, 2003. (Serial No. 26).

Anti-Terrorism Investigations and the Fourth Amendment After September 11: Where and When Can the Government Go to Prevent Terrorist Attacks? May 20, 2003. (Serial No. 35).

Potential Congressional Response to the Supreme Court's Decision in *State Farm Mutual Automobile Insurance Co.* v. *Campbell:* Checking and Balancing Punitive Damages. September 23, 2003. (Serial No. 48).

GAO's Report on the Implementation of Executive Order 12630 and the State of Federal Agency Protections of Private Property Rights. October 16, 2003. (Serial No. 53).

Civil Rights Division of the U.S. Department of Justice. March 2, 2004. (Serial No. 66).

Defense of Marriage Act. March 30, 2004. (Serial No. 70).

Legal Threats to Traditional Marriage: Implications for Public Policy. April 22, 2004. (Serial No. 76).

Limiting Federal Court Jurisdiction to Protect Marriage for the States. June 24, 2004. (Serial No. 92).

Privacy and Civil Liberties in the Hands of the Government Post-September 11, 2001: Recommendations of the 9/11 Commission and the U.S. Department of Defense Technology and Privacy Advisory Committee. August 20, 2004. (Serial No. 113).

Due Process and the NCAA. September 14, 2004. (Serial No. 106).

Status of the Implementation of the *Pigford* v. *Glickman* Settlement. September 28, 2004. (Serial No. 108).

Presidential Succession Act. October 6, 2004. (Serial No. 110).

"Notice" Provision in the *Pigford* v. *Glickman* Consent Decree. October 18, 2004. (Serial No. 117).

Oversight of the United States Commission on Civil Rights

The House Committee on the Judiciary through its Subcommittee on the Constitution has continued its oversight of the United States Commission on Civil Rights. On March 31, 2003, the Government Accountability Office confirmed its commitment to conduct a review of the Commission that would address the adequacy of the Commission's procedures for identifying and carrying out projects, and the sufficiency of the Commission's controls over contracting services and managing contracts.

On September 17, 2003, Chairman Chabot wrote Commissioner Christopher Edley, Jr. to express disappointment in Edley's decision to oppose a request by another Commissioner that an investigation of a mishandling of a confidential communication within the Commission be undertaken. On November 6, 2003, GAO released a report that was requested by Chairman Sensenbrenner during the 107th Congress. This report is entitled "More Operational and Financial Oversight Needed."

On March 16, 2004, Chairman Sensenbrenner and Chairman Hatch sent a letter to GAO requesting a study of the effectiveness

of the Commission structure under the current statutory framework and of whether the Government Performance and Results Act has been successful in assisting the USCCR to improve program performance. On October 27, 2004, part I of this report, entitled "Management Could Benefit from Improved Strategic Planning and Increased Oversight," was released by GAO. On April 22, 2004, Chairman Sensenbrenner and Chairman Hatch sent a letter to GAO requesting a financial audit for the year ending September 30, 2003.

Reauthorization of the Civil Rights Division of the United States Department of Justice

On Thursday, May 15, 2003, the Subcommittee on the Constitution held an oversight hearing on the reauthorization of the Civil Rights Division of the Department of Justice. The purpose of the hearing was to conduct the Subcommittee's annual oversight over the activities of the Division for the purpose of reauthorizing the United States Department of Justice.

The witness testifying at the Subcommittee hearing was Ralph F. Boyd, Jr., the Assistant Attorney General for the Civil Rights Division. He testified that since the beginning of his tenure, the attorneys have opened investigations of 37 nursing homes, mental health facilities, and jails for violating the constitutional rights of their patients or inmates and that that number is an almost 200 percent increase over the prior 2 years. In fiscal 2002 alone, he explained, the Division pursued 173 cases from 33 different States and they have charged, convicted, and secured sentences for 92 human traffickers in 21 cases for trafficking victims into the United States, which is a 300 percent increase over the prior 2-year period. He explained that they have twice as many current pending investigations than were pending in January 2001.

He testified that they have targeted employment discrimination by opening 65 new investigations in 2002, 14 more than in 2001 and 48 more than in 2000 and that they are targeting disability discrimination by more than doubling the number of formal settlement agreements reached under the Americans with Disabilities Act compared with 1999 and 2000. He explained that since January of 2001, they have received more submissions under section 5 of the Voting Rights Act than ever before and that they never missed a deadline.

"Anti-Terrorism Investigations and the Fourth Amendment After September 11: Where and When Can the Government Go To Prevent Terrorist Attacks?"

On May 20, 2003, the Constitution Subcommittee held an oversight hearing on "Anti-Terrorism Investigations and the Fourth Amendment After September 11: Where and When Can the Government Go to Prevent Terrorist Attacks?" Witnesses included: Viet D. Dinh, Assistant Attorney General for the Office of Legal Policy, Department of Justice; James Dempsey, Executive Director, The Center For Democracy and Technology; Orin Kerr, associate law professor, George Washington University Law School; and Paul Rosenzweig, Senior Research Fellow, the Heritage Foundation.

Assistant Attorney General Dinh testified, among other things, that the successful effort in preventing another catastrophic attack on the American homeland in the past 20 months would have been much more difficult, if not impossible, without the tools that Congress has authorized in the USA PATRIOT Act. These authorities have substantially enhanced DOJ's ability to investigate, prosecute, and most important, to prevent terrorist attacks.

Mr. Dempsey testified, among other things, that the PATRIOT Act eliminated the standards that required some reason to believe that there was some connection with terrorism and some minimal factual showing, before library information about an individual could be gathered. Mr. Dempsey further testified that we were now going to be seeing more information acquired under the Foreign Intelligence Surveillance Act ("FISA") used in criminal cases.

Mr. Kerr testified, among other things, that a positive change brought about by the PATRIOT Act is section 216 of the PATRIOT Act, which clarifies that the pen register law applies as well to the Internet.

Mr. Rosenzweig testified, among other things, that the Constitution has very little to say about the recent changes to the FBI's investigative guidelines relating to the FBI's ability to enter into public places and access public information on the Internet.

Potential congressional responses to the Supreme Court's decision in State Farm Mutual Automobile Ins. Co. v. Campbell: Checking and balancing punitive damages

On September 23, 2003, the Constitution Subcommittee held an oversight hearing on "Potential Congressional Responses to the Supreme Court's Decision in State Farm Mutual Automobile Ins. Co. v. Campbell: Checking and Balancing Punitive Damages." Witnesses included: David Owen, Carolina Distinguished Professor of Law and Director of the Office of Tort Law Studies at the University of South Carolina; Robert Peck, President, the Center for Constitutional Litigation; and Victor Schwartz, Shook, Hardy & Bacon.

Mr. Owen testified, among other things, that punitive damages are a very powerful instrument of the law, and can be substantially abused. In a Nation such as ours, where manufacturers market to the 50 States, it would be helpful to have guiding principles that were more predictable in the way that the Supreme Court suggests is desirable.

Mr. Schwartz testified, among other things, that punitive damages for years presented no problem. But that changed in the 1970s, when punitive damages started to be awarded for things that were not intentional. And then, because it was not intentional, they were awarded against product manufacturers and awarded again and again for the same conduct.

The GAO's report on the implementation of Executive Order 12630 and the state of Federal agency protections of private property rights

On October 16, 2003, the Constitution Subcommittee held an oversight hearing on "The GAO's Recent Report on the Implementation of Executive Order 12630 and the State of Federal Agency Protections of Private Property Rights." Witnesses included: Anu

Mittal, Director, Natural Resources and Environment Division, U.S. General Accounting Office; Roger Marzulla, founder and general counsel of Defenders of Property Rights; John Echeverria, Professor, Georgetown Law Center Environmental Law and Policy Institute; and Steven Eagle, Professor, George Mason University School of Law.

Ms. Mittal summarized the General Accounting Office's report, which was requested by Constitution Subcommittee Chairman Steve Chabot, entitled "Regulatory Taking: Agency Compliance with Executive Order on Government Actions Affecting Private Property Use."

Mr. Marzulla testified, among other things, that the Defenders of Property Rights issued a report which in some ways parallels the findings of the Government Accounting Office. That report confirms there is noncompliance with the executive order throughout the Executive branch.

Mr. Echeverria testified, among other things, that Executive Order 12,630 should be rescinded because it "appears to impose a significant bureaucratic burden on Federal agencies to address a relatively modest fiscal issue."

Civil Rights Division of the U.S. Department of Justice

On Tuesday, March 2, 2004, the Subcommittee on the Constitution held an oversight hearing on the activities of the U.S. Department of Justice's Civil Rights Division ("Division"), for the purposes of conducting the Subcommittee's annual oversight over the activities of the Division and the reauthorization of the United States Department of Justice. Alexander Acosta, the Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice, appeared as the witness and submitted a written statement for the record.

Alexander Acosta testified that cross burning has too long been a tool of intimidation against racial and religious minorities and, to put an end to it, since 2001, the Civil Rights Division has prosecuted nearly 40 of these cases, almost 1 a month. In addition, he explained some of the work the Division has been undertaking to address religious discrimination and human trafficking. He testified that the Division has been vigorously enforcing the Americans with Disabilities Act by litigation, but at the same time doing everything in its power to promote voluntary and cooperative compliance. The Committee submitted follow up questions to Mr. Acosta on March 11, 2004, and received responses on October 8, 2004.

The Defense of Marriage Act

On March 30, 2004, the Constitution Subcommittee held an oversight hearing on "The Defense of Marriage Act." Witnesses included: the Honorable Bob Barr, Former Member of Congress, Atlanta, Georgia; Vincent P. McCarthy, The American Center for Law and Justice, Inc., New Milford, Connecticut; John Hanes, Chairman of the Wyoming Senate Judiciary Committee, Cheyenne, Wyoming; and Bruce Fein, Fein & Fein, Washington, D.C.

Mr. Barr testified, among other things, that the federal Defense of Marriage Act, passed in 1996, allowed legislatures the latitude to decide how to deal with marriage rights themselves, but ensured

that no one state could force another to recognize marriages of same-sex couples. He also stated that he believes a constitutional amendment is ill advised.

Mr. McCarthy testified, among other things, that in 1996, the Congress passed, and President Clinton signed into law, the Defense of Marriage Act ("DOMA"). DOMA does two important things. First, DOMA permits States to choose what effect, if any, to give to any "public act, record, or judicial proceeding * * * respecting a relationship between persons of the same sex that is treated as a marriage under the law of such other State. * * *" Second, DOMA amends the Dictionary Act to provide express federal definitions of the terms "marriage" and "spouse."

Mr. Hanes testified, among other things, that "there is a lot of activity in this area" in the states, "both in terms of constitutional amendments at the various States, in terms of dealing with the civil unions and the domestic partnerships, and the discussions run all the way from being in favor of these things to not being in favor of these things." He stated that marriage policy should be left to state law.

Mr. Fein testified, among other things, that the Defense of Marriage Act clearly satisfies the Full Faith and Credit Clause and Equal Protection Clause and the Due Process Clause of the Constitution and that any attacks on its legitimacy would fail.

Legal threats to traditional marriage

On April 22, 2004, the Constitution Subcommittee held an oversight hearing on "Legal Threats to Traditional Marriage: Implications for Public Policy." Witnesses included: Dwight Duncan, Southern New England School of Law; Stanley Kurtz, Hoover Institution; Dr. Jill Joseph, George Washington University School of Medicine; and Lincoln Oliphant, Marriage Law Project.

Mr. Duncan testified, among other things, that there are several cases, decided over the past year, that threaten to undermine the age-old consensus of civilization that marriage is uniquely between a man and a woman. Mr. Duncan also testified that it is "increasingly clear" that the Maginot Line the federal Defense of Marriage Act created will not hold, arguing that the Defense of Marriage Act is inadequate to protect the definition of marriage.

Mr. Kurtz testified, among other things, that the experience of Scandinavia and the Netherlands make it clear that same-sex marriage could widen the separation between marriage and parenthood here in the United States. America is already the world leader in divorce. Our high divorce rates have significantly weakened the institution of marriage in this country.

Dr. Joseph testified, among other things, that prohibiting the marriage of gay parents would hurt the "hundreds of thousands" of children whose parents are gay or lesbian. She referred to 23 studies conducted between 1978 and 2003 that concluded that children raised by lesbian mothers or gay fathers did not systematically differ from other children on any of the outcomes.

Mr. Oliphant testified, among other things, that Congress and all of the Nation's legislatures must understand that the foremost implication of the current strategy of some against marriage is to di-

vest elected officials of their long-standing powers to define and protect marriage.

Limiting Federal court jurisdiction to protect marriage for the States

On June 24, 2004, the Constitution Subcommittee held an oversight hearing on "Limiting Federal Court Jurisdiction to Protect Marriage for the States." Witnesses included: Phyllis Schlafly, Founder and President, Eagle Forum; Honorable William E. Dannemeyer, Former United States Representative; Mr. Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern Law School; and Mr. Michael Gerhardt, Arthur B. Hanson, Professor of Law, William & Mary Law School.

Ms. Schlafly testified, among other things, that the legal assault on the Defense of Marriage Act ("DOMA") has already begun, with several lawsuits being filed against it. She argued that the very idea that unelected, unaccountable judges could nullify both other branches of government and the will of the American people is an offense against our right of self-government that must not be tolerated.

Mr. Dannemeyer testified, among other things, that Congress should use its powers under Article III, section 2, of the Constitution to prevent federal courts from striking down various federal laws, including the Pledge of Allegiance.

Professor Redish testified, among other things, that as a matter of constitutional text, structure and history, the power of Congress to limit the jurisdiction of the Federal courts is clear. He believes that Article III of the Constitution explicitly vests in Congress the power not to have created lower Federal courts in the first place, but he believes that Congress should be very reluctant to exercise that power. He also testified that Congress's power to strip the jurisdiction of the Federal courts may be limited by other doctrines like due process, equal protection, or separation of powers.

Professor Gerhardt testified, among other things, that Congress may not use its power under Article III to limit the "essential functions" of the Federal judiciary.

The 9/11 Commission Report and implications for privacy and civil liberties

On Friday, August 20, 2004, the Subcommittee on Commercial and Administrative Law and the Subcommittee on the Constitution held an oversight hearing on the 9/11 Commission Report and the implications for privacy and civil liberties. The following witnesses appeared and submitted a written statement for the record: The Honorable Lee H. Hamilton, Vice Chair, National Commission on Terrorist Attacks Upon the United States; The Honorable Slade Gorton, Commission Member, National Commission on Terrorist Attacks Upon the United States; The Honorable John O. Marsh, Jr., on behalf of the U.S. Department of Defense Technology and Privacy Advisory Committee; Ms. Nuala O'Connor Kelly, Chief Privacy Officer, U.S. Department of Homeland Security.

Lee Hamilton and Slade Gorton testified, among other things, that concern about the civil liberties of American citizens was one of a number of reasons why the Commission rejected the idea of

moving the domestic intelligence and counterterrorism responsibilities of the FBI out of that agency and placing them in a new agency.

Nuala O'Connor Kelly testified, among other things, that, in light of her professional experience during the past year, that protecting both privacy and security is well within the grasp of the collective imagination of Congress and executive agencies. She testified that her office has crafted privacy training and privacy policies for many of its programs, ensured that statutorily-required Privacy Impact Assessments and System of Records Notices are written and reviewed, and counseled DHS officials regarding the effective and responsible use of technology.

John O. Marsh testified, among other things, that the Committee unanimously agreed that the United States should use data mining to enhance national security and made recommendations on its use with appropriate safeguards.

Due process and the NCAA

On September 14, 2004, the Subcommittee on the Constitution held an oversight hearing on "Due Process and the NCAA." Witnesses included, Jeremy Bloom, U.S. Olympic Skier and former University of Colorado Football Player; Jo Potuto, Vice Chair, NCAA Committee on Infractions; and Dr. B. David Ridpath, Assistant Professor, Sport Administration, Mississippi State University. In addition, the Subcommittee received the prepared testimony of Gary R. Roberts, Deputy Dean and Director of the Sports Law Program at Tulane Law School, who was scheduled to testify before the Subcommittee but was unable to attend. The Subcommittee also received a prepared statement from Congressman Tom Osborne of Nebraska, who is the former head football coach at the University of Nebraska.

Jeremy Bloom testified, among other things, that the NCAA's policies and procedures made it very difficult for student athletes to obtain a fair hearing regarding alleged NCAA infractions.

Jo Potuto testified, among other things, that the NCAA system for investigating schools, coaches, and student-athletes "ain't broke." According to Potuto, the NCAA provides procedures that are fair to the participants but at the same time ensure a level playing field for college athletics.

Dr. David Ridpath testified, among other things, that the NCAA's enforcement system encourages member institutions to scapegoat coaches, players, and athletics department personnel so as to receive a lighter sentence from the NCAA.

Status of the implementation of the Pigford v. Glickman settlement

On Tuesday, September 28, 2004, the Subcommittee on the Constitution held an oversight hearing on the "Status of the Implementation of the Pigford v. Glickman Settlement."

The following witnesses appeared and submitted a written statement for the record: Phillip J. Haynie, II, Haynie Farms, LLC; Michael K. Lewis, Adjudicator, *Pigford* v. *Glickman*; and Randi Ilyse Roth, Monitor, *Pigford* v. *Glickman*. The following witness appeared, but did not submit a written statement: Alexander Pires, Class Counsel, *Pigford* v. *Glickman*.

Phillip J. Haynie, II testified, among other things, that the Pigford v. Glickman settlement was supposed to put an end to discrimination to black farmers and compensate black farmers for years of discrimination and that this settlement has failed black farmers, but that there were problems with the settlement.

Randi Ilyse Roth provided an explanation of her role as Monitor. Next she testified, among other things, to the results thus far under the Consent Decree. Finally, she addressed the question of whether the terms of the Consent Decree have been honored.

Michael K. Lewis testified, among other things, that a court order provides that no late claim petition would be accepted for consideration if filed after September 15, 2000 and that 65,950 late claim petitions were filed by the September 15, 2000 deadline. He added that an additional 7,742 were filed after the September 15 deadline and that each of the petitioners in the latter category were sent a letter by him informing them that he or she had missed the court imposed deadline. He also explained that he created a process permitting late claim petitioners to request reconsideration of his decision to deny their participation in the settlement and that the reconsideration process provided petitioners with a 60-day window in which to request reconsideration of the initial decision to deny their late claim petitions.

Alexander Pires testified, among other things, that it is very hard to win discrimination cases against the USDA; that the *Pigford* case is a very limited case and that when he started he hoped to represent a thousand farmers and ended up with 22,000; that when they talked about settling this case, there were four black firms, four white law firms, and Charles Ogletree from Harvard University; that the number one demand of the black lawyers was that black people get money and not injunctive relief or getting requirements from USDA.

Presidential Succession Act

On October 6, 2004, the Constitution Subcommittee held an oversight hearing on the Presidential Succession Act. Witnesses included: The Honorable Brad Sherman, U.S. Representative, 27th District of California; Mr. Thomas H. Neale, Congressional Research Service, Library of Congress; Mr. Akhil Reed Amar, Southmayd Professor of Law, Yale Law School; and M. Miller Baker, Partner, McDermott Will & Emery.

Rep. Brad Sherman testified in favor of legislation that included the following provisions: the line of succession should run through the Cabinet Officers, not through the Congressional leadership; and five ambassadors should be added to the end of the succession list.

Thomas Neal provided a summary of his Congressional Research Service Report entitled "Presidential and Vice Presidential Succession: Overview and Current Legislation."

Akhil Reed Amar testified that the current presidential succession act, 3 U.S.C. § 19, was many problems.

M. Miller Baker testified that the current Presidential Succession Act "is almost certainly the most dangerous statute to be found in the United States Code."

"Notice" provision in the Pigford v. Glickman consent decree

On Thursday, November 18, 2004, the Subcommittee on the Constitution held an oversight hearing on the "'Notice' Provision in the *Pigford* v. *Glickman* Consent Decree."

The following witnesses appeared and submitted a written statement for the record: Jeanne C. Finegan, APR, Consultant to Poorman-Douglas Corporation (Court-Appointed Facilitator, *Pigford* v. *Glickman*) for Communications and Public Relations; Formerly Vice-President and Director of Huntington Legal Advertising, a division of Poorman-Douglas Corporation; Thomas Burrell, Farmer; Bernice Atchison, Farmer. The following witness appeared, but did not submit a written statement: J.L. Chestnut, Jr., Chestnut, Sanders, Sanders, Pettaway, & Campbell, L.L.C., Class Counsel, *Pigford* v. *Glickman.*

J.L. Chestnut testified that the settlement only became possible after a judge agreed to set a court date. He also stated that he tried to educate the white class counsel to the fact that black farmers would not believe that the same government that had served for 150 years to ruin them would now be legitimately providing help to them. He explained that black farmers would believe the settlement when they started to see others receiving checks and, by then, the filing period would have expired. He testified that no matter what farmers received in the settlement, they will not be satisfied that justice has been served.

Jeanne Finegan testified that she does not believe that the number of late applicants means that the notice campaign was flawed or inadequate. She explained that the problem is not that the class members' awareness was late, but class member activation was late and she is not certain that any class notification program, by itself, could have remedied the problem.

Thomas Burrell testified that the media chosen to advertise the settlement were not culturally and occupationally attuned to black farmers.

Bernice Atchison testified that she sent certified letters asking for affidavits and claim packages because none were available in Chilton County, Alabama. She explained that she was not notified by mail of the settlement and that none of the local government offices or newspapers had received copies of the Notice.

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY [1]

HOWARD COBLE, North Carolina, *Chairman*

TOM FEENEY, Florida
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
MARK GREEN, Wisconsin
RIC KELLER, Florida
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia

ROBERT C. SCOTT, Virginia
ADAM B. SCHIFF, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts

[1] Subcommittee chairmanship and assignments approved February 12, 2003.

Tabulation of subcommittee legislation and activity

Legislation referred to the Subcommittee	328
Legislation on which hearings were held	20
Legislation reported favorably to the full Committee	9
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	11
Legislation pending before the full Committee	1
Legislation reported to the House	19
Legislation discharged from the Committee	9
Legislation pending in the House	7
Legislation passed by the House	19
Legislation pending in the Senate	5
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	12
Legislation enacted into Public Law as part of other legislation	4
Days of legislative hearings	15
Days of oversight hearings	6

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Crime, Terrorism, and Homeland Security has jurisdiction over the Federal Criminal Code, drug enforcement, sentencing, parole and pardons, terrorism, internal and homeland security, Federal Rules of Criminal Procedure, other appropriate matters as referred by the Chairman, and relevant oversight.

LEGISLATIVE ACTIVITIES

H.R. 1161, the "Child Obscenity and Pornography Prevention Act"

Summary.—Representative Lamar S. Smith introduced H.R. 4623, the "Child Obscenity and Pornography Prevention Act of 2002," on April 30, 2002, to address the April 16, 2002 Supreme Court decision in *Ashcroft* v. *the Free Speech Coalition.*[1] No action was taken in the Senate on the bill in the 107th Congress, and Congressman Smith reintroduced the bill as H.R. 1161 on March 6, 2003. The Supreme Court decision held that two parts of the

[1] 122 S. Ct. 1389 (2002).

Federal definition of child pornography in Title 18 of the United States Code were too broad and were therefore unconstitutional. Those two provisions were 18 U.S.C. § 2256(8)(B), which defined child pornography to include wholly computer generated pictures that appear to be of a minor engaging in sexually explicit conduct, and 18 U.S.C. § 2256(8)(D), which defined child pornography to include a visual depiction where it is advertised, promoted, or presented, to convey the impression that the material contains a visual depiction of a minor engaging in sexually explicit conduct. This decision did not hold that all virtual child pornography was protected by the First Amendment. At risk are the prosecutions against child pornographers who are frequently child molesters.[2] In any criminal case, the prosecution must prove beyond a reasonable doubt that a crime was committed.

To ensure the continued protection of children from sexual exploitation, this legislation attempted to respond to concerns of the Supreme Court by narrowing the definition of child pornography, strengthening the existing affirmative defense, amending the obscenity laws to address virtual and real child pornography that involves visual depictions of pre-pubescent children, establishing new offenses against pandering visual depictions as child pornography, and creating new offenses against providing children obscene or pornographic material.

Legislative History.—The Subcommittee on Crime, Terrorism, and Homeland Security held two days of hearings on H.R. 4623. On May 9, 2002, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 4623, as amended, by voice vote, a quorum being present. On May 15, 2002, the Committee met in open session and ordered favorably reported the bill, H.R. 4623, with an amendment by a recorded vote of 22 to 3, a quorum being present. The bill was reported to the House on June 24, 2002 (H. Rept. No. 107–526). The House passed the bill on June 25, 2002, by a recorded vote of 413 yeas to 8 nays and 1 present. No further action was taken on the bill, H.R. 4623, during the 107th Congress. Congressman Lamar S. Smith reintroduced the bill as H.R. 1161 on March 6, 2003. On March 11, 2003, the Subcommittee held a hearing on H.R. 1161, the "Child Obscenity and Pornography Prevention Act." This bill was incorporated into S. 151, the "Prosecuting Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003," which became Public Law No. 108–21 on April 30, 2003.

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[2] Andres E. Hernandex, Psy.D. Federal Bureau of Prisons, Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders. (In November 2000, the Federal Bureau of Prisons released a study on Internet sex offenders who used the Internet to download, trade, and distribute child pornography as well as offenders who lure children for sexual abuse and exploitation. The study examined two groups: those convicted of sexual contact crimes against children and those convicted of nonsexual contact crimes against children. The nonsexual contact crimes consisted of those convicted under the child pornography laws and those convicted of traveling to meet a child with the intent to sexually exploit that child. Of the 90 subjects of the study 66 were convicted of crimes that did not include sexual contact. Out of the 66 who were convicted of non-contact crimes, 62 were still related to the sexual exploitation of children through child pornography or traveling to meet a child with the intent to sexually abuse a child. Of the 62, 49 were convicted of child pornography (trading or possessing child pornography) and 13 were convicted for traveling to meet a child. None of those convicted were producers of pornography. Of the 62 convictions for non-contact crimes against children, 76 percent of offenders admitted to sexually abusing or exploiting a child. These offenders admitted to an average of 30.5 victims per offender.)

H.R. 1104, the "Child Abduction Prevention Act"

Summary.—Chairman F. James Sensenbrenner, Jr. introduced H.R. 1104 on March 5, 2003. This bill strengthened penalties against kidnaping, including mandatory minimum sentences; subjected those who abduct and sexually exploit children to the possibility of lifetime supervision; aided law enforcement in effectively preventing, investigating, and prosecuting crimes against children; and provided families and communities with immediate and effective assistance to recover a missing child.

According to the United States Department of Justice (DOJ), Office of Juvenile Justice Delinquency Prevention (OJJDP), the number of missing persons reported to law enforcement had increased from 154,341 in 1982 to 876,213 in 2000, an increase of 468 percent. Out of those cases, there are approximately 3,000 to 5,000 non-family abductions reported to police each year, most of which are short term sexually-motivated cases. About 200 to 300 of those cases, or about 6 percent, made up the most serious cases where the child was murdered, ransomed or taken with the intent to keep. According to Federal Government statistics, three out of four children who are kidnapped and murdered are killed within three hours of their initial abduction. Research has shown that the average victim of abduction and murder is an approximately 11–year-old girl from a stable family who has initial contact with the abductor within a quarter mile of her home.

H.R. 1104 authorized funding for a voluntary national AMBER Alert program to help expand the child abduction communications warning network throughout the United States. This legislation further provided a 20–year mandatory minimum sentence of imprisonment for stranger abductions of a child under the age of 18, lifetime supervision for sex offenders, and mandatory life imprisonment for second time offenders. Furthermore, H.R. 1104 removed any statute of limitations and any opportunity for pretrial release for crimes of child abduction and sex offenses.

Legislative History.—On March 11, 2003, the Subcommittee held a legislative hearing on H.R. 1104, the "Child Abduction Prevention Act." The two witnesses who testified were: Daniel P. Collins, Associate Deputy Attorney General, U.S. Department of Justice; and Ernest E. Allen, President and Chief Executive Officer, National Center for Missing and Exploited Children. On March 11, 2003, the Subcommittee held a markup of H.R. 1104, reporting it favorably to the Judiciary Committee. On March 27, 2003, the House of Representatives passed H.R. 1104 by a vote of 410–14. The House amendment to the text of this bill was inserted as a substitute text to the Senate bill and was passed as S. 151, the "Prosecuting Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003," which became Public Law No. 108–21 on April 30, 2003.

S. 151, the "Prosecuting Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003"

Summary.—Senate Orrin Hatch introduced S. 151 on January 13, 2003. The House amendment to the text of the bill struck all of the Senate bill after the enacting clause and inserted a sub-

stitute text using Chairman Sensenbrenner's legislation, H.R. 1104, as the base bill.

As noted above, the PROTECT Act included several bills and provisions, which were considered by the Judiciary Committee. Among these are H.R. 1104, the "Child Abduction Prevention Act," which the House passed on March 27, 2003; H.R. 4623, the "Child Obscenity and Pornography Prevention Act of 2002," which the House passed on June 25, 2002 and was included in H.R. 1104; and H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003."

This legislation also included provisions from H.R. 4477, the "Sex Tourism Prohibition Improvement Act of 2002," which the House passed (418–8) on June 26, 2002. This bill addressed a number of problems related to persons who travel to foreign countries and engage in illicit sexual relations with minors. Before its passage, the Government had to prove that the defendant traveled "for the purpose" of engaging in the illegal activity. Under this bill, the government only has to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country. This legislation also criminalized the actions of sex tour operators by prohibiting persons from arranging, inducing, procuring, or facilitating the travel of a person knowing that such a person is traveling in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct.

This bill also included H.R. 4658, the "Truth in Domain Names Act," which Representative Pence introduced on May 1, 2002. The Internet, at its best, is used to disseminate information and provide educational materials to children. However, websites have used legitimate-sounding domain names to lure children into viewing pornographic materials. This legislation addressed this problem by making it a crime to use domain names that deliberately mislead minors into viewing pornographic material.

S. 151 included provisions similar to H.R. 1877, the "Child Sex Crimes Wiretapping Act of 2002, which the House passed (396–11) on May 21, 2002. H.R. 1877 assists law enforcement by authorizing the interception of wire, oral, or electronic communications in the investigation of: the selling and buying of a child for sexual exploitation; child pornography; the coercion and enticement to engage in prostitution or other illegal sexual activity; and the transportation of minors to engage in prostitution or other illegal sexual activity and travel with intent to engage in a sexual act with a juvenile.

Additionally, the PROTECT Act provided strong support to recover abducted children quickly and safely through a prompt and effective public alert system. Such a system can be the difference between life and death for that child. To accomplish this, the bill codified the AMBER Alert program in place in the Departments of Justice and Transportation and authorized increased funding to help States deploy child abduction communications warning networks. While our goal must always be to prevent the abduction of a child before it occurs, our communities must have effective and responsive AMBER Alert systems to assist in the quick and safe return of a kidnapped child.

This legislation doubled the authorized funding for the National Center for Missing and Exploited Children, the Nation's resource

center for child protection, to $20 million through 2005. The Center assists in the recovery of missing children and raises public awareness about ways to protect children from abduction, molestation, and sexual exploitation.

This legislation included provisions from H.R. 4679, the "Lifetime Consequences for Sex Offenders Act of 2002," which the House passed (409–3) on June 25, 2002. These provisions allow federal judges to include, as part of any sentence of a convicted sex offender, a term of supervised release for any term of years or life. This legislation also provided a 20-year mandatory minimum sentence of imprisonment for non-familial abductions of a child under the age of 18 and mandatory life imprisonment for second time offenders.[3] The compromise legislation restricted the opportunity for pretrial release for crimes of child abduction and sex offenses and extends the statute of limitations.

Finally, this legislation included the "Feeney Amendment," which was adopted during floor consideration of H.R. 1104 on March 27, 2003. Among other things, this amendment placed strict limits on departures from federal sentencing guidelines by allowing sentences outside the guideline range only upon grounds specifically enumerated as proper for departure and required courts to give specific and written reasons for any departure from federal sentencing guidelines. It also amended sentencing guidelines with regard to the penalties for possession of child pornography by increasing penalties if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence and by increasing penalties based on the amount of child pornography involved in the offense.

Legislative History.—On February 24, 2003, the Senate passed S. 151, the "PROTECT Act," by a vote of 84 to 0. The bill was referred to the House Judiciary Committee on February 26 and to the Subcommittee on Crime, Terrorism, and Homeland Security on March 6, 2003. On March 27, 2003, Chairman Sensenbrenner insisted on House amendments and requested a conference, agreed to without objection. The conference report was filed on April 9, 2003.[4] On April 10, 2003, both the House and the Senate agreed to the conference report by votes of 400–25 and 98–0, respectively. S. 151 became Public Law No. 108–21 on April 30, 2003.

H.R. 21, the "Unlawful Internet Gambling Funding Prohibition Act"

Summary.—Congressman James Leach introduced H.R. 21, the "Unlawful Internet Gambling Funding Prohibition Act" on January 7, 2003. It would provide State and Federal authorities with the means to enforce current statutes and would clarify that those statutes make gambling over the Internet illegal. This bill would create a new crime—accepting financial instruments, such as credit cards or electronic fund transfers, for debts incurred in illegal Internet gambling. Because the perpetrators of this activity are off-shore and beyond the reach of U.S. law enforcement tactics, the bill

[3] These provisions are similar to H.R. 2146, the "Two Strikes and You're Out Child Protection Act," which the House passed (382–34) on March 14, 2002. This legislation amends the Federal criminal code to provide for mandatory life imprisonment of a person convicted of a Federal sex offense in which a minor is the victim, when that person has previously been convicted of a state or Federal child sex offense.

[4] H. Rep. No. 108–66 (2003).

would enable State attorneys general and Federal enforcement authorities to request that injunctions be issued against any party, including financial institutions, Internet service providers, and computer software providers, to assist in the prevention or restraint of this crime. Finally, this bill would allow Federal bank regulators to create rules requiring financial institutions to use designated methods to block or filter illegal Internet gambling transactions.

Legislative History.—On April 29, 2003, the Subcommittee held a legislative hearing on H.R. 21. On May 6, 2003, the Subcommittee held a markup of H.R. 21 and reported it favorably to the Judiciary Committee. On May 22, 2003, the Committee ordered H.R. 21 reported favorably as amended by a recorded vote of 16 yeas to 15 nays. The bill was reported to the House on May 22, 2003 (H. Rept. No. 108–051, Part II).

H.R. 1223, the "Internet Gambling Licensing and Regulation Commission Act"

Summary.—On March 12, 2003, Congressman John Conyers, Jr. introduced H.R. 1223, the "Internet Gambling Licensing and Regulation Commission Act." As noted above, it is unclear that using the Internet to operate a gambling business is illegal under current Federal law. Accordingly, this bill would establish the Internet Gambling Licensing and Regulation Study Commission to conduct a comprehensive study of the existing legal framework governing Internet gambling and the issues involved with the licensing and regulation of Internet gambling.

Legislative History.—H.R. 1223 was referred to the Subcommittee and a legislative hearing was held on April 29, 2003. No further action was taken during the 108th Congress.

H.R. 1707, the "Prison Rape Reduction Act of 2003"

Summary.—Representative Frank Wolf introduced H.R. 1707 on April 9, 2003. This legislation made prevention of prison rape a priority for Federal, State, and local institutions and provided for the development of national standards for detection, prevention, reduction, and punishment of prison rape. It required State and local governments to work with the Federal Bureau of Justice Statistics (BJS) to study the number and effects of sexual assaults in correctional facilities and to adopt and maintain compliance with the national standards developed by the Attorney General. All sections of the bill were intended to address the problem of inmates who are raped while incarcerated in a correctional facility.

The original legislation mandated a study to determine the number of incidents and effects of sexual assault in correctional facilities and provide accurate data for the first time on the number of incidents. The legislation as introduced was controversial due to its grant funding scheme. For institutions that complied with the Federal Government standards and requests for information, it would have increased the amount of all grant funding a State or local government receives by 10 percent, at the expense of those States who do not comply with such requests or adopt such standards. Additionally, because this legislation required that the grant funds designated must aggregate a minimum of $1 billion (affecting approxi-

mately one-third of all grants at the Office of Justice Programs), many different grants for many entities that have no relationship to prisons might have been affected. After introduction of the bill, a compromise was reached after negotiation among various parties. A bipartisan substitute amendment representing that compromise was then reported favorably by the Subcommittee on Crime, Terrorism, and Homeland Security.

The substitute amendment still requires a study on the incidence and effects of sexual assault in correctional facilities. But, the substitute no longer rewards States and institutions who are invited to testify at the expense of other States and institutions. Additionally, the grant program provisions were revised in the substitute to specifically target only those grant programs that award funds to State and local prisons. The substitute requires States to adopt national standards for the prevention and prosecution of prison rape. States that do not adopt these standards can lose 5 percent of prison funds unless they choose to redirect those funds to become compliant with the national standards. The provisions of this legislation, including both the reporting requirements and the standards and protections developed by the Attorney General, are intended to apply to all individuals detained in the U.S. in both civil and criminal detentions.

Legislative History.—On April 9, 2003, the Subcommittee held a legislative hearing on H.R. 1707. On June 12, 2003, the Subcommittee held a markup of H.R. 1707 and ordered the bill reported favorably with an amendment by voice vote. The Judiciary Committee held a markup of H.R. 1707 on July 9, 2003, ordering the bill reported as amended by voice vote. The bill was reported as amended by the Judiciary Committee on July 18, 2003 (H. Rept. No. 108–219). This legislation was later incorporated into S. 1435, the "Prison Rape Elimination Act of 2003." S. 1435 passed the Senate on July 21, 2003 and the House on July 25, 2003 and became Public Law No. 108–79 on September 4, 2003.

H.R. 919, the "Hometown Heroes Survivors Benefits Act of 2003"

Summary.—Congressman Bob Etheridge introduced H.R. 919, the "Hometown Heroes Survivors Benefits of 2003" on February 26, 2003. Similar legislation, S. 459, was introduced and passed in the Senate. Before its passage (as S. 459), current law provided $250,000, indexed for inflation, to the survivors of public safety officers such as police officers, firefighters, and rescue squad officers who died "as the direct and proximate result of a personal injury sustained in the line of duty." S. 459, the "Hometown Heroes Survivor Benefits Act of 2003," as introduced, provided that if a public safety officer died as the direct and proximate result of a heart attack or stroke suffered while on duty or within 24 hours after participating in a training exercise or responding to an emergency situation, that officer was presumed to have died as the direct and proximate result of a personal injury sustained in the line of duty for purposes of that officer's survivors receiving a death benefit.

The intent of H.R. 919 was to cover officers who suffered a heart attack or stroke as a result of non-routine stressful or strenuous physical activity; however, testimony at the Subcommittee hearing indicated that the legislation as drafted was overbroad. Witnesses

testified that the legislation as drafted would undermine the purpose of the Public Safety Officer Benefits program, which was intended to provide a benefit to heroes who gave their lives in the line of duty for their communities. As drafted, it would cover officers who did not engage in any physical activity but merely happened to suffer a heart attack at work.

A compromise substitute amendment to S. 459 was offered by Representative DeLay and passed with unanimous consent on the House floor to address these concerns. The substitute amendment creates a presumption that an officer who died as a direct and proximate result of a heart attack or stroke died as a direct and proximate result of a personal injury sustained in the line of duty if:

(1) that officer participated in a training exercise that involved non-routine stressful or strenuous physical activity or responded to a situation and such participation or response involved non-routine stressful or strenuous physical law enforcement, hazardous material response, emergency medical services, prison security, fire suppression, rescue, disaster relief, or other emergency response activity;

(2) that officer suffered a heart attack or stroke while engaging or within 24 hours of engaging in that physical activity; and

(3) such presumption cannot be overcome by competent medical evidence.

For the purposes of this Act, the phrase "non-routine stressful or strenuous physical" activity excludes actions of a clerical, administrative, or non-manual nature. Such deaths, while tragic, are not to be considered in the line of duty deaths. Therefore, the families of officers who died of such causes would not be eligible to receive public safety officers benefits.

Legislative History.—Representative Bob Etheridge previously introduced similar legislation, H.R. 5334, the "Hometown Heroes Survivors Benefits Act of 2002," on September 5, 2002. The House passed H.R. 5334 by unanimous consent on November 15, 2002, but no action was taken by the Senate during the 107th Congress. Representative Etheridge reintroduced the bill as H.R. 919, and on June 26, 2003, the Subcommittee held a legislative hearing on H.R. 919. Witnesses who testified at the hearing were: Captain Brian Willison, Chair, Wisconsin Law Enforcement Memorial, Inc.; Craig Floyd, Chairman and Executive Director, National Law Enforcement Memorial Fund, Inc.; and Mike Williams, Fire Rescue Training Specialist, North Carolina Department of Insurance, Office of the State Fire Marshal. H.R. 919 was incorporated into S. 459, as an amendment in the nature of a substitute, and the bill as amended passed the Senate without objection as the "Hometown Heroes Survivors Benefits Act of 2003," which became Public Law No. 108–182 on December 15, 2003.

H.R. 2214, the "Reduction in Distribution of Spam Act of 2003"

Summary.—Chairman Sensenbrenner, Mr. Burr, Mr. Tauzin, Mr. Goodlatte, Mr. Upton, Ms. Hart, Mr. Stearns, and Mr. Cannon introduced H.R. 2214 on May 22, 2003. The bill would amend Title 18 of the U.S. Code to provide significant criminal penalties and

civil fines for the most egregious senders of spam—those who intentionally falsify their identity and the source of their messages; attack protected computers; harvest the addresses of unsuspecting internet users; and send unwanted sexually explicit materials.

Legislative History.—On July 8, 2003, the Subcommittee held a legislative hearing on H.R. 2214, the "Reduction in Distribution of Spam Act of 2003." No further action was taken on the bill.

H.R. 3214, the "Advancing Justice Through DNA Technology Act of 2003"

Summary.—Chairman Sensenbrenner introduced H.R. 3214 on October 1, 2003. H.R. 3214 addresses three interrelated problems: the elimination of backlogs of DNA evidence that has not been analyzed; the lack of training, equipment, technology, and standards for handling DNA and other forensic evidence; and the conviction of innocent persons.

Title I of the bill addressed DNA backlogs by reauthorizing and expanding the "DNA Analysis Backlog Elimination Act of 2000." It increased the authorized funding levels for the DNA Analysis Backlog Elimination program to $151 million annually for the next five years. Title II authorized funding for training for law enforcement, correctional, court, and medical personnel on the use of DNA evidence. Title II also authorized grant programs to reduce other forensic science backlogs, research new DNA technology, and promote the use of DNA technology to identify missing persons. Title II provided funds to the FBI for the administration of its DNA programs. Title III established rules for post-conviction DNA testing of Federal prison inmates and required the preservation of biological evidence in Federal criminal cases while the defendant remains incarcerated. Additionally, the legislation provided incentive grants to States that adopt adequate procedures for providing post-conviction DNA testing and preserving biological evidence. Finally, it authorized funding to help States provide competent legal services for both the prosecution and the defense in death penalty cases and provided funds for post-conviction DNA testing.

Legislative History.—The Subcommittee held an oversight hearing on "Advancing Justice through the Use of Forensic DNA Technology" on July 17, 2003. On October 8, 2003, the Judiciary Committee held a markup of H.R. 3214, ordering the bill reported as amended. On November 5, 2003, the House passed H.R. 3214 by a vote of 357–67. The bill was later incorporated into H.R. 5107, the "Justice for All Act of 2004," which was introduced by Chairman Sensenbrenner on September 21, 2004. The Judiciary Committee held a markup of H.R. 5107 on September 22, 2004, reporting the bill favorably as amended by a voice vote (H. Rept. No. 108–711). On October 6, 2004, H.R. 5107 passed the House by a vote of 393–14 and the Senate on October 9, 2004, and was signed by the President on October 30, 2004 becoming Public Law No. 108–405.

H.R. 3266, the "Faster and Smarter Funding for First Responders Act"

Summary.—Congressman Chris Cox introduced H.R. 3266, the "Faster and Smarter Funding for First Responders Act of 2004," on

October 8, 2003. H.R. 3266, the "Faster and Smarter Funding for First Responders Act of 2004," would improve the effectiveness and efficiency with which the Department of Homeland Security ("DHS") issues grants to States, local governments, and first responders to prevent, prepare for, mitigate, and respond to terrorism.

H.R. 3266, the "Faster and Smarter Funding for First Responders Act of 2004," would change the criteria for distributing funding for two existing grant programs managed by the Office for Domestic Preparedness ("ODP"). Since 1998, ODP, as part of the Department of Homeland Security and previously as part of the Department of Justice, has had the mission of enhancing State and local capabilities for responding to terrorists using weapons of mass destruction ("WMD"). One of the two grant programs is the State Homeland Security grant program, which the Committee on the Judiciary authorized in the USA PATRIOT Act after the September 11, 2001 terrorist attacks. The other grant program is the Urban Area Security Initiative grant program, which was established in fiscal year 2003. The bill was introduced to improve the management of these grants because of numerous complaints from State and local governments and first responder organizations that the money was not being distributed effectively or efficiently.

H.R. 3266, as introduced, would authorize the DHS to consolidate the State Homeland Security and the Urban Area Security Initiative grant programs and replace the minimum formula and population based distribution with a funding distribution based on: (1) the degree to which applications would lessen the threats, vulnerabilities, and consequences of a terrorist attack; and (2) the degree to which applications demonstrate a valid need for such funding. The bill also directs the Secretary of DHS to establish "essential capabilities" that different types of communities should obtain to prepare for potential terrorist acts, and directs grant assistance to be utilized to build these essential capabilities in a measurable fashion. Under the bill, the States must disburse the grant money to local governments within 45 days of receiving the funds. The bill would increase total funding in fiscal year 2006 to $3.4 billion and would expand the suggested list of activities covered by the grants to include covering the costs of additional personnel during heightened threat alerts and training activities. Another change would allow the Department to transfer funds directly to local recipients.

Finally, the security of Indian reservations and tribal lands against acts of terrorism must be considered by DHS and the States as part of their overall goal of protecting the American homeland against terrorism. The DHS must also consider security of the territories against acts of terrorism. H.R. 3266 as amended by the Committee on the Judiciary would ensure such coverage. Similar to current law, the amended bill provides a base level of funding for the territories. Puerto Rico and the District of Columbia are treated as States. Indian Tribes are treated as described below. Section 1804, as amended, would establish a program to permit twenty "directly eligible Tribes" or consortia of tribes to receive covered grants from DHS. This program parallels that established for regions; it requires directly eligible Tribes to designate a liai-

son, to submit simultaneously its application to both DHS and to each State within the boundaries of which any part of that tribe is located and to submit an application consistent with any applicable State homeland security plan or plans. The Committee, however, recognized that the vast majority of Indian Tribes will not be eligible to receive direct grant funding. As a consequence, the Committee expected the States to treat Indian Tribes fairly in the grant process.

Legislative History.—On November 20, 2003, the Subcommittee held a legislative hearing on H.R. 3266, the "Faster and Smarter Funding for First Responders Act of 2004." On June 16, 2004, the Judiciary Committee held a legislative markup of H.R. 3266, ordering the bill reported favorably as amended. On June 21, 2004, the bill was reported to the House (H. Rept. No. 108–460, Part IV). There was no further action taken on this bill. However, a version of the bill was included in the intelligence reform bill, S. 2845, which became Public Law No. 108–458.

H.R. 3158, the "Preparing America to Respond Effectively Act of 2003" or the "Prepare Act"

Summary.—Congressman Jim Turner introduced H.R. 3158 on September 24, 2003. This bill would create a task force on standards for terrorism preparedness. The task force would conduct a study to identify the essential capabilities needed by every State and local government and determine the extent to which a State or local government has achieved or failed to achieve these essential capabilities, among other things. The bill would also create a grant program to address the State's need to meet these essential capabilities. This bill would authorize ODP to administer all terrorism preparedness and response grant programs. This bill was referred to the Select Committee on Homeland Security and the Committees on Judiciary, Transportation and Infrastructure, and Energy and Commerce.

Legislative History.—The Subcommittee held a legislative hearing on H.R. 3158 on November 20, 2003. No further action was taken during the 108th Congress.

H.R. 2512, the "First Responders Funding Reform Act of 2003"

Summary.—Congressman John E. Sweeney introduced H.R. 2512 on June 18, 2003. This bill would amend the USA PATRIOT Act to change the formula the Office for Domestic Preparedness uses to provide domestic preparedness grants. Section 1014 of the PATRIOT Act (Public Law No. 107–56) authorized the formula used to distribute funds in the FY 04 Homeland Security Grant Program application kit. The allocations were determined using a base amount of .75 percent of the total allocation for the States (including the District of Columbia and the Commonwealth of Puerto Rico), and .25 percent of the total allocation for the U.S. Territories (American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands), with the balance of funds being distributed on a population-share basis. ODP used 2002 U.S. Bureau of the Census data to determine population figures. H.R. 2512 would lower the fixed amount each State receives from the current 0.75 percent to 0.5 percent of the total amount ap-

propriated for domestic preparedness grants and would require that each grant be based upon a risk assessment for threat, vulnerability, and consequence. The bill would also require the Office for Domestic Preparedness to submit an assessment to Congress by March 1 of each year.

Legislative History.—On November 20, 2003, the Subcommittee held a legislative oversight hearing, entitled "Homeland Security—the Balance Between Crisis and Consequence Management Through Training and Assistance," which included discussion of H.R. 2512.

H.R. 3866, the "Anabolic Steroid Control Act of 2004"

Summary.—Chairman F. James Sensenbrenner, Jr. along with Representatives Conyers, Sweeney, Osborne, and Berman, introduced H.R. 3866 on March 1, 2004. H.R. 3866, the "Anabolic Steroid Control Act of 2004," helps to prevent the abuse of steroids by professional athletes. It also addresses the widespread use of steroids and steroid precursors by college, high school, and even middle school students.

Steroid use has been banned in the United States since the passage of the "Anabolic Steroids Control Act of 1990." This legislation adds several new substances to the list of banned substances and provides increased penalties (up to twice the current maximum term of imprisonment, maximum fine, or maximum term of supervised release) for any individual who traffics in steroids within 1,000 feet of an athletic facility.

The Subcommittee amended this legislation to include a requirement that the Department of Health and Human Services and the Department of Justice report to the House and Senate Committees on the Judiciary within two years regarding the need to add additional dangerous substances to the list.

H.R. 3866 served as the House counterpart to S. 2195, introduced by Senators Biden and Hatch. Both bills were endorsed by a broad cross-section of groups representing the medical and sports communities, including the National Football League, Major League Baseball, the U.S. Anti-Doping Agency, the American Medical Association, and the Major League Baseball Players Association. The Major League Baseball Players Association has stated, "* * * if Congress chooses to expand the definition of Schedule III anabolic steroids in order to cover certain steroid precursors, we would not only support such a decision but also would automatically expand our testing program, jointly administered with the clubs, to cover such substances."

Legislative History.—On March 16, 2004, the Subcommittee held a legislative hearing on H.R. 3866, the "Anabolic Steroid Control Act of 2004." On March 30, 2004, the Subcommittee held a markup of the legislation and ordered it reported favorably, as amended by voice vote, to the Judiciary Committee. On March 31, 2004, the Judiciary Committee held a markup of H.R. 3866, ordering it reported favorably, as amended by voice vote, to the House (H. Rept. No. 108–461, Part I). The House passed the bill under suspension of the rules on June 3, 2004, by a vote of 408–3. On October 6, 2004, the Senate passed S. 2195 with an amendment by unanimous consent. The bill was then referred to the House and passed by unani-

mous consent on October 8, 2004 and became Public Law No. 108–358.

H.R. 1731, the "Identity Theft Penalty Enhancement Act"

Summary.—Congressman John Carter introduced H.R. 1731 on April 10, 2003. H.R. 1731, the "Identity Theft Penalty Enhancement Act," addresses the growing problem of identity theft. Previously, under 18 U.S.C. § 1028, many identity thieves received short terms of imprisonment or probation; after their release, many of these thieves would go on to use false identities to commit much more serious crimes. H.R. 1731 provides enhanced penalties for persons who steal identities to commit immigration violations, firearms offenses, and other serious crimes. The bill also amends current law to impose a higher maximum penalty for identity theft used to facilitate acts of terrorism.

Amendments to this legislation were adopted both at Subcommittee and full Committee and incorporated into the version of the bill the Committee ordered reported. The Subcommittee adopted an amendment to allow the aggravated identity theft penalties to be applied to individuals who used fraudulent identities, in addition to those who used the identities of other persons, to commit a terrorist offense. The full Committee adopted two amendments. The first amendment added several Social Security fraud crimes and theft or embezzlement by a bank officer or employee to the list of crimes for which the enhanced penalties may be applied. Additionally, this amendment clarified that a crime involving more than one incident could be aggregated for purposes of determining the penalties. It also included a directive to the United States Sentencing Commission to require that the Federal Sentencing Guideline, "Abuse of Position of Trust or Use of Special Skill," be amended to apply to employees or directors who use access to information at their place of business to commit identity theft or fraud. This amendment helps to address the problem of insiders who use their employment position to commit fraud or help others commit fraud. It allows judges to apply additional penalties to these individuals under the sentencing guidelines.

The second amendment adopted by the Committee authorized $2 million per year for 5 years for the Department of Justice to investigate and prosecute identity theft and identity fraud cases. Significantly, the Committee rejected amendments which would have removed the mandatory consecutive sentences from the bill.

Legislative History.—The Subcommittee held a legislative hearing on H.R. 1731 on March 23, 2004. On March 30, 2004, the Subcommittee conducted a markup of the legislation and ordered it reported favorably to the Judiciary Committee, as amended by voice vote. On May 12, 2004, the Judiciary Committee held a markup of H.R. 1731, reporting it to the House as amended by voice vote. On June 23, 2004, H.R. 1731 passed the House by a voice vote under suspension of the rules, and on June 25, 2004, it passed the Senate by unanimous consent. The President signed the bill on July 15, 2004, and it became Public Law No. 108–275.

H.R. 3693, the "Identity Theft Investigation and Prosecution Act of 2003"

Summary.—Congressman Robert Scott introduced H.R. 3693 on December 8, 2003. This bill proposes additional steps Congress can take to minimize the threat of identity theft to the individual, American companies, and the security of our country. H.R. 3693 would provide $100 million to the Department of Justice to investigate and prosecute identity theft crimes.

Legislative History.—The Subcommittee held a legislative hearing on H.R. 3693 on March 23, 2004. This funding was reduced to $10 million over five years and incorporated into H.R. 1731 as passed. No further action was taken on the bill, but a version of it was incorporated into H.R. 1731.

S. 1743, the "Private Security Employment Authorization Act of 2003"

Summary.—Senator Carl Levin introduced S. 1743 on October 16, 2003. This bill addressed the security officer industry's unique need for criminal history background checks on employees and prospective employees. This bill would authorize private security companies access to criminal history records. This would prevent companies from hiring individuals who have criminal histories that make them unsuitable for employment guarding critical infrastructures or other sensitive assignments.

Legislative History.—On March 30, 2004, the Subcommittee held a legislative hearing on S. 1743. Provisions of this legislation was incorporated into S. 2845, the "National Intelligence Reform Act of 2004," which became Public Law No. 108–458. The President signed it on December 17, 2004.

S. 1301, the "Video Voyeurism Prevention Act of 2004"

Summary.—Senator Michael DeWine introduced S. 1301 on June 19, 2003. S. 1301, the "Video Voyeurism Prevention Act of 2003," would amend the Federal Criminal Code to prohibit a person, in the special maritime and territorial jurisdiction of the United States, from intentionally capturing an image of a private area of an individual without that individual's consent and the person capturing the image knowingly does so under circumstances in which the individual has a reasonable expectation of privacy.

S. 1301 would criminalize the act of "video voyeurism" on Federal land, such as national parks or Federal buildings, using the well-accepted legal concept that individuals are entitled to a reasonable expectation of privacy. This crime is now punishable by a fine of not more than $100,000 or imprisonment for up to 1 year, or both. S. 1301, the "Video Voyeurs Prevention Act of 2003," is similar in substance to H.R. 2405, the "Video Voyeurism Prevention Act," introduced by Representatives Oxley, Gonzalez, Goode, and Baird.

Legislative History.—The Subcommittee held a legislative hearing and markup of S. 1301 on March 30, 2004, ordering the bill reported favorably to the Judiciary Committee. On May 12, 2004, the Judiciary Committee held a markup and ordered the bill reported favorably as amended by voice vote, and on May 20, the bill was reported to the House (H. Rept. 108–504). On September 21, 2004,

the bill was considered under suspension of the rules and was agreed to, as amended, by a voice vote. Likewise, the Senate amended the bill and passed it under unanimous consent on September 25. On November 18, 2004, the House sent to the Senate an amendment to the Senate bill. The Senate agreed to the House amendment by unanimous consent on December 7, 2004.

H.R. 1678, the "Anti-Hoax Terrorism Act of 2004"

Summary.—Congressman Lamar S. Smith introduced H.R. 1678 on April 8, 2003. H.R. 1678, the "Anti-Hoax Terrorism Act of 2003," creates criminal and civil penalties for whoever knowingly engages in any conduct, with intent to convey false or misleading information, under circumstances where such information may reasonably be believed and where such information concerns an activity which would constitute a violation of such crimes as those relating to explosives; firearms; destruction of vessels; terrorism; sabotage of nuclear facilities; aircraft piracy; a dangerous weapon to assault flight crew members and attendants; explosives on an aircraft; homicide or attempted homicide or damaging or destroying facilities. The bill also prohibits making a false statement with intent to convey false or misleading information about the death, injury, capture, or disappearance of a member of the U.S. Armed Forces during a war or armed conflict in which the United States is engaged. Additionally, the bill increases penalties from not more than 5 years to not more than 10 years for making false statements, and obstructing justice, if the subject matter relates to international or domestic terrorism.

H.R. 1678 grows out of H.R. 3209, the "Anti-Hoax Terrorism Act of 2001," which passed the House in the 107th Congress on December 12, 2001, by a recorded vote of 423 yeas to 0 nays. No further action was taken on the bill during the 107th Congress.

Legislative History.—The Subcommittee held a legislative hearing on H.R. 1678 on July 10, 2003. On March 30, 2004, the Subcommittee held a markup and ordered the bill reported favorably to the Judiciary Committee as amended by voice vote. On May 12, 2004, the Judiciary Committee held a legislative markup, ordering the bill reported favorably as amended by voice vote, and on May 20, 2004, the bill was reported to the House (H. Rept. No. 108–505). This bill was included in the conference report of S. 2845, the "National Intelligence Reform Act," which was agreed to by the House on December 7, 2004 and by the Senate on December 8, 2004. The President signed it on December 17, 2004, and it became Public Law No. 108–458.

H.R. 2934, the "Terrorist Penalties Enhancement Act of 2004"

Summary.—Congressman John R. Carter introduced H.R. 2934 on July 25, 2003. H.R. 2934 would provide for increased penalties, including up to life in prison or death, for terrorist offenses that result in the death of another person. H.R. 2934 would also provide that any person convicted of a "Federal crime of terrorism" is ineligible to receive any benefits from the Federal Government for any term of years or for life.

Despite some changes to the law to increase penalties after the deadly terrorist attacks, a jury still cannot consider a sentence of

death or life imprisonment for terrorists in many cases even when the attack resulted in death. For example, in a case in which a terrorist caused massive loss of life by sabotaging a national defense installation, sabotaging a nuclear facility, or destroying an energy facility, there would be no possibility of imposing the death penalty under the statutes defining these offenses because they contain no death penalty authorizations. In contrast, dozens of other Federal violent crime provisions authorize up to life imprisonment or the death penalty in cases where victims are killed. There are also cross-cutting provisions which authorize these sanctions for specified classes of offenses whenever death results, such as 18 U.S.C. § 2245, which provides that a person who, in the course of a sexual abuse offense, "engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life."

Current law allows Federal courts to deny Federal benefits to persons who have been convicted of drug-trafficking or drug-possession crimes. 21 U.S.C. § 862. As a result, these convicts can be prohibited, for periods of up to life, from receiving grants, contracts, loans, professional licenses, or commercial licenses that are provided by a Federal agency or out of appropriated funds. This legislation provides the same authority for terrorism offenses.

Legislative History.—The Subcommittee held a legislative hearing and markup of H.R. 2934 on April 21, 2004, ordering the bill reported favorably to the Judiciary Committee. On June 23, 2004, the Judiciary Committee held a legislative markup, reporting the bill favorably as amended by voice vote to the House (H. Rept. No. 108–588). H.R. 2934 was originally include in H.R. 10, the "9/11 Recommendations Implementation Act," but was removed in conference. No further action was taken during the 108th Congress.

H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003"

Summary.—Chairman Sensenbrenner introduced H.R. 3179 on September 25, 2003. The bill would strengthen the existing prohibition against disclosing an FBI request for information related to a counterterrorism or a foreign counterintelligence investigation using a National Security Letter (NSL). The bill would also enhance compliance with an NSL request through judicial enforcement. An NSL is an administrative subpoena used in investigations of international terrorism or clandestine intelligence activities. An administrative subpoena is an investigative tool that allows a Federal agency to request document production or testimony without prior approval from a grand jury, court, or other judicial entity. An NSL cannot be used for a criminal investigation unrelated to international terrorism or clandestine intelligence activities.

Additionally, this legislation included a provision that changed the Foreign Intelligence Surveillance Act's (FISA) definition of "agent of foreign power" to cover non-U.S. persons who are engaged in international terrorism but who are not specifically affiliated with an international terrorist group. A modified version of this provision was adopted in S. 2845, the "National Intelligence Reform Act of 2004." H.R. 3179 would also amend section 4 of the

Classified Information Procedures Act (CIPA) to provide the Department of Justice the discretion to make a request to a court to delete classified information in documents made available to a defendant, to substitute a summary of the classified information, or to substitute a statement admitting relevant facts. H.R. 3179 would not change the court's discretion to grant or deny this request. Finally, the bill would amend FISA to provide that while the prosecution has to disclose information in immigration proceedings, the government would no longer have to point out that the information was collected under FISA.

Legislative History.—The Subcommittee held a legislative hearing on H.R. 3179 on May 18, 2004. No further action was taken on the bill, but portions of the bill were included in S. 2845, the Intelligence Reform bill, which became Public Law No. 108–458.

H.R. 218, the "Law Enforcement Officers Safety Act of 2004"

Summary.—Congressman Randy (Duke) Cunningham introduced H.R. 218 on January 7, 2003. A State has traditionally, in the exercise of its sovereignty, controlled who within its borders may carry concealed weapons and when law enforcement officers may carry firearms.

Before its passage, the law allowed individual States to decide whether or not they wished to allow out-of-State officers to carry a concealed weapon within that State's borders. The law also allowed active, but not retired, Federal law enforcement officers to carry a concealed weapon anywhere within the jurisdiction of the United States; however, it did not allow active and retired State and local law enforcement officers to carry a concealed weapon without the permission of each specific State. H.R. 218, the "Law Enforcement Officers Safety Act of 2003," overrides State laws to allow current and retired police officers to carry a concealed weapon in any of the 50 States.

Legislative History.—The Subcommittee held a legislative hearing on H.R. 218 on June 15, 2004. On June 15, 2004, the Subcommittee held a markup of H.R. 218, ordering the bill reported favorably. On June 23, 2004, the Judiciary Committee ordered the bill reported favorably to the House by a recorded vote of 23 yeas to 9 nays (H. Rept. No. 108–560). On June 23, 2004, H.R. 218 passed the House by a voice vote under suspension of the rules, and on July 7, 2004, the bill passed the Senate by unanimous consent without amendment. The President signed the bill on July 22, 2004, and it became Public Law No. 108–277.

S. 1194, the "Mentally Ill Offender Treatment and Crime Reduction Act of 2004"

Summary.—Senator Mike Dewine introduced S. 1194 on June 5, 2003. S. 1194, the "Mentally Ill Offender Treatment and Crime Reduction Act of 2004," creates a grant program to encourage State and local governments to improve their treatment of mentally ill offenders. The grants can be used: to fund mental health courts or diversion programs; to promote cooperation between the criminal justice and mental health personnel; or to train criminal justice and mental health personnel on issues relating to mentally ill offenders.

During a markup, the Committee adopted an amendment in the nature of a substitute that ensures an appropriate role for victims and law enforcement personnel in dealing with mentally ill offenders, encourages graduated sanctions, limits the amount of authorizations, and encourages continued monitoring of mentally ill offenders after release.

Legislative History.—On June 22, 2004, the Subcommittee held a legislative hearing on S. 1194, and on September 23, 2004, the Subcommittee held a markup, ordering the bill reported favorably to the Judiciary Committee as amended by a voice vote. On September 30, 2004, the Judiciary Committee held a markup of S. 1194, and the bill was reported to the House as amended on October 5, 2004 (H. Rept. No. 108–732). On October 6, 2004, the bill, as amended, passed the House by a voice vote under suspension of the rules. The Senate agreed to the House amendment and passed the bill by unanimous consent on October 11, 2004. On October 30, 2004, the President signed the bill, making it Public Law No. 108–414.

H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004"

Summary.—Chairman Sensenbrenner introduced H.R. 4547 on June 14, 2004. This bill would amend the Controlled Substance Act to protect vulnerable persons, including recovering addicts and children, from drug traffickers.

This legislation is intended to penalize those who victimize the most vulnerable of our citizens. It would: increase mandatory minimum sentences under existing laws and expand protected drug-free zones to include drug treatment centers, day-care centers, and libraries; direct sentencing enhancements for exposing children and incompetent persons to drug trafficking activities and firearms; and assure progressive sentencing enhancements for possessing and using firearms.

Legislative History.—On July 6, 2004, the Subcommittee held a hearing on H.R. 4547. On September 23, 2004, the Subcommittee held a markup of H.R. 4547, ordering the bill reported favorably, as amended by voice vote, to the Judiciary Committee.

OVERSIGHT ACTIVITIES

List of oversight hearings

Reauthorization of the United States Department of Justice—Part I: Criminal Law Enforcement: Bureau of Alcohol, Tobacco, Firearms, and Explosives; Federal Bureau of Investigation; and Drug Enforcement Administration, May 6, 2003 (Serial No. 43).

Reauthorization of the United States Department of Justice—Part II: Criminal Law Enforcement: Bureau of Prisons, Office of Justice Programs, U.S. Marshals Service, and Criminal Division, May 14, 2003 (Serial No. 43).

Advancing Justice through Forensic DNA Technology, July 17, 2003 (Serial No. 46).

Terrorist Threat Integration Center (TTIC) and its relationship with the Departments of Justice and Homeland Security,

July 22, 2003 (Serial No. 64). (This was a full Committee hearing but was facilitated by the Subcommittee and held jointly with the Select Committee on Homeland Security).

Law Enforcement Efforts Within the Department of Homeland Security, February 3, 2004 (Serial No. 83).

Process of Consolidating Terrorist Watchlists—The Terrorist Screening Center (TSC), March 25, 2004 (Serial No. 86). (Held jointly with the Subcommittee on Intelligence and Counterterrorism of the Select Committee on Homeland Security).

Recommendations of the 9/11 Commission, August 23, 2004 (Serial No. 115)

Federal Offender Reentry and Protecting Children from Criminal Recidivists, October 7, 2004 (Serial No. 116)

Oversight issues

Law enforcement issues generally

As part of its oversight responsibilities, the Subcommittee monitors the Justice Department's state and local law enforcement grants programs; examines the efficiency and effectiveness of the various law enforcement training programs by the Departments of Justice and Homeland Security; and examines the policies, procedures, and incentives for local police organizations to ensure (1) that incidents of misconduct will be minimized, and (2) that allegations of misconduct are investigated and prosecuted appropriately.

Since 9/11, the Subcommittee on Crime, Terrorism, and Homeland Security has held thirty-four hearings on law enforcement matters. Among the most important of these are hearings entitled: "Law Enforcement Efforts Within the Department of Homeland Security;" "Homeland Security—the Balance Between Crisis and Consequence Management through Training and Assistance (Review of Legislative Proposals;" "Terrorism and War-Time Hoaxes;" "The Proposal to Create a Department of Homeland Security;" "The Risk to Homeland Security From Identity Fraud and Identity Theft;" the "Antiterrorism Explosives Act of 2002;" the "Homeland Security Information Sharing Act;" the "Cyber Security Enhancement Act;" "Implementation Legislation for the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism;" and the "Anti-Hoax Terrorism Act of 2001."

In addition to these hearings, the Crime Subcommittee, in the spirit of cooperation, has held a joint hearing with the Select Committee on Homeland Security on the Terrorism Threat Integration Center ("TTIC"); jointly sent letters with post-hearing questions to the relevant agencies on the implementation of TTIC; and conducted a joint hearing on the integration of terrorism watchlists at the Terrorism Screening Center.

In the law enforcement and law enforcement training area, the Crime Subcommittee held a joint hearing with a subcommittee of the Select Committee on Homeland Security on consolidating terrorist watch lists. The Subcommittee held a hearing and markup on H.R. 2934, a bill to expand the death penalty to additional acts of terrorism. The full committee reported that bill on June 23,

2004. The Subcommittee held a hearing on H.R. 3179, a bill to enhance law enforcement powers in stopping terrorism. The Subcommittee worked closely with the Select Committee on Homeland Security on H.R. 3266, a bill to improve grants to first responders, which the full committee reported on June 16, 2004. A version of H.R. 3266 was included in the National Intelligence Reform Act which became Public Law No. 108–458. Additionally, the Subcommittee held an oversight hearing on October 7, 2004, regarding federal offender reentry and how to protect children from criminal recidivists. The Committee is working closely with the Select Committee on yet to be introduced legislation to reauthorize the Department of Homeland Security.

Finally, Subcommittee staff conducted continuous oversight of the Justice Department's Office of Justice Programs (OJP). As part of a continuing effort to reform the Office of Justice Programs, staff met with OJP in April of 2003 to review its reorganization. In addition, staff requested that GAO conduct several studies, including studies to evaluate drug court programs; the National Criminal History Improvement Program (NCHIP); the National Institute of Justice's operations and research; and the Justice Department's Weed and Seed program. The combination of the Subcommittee's oversight and review of these GAO studies were instrumental in determining what legislative fixes were to be included in the DoJ Reauthorization bill.

Missing firearms

In the 107th Congress, the Inspector General for the Department of Justice reported that a number of Justice Department agencies could not account for hundreds of firearms supposed to be in their possession. Based on this information, the Committee on Judiciary began an oversight review of the practices to inventory and secure firearms at all Federal Departments and agencies with law enforcement authorities and personnel.

As part of this oversight the House Committee on the Judiciary requested the General Accounting Office (GAO), the independent research arm of the Congress, on July 30, 2001, review "the internal controls for weapons in the possession of the law enforcement agencies with the Executive Branch of the [F]ederal [G]overnment."

The GAO study was released in June of 2003 and indicates that agencies have implemented, or are in the process of implementing actions, to strengthen their firearms controls. GAO found that all 18 of the federal agencies they reviewed had policies and procedures designed to control and safeguard firearms. The agencies, according to GAO, should strengthen these controls in areas that are important for effective inventory management such as recording and tracking firearms inventory data.

Implementation of the USA PATRIOT Act

Section 1001 of the PATRIOT Act requires the Department of Justice to report to the House and Senate Committees on the Judiciary on a semi-annual basis on any complaints of civil liberties abuses by the Department of Justice. In accordance with Section 1001, the Department of Justice sent the House and Senate Judiciary Committees, four reports entitled, "Report to Congress on the

Implementation of Section 1001 of the USA PATRIOT Act." The first report was sent on July 15, 2002; the second on January 22, 2003; the third on July 17, 2003; and the fourth on January 27, 2004.

On April 1, 2003, Chairman Sensenbrenner and Ranking Minority Member Conyers sent a letter to the Department of Justice with additional questions regarding the use of pre-existing authorities and the new authorities conferred by the PATRIOT Act.[5] The questions were the product of bipartisan coordination by Committee staff. Acting Assistant Attorney General Jamie E. Brown responded with a letter on May 13, 2003, answering the questions she deemed relevant to the Department of Justice and forwarding the remaining questions to the appropriate officials at the Department of Homeland Security. On June 13, 2003, the Assistant Secretary for Legislative Affairs at the Department of Homeland Security, Pamela J. Turner, sent responses to the forwarded questions Chairman Sensenbrenner and Ranking Minority Member Conyers. These items were the subject of extensive press coverage. On May 20, 2003, Chairman Sensenbrenner and Ranking Minority Member Conyers released statements regarding the Department of Justice's response to questions concerning oversight and civil liberties issues. Additionally, Chairman Sensenbrenner threatened to subpoena Attorney General Ashcroft if the Committee did not receive responses to its questions.

The House Judiciary Committee also held hearings as part of its ongoing oversight efforts. On May 20, 2003, the Committee's Subcommittee on the Constitution held an oversight hearing entitled, "Anti-Terrorism Investigations and the Fourth Amendment After September 11th: Where and When Can Government Go to Prevent Terrorist Attacks?" Then, on June 5, 2003, the Attorney General testified before the Committee at an oversight hearing on the United States Department of Justice. Both the hearing on May 20th and the hearing on June 5th discussed oversight aspects of the PATRIOT Act.

Further, the Subcommittee on Crime, Terrorism, and Homeland Security requested that officials from the Department of Justice appear and answer questions regarding the implementation of the PATRIOT Act. In response to our request, the Department of Justice gave two separate briefings to Members and Staff. During the briefing held on August 7, 2003, Department officials covered the long-standing authority for law enforcement to conduct delayed searches and collect business records, as well as the effect of the PATRIOT Act on those authorities. During the second briefing, held on February 3, 2004, the Department of Justice discussed its views of S. 1709, the "Security and Freedom Ensured (SAFE) Act of 2003" and H.R. 3352, the House companion bill, as both bills propose changes to the PATRIOT Act. All Members' offices were invited to these briefings.

On November 20, 2003, Chairman Sensenbrenner and Congressman Hostettler, Chairman of the Subcommittee on Immigration, Border Security, and Claims, sent a letter to the Comptroller Gen-

[5] These questions were in addition to those sent to the Department of Justice during the 107th Congress.

eral requesting a GAO study of the implementation of the PATRIOT Act anti-money laundering provisions. The Committee has not yet received this report.

Staff for the Subcommittee on Crime, Terrorism, and Homeland Security continually monitored concerns expressed by Members' offices regarding the implementation of the PATRIOT Act, as well as matters reported in the press. Counsel maintained regular contact with officials in the Departments of Justice and Homeland Security and received periodic briefings. As an example, on June 10, 2003 and October 29, 2003, staff received briefings by the Department of Justice on the Foreign Intelligence Surveillance Act (FISA). The staff also met with various civil liberty groups, such as the American Civil Liberty Union, the Center for Democracy and Technology, the Library Association, and the American Conservative Union. The staff also regularly communicated with representatives of these groups over the phone or through email.

Metropolitan Detention Center (MDC)

In the first 11 months after the 9/11 attacks, 672 illegal aliens were detained in connection with the FBI terrorism investigations for various immigration offenses. Eighty-four of those aliens were confined at Federal Bureau of Prisons (BOP) Metropolitan Detention Center (MDC) in Brooklyn, NY. Chairman Sensenbrenner visited MDC in July 2003.

Section 1001 of the USA PATRIOT Act requires the DoJ's Inspector General to provide for the review of information and receipt of complaints alleging abuses of civil rights and civil liberties by employees of the DoJ and also requires that the IG submit a report to the Committee on the implementation of this provision. Accordingly, in October of 2001, the Bureau of Prisons (BOP) Office of Internal Affairs referred to the Department of Justice (DoJ) Office of the Inspector General (OIG) several allegations of physical abuse at the (BOP) Metropolitan Detention Center (MDC) in Brooklyn, NY. The OIG New York Field Office initiated a criminal investigation and consulted with prosecutors from the Civil Rights Division of the DoJ and with the United States Attorney's Office for the Eastern District of New York. The Civil Rights Division assigned some additional allegations to the FBI for investigation and the OIG referred several allegations to the BOP Office of Internal Affairs (BOP OIA) for investigation.

On September 25, 2002, the Civil Rights Division and the United States Attorney's Office declined criminal prosecution of the MDC staff who were the focus of the OIG's New York Field Office. The OIG continued its investigation to determine if disciplinary or other administrative actions were warranted. The allegations of detainee abuse assigned to the FBI and the BOP OIA were considered but declined for criminal prosecution and as a result the OIG took over all of these cases and issued a report on June 2, 2003, entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." In the June 2, 2003 report, the OIG stated that while it had not completed its investigation, the OIG found that some detainees had been physically and mentally abused. The 47-page follow-up report discusses the evidence of

abuse, describes several issues related to systemic treatment of the detainees, and offers recommendations.

In December 2003, the Office of the Inspector General (OIG) released its Supplemental Report regarding allegations of abuse at the Metropolitan Detention Center (MDC) in New York. This report generated further concerns about the FBI's timeliness in handling the investigations of abuse. Accordingly, on February 9, 2004, the Committee sent a letter to Attorney General Ashcroft to learn why the FBI did not attempt to locate or interview detainee complainants that had been removed either prior to the FBI receiving the case or subsequent to the FBI receiving the case. In addition, the Chairman requested information regarding the delay of the FBI in interviewing detainees and an explanation of reported incidents that attorney-client communications were recorded without regard to established procedures for such conduct; that employees may have intentionally lied during the OIG inquiry; and that the MDC refused or otherwise failed to turn over video tapes after several attempts by the OIG to obtain them. The Committee requested information regarding the implementation of the OIG's recommendations be reported to the Committee by March 31, 2004.

The DoJ responded with a letter on July 20, 2004, stating that the OIG began investigating allegations of mistreatment and abuse of the detainees as early as November 2001. Although these investigations resulted in recommendations to BOP to correct aspects of its practices, they did not determine that criminal prosecution of any BOP officials was warranted. Further, the DoJ explained the lack of FBI interviews due to the unavailability of complainants and the concurrent OIG investigations, which involved numerous interviews.

Detainees at Guantanamo Bay

During the U.S.-led war in Afghanistan, "Operation Enduring Freedom," approximately 10,000 individuals were taken prisoner, screened, and released in Afghanistan. Less than 10% of those screened were moved to the U.S. naval base in Guantanamo Bay, Cuba along with a small number captured in Pakistan. Detainee operations began in Guantanamo in January of 2002.

Debate has ensued about whether the detentions are legal, and opponents of the policy have argued that the policy creates a "no law zone" and places the prisoners outside the reach of any type of judicial review. Opponents have also questioned the living conditions of the prisoners. Proponents have argued that the detention of these "enemy combatants" is lawful, justified, and necessary for the effective collection and exploitation of intelligence in support of the global war on terrorism. In *Rasul* v. *Bush*, the Supreme Court held that the foreign combatants held in Cuba are entitled to judicial protection, and the approximate 550 enemy combatants currently being held in Cuba are receiving reviews by Combatant Status Review Tribunals to determine whether they are being properly held or whether they should be released.

The Committee on the Judiciary requested that the DoD brief the Committee regarding the Guantanamo detainees, military tribunals, and the Geneva Conventions. Accordingly, on November 15, 2003 and February 24, 2004, military officers briefed Members and

staff on the detainees being held in Guantanamo Bay, Cuba. Both of these briefings were classified.

Additionally, the Committee requested an unclassified briefing, where Brigadier General Wright and Lieutenant General Alexander briefed Members and staff on May 21, 2004. In light of the recent revelations of abuse at Abu Ghraib prison, the military officers discussed the interrogation rules of engagement and outlined the events that occurred at Abu Ghraib prison, including how many prisoners were interrogated, how many pictures were taken, etc. Further, they discussed the Geneva Conventions, focusing on the Third and Fourth Conventions, which covered POWs and detainees, respectively. They described who would be covered by the Conventions and what rights would be afforded to POWs and military detainees under the rules of the Conventions.

Subcommittee Chairman Coble led a bipartisan delegation to Guantanamo, including Representatives Schiff and Hart and subcommittee staff. On April 29, 2004, officials from the Departments of Defense and Justice briefed those going on the trip, and on May 3, 2004, the group toured the facilities in Guantanamo Bay, Cuba, where they saw firsthand the living conditions of the prisoners.

Chairman Sensenbrenner wrote a letter to the Attorney General on July 13, 2004, regarding documents related to the interrogation of detainees. The DoJ responded on July 20, 2004, assuring the Committee that the Administration had released all unclassified, final written opinions from the Department addressing the legality of interrogation techniques used in the interrogations of al-Qaeda and Taliban enemy combatants. The letter also cited the release from the White House of numerous documents on June 22, 2004.

Review of National Criminal History Improvement ("NCHIP") Program

On October 15, 2002, Chairman Sensenbrenner requested that the GAO audit the use of Federal funds by the State of Maryland to implement the National Criminal History Improvement Program ("NCHIP"). The Committee expressed its concern that the State of Maryland misused its NCHIP funds, possibly endangering lives and threatening public safety. After learning that GAO had not yet started this audit, Chairman Sensenbrenner sent a letter to Comptroller General David M. Walker, dated May 21, 2003, requesting that the audit begin immediately. Additionally, the Chairman requested that the GAO provide the Committee with a report, including an audit of how other states use NCHIP funds and a determination of whether states are cleaning up their files and records adequately. On June 30, 2003, the Committee received a letter from GAO, saying that the GAO accepted its request proposal and would begin work with subcommittee staff to discuss the project. In a letter dated August 22, 2003, the GAO laid out its objectives and key questions that would be answered by the study. The study was completed and sent to the Committee on February 27, 2004.

DoJ and Falun Gong

Subcommittee staff requested several meetings with representatives of Falun Gong, a spiritual movement originating in China. On February 6, 2003, the Subcommittee wrote a letter to Attorney

General John Ashcroft regarding claims by members of Falun Gong that the Chinese Government was harassing, intimidating, and conducting surveillance of them in the United States. Members of Falun Gong had reportedly met with officials from the Department of Justice and the FBI but had expressed frustration that incidents had not been investigated by agents in various fields. The subcommittee requested that the appropriate Department personnel brief subcommittee staff on these matters. On July 21, 2003, subcommittee staff met with one of the victims of the Falun Gong harassment and viewed video footage of an attack in New York on Falun Gong practitioners by persons suspected of having connections to the PRC government.

COPS program

On May 10, 2003, the Committee on the Judiciary requested that the General Accounting Office (GAO) do an analysis of data provided to the Committee by the DoJ regarding the Community Oriented Policing Services (COPS) program. The data was provided to GAO on May 13, 2003. Due to time constraints, the GAO indicated that it could not provide an official analysis. Accordingly, in a letter to David M. Walker, Comptroller General of the United States, dated June 2, 2003, the Chairman extended the deadline for the request to June 3, 2003 to ensure that an official document could be provided. Additionally, the Committee requested that GAO do an independent study of the COPS Program's effect on crime, including consideration of other Federal, state, and local programs or policies that are focused on reducing crime.

On November 11, 2003, staff from the GAO met with staff from the Judiciary Committee regarding this issue. In a letter dated January 8, 2004, the GAO notified the Committee that a separate design phase would be necessary to assess the relationship between COPS funding and crime while considering the effects of other such programs. The GAO estimated that the design phase would be completed by March 31, 2004. The GAO is currently still working on the study.

First responders and interoperability of their equipment

In light of the 9/11 attacks and the importance of first responders in responding to terrorist attacks and other emergencies, the Committee has a strong interest in grants to first responders and the interoperability of their communications systems. On April 1, 2003, Chairman Sensenbrenner met with officials from the International Association of Chiefs of Police (IACP) and the police chief from Oregon, Wisconsin. During their meeting, they discussed the issue of interoperability of communications, allowing first responders to communicate with other first responders. At the time, communications were not interoperable, in part because television stations had not switched from analog to digital signals for high definition television, vacating the channels needed for public safety officers. As a result of this meeting, Chairman Sensenbrenner wrote a letter, dated June 2, 2003, to the Federal Communications Commission (FCC) requesting that the FCC set a specific deadline to make the spectrum available for public use. Chairman Sensenbrenner requested a response by June 16, 2003.

The FCC responded with a letter on June 30, 2003, stating that it had taken a number of steps to provide the public safety community with additional spectrum. The FCC admitted, however, that some spectrum is currently unavailable for public safety use in many areas of the country:

> The 700 MHz band spectrum currently is encumbered by broadcasters in many parts of the country, particularly in the urban areas where the Commission anticipates the greatest demand for public safety use. Under the existing statutory framework for this spectrum, the Commission is constrained from making this spectrum fully available for public safety because incumbent television broadcasters do not have to vacate their analog channels until the end of 2006, and may seek to remain until at least 85 percent of the households in their markets have access to DTV signals, whichever is later. * * *
>
> In response to these statutory constraints, the Commission had crafted a policy to facilitate voluntary band clearing arrangements between broadcasters and new commercial wireless users to clear the entire upper 700 MHz band. * * *

The contents of the letter conveyed that the FCC had done all that it could to comply with the needs of first responders.

On November 23, 2003, the Washington Post printed an article entitled, "Anti-Terrorism Funds Buy Wide Array of Pet Projects," which alleged possible mismanagement of first responder grants. In response, Chairman Sensenbrenner and Ranking Minority Member Conyers wrote a letter, dated January 21, 2004, to the Inspectors General (IG) at the Departments of Justice and Homeland Security requesting that they conduct a review of the accountability procedures for first responder grants. Letters were sent to the Attorney General and the Secretary of the Department of Homeland Security as well, requesting answers to the Post allegations.

On February 20, 2004, Chairman Sensenbrenner and Ranking Minority Member Conyers wrote a letter to the Attorney General and the Secretary of the Department of Homeland Security regarding "interoperability" among state and local first responders. The letter stated the Committee's belief that first responders should receive federal support to resolve the "interoperability" in its efforts to prevent, prepare, and respond to terrorist attacks. The letter asked the AG and the Secretary to provide in detail their efforts to assist state and local first responders with "interoperability."

The DHS responded on May 11, 2004, saying that the Office for Domestic Preparedness (ODP) had begun awarding grants under the Homeland Security Grant Program and the Urban Areas Security Initiative to States and territories and high-threat areas, respectively. In addition, ODP encouraged all new radio systems purchased with these funds to be compatible with standards that will ensure interoperability. Further, ODP, in conjunction with other organizations, provided funds to the Chula Vista C41 Evaluation Exercise, which would test and implement a secure and seamless communication and data system for interoperability.

Allegations of misleading testimony before the subcommittee and Judge Rosenbaum

On October 31, 2002, the Committee issued its report on H.R. 4689, the "Fairness in Sentencing Act of 2002,"[6] which also dealt with the May 14, 2002 testimony of the Honorable James M. Rosenbaum, Chief Judge, United States District Court for the District of Minnesota before the Subcommittee on Crime, Terrorism, and Homeland Security.

Although most of the activity relating to this matter occurred in the 107th Congress, there was additional activity during the 108th Congress. On March 10, 2003, the Committee noticed consideration of, "Resolution authorizing the Chairman to issue subpoenas in the matter relating to the Honorable James M. Rosenbaum." After meeting with Judge Rosenbaum's attorneys and with the assistance of the Administrative Office for the United States Courts, the Committee obtained pertinent records, including transcripts of sentencing proceedings on a rolling basis over the ensuing months. The Committee is continuing to review the records as part of its ongoing investigation into Judge Rosenbaum's sentencing decisions.

FBI employee turnover

On February 9, 2004, the Committee sent a letter to FBI Director, Robert S. Mueller, III regarding the turnover of FBI personnel, in particular, the fact that the FBI has had four different Executive Assistant Directors (EAD) of Counterterrorism-Counterintelligence since it established the position in December of 2001. As the United States continues to fight the war on terrorism at home and abroad, it is imperative that the leadership of the FBI is consistent, experienced, and knowledgeable. Therefore, the Judiciary Committee requested from the FBI: the entry-exit dates of service of each individual who served at the rank of Executive Assistant Director to Special Agent in Charge since September 11, 2001, along with their reasons of departure and where they went; any difference in turnover trends from pre-9/11 to post-9/11; the average length of time that level GS–14 agents serve in various capacities; the average length of time that an agent serves as an investigator before entering the management career track; and the status and objectives of the current overhaul of the FBI's career development program. A response was due back from the FBI by March 31, 2004. On April 26, 2004, the Committee received a letter from the FBI's Congressional Affairs Office, saying that additional time would be needed to prepare material that was responsive to our request.

Terrorist Explosive Device Analytical Center (TEDAC)

Since 9/11, the Government has been examining the potential threats against the security of our nation, including an attack utilizing an improvised explosive device (IED). IEDs are explosives made with the right combination of common household materials and have the potential to kill or maim. These types of explosives have been used in over 90 percent of explosive attacks on Americans in the past five years, and investigators believe a global bomb-

[6] H. Rep. No. 107–769 (2002).

making network exists that disseminates instructions for creating such explosives.

In response, the FBI established the Terrorist Explosive Device Analytical Center (TEDAC) in December of 2003. The Center works with multiple agencies to examine explosive devices used in attacks against Americans to identify bomb-making networks and bomb makers. The Subcommittee requested an FBI briefing, and on February 27, 2004, the FBI briefed Members and staff on TEDAC and its operations.

FBI's misidentification of suspected terrorist

Numerous press reports drew attention to Brandon Mayfield, who was detained for two weeks as a result of an inaccurate fingerprint identification tied to the Madrid bombing, which occurred in March of 2004. Accordingly, Subcommittee staff requested briefings by the FBI regarding the material witness detainment of Mayfield. Two briefings were held jointly with the Committee on Government Reform and Oversight on May 5 and June 8, 2004. Apparently, the FBI failed to investigate the accuracy of the fingerprint after Spanish authorities questioned it weeks before Mayfield's May 6th arrest. The FBI further failed to examine the original fingerprint when they met with Spanish investigators in Madrid on April 21. On May 21, the FBI finally compared the fingerprint to an Algerian national whom the Spanish investigators had identified. The FBI's misidentification was alarming because such "conclusive" evidence is used in courts around the country to arrest and detain people.

Child protection

The FBI's Cyber Crime Division reports that online child pornography and sexual exploitation is the most significant cyber crime against children facing investigators today. Sexual predators are using the Internet to distribute child pornography and to lure youth into illicit sexual relationships. The FBI's Innocent Images National Initiative (IINI) tracks down these predators and identifies and helps their victims. On March 9, 2004, the Subcommittee hosted a briefing where IINI staff briefed Members and Staff on its goals and operations, the technology used to investigate these crimes, and recent developments in the fight to protect American children.

Additionally, the Judiciary Committee received concerns, expressing frustration with the Department of Justice's distribution of the Amber Alert grants created by the PROTECT Act. In response, on April 21, 2004, the Committee sent the Attorney General a letter requesting general information about the Amber Alert grants. The purpose of the letter was to determine whether the grant program was being implemented for the purposes stated in the Act and whether the money was being fairly distributed. Chairman Sensenbrenner requested a response by May 21, 2004. On May 17, 2004, the Department of Justice sent a letter to the Chairman, stating that the April 21, 2004 letter had been received and referred to the proper Department component. The Department is currently working on a response.

Identification and employment authorization

In a letter to the Department of Defense dated March 19, 2004, Chairman Sensenbrenner requested that it "undertake an investigation of the processes that the Department of Defense (DoD) uses to verify the identification and employment authorization of individuals seeking to enlist in the United States Armed Forces." On February 24, 2004, the Denver Post claimed that, at the time, the citizenship status of 16,031 active duty members of the Army, Navy, Air Force, and Marines was listed as "unknown." On June 23, 2004, the Assistant Inspector General at the DoD responded, saying that the matter was under the purview of the Deputy Under Secretary of Defense for Military Personnel Policy, an element of the Under Secretary of Defense for Personnel and Readiness. The DoD referred the inquiry accordingly and requested that the Under Secretary respond to the matter. On July 14, 2004, the Office of the Undersecretary of Defense responded with a letter and memorandum, noting that enlistment in the U.S. Armed Forces is limited by law and service policy to U.S. citizens or aliens lawfully permitted for permanent residency. The Department acknowledged inaccuracies in personnel databases and ensured that it had taken steps to improve its data entry and transfer processes. Along with two critical safeguards that had been implemented to improve document verification, these steps were outlined in the accompanying memorandum.

Supreme Court decision in Department of Interior v. Klamath Water Users Protective Association

On March 23, 2004, Chairman Sensenbrenner wrote a letter to Attorney General Ashcroft regarding the Supreme Court's decision in *Department of Interior* v. *Klamath Water Users Protective Association,* which required the government to disclose, under the "Freedom of Information Act" (FOIA), documents regarding settlement negotiations and communications with co-parties while non-governmental litigants are not obliged to reveal such information.

The Chairman was concerned that the Department of Justice may have been compelled to publicly disclose documents regarding settlement negotiations or communications with co-parties. He believed that this would place the government at a disadvantage vis-a-vis non-governmental parties and prejudice taxpayer interests because they reveal information about the government's negotiating position and vulnerabilities in litigation. To assist in his evaluation of whether to pursue legislation to address this matter, the Chairman requested that the Attorney General address several questions regarding the Klamath decision.

Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) facilities oversight

On July 16, 2003, subcommittee staff toured ATF's new laboratory in College Park, Maryland, and in March of 2004, staff returned for an arson demonstration, where they were briefed on ATF's role in arson investigations. On April 13, 2004, staff from the subcommittee toured the Bureau of Alcohol, Tobacco, Firearms, and Explosives and the U.S. Customs Service canine training center in Front Royal, Virginia to learn about the training program for

bomb sniffing and drug sniffing dogs that these two agencies employ, respectively. In addition, on April 15, 2004, subcommittee staff and staff visited the ATF firing range. There, staff were briefed on ATF's mission and responsibilities and received instruction on appropriate protocol while on the firing range. Staff saw the training and firearms instruction that ATF agents receive.

Federal sentencing guidelines and the Blakely v. Washington case

Subcommittee staff met periodically with members and staff of the U.S. Sentencing Commission and the Justice Department during the one-year amendment cycle. In a letter dated May 11, 2004, Subcommittee Chairman Coble forwarded to Members of the Judiciary Committee an April 30, 2004 correspondence from the United States Sentencing Commission, which conveyed amendments to the Federal Sentencing Guidelines. The amendments reflected ongoing oversight and legislative initiatives of the Judiciary Committee and the Subcommittee. These include implementing provisions included in the "PROTECT Act," assuring increased penalties for child pornography and sexual abuse offenses.

In 1984, Congress authorized the creation of the Federal Sentencing Guidelines in response to the realization that large sentencing disparities existed throughout the nation, as judges in different localities sentenced differently for very similar crimes. To lessen these sentencing disparities, the U.S. Sentencing Commission was established and charged with promulgating the Sentencing Guidelines to ensure and standardize sentences for similar crimes nationwide. After seventeen years, the Supreme Court called this system into question with its decision in *Blakely* v. *Washington* (June 24, 2004). In *Blakely,* the Court applied the rule announced in *Apprendi* v. *New Jersey,* to invalidate, under the Sixth Amendment, enhanced penalties under the Washington State sentencing guideline system that was imposed on the basis of facts found by the court at sentencing.

Judge Paul Cassell of the U.S. District Court in Utah, announced on June 29, 2004, that the Federal Sentencing Guidelines could not be applied constitutionally in a child pornography case. Cassell stated that he intended to continue to issue sentences without regard for the guidelines "until the constitutionality * * * has been definitely resolved by the Supreme Court." He planned to issue a "fallback sentence," however, to avoid re-sentencing in the event that the Guidelines were upheld.

As a result, Subcommittee staff were active in preparing for various possible scenarios, considering what, if any action, Congress should take in response to possible Supreme Court rulings. On July 7, 2004, subcommittee staff met with Senate counterparts regarding judicial oversight and a possible legislative fix to *Blakely.* Similarly, on July 9, staff met with Senate counterparts and DoJ officials regarding the decision. On September 10, 2004, staff met with staff from the U.S. Sentencing Commission regarding the guidelines and post-*Blakely* plans. On September 13, 2004, staff attended a CRS briefing regarding the *Blakely* decision and possible remedies and reactions that would stem from the decision and future Supreme Court decisions regarding the Guidelines. Lastly, on

November 4, 2004, staff met with officials from the Administrative Office of the Courts regarding the decision.

In addition, staff was in regular contact with staff from the U.S. Sentencing Commission to discuss periodic amendments to the Guidelines that were suggested by the Commission. Subcommittee staff met with U.S. Sentencing Commission staff on January 12, 21, and on May 27, 2004.

On October 5, 2004, subcommittee staff met with ABA officials to discuss their concerns with a Commission amendment regarding corporate defendants and the waiver of attorney-client and work product protections to show "thorough" cooperation with the government, and subsequently qualify for a reduction in the culpability score under the Guidelines.

U.S. Marshals Service

From May 26–28, 2004, subcommittee staff visited the U.S. Marshals Service's Special Operations Group (SOG) at Camp Beauregard, Louisiana and reviewed the missions, capabilities, and equipment of the SOG. The SOG is a specially trained tactical unit based in Pineville, Louisiana. The SOG is deployed in high risk or sensitive law enforcement situations, national emergencies, civil disorders, and natural disasters in support of USMS districts and headquarters operational divisions or as ordered by the U.S. Attorney General. The SOG is staffed full-time by eight criminal investigators and three administrative personnel, and the SOG workforce core is comprised of 72 highly-trained criminal investigators who are activated and respond to SOG missions when necessary. The SOG was founded and continues to function based on operational necessity. Many of the SOG's supplies, weapons, vehicles, and equipment were obtained second-hand from other government agencies. The SOG staff has made great efforts to refurbish this equipment and suit it to their own needs, saving government and taxpayer dollars. The trip continued ongoing oversight by the Subcommittee on Crime, Terrorism, and Homeland Security of the U.S. Marshals Service.

Further, news reports in April of 2004 alleged inappropriate behavior by the U.S. Marshals while protecting Supreme Court Justice Scalia. In response, staff set up oversight meetings with Marshals officials on April 29, 2004. In addition, in August of 2004, staff visited the U.S. Marshals Electronic Surveillance Unit to review technology and operations utilized in electronic surveillance for fugitive apprehensive. Finally, in October of 2004, the subcommittee requested that the Marshals provide an identity theft demonstration. At the briefing, Judiciary staff reviewed technology to detect fraudulent identification documents, including drivers' licenses and passports for security of federal buildings, borders, and national transportation.

DEA auditor and laptop

In a letter dated June 18, 2004, Subcommittee Chairman Coble asked the IG at the DoJ for information regarding an incident involving an Office of the Inspector General auditor and a laptop computer containing sensitive but unclassified information related to an audit of the Drug Enforcement Administration (DEA). The IG

responded in a letter dated July 28, 2004, providing a response to the Subcommittee's questions and assuring the Subcommittee that the incident had been thoroughly investigated and that no sensitive information was lost or placed into the wrong hands.

Information sharing with State and local law enforcement

On July 1, 2004, staff from the Subcommittee coordinated and participated in a briefing regarding information sharing with State and local law enforcement officials. The briefing was led by FBI Assistant Director, Louis Quijas, who discussed the Office of Law Enforcement Coordination (OLEC) and its role in ensuring optimum coordination and communication between federal, state, and local law enforcement agencies.

The topic of law enforcement cooperation and information sharing has been frequently examined by the Committee since 9/11 and has been the focus of hearings, legislation, and constituent letters. The FBI's OLEC was created to enhance coordination and communications between the FBI and its federal, state, and local law enforcement partners on a national level. The OLEC facilitates two-way communication, collaboration, and a high level of customer service. It supports the FBI in coordination with its law enforcement partners to uphold the law and protect the United States from criminal and terrorist activities. The OLEC serves as the FBI's primary liaison for the national law enforcement associations and represents the perspective of police and sheriffs' departments within the FBI. The OLEC coordinates the Director's Law Enforcement Advisory Group and supports the FBI's intelligence-sharing and technological efforts with state and local law enforcement.

National Security Entry-Exit Registration System (NSEERS) and the detainment of Iranians

On July 16, 2004, staff from the subcommittee attended a briefing by the Iranian American Bar Association regarding the detainment of Iranians in response to events of 9/11. Beginning in November of 2002, Iranians living in the United States were detained after voluntarily appearing for registration in the National Security Entry-Exit Registration System (NSEERS).

One of the presenters noted that under the PATRIOT Act, detainees could "be disappeared" for seven days without counsel or the notification of family members. The Attorney General has inherent authority to detain individuals for immigration proceedings. Under § 236 of the Immigration and Nationality Act, one can be detained in anticipation of removal, which is a civil—not a criminal-proceeding. The PATRIOT Act provides for a 7-day limitation, within which the AG must go through a certification process to ensure that detainees are put into proceedings within this allotted time.

9/11 Commission Report, recommendations, and legislation

The National Commission on Terrorist Attacks Upon the United States (9/11 Commission) was created in late 2002 to investigate and subsequently prepare a report about the circumstances surrounding the 9/11 attacks, including an assessment of the U.S. preparedness and response to the attacks. In addition, the Commission was to provide recommendations to guard against future attacks.

The 9/11 Commission released its lengthy report on July 22, 2004, including 41 recommendations. These recommendations prompted a flurry of hearings and proposed legislation.

The Subcommittee held a hearing to discuss the report and recommendations on August 23, 2004. Witnesses included: Mr. Christopher Kojm, the Deputy Executive Director of the National Commission on Terrorist Attacks Upon the United States; Mr. John S. Pistole, the Executive Assistant Director of the Counterterrorim Division of the FBI; Mr. John O. Brennan, Director of the Terrorist Threat Integration Center; and Mr. Gregory T. Nojeim, the Associate Director of the American Civil Liberties Union. In addition to considering the Commission's recommendations, the hearing was consistent with the Judiciary Committee's ongoing oversight of the Departments of Justice and Homeland Security.

The hearing specifically focused on the 9/11 Commission's recommendations in the following areas: the creation of a National Intelligence Director (NID); the tightening of U.S. borders; the establishment of a National Counterterrorism Center; the prevention of identity theft and fraud; the creation of a specialized and integrated national security workforce at the FBI; and the targeting of networks that provide material support to terrorists. Additionally, the hearing provided the DoJ and the Director of the Terrorist Threat Integration Center (TTIC) an opportunity to discuss the 9/11 Commission recommendations that had already been, or were in the process of being, implemented.

Violence against women

The Committee sent a letter to the DoJ in support of the federal Judicial Oversight Demonstration Initiative (JODI) to the Office on Violence Against Women for continuation funding. In response, DoJ sent a letter to the Committee on August 19, 2004, indicating that the Office of Violence Against Women would provide each of the three Federal Judicial Oversight Demonstration Initiatives (JODI) sites with limited support for an additional year, as the JODI was scheduled to end in Fiscal Year 2004. After 2005, however, each JODI site will be eligible to compete for a grant through the Fiscal Year 2005 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Grant Program.

Federal Air Marshals Service (FAMS)

On September 28, 2004, the Committee sent a letter to Thomas D. Quinn, Director of the Federal Air Marshals Service (FAMS) regarding alleged security gaps in air travel. In their letter, they asked the FAMS to respond to a number of detailed questions by October 15, 2004. On October 20, 2004, Director Quinn responded with 29 pages of information and several classified secret documents, which were placed in a separate folder. Committee staff has reviewed this material, and these issues are an ongoing oversight issue.

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS [1]

JOHN N. HOSTETTLER, Indiana, *Chairman*

JEFF FLAKE, Arizona
MARSHA BLACKBURN, Tennessee
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
CHRIS CANNON, Utah
STEVE KING, Iowa
MELISSA A. HART, Pennsylvania

SHEILA JACKSON LEE, Texas
LINDA T. SANCHEZ, California
ZOE LOFGREN, California
HOWARD L. BERMAN, California
JOHN CONYERS, JR., Michigan

[1] Subcommittee chairmanship and assignments approved February 12, 2003.

Tabulation of subcommittee legislation and activity

Public:	
Legislation referred to the Subcommittee	226
Legislation on which hearings were held	8
Legislation reported favorably to the full Committee	4
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	6
Legislation pending before the full Committee	0
Legislation reported to the House	9
Legislation discharged from the Committee	2
Legislation pending in the House	2
Legislation passed by the House	12
Legislation pending in the Senate	4
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	8
Days of legislative hearings	3
Days of oversight hearings	22
Private:	
Claims:	
Legislation referred to the Subcommittee	16
Legislation on which hearings were held	0
Legislation reported favorably to the full Committee	2
Legislation pending before the full Committee	1
Legislation reported to the House	1
Legislation discharged from the Committee	0
Legislation pending in the House	1
Legislation passed by the House	1
Legislation pending in the Senate	0
Legislation enacted into Private Law	1
Immigration:	
Legislation referred to the Subcommittee	77
Legislation on which hearings were held	0
Legislation reported favorably to the full Committee	4
Legislation pending before the full Committee	0
Legislation reported to the House	4
Legislation discharged from the Committee	0
Legislation pending in the House	0
Legislation passed by the House	4
Legislation pending in the Senate	0
Legislation enacted into Private Law	4

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Immigration, Border Security, and Claims shall have jurisdiction over the following subject matters: immigration and naturalization, border security, admission of refugees, treaties, conventions and international agreements, claims against the United States, federal charters of incorporation, private immigration and claims bills, other appropriate matters as referred by the Chairman, and relevant oversight.

LEGISLATIVE ACTIVITIES

IMMIGRATION

H.R. 2152, Extending the Special Immigrant Religious Worker Program

Summary.—"Special immigrant" visas (9,940 each year) are available for a number of different categories of aliens. One such category is religious workers. An alien (along with spouse and children) can qualify for a special religious worker visa if the alien has been a member for the immediately preceding two years of a religious denomination having a bona fide nonprofit, religious organization in the United States and seeks to enter the United States to (1) serve as a minister, (2) serve in a professional capacity in a religious vocation or occupation at the request of the organization, or (3) serve in a religious vocation or occupation at the request of the organization, and in each case has been carrying out such work continuously for at least the prior two years. The two non-minister categories are limited to 5,000 visas a year and were set to sunset on October 1, 2003. H.R. 2152 extends the sunset date to October 1, 2008.

Legislative History.—On May 19, 2003, Representative Barney Frank introduced H.R. 2152. On July 15, 2003, the Subcommittee on Immigration, Border Security and Claims ordered H.R. 2152 reported to the Judiciary Committee by a voice vote. On September 10, 2003, the Judiciary Committee ordered H.R. 2152 reported by a voice vote. On September 16, 2003, the Judiciary Committee reported H.R. 2152 (H. Rept. No. 108–271). On September 17, 2003, the House passed H.R. 2152 under suspension of the rules by a voice vote. On October 3, 2003, the Senate passed H.R. 2152 by unanimous consent. On October 15, 2003, the President signed H.R. 2152 into law (Public Law No. 108–99).

Naturalization through service in the Armed Forces

Summary.—After learning that 10 members of our Armed Forces who died in combat during "Operation Iraqi Freedom" were not United States citizens, Congress acted to ease the naturalization requirements of legal permanent residents in the armed services and provided immigration benefits to surviving family members of those killed in service to America. Public Law No. 108–136:

- Reduces the peace time military service requirement from three years to one year before a lawful permanent resident military member may apply for naturalization without having to have met the requirement of five years continuous residence in the U.S.

• Prohibits fees from being charged to military members applying for naturalization or a certificate of naturalization, including full or partial State charges for State documents that support an application for naturalization, such as criminal disposition documents.

• For alien military members who naturalize using expedited procedures, the legislation permits the revocation of citizenship for separation from military service under other than honorable conditions. Because active-duty and certain other military members may apply for naturalization during a named period of hostilities without having met any requirement of continuous residence in the U.S., prior law provided that such military members may have their naturalization revoked if, at any time subsequent to naturalization, the persons are separated from the military under other than honorable conditions. The legislation provides that such military members may have their naturalization revoked only if the person had not served honorably in the military for a period or periods aggregating five years. Since the legislation lowers the peace time military service requirement from three years to one year before a lawful permanent resident military member may apply for naturalization without having met any requirement of continuous residence in the U.S., the legislation also provides that such military members may have their naturalization revoked if they are separated from the military under other than honorable conditions and had not served honorably in the military for a period or periods aggregating five years.

• The Departments of Homeland Security, State, and Defense must make available naturalization applications, interviews, filings, oaths, and ceremonies through United States embassies, consulates, and as practicable, U.S. military installations overseas.

• Under prior law, active-duty military members could apply for naturalization during a named period of hostilities without having met any requirement of continuous residence in the U.S. The legislation extends this privilege to members of the Selected Reserve of the Ready Reserve.

• Spouses, children, and parents of U.S. citizens who served honorably in active duty status and died as a result of injury or disease incurred in or aggravated by combat, may retain their status as immediate relatives for purposes of receiving immigration benefits.

• An alien who was the spouse, child, or parent of an alien who served honorably in active duty, died as a result of injury or disease incurred in or aggravated by combat and was granted posthumous citizenship, shall be considered immediate relatives of a U.S. citizen for the purpose of receiving immigration benefits (regardless of whether the service member had previously petitioned for family-sponsored immigrant status for them).

• The public charge ground of inadmissibility is waived for aliens seeking such posthumous immigration benefits.

• Under prior law, the surviving spouse of a U.S. citizen who died during a period of honorable service in active duty could naturalize without having met any requirement of continuous residence in the U.S. The legislation extends this privilege to surviving spouses of military members granted posthumous citizenship.

Legislative History.—On May 6, 2003, Chairman F. James Sensenbrenner, Jr., introduced H.R. 1954. On May 7, 2003, the Judiciary Committee ordered H.R. 1954 reported as amended by a voice vote. On May 19, 2003, the Judiciary Committee reported H.R. 1954 (H. Rept. No. 108–111). On June 4, 2003, the House passed H.R. 1954 under suspension of the rules by a vote of 414–5. On June 12, 2003, the Senate Judiciary Committee ordered H.R. 1954 reported to the Senate with an amendment in the nature of a substitute. On November 24, 2003, the President signed into law H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004 (Public Law No. 108–136), §§ 1701–05 of which contained language representing a compromise between the House and Senate versions of H.R. 1954.

H.R. 2620, the "Trafficking Victims Protection Reauthorization Act of 2003"

Summary of Immigration Provisions.—The Trafficking Victims Protection Act of 2000 created a new nonimmigrant "T" visa for persons who: (1) are victims of severe forms of trafficking in persons (sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such acts has not attained 18 years of age, or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery), (2) are in the U.S. or at a U.S. port of entry on account of such trafficking, (3) have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or have not attained 15 years of age, and (4) would suffer extreme hardship involving unusual and severe harm upon removal from the U.S. The TVPA also permitted the Department of Homeland Security to grant a T visa, if necessary to avoid extreme hardship, to the victim's spouse, children, and parents if the victim is under 21 years of age, and the victim's spouse and children if the victim is 21 years of age or older. The Act precluded anyone from receiving a T visa if there was substantial reason to believe that the person had committed an act of a severe form of trafficking in persons. It also placed an annual cap of 5,000 on T visas for trafficking victims and permitted DHS to waive certain grounds of inadmissibility. The TVPA permitted DHS to adjust the status of a T visa holder to that of a permanent resident if the alien: (1) has been physically present in the U.S. for a continuous period of at least three years since the date of admission, (2) has throughout such period been a person of good moral character, and (3) has, during such period, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or would suffer extreme hardship involving unusual and severe harm upon removal from the U.S. It also permitted DHS to adjust the status of the victim's spouse, parent, or child, if admitted with a T visa, to that of an alien lawfully admitted for permanent residence. An annual cap of 5,000 was placed on adjustments of status for trafficking victims.

H.R. 2620 made the following modifications to the immigration provisions of the TVPA:

• Aliens can qualify for T visas by cooperating with state and local law enforcement agencies as well as federal agencies.

• The age of aliens who can receive T visas without cooperating with law enforcement authorities was raised from under 15 years of age to under 18 years of age.

• If an alien receiving a T visa is under 21, unmarried siblings under 18 would have been added to the list of family members who can also receive T visas (and subsequently permanent residence).

• The public charge ground of inadmissibility will not apply to aliens seeking T visas.

Legislative History.—On June 26, 2003, Representative Christopher H. Smith introduced H.R. 2620. The Committees on International Relations and the Judiciary received referrals on H.R. 2620 on June 26, 2003. On September 22, 2003 the Subcommittee on Immigration and Claims was discharged from further consideration of the bill. H.R. 2620 was marked up and reported by the Judiciary Committee on September 24, 2003 with an amendment, by a voice vote. (H. Rept. 108–264, Part II) The Committee on International Relations also filed a report on September 5, 2003. (H. Rept. No. 108–264, Part I) The Senate passed H.R. 2620 on December 9, 2003, without amendment, by unanimous consent. The President signed H.R. 2620 on December 19, 2003 and the bill became Public Law No. 108–193.

S. 1685, Extending and Expanding the Basic Pilot Program for Employment Eligibility Verification

Summary.—The Immigration Reform and Control Act of 1986 made it unlawful for employers to knowingly hire or employ aliens not eligible to work and required employers to check the identity and work eligibility documents of all new employees.

Title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 instituted three employment eligibility confirmation pilot programs for volunteer employers that were to last for four years. Under the "basic pilot program," the proffered Social Security numbers and alien identification numbers of new hires would be checked against Social Security Administration and Immigration and Naturalization Service records in order to weed out fraudulent numbers and thus to ensure that new hires are genuinely eligible to work.

The basic pilot program was commenced in November 1997 and was set to expire in November 2001. Public Law 107–128 extended its operation through November 2003. The program was required to operate in, at a minimum, 5 of the 7 states with the highest estimated population of illegal aliens.

IIRIRA required the INS to submit a report on the basic pilot program after the end of the third and fourth years the program was in effect. The report found that "an overwhelming majority of employers participating found the basic pilot program to be an effective and reliable tool for employment verification"—96% of employers found it to be an effective tool for employment verification; and 94% of employers believed it to be more reliable than the IRCA-required document check. The report found that 64% of employers agreed that the number of unauthorized workers who applied for jobs decreased when the basic pilot system was used.

"[E]mployees were largely satisfied with the services provided by INS and the Social Security Administration." Of the employees who contacted local SSA or INS offices as part of the verification process, 95% who visited SSA offices said that their work authorization problem was resolved in a timely, courteous, and efficient manner, as did 90% who visited INS offices.

The report found that the "Social Security Administration and INS are currently capable of handling either of the voluntary programs described here [a voluntary program open to employers nationwide or an enhanced voluntary program in selected states], or some other program of limited scope." However, it recommended against "a mandatory or large-scale program."

S. 1685 extends operation of the pilot programs for an additional 5 years and requires that it be made available to employers nationwide no later than December 1, 2004. The bill also extends the regional center pilot program of the fifth employer preference "investor visa" program. To encourage economic development through the immigrant investor visa program, Congress created a five year temporary pilot program in 1993 that set aside 3,000 immigrant visas each year for aliens who invested at least $500,000 in "designated regional centers." A regional center is "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment." The bill extends the pilot program through September 2008 and allows DHS to process investor visa petitions involving regional centers expeditiously as compared to non pilot program investor visa petitions. Finally, the bill required GAO to conduct a study of the investor visa program.

Legislative History.—On June 5, 2003, Representative Ken Calvert introduced H.R. 2359. On September 24, 2003, the Judiciary Committee ordered H.R. 2359 reported with an amendment by a vote of 18–8. On October 7, 2003, the Judiciary Committee reported H.R. 2359 to the House (H. Rept. No. 108–304, Part I). On October 28, 2003, the Judiciary Committee filed a supplemental report on H.R. 2359 (H. Rept. No. 108–304, Part II). On the same date, the House failed to pass H.R. 2359 under suspension of the rules by a vote of 231–170 (a two-thirds vote being required). On September 30, 2003, Senator Charles Grassley introduced S. 1685. On November 6, 2003 the Senate Judiciary Committee ordered S. 1685 reported to the Senate with an amendment in the nature of a substitute, and reported the bill without a written report. On November 12, 2003, the Senate passed S. 1685 as amended by unanimous consent. On November 19, 2003, the House passed S. 1685 under suspension of the rules by a voice vote. On December 3, 2003, the President signed S. 1685 into law (Public Law No. 108–156).

H.R. 4417, Modifying Certain Deadlines Pertaining to Machine-Readable, Tamper-Resistant Entry and Exit Documents

Summary.—The visa waiver program allows tourists from low-risk nations to visit the United States without having to first procure visas. The program facilitates more than ten million foreign visits to the U.S. each year. However, allowing aliens to come to the U.S. without first being interviewed for visas poses certain

risks. Thus, the Enhanced Border Security and Visa Entry Reform Act in 2002 required that countries wishing to participate in the visa waiver program begin to issue passports with biometric features. These high-security passports will ensure that their bearers are the individuals to whom they were issued and will be harder to alter or counterfeit than conventional passports.

The Enhanced Border Security and Visa Entry Reform Act established an October 26, 2004, deadline by which countries participating in the visa waiver program had to begin issuing biometric passports. Nationals of visa waiver countries wanting to enter the U.S. pursuant to the program who had passports issued after this date would also have to present biometric passports. While some countries would have been able to meet the October deadline, many others would not. Our embassies would not be able to handle the sudden rush of applicants, and tourism to the U.S. could be seriously disrupted. H.R. 4417 extends the deadline to October 26, 2005. This prevented a severe disruption to international tourism to the U.S. However, by keeping a strict October 2005 deadline, the bill will keep the necessary pressure on those countries who have unfortunately been slow to add biometrics.

Legislative History.—On May 20, 2004, Chairman F. James Sensenbrenner, Jr., introduced H.R. 4417. On June 14, 2004, the House passed H.R. 4417 under suspension of the rules by a voice vote. On July 22, 2004, the Senate passed H.R. 4417 by unanimous consent. On August 9, 2004, the President signed H.R. 4417 into law (Public Law No. 108–299).

H.R. 4011, the "North Korean Human Rights Act of 2004"

Summary of Immigration Provisions.—The legislation reiterates that North Koreans who have not availed themselves of the right to South Korean citizenship are eligible to be considered as refugees and asylees, and directs the Secretary of State to facilitate the submission of refugee applications by North Koreans and to report to Congress on how the Secretary has done so.

Legislative History.—On March 23, 2004, Representative James Leach introduced H.R. 4011. On March 31, 2004, the Committee on International Relations ordered H.R. 4011 reported as amended by unanimous consent. On May 4, 2004, the Committee on International Relations reported H.R. 4011 (H. Rept. No.108–478, Part I). On July 16, 2004, the Judiciary Committee was discharged from further consideration of H.R. 4011. On July 21, 2004, the House passed H.R. 4011 under suspension of the rules by a voice vote. On September 28, 2004, the Senate passed H.R. 4011 by unanimous consent. On October 4, 2004, the House passed H.R. 4011 (as amended by the Senate) under suspension of the rules by a voice vote. On October 18, 2004, the President signed H.R. 4011 into law (Public Law No. 108–333).

H.R. 4306, Amending the Immigration and Nationality Act to Improve the Process for Verifying an Individual's Eligibility for Employment

Summary.—All employers in the United States are required to complete and retain an Employment Eligibility Verification Form (Form I–9) for each individual they hire for employment. On the

form, the employer must identify the documents presented by the employee to establish identity and employment authorization and verify that the employer has reviewed those documents. The form is not filed with the government, but instead the employer must keep the I–9 in paper form or on microfiche or microfilm, either for three years after the date of hire or for one year after employment is terminated, whichever is later. The form must be made available for inspection by federal officials from U.S. Immigration and Customs Enforcement, the Justice Department's Civil Rights Division, and the Department of Labor. Government officials who want to inspect those documents must provide the employer with three business days' notice of such inspection. The documents must be made available for inspection either at the place where the request was made or elsewhere if the employer and government officials agree.

H.R. 4306 allows employers to electronically complete and store I–9 forms. This will facilitate employer preparation and storage and government inspection of those documents.

Legislative History.—On May 6, 2004, Representative Chris Cannon introduced H.R. 4306. On September 14, 2004, the Subcommittee on Immigration, Border Security and Claims reported the bill to the Judiciary Committee as amended by a voice vote. On September 30, 2004, the Judiciary Committee ordered H.R. 4306 reported by a voice vote. On October 5, 2004, the Judiciary Committee reported H.R. 4306 (H. Rept. No. 108–731). On October 6, 2004, the House passed H.R. 4306 under suspension of the rules by a voice vote. On October 11, 2004, the Senate passed H.R. 4306 by unanimous consent. On October 30, 2004, the President signed H.R. 4306 into law (Public Law No. 108–390).

S. 2302, Improving Access to Physicians in Medically Underserved Areas

Summary.—Aliens who participate in medical residencies in the United States on "J" exchange program visas must generally leave the U.S. at the conclusion of their residencies to reside abroad for two years before they can be eligible for permanent residence or status as "H–1B" or "L" visa nonimmigrants. The intent behind this policy is to encourage American-trained foreign doctors to return home to improve health conditions and advance the medical profession in their native countries. In 1994, Congress created a waiver (until June 1, 1996) of the two-year foreign residence requirement when requested by state departments of public health for foreign doctors who commit to practicing medicine for no less than three years in a geographic area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals. The number of foreign doctors who could receive the waiver was limited to 20 per state. In 1996, Congress extended the waiver to June 1, 2002. In 2002, Congress extended the waiver until June 1, 2004. At the same time, the numerical limitation on waivers was increased to 30 per state.

S. 2302 extends the waiver until June 1, 2006. The bill also continues the practice of allowing foreign doctors receiving a waiver to receive H–1B nonimmigrant status regardless of the annual H–1B visa quota (whether they are sponsored by a state or federal agency). It allows foreign doctors receiving a waiver to work in medi-

cally-underserved areas in either primary care or specialty medicine. The bill allows five of each state's 30 waivers to go to doctors who would practice medicine in areas not designated by the Secretary of Health and Human Services as having a shortage of health care professionals, if the doctors receiving the waivers would practice in facilities that serve patients who reside in areas designated by the Secretary as having a shortage of health care professionals. Finally, where a physician seeking a waiver will practice specialty medicine, there must be a shortage of health care professionals able to provide services in the specialty to the patients who will be served by the physican.

Legislative History.—On April 7, 2004, Senator Kent Conrad introduced S. 2302. On May 20, 2004, Representative Jerry Moran introduced H.R. 4453, the Access to Rural Physicians Improvement Act of 2004. On June 3, 2004, the House Subcommittee on Immigration, Border Security and Claims reported H.R. 4453 to the Judiciary Committee by a voice vote. On September 30, 2004, the House Judiciary Committee ordered H.R. 4453 reported as amended by a voice vote. On October 5, 2004, the House Judiciary Committee reported H.R. 4453 (H. Rept. No. 108–730). On October 6, 2004, the House passed H.R. 4453 under suspension of the rules by a voice vote. On October 7, 2004, the Senate Judiciary Committee ordered S. 2302 reported as amended to the Senate and reported the bill without a written report. On October 11, 2004, the Senate passed S. 2302 by unanimous consent. On November 17, 2004, the House passed S. 2302 under suspension of the rules by a vote of 407–4. On December 3, 2004, the President signed S. 2302 into law (Public Law No. 108–441).

L–1 Visa and H–1B Visa Reform Act

Summary.—The H–1B Visa Program. "H–1B" visas are available for workers coming temporarily to the United States to perform services in a specialty occupation. Such an occupation is one that requires "theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."

The Immigration Act of 1990 set a 65,000 annual cap on H–1B visas. The American Competitiveness and Workforce Improvement Act of 1998 increased the cap to 115,000 in 1999 and 2000 and 107,500 in 2001, after which the cap would revert to 65,000. The American Competitiveness in the Twenty-First Century Act of 2000 increased the cap to 195,000 in 2001 through 2003, after which it reverted back to 65,000. AC21 also provided that aliens who are employed at institutions of higher education or at nonprofit or governmental research organizations do not count against the cap and are not limited by the cap.

Because of the need of employers to bring H–1B aliens on board in the shortest possible time, the H–1B program's mechanism for protecting American workers is not a lengthy pre-arrival review of the availability of suitable American workers (such as the labor certification process necessary to obtain most employer-sponsored immigrant visas). Instead, an employer files a "labor condition application" with the Department of Labor making certain basic at-

testations (promises) and the Department then investigates complaints alleging noncompliance.

There are six attestations a petitioning employer must make:

• The employer will pay H–1B aliens wages that are the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of employment, and the employer will provide working conditions for H–1B aliens that will not adversely affect those of workers similarly employed. Pursuant to ACWIA, an employer must offer an H–1B alien benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as the employer offers to American workers, and universities and certain other employers only have to pay the prevailing wage level of employees at similar institutions.

• There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

• At the time of the filing of the application, the employer has provided notice of the filing to the bargaining representative of the employer's employees in the occupational classification and area for which the H–1B aliens are sought, or if there is no such bargaining representative, the employer has posted notice in conspicuous locations at the place of employment.

• The application will contain a specification of the number of aliens sought, the occupational classification in which the aliens will be employed, and the wage rate and conditions under which they will be employed.

• Pursuant to ACWIA, two attestations—the no-lay off attestation and the recruitment attestation—apply to "H–1B dependent employers" (generally 15% or more of whose workforces are composed of H–1B aliens) and to employers who have been found to have wilfully violated the rules of the H–1B program. The H–1B dependent employers (+15%) are subject to these attestations in those instances where they petition for aliens without masters degrees in their specialties or who will not be paid at least $60,000 a year. These two attestations expired at the end of fiscal year 2003. The no-lay off attestation prohibits an employer from laying off an American worker from a job that is essentially the equivalent of the job for which an H–1B alien is sought (involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same areas of employment) during the period beginning 90 days before and ending 90 days after the employer files a visa petition for the alien. The recruitment attestation requires an employer to have taken good faith steps to recruit American workers (using industry-wide standards) for the job an H–1B alien will perform and to offer the job to any American worker who applies and is equally or better qualified than the alien.

Departmental investigations as to whether an employer has failed to fulfill its attestations or has misrepresented material facts in its application are triggered by complaints filed by aggrieved persons or organizations (including bargaining representatives). Investigations can be conducted where there is reasonable cause to believe that a violation has occurred. Pursuant to ACWIA, the

Labor Department can investigate an employer using the H–1B program without having received a complaint from an aggrieved party in certain circumstances where it receives specific credible information that provides reasonable cause to believe that the employer has committed a willful failure to meet conditions of the H–1B program, has shown a pattern or practice of failing to meet the conditions, or has substantially failed to meet the conditions in a way that affects multiple employees. In addition, ACWIA allows the Labor Department to subject an employer to random investigations for up to five years after the employer is found to have committed a willful failure to meet the conditions of the H–1B program.

The Labor Department enforces all aspects of the program except in instances where an American worker claims that he should have been offered a job instead of an H–1B alien. In such cases, an arbitrator appointed by the Federal Mediation and Conciliation Service will decide the issue.

An employer is subject to penalties for failing to fulfill the attestations and for making a misrepresentation of material fact in an application. Potential penalties include back pay, civil monetary penalties of up to $1,000 per violation (up to $5,000 per willful violation, and up to $35,000 per violation where a willful violation was committed along with the improper layoff of an American worker), and debarment from the H–1B program for from one to three years. Whistleblower protection is provided to employees.

ACWIA established a $500 fee per alien for all employers except universities and certain other institutions. The funds go principally for scholarship assistance for low-income students studying mathematics, computer science, or engineering, for federal job training services, and for administrative and enforcement expenses. The fee was raised to $1,000 in 2000, and primary and secondary school employers were exempted. The fee expired at the end of fiscal year 2003.

The L Visa Program. L visas are available for "intracompany transferees"—they allow employees working at a company's overseas branch to be shifted to the company's worksite in the United States. A visa is available to an alien who within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year (or for six months in certain circumstances) by a firm or an affiliate or subsidiary and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate in a capacity that is managerial, executive, or involves specialized knowledge.

"Specialized knowledge" with respect to a company is special knowledge of the company product and its application in international markets or an advanced level of knowledge of processes and procedures of the company.

The visas are good for up to five years for aliens admitted to render services in a capacity that involves specialized knowledge and for up to seven years for aliens admitted to render services in a managerial or executive capacity.

To make the L visa program more convenient for established and frequent users of the program and to reduce adjudicatory costs,

"blanket" L visas are available. If an employer meets certain qualifications—it (1) is engaged in commercial trade or services, (2) has an office in the U.S. that has been doing business for at least one year, (3) has three or more domestic and foreign branches, subsidiaries, or affiliates, and (4) has received approval for at least 10 L visa professionals during the past year or has U.S. subsidiaries or affiliates with annual combined sales of at least $25 million or has a U.S. workforce of at least 1,000 employees—it can receive pre-approval for an unlimited number of L visas from the INS. Individual aliens seeking visas to work for the company simply have to go to a U.S. consular office abroad and show that the job they will be employed in qualifies for the L visa program and that they are qualified for the job.

The L–1 Visa and H–1B Visa Reform Act

As to L visas:

• An alien who will serve in a capacity involving specialized knowledge of his employer and who will be stationed primarily at the worksite of another employer shall not be eligible for L visa status if he will be controlled and supervised principally by the other employer or the placement of the alien at the worksite of the other employer is essentially an arrangement to provide labor for hire, rather than a placement in connection with the provision of a product or service for which specialized knowledge of the petitioning employer is necessary.

• The continuous service requirement for an employee shall be one year uniformly.

• The Department of Homeland Security will maintain certain statistics regarding usage of the L visa program.

• The Inspector General of DHS shall investigate the vulnerabilities and potential abuses of the L visa program. Then, an L Visa Interagency Task Force shall review and seek to implement the recommendations of the Inspector General.

• A new fraud prevention and detection fee of $500 will be assessed against employers for each alien receiving L visa status. One-third of the fee receipts will be provided to the Secretary of State for programs and activities at U.S. embassies and consulates abroad to prevent and detect H–1B and L visa fraud. One-third of the fee receipts will be provided to the Secretary of Homeland Security for the same purposes. One third of the fee receipts will be provided to the Secretary of Labor to assist enforcing the H–1B program.

As to H–1B visas:

• The $1,000 fee is permanently reauthorized and increased to $1,500 (except that it shall be $750 for each petition by an employer with no more than 25 full-time equivalent employees in the U.S.). Certain changes will be made to the percentage of fee receipts provided to various recipients and to the purposes for which the receipts shall be utilized.

• The no-lay off attestation and the recruitment attestation are permanently reauthorized.

• The prevailing wage required to be paid to an H–1B worker shall be 100% of the wage determined as the prevailing wage (prior regulations called for the payment of 95%). In addition, where the

Secretary of Labor uses a governmental survey to determine the prevailing wage, such survey shall provide at least four levels of wages commensurate with experience, education, and the level of supervision.

• The Secretary of Labor's investigative authority is expanded in that the Secretary may initiate an investigation of any employer of H–1B aliens if the Secretary has reasonable cause to believe that the employer is not in compliance with the H–1B program requirements.

• An employer is considered to have complied with the H–1B program requirements, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith attempt to comply. However, this will not apply if the Department of Labor has explained the basis for the failure, and the employer has not corrected the failure voluntarily within 10 business days, or if the employer has engaged in a pattern or practice of willful violations of the H–1B program requirements.

• An employer that is found to have violated the H–1B program's prevailing wage requirements shall not be assessed fines or other penalties if the manner in which the employer calculated the prevailing wage was consistent with recognized industry standards and practices, unless the employer has engaged in a pattern or practice of willful violations of the H–1B program requirements.

• Aliens who have earned master's or higher degrees from U.S. institutions of higher education will not count against the annual H–1B cap and are not limited by the cap, until the number of such aliens during a fiscal year exceeds 20,000.

• A new fraud prevention and detection fee of $500 will be assessed against employers for each alien receiving H–1B visa status, as with the L visa program.

Legislative History.—On December 8, 2004, the President signed H.R. 4818, the Consolidated Appropriations Act, 2005, into law (Public Law No. 108–447). Title IV of Division J of the Act contains the L–1 Visa and H–1B Visa Reform Act.

H.R. 2655, Amending the Irish Peace Process Cultural and Training Program Act of 1998

Summary.—In 1998, the Irish Peace Process Cultural and Training Program Act was enacted. The purpose of the program was to allow adults between the ages of 18 and 35 years old who lived in disadvantaged areas of Northern Ireland and designated border counties of Ireland that were suffering from sectarian violence and high unemployment to enter the United States to develop job skills and conflict resolution abilities in a diverse, cooperative, peaceful, and prosperous environment, so that they could return to their homes better able to contribute toward economic regeneration and the Irish peace process. Up to 4,000 qualifying aliens (and their spouses and minor children) could be admitted each year and they could stay in the U.S. for up to three years. The program was set to sunset on October 1, 2005. In the 107th Congress, the program was extended until October 1, 2006.

H.R. 2655 extends the program for another two years until October 1, 2008. It also makes a number of changes to the program. These changes are mainly designed to ensure that the aliens grant-

ed admission are those truly economically disadvantaged young adults the program was designed to help. These changes include requirements that the program participants be citizens of the United Kingdom or the Republic of Ireland, not have degrees from higher education institutions, be at least 21 years of age, and have been unemployed for at least one year and resident in Northern Ireland or the designated border counties for at least 18 months.

The bill also makes changes to the program to help ensure that the aliens return to Ireland to foster economic development and peace. The bill reduces the duration of the visa term from three years to two years. The bill also requires that aliens admitted under the program return home for two years before they can apply for an immigrant visa, permanent residence, or another nonimmigrant visa. The Secretary of Homeland Security may waive this requirement if departure from the U.S. would impose exceptional hardship upon the alien's U.S. citizen or permanent resident spouse or child, or the admission of the alien is in the public or national interest of the U.S.

Legislative History.—On June 26, 2003, Representative James Walsh introduced H.R. 2655. On July 25, 2003, the Judiciary Committee ordered H.R. 2655 reported by a voice vote. On September 4, 2003, the Judiciary Committee reported H.R. 2655 (H. Rept. No. 108–260, Part I). On October 7, 2003, the House passed H.R. 2655 under suspension of the rules by a voice vote. On November 19, 2004, the Senate passed H.R. 2655 with an amendment by unanimous consent. On November 20, 2004, the House passed H.R. 2655 (as amended by the Senate) by unanimous consent. On December 10, 2004, the President signed H.R. 2655 into law (Public Law No. 108–449).

LEGISLATION PASSED BY THE JUDICIARY COMMITTEE

H.R. 775, the "Security and Fairness Enhancement for America Act of 2003"

Summary.—The diversity visa program was designed to provide nationals of countries with low levels of immigration to the United States the opportunity to apply for immigrant visas. The program is also called the "visa lottery" because the winners are determined through a computer-generated random drawing. In 2004, 10 million applications were submitted. Between 90,000 and 110,000 lottery "winners" are selected, who apply for 50,000 available visas. H.R. 775 would have terminated the diversity program because of a variety of complaints about it.

Legislative History.—On February 13, 2003, Representative Bob Goodlatte introduced H.R. 775. On September 14, 2004, the Subcommittee on Immigration, Border Security and Claims reported H.R. 775 to the Judiciary Committee by a vote of 5–3. On September 30, 2004, the Judiciary Committee ordered H.R. 775 reported by a vote of 18–8. On October 6, 2004, the Judiciary Committee reported H.R. 775 (H. Rept. No. 108–747). No further action was taken on H.R. 775.

FEDERAL CHARTERS

Subcommittee policy on new Federal charters

On March 6, 2003, the Subcommittee on Immigration, Border Security, and Claims adopted the following policy concerning the granting of new federal charters:

The Subcommittee will not consider any legislation to grant new federal charters because such charters are unnecessary for the operations of any charitable, non-profit organization and falsely imply to the public that a chartered organization and its activities carry a congressional "seal of approval," or that the Federal Government is in some way responsible for its operations. The Subcommittee believes that the significant resources required to properly investigate prospective chartered organizations and monitor them after their charters are granted could and should be spent instead on the Subcommittee's large range of legislative and other substantive policy matters. This policy is not based on any decision that the organizations seeking federal charters are not worthwhile, but rather on the fact that federal charters serve no valid purpose and therefore ought to be discontinued.

This policy represented a continuation of the Subcommittee's informal policy, which was put in place at the start of the 101st Congress and has been continued every Congress since, against granting new federal charters to private, non-profit organizations.

A federal charter is an Act of Congress passed for private, non-profit organizations. The primary reasons that organizations seek federal charters are to have the honor of federal recognition and to use this status in fundraising. These charters grant no new privileges or legal rights to organizations. At the conclusion of the 104th Congress, approximately 90 private, non-profit organizations had federal charters over which the Judiciary Committee has jurisdiction. About half of these had only a federal charter, and were not incorporated in any state and thus not subject to any state regulatory requirements.

Those organizations chartered more recently are required by their charters to submit annual audit reports to Congress, which the Subcommittee sent to the General Accounting Office to determine if the reports comply with the audit requirements detailed in the charter. The GAO does not conduct an independent or more detailed audit of chartered organizations.

PRIVATE BILLS

During the 108th Congress, the Subcommittee on Immigration, Border Security and Claims received referral of 28 private claims bills, 1 private claims resolution, and 72 private immigration bills. The Subcommittee held no hearings on these bills. The Subcommittee recommended one private claims bill, one private claims resolution, and 4 private immigration bills to the full Committee. The Committee ordered 1 private claims bills and 4 private immigration bills reported favorably to the House. The House passed no private claims bills and 4 private immigration bills reported by the Committee. The private immigration bills were passed by the Senate and signed into law by the President. One Senate private claims bill was passed by unanimous consent by the House (a

House bill for the same individual had passed the House in a prior Congress) and signed into law by the President. No bills were still pending in the Senate at the close of the 108th Congress. A private House Resolution ordered reported by the Subcommittee to the full Committee was not taken up by the Committee prior to the close of the 108th Congress.

OVERSIGHT ACTIVITIES

Oversight list of hearings

Alien Removals under Operation Predator, March 4, 2004 (Serial no. 73)

US–VISIT—A Down Payment on Homeland Security, March 18, 2004 (Serial no. 77)

Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives, May 18, 2004 (Serial no. 88)

Families and Businesses in Limbo: The Detrimental Impact of the Immigration Backlog, June 17 and 23, 2004 (Serial no. 96)

The Diversity Visa program, and its Susceptibility to Fraud and Abuse, April 29, 2004 (Serial no. 82)

Funding for Immigration in the President's 2005 Budget, February 25 and March 11, 2004 (Serial no.68)

Oversight of public safety and immigration consequences of local immigration "sanctuary" policies

In the first session, the Subcommittee on Immigration, Border Security, and Claims examined local sanctuary policies, which bar local employees from contacting the immigration authorities about suspected illegal aliens. In particular, the Subcommittee reviewed such policies in the context of a brutal sexual assault that occurred in New York City on December 19, 2002, carried out by a group of aliens, some of whom had prior criminal records at the time of the assault.

At a February 27, 2003 hearing, the Subcommittee reviewed the immigration and criminal histories of the aliens charged in connection with the December 1992 assault, assessed whether any of those individuals should have been removed from the United States prior to that assault, and examined whether a New York City policy, which purportedly bars city police officers from contacting immigration authorities about arrested aliens, may have prevented New York City Police Department (NYPD) officers from contacting the Immigration and Naturalization Service (INS) about four of those aliens, each of whom had been previously arrested by the NYPD. In addition, the effect of other, similar policies on law enforcement efforts was reviewed at the hearing.

The Subcommittee continues to investigate the effect of sanctuary policies on alien criminality in the United States.

Oversight of nonimmigrant student tracking: implementation and proposed modifications

The Subcommittee has closely overseen the implementation of the system for tracking alien students in both the 107th and 108th Congresses. On Wednesday, April 2, 2003, the Subcommittee held a hearing on the INS's implementation of its student tracking pro-

gram, and proposed modifications to that program. This was a follow-up to the Subcommittee's September 18, 2002 oversight hearing on "The Immigration and Naturalization Service's (INS's) Implementation of the Foreign Student Tracking Program." At the April 2, 2003, hearing, the Subcommittee examined INS's and ICE's implementation of the program, Student Exchange Visitor Information System (SEVIS), as well as some possible modifications to the system that might improve its performance and functionality in the war against terrorism.

As the SEVIS system neared implementation, concerns were raised about its effectiveness, and about the INS's ability to have the system fully functional by the January 30, 2003 deadline. In particular, prior to implementation, schools complained that they would not be able to comply with the January 30, 2003 deadline, for a variety of reasons.

Schools also assailed the INS's unilateral decision to discontinue SEVIS seminars. The INS had previously hired EDS, which developed the student database, to set up daylong information seminars on college campuses and elsewhere to show officials how to use the system and to field questions and concerns about it. The schools deemed these to be "training sessions." In July 2002, the INS discontinued those seminars to focus on technical support.

INS had previously argued that it had decided to eliminate the contracted services to focus resources on getting SEVIS up and running as quickly and effectively as possible, and that it wanted to put more effort toward ensuring that institutions filed the proper paperwork with the immigration agency on time. As Janis Sposato, former Assistant Deputy Associate Commissioner at the INS and the then-head of the SEVIS implementation team stated at the September hearing:

> For the last year INS had regularly scheduled SEVIS seminars across the country to provide the information necessary to schools and programs to begin implementation of SEVIS. With the publication of the proposed rule and the deployment of the system in July, INS transitioned from providing informational seminars to providing a SEVIS-dedicated, national call center with multiple tiers to answer technical and policy-related questions.

Furthermore, Sposato asserted, the INS SEVIS team frequently participated in national and regional level educational conferences to inform the schools about SEVIS.

The Department of Justice's Inspector General also voiced concerns about the system. The Inspector General had overseen SEVIS since it was in its development stage, as part of his larger review of how the INS tracked foreign students. His findings with respect to SEVIS were included in a May 2002 report on the issuance of visas to two of the September 11 hijackers and in testimony before the Subcommittee at the September 2002 student-tracking hearing.

At the hearing, the Inspector General stated that SEVIS would help solve many of the problems that the INS has had in the past in tracking foreign students, and would help the INS detect I–20 fraud by schools and students. He concluded, however, that despite these improvements, there were problems in the INS's student pro-

gram that the implementation of SEVIS would not solve. He also asserted that the INS was failing to address problems that his office had identified in its May 2002 report.

In addition to pre-implementation concerns about the system, critics also had concerns and complaints about the system after it was implemented. While January 30, 2003 was the original deadline for schools to enroll in SEVIS to produce Forms I–20 for foreign students, that deadline was extended to February 15, 2003, because of a performance problem in the system that had slowed the response times for system users. Even after that date, however, some system users and the Inspector General were critical of the system. Many of those criticisms mirrored concerns that the schools and the Inspector General voiced prior to the January 2003 implementation of the system.

The schools and other users of SEVIS complained that the system suffered from numerous problems, which fell into three general categories.

The first category of problems were technical in nature. Schools asserted that they encountered numerous technical difficulties and glitches in using the system. The second purported problem with SEVIS was that the system did not provide real-time access to data. The system is intended to link ICE, the State Department, and the schools in real time. In testimony before the House Science Committee, however, Dr. David Ward of ACE testified that some embassies and consulates had found that it took a week or longer for them to access data entered into SEVIS, meaning that students who had traveled to consular posts for their visas were turned away because the consular officers had no SEVIS record for the students.

The third category of complaints that academic officials raised about SEVIS concerned user support. Reflecting pre-implementation complaints, Ward testified before the Science Committee that the INS failed to provide adequate training to either INS employees or the academic community on use of the system. Schools officials also complained about the SEVIS users' guides and help desk. In addition to the complaints raised by academic officials about glitches in SEVIS, the Inspector General released a report on March 17, 2003, that identified additional deficiencies in the INS's implementation of the system.

The INS had guaranteed that it would process, by January 30, 2003, all I–17 applications submitted by November 15, 2002. The Inspector General concluded, however, that the INS failed to complete its reviews for those schools in time to comply with the enrollment deadline for SEVIS, processing by that date only 1,963 (69%) of the 2,856 applications that were submitted between September 25, 2002, and November 15, 2002. There were delays in processing those applications, he determined, because of insufficient field adjudication staffing; technical problems related to the adjudicators' password access to SEVIS; and the failure of the INS contract investigators to conduct on-site reviews in a timely manner and to transmit the schools' supporting documentation to the INS adjudicators.

The Inspector General also concluded in that report that SEVIS was not "fully implemented" by January 1, 2003, as required by the

USA PATRIOT Act, and that the system was "only technically available" by that date. Arguing that "system implementation can[not] be viewed as separate from program implementation," he asserted that "SEVIS has not been fully implemented because the program elements essential to ensuring the integrity of the system are not fully in place." He identified these elements, inter alia, as: (1) ensuring that sufficient resources are devoted to the foreign student program; (2) ensuring that only bona fide schools are provided access to SEVIS; (3) ensuring that schools are completely and accurately entering information on their foreign students into SEVIS in a timely manner; (4) adequately training Department of Homeland Security (DHS) employees and school representatives; (5) establishing procedures for using SEVIS data to identify noncompliant and fraudulent operations; and (6) following up when SEVIS data indicated fraud in a school's program.

The Inspector General drew upon his review of SEVIS to support his conclusion that these elements were not fully in place. He found that the INS's oversight of its contractors was inadequate to ensure that schools with access to SEVIS are bona fide.

The Inspector General also found that the INS's review of the schools' recordkeeping and internal controls was insufficient to ensure that the schools were complying with SEVIS recordkeeping requirements. The INS relied on contract investigators to conduct compliance audits to ensure that schools had appropriate internal controls in place and were entering data into SEVIS accurately, completely, and in a timely manner. The report concluded that this process was not sufficient to identify a school's internal control weaknesses, however, which, the Inspector General concluded, could lead to fraud, or to determine that a school's SEVIS records are complete, accurate, and current.

In addition, the Inspector General argued that the SEVIS database would not be fully functional as a monitoring system until August 1, 2003 by which date schools were required to enter information on their continuing (as opposed to newly admitted) foreign students into the system. Until then, the Inspector General found, the INS would continue to operate what he termed an "inadequate, paper-based system to monitor continuing foreign students."

The Inspector General further found that the INS needed to ensure that it uses SEVIS to identify foreign students who are not complying with their visa requirements, as well as schools and other individuals engaging in visa fraud. While the INS had taken steps to achieve these goals, he found, due to limited resources the INS was unable to investigate all foreign students who fail to enroll or who fail to leave the United States after completing their studies, sham schools, and designated school officials (DSOs) who commit foreign student visa fraud at legitimate schools.

Finally, the Inspector General found that the transfer of INS to DHS created a significant management challenge for the foreign student program and SEVIS implementation. Pursuant to the Homeland Security Act of 2002, responsibility for SEVIS implementation was shifted from the Immigration Services Division at the INS to ICE. The Inspector General concluded that "[c]lose oversight is required to ensure a smooth transition," and that it was essential that the individuals responsible for certifying schools in ICE be

quickly identified,[1] so that they could receive sufficient training and guidance.

ICE defended the system at the April 2003 hearing. It argued that since implementation, SEVIS has performed very effectively, and that while it has not been without issues, most problems are quickly addressed and resolved. "For example," it asserted, "the intermittent inability of some schools to access the system and users timing out before they could complete their desired task had occurred. In early March, the system was taken off line for 15 minutes and the necessary fixes were made to remedy these performance problems." The only "outstanding issue" identified by ICE had to do with "an issue known as 'bleeding,' the unintended merging of data from one school to another which results in the printing of legitimate student information at the wrong institution." The agency witness stated that ICE had hired an additional contractor specifically to address this issue, which it termed an issue of "privacy, not accuracy."

The agency promised to continue to enhance its internal training of DHS officers on the system, as well as to improve the SEVIS training provided to schools. Looking ahead to a constant two-year cycle of school certification reviews, it asserted that it would be "examining the best ways to verify the bona fides of currently certified schools and new schools seeking to use the system." With the system fully implemented and all schools enrolling foreign students required to utilize the system, ICE averred that it would "continue to examine and re-examine methods used to verify compliance with record-keeping, reporting, and other SEVIS requirements."

Finally, responding to concerns in the school community that SEVIS errors were responsible for unwarranted enforcement actions being taken against students, the ICE witness "assure[d] the public that [ICE] does not rely solely on information in SEVIS." Rather, he stated, "[p]rior to taking an enforcement action, ICE agents review each individual case, including interviewing potential violators, to confirm that action is warranted."

An additional concern about SEVIS that was only briefly addressed at the April 2003, hearing was funding for the system. Section 641 of IIRIRA mandated the imposition of a fee on students and exchange visitors to fund the design, development, and operation of SEVIS. This payment feature has been one of the most controversial parts of the system.

On December 21, 1999, the INS published a proposed rule to implement this provision. Following the language in § 641(e) of IIRIRA, which required that "an approved institution of higher education and a designated exchange visitor program" collect and remit the fee to the Attorney General, the proposed regulation identified these two groups as the designated fee collectors. The INS received over 4,600 comments to the proposed regulation, most of which opposed the role of educational institutions and exchange visitor programs as fee collectors, which, commentators asserted, was an inappropriate role for such institutions.

[1] Prior to the break-up of the INS, I–17 applications were adjudicated by district office benefits personnel, who were moved in the transition to CIS. As noted, responsibility for SEVIS has been shifted to ICE, which has jurisdiction over interior immigration enforcement.

In response, the INS worked with Congress, the State Department, and stakeholder groups to amend §641(e). The resulting legislation was included in § 404 of the Visa Waiver Permanent Act, Pub. L. No. 106–396 (2000). The three most significant changes in that section were: (1) the removal of the requirement that educational institutions and exchange visitor programs collect SEVIS fees, and the requirement that aliens pay fees directly to the Attorney General; (2) a requirement that the alien pay the fee before being classified as an F, J, or M nonimmigrant; and (3) a reduction in the fee amount for certain J–1 nonimmigrants, specifically au pairs, camp counselors, and summer work or travel participants.

INS subsequently submitted a fee collection rule to OMB, but withdrew that rule following the passage of the USA PATRIOT Act, which authorized funding to accommodate the fast track implementation of SEVIS. The SEVIS fee was eventually instituted on September 1, 2004, after several inquiries from the Subcommittee. There are currently multiple methods of paying the SEVIS fee: Internet payments via debit or credit card; checks or money orders drawn on a U.S. account; third-party payments; via Western Union Quick Pay service; and through bulk-filing payments for certain exchange visitor program sponsors.

The Subcommittee continues to oversee the implementation of SEVIS.

Oversight of John Allen Muhammad, passport fraud, and the Western Hemisphere passport exception

In the 108th Congress, the Subcommittee examined the so-called Western Hemisphere exception, which relieves United States citizens of the statutory requirement that they carry passports when entering the country from, and leaving to, a country in the Western Hemisphere other than Cuba, in the context of the John Muhammad case.

Muhammad, convicted in connection with one of a series of shootings in the National Capital area that occurred in October 2002, lived in Antigua from March 2000 to May 2001. In a December 31, 2002, report, an Antiguan government-sponsored "Task Force" headed by island attorney John Fuller determined that Muhammad primarily supported himself in Antigua by selling forged U.S.-travel documents, including birth certificates and driver's licenses, to travelers seeking admission to the United States. On May 13, 2003, the Subcommittee held a hearing to examine Muhammad's document-fraud activities in Antigua, his apparent exploitation of the Western Hemisphere exception in the course of those activities, and ways to address that loophole.

According to a government website reviewed by the Subcommittee in May 2003, a U.S. citizen returning to the United States from elsewhere in the Western Hemisphere may present either a passport or a secondary document, i.e., a certified copy of the citizen's birth certificate or baptismal record, along with a current photo identification issued by a government agency (such as a state identification card, driver's license, or military identification card). A citizen without a certified copy of his or her birth certificate may present a U.S. state- or federal-government-issued birth record or

baptismal record, accompanied by a government-issued identification.

Logically, aliens withdrawal visas may try to persuade themselves as citizens to gain entry. Another reason for a traveler to present false documents at a port of entry is to evade scrutiny on entry. The computer system used by inspectors at the ports of entry accesses a number of databases, including "lookout" databases, which target specific individuals who are sought, for questioning or otherwise, by various law-enforcement agencies. The class of individuals who might present false documents for this reason crosses the spectrum of immigration statuses, from citizens to lawful permanent residents to inadmissible aliens. It is reasonable to presume that smugglers and others who cross the border frequently for illicit purposes would employ a number of aliases for this reason.

The effectiveness of the INS's screening of secondary citizenship documents was examined by the GAO Office of Special Investigations (OSI) twice, once in late 2002 at the Senate's request, and again at the Committee's request in May 2003. In those operations, GAO created counterfeit identification documents to establish fictitious identities for the agents "by using off-the-shelf computer graphic software that is available to any purchaser." The agents then entered the United States from Jamaica, Barbados, Mexico, and Canada using the fictitious names, counterfeit driver's licenses, and birth certificates. As Robert Cramer, Managing Director of OSI described the results at the May 2003, Subcommittee hearing: "CBP staff never questioned the authenticity of the counterfeit documents, and our agents encountered no difficulty entering the country using them."

In apparent contradiction to the information contained on the aforementioned government website, Cramer asserted that "people who enter the United States are not always asked to present identification." He concluded that "[a]lthough [CBP] inspects millions of people who enter the United States and detects thousands of individuals who attempt to enter illegally each year, the results of our work indicate that [CBP] inspectors are not readily capable of detecting counterfeit identification documents."

The large number of documents that could be processed for inspector undoubtedly complicates CBP's Task. The number of documents that may be presented to enter the United States increases exponentially when birth certificates are factored in. Specifically, more than 8,000 different authorities in the United States issue birth certificates, and more than 50,000 different versions of birth certificates are issued by states, counties and municipalities. Even if baptismal certificates are removed from the equation, therefore, the number of acceptable documents that could be presented by a traveler seeking entry as a U.S. citizen is far greater than any one inspector, or any one port, could possibly have familiarity with, let alone a working knowledge of.

The second factor that makes it difficult to screen purported U.S. citizens at ports of entry with secondary documents, or no documents at all, has to do with the checks that inspectors perform at those ports. At a January 30, 2003, Senate hearing, Ron Malfi of OSI described those checks as "negative checks," explaining: "[I]f

the name is fictitious and there is no record of those names or those identifiers and it is not someone that has a record using that name, nothing is going to bounce out of these computers." Therefore, an inspector cannot rely on the inspections databases to identify mala fide travelers using false names, or to verify claims of U.S. citizenship.

Thus, when a traveler at a port of entry carrying only secondary documents, or no documents at all, seeks entry into the United States as a U.S. citizen, the inspector at the port of entry must largely rely on his or her judgment and instincts in evaluating the traveler's demeanor in determining whether the traveler is bona fide, or rather is using an alias or making a false claim to U.S. citizenship. As the INS witness explained at the January 30, 2003 hearing: "[I]nspectors rely heavily on their experience. Some people call it a sixth sense, or a gut feeling." While relying on an inspector's sixth sense may be reasonable with seasoned inspectors, such reliance may be misplaced when the inspector is newly hired, as approximately 26% of all immigration inspectors were in FY 2002.

The advanced level of readily available technology that is used by document counterfeiters is a third factor that makes it difficult for inspectors at the ports of entry to screen citizenship claims. Such technology, coupled with the lack of uniform standards for birth certificates and driver's licenses in the United States, would make it difficult if not impossible for even the most well-informed, observant and conscientious inspector to identify every counterfeit document that is presented for inspections purposes.

Such factors do not impede an inspector who is reviewing a U.S. passport, on the other hand. While a passport, like any document, is susceptible to counterfeiting or alteration, it is a fairly standardized document with a number of security features that make it more difficult to counterfeit, and that make alterations more apparent. The passport is printed on high-quality safety paper with a watermark. The passport pages use multicolor split-fountain printing and solvent-sensitive inks. Each visa page is unique, having a different U.S. state seal in the center. The document is machine readable, conforming to standards set by the International Civil Aviation Organization. These features make it easier for an immigration inspector to identify a mala fide traveler with a counterfeit, altered, or photo-substituted passport. Accordingly, the Western Hemisphere exception to the passport rule makes it easier for U.S. citizens and aliens to avoid scrutiny at the ports of entry, by making it easier for them to use non-verifiable aliases. These factors also make it easier for inadmissible aliens to falsely claim U.S. citizenship.

From the Committee's investigation, it is apparent that Muhammad took advantage of the Western Hemisphere exception in assisting aliens who were inadmissible to the United States. The vulnerability of the exception to terrorist fraud and abuse was raised by the 9/11 Commission in its final report. This loophole was addressed in § 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004, which will limit the documents that may be presented for admission purposes.

Oversight of lateral repatriation and the release of non-Mexican nationals along the southwest border

In the fall of 2003, at the request of Members of the Texas delegation, Subcommittee staff reviewed two policies affecting south Texas: lateral repatriation and the release of nationals from countries other than Mexico (OTMs) on their own recognizance (OR) in Laredo.

In FY 2003, 7,787 OTMs were arrested in the Laredo sector, as were 62,734 Mexicans. The five largest sending countries for OTMs were Honduras, El Salvador, Brazil, Guatemala, and Nicaragua. Most of these OTMs, those who were not criminals, were released on their own recognizance.

Due to an October 2003 change in local court policy on the detention of OTMs prosecuted for illegal entry, however, some 64 such aliens were subject to release shortly after they were convicted. ICE was able to detain 24 of those aliens, but the remaining 40 were released on their own recognizance as a group.

When this fact became public, it raised concerns in the local community, and prompted the Subcommittee's review of the release of OTMs into Laredo. Staff was sent to assess the situation in Laredo, and to consult with local officials and DHS in Texas. In San Antonio, DHS informed staff that additional bedspace would be secured for the OTMs apprehended along the Texas border, and that procedures would be put in place to ensure that their cases could be adjudicated quickly.

On August 10, 2004, DHS announced plans to expand the expedited removal program beyond the ports of entry, in part to address OTM release issues like those experienced in Laredo. DHS expanded expedited removal to cover OTMs who have entered illegally, and who are encountered within 100 miles of the border and within two weeks of entry. This will allow such aliens to be removed more quickly than in traditional immigration proceedings, freeing up detention bedspace.

At the same time, the staff explained "lateral repatritation," whereby Mexican nationals apprehended in Arizona were sent to south Texas for deportation. Critics in the affected Texas communities complained that Border Patrol was "dumping" aliens from Arizona into the area, and argued that the aliens that the Border Patrol removed were likely to try to reenter at the "safer" crossing points along the Texas-Mexican border than they would in Arizona. In addition, there were concerns that the aliens would attempt illegal entry into Laredo, as well as concerns about the impact that the surge of aliens into Laredo would have on Nuevo Laredo, across the river. All of these concerns were apparently heightened by reports that aliens to be repatriated were seen deplaning in shackles, raising fears that the aliens were criminals.

The staff investigation has revealed that the aliens repatriated across the Mexican border did not, in fact, attempt to reenter the United States at any substantive level. Of the 1700 Mexican nationals repatriated at Laredo, only 14 were caught while reentering. Given the fact that the Border Patrol estimates that it apprehends 90% of the aliens attempting illegal entry through Laredo, this would mean that less than 1% of the aliens repatriated tried to reenter. Nor were any of the aliens transported known to

be criminal aliens. Rather, while the aliens were shackled during their flights, this was only done to protect the detention officers and crew.

Despite its successes, CBP has not attempted to reinstate the lateral repatriation program. In its place, on June 29, 2004, the agency announced a bilateral agreement between the United States and Mexico for a voluntary interior repatriation pilot program. Under this interior repatriation program, Mexican nationals are given the option of returning to their place of origin when apprehended for illegal entry. As the CBP press release puts it: "Beginning in July [2004], illegal Mexican migrants may volunteer for the program, returning home via charter aircraft from Tucson, Arizona to either Mexico City or Guadalajara. Bus transportation will then be provided to their final destination."

Oversight of alien gang activity

Published reports have indicated that there are upwards of 750,000 gang members in the United States. Gang membership has reportedly been on the increase among aliens, particularly aliens from Mexico and Central America, and published reports in 2004 linked alien gang members to a series of shocking crimes across the country.

In June 2004, Chairman Hostettler wrote to ICE, asking for that agency's response to the growing alien gang problem. ICE has subsequently announced that in 2005, it will be launching a nationwide gang-enforcement program.

Immigration backlog

On June 17 and 23, 2004, the Subcommittee on Immigration, Border Security, & Claims held an oversight hearing on how the Department of Homeland Security (DHS), U.S. Citizenship & Immigration Services (USCIS), plans to fulfill the President's commitment to reduce the immigration and naturalization petition and application backlog (hereinafter, "application backlog") to a six-month response time by FY 2006.

The President has targeted a universal six-month processing time standard by FY 2006 for all immigration petitions filed. Towards this goal he proposed a $500 million initiative to attain this standard and Congress has so far accommodated this initiative.

The Subcommittee examined the experience of family members and business owners suffering because the immigration backlog has prevented legitimate aliens from entering the U.S. or gaining proper status to be with their relatives or work for an American company. The hearing also reviewed the history of the now 6 million petition backlog (as of the end of FY 2003), USCIS problems in keeping current with the application flow, and several possible solutions to assist in reducing in the backlog.

The petition backlog has had a wide ranging impact on families, business, and security issues in the U.S. Families have had to wait longer to see their loved ones come to the United States while waiting overseas for a petition approval. Even if their family member is in the U.S., and they have been able to extend their immigration status while waiting for a decision on the petition from USCIS, they are essentially in limbo status and unable to make long term

decisions. Many family-based applicants feel they are unable to leave the U.S. on business or to visit family overseas until their immigration petition is adjudicated (although humanitarian parole is available, this requires more paperwork added to backlog work).

Businesses have difficulty taking on new employees without knowing whether they will be employed long-term, and yet they feel compelled to do so in the case of some aliens who possess skills otherwise unavailable in the U.S. Large American multinationals have found it increasingly difficult to act efficiently in shutting down offices in international locations, opening others, and moving their international personnel to and from the U.S. to conduct business. International business partners or potential partners or clients are increasingly frustrated from their inability to fly freely to speak to American counterparts in the U.S. Further, businesses have been unable to timely fill positions with foreign personnel when market demands have required an immediate, if not temporary, increase in certain types of personnel (e.g., the "dot com" boom). In some cases, these businesses lose competitiveness because of the immigration backlog factor.

From FY 1992 through FY 1994, the Immigration & Naturalization Service (INS) was "current" in processing immigration applications within a reasonable time. The number of applications pending at INS increased from 656,000 in FY 1992 to 1.8 million in FY 1995. By the end of FY 2003, the applications backlog increased to over six million (including 662,000 naturalization applications as of June 2004). Current processing times can take years (e.g., a naturalization N–400 application in Columbus, Ohio, currently takes two years).

At the hearing, USCIS revealed its formal plan to reduce response times on immigration petitions to six months or less by FY 2006 (and thus, "eliminate" the backlog). The Department of Homeland Security Ombudsman unveiled his formal report on USCIS operations required by the Homeland Security Act of 2000.

On May 13, 2004, Chairman F. James Sensenbrenner, Jr., and Ranking Member John Conyers, Jr., sent a joint letter to Comptroller General, requesting an audit of the funds appropriated to reduce the immigration application backlog, and examine the management issues, employee incentives, accountability, incompatible dual missions, legal restraints, technology issues, and funding issues that related to the application backlog. GAO accepted the request and the examination is ongoing.

The Committee staff also discussed reforms with the Department of Homeland Security (DHS) Ombudsman including pilot programs he advanced. The DHS Ombudsman has a specific mandate in the Homeland Security Act of 2002, § 452, to assist individuals and employers in resolving problems with USCIS and to propose changes in the administrative practices of USCIS. Thus, the Ombudsman has proposed and is about to institute pilot programs with the cooperation of DHS (but USCIS's position on the pilot program is uncertain). One pilot program will provide an interview to immediate relatives of U.S. citizens as soon as a petition is filed. Currently, these aliens may obtain work authorization immediately, but their application may not be acted upon for years while waiting its turn in the backlog (at which time, it may be determined that a genuine

family relationship does not exist). The pilot would try to immediately adjudicate new petitions instead of taking the oldest cases in the backlog (the traditional method). Such a method of handling long adjudication delays was employed with asylum cases in the mid 1990s. The Ombudsman submitted his report before the end of June.

Various parties have suggested better computer systems and data management as a critical part of improving immigration petition processing. As mentioned above, USCIS is developing e-filing, but remains tied to its outdated Computer Linked Application Information Management System (CLAIMS4) system for handling data management. The CLAIMS4 system is not capable of producing statistics on the backlog for particular types of immigration petitions (e.g., those which must wait for an available visa number versus those which do not).

The Department of Labor (DOL) also has a backlog of immigration applications, which the Subcommittee has monitored. DOL handles the "labor certifications" for H–2 nonimmigrant visas and some employment-based immigrant visas (green cards), and the less stringent "labor attestations" for H–1 nonimmigrant visas (approvals go to USCIS for final adjudication on immigration status approval). This process is designed to protect American workers from adverse wage impacts or conditions stemming from foreign worker influx. Part of the process is handled at the state level where processing has been slow; however, Department of Labor has also had difficulty keeping their applications for labor certifications and labor attestations current. DOL has published interim final rules (regulations) to consolidate the processing at two centers and remove state agencies from the process (except in setting "prevailing wages" for comparison). The Committee staff obtained planning information and received a number of briefings on this subject.

The Committee also sent staff, at State Department expense, to examine the National Visa Center and the National Passport Center, located in New Hampshire, and the USCIS Service Center at St. Albans, Vermont. The trip exposed different types of processing for immigration applications and other backlog issues.

Alien sexual predators

The Subcommittee held a hearing on removing alien sexual predators under "Operation Predator" in March 2004. According to a recent study on "The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico," funded in part by the Department of Justice, between 300,000 and 400,000 U.S. children are victims of some type of sexual exploitation every year.[2] Police officials have reported that, at the border, it is easier for sexual predators of children to avoid prosecution.[3] The State Department has reported that 20,000 people are trafficked into the U.S. each year for the

[2] Edwards, *U.S. child-sex exploitation an 'epidemic,' study finds,* The Washington Times, p. A7, Sept. 11, 2001.

[3] Valedez, *Border helps cloak sexual predators,* El Paso Times, June 15, 2001, p. 4B.

purpose of sexual exploitation.[4] ICE launched an initiative in July 2003 to identify, investigate, and arrest alien child predators. That initiative, "Operation Predator," draws on the expertise of the several legacy organizations merged into ICE, including legacy Customs Service and the enforcement wing of the Immigration & Naturalization Service (INS). Operation Predator personnel utilize ICE intelligence, investigative, detention and removal and cyber resources (including ICE CyberSmuggling Center in Fairfax, VA) to accomplish its goals.

Since inception, the "Operation Predator" initiative has resulted in over 2000 arrests nationwide. "Operation Predator" concentrates on Internet child predators, human traffickers, and other sexual predators. As part of the effort, ICE has established a single web portal to access all publicly available state addresses provided under Megan's Law. Megan's Law, enacted in 1996, requires state and local agencies to release information to communities about violent sex offenders when then move into a neighborhood. The law was named after seven-year-old Megan Kanka who was raped and murdered by Jesse K. Timmendequas, a convicted sex offender in Hamilton Township, N.J.

ICE agents are stationed abroad to work with foreign governments and their foreign law enforcement counterparts to enhance coordination and cooperation on related crimes across borders. Similarly, ICE is working with INTERPOL to enhance foreign government intelligence on criminal child predators. It has created a National Child Victim Identification System with other agencies. ICE also works with non-governmental organizations such as World Vision to fight child sex trafficking, and recently signed a Memorandum of Understanding with National Center for Missing & Exploited Children (NCMEC) for NCMEC to perform child identification functions for ICE.

ICE's Detention and Removal Division has prioritized the removal of criminal aliens with a history of sexual offenses. These are aliens who have been convicted but who subsequently evaded efforts to remove them from the U.S. If apprehended, these aliens are held without bond. To assist in this effort, ICE publishes a "Most Wanted" Criminal Aliens List on its website, and staffs a 24 hour tip-line at 1–866–DHS–BICE.

ICE's Institutional Removal Program identifies removable alien inmates at federal prisons and ensures that they are identified prior to release and removed after serving their sentence. Similarly, ICE has sought to partner with state prison officials to ensure the same treatment at state prisons. Further, ICE has begun notifying foreign governments to notify them of any deportations of aliens with child sex histories, and hopes to obtain information from foreign governments on sexual predators seeking to enter the U.S.

In December, the Subcommittee submitted a bipartisan request to the General Accountability Office (GAO) to examine the fact that USCIS has found prior felons with histories of sexual abuse against minors and spouses petitioning for foreign spouses with children.

[4] Trafficking in Persons Report, June 2003, "A recent U.S. Government estimate indicates * * * between 18,000 and 20,000 of those victims are trafficked into the United States." http://www.state.gov/r/pa/ei/rls/21475.htm

US VISIT entry exit system

The Subcommittee held a hearing on March 18, 2004 on the US VISIT program. US VISIT is a Congressionally mandated entry-exit system that collects biometric data and utilizes previously collected data at U.S. ports of entry and at U.S. Consulates abroad. DHS met its statutory deadline for implementing US VISIT entry screening by initiating the program at all airports and seaports just after the new year began, but the exit screening portion has not been completed. The data collected at entry is compared with databases containing names, biometric data, and information regarding known or suspected terrorists, criminals, visa-ineligible aliens and immigration violators. The biometric data taken at the time of visa issuance abroad will be compared to fingerprints and pictures taken at the U.S. port of entry. This assures that the person to whom the State Department issued a visa is also the person who is applying for entry at the port of entry. It also provides a second check of watchlists to ensure aliens entering the U.S. are not ineligible for entry.

Aliens issued visas are processed through the US VISIT program at the port of entry by presenting a passport with the U.S. visa. They are asked to place their index fingers on a scanner which captures the fingerprint for entry into a watchlist database. The immigration inspector also takes a quick digital photo of the alien's face which also goes into the US VISIT database. This data, as well as the data contained in the visa and passport, are checked against watchlists that have been connected through US VISIT. If an alien's identity or visa eligibility is in question, that person is sent to secondary inspection for further investigation. In the middle of the year, Visa Waiver Program (VWP) aliens were no longer excepted from US VISIT, but Border Crossing Card (BCC) holders and Canadians continue to be.

VWP countries are required to begin production of biometric passports by October 2005. The State Department has developed a "chip" passport that is scheduled to go into production late this year. The new passport will contain a chip that is capable of containing biometric data, including fingerprint and facial recognition data. To remain in the VWP program, countries must follow suit in producing these passports in the near future. VWP entrants can only visit the United States for up to 90 days as a visitor or for temporary business (essentially, as a B1/B2 visa holder with shorter timeframes). In 2003, 13.5 million aliens entered the U.S. on the VWP program.

Processing times only increased by 15 additional seconds per person admitted. There are no reported incidents of backlogs in processing travelers through the airports, although there are occasional complaints about providing a fingerprint. Delays may be experienced when US VISIT is implemented at the land borders later this year and as an exit system. Nevertheless, there are signs that the fingerprinting process of US VISIT actually increases the efficiency of processing travelers through inspection. The gradual progression of the program continues to be an important oversight issue.

The Data Management Improvement Act (DMIA) created the current basis of US VISIT. The Illegal Immigration Reform & Im-

migrant Responsibility Act of 1996 (IIRIRA), § 110, initially required the development of an entry-exit system that would track non-immigrants who overstayed their visas. After the 9–11 terrorist attacks, the Enhanced Border Security and Visa Reform Act of 2002 set a deadline of October 26, 2004, for installing equipment and a system to make biometric comparisons of entry and exit data from non-immigrant aliens. However, it is the DMIA that amended § 110 of IIRIRA to require the basic system to collect electronic data on the arrival of aliens with the capability of matching that data with an alien's departure data. It also requires equipment to access the data at ports of entry and exit. IIRIRA originally set the development of an entry-exit system by September 20, 1998. DMIA set December 31, 2003, as the deadline for implementation of the entry-exit system at airports and seaports. Implementation of the system is to take place at the 50 busiest land borders one year later. By December 31, 2005, the entry-exit system should be implemented at all ports of entry.

The Subcommittee corresponded with the Under Secretary for Homeland Security Asa Hutchison to clarify what would be considered to be a complete entry-exit system, as little has been done to complete the exit portion of the system.

Alien smuggling

On May 18, 2004, the Subcommittee held a hearing on "Pushing out the Border on Alien Smuggling: New Tools and Intelligence Initiatives."

From FY 1997 to FY 1999, the number of apprehended aliens smuggled into the U.S. increased nearly 80%. Government estimates indicate 500,000 illegal aliens are smuggled into the United States by organized crime networks. Of those illegal immigrants who entered the U.S. in 1999, 500,000 are estimated to be Mexican nationals, 225,000 were estimated to be Central American nationals, and 30,000 to 40,000 were smuggled in from Asia. Worldwide, the United Nations estimates 4 million people are smuggled annually, amounting to a $7 billion enterprise (USG estimates reach $9.5 billion). In the past fifteen years, alien smuggling has developed into big business run by well organized and sophisticated criminal organizations reaching from distant Ukraine, Vietnam, and China. The U.S. Department of State estimated that the primary target for smugglers is the United States and that thousands of people are constantly in the smuggling pipeline waiting in holding facilities and waiting for either new routes to open up or fraudulent documents to be produced.

Since its creation, DHS/ ICE has conducted a number of successful operations to interdict alien smugglers. Operation ICE Storm was unleashed in November of 2003 and included the formation of a federal, state, and local agencies task force to uncover criminal organizations that have turned to smuggling human beings for profit in the Phoenix, Arizona sector. Phoenix has large highway systems and an international airport, making it an attractive hub for alien smugglers; it has also seen a large increase in the violence and deaths associated with smuggling organizations. One feature of the program was the creation of a Most Wanted list for alien smugglers with a toll free line for reporting.

ICE will discuss this program and similar programs (such as internal transportation checks) during its testimony. It will also discuss the increasingly violent and organized nature of alien smuggling rings. ICE may also discuss the need for better tools to investigate alien smuggling, such as increased penalties for alien smuggling.

ICE addresses alien smuggling at the national and international levels and will focus its efforts in intelligence-based investigations against major violators. Specifically, ICE will target smuggling organizations with ties to countries that support terrorists. A 1997 legacy INS strategy paper called for INS intelligence to optimize its ability to collect, analyze, and disseminate intelligence information to identify targets for enforcement, and for its international components to conduct operations in cooperation with foreign governments.

The State Department, Diplomatic Security Bureau (DS), has funded some anti-alien smuggling operations, including the staffing of 25 new positions to combat fraud and gather information on alien smuggling operations. In the past, DS has worked with ICE on a number of anti-smuggling anti-fraud efforts, and this relationship needs to develop further to combat alien smuggling before it reaches the U.S. It would like to testify on the need to proactively coordinate an international response by working with foreign law enforcement agencies and committing more resources to gathering intelligence on large smuggling rings and stopping alien smuggling abroad. Transnational resources at U.S. embassies and consulates abroad need to be developed and devoted to disrupting the well-organized criminal rings (small or large scale) profiting off the smuggling of aliens into the U.S.

DS is the most far-flung federal law enforcement agency, with 32,500 employees assigned to more than 170 countries. The DS Criminal Investigative Division conducts criminal investigations into large scale visa and passport fraud. It coordinates all requests from other federal, state, and local law enforcement agencies for criminal investigative assistance overseas, including requests for assistance in investigations involving fugitive alien smuggling and parental abductions. DS likes to point out that by definition alien smuggling involves more than one country. DS has experience with U.S. law enforcement authorities operating abroad and is cognizant of issues involving sovereignty and the application of foreign laws and, further, in dealing with the capabilities and limitations of local law enforcement authorities in the foreign country. DS has experience with individuals associated with terrorist organizations who have been known to use existing smuggling organizations and document vendors to facilitate their travel in various parts of the world. Consequently, DS at the State Department works with DOJ and DHS to minimize threats to our national security.

The President, under NSPD–22 (classified) has directed agencies to develop strategic plans to combat alien smuggling (and trafficking). He has also provided $50 million to "rescue victims" of trafficking and alien smuggling, some of which goes to foreign local law enforcement for anti-alien smuggling efforts.

Major projects on the border include traffic checkpoints along highways, city patrols and transportation checks, and anti-smug-

gling investigations. Since 1994, CBP has made more than 11.3 million apprehensions nationwide. In FY 2001, CBP apprehended almost 1.26 million persons for illegally entering the country (a 24% decline from the previous year). Data has indicated an overall decline in apprehensions (from a high of 1.6 million in fiscal year 2000, down to a 28-year low of less than 1 million in fiscal year 2002). Border Patrol also maintains relationships with local communities, including ranchers, farmers and other law enforcement entities to assist in interdicting alien smugglers. At the hearing, CBP will discuss its major initiatives and the tools it requires to combat alien smuggling.

The Department of Justice, Criminal Division, Domestic Security Section, is a major player involved in the prosecution of alien smugglers. In 2000, the Domestic Security Section created the Alien Smuggling Task Force. The Civil Rights Division, with the United States Attorneys' Offices, prosecutes alien smuggling cases involving sweat shops, domestic servitude, and agricultural workers. As part of the effort, DOJ works with other U.S. agencies, such as the FBI, DHS, the Labor Department, and the State Department, as well as with foreign authorities. DOJ has assisted foreign countries in removing officials collaborating with alien smuggling organizations, and assisted foreign counterparts to initiate their own prosecutions (of those the U.S. would like to see prosecuted). DOJ would like to expand international immigration enforcement efforts.

On January 20, 2004, Chairman John N. Hostettler of the Subcommittee on Immigration, Border Security & Claims, sent a letter to the Comptroller General, David Walker, requesting a study on the federal government response to alien smuggling. This study is ongoing.

Diversity visas

On April 29, 2004, the Subcommittee held a hearing on "The Diversity Visa Program, and Its Susceptibility to Fraud and Abuse." On January 28, 2004, Chairman John N. Hostettler of the Subcommittee on Immigration, Border Security, & Claims, sent a letter to the Secretary of State, Colin Powell, requesting clarification on several points in the U.S. Department of State's Inspector General Report (#ISP–CA–03–52) on the Diversity Visa Program. The request included data required under regulation, the results of a workload study when completed, and a legal clarification on the applicability of Immigration & Nationality Act (INA) § 212(a)(6)(C) when multiple applications for one applicant is discovered.

On June 1, 2004, Subcommittee Chairman John N. Hostettler of the Subcommittee on Immigration, Border Security & Claims, sent a letter to the Secretary of State, Colin Powell, requesting further clarification of various issues after the oversight hearing was conducted. The State Department explained its program to transform the entire diversity visa program into an electronic based system that could combat fraud more easily (the system was put in place).

Citizenship

In July, the Committee requested an explanation from the State Department on how it records the dates of entry, exit, and accredi-

tation for foreign diplomats with full privileges and immunities, and how it consequently makes determinations on the citizenship status of children born to such foreign diplomats. There is a concern that the Protocol Office relies heavily on present and past records held by foreign embassies rather than maintaining accurate records of its own. The State Department has only provided an interim response.

In September, the Committee inquired into whether Certificates of Loss of Nationality had been issued by the State Department for "American Taliban" as required under law and regulation, whether such certificates had been approved, and whether any legal analysis had been conducted on this subject. The legal strategy for several high-profile cases might have changed depending on whether the certificates had been issued, including the cases of Yaser Esam Hamdi, John Phillip Walker Lindh, Jose Padilla, Adham Amin Assoun, Mohamed Hesham Youssef, and possibly future similar cases. The State Department has sent an interim response. The issue was again raised when "Azzam the American," suspected to be Adam Yahiye Gadahn, issued threats of mass carnage against Americans in October.

Redesign of the naturalization exam

In April, the Committee asked for clarification of a statement from a U.S. Citizenship and Immigration Services (USCIS) official essentially setting the pass rate for the new exam at the same level as current pass/fail rate. The Committee expressed concerns that the redesign of the exam would be a tailored to ensure the same pass/fail rate rather than ensure that applicants meet the statutory requirements to obtain citizenship. The Committee staff also attended workshops, researched legislative history, and provided advice on the direction of the design of the exam. Many stakeholders have expressed differing opinions about the direction of the examination. CRS was requested to conduct research on the English language and civics requirements of the naturalization process.

Passports

On January 16, 2004, Chairman John N. Hostettler of the Subcommittee on Immigration, Border Security, and Claims sent a letter to Secretary of State Colin Powell, requesting information on the integrity of recently issued Venezuelan passports. Various news agencies reported that Venezuelan President Chavez made two controversial appointments to head passport issuance and national identity document issuance. These appointees had ties to certain Ba'ath Party members and had reportedly provided identity documents to radical Islamic groups. The State Department responded with a letter that included a recent cable to all consular posts entitled, "New Policy for Venezuelan Passports."

In April, the Committee requested the State Department's position on eliminating the "Western Hemisphere" passport exception (the exception to the rule based in statute that requires all American to enter the country with a valid U.S. passport). Based on past hearings, the Government Accounting Office (GAO) recommended elimination of the exception. State Department responded that would wait for recommendations from the 9/11 commission.

Adoption

In February, the subcommittee sent a letter to inquire about particular adoption cases held up in Guatemala because of investigations requiring DNA checks. The State Department responded to these concerns. The Committee staff met with interest groups about adoption issues.

Application fraud

In July, the Subcommittee requested a study into immigration application fraud across several agencies. The Department of Homeland Security (DHS) Ombudsman Report, required by § 452 of the Homeland Security Act of 2002, verifies testimony by USCIS Director Aguirre, that fraudulent petitions significantly add to the backlog. One recent discussion with the DHS Ombudsman revealed that G–22 workload reports from USCIS district offices indicated an over 40% rejection rate at the New York offices for immigrant "green card" applications (a strong indicator of fraudulent applications), and similar high rejection rates in other offices. The DHS Ombudsman has reported that findings on application rejection rates suggest that fraud is more prevalent as the backlog grows and prevents investigation of bogus applications. In meetings with USCIS, anti-fraud officers have indicated that petitioners and unscrupulous immigration attorneys have become ever more bold in submitting fraudulent applications (in one case, an attorney submitted thousands of fraudulent applications).

Within DHS, application and lower level fraud is handled by USCIS as it comes before an adjudicator. However, if the processing reveals a larger fraud conspiracy, the matter is sent to Immigration & Customs Enforcement (ICE) as with all large scale immigration investigations.

On February 11, 2004, Chairman John N. Hostettler of the Subcommittee on Immigration, Border Security, and Claims sent a letter to Assistant Secretary of State for Legislative Affairs, Paul Kelly, to request a copy of a cable sent to all consular posts instructing consular officers on how to look out for "L" petition fraud. "L" fraud was expected to increase as the "H–1B" visa cap was reached for FY 2004 and FY 2005. The State Department provided the instruction cable shortly after. Staff requested CRS information on anti-fraud budgets of USCIS, DOL, State Department, and ICE.

Consular malfeasance

In April, the Committee clarified a request to the Government Accountability Office (formerly and at the time, the Government Accounting Office) to expand its inquest (from 2003) into specified consulates with possible consular malfeasance problems, to examine all posts. Visa fraud rings have been uncovered in the past two years at consular posts in Sri Lanka, Mexico, Qatar, Guyana, and the Czech Republic.

Visa security issues

Staff conducted a courtesy call on Ambassador Arcos to research and discuss issues related to the staffing of DHS personnel to oversee visa processing at various consular posts abroad. DHS is currently having difficulty increasing staffing abroad and an Inspector

General report indicates DHS has added little additional security to the process so far. It also indicated that DHS has done little to assert its authority, given in the Homeland Security Act, § 428, and a consequent Memorandum of Understanding with the State Department, over visa policy. As a result, the Committee began asserting its concern about visa policy by requesting various studies, investigations and policy changes directly (some of which are discussed elsewhere in this report).

In July, the Subcommittee requested the Government Accounting Office examine problems with combating application fraud across different agencies. Various government reports indicate immigration application fraud is rampant and that anti-fraud coordination problems still exist across agencies. Fraudulent visa applications present a security risk.

In August the Committee requested information on worldwide visa refusals based on "immigrant intent," especially with regard to visa refusals at consular posts located in Saudi Arabia. The State Department complied and the data is under examination. Part of the examination led to a request for a State Department Inspector General inquiry into the way "immigrant intent" refusals are made and a bipartisan request to examine what safeguards are in place to protect visa application adjudicators.

The Subcommittee requested and received copies of all visa policy cables sent to all consular and diplomatic posts setting standard operating procedures. It also requested and received information on the Technology Alert List and investigated numerous issues related to visa security checks for security, terrorism, law enforcement, technology transfer, and economic espionage issues. This oversight prodded certain agencies to expedite the process without degrading related security. Much of this oversight was conducted in a classified setting. Field visits were made to the FBI records warehouse and computer processing centers.

The Committee reminded the Central Intelligence Agency that § 359 of the Intelligence Authorization Act for Fiscal Year 2004 (Pub. L. No. 108–177) required their agency to submit a report on the operations of the Terrorist Threat Integration Center (TTIC). CIA responded to the request.

In December, the Subcommittee sent an inquiry into the fact that the U.S. Embassy in Mexico City houses two machines to produce Border Crossing Cards (BCCs). All other BCCs are produced at a central location in the United States.

The Subcommittee staff requested CRS conduct research on what other countries (particularly the U.K., Australia, and Canada) have done to attract more foreign students, what measures they have put in place to guard against economic espionage and technology transfer, and what foreign students in these countries can do to remain in these countries permanently.

Legal interpretations

The Subcommittee requested a Government Accounting Office (GAO) study of the sharp increase in "J–1" cultural exchange summer work travel program." The program has tripled the number of aliens entering under the "J–1" summer hire program from 1998–2003; the current number (approximately 87,000) exceeds the an-

nual limit for H–2B issuances for temporary workers. There is concern that the program has not been monitored sufficiently to prevent abuses, that J–1 category aliens are not entering primarily for cultural exchange purposes, and that rules regarding this category do not provide sufficient safeguards or monitoring.

In June, the Committee wrote to USCIS and requested a legal clarification of the "P–1" visa category requirements. Specifically, the request was to examine whether minor league players should be eligible for admission under the P–1 category (even though they would be eligible to become a legal permanent resident).

A staff member to spoke at the National Academy of Sciences regarding "immigrant intent" visa denials (§ 214(b) of the Immigration and Nationality Act (INA)). Applying the denials to student visas has come under scrutiny as many student visa holders eventually apply for work visa status or otherwise gain permanent residency in the United States. Most graduate engineering students seeking a doctorate in the country are aliens and the academic community believes continued high-technology research is dependent on a continued flow of foreign students. Concerns regarding security and the low level of American student participation in the sciences were raised, as well as possibilities for reform.

The Committee contacted the Office of Legal Counsel to resolve an interagency dispute regarding legal thresholds for the denial and revocation of visas based on information contained in terrorist watch lists. The legal dispute between the U.S. Department of State, U.S. Department of Homeland Security, and the U.S. Department of Justice regards the ability of consular officers to deny a visa based solely on a name check search of terrorist watch lists that results in a match or "hit." The DOJ letter stated: "The State Department is also of the view that it cannot deny a visa based solely on a Foreign Terrorist Task Force (FTTTF) or Federal Bureau of Investigation (FBI) name search that results in a hit or match. We do not share the State Department's view of the law * * * [as it] presumes that a visa applicant is inadmissible and places the burden of proof on the applicant to establish his admissibility. As such, a consular officer need not have specific evidence that the applicant has participated in terrorist activities or associations to justify a visa denial * * * a name search hit does provide the consular officer a 'reasonable ground to believe' * * * that the applicant presents a threat to national security and is therefore ineligible for admission."

Southern border security

On January 14, 2004, Chairman F. James Sensenbrenner, Jr., and Ranking Member John Conyers, Jr., sent a joint letter to the Department of Justice Inspector General requesting all information, studies, and reports in his possession regarding government employee corruption in connection with the enforcement of the immigration laws. The letter also requested any materials produced with or shared by the Department of Homeland Security.

On January 27, 2004, Chairman John N. Hostettler of the Subcommittee on Immigration, Border Security & Claims sent a letter to Secretary of Homeland Security, Thomas Ridge, requesting an

explanation of Department of Homeland Security policy regarding parole and admission of asylum seekers along the Mexican border.

On January 21, 2004, Chairman John N. Hostettler of the Subcommittee on Immigration, Border Security & Claims sent a letter to Attorney General John Ashcroft and Secretary of Homeland Security, Thomas Ridge, requesting the results of an investigation into Hesham Hedayet who killed two and wounded several others at the Los Angeles International Airport on July 4, 2002. Mr. Hedayet was a lawful permanent resident who won the diversity lottery in 1996 and adjusted his status (received a green card without having to leave the United States).

Gang violence

In June, the Subcommittee requested an explanation of Immigration and Customs Enforcement (ICE) policies with regards to combating gang violence tied to illegal immigration, citing cases in the Northern Virginia area.

Illegal hiring of undocumented workers

The Committee requested in March the Department of Defense Inspector General investigate the hiring practices of the Defense Department with regards to checking the documentation of those it recruits. The issue was raised at a hearing and has been reported on in major news media. The Defense Department responded through its Deputy Under Secretary for Military Personnel Policy by explaining its new safeguards.

In May, the Committee requested the GAO examine the policies and programs aimed at enforcing the immigration laws in the workplace, including the verification systems to ensure legal authority to work and hire and related enforcement mechanisms. The Committee wrote to the Social Security Commissioner, Jo Anne Barnhart, in June to clarify implementation of various statutes and to clarify how the Social Security Administration would implement a totalization agreement with Mexico.

In June, the Committee urged the Department of Homeland Security, General Counsel, to revise the last administration's interpretation of the legal weight of social security "no match" letters. These letters inform employers that the social security number provided to the Social Security Administration by new employees do not match a validly issued social security number on record. Current interpretation is that the no match letters are not a basis to preclude employment unless or until the mismatch is clarified. DHS declined to change the interpretation.

Refugees

In April, the Subcommittee wrote letters to the Department of Homeland Security and the State Department asking for facts and their opinions on the North Korean refugee situation. Both agencies provided information. The Committee staff examined refugee resettlement first hand both in the Republic of Korea and in the United States, and trip reports were filed. Staff also met with various interest groups on this issue, including Mr. Syghman Rhee of the Presbyterian Church and Friends Committee.

Staff monitored the situation in Haiti and Dominican Republic as various political, economic, and natural disaster conditions made it increasingly likely that refugees may attempt to enter the United States.

Staff researched and produced materials concerning the refugee situation in Darfur, Sudan and neighboring Chad. The issue was raised during the annual refugee consultations with the Secretary of State.

Asylum

Staff requested various asylum files from the Department of Justice, Executive Office of Review (EOIR) as part of its continuing oversight function. In August, the Committee requested all information in its possession from the Department of Justice and the Department of Homeland Security on a Russian national. He recently received asylum despite the fact that the Russian Federation issued an international arrest warrant for him. DHS initially appealed the asylum judgment, but then declined to appeal. The Committee has asked for more information on the reasons for the reversal and asked the Department of Justice to review the decision of the Immigration Court. The Department of Justice interpreted relevant regulations to preclude their review and DHS has not responded yet.

In mid-November, the State Department was asked to clarify a statement by its spokesman indicating that it would not rule out allowing Uighur detainees at Guantanamo Bay to enter the United States and claim asylum. A formal response is pending. Much of this oversight involved classified information.

The Subcommittee examined the issue of parole and asylum seekers at the Mexican and Canadian borders.

Funding immigration

The Subcommittee held two hearings on immigration related budgets for the U.S. Department of Homeland Security, U.S. Customs and Border Patrol, U.S. Immigration and Customs Service, U.S. Citizenship & Immigration Services, and the Bureau of Consular Affairs at the U.S. Department of State. The hearings were held on February 25 and March 11, 2004. The President's FY 2005 budget for the Department of Homeland Security (DHS) contains increases for several key immigration initiatives, mainly in the areas of interior enforcement and alien detention and removal. Other enforcement initiatives, however, received more limited increases. In particular, under the President's budget, the number of Border Patrol Agents would remain approximately the same in FY 2005 as this year. The budget also calls for additional funding to reduce the backlog in applications for immigration benefits.

On February 3, 2004, Chairman F. James Sensenbrenner, Jr., sent a letter to the Department of Justice Inspector General, Glenn A. Fine, requesting action on recommendations provided in the Department of Justice Inspector General report entitled "Immigration & Naturalization Service Expenditures Charged to the Organized Crime Drug Enforcement Task Forces Program for Fiscal Years 1997–2002" (Audit Report 04–03, November 2003).

The Subcommittee staff requested CRS research statistics on immigration categories and the relationship to welfare and other assistance. In addition, CRS researched federal grants available to foreign students (directly or indirectly); CRS was unable to find much information compiled on this subject.

Pre-clearance for aviation security

On October 20, 2004, the Committee requested that the Department of Homeland Security provide information on fourteen Syrians who were detained on Flight Northwest 327 from Detroit to Los Angles. Various questions concerned their valid immigration status. This led to an inquiry at the State Department and their visa applications, which are the subject of an on going examination. Flight 327 and on several other aviation security incidents involving pre-clearance and "no-fly" watch list issues (including United Flight 919 on September 21, and Olympic Flight 411 on September 27) are under continued examination.

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW [1]

CHRIS CANNON, Utah, *Chairman*

HOWARD COBLE, North Carolina
JEFF FLAKE, Arizona
JOHN R. CARTER, Texas
MARSHA BLACKBURN, Tennessee
STEVE CHABOT, Ohio
TOM FEENEY, Florida

MELVIN L. WATT, North Carolina
JERROLD NADLER, New York
TAMMY BALDWIN, Wisconsin
WILLIAM D. DELAHUNT, Massachusetts
ANTHONY D. WEINER, New York

[1] Subcommittee chairmanship and assignments approved February 12, 2003.

Tabulation of subcommittee legislation and activity

Legislation referred to the Subcommittee	57
Legislation reported favorably to the full Committee	3
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	7
Legislation ordered tabled in the Subcommittee	0
Legislation pending before the full Committee	0
Legislation reported to the House	8
Legislation discharged from the Committee	2
Legislation pending in the House	4
Legislation passed by the House	13
Legislation pending in the Senate	7
Legislation vetoed by the President	1
Legislation enacted into public law	5
Legislation enacted into public law as part of another bill	0
Legislation on which hearings were held	8
Days of legislative hearings	8
Days of oversight hearings	10

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Commercial and Administrative Law shall have jurisdiction over the following subject matters: bankruptcy and commercial law, bankruptcy judgeships, administrative law, independent counsel, state taxation affecting interstate commerce, interstate compacts, other appropriate matters as referred by the Chairman and relevant oversight.

LEGISLATIVE ACTIVITIES

PRIVACY

H.R. 338, the "Defense of Privacy Act"

Summary.—H.R. 338 was intended to help safeguard privacy rights of Americans by requiring a rule noticed for public comment by Federal agencies to be accompanied by an initial assessment of the rule's impact on personal privacy interests, including the extent to which the proposed rule provided notice of the collection of personally identifiable information, the type of personally identifiable

information to be obtained, and the manner in which this information would be utilized by the Federal government. The bill also required a final rule to be accompanied by a final privacy impact analysis detailing how the issuing agency considered and responded to privacy concerns raised during the public comment period and explaining whether the agency could have taken an approach less burdensome to personal privacy. H.R. 338, in addition, contained a provision for judicial review to ensure agency compliance with its requirements.

Legislative History.—Subcommittee on the Constitution Chair Steve Chabot introduced H.R. 338, the "Defense of Privacy Act," on January 27, 2003. The bill's short title was subsequently amended and reported as the "Federal Agency Protection of Privacy Act." The Subcommittee held a joint legislative hearing together with the Subcommittee on the Constitution on H.R. 338 on July 22, 2003. Witnesses who testified included Senator Charles Grassley, former Congressman Bob Barr, on behalf of the American Conservative Union, James X. Dempsey, on behalf of the Center for Democracy & Technology, and Laura Murphy, on behalf of the American Civil Liberties Union.

On February 10, 2004, the Subcommittee ordered H.R. 338 favorably reported with an amendment by voice vote. Thereafter, the Committee ordered the bill favorably reported with an amendment by voice vote on June 23, 2004. The Committee reported H.R. 338 on July 7, 2004 as House Report No. 108–587. Although placed on the Union Calendar, the bill was not acted upon prior to the conclusion of the 108th Congress.

COMMERCIAL LAW

H.R. 361, To designate certain conduct by sports agents relating to the signing of contracts with student athletes as unfair and deceptive acts or practices to be regulated by the Federal Trade Commission

Summary.—H.R. 361 prohibits an athlete agent from: (1) recruiting or soliciting a student athlete to enter into an agency contract by giving false or misleading information, making a false promise or representation, or providing anything of value to the athlete or anyone associated with the athlete before entering into such contract; (2) entering into an agency contract with a student athlete without providing the required disclosure document; or (3) predating or postdating an agency contract.

Legislative History.—Representative Bart Gordon introduced H.R. 361, a bill to designate certain conduct by sports agents relating to the signing of contracts with student athletes as unfair and deceptive acts or practices to be regulated by the Federal Trade Commission, on January 27, 2003. H.R. 361 was referred to the House Committee on Energy and Commerce, which marked up the bill on January 27, 2003 and ordered the bill reported by voice vote. On March 5, 2003, the House Committee on Energy and Commerce reported the bill as H. Rept. No. 108–24, Part I.

On March 5, 2003, the House Committee on Judiciary received H.R. 361 as a sequential referral, for a period ending not later than June 1, 2003, for consideration of such provisions of the bill as fall

within the Committee's jurisdiction. On May 1, 2003, the bill was referred to the Subcommittee on Commercial and Administrative Law. On May 15, 2003, the Subcommittee held a hearing on H.R. 361, with Representative Gordon, Representative Tom Osborne, and Sports Agent Scott Boras as witnesses, and moved the bill for consideration and mark-up, and forwarded with an amendment relating to sports agent conduct with student athletes to the full Committee by voice vote.

On May 21, 2003, the Committee reported H.R. 361, as amended, by voice vote and filed its report on June 2, 2003 as H. Rep. No. 108–24, Part II. On June 4, 2003, H.R. 361 was considered by the House under the suspension of the rules and the bill passed, as amended.

On June 6, 2003, H.R. 361 was received in the Senate and referred to the Committee on Commerce, Science, and Transportation. On September 9, 2004, the bill passed the Senate by unanimous consent. On September 24, 2004, the bill was signed by the President and became Public Law 108–304.

BANKRUPTCY

H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2003"

Summary.—H.R. 975 represented the culmination of nearly seven years of Congressional consideration of bankruptcy reform legislation. With respect to creditors, H.R. 975's principal provisions consisted of needs-based bankruptcy relief, general protections for creditors, and protections for specific types of creditors. The bill's debtor protections included heightened requirements for those professionals and others who assist consumer debtors in connection with their bankruptcy cases, expanded notice requirements for consumers with regard to alternatives to bankruptcy relief, required participation in debt repayment programs for consumers before they may be debtors in bankruptcy, and the institution of a pilot program to study the effectiveness of consumer financial education for debtors.

The heart of H.R. 975's consumer bankruptcy reforms was the implementation of a mechanism to ensure that consumer debtors repay their creditors the maximum that they can afford. This income/expense mechanism variously referred to as the "needs-based test" or "means test" articulated objective criteria so that debtors and their counsel could self-evaluate their eligibility for relief under chapter 7 (a form of bankruptcy relief where the debtor generally receives a discharge of his or her personal liability for most unsecured debts). Certain expense allowances were localized and a debtor's special circumstances were recognized, including episodic losses of income. Parties in interest, such as creditors, were empowered under H.R. 975 to move for dismissal of chapter 7 cases for abuse. These reforms were intended to not affect consumer debtors lacking the ability to repay their debts and deserving of an expeditious fresh start.

With regard to business bankruptcy reform, H.R. 975 addressed the special problems that small business cases present by instituting a variety of time frames and enforcement mechanisms to

identify and weed out debtors that were not likely to reorganize. It also required more active monitoring of these cases by United States Trustees and the bankruptcy courts. In addition, H.R. 975 included provisions dealing with business bankruptcy cases in general and chapter 12 (family farmer bankruptcies). The small business and single asset real estate provisions of H.R. 975 were largely derived from consensus recommendations of the National Bankruptcy Review Commission. Many of these recommendations received broad support from those in the bankruptcy community, including various bankruptcy judges, creditor groups, and the Executive Office for United States Trustees. It also included provisions concerning the treatment of certain financial contracts under the banking laws as well as under the Bankruptcy Code. H.R. 975 responded to the special needs of family farmers by making chapter 12 of the Bankruptcy Code, a form of bankruptcy relief available only to eligible family farmers, permanent. With regard to single asset real estate debtors, H.R. 975 eliminated the monetary cap from the Bankruptcy Code's definition applicable to these debtors and made them subject to the small business provisions of the bill.

H.R. 975, in addition, contained several provisions having general impact with respect to bankruptcy law and practice. Under H.R. 975, certain appeals from final bankruptcy court decisions would be heard directly by the court of appeals for the appropriate circuit. Another general provision of H.R. 975 required the Executive Office for United States Trustees to compile various statistics regarding chapter 7, 11, and 13 cases, to make these data available to the public, and to report annually to Congress on the data collected. Other general provisions included an allowance of shared compensation with bona fide public service attorney referral programs.

Legislative History.—Committee Chairman F. James Sensenbrenner, Jr. (for himself and 50 original cosponsors) introduced H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2003," on February 27, 2003. On March 4, 2003, the Subcommittee held a hearing on H.R. 975 during which testimony was received from a representative from the Executive Office for United States Trustees (a component of the United States Department of Justice charged with administrative oversight of bankruptcy cases), a credit union representative, a representative on behalf of the Coalition for Responsible Bankruptcy Laws (a coalition of various consumer creditors), and a representative on behalf of the Commercial Law League of America (a creditors' rights organization comprised of attorneys and other professionals engaged in the fields of bankruptcy, insolvency, reorganization, and commercial law).

On March 7, 2003, the Subcommittee was discharged from further consideration of the bill. Thereafter, the Committee met in open session on March 12, 2003 and ordered H.R. 975 favorably reported by a vote of 18 to 11 with an amendment making technical revisions to the bill. On March 18, 2003, the Committee filed its report on H.R. 975 as House Report No.108–40.

The House, under a rule making certain amendments in order, thereafter passed H.R. 975, as amended, on March 19, 2003 by a vote of 315 to 113, with one Member voting present. H.R. 975 was

received in the Senate on March 20, 2003. The Senate did not consider the bill prior to the conclusion of the 108th Congress.

S. 1920, Bankruptcy Abuse Prevention and Consumer Protection Act of 2004

Summary.—As introduced, S. 1920 simply provided for a temporary extension of chapter 12, a specialized form of bankruptcy relief for family farmers. As passed by the House, the bill was amended to include the text of H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act."

Legislative History.—On November 21, 2003, Senator Charles Grassley introduced S. 1920, a bill to extend chapter 12 (a specialized form of bankruptcy relief for family farmers) for six months. On November 25, 2003, the Senate passed S. 1920 without amendment by unanimous consent. The bill was received in the House on December 8, 2003.

On January 28, 2004, the House considered and passed the bill by a vote of 265 to 99, with one Member voting present, under a rule making certain amendments in order. The sole amendment that the House passed consisted of an amendment in the nature of a substitute that replaced the text of S. 1920 with that of H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act" (previously discussed in this Report). Committee Chairman F. James Sensenbrenner, Jr. moved that the House insist upon its amendment, and request a conference. His motion was granted without objection by voice vote. A motion to instruct conferees offered by Representative Jerrold Nadler (relating to the applicability of the disinterestedness standard to investment bankers retained to represent a bankrupt company) failed by a vote of 146 to 203, with one Member voting present.

The following Members from the Committee on the Judiciary were appointed as conferees for the consideration of the Senate bill and the House amendment: Committee Chairman F. James Sensenbrenner, Jr., Henry Hyde, Lamar S. Smith, Steve Chabot, Subcommittee Chairman Chris Cannon, Melissa Hart, Committee Ranking Member John Conyers, Jr., Subcommittee Ranking Member Mel Watt, Rick Boucher, and Jerrold Nadler. The following Members from the Committee on Financial Services were appointed as conferees for consideration of §§ 901–906, 908–909, 911, and 1301–1309 of the House amendment: Representatives Michael Oxley, Spencer Bachus, and Bernard Sanders.

S. 1920, as amended, was received in the Senate on February 3, 2004. The Senate did not consider the bill prior to the conclusion of the 108th Congress.

H.R. 1375, the "Financial Services Regulatory Relief Act of 2003"

Summary.—H.R. 1375, the Financial Services Regulatory Relief Act of 2003, allows the expeditious termination or netting of certain types of financial transactions.[1] Provisions substantially identical

[1] In addition to the Bankruptcy Code, the bill amends the Federal Deposit Insurance Act, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Federal Deposit Insurance Corporation Improvement Act of 1991, the Federal Reserve Act, and the Securities Investor Protection Act of 1971.

to those in H.R. 1375 were included as title IX in H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act."

Legislative History.—H.R. 1375 was introduced by Representative Shelley Moore Capito on March 20, 2003. The bill was referred to the Committee on Financial Services and the Committee on the Judiciary. The Committee on Financial Services reported H.R. 1375 on June 12, 2003 as H. Rept. No. 108–152, Part I. On July 14, 2003, the Committee on the Judiciary reported H.R. 1375, as amended, by voice vote, as H. Rept. No. 108–152, Part II. H.R. 1375 passed the House by a vote of 392–25 on March 18, 2004, but was not considered in the Senate prior to the conclusion of the 108th Congress.

H.R. 1428, the "Bankruptcy Judgeship Act of 2003"

Summary.—H.R. 1428, the "Bankruptcy Judgeship Act of 2003," would have authorized 29 permanent and seven temporary bankruptcy judgeships. H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act," included a similar provision, which would have authorized 28 additional bankruptcy judgeships and extended four existing temporary judgeships.

Legislative History.—On March 25, 2003, Representative Jack Kingston (R–GA) (for himself and 22 original cosponsors) introduced H.R. 1428, the "Bankruptcy Judgeship Act of 2003." The Subcommittee, on May 22, 2003, conducted a hearing on H.R. 1428. Witnesses who testified at the hearing included representatives from the Judicial Conference of the United States, the United States Government Accountability Office, and the National Conference of Bankruptcy Judges, and a consultant. Further consideration of H.R. 1428 by either the House or the Senate did not occur prior to the conclusion of the 108th Congress.

H.R. 1529, the "Involuntary Bankruptcy Improvement Act of 2003"

Summary.—Current law provides that a person can voluntarily commence a bankruptcy case[2] or be involuntarily forced into bankruptcy, under certain circumstances.[3] With respect to involuntary bankruptcy, one or more creditors (meeting specified criteria)[4] can file an involuntary petition for bankruptcy relief under chapter 7 (liquidation) or chapter 11 (business reorganization) of the Bankruptcy Code against an individual as well as certain types of business entities,[5] if grounds for granting such relief are established.[6] If the person who is the subject of an involuntary bankruptcy petition does not timely oppose the petition, the court enters an "order

[2] 11 U.S.C. § 301 (2002).

[3] 11 U.S.C. § 303 (2002).

[4] 11 U.S.C. § 303(b)(2002). If, for example, the alleged debtor has less than 12 creditors, a single creditor holding a claim of at least $11,625 can commence an involuntary petition. 11 U.S.C. § 303(b)(2) (2002).

[5] 11 U.S.C. § 303(b) (2002). Certain individuals and entities, such as farmers and eleemosynary institutions, cannot be involuntarily forced into bankruptcy. Id.

[6] A court may grant an involuntary bankruptcy petition only if:

> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or
>
> (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

11 U.S.C. § 303(b) (2002).

for relief," which formally commences the bankruptcy case.[7] If the involuntary petition is opposed by the putative debtor, then the court must conduct a trial to determine if the debtor should be adjudicated a bankrupt.[8]

In 2002, for example, one tax protester filed fraudulent involuntary petitions against 36 local public officials in Wisconsin,[9] some of whom did not find out about the petitions until "they attempted to use a credit card or execute some other financial transaction."[10] These filings were subsequently dismissed by the bankruptcy court, which found that they were filed in bad faith without legal basis and were commenced "for the sole purpose of harrassment of the named public officials."[11]

Legislative History.—Committee Chairman Sensenbrenner introduced H.R. 1529, the "Involuntary Bankruptcy Improvement Act of 2003," on April 1, 2003: First, it amended the Bankruptcy Code to require the bankruptcy court on motion of an individual who was the subject of a fraudulent involuntary bankruptcy case to expunge all records relating to that case from the court's files. Second, it authorized the bankruptcy court to prohibit any credit reporting agency from issuing a consumer report containing any reference to a fraudulent involuntary bankruptcy case if the case is dismissed.

On May 7, 2003, the Committee ordered the bill favorably reported without amendment by voice vote. Thereafter, the report on H.R. 1529 was filed on May 19, 2003 as House Report No. 108–110. The House, on June 10, 2003, passed the bill, without amendment, under suspension of the rules by voice vote. H.R. 1529 was received the following day in the Senate. The Senate, however, did not consider the bill prior to the conclusion of the 108th Congress.

H.R. 2465, the "Family Farmer Bankruptcy Relief Act of 2003" and S. 2864, the "Family Farmer Bankruptcy Relief Act of 2004"

Summary.—During the 108th Congress, 11 bills were introduced to either extend chapter 12 or make it a permanent component of the Bankruptcy Code. In addition, a provision that would make chapter 12 permanent was included in omnibus bankruptcy reform legislation, H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act." Two of these bills, providing for the temporary extension of chapter 12, were enacted into law.

Chapter 12 permits eligible family farmers, under the supervision of a bankruptcy trustee, to reorganize their debts pursuant to a repayment plan. The special attributes of chapter 12 make it better suited to meet the particularized needs of family farmers in financial distress than other forms of bankruptcy relief, such as chapter 11 (business reorganization) and chapter 13 (individual re-

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[7] Id.

[8] Id.

[9] See In re Kenealy, No. 02–6100–MDM (Bankr. E.D. Wis. May 21, 2002). Involuntary petitions "were filed against all but one of the County Board supervisors," the county corporation counsel, county sheriff, clerk of courts, and county circuit judge. Jeff Cole, Paperwork Uned for Revenge; Protester's Bogus Bankruptcy Petitions Temporarily Disrupt Officials' Credit, Milwaukee J. Sentinel, June 6, 2002, at 1B. The protester also filed numerous liens totaling $15 million against these individuals. Jeff Cole, Man Charged with Filing False Documents; Town of Fredonia Protester's Case in 5th Brough by State, Milwaukee J. Sentinel, May 21, 2002, at 1B.

[10] Jeff Cole, Paperwork Used for Revenge; Protester's Bogus Bankruptcy Petitions Temporarily Disrupt Officials' Credit, Milwaukee J. Sentinel, June 6, 2002, at 1B.

[11] In re Kenealy, No. 02–26100–MDM (Bankr. E.D. Wis. May 21, 2002).

organization). It was enacted on a temporary seven-year basis as part of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 in response to the farm financial crisis of the early 1980s.[12] It has subsequently been extended several times.

Legislative History.—On June 12, 2003, Chairman Sensenbrenner introduced H.R. 2465, the "Family Farmer Bankruptcy Relief Act of 2003," to extend chapter 12 for six months to January 1, 2004. The House under the suspension of the rules passed the bill, without amendment, by a vote of 379 to 3 on June 23, 2003. It thereafter passed the Senate on unanimous consent, without amendment, on July 31, 2003. The bill was signed into law on August 15, 2003 as Public Law No. 108–73.

On September 29, 2004, Senator Charles Grassley introduced S. 2864, the "Family Farmer Bankruptcy Relief Act of 2004," to extend chapter 12 for eighteen months to July 1, 2005. After the Senate passed the bill, without amendment, by unanimous consent on October 6, 2004, Subcommittee Chairman Chris Cannon requested unanimous consent to have the bill discharged from the Committee and considered by the House. His request was granted and S. 2864 was considered and passed by the House on October 8, 2004 by voice vote without amendment. The bill was signed into law on October 25, 2004 as Public Law 108–369.

STATE TAXATION AFFECTING INTERSTATE COMMERCE

Electronic commerce

The Internet and information technology (IT) industries comprise an increasingly vital component of U.S. economic health. Internet retail sales continue to accelerate at an impressive rate. While some forecasts estimate Internet retail sales could reach $300 billion annually,[13] these claims have yet to materialize.

Contrary to the widespread impression that the Internet is a tax-free haven, electronic commercial transactions do not escape all State and local taxes. Telecommunications channels such as telephone lines, wireless transmissions, cable, and satellites are subject to State and local taxes. Electronic merchants are required to pay State and local income, licensing, franchise, business activity and other direct taxes. In addition, physically-present electronic merchants are required to collect and remit applicable sales and use taxes for all intrastate transactions. In short, online transactions are subject to nearly all taxes imposed on traditional, brick and mortar enterprises. The only substantive difference between the tax treatment of online and traditional retailers is a State's authority to require nonresident electronic merchants to collect and remit sales and use taxes.

In 1998, Congress passed the Internet Tax Freedom Act[14] (ITFA) to help address the emerging challenges associated with Internet commerce. The ITFA imposed a three-year moratorium on both

[12] Pub. L. No. 99–554, 100 Stat. 3088, 3105 (1986).

[13] See, e.g., Clayton W. Shan, Taxation of Global E-Commerce on the Internet. The Underlying Issues and Proposed Plans, 9 Minn. J. Global Trade 233, 235 (2000).

[14] The Internet Tax Freedom Act comprises titles XI and XII of Division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105–277, 112 Stat. 2681 (1998) (codified as amended at 47 U.S.C. Sec. 151 (1998)).

Internet access taxes and multiple and discriminatory taxes on electronic commerce. The bill also created a 19-member Advisory Commission on Electronic Commerce to examine, among other things, the effect of State and local taxes on Internet commerce. While a majority of Commissioners recognized the need to move toward national uniform treatment of electronic commerce, no consensus on the taxing status of the Internet was achieved.

During the 107th Congress, the Subcommittee reported H.R. 1552 extending the moratorium on taxation of Internet access and multiple and discriminatory taxes until November 1, 2003. It also maintained the authority of States to collect Internet access taxes were generally imposed and collected prior to October 1, 1998. That bill was signed into law by President Bush on November 28, 2001 as Public Law 107–75.

H.R. 49, the "Internet Tax Nondiscrimination Act"

Summary.—H.R. 49, the "Internet Tax Nondiscrimination Act," permanently extended the moratorium enacted by the Internet Tax Freedom Act. In doing so, H.R. 49 sought to promote equal access to the Internet and protect electronic commerce from discriminatory State and local taxes. H.R. 49 applied equally to all States, and therefore contained an immediate abolishment of the grandfather clause contained in the 1998 ITFA that allowed certain states special status to continue taxing Internet access. H.R. 49 also made the moratorium permanent rather than subject to renewal.

Legislative History.—H.R. 49 was introduced by Representative Christopher Cox on January 7, 2003 and referred to the Judiciary Committee. Subsequently referred to the Subcommittee on Commercial and Administrative Law on March 6, 2003, the bill was the subject of a subcommittee hearing on April 1, 2003 at which testimony was received from: Harley T. Duncan, Executive Director, Federation of Tax Administrators; the Honorable James S. Gilmore, former Governor, Commonwealth of Virginia; the Honorable Jack Kemp Co-Director, Empower America; and Harris N. Miller, President, Information Technology Association of America.

On May 22, 2003, the Subcommittee on Commercial and Administrative Law held a markup of H.R. 49. During markup, the Ranking Minority Member Mel Watt introduced one amendment addressing a development in the tax treatment of certain types of Internet access since 1998. Mr. Watt noted that some States had issued letter rulings that DSL Internet access service constituted a "bundle" of taxable telecommunications services and Internet access. Thus some Internet access had become subject to State taxation in contravention of the ITFA, while others were not. Mr. Watt withdrew the amendment, and Subcommittee Chairman Chris Cannon stated his intention to study the issue and develop amendment language with Mr. Watt to offer for consideration at the full Committee markup. Additionally, Mr. Cannon offered an amendment in the nature of a substitute which was adopted by voice vote.

At the full Committee markup of H.R. 49 on July 16, 2003, Mr. Watt and Mr. Cannon offered an amendment to the definition of "Internet access" to ensure parity of tax treatment for all tech-

nologies used to provide Internet access to consumers and emphasize the original intent of the ITFA. The amendment was adopted and the bill was reported by voice vote.

H.R. 49 was passed by the House under suspension of the rules by voice vote on September 17, 2003.

On July 31, 2003, the Senate Commerce Committee reported S. 150 extending the moratorium under the ITFA for five years but continuing the grandfather clause for states currently taxing Internet access for three years. Further Senate action on S. 150 was delayed by opposition within that body until April 26, 2004 when cloture was invoked by a vote of 74–11 and the bill was passed as amended by a vote of 93–3 on April 29, 2004, six months after the moratorium expired. The final amended version of S. 150 that passed the Senate differed from H.R. 49 in several important ways. First, rather than a permanent moratorium it created a temporary, four-year moratorium on Internet access taxes, running retroactively from November 1, 2003 until November 1, 2007. Second, it extended the 1998 "grandfather" clause for the life of the moratorium so those states currently taxing Internet access will continue to do so. Third, it created a new, two-year grandfather clause for States that taxed Internet access after the expiration of the moratorium.

Although the Senate passed its version second, it did not seek a conference with the House and indicated an unwillingness to go to conference on the legislation. Informal negotiations between the House and Senate continued throughout the summer and fall of 2004 on crafting a compromise measure until an agreement about modest changes was achieved. Pursuant to the agreement between House and Senate negotiators, both bodies considered and adopted an enrolling resolution, S. Con. Res. 146, that directed the Secretary of the Senate upon passage of the resolution and underlying bill by both chambers to incorporate the changes contained therein into the enrolled version of S. 150 before it was presented to the President for signature. The Senate passed S. Con. Res. 146 on November 17, 2004. On November 19, 2004 the House passed both S. Con. Res. 146 and S. 150 under suspension of the rules by voice vote. The changes made to S. 150 by this process included a provision that ended some state taxation of Internet access previously allowed by the original 1998 moratorium grandfather exceptions. The final version of S. 150 was signed by President Bush on December 3, 2004 as Public Law No. 108–435.

Business activity taxation

During the 107th Congress, the Subcommittee considered H.R. 2526, legislation introduced by Representative Bob Goodlatte that would, among other things, have established a bright-line physical presence nexus requirement for States to collect business activity taxes on multistate enterprises.[15]

[15] H.R. 2526 defined business activities taxes as those imposed or measured by net income, a business license tax, a franchise tax, a single business tax or a capital stock tax, or any similar tax or fee imposed by a State or locality on a business for the right to conduct business within the taxing jurisdiction which is measured by the amount of such business or related activity.

The genesis of the physical-presence-nexus portion of the bill was the Supreme Court's ruling in *Quill Corp.* v. *North Dakota,*[16] which invalidated State efforts to compel out-of-State sellers to collect and remit sales and use taxes without the existence of a physical presence or other "substantial nexus." While the Court established in *Quill* a physical presence threshold for the collection of sales taxes, it did not fully articulate a coherent basis for determining when a nonresident business enterprise has a sufficient economic presence to justify the imposition of business activity taxes. As a result, the degree of connection or nexus necessary to justify the imposition of business activity taxes led to costly and protracted litigation between State taxing authorities and multistate businesses.

Most States and some local governments levy a range of business activities taxes on companies that either operate or conduct business activities within their jurisdictions. With the exception of Michigan, Nevada, South Dakota, Washington, and Wyoming, all States and the District of Columbia levy general corporate income taxes. H.R. 2526 would have reduced the uncertainties—and litigation costs—surrounding business activity taxes by establishing a bright-line physical presence requirement for States and localities as a prerequisite to collect such taxes on multistate businesses. The bill also listed those conditions which would not meet the 'substantial physical presence' threshold sufficient to warrant the imposition of business activity taxes upon a nonresident enterprise. The Subcommittee reported H.R. 2526 to the full committee on July 17, 2002, but no further action was taken by the House during the 107th Congress.

H.R. 3220, the "Business Activity Tax Simplification Act of 2003"

Summary.—H.R. 3220 amended Federal law concerning the taxation of interstate commerce to expand the scope of the protections prohibiting taxation by jurisdictions of the income of out-of-state corporations whose in-state presence is nominal from just tangible personal property to include intangible property and services. The bill required that an out-of-state company have a physical presence in a State before the State can impose franchise taxes, business license taxes, and other business activity taxes.

Legislative History.—H.R. 3220 was introduced on October 1, 2003 by Representative Goodlatte. Referred to the Subcommittee on Commercial and Administrative Law on October 22, 2003, the bill was the subject of a public hearing on May 13, 2004. There was no further consideration of H.R. 3220 during the 108th Congress.

TORT REFORM

H.R. 339—the "Personal Responsibility in Food Consumption Act of 2004"

Summary.—H.R. 339, the "Personal Responsibility in Food Consumption Act," would generally prohibit obesity or weight gain-related claims against the food industry. It would, however, allow obesity-related claims to go forward in several circumstances, in-

[16] 504 U.S. 298, 311 (1992).

cluding cases in which a state or federal law was broken and as a result a person gained weight. Under H.R. 339, cases could also go forward in which a company violates an express contract or warranty. Also, because H.R. 339 only applies to claims based on "weight gain" or "obesity," lawsuits could go forward under the bill if, for example, someone gets sick from a tainted hamburger. H.R. 339 also contains provisions governing the conduct of legal proceedings. First, H.R. 339 includes the discovery provisions designed to prevent fishing expeditions that are already part of our federal securities laws. These provisions provide that discovery of documents be stayed while the court decides whether the case should be dismissed, unless the court decides that particular discovery is necessary to preserve evidence or to prevent undue prejudice to a party. Such provisions also provide for court sanctions if a defendant destroys any documents relevant to the litigation. Second, H.R. 339 contains provisions that require that a complaint must set out the state and federal laws that were allegedly violated, and the facts that are alleged to have proximately caused the injuries claimed, whenever a lawsuit is filed under the exception in the bill that allows obesity claims to proceed when a violation of state or federal law was the proximate cause of harm.

Legislative History.—H.R. 339, the "Personal Responsibility in Food Consumption Act of 2003," was introduced by Rep. Ric Keller on January 27, 2003. On May 19, 2003, H.R. 339 was referred to the Subcommittee on Commercial and Administrative Law for purposes of hearing only (jurisdiction retained at Full Committee). On June 19, 2003, the Subcommittee held a hearing on H.R. 339 at which testimony was received from the following witnesses: John Banzhaf, Professor, George Washington University Law School; Victor Schwartz, Shook, Hardy & Bacon; Christianne Ricchi, the National Restaurant Association; and Richard Berman, the Center for Consumer Freedom. On January 28, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 339 with an amendment by voice vote, a quorum being present. (H. Rept. No. 108–432). On March 10, 2004, H.R. 339 was passed by the House by a vote of 276 to 139. No further action was taken on the bill.

ADMINISTRATIVE LAW

H.R. 4917, the "Federal Regulatory Improvement Act of 2004"

Summary.—Established as a permanent independent agency in 1964, the Administrative Conference of the United States (Conference or ACUS) was created to develop recommendations for improving procedures by which federal agencies administer regulatory, benefit, and other government programs.[17] The Conference's jurisdiction over administrative procedure was intentionally broad.[18] It was authorized to study "the efficiency, adequacy, and

[17] Administrative Conference Act of 1964, Pub. L. No. 88–499, 5 U.S.C. §§ 591–96 (2002). Temporary conferences were established in 1953 by President Eisenhower, Memorandum Convening the President's Commission on Administrative Procedure, Pub. Papers, 219–22 (Apr. 28, 1953), and in 1961 by President Kennedy, Exec. Order No. 10,934, 26 Fed. Reg. 3233 (Apr. 13, 1961).

[18] Section 592 of title 5, for example, provides that the term "administrative procedure," is to be "broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of

fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States[.]"[19] In addition, ACUS facilitated the exchange among administrative agencies of information potentially useful in improving administrative procedure. The Conference also collected information and statistics from administrative agencies and published reports evaluating and improving administrative procedure. It served as a "private-public think tank" that conducted "basic research on how to improve the regulatory and legal process."[20] Although ACUS's authorization expired as of February 1, 1996, the statutory provisions establishing the Conference were not repealed.[21]

H.R. 4917 was introduced to reauthorize ACUS. The bill grew out of two oversight hearings that the Subcommittee on Commercial and Administrative Law held on the Conference, which are described in the Subcommittee's Oversight Activities section of this Report. The bill amends § 591 of Title 5 of the United States Code, which sets forth the Conference's purposes, to add four additional purposes as follows: (1) promote more effective public participation and efficiency in the rulemaking process; (2) reduce unnecessary litigation in the regulatory process; (3) improve the use of science in the regulatory process; and (4) improve the effectiveness of laws applicable to the regulatory process. In addition, the bill revises §596 of Title 5 of the United States Code to authorize $3 million for fiscal year 2005, $3.1 million for fiscal year 2006, and $3.2 for fiscal year 2007.

Legislative History.—On July 22, 2004, Subcommittee on Commercial and Administrative Law Chairman Chris Cannon (for himself and 33 original cosponsors) introduced H.R. 4917, the "Federal Regulatory Improvement Act of 2004." On request of Subcommittee Chairman Cannon, the bill was discharged from the Committee and considered by the House on unanimous consent. The House passed the bill, without amendment, by voice vote on October 8, 2004. H.R. 4917 was received by the Senate on the following day. On October 11, 2004, the Senate passed the bill without amendment on unanimous consent. Thereafter, the bill was signed into law as Public Law 108–401 on October 30, 2004.

OVERSIGHT ACTIVITIES

Oversight hearing list

Date/Serial No.	Hearing title
April 8, 2003/# 28	Reauthorization of the United States Department of Justice: Executive Office for United States Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for United States Trustees, and Office of the Solicitor General.

agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review. . . ." 5 U.S.C. § 592(3) (2002).

[19] 5 U.S.C. § 594(1) (2002).

[20] Reauthorization of the Administrative Conference of the United States Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 104th Cong. 31 (1994) (statement of C. Boyden Gray).

[21] H.R. Rep. 104–291, at 6 (1995).

Date/Serial No.	Hearing title
October 1, 2003/#57.	Streamlined Sales Tax Agreement: States' Efforts to Facilitate Sales Tax Collection from Remote Vendors
February 10, 2004/#85.	Privacy in the Hands of the Government: The Privacy Officer for the Department of Homeland Security
March 9, 2004/#79.	Reauthorization of the United States Department of Justice: Executive Office for United States Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for United States Trustees, and Office of the Solicitor General
March 31, 2004/#100.	Legal Services Corporation (LSC): Inquiry into the Activities of the California Rural Legal Assistance Program and Testimony Relating to the Merits of Client Co-Pay
May 20, 2004/#109.	Reauthorization of the Administrative Conference of the United States—Part I
June 24, 2004/#109.	Administrative Conference of the United States—Part II: Why Is There a Need to Reauthorize the Conference
July 21, 2004/#114.	Administration of Large Business Bankruptcy Reorganizations: Has Competition for Big Cases Corrupted the Bankruptcy System?
July 23, 2004/#102.	Regulatory Aspects of Voice Over the Internet Protocol (VoIP)
August 20, 2004/#113.	Regarding Privacy and Civil Liberties in the Hands of the Government Post-September 11, 2001: Recommendations of the 9/11 Commission and the U.S. Department of Defense Technology and Privacy Advisory Committee

Privacy in the hands of the government: The privacy officer for the Department of Homeland Security

The Privacy Act of 1974 regulates how federal agencies may use personally identifiable information they collect from individuals.[22] It generally prohibits these agencies from disclosing this information to other federal or state agencies or to any other person,[23] subject to certain specified exceptions.[24] An agency that releases such information in violation of the Privacy Act may be sued for damages sustained by an individual as a result of such violation, under certain circumstances.[25] In addition, the Privacy Act grants individuals the right to have agency records maintained on themselves corrected upon a showing that such records are inaccurate, irrelevant, out-of-date, or incomplete.[26]

Technological developments have increasingly facilitated the collection and dissemination of personally identifiable information and have correspondingly increased the potential for misuse of such information.[27] Compliance with the Privacy Act by federal agencies, however, remains "uneven," according to the U.S. Government Accountability Office.[28]

[22] 5 U.S.C. § 552a (2002). According to one treatise, the Privacy Act "gives individuals greater control over gathering, dissemination, and ensuring accuracy of information collected about themselves by agencies" and that its "main purpose" is to "forbid disclosure unless it is required by the Freedom of Information Act." Administrative Conference of the United States, Federal Administrative Procedure Sourcebook—Statutes and Related Materials 863 (2d ed. 1992).

[23] 5 U.S.C. § 552a(b) (2002). For example, medical, educational, criminal, financial, and employment records generally may not be disclosed. 5 U.S.C. § 552a(a)(4) (2002).

[24] The Privacy Act, for instance, except disclosures that constitute a "routine use" of such information by an agency "compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7), (d)(3) (2002). It also permits disclosure for law enforcement purposes, in response to a Congressional request, pursuant to court order, for the purpose of carrying out a census, or to a consumer reporting agency. 5 U.S.C. § 552a(b) (2002).

[25] 5 U.S.C. § 552a(g)(4) (2002).

[26] 5 U.S.C. § 552a(d) (2002).

[27] The Federal GTrade Commission, for example, reported that "identity theft topped the list" of consumer complaints it received in 2002 and that they accounted for 43 percent of the complaints lodged in its database. Federal Trade Commission Release, TC Releases Top 10 Consumer Complaint Categories in 2002—As in 2000 and 2001, Identity Theft Tops the List, at 1 (Jan. 22, 2003), at http://www.ftc.gov/opa/2003/01/top10.htm.

[28] U.S. Government Accountability Office, Privacy Act: OMB Leadership Needed to Improve Agency Compliance, GAO–03–304, at 1 (June 2003).

Particularly since the September 11, 2001 terrorist attacks, Congress has sought to balance two competing goals: keeping the nation secure and protecting the privacy rights of our nation's citizens. The desire to achieve and maintain this balance was reflected in the debate concerning the creation of the Department of Homeland Security (Department or DHS) during the 107th Congress. In 2002, the Subcommittee held a hearing on various privacy and administrative law issues presented by the anticipated creation of the Department.[29] Among the matters considered were issues concerning how the new Department would ensure the privacy of personally identifiable information as it "establishes necessary databases that coordinate with other agencies of the Government."[30] Concerns were expressed on a bipartisan basis about the agency's ability to collect, manage, share, and secure personally identifiable information.[31] Over the course of the hearing, it became apparent that the Department would benefit from the appointment of an individual responsible for privacy issues.[32]

In response to such persuasive testimony, the Subcommittee with the support of Committee Chairman Sensenbrenner, successfully sought to have legislation establishing the Department amended to include the appointment of a privacy officer.[33] This legislation, signed into law on November 25, 2002,[34] directed the DHS Secretary to appoint a senior official in the Department to "assume primary responsibility for privacy policy."[35] In April of 2003, DHS Secretary Tom Ridge appointed Nuala O'Connor Kelly to serve as the Department's privacy officer.[36]

Since her appointment, Ms. Kelly has played an active role in evaluating privacy ramifications of various terrorist-detection initiatives undertaken by the DHS, including the Computer-Assisted Passenger Prescreening System (also known as CAPPS II), a prescreening system designed to conduct risk assessments and authentications for airline passengers traveling to the United

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[29] Administrative Law, Adjudicatory Issues, and Privacy Ramifications of Creating a Department of Homeland Security: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 107th Congress (2002).

[30] Id. at 2 (statement of Subcommittee Chairman Chris Cannon).

[31] See, e.g., id. at 3–4 (statements of Rep. Mark Green and Rep. Maxine Waters).

[32] Id. at 14 (statement of Professor Jeffrey S. Lubbers, Washington College of Law—American University); 20 (statement of Professor Peter P. Swire, Chief Counselor for Privacy, U.S. Office of Management and Budget under the Clinton Administration);

[33] H. Rep. No. 107–609, at 9–10 (2002).

[34] Pub. L. No. 107–296, § 222, 116 Stat. 2135, 2155 (2002).

[35] 6 U.S.C. § 142 note (2002). The statutory duties of the privacy officer are specified as the following:

> (1) assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information;
>
> (2) assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out int he Privacy Act of 1974;
>
> (3) evaluating legislative and regulatory proposals involving collection, use, and disclosure of personal information by the Federal Government;
>
> (4) conducting a privacy impact assessment of proposed rules of the Department or that of the Department on the privacy of personal information, including the type of personal information collected and the number of people affected; and
>
> (5) preparing a report to Congress on an annual basis on activities of the Department that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and other matters.

Id.

[36] DHS Press Release, Department of Homeland Security Announces Privacy Officer (Apr. 16, 2003).

States.[37] After the revelation that certain airlines apparently shared passenger data without their knowledge with federal agencies,[38] Ms. Kelly met with airline executives to discuss privacy protections for passengers and the need to improve their privacy policies.[39] She also investigated whether any agencies or airlines acted improperly.[40]

In addition, Ms. Kelly prepared a privacy impact assessment for the United States Visitor and Immigration Status Indicator Technology Program, an integrated entry and exit data system designed to: (1) record the entry into and exit out of the United States by certain individuals; (2) verify the identity of such individuals; and (3) confirm their compliance with the terms of their admission into the United States.[41] The privacy impact assessment "was hailed by many in the privacy community as an excellent model of transparency, including detailed information about the program, the technology and the privacy protections."[42]

To assess Ms. Kelly's performance and execution of her official responsibilities, the Subcommittee held an oversight hearing on February 10, 2004. In addition to Ms. Kelly, witnesses at the hearing included the Honorable James S. Gilmore, President, USA Secure Corporation; Professor Sally Katzen, Visiting Professor at the University of Michigan Law School; and James Dempsey, Executive Director, the Center for Democracy & Technology. The three private sector witnesses generally endorsed Ms. Kelly's work and performance.

Based on the results of this hearing, the Subcommittee actively pursued and ultimately obtained the inclusion of a provision in H.R. 3036, the "Department of Justice Appropriations Authorization Act, Fiscal Years 2004 through 2006," requiring the Attorney General to designate a senior official to assume primary responsibility for privacy policy.[43] This bill is discussed in greater detail in the Committee section of this Report.

In addition, the Subcommittee sought and successfully obtained inclusion in legislation reorganizing our nation's intelligence agencies, S. 2845, the "Intelligence Reform and Terrorism Prevention Act of 2004," a provision expressing a sense of the Congress that the head of a Federal agency with law enforcement or anti-terrorism functions appoint a chief privacy officer to have primary re-

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[37] See U.S. Department of Homeland Security Transportation Security Administration—Privacy Act of 1974: System of Records Notice of Status of System of Records; Interim Final Notice; Request for Further Comments, 68 Fed. Reg. 45265, 45265 (Aug. 1, 2003).

[38] Leslie Miller, Airline Industry To Work on Privacy Issues, Associated Press, Jan. 22, 2004; Terence Neilan, Suits Against Airline Put Focus on Privacy Concerns, N.Y. Times, Jan. 22, 2004; Sara Kehaulani Goo, Northwest Gave U.S. Data on Passengers; Airline Had Denied Sharing Information for Security Effort, Wash. Post, Jan. 18, 2004, at A1; Matthew L. Wald, Airline Gave Government Information on Passengers, N.Y. Times, Jan 18, 2004, at 16.

[39] Leslie Miller, Airline Industry To Work on Privacy Issues, Associated Press, Jan. 22, 2004.

[40] Drew Clark, Privacy: Homeland Security Official Discusses Department's Privacy Work, Nat'l Journal's Technology Daily PM, Nov. 17, 2003; Philip Shenon & John Schwartz, JetBlue Target of Inquiries by 2 Agencies, N.Y. Times, Sept. 23, 2003, at 1.

[41] U.S. Department of Homeland Security, Privacy Impact Assessment and Privacy Policy; US–VISIT Program, 69 Fed. Reg, 2608–15 (Jan. 16, 2004). The US–VISIT Program was implemented pursuant to the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107–173, Title III, § 302 (codified at 8 U.S.C. 1731 (2002)).

[42] Review of US–VISIT Border Security Program: Hearing Before the Subcomm. on Infrastructure and Border Security of the House Select Comm. on Homeland Security, 108th Cong. 36 (2004) (testimony of Undersecretary Asa Hutchinson, Department of Homeland Security).

[43] H.R. 3036, 108th Cong. § 305 (2003).

sponsibility for that agency's privacy policy.[44] S. 2845 is discussed in greater detail in the Committee section of this Report.

Reauthorization of the Administrative Conference of the United States

As earlier noted in the Subcommittee's Legislative Activities section discussion of H.R. 4917, the "Federal Regulatory Improvement Act of 2004," the bill, which was enacted into law as Public Law 108–401, reauthorizes the Administrative Conference of the United States. H.R. 4917 grew out of two oversight hearings conducted by the Subcommittee.

Witnesses at the first oversight hearing, held May 20, 2004, consisted of the Honorable Antonin Scalia and the Honorable Stephen Breyer, Associate Justices of the United States Supreme Court. Both Justices, without qualification, strongly endorsed the Administrative Conference and supported its reauthorization. Justice Scalia, a former chairman of the Conference, described this agency as "a worthwhile organization" that offered "a unique combination of talents from the academic world, from within the executive branch * * * and, thirdly, from the private bar, especially lawyers particularly familiar with administrative law."[45] He observed, "I did not know another organization that so effectively combined the best talent from each of those areas." In addition, he said that the Conference was "an enormous bargain."[46] Likewise, Justice Breyer cited the "huge" savings to the public as a result of the Conference's recommendations.[47] Noting that the Conference was "a matter of good Government," he stated, "I very much hope you reauthorize the Administrative Conference."[48] Both Justices agreed that there were various matters that a reauthorized Conference could examine. These included assessing the value of having agencies use teleconferencing facilities and the need to create a regulatory process that promotes sound science.[49]

A second oversight hearing on this matter was held June 24, 2004. Witnesses at the hearing included C. Boyden Gray, on behalf of the American Bar Association; Professor Gary J. Edles, Fellow in Administrative Law at American University Washington College of Law and General Counsel of the Administrative Conference from 1987 to 1995; Professor Philip J. Harter, Earl F. Nelson Professor of Law Center for the Study of Dispute Resolution, University of Missouri Law School; and Professor Sallyanne Payton, William W. Cook Professor of Law at the University of Michigan Law School, on behalf of the National Academy of Public Administration.

As with the prior hearing, each witness at this latter hearing enthusiastically endorsed the Conference's work and supported its reauthorization. Issues explored at this hearing included the following: (1) whether the Conference should be reauthorized without any modification; (2) whether the Conference should be established

[44] H. Rep. No. 108–796, at 53 (2004).
[45] Reauthorization of the Administrative Conference of the United States Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 108th Cong. 10 (2004).
[46] Id. at 21.
[47] Id. at 22.
[48] Id. at 15.
[49] Id. at 25–26.

as part of another agency, such as the Justice Department or be the General Services Administration, or privatized; (3) the priorities of a reconstituted Conference; and (4) the amount of funding necessary to authorize the Conference.

Administration of large business bankruptcy reorganizations: Has competition for big cases corrupted the bankruptcy system?

From a societal perspective, chapter 11 of the Bankruptcy Code reflects the premise that "the debtor is worth more economically alive than economically dead."[50] Unlike a liquidation case (where the debtor's assets are sold to pay the claims of creditors), a chapter 11 reorganization case permits a debtor to restructure its finances while continuing to operate its business.[51] The perceived benefits of this process are that it theoretically preserves the debtor's going concern value, enables the debtor to repay its creditors, and provides continued employment for its workers. Absent bankruptcy, claimants engage in a veritable "race to the courthouse" leaving little recourse for future claimants.

Some academics describe the "Delawarization" of bankruptcy venue as an "embarrassing" development[52] and cite the higher failure rates of cases filed in Delaware.[53] Critics "also complain that Delaware's bankruptcy judges are so interested in attracting prominent reorganizations to Delaware that they will take only debtors' interests into account."[54] On the other hand, some observers view this development "as part of beneficial jurisdictional competition that serves to force bankruptcy judges to make bankruptcy outcomes more efficient."[55]

Over the years, various legislative responses have been considered. In 1997, for example, the National Bankruptcy Review Commission recommended, as part of its report to Congress,[56] that the venue options of corporate debtors be restricted to districts in which their principal places of business or principal assets are located. As part of its consideration of comprehensive bankruptcy reform.[57]

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[50] Linda J. Rusch, Unintended Consequences of Unthinking Tinkering: The 1994 Amendments to the Chapter 11 Process, 69 Am. Bankr. L.J. 349, 349 (1995).

[51] Note, however, that a debtor may also liquidate all of its assets in Chapter 11. See 11 U.S.C. § 1123(a)(5)(B), (D) (2002).

[52] Theodore Eisenberg & Lynn M. LoPucki, Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations, 84 Cornell L. Rev. at 968.

[53] See, e.g., Lynn M. LoPucki & Joseph W. Doherty, Why Are Delaware and New York Bankruptcy Reorganizations Failing? 55 Vand. L. Rev. 1933 (2002). These academics concluded:

> The data show that during their first five years, firms emerging from Delaware bankruptcy court reorganizations refile more often than firms emerging from [o]ther [c]ourt reoganizations. Specifically, firms emerging from Delaware reorganization were more than ten times as likely to refile (42%) during this period than were firms emerging from reorganization in Other Courts (4%) and more than twice as likely to refile as firms emerging from New York reorganization (19%)[.]

Id. at 1939.

[54] David A. Skeel, Jr., Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware, 1 Del. L. Rev. 1, 1 (1998).

[55] Barry E. Adler & Henry N. Butler, On the "Delawarization of Bankruptcy" Debate, 52 Emory L.J. at 1310; see, e.g.,Douglas G. Baird & Robert K. Rasmussen, Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations, 87 VA. L. Rev. 921 (2001); Robert K. Rasmussen & Randall S. Thomas, Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations, 54 Vand. L. Rev. 283 (2001).

[56] National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 770–87, 791 (1997).

[57] In the 108th Congress, for example, considered an amendment that would have restricted venue of corporate bankruptcy cases to where the debtor's principal place of business is located. The amendment failed by a vote of 155 to 269. 149 Cong. Rec. H2095–96 (daily ed. Mar. 19,

To provide an opportunity to examine into the validity of these and other concerns, the Subcommittee held an oversight hearing on July 21, 2004 that focused on how large chapter 11 cases are administered in the current bankruptcy system. Witnesses at the hearing consisted of Roberta DeAngelis, Acting United States Trustee for Region 3, on behalf of the Executive Office for United States Trustees; Professor Lynn LoPucki, UCLA School of Law; and Professor Lester Brickman, Yeshiva University—Benjamin N. Cardozo School of Law. The witnesses addressed the following matters: (1) whether the bankruptcy courts seek to attract large chapter 11 cases; (2) whether the current law adequately addresses the treatment of future mass claims; (3) whether the venue provisions in Title 28 of the United States Code provide adequate protection against inappropriate forum shopping by chapter 11 debtors; (4) whether prepackaged reorganization plans create an unlevel playing field for participants in chapter 11 cases; (5) whether such plans result in higher failure rates; (6) why the failure rates of chapter 11 cases in certain districts higher than in other districts; and (7) whether the United States Trustee Program adequately polices the integrity of the bankruptcy system, especially with respect to large chapter 11 cases.

Further analysis of these issues will continue during the 109th Congress, particularly with respect to the treatment of asbestos claims in bankruptcy cases.

Regarding privacy and civil liberties in the hands of the government Post-September 11, 2001: Recommendations of the 9/11 Commission and the U.S. Department of Defense Technology and Privacy Advisory Committee

On November 27, 2002, President George W. Bush signed into law legislation creating the National Commission on Terrorist Attacks Upon the United States (9/11 Commission or Commission).[58] The Commission's principal responsibility was to "examine and report upon the facts and causes relating to the terrorist attacks of September 11, 2001," with respect to intelligence and law enforcement agencies, diplomacy, immigration and border control, the flow of assets to terrorist organizations, commercial aviation, and the role of congressional oversight and resource allocation, among other matters, and to suggest "corrective measures that can be taken to prevent acts of terrorism."[59] Established on an independent, bipartisan basis,[60] the 9/11 Commission held 19 days of hearings and received public testimony from 160 witnesses over the course of its 20-month existence.[61]

2003). In the 107th Congress, a similar provision was included in bankruptcy legislation, as reported by the Committee. H.R Rep. No. 106–123, at 36, 144 (1999).

[58] Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107–306, Title VI, 116 Stat. 2383, 2408–13 (2002).

[59] Id. at §§ 602(1), (5), 604.

[60] Id. at § 603. The Republican members were Commission Chair Thomas H. Kean, Fred F. Fielding, Slade Gorton, John F. Lehman, and James R. Thompson. The Democratic members were Commission Vice Chair Lee H. Hamilton, Richard Ben-Veniste, Jamie S. Gorelick, Bob Kerrey, and Timothy J. Roemer. The 9/11 Commission Report—Final Report of the National Commission on Terrorist Attacks Upon the United States, at xii (2004) [hereinafter 9/11 Commission Report].

[61] The 9/11 Commission Report—Final Report of the National Commissionon Terrorist Attacks Upon the United States, at xv (2004).

Pursuant to its statutory mandate, the Commission submitted its final report and unanimous recommendations to Congress and the President on July 22, 2004.[62] The 567-page report provides a detailed chronicle of the events leading up to the September 11th attacks. The paperback version of the report has since become a "national bestseller, a first for such a commission report."[63] As part of its analysis of these events, the Commission identified "fault lines within our government—between foreign and domestic intelligence, and between and within agencies."[64] The Commission also cited "pervasive problems of managing and sharing information across a large and unwieldy government that had been built in a different era to confront different dangers."[65]

The Commission's Report contained 41 recommendations, "[m]any" of which called for the government to increase its presence in our lives—for example, by creating standards for the issuance of forms of identification, by better securing our borders, [and] by sharing information gathered by many different agencies."[66] Three of these recommendations, however, specifically addressed the need to protect our citizens' privacy and civil liberties.[67]

As the Commission engaged in its deliberations, the U.S. Department of Defense (DOD) undertook a self-examination of how it treats private information. In February 2003, Secretary Donald Rumsfeld appointed the Technology and Privacy Advisory Committee (TAPAC) to examine the Terrorism Information Awareness

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[62] Press Release, 9/11 Commission, 9–11 Commission Releases Unanimous Final Report—Calls for Quick Action on Recommendations to Prevent Future Attacks (July 22, 2004), at http://www.9-11commission.gov/press/pr-2004-07-22.pdf.

[63] Jim VandeHei, 9/11 Panel Roiling Campaign Platforms, Wash. Post, Aug. 9, 2004, at A1.

[64] The 9/11 Commission Report—Final Report of the National Commission on Terrorist Attacks Upon the United States, at xvi (2004).

[65] Id.

[66] Id. at 393–94. As part of its findings concerning operational management issues, the Commission observed:

> Earlier in this report we detailed various missed opportunities to thwart the 9/11 plot. Information was not shared, sometimes inadvertently or because of legal misunderstandings. Analysis was not pooled. Effective operations were not launched. Often the handoffs of information were lost across the divide separating the foreign and domestic agencies of the government.

Id. at 353.

[67] The three recommendations were as follows:

> As the President determines the guidelines for information sharing among government agencies and by those agencies with the private sector, he should safeguard the privacy of individuals about whom information is shared.
>
> The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.
>
> At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.

Id. at 394–95.

With respect to a related concern regarding the need for secure identification information, the Commission made the following recommendation:

> Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.

Id. at 390.

Program (TIA or Program), a controversial data mining project.[68] TAPAC was tasked with proposing recommendations that would "ensure that the application of this or any like technology developed within DOD is carried out in accordance with U.S. law and American values related to privacy."[69] The eight-member, bipartisan committee was comprised of private citizens, "independent from the government and 'selected on the basis of their preeminence in the fields of constitutional law and public policy relating to communication and information management.'"[70] Over the course of its deliberations, TAPAC received testimony from 60 witnesses, including Members of Congress, representatives from the DOD and other government agencies, private industry, academia, and various advocacy groups.[71] TAPAC's final report included five recommendations regarding government-wide data mining operations.[72]

To provide an opportunity for the Subcommittee to examine the recommendations relating to privacy and civil liberties proposed by the Commission and TAPAC, an oversight hearing was held jointly with the Subcommittee on the Constitution on August 20, 2004. Witnesses at the hearing consisted of the Honorable Lee H. Ham-

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[68] Created by the Defense Advanced Research Projects Agency (DARPA) in 2002, the TIA Program was intended to proactively detect terrorist plots through the use of data mining. Its ambitious data mining security system/network would have gathered, among other things, personally identifiable information from governmental and private sources to prevent future international terrorist attacks against the United States by preemptively determining behavior patterns indicative of terrorist activities. U.S. Department of Defense, Executive Summary, Report to Congress Regarding the Terrorism Information Awareness Program, at 1, note 1 (May 20, 2003); see Gina Marie Stevens, Privacy: Total Information Awareness Programs and Related Information Access, Collection, and Protection Laws, Congressional Research Service Report for Congress, at 3 (Mar. 21, 2003). The Program was previously known as "Total Information Awareness," but was changed to its present title because the former name "created in some minds the impression that TIA was a system to be used for developing dossiers on U.S. citizens." U.S. Department of Defense, Executive Summary, Report to Congress Regarding the Terrorism Information Awareness Program, at 1 (May 20, 2003).

[69] U.S. Department of Defense, safeguarding Privacy in Re Fight Against Terrorism—Report of the Technology and Privacy Advisory Committee, at vii (Mar. 2004) (quoting U.S. Department of Defense, Technology and Privacy Advisory Committee Charter (Mar. 25, 2003)).

[70] Id. at 1 (quoting U.S. Department of Defense Notice of Establishment of the Technology and Privacy Advisory Committee, 68 Fed. Reg. 11384 (Mar. 10, 2003)).

[71] Id. at 2, 97–98.

[72] The five recommendations were as follows:

> The [DOD] Secretary should recommend that Congress and the President establish one framework of legal, technological, training, and oversight mechanisms necessary to guarantee the privacy of U.S. persons in the context of national security and law enforcement.
>
> The [DOD] Secretary should recommend that the President appoint an inter-agency committee to help ensure the quality and consistency of federal government efforts to safeguard informational privacy in the context of national security and law enforcement activities.
>
> The [DOD] Secretary should recommend that the President appoint a panel of external advisors to advise the President concerning federal government efforts to safeguard informational privacy in the context of national security and law enforcement activities.
>
> The [DOD] Secretary should recommend that the President and Congress take those steps necessary to ensure the protection of U.S. persons' privacy and the efficient and effective oversight of government data mining activities through the judiciary and by this nation's elected leaders through a politically credible process. Specifically, Congress and the President should authorize the Foreign Intelligence Surveillance Court to receive requests for orders under Recommendations 2.4 and 8 and to grant or deny such orders, and each house of Congress should identify a single committee to receive all agencies' reports concerning data mining.
>
> The [DOD] Secretary should recommend that the President and Congress support research into means for improving the accuracy and effectiveness of data mining systems and technologies; technological and other tools for enhancing privacy protection; and the broader legal, ethical, social, and practical issues involved with data mining concerning U.S.

Id. at xiv.

ilton and the Honorable Slade Gorton on behalf of the 9/11 Commission; former Secretary of the Army John O. Marsh, Jr. on behalf of the U.S. Department of Defense Technology and Privacy Advisory Committee; and Nuala O'Connor Kelly, Chief Privacy Officer for the U.S. Department of Homeland Security. Various issues were considered at the oversight hearing, including how Congress, in crafting legislation, can best protect our citizens' privacy without compromising legitimate law enforcement and terrorism detection efforts. Another issue explored at the hearing was the role of privacy officers in effectuating the privacy-related recommendations of the Commission.

Based on testimony received from this hearing, the Subcommittee actively pursued the inclusion of privacy protections in S. 2845, the "Intelligence Reform and Terrorism Prevention Act of 2004," which is discussed in greater detail in the Committee section of this Report.

Regulatory aspects of Voice over the Internet Protocol (VoIP)

The right of states to tax economic activities within their borders is a key aspect of federalism rooted in the Constitution and long recognized by Congress. At the same time, the authority of States to lay and collect taxes is subject to various constitutional limitations. First, the Commerce Clause prohibits States from assessing taxes which unduly burden interstate commerce. Second, the Due Process Clause prohibits States from taxing those who lack "substantial nexus" with the taxing State. Finally, the Privilege and Immunities Clause prevents States from assessing taxes which discriminate against nonresidents. During the 107th Congress, the Subcommittee considered a number of bills that bear directly on State taxes affecting interstate commerce.

Background.—Voice over the Internet Protocol (VoIP) is a dynamic technology that sends telephone calls over a broadband Internet connection rather than a regular (or analog) telephone line. VoIP, also called Internet Protocol ("IP") telephony, converts the voice signal from a telephone into a digital signal that travels over the Internet and then converts it back at the other end so the user may speak to anyone with a regular telephone number.

VoIP functionality differs from that of traditional telephone companies which use circuit-switched technology. A person using a traditional telephone, or "plain old telephone service" (POTS), is connected to the public switched telephone network (PSTN), which is operated by local telephone companies. In contrast, voice communication using the Internet utilizes "packet switching," a process of breaking down data into packets of digital bits and transmitting them over the Internet. A marked difference between VoIP and POTS functionalities is that POTS establishes a dedicated circuit between the parties to a voice transmission, whereas VoIP technology sends packets of information over the fastest available route along the Internet, without requiring the establishment of an end-to-end path.

IP telephony falls generally into one of three categories: computer-to-computer; telephone-to-computer; and telephone-to-telephone. In other words, some VoIP services only work over a computer or a special VoIP phone, while others allow the use of a tra-

ditional phone through an adaptor. Some services using VoIP may only allow a user to call other people using the same service, but others may allow a user to call anyone who has a telephone number—including local, long distance, mobile, and international numbers.

VoIP presents new opportunities for users and investors alike. VoIP is based on software rather than hardware, which makes it less expensive to set up and operate and more flexible than circuit-switched technology.[73] Further, because VoIP is digital, it may offer features and services that are not available with POTS, such as calls that follow the customer from telephone to telephone, voice mail sent to the user's e-mail, and inexpensive conference calling. Further, VoIP allows new competitors into the telephone business, which could change the face of the U.S. telecommunications business. Indeed, FCC Chairman Michael K. Powell has heralded VoIP as promising "the most important shift in the entire history of modern communications since the invention of the telephone."[74]

VoIP has been offered in various forms since at least 1995. While early experience deterred investors and consumers from adopting VoIP because it was deemed unreliable and poor in quality, technology has now overcome such concerns. In addition to such improvements, the VoIP market has been driven by the creation of new IP services and increasing penetration of broadband into the residential market. Further, market entry by IP service providers such as Vonage appears to have spurred deployment of IP-enabled voice services by established telephony providers. For example, AT&T in 2003 announced that it expected to enroll over one million customers in the next two years.[75] SBC, BellSouth, Qwest and Verizon either offer VoIP currently or plan to offer VoIP in the near future.[76] Wireless service providers have also begun to provide VoIP, and Time Warner Cable predicted that it would offer IP telephony to all of its subscribers by the end of 2004.[77]

Prior Legislation Relevant to VoIP.—Relevant to the consideration of the proper regulatory treatment of VoIP are the Communications Act of 1934,[78] as amended by the Telecommunications Act of 1996,[79] and prior FCC orders. The Communications Act defines the terms "common carrier" and "carrier" to include "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio."[80] Next, the FCC has long distinguished between "basic" and "enhanced" service offerings. In the

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[73] Scott Cleland of the Precursor Group claims that one could replace the $125 billion in hardware that the Bell companies have installed in their conventional networks with a few billion dollars worth of VoIP software and servers. Eric J. Savits, Talk Gets Cheap: Internet Telephony is Bad News for the Bells, but may be Great News for the Cable Guys, Barron's, May 24, 2004.

[74] Id.

[75] See Shawn Young, AT&T to Launch Internet-Based Telephone Service, Wall St. J. B6 (Dec. 11, 2003).

[76] See, e.g. Ben Charny, Qwest Taps into Net Telephony, CNET News.com (Dec. 10, 2003); Ben Charny, Verizon Details Internet Phone Plans, CNET News.com (Nov. 18, 2003).

[77] See Presentation by John Billock, Vice Chairman & Chief Operating Officer, Time Warner Cable, to FCC VoIP Forum, at 5 (Dec. 1, 2003), available at <http://www.fcc.gov/voip>.

[78] 47 U.S.C. § 151 et. seq. (1934) (hereinafter "Communications Act").

[79] 47 U.S.C. § 151 et. seq. (1996) (hereinafter "1996 Act").

[80] 47 U.S.C. § 153(10). The Act specifically excludes persons "engaged in radio broadcasting" from this definition. Id.

Computer Inquiry line of decisions,[81] the Commission specified that a "basic" service is a service offering transmission capacity for the delivery of information without net change in form or content.[82] Providers of "basic" services were subjected to common carrier regulation under Title II of the Act.[83] In contrast, an "enhanced service contains a basic service component but also "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." [84] The Commission found that enhanced services were subject to the Commission's jurisdiction.[85] The Commission further found that the enhanced service market was highly competitive with low barriers to entry; therefore the Commission declined to treat providers of enhanced services as "common carriers" subject to regulation under Title II of the Act.[86]

The 1996 Act represented the first major overhaul of telecommunications law in nearly 62 years. Enacted twelve years after the breakup of the AT&T monopoly, the 1996 Act was intended to move all telecommunications markets toward competition. The Act envisioned competition in all telecommunications markets, both in the markets for the various elements that comprise the telecommunications network, as well as for the final services the network creates. Building on the experience of the long distance market, which was transformed from a monopoly to an effectively competitive market, the Act attempts to promote competition in the formerly monopolized local exchange markets. Of the most important provisions of the Act is the requirement that incumbent local exchange carriers (ILECs) provide competitors access to their networks and lease to competitors parts of their networks (unbundled network elements) at reduced rates.[87]

The 1996 Act codified, with minor modifications, the Commission's distinction between regulated "basic" and largely unregulated "enhanced" services. The Act defined the terms "telecommunications," "telecommunications services" and "information services." [88] As discussed below, a distinction critical to the industry is

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[81] See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1996); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971); Amendment of Section 64.702 of the Commission's Rules and Regulations, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979); Amendment of Section 64.702 of the Commission's Rules and Regulations, Docket No. 20828, Final Decision, 77 FCC 2d 384; Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85–229, Report and Order, 104 FCC 2d 958.

[82] 77 FCC 2d at 419–22, paras. 93–99.

[83] Id. at 428, para. 114.

[84] 47 C.F.R. § 64.702; see also 77 FCC 2d at 420–21, para. 97.

[85] 77 FCC 2d at 432, para. 125.

[86] Id. at 432–35, paras. 126–132.

[87] 47 U.S.C. § 251.

[88] The 1996 Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities use." 47 U.S.C. § 153(46). "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any

whether VoIP is a regulated telecommunications service, which has a long history of substantial government regulation, or an "information service" subject to federal jurisdiction but largely unregulated. Reaching a definitive conclusion has thus far eluded the FCC, at least in part due to the unique nature of VoIP functionality and its disconnect with the current telecommunications regulatory scheme.

The current telecommunications regulatory model reflects the "legacy PSTN era," in which specific platforms were optimized for one and only one application.[89] For example, POTS required a physical wire connection to every home in order for a connection to be made. In contrast, the concept of "end points" has little relevance to VoIP. VoIP and other IP platforms are not specific to one application; rather they can operate on various applications. VoIP technology is therefore a new paradigm because it has disconnected the architecture from the application platform. In sum, because the current telecommunications regulatory model does not accommodate VoIP functionality, VoIP represents a unique regulatory challenge.

FCC Action on VoIP.—While the FCC has not addressed VoIP and IP-enabled services in a comprehensive manner, it has taken steps to determine the appropriate regulatory approach.

VoIP Forum

On December 1, 2003, the FCC announced a year-long VoIP Forum, in which all Commissioners would participate.[90] The purpose of the Forum was to discuss VoIP and to solicit comments from the public on the impact that IP-enabled services, including VoIP, have had and will continue to have on the United States.[91] Seventy parties submitted materials to the VoIP Forum, including small- to medium-sized telecommunications companies, larger concerns such as AT&T, related associations, individuals working in related fields, and Members of the other body.[92]

FCC Rulings

To date, the FCC has issued a handful of rulings on the regulatory treatment of VoIP, including:

Pulver.com

Pulver.com is a company offering a service entitled "Free World Dialup" ("FWD"), which allows users of broadband Internet services to make telephone calls, free of charge, to others who installed FWD software, using WiFi telephones, or other consumer devices.[93]

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use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

[89] The current regulatory paradigm has been described as conceptually "vertical" in organization, in which the communications service offered and the underlying network utilized are deemed one in the same. In contrast, VoIP and other IP-related services are, in concept, horizontally layered stacks in which the services are no longer tied to discrete networks, facilities or technologies.

[90] See http://www.fcc.gov/voip/voipforum.

[91] Id.

[92] Comments are posted on the FCC website at http://www.fcc.gov/voip/materials-view.html.

[93] FWD operates by requiring members to complete an initial registration process and comply with other requirements. Specifically, members must have an existing broadband Internet access service as FWD does not offer transmission service or transmission capability. In addition,

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On February 5, 2003, company founder Jeff Pulver had filed a petition for declaratory ruling requiring the FCC to declare FWD to be neither a "telecommunications service" nor "telecommunications" as defined in the Communications Act of 1934.[94] Mr. Pulver maintained that, because FWD originates on the Internet and provides no transmission capabilities to its members, it should not be subject to regulation as a telecommunications service. Rather, Mr. Pulver argued, FWD is an Internet application that provides its members information that members use to communicate with other members.[95]

On February 12, 2004, more than one year after the submission of comments by interested parties, the FCC issued a 29-page Memorandum opinion and Order ("Order") agreeing with Mr. Pulver.[96] The Order declared that FWD is neither "telecommunications," nor a "telecommunications service," but that FWD is an unregulated "information service" subject to federal jurisdiction.[97] The Commission's Order noted that pulver.com neither offers nor provides transmission to its members.[98] Rather, FWD members must "bring their own broadband" transmission in order to interact with the FWD server.[99] The FCC further stated:

> Offerings such as Pulver's FWD promise significant benefits in the form of lower prices, new pricing models and enhanced functionality. Accordingly, our action is part of a number of initiatives that are designed to bring the benefits of * * * IP-based services to American consumers.[100]

AT&T's "Phone-to-Phone" VoIP Services

Following its Order concerning FWD, the Commission turned its attention to the outstanding question of whether "phone-to-phone" IP telephony services are subject to the access charges applicable to circuit-switched interexchange calls. On October 18, 2002, AT&T had filed a petition for declaratory ruling to exempt its phone-to-phone telephony services from access charges.[101] AT&T's VoIP functionality differs from that of FWD in that the service originates and terminates on the PSTN.[102]

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members must acquire download software or appropriately configured phones that enable their personal computers to function as "soft phones." Once these criteria are met, anyone anywhere in the world may obtain a Pulver-assigned FWD number that enables members to make free VoIP communications to other FWD members. Further, FWD numbers are completely portable to any broadband-accessible location to which a member may go. Pulver.com neither knows nor needs to know the geographical location of its members in order for its members to use FWD.

[94] Federal Communications Commission, Pulver.com Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03–45 (filed Feb. 5, 2003).

[95] Id.

[96] Federal Communications Commission, Memorandum Opinion and Order, In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03–45, FC 04–27 (rel. Feb. 12, 2004).

[97] Id. at 5.

[98] Id. at 4.

[99] Id. at 6.

[100] Id. at 1.

[101] Federal Communications Commission, Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02–361 (filed Oct. 18, 2002).

[102] Specifically, AT&T's service consists of an interexchange call that is initiated in the same manner as traditional interexchange calls, by an end-user who dials 1 + the called number from a regular telephone. When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local-exchange-car-

The Commission issued its Order on April 21, 2004, one and one-half years after the filing of the petition.[103] The FCC stated that its Order was intended to provide clarity to the industry with respect to the application of interstate access charges pending the outcome of the FCC's notice of Proposed Rulemaking on IP-Enabled Services ("NPRM"), discussed *supra*.[104] The Order rejected AT&T's petition, ruling that traditional telephone calls that start and end on the PSTN, but are carried part of the time on AT&T's Internet backbone, are properly classified as a telecommunications service.[105] Those calls, the Commission ruled, are subject to the access charges that are exchanged when a telephone call made through one carrier ends on another carrier's network.[106] FCC Chairman Michael Powell remarked that the decision was "correctly decided on very narrow grounds. A straightforward application of existing law places the long distance telephone service, as it is factually described by AT&T, squarely in the category of a telecommunications service." [107]

Outstanding petitions

As of the subcommittee's June 23, 2004 hearing, several outstanding petitions remained at the FCC, including that of Vonage Holdings Corporation ("Vonage"), a VoIP service offering computer-to-computer and phone-to-computer telephony. In September, 2003 Vonage filed with the FCC a petition for declaratory ruling that Vonage's service constituted an information service and that federal policy preempts state action in this area.[108] Vonage's petition was contemporaneous with its involvement in litigation with the Minnesota Public Utilities Commission (MPUC), discussed in further detail infra. The FCC has yet to issue an Opinion in this matter.

In addition, on December 23, 2003, Level 3 Communications filed a petition with the FCC requesting that it forebear from applying the requirements of § 251(g) of the 1996 Act and FCC rules to the extent that they might be interpreted to allow local exchange carriers to impose interstate or intrastate access charges on IP traffic that originates or terminates on the PSTN.[109] As of the time of this report, several other petitions relating to the regulatory treatment of VoIP remain outstanding with the FCC.[110]

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rier local business lines. Services such as AT&T's have been called "IP in the middle" services. See Tech Law Journal, FCC Rules on AT&T's VOIP Petition, April 21, 2004.

[103] Federal Communications Commission Order In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02–36, FCC 04–97 (rel. April 21, 2004).

[104] Id. at 7.

[105] Id. at 9.

[106] Id.

[107] Statement of Chairman Michael K. Powell Re: Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02–361, Order, available at www.fcc.gov.

[108] Federal Communications Commission, Vonage Petition for Declaratory Ruling, WC Docket No. 03–211 (filed Sept. 22, 2003).

[109] Federal Communications Commission, Level 3 Communications Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51,701(b)(1), and Rule 69.5(b), WC Docket No. 03–266 (filed Dec. 23, 2003).

[110] Additional pending petitions related to the regulatory treatment of VoIP are those of Vonage, SBC, and Inflexion.

Notice of proposed rulemaking in the matter of IP-Enabled Services

On March 10, 2004, the FCC issued a Notice of Proposed Rulemaking ("NPRM") regarding "IP-Enabled Services."[111] In the NPRM, the FCC raised issues relating to services and applications making use of IP including, but not limited to, VoIP, and solicited comments on a broad array of concerns, including:

1. The impact that such IP-enabled services, including VoIP, have had and will continue to have on the United States' communications landscape;[112]
2. How the Commission might distinguish among such services and on whether any regulatory treatment would be appropriate for any class of IP services;[113]
3. Whether the proliferation of services and applications utilizing a common protocol may permit competitive developments in the marketplace to play the key role once played by regulation;[114]
4. Whether there is a compelling rationale for applying traditional economic regulation to providers of IP-enabled services;[115]
5. How the regulatory classification of IP-enabled services, including VoIP would affect the FCC's ability to fund universal service;[116] and
6. Whether to extend the application of the Commission's ruling in Pulver.[117]

The FCC received 249 comments and reply comments in response to the NPRM within the May 10, 2004 and June 10, 2004 deadlines, respectively. According to the FCC, it has taken no further action on these submissions.[118] According to press reports, "broad VoIP rules are expected to be released" by about May 2005.[119]

State Action.—While the FCC has continued to consider the matter, States have begun to address VoIP regulation. For example, in September 2003, the Minnesota Public Utilities Commission (MPUC) found that it had jurisdiction over the VoIP services provided by companies such as Vonage, a service that offered computer-to-computer and phone-to-computer telephony only.[120] The MPUC ordered Vonage to comply with state statutes and rules regarding the offering of telephone service.

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[111] Federal Communications Commission, Notice of Proposed Rulemaking, In the Matter of IP-Enabled Services, WC Docket No. 04–36, FCC 04–48 (adopted Feb. 12, 2004) (hereinafter "NPRM").
[112] NPRM at 2.
[113] Id. at 24.
[114] Id. at 5.
[115] Id. at 49.
[116] Id. at 43.
[117] Id. at 24.
[118] E-mail communication with FCC staff Russ Hauser, July 1, 2004.
[119] See Josh Long, FCC Due to Explain IP Voice Rules/Tauzin: "Silence Is Not Acceptable," Xchange, March 1, 2004.
[120] See *Vonage Holdings Corp.* v. *Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003) (citing In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota, Docket No. P–6214/C–03–108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003) (order finding jurisdiction and requiring compliance) (Minnesota federal court decision hereinafter "Vonage-Minnesota").

Vonage sought review of the decision in federal court,[121] and on October 16, 2003, the U.S. District Court for the District of Minnesota concluded that Vonage "uses telecommunications services, rather than provides them."[122] The court found Vonage's VoIP service to constitute an information service within the meaning of the Communications Act, noting that Vonage's process of transmitting customer calls over the Internet requires Vonage to "act on" the format and protocol of information.[123] In other words, for calls originating with one of Vonage's customers, calls in the VoIP format must be transformed into the PSTN format before a POTS user can receive the call.[124] Further, the court held that state "regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated."[125]

The State of New York initially reached the opposite conclusion with regard to Vonage.[126] In September 2003, Frontier Telephone of Rochester, Inc. ("Frontier") filed a complaint against Vonage alleging Vonage was a telephone corporation providing a telecommunications service under New York State Public Law.[127] Vonage argued that it was not a telecommunications service, rather an "information service."[128] Vonage also argued that even if found to be a telephone corporation, state regulation is preempted because the interstate and intrastate aspects of its service cannot be segregated.[129]

The New York State Public Services Commission ("NYPSC") found in favor of Frontier in May 2004.[130] The NYPSC held that Vonage is not an "information service" under the Telecommunications Act of 1996, but rather a "telecommunications service" which can be regulated by the states.[131] The Commission held that Vonage is a telephone corporation under state law and as such subject to statutory requirements.[132] The Commission reasoned that Vonage is reselling to its own customers capabilities it acquires from the other, third party, telephone corporations.[133] Finally, the NYPSC found Vonage "should be subject to, at most, the same limited regulatory regime to which comparable circuit switched competitive carriers are currently subject to in New York."[134]

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[121] Id. Vonage also filed with the FCC a petition for declaratory ruling that its service is an "information service" and that federal policy preempts state action in this area. See supra n. 34.

[122] Vonage-Minnesota at 999 (emphasis in original).

[123] Id.

[124] Id.

[125] Id. at 98.

[126] Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law, Case 03–C–1285 (New York Public Service Comm'n May 21, 2004) (order establishing balanced regulatory framework for Vonage Holdings Corporation) (hereinafter "Vonage Minnesota").

[127] Id.

[128] Id.

[129] Id.

[130] Id.

[131] Id.

[132] Id.

[133] Id.

[134] Id. Jeff Pulver criticized the decision, stating, "I am quite disappointed to see that New York State decided to apply legacy telephone regulation to Internet-based communications, while the FCC is in the process of figuring out the right regulatory treatment for VoIP. * * * Between his decision in New York and a pending decision in California, these new developments

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However, on June 30, 2004, Magistrate Judge Douglas F. Eaton, U.S. District Court (Southern District of New York) announced his intention to enjoin the NYPSC from regulating Vonage as a telecommunications carrier.[135] Judge Eaton will consider the merits of a permanent injunction in January 2005.[136] Although Judge Eaton's action reinforces the *Vonage Minnesota* decision, the formation of a national framework for the emerging VoIP industry remains incomplete. Indeed, it is not surprising that Vonage CEO Jeffrey Citron calls the threat of increased regulation "one of the biggest uncertainties" his company faces.[137]

Further, about half of all states have launched regulatory or legal proceedings addressing VoIP.[138] Some, such as Colorado, have postponed their efforts until the FCC completes its NPRM.[139] In response to increasing state involvement, some state regulators have urged the FCC to take a prompt stance on VoIP.[140] Members of the California and Florida public-utilities commissions warned that many state regulators and legislators are being driven by an "irrational fear of Internet telephone services," and stated that the FCC "must pre-empt states from tampering" with VoIP.[141] The members warned that, in the absence of needed federal preemption, states will occupy the VoIP field. The California member concluded, "We need the FCC to step in and take the bullets for us at the federal level."[142]

Legislative Initiatives.—On April 2, 2004, Rep. Charles "Chip" Pickering introduced H.R. 4129, the "VoIP Regulatory Freedom Act of 2004."[143] The intent of H.R. 4129 was to provide a clear structure for the regulatory treatment for the offering or provision of VoIP applications. The bill reserved sole authority to regulate VoIP applications to the federal government. H.R. 4129 prohibited state regulation of VoIP applications as well as the delegation of reserved authority to any state or political authority.

The bill directed the FCC to: (1) establish rules and standards for appropriate arrangements to compensate providers of facilities and equipment used to transmit communications employing a connected VoIP application; and (2) maximize participation in the support of universal service among the greatest number of providers of connected VoIP applications. H.R. 4129 also requires the FCC to appoint an appropriate representative industry organization to develop guidelines and protocols related to the offering of connected

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may lead to the introduction of new regulatory barriers that in fact could slow the adoption of IP communication services and delay the extraordinary benefits available from such services." See Evan Hansen, New York Classifies Vonage as Phone Company; Handing a Setback to Emerging Net Phone Services, the State's Public Service Commission Rules that Vonage Holdings is a Telephone Company and thus Subject to State Regulation, CNETNews.com (May 19, 2004).

[135] See Ben Charney, Vonage Beats Back New York Ruling, CNET News.com, June 30, 2004.

[136] Id.

[137] Brian M. Carney, Business, Make Way for the VoIP Revolution, Wall St. J. Eur., June 14, 2004.

[138] Mark Wigfield, It Looks Like a Duck; or Does It? Should Regulators Treat Internet Phone Service Like a Phone or the Internet? Its Future May Depend on the Answer, Wall St. J. R8 (May 24, 2004).

[139] Id.

[140] Drew Clark, State Regulators Urge FCC Stand on Internet Telephony, Tech. Daily PM, June 22, 2004.

[141] Id.

[142] Id.

[143] H.R. 4129, 108th Cong., 2004. The bill currently has two cosponsors, Subcommittee on Commercial and Administrative Law Chairman Chris Cannon and Rep. James T. Walsh.

VoIP applications for: (1) providing emergency 911 services; (2) improving use by the disabled community; and (3) improving the reliability and security of voice communications.

Further, H.R. 4129 prohibited states or their subdivisions from taxing or imposing other charges on the offering or provision of a VoIP application. The bill would not affect the authority to regulate transmission facilities nor would it authorize regulation of such authorities.

H.R. 4129 had a companion bill in the other body, S. 2281, which was similar, although not identical, to H.R. 4129.[144] No action was taken by the House on H.R. 4129. S. 2281 was reported by the Committee on Commerce, Science and Transportation on November 19, 2004 to the Senate, which took no further action.

Hearing by Subcommittee on Commercial and Administrative Law

On July 23, 2004, the Subcommittee on Commercial and Administrative Law held an oversight hearing entitled "Regulatory Aspects of Voice over Internet Protocol."[145] The purpose of the hearing was to discuss aspects of VoIP relevant to the consideration of the appropriate regulatory treatment of this technology. Witnesses at the hearing were Robert Pepper, Ph.D., chief of policy development at the FCC; John Langhauser, vice-president, law, and chief counsel to the Consumer Services Group of AT&T Corporation; Stephen Cordi, deputy comptroller for the Maryland Comptroller of the Treasury and immediate past president of the Federation of Tax Administrators; and James Kirkland, general counsel and senior vice-president of Covad Communications Group.

Mr. Pepper began his testimony stating that VoIP presents unique challenges to the FCC because it does not conform to the traditional economic and regulatory structures that have governed the traditional telephone industry for more than a century.[146] According to Mr. Pepper, "[s]aying that VoIP is just another way to make a phone call is much like saying that Ebay is just another way to have a garage sale."[147] A fundamental change is associated with the transmission of voice over the Internet, because, according to Mr. Pepper, it has made voice simply one of many applications over a digital broadband network with multiple uses.[148] Due to the fundamental shifts associated with VoIP, Mr. Pepper reasoned, "it

[144] Both bills provide that regulation of VoIP is an exclusively federal prerogative, that states cannot tax the offering or provision of a VoIP application, and that the FCC has regulatory authority only in the enumerated areas of interprovider compensation, universal service contributions, and law enforcement surveillance. The bills differ in the nature and extent of the FCC's regulatory authority in these latter categories. See, e.g., "Summary of VOIP Regulatory Freedom Bills," Tech Law Journal, E-Mail Alert No. 872, (April 8, 2004). A hearing was held on S. 2281 in the Committee on Commerce, Science & Transportation in the other body on June 16, 2004. Witnesses at the hearing included: Jeff Pulver, Thomas Rutledge; Chief Operating Officer, Cablevision Systems Corporation; David Jones, Director of Emergency Services, Spartanburg County Communications/9–1–1; the Honorable Stan Wise, Commissioner of the Georgia Public Service Commission; and James X. Dempsey, Executive Director, Center for Democracy & Technology. On July 22, 2004, S. 2281 was reported favorably by the Committee on Commerce, Science & Transportation with an amendment in the nature of a substitute which, rather than imposing a blanket prohibition on state taxation of VoIP, would limit the preemption of state regulation on VoIP to three years.

[145] Regulatory Aspects of Voice Over Internet Protocol: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 108th Cong. (2004) (hereinafter "Hearing Transcript").

[146] Hearing Transcript at 63.

[147] Id.

[148] Id.

would be irrational for regulators to ignore these changes and automatically apply legacy regulation without first seriously examining whether it is relevant."[149] Pointing to cell phones and the Internet as positive examples of a "deregulatory course,"[150] Mr. Pepper noted that the FCC has begun careful and thorough examination of VoIP because "development of this promising technology might very well be hampered by unjustified, conflicting and burdensome regulatory requirements that could result as different state commissions and courts begin to address this area."[151] Further, he testified that the FCC "cannot simply assume that inaction will create an environment that encourages innovation, investment and competition."[152] Mr. Pepper summarized the many activities in which the FCC is engaged pertaining to VoIP, including the Notice of Proposed Rulemaking, the consideration of VoIP-related petitions, and questions related to the universal service fund, but noted that the FCC is nonetheless constrained by the amount of flexibility and discretion granted to it by Congress through the Telecommunications Act.[153]

Mr. Langhauser testified that the benefits of VoIP to be derived by small businesses and the larger economy alike will only be realized if Congress and regulators "bring certainty and stability to the regulatory rules surrounding VoIP."[154] Mr. Langhauser called for strong leadership at the Federal level with regard to VoIP, stating that this technology should be allowed to develop into another technology controlled via the anticompetitive practices of the Bell monopolies.[155] Mr. Langhauser stated that such anticompetitive practices include the Bells' refusal to sell broadband to customers purchasing voice services from a competitor.[156] Legislative and regulatory certainty, he reasoned, would "encourage AT&T to invest in VoIP and remain in the domestic residential voice market."[157] Mr. Langhauser commended the efforts of Judiciary Committee Chairman Sensenbrenner and Ranking Member Conyers in offering H.R. 4412, the "Clarification of Antitrust Remedies in Telecommunications Act of 2004,"[158] legislation to ensure that the Telecommunications Act is not construed to supersede the antitrust laws.[159] In conclusion, Mr. Langhauser asked Congress to allow VoIP to deliver on its promising potential by not regulating it like "plain old telephone service," noting in particular that the FCC's delays in achieving reforms have only benefitted the incumbent local exchange carriers.[160]

The prepared testimony of Mr. Cordi, who represented the Federation of Tax Administrators, addressed only his objections to H.R. 4129. Mr. Cordi presented four objections to the bill: (1) it discriminates against other providers of voice communications services; (2) it represents a considerable fiscal cost to the state governments; (3)

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[149] Id.
[150] Id. at 64.
[151] Id.
[152] Id.
[153] Id.
[154] Id. at 72.
[155] Id. at 73.
[156] Id.
[157] Id.
[158] H.R. 4412, 108th Cong. (2004).
[159] Hearing Transcript at 73.
[160] Id.

it runs counter to the system of federalism; and (4) no case has been made for preempting state and local tax authority.[161] Mr. Cordi elaborated that, in nurturing a new technology, we must not forget existing and competing products. Since a primary goal of tax policy is to treat similar taxpayers and similar goods in a similar fashion, Mr. Cordi stated, the government should not put traditional phone service (i.e., land-line service) at a disadvantage through tax preemption of VoIP. Mr. Cordi reasoned that VoIP, wireless telephone, and traditional telephone services are functional equivalents and should be taxed in a similar manner. Mr. Cordi also cautioned that preemption would reduce state revenues by at least $3 billion per year within five years, and possibly lead to much more in the future. Mr. Cordi also objected to H.R. 4129 on the grounds that states are sovereign entities and Congress "has heretofore generally limited preemption of state and local taxation to narrow situations" such as excessive reporting burdens or a compelling need for uniformity. Mr. Cordi concluded that there is no evidence of such a compelling need to preempt state taxing authority with regard to VoIP.

Mr. Kirkland offered the perspective of Covad Communications, stressing that the Judiciary Committee's oversight in ensuring the proper application of antitrust laws to telecommunications was of paramount importance. Citing the recent *Trinko*[162] line of decisions, Mr. Kirkland noted that there appears to have been a "bait and switch" since 1996, when the Telecommunications Act was promulgated to encourage competition in the industry. Mr. Kirkland explained the difference between the offerings of Covad versus that of other organizations: while services such as AT&T's CallVantage and Vonage offer applications and software packages that can be delivered over any kind of broadband network, Covad provides the underlying transmission facilities. Mr. Kirkland continued that the one "ubiquitous set of loops that connects all homes and all businesses in this country," however, remains the local telephone network. In order to achieve continued innovation and competition, therefore, companies such as Covad will still require access to those loops in order to provide VoIP service. Thus, Mr. Kirkland concluded, pro-competitive market regulation with regard to VoIP "still has a critical role to play."

Mr. Cannon then proceeded to question the witnesses regarding the tax base of VoIP. Specifically, since the cost of VoIP was, at present, approximately ⅕ that of traditional telephone service, and will reduce over time, it appeared that taxation of VoIP would inevitably result in smaller state tax revenue. Mr. Cordi conceded that the reduced cost of VoIP service would result in a smaller state tax collections, and this would present a problem for states

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[161] Id. at 80–83.

[162] *Verizon Communications Inc.* v. *Law Offices of Curtis. V. Trinko,* 124 S. Ct. 872 (2004) (Complaint by customer of competing telephone service against incumbent carrier alleging antitrust and Telecommunications Act violations did not state an antitrust claim under Section 2 of the Sherman Act. Telecommunications Act of 1996 has no effect upon the application of traditional antitrust principles, in light of antitrust-specific savings clause which barred fining of implied immunity); rev'g *Law offices of Curits V. Trinko, L.L.P,* v. *Bell,* 305 F. 3d 89 (2d Cir. 2002) (Customer bringining action for alleged violations of Telecommunications Act has standing to bring antitrust action, and Telecommunications Act does not take precedence over general antitrust laws.): aff'g in part, vacating in part, *Law offices of Curtis V. Trinko, L.L.P.* v. *Bell Atlantic Corp.,* 294 F. 3d 307 (S.D.N.Y. 2000) (alleged violations of Telecommunications Act obligations do not constitute antitrust violations under Section 2 of the Sherman Act).

over time. Mr. Cordi stated that, to the extent that states would need additional revenue, they would either have to increase rates for their services, find other sources of revenue, or cut expenditures. Mr. Pepper offered that affordable telephone service is a shared goal of everyone, including the FCC, states and Congress, and that lower costs for telephone service will contribute to the goal of providing affordable telephone service to all Americans. Mr. Pepper added that broadband deployment is a good example of the advantages that new technologies bring to communities.

Mr. Cannon then questioned the witnesses as to whether a tax on a fundamental service, such as VoIP was inherently a regressive tax that broadens the "digital divide" between those who benefit from technology and those that do not. Mr. Pepper agreed, offering that, ironically, it is the poorest Americans, who make many long-distance calls, that tend to bear the greatest telecommunications tax burdens. Mr. Langhauser, also agreeing on the question of regressiveness, added that the telecommunications industry has been singled out for a myriad of state and local taxation, and is treated somewhat punitively, as if it were tobacco or alcohol.

Building on this observation, Mr. Kirkland proffered that real inequities exist in the telecommunications industry with regard to taxes and fees that are based on the legacy system created under the Telecommunications Act. Mr. Kirkland stated that regulators must carefully examine the current system, consider the rationalization for the existence of rules generated under it, and undertake a fundamental and equitable restructuring of the paradigm. Mr. Cordi, in responding to the question of regressive taxation, initially argued that preemption of the type found in H.R. 4129 is in fact regressive, given the fact that wealthier citizens would benefit from H.R. 4129 because it is they who are computer-literate and can afford to buy broadband access. Mr. Cannon then responded by pointing out that VoIP requires only that a person own a telephone, not a computer, and the poorest citizens tend to live in densely packed urban areas where DSL connections are widely available for use by VoIP companies. Mr. Cannon questioned Mr. Cordi whether these were the type of people that should be brought to the right side of the "digital divide" (i.e., given the opportunity to benefit from the advantages of new technology). Mr. Cordi agreed with Mr. Cannon following these comments.

Mr. Cannon then questioned Mr. Pepper about the FCC's efforts to address the social issues associated with VoIP, including the universal service fund and 911 service. Mr. Pepper responded that the FCC believes it very important to "separate economic regulation from * * * social or consumer policies."[163] In this regard, the FCC has organized a series of summits to discuss the issues and work toward potential solutions. Finally, when questioned about intercarrier compensation (the price one provider of a service pays another to terminate a call), Mr. Pepper noted that the FCC has undertaken a separate proceeding on the issue to resolve problems including that of multiple prices for the same service.

[163] Id. at 106.

Conclusion

Several points were underscored at the hearing, notably that VoIP is a unique and dynamic technology that offers greater consumer options in telecommunications at a lower cost. The testimony of the witnesses emphasized that this technology should be fostered and allowed to develop to its full potential, although the social obligations associated with telecommunications should not be ignored. There was general agreement that preemption of state taxation on VoIP stands to benefit poor Americans and avail them of the advantages offered by new technology. Since both the FCC and Congress have critical roles to play in establishing the appropriate regulatory framework for VoIP, continuing oversight by the Judiciary Committee is important to ensure development of the technology and proper competition in the industry.

Oversight hearing on the "Streamlined Sales Tax Agreement: States" Efforts to Facilitate Sales Tax Collection from Remote Vendors"

The Streamlined Sales and Use Tax Agreement (SSTA) is the result of an effort by State and local tax administrators to design and implement a system radically simplifying sales and use taxes.[164] Organizers of this project are referred to generally as the "Streamline Sales Tax Project" (SSTP or "Project"). The SSTP has worked with the support of the National Governors' Association (NGA) and the National Conference of State Legislatures (NCSL).

On November 12, 2002, the State participants approved a final agreement outlining a comprehensive system to streamline and make uniform the States' current sales tax rules and administrative requirements.

The SSTA would mark a significant departure from the sales and use tax system now in place in the United States. Currently, a State is prohibited under the Supreme Court's decision in *Quill*[165] from compelling a remote seller lacking a physical presence in the State to collect and remit sales taxes for sales made to citizens within that States boundaries. The Project is expected to ask Congress to approve the agreement, and thereby authorize the States to compel out-of-State merchants to collect sales taxes on all sales to customers in their respective States. Without Congressional authorization, compliance with the SSTA will be voluntary.

On October 1, 2003, the Subcommittee conducted a hearing on the SSTA.[166] Witnesses included: the Honorable Bill Owens, Governor of the State of Colorado; Maureen Riehl, Vice President, State and Government Relations Counsel, the National Retail Federation; George Isaacson, tax counsel, the Direct Marketing Association; and Jack VanWoerkom, Executive Vice President and General Counsel, Staples Incorporated.

Governor Owens testified that the SSTA raises many questions about whether it will in effect be viewed as a new tax that would, in effect, negate tax relief Congress has granted to the American

[164] See http://www.geocities.com/streamlined2000/ and http://www.streamlinedsalestax.org for information on the SSTP.

[165] *Quill Corp.* v. *North Dakota,* 504 U.S. 298 (1992).

[166] Hearing entitled: "Streamline Sales and Use Tax Agreement: States' Efforts to Facilitate Sales Tax Collection from Remote Vendors", Serial No. 57. October 1, 2003.

people over the past several years. He viewed the SSTA as being essentially unfair to consumers and raising troubling questions of fairness in how states will deal with retailers. He indicated his concerns about whether the SSTA respected principles of federalism by ceding authority over State tax policy to "a board of unelected, out-of-State members of the sales tax administrative bureaucracy." [167]

Ms. Riehl testified in favor of the SSTA, indicating that in her view it was "very pro-retail." [168] She indicated that the SSTA would provide certainty for retailers and give them the benefits of "common definitions, centralized administration of the sales tax, limits on audits, which are an enormous cost burden to retailers and we can have simplicity down to one rate per zip code." [169]

Mr. Isaacson noted that while there has been general agreement among commentators on the American sales and use tax system that a major problem is the existence of thousands of taxing jurisdictions. The SSTA, however, involves no reduction in the number of these jurisdictions, he noted. He testified that in 1967 there were approximately 3000 taxing jurisdictions, while there are now more than 8,000. "The problem worsens and the SSTA does not address it," he said.[170] He emphasized the complexity of the sales and use tax collection was not considered in the development of the SSTA, "nor do we have conforming legislation that matches even the weakest version of uniformity that SST project has passed. What is important is to go back to the drawing board and do it right." [171]

Mr. VanWoerkom testified in support of the SSTA because it "levels the playing field among all retailers by requiring remote retailers to collect and remit State sales taxes in the same manner as brick-and-mortar retailers * * * We also support it because it simplifies the enormous task of complying with State sales tax, and it is enormous." [172] He indicated that consistent definitions would be a benefit to retailers.

Oversight Hearings on the reauthorization of the United States Department of Justice: Executive Office for United States Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for United States Trustees, and Office of the Solicitor General

Pursuant to House Rules, the Judiciary Committee has jurisdiction over the functions of the Department of Justice ("Department" or "DOJ"). The Subcommittee on Commercial and Administrative Law has jurisdiction over the following components of the Department of Justice: the Executive Office for United States Attorneys, the Civil Division, the Environment and Natural Resources Division, the Executive Office for United States Trustees, the Office of the Solicitor General of the United States, and any other areas which may be assigned to it by the Chairman.

During the 108th Congress, the Subcommittee two oversight hearings on the reauthorization requests of the DOJ components over which it has jurisdiction. The first hearing was held on April

[167] Hearing Transcript at 11.
[168] Id. at 13.
[169] Id.
[170] Id. at 18
[171] Id. at 19.
[172] Id. at 74.

8, 2003. Testifying on behalf of the DOJ were: Lawrence Friedman, Director, Executive Office for United States Trustees; Guy Lewis, Director, Executive Office for United States Attorneys; Honorable Thomas Sansonetti, Assistant Attorney General, Environment and Natural Resources Division; and Stuart Schiffer, Deputy Assistant Attorney General, Civil Division. The second hearing was held on March 9, 2004. Testifying at this hearing were the following: Lawrence Friedman, Director, Executive Office for United States Trustees; Guy Lewis, Director, Executive Office for United States Attorneys; Honorable Thomas Sansonetti, Assistant Attorney General, Environment and Natural Resources Division; and Peter D. Keisler, Assistant Attorney General, Civil Division.

(a) Executive Office for United States Attorneys (EOUSA)

During the two reauthorization oversight hearings, the Subcommittee examined the budget priorities for programs within the responsibility of the United States Attorneys (USAs) to determine whether adequate resources were being devoted to these responsibilities. The Subcommittee also examined how well the EOUSA and the Attorney General oversaw and coordinated the efforts of the 94 USAs.

(b) Office of the Solicitor General (OSG)

The Subcommittee received written statements for both hearings from Theodore B. Olson, the Solicitor General, discussing the criteria utilized by the OSG in determining which issues to appeal, the relationship between the OSG and other areas of the DOJ with respect to the control of appellate matters, improving efficiency and other administrative matters.

(c) Executive Office for United States Trustees

The United States Trustee Program is responsible for overseeing the administration of bankruptcy cases and private trustees. The Program is overseen by the Executive Office for United States Trustees, which provides policy and management direction to United States Trustees. The Program operates through a system of 21 regions.

Specific responsibilities of the United States Trustees include appointing and supervising private trustees who administer chapter 7,[173] 12,[174] and 13[175] bankruptcy estates; taking legal action to enforce the requirements of the Bankruptcy Code; ferreting out fraud

[173] Under chapter 7, a debtor's non-exempt assets are collected and liquidated to satisfy the claims of creditors. The United States Trustee appoints a private trustee who serves as a fiduciary for the debtor's creditors and adminsiters the chapter 7 bankruptcy estate. An eligible debtor may receive a discharge from his or her debts under chapter 7, except for certain debts prohibited from discharge under the Bankruptcy Code.

[174] Chapter 12 permits an eligible family farmer to reorganize the farm's financial obligations while continuing his or her farming operations. The United States Trustree typically appoints a standing trustee who serves as a fiduciary for the debtor's creditors and oversees the fulfillment of debtor's obligaitons under a repayment plan. Upon completion of the plan payments, the chapter 12, debtor is eligible to receive a discharge.

[175] Chapter 13 is used primarily be individual consumers to reorganize their financial affairs under a repayment plan that must be completed within five years. To be eligible for chapter 13 relief, a consumer must have regular income and may not have more than a certain amount of debt. A standing trustee appointed by the United States Trustee serves as a fiduciary for the debotr's creditors and oversees the fulfillment of the debtor's obligations under a repayment plan. Upon completion of the plan playments, the chapter 13 debtor is eligible to receive a discharge.

and abuse; referring matters for investigation and criminal prosecution when appropriate; ensuring that bankruptcy estates are administered promptly and efficiently; ensuring that professional fees are reasonable; appointing and convening creditors' committees in chapter 11 business reorganization cases;[176] and reviewing disclosure statements and retention applications for professional persons retained to represent certain interested parties in bankruptcy cases.

The oversight hearings conducted in 2003 and 2004 provided an opportunity for the Subcommittee to consider various issues, including the following:

(1) In light of DOJ Inspector General's 2003 Audit Report on the United States Trustee Program's Efforts to Prevent Bankruptcy Fraud and Abuse—which was rather critical of the Program's efforts to detect criminal fraud and abuse—what efforts had the Program undertaken to respond to the Audit Report's findings?

(2) Has the Program's refocused emphasis on dismissing chapter 7 cases for substantial abuse taken resources away from other Program priorities, such as detecting criminal fraud and abuse?

(3) Does the Program currently screen every chapter 7 case for substantial abuse?

(4) In fiscal year 2002, the Program obtained discharge denials in 308 chapter 7 cases out of approximately 1 million chapter 7 cases filed that year. What is the significance of these statistics?

In addition, the Subcommittee inquired into how the Program utilizes federal training and meeting facilities.

As a result of these hearings, the Subcommittee successfully sought to have included two provisions in H.R. 3036, the "Department of Justice Appropriations Authorization Act, Fiscal

Years 2004 through 2006." Section 304 of the bill provides that unless specifically authorized in writing by the Attorney General, the Department of Justice (and each entity within it) must use for any predominately internal training or conference meeting only a facility that does not require payment to a private entity for use of the facility. In addition, section 306 of the bill requires the Director of the Executive Office for United States Trustees to prepare an annual report to the Congress detailing the following: (1) the number and types of criminal referrals made by the United States Trustee Program; (2) the outcomes of each criminal referral; (3) for any year in which the number of criminal referrals is less than for the prior year, an explanation of the decrease; and (4) the United States Trustee Program's efforts to prevent bankruptcy fraud and abuse, particularly with respect to the establishment of uniform internal controls to detect common, higher risk frauds, such as a debtor's failure to disclose all assets.

[176] Chapter 11 provides an individual or business entity the opportunity to reorganize financial liabilities while remaining in business. The debtor, typically with the participation of its creditors, prepares a reorganization plan to repay all or part of its debts.

(d) Civil Division

The Civil Division is one of six litigating divisions within the Justice Department, and represent the United States, its departments and agencies, Members of Congress, Cabinet officers, and other Federal employees. The Division itself is comprised of seven branches: Commercial Litigation; Federal Programs; Torts; Office of Immigration Litigation; Office of Consumer Litigation; Office of Management Programs; and Appellate Staff. The Subcommittee focused questioning on decentralization of Division attorneys from Main Justice to field offices, and current status of *Cobell* v. *Norton* involving Individual Indian Trust Accounts.

(e) Environment and Natural Resources Division (ENRD)

ENRD handles disputes involving federal lands, water, and Indian disputes. The Division is composed of the following sections: Environmental Crimes; Environmental Enforcement; Environmental Defense; Wildlife and Marine Resources; General Litigation; Indian Resources; Land Acquisition; Policy, Legislation, and Special Litigation; and Appellate. Assistant Attorney General Sansonetti testified before the Subcommittee, with questioning centering around the Division's past handling of the *Cobell* v. *Norton* case, and general issues involving future potential claims arising from the Department of Interior's handling of Individual and Tribal Trust Accounts.

Oversight hearing on the Legal Services Corporation (LSC): Inquiry into the activities of the California Rural Legal Assistance Program and testimony relating to the merits of client co-pay

The hearing on LSC took place on March 31, 2004. Witnesses for the hearing were Helaine M. Barnett, President of LSC; Jose R. Padilla, Executive Director of California Rural Legal Assistance, Inc.; and Jeanne Charn, Director of the Hale and Dorr Legal Services Center, and Director, Bellow-Sachs Access to Legal Services Project, Harvard Law School.

LSC is a private, non-profit corporation established by Congress to provide civil legal assistance to those who would otherwise be unable to afford it. LSC was created in 1974 and is funded through congressional appropriation. LSC does not provide services directly. Instead, it acts as the funding source to various grantees organized across the country that provide the actual legal services. LSC acts as the oversight and administrative body to assure that the federal funds are expended in accordance with congressional intent and in an efficient and effective manner. These grantees provide service in every county in America, as well as U.S. territories, and also specialize in migrant farmworker and Native American needs in certain coverage areas.

LSC is headed by an 11-member Board of Directors appointed by the President and confirmed by the Senate. The board is bipartisan, and no more than six members of the board may be affiliated with the same political party. Local programs are governed by their own board of Directors, which set priorities and determine the types of cases that will be handled by the grantee, subject to the restrictions placed by Congress. These boards are comprised of members of local bar associations as well as others. Each board

hires its own executive director, who in turn hires the program staff. Programs may supplement their LSC grants with additional funds from state and local governments, IOLTA (Interest on Lawyer Trust Accounts), other federal agencies, bar associations, United Way and other charitable organizations, foundations and corporations, and individual donors. They further leverage federal funds by involving private attorneys in the delivery of legal services for the poor, mostly through volunteer pro bono work.

Congressionally-mandated restrictions specify which cases a grantee may undertake. LSC-funded programs may not handle criminal cases, nor may they accept fee-generating cases that private attorneys are willing to accept on a contingency basis. In addition, Congress imposed further restrictions through the 1996 LSC Appropriations Act, which clarified the scope of work which an LSC funded grantee may undertake, even with non-LSC funds. Among them were prohibitions on class actions, challenges to welfare reform, collection of attorneys' fees, rulemaking, lobbying, litigation on behalf of prisoners, representation in drug-related public housing evictions, and representation of certain categories of aliens. It is the duty of LSC to make sure that grantees are operating within the restrictions set by Congress.

LSC states that its legal services delivery system is based on several principles. These include: local priorities, national accountability, competition for grants, and a strong public- private partnership. Local programs are independent entities, governed by Boards of Directors drawn from the local bar and client community. All legal services programs must comply with laws enacted by Congress and the implementing regulations promulgated by LSC.

The hearing provided an opportunity for the Subcommittee to explore the notion of co-payments between clients and grantees. In addition, the hearing considered the activities of the California Rural Legal Assistance (CRLA), which had been the subject of LSC Inspector General reports.

Congressman Doolittle prompted an Inspector General report regarding CRLA's involvement in *Hernandez* v. *Board of Education of Stockton Unified School District*. Pursuant to the investigation conducted by LSC's Inspector General, it found that involvement in the Hernandez case in 2002 and 2003 violated the statutory and regulatory prohibitions on participation in class actions cases. However, the Inspector General also indicated that continued participation in a desegregation case was permissible because CRLA reasonably relied on LSC guidance for pre-existing desegregation cases provided in 1977. Finally, there was insufficient evidence to substantiate the allegation that CRLA acted unilaterally by not consulting with clients. The Inspector General has recommended that CRLA withdraw from the *Hernandez* case, and reportedly CRLA has agreed to file the proper motion to withdraw.

The Inspector General conducted an audit of CRLA that revealed multiple concerns regarding the administration and function of CRLA and, specifically, its compliance with certain requirements of 45 CFR Part 1610, a regulation which prohibits grantees from transferring LSC funds to an organization that engages in activities prohibited by the LSC Act, and LSC Appropriations Acts, and LSC regulations. To comply with these requirements, grantees

must be legally separate from such organizations, not transfer LSC funds to them, not subsidize any restricted activity, and maintain physical and financial separation from them. The report by the Inspector General indicated that, in the period between January 1, 2000 and May 10, 2002: (1) CRLA did not maintain objective integrity and independence from a legal organization which engaged in prohibited activities; (2) CRLA did not prepare statements of facts and identify clients in certain cases; and, (3) CRLA improperly made rental payments for an organization in further contradiction of 45 CFR 1610.

Specifically, CRLA was found to subsidize the restricted activities of another separate entity that was involved in restricted activity while also maintaining a sufficiently close relationship with the restricted entity that it was difficult to distinguish between the two organizations. This was demonstrated through co-counseled cases, shared staff, rent subsidy, and the physical separation (or lack thereof) of facilities. Additionally, in contravention of 45 CFR 1636.2, the grantee did not prepare statements of facts nor identify all clients as required, leaving out the identity of some 197 clients. Section 1636.2 of LSC's regulations requires that when a grantee files a complaint in court or participates in litigation, it must identify each plaintiff and prepare a statement of facts that each plaintiff signs. And, finally, CRLA improperly paid rent for a separate organization, the San Luis Obispo Legal Alternatives Corporation (SLOLAC). SLOLAC, a separate legal organization which provides legal services to the elderly, was co-located with the one of CRLA's branch offices, and CRLA gave rent subsidization during 2000 and 2001 in an amount of $6,845.

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