



Adam Walsh Child Protection and Safety Act: A Legal Analysis

Charles Doyle
Senior Specialist in American Public Law

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Summary

The Adam Walsh Child Protection and Safety Act, (P.L. 109-248, H.R. 4472), emerged from Congress following the passage of separate bills in the House and Senate (H.R. 3132 and S. 1086 respectively). The act's provisions fall into four categories: a revised sex offender registration system, child and sex related amendments to federal criminal and procedure, child protective grant programs, and other initiatives designed to prevent and punish sex offenders and those who victimize children.

The sex offender registration provisions replace the Jacob Wetterling Act provisions with a statutory scheme under which states are required to modify their registration systems in accordance with federal requirements at the risk of losing 10% of their Byrne program law enforcement assistance funds. The act seeks to close gaps in the prior system, provide more information on a wider range of offenders, and make the information more readily available to the public and law enforcement officials.

In the area of federal criminal law and procedure, the act enlarges the kidnaping statute, increases the number of federal capital offenses, enhances the mandatory minimum terms of imprisonment and other penalties that attend various federal sex offenses, establishes a civil commitment procedure for federal sex offenders, authorizes random searches as a condition for sex offender probation and supervised release, outlaws Internet date drug trafficking, permits the victims of state crimes to participate in related federal habeas corpus proceedings, and eliminates the statute of limitations for certain sex offenses and crimes committed against children.

The act revives the authorization of appropriations under the Police Athletic Youth Enrichment Act among its other grant provisions and requires the establishment of a national child abuse registry among its other child safety initiatives.

This report is available in an abridged version, without footnotes and most citations to authority, as CRS Report RS22646, *Adam Walsh Child Protection and Safety Act: A Sketch*, by (name redacted).

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Introduction

The President signed the Adam Walsh Child Protection and Safety Act on July 27, 2006.¹ The act serves four basic purposes. First, it reformulates the federal standards for sex offender registration in state, territorial and tribal sexual offender registries, and does so in a manner designed to make the system more uniform, more inclusive, more informative, and more readily available to the public online. Second, it introduces a fairly extensive and diverse set of amendments to federal criminal law and procedure, featuring, among other things, a federal procedure for the civil commitment of convicted sex offenders upon their release from prison, a random search authority over sex offenders on probation or supervised release, and a number of new mandatory minimum terms of imprisonment for various new and existing federal sex offenses. Third, it creates, amends, or revives several grant programs designed to reinforce private, state, local, tribal and territorial prevention; law enforcement; and treatment efforts in the case of crimes committed against children. Finally, it calls for a variety of administrative or regulatory initiatives in the interest of child safety, such as the creation of the National Child Abuse Registry.

The act arrived on the President's desk as H.R. 4472 having been approved by the House on March 8, 2006² and by the Senate on July 20, 2006.³ Each Chamber had previously passed many of the same provisions in separate bills of their own. In the case of the House, the predecessor was H.R. 3132 which the House endorsed on September 15, 2005;⁴ in the case of the Senate, it was S. 1086, which the Senate approved on May 4, 2006.⁵

Sex Offender Registration

One of the center pieces of the Adam Walsh Child Protection and Safety Act is the revision of the nation-wide sex offender registration system.⁶ The earlier statute, the Jacob Wetterling Act, encouraged states to establish and maintain a registration system.⁷ Each of them has done so.⁸ The

¹ P.L. 109-248, 120 Stat. 587 (2006).

² 152 *Cong. Rec.* H692 (daily ed. Mar. 8, 2006).

³ 152 *Cong. Rec.* S8031 (daily ed. July 7, 2006).

⁴ 151 *Cong. Rec.* H7924 (daily ed. Sept. 14, 2005); *see also*, H.Rept. 109-218, pts.I, II (2005); *Protection Against Sexual Exploitation of Children Act of 2005, and the Prevention and Deterrence of Crimes Against Children Act of 2005: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary on H.R. 2318 and H.R. 2388*, 109th Cong., 1st Sess. (2005); *House Bills on Sexual Crimes Against Children: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary on H.R. 764, H.R. 95, H.R. 1355, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797*, 109th Cong., 1st Sess. (2005).

⁵ 152 *Cong. Rec.* S4089 (daily ed. May 4, 2006). S. 1086 had been reported earlier without written report, 151 *Cong. Rec.* S11664 (daily ed. Oct. 20, 2005).

⁶ For a discussion of related legislative proposals in the 110th Congress and associated policy matters, see CRS Report RL32800, *Sex Offender Registration and Community Notification Law: Recent Legislation and Issues*, by (name redacted).

⁷ 42 U.S.C. 14071-14073 (commonly referred to as the Jacob Wetterling Act).

⁸ Ala. Code §§ 13A-11-200 to 13A-11-202; Alaska Stat. §§12.63.010 to 12.63.100; Ariz. Rev. Stat. Ann. §§ 13-3821 to 13-3828; Ark. Code Ann. §§ 12-12-901 to 12-12-922; Cal. Penal Code §§ 290-293; Colo. Rev. Stat. § 16-22-101 to 16-22-114; Conn. Gen. Stat. Ann. §§ 54-250 to 54-261; Del. Code Ann. tit. 11, § 4120; Fla. Stat. Ann. § 775.21; Ga. Code Ann. § 42-1-12; Haw. Rev. Stat. Ann. §§ 846E-1 to 846E-13; Idaho Code §§ 18-8301 to 18-8329; 730 Ill. Comp. Stat. Ann. ¶¶105/1 to 150-12; 152/101 to 152/121; Ind. Code Ann. §§ 11-8-8-1 to 11-8-8-20; Iowa Code Ann. §§ 692A.1 to 692A.16; Kan. Stat. Ann. §§ 22-4901 to 22-4912; Ky. Rev. Stat. Ann. §§ 17.500-17.580; La. Rev. Stat. Ann. §§ 15:540-15:550; Me. Rev. Stat. Ann. tit. 34-A, §§ 11201-11256; Md. Code Ann. Crim. Proc. §§11-701 to 11-726; Mass. Gen. Laws ch. 6, §§ 178D-Q; Mich. Comp. Laws Ann. §§ 28.721-.732; Minn. Stat. Ann. §§ 243.166, 243.167; Miss. (continued...)

state systems had many common features, but were hardly uniform. The Walsh Act preserves the basis structure of the earlier law, expands upon it, and makes more specific matters that were previously left to individual state choice.⁹ It contemplates a publicly available, contemporaneously accurate, online system. Conscious of the legal and technical adjustments required, the Walsh Act anticipates that states and other jurisdictions may require three years or more to fully implement its modifications. As a consequence, for purposes of compliance by the states and other jurisdictions, the prior law remains in effect until the later of three years after enactment or one year after the necessary software for the new uniform, online system has become available.¹⁰ For registrants, however, the new requirements became effective upon enactment.¹¹

Constitutional Considerations

Two state sex offender statutes have survived constitutional scrutiny before the Supreme Court, *Connecticut Department of Public Safety v. Doe*¹² and *Smith v. Doe*.¹³ In *Smith*, the Court rejected an ex post facto challenge because the statute was intended to create a regulatory scheme that was civil and nonpunitive and because it was not “so punitive either in purpose or effect as to negate the state’s intention to deem it civil.”¹⁴ In *Connecticut Department of Public Safety*, it rejected the argument that due process required a pre-registration hearing as to the current dangerousness of the offender because the statute predicated registration upon prior conviction, not upon current dangerousness.¹⁵

(...continued)

Code Ann. §§ 45-33-21 to 45-33—57; Mo. Ann. Stat. §§ 589.400-589.425 Mont. Code Ann. §§ 46-23-501 to 46-23-570; Neb. Rev. Stat. 29-4003 to 29-4013; Nev. Rev. Stat. §§ 179D.010-179D.850; N.H. Rev. Stat. Ann. §§ 651-B:1 to 651-B:12; N.J. Stat. Ann. §§ 2C:7-1 to 2C:7-19; N.M. Stat. Ann. §§ 29-11A-1 to 29-11A-10; N.Y. Correct. Law §§ 168 to 168-v; N.C. Gen. Stat. §§ 14-208.5 to 14-208.32; N.D. Cent. Code § 12.1-32-15; Ohio Rev. Code Ann. § 2950.1 - 2950.99; Okla. Stat. Ann. tit. 57, §§ 581-589; Or. Rev. Stat. §§ 181.592-181.608; 42 Pa. Cons. Stat. Ann. §§ 9791-9799.9; R.I. Gen. Laws §§ 11-37.1-1 to 11-37-20; S.C. Code Ann. §§ 23-3-400 to 23-3-550; S.D. Codified Laws §§ 22-24B-1 to 22-24B-32; Tenn. Code Ann. §§ 40-39-201 to 40-39-211; Tex. Rev. Code Crim. Pro. Ann. arts. 62.051 - 62.408; Utah Code Ann. § 77-27-21.5; Vt. Stat. Ann. tit. 13 §§ 5401 - 5414; Va. Code Ann. §§ 9.1-901 to 9.1-920; Wash. Rev. Code Ann. §§ 9A.44.130 - 9A.44.145; W. Va. Code §§ 15-12-1 to 15-12-10; Wis. Stat. Ann. §§ 301.45 - 301.46; Wyo. Stat. Ann. §§ 7-19-301 to 7-19-307; D.C. Code Ann. §§ 22-4001 to 22-4017.

⁹ Title I of the Adam Walsh Child Protection and Safety Act is captioned the Sex Offender Registration and Notification Act, §101. To avoid confusion with other sections of law, sections of the Adam Walsh Child Protection and Safety Act are noted in italics throughout this report.

¹⁰ 42 U.S.C. 16924; P.L. 109-248, §129, 120 Stat. 600-601 (2006).

¹¹ *United States v. Madera*, ____ F.Supp.2d ____, ____ (2007 WL 141283)(M.D.Fla. Jan. 16, 2007); Department of Justice, Interim Rule with Request for Comments, Supplemental Information, (Interim Rule), 72 *Fed.Reg.* 8894, 8895 (Feb. 28, 2007)(“In contrast to SORNA [Sex Offender Registration and Notification Act]’s provision of a three-year grace period for jurisdictions to implement its requirements, SORNA’s direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. They took effect when SORNA was enacted on July 27, 2006, and currently apply to all offenders in the categories for which SORNA requires registration”).

¹² 538 U.S. 1 (2003).

¹³ 538 U.S. 84 (2003).

¹⁴ *Smith v. Doe*, 538 U.S. at 92.

¹⁵ *Connecticut Department of Public Safety v. Doe*, 538 U.S. at 7.

Other courts have rejected similar and other constitutional challenges,¹⁶ although individual aspects of a particular statute or its implementation have been found constitutionally defective on occasion.¹⁷

Who Must Register

The class of offenders required to register has been expanded under the act. The group includes anyone found in the United States and previously convicted of a federal, state, local, tribal, military, or foreign qualifying offense,¹⁸ although strictly speaking violations of the laws of the District of Columbia or U.S. territories are not specifically mentioned as qualifying offenses.¹⁹ Offenders must register in each state or territory in which they live, work, or attend school.²⁰

There are five classes of qualifying offenses: crimes identified as one of the “specific offenses against a minor;” crimes in which some sexual act or sexual conduct is an element; designated federal sex offenses; specified military offenses; and attempts or conspiracy to commit any offense in the other four classes of qualifying offenses.²¹

Specified offenses against a minor

This class consists of essentially the same members as made up the class of qualifying offenses under the Jacob Wetterling Act when these offenses are or were committed in violation of state, local, tribal, foreign, or military law, or presumably in violation of D.C. or territorial law:

¹⁶ E.g., *United States v. Madera*, ___ F.Supp.2d ___, ___ (2007 WL 141283)(M.D.Fla. Jan. 16, 2007)(upholding the constitutionality of the Adam Walsh sex offender registration system against challenge on ex post facto, procedural due process, substantive due process, and federalism grounds); *see generally*, *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities*, 36 ALR5th 161 (1996 & 2006 Supp.) and cases cited therein.

¹⁷ *See e.g.*, *State v. Dickerson*, 142 Idaho 514, 129 P.3d 1263 (2006)(unconstitutional violation of the right to travel in a statute imposing more stringent reporting requirements on those who moved into the state after a particular date); *Creekmore v. Attorney General*, 341 F.Supp.2d 648 (E.D.Tex. 2004)(due process violation in requiring registration administratively on the basis of a military conviction when the statute did not require registration for such convictions); *State v. Bani*, 97 Haw. 285, 36 P.3d 1255 (2002)(public notification feature of the state registration statute, without a hearing on dangerousness, would violate the due process clause of the Constitution of Hawai‘i); *but see*, *State v. Guidry*, 105 Haw. 222, 96 P.3d 242 (2004)(due process requirements may be satisfied by petitioning the court for hearing).

¹⁸ “A sex offender shall register. . . .” 42 U.S.C. 16913(a). “The term ‘sex offender’ means an individual who was convicted of a sex offense,” 42 U.S.C. 16911(1). “[T]he term ‘sex offense’ means – a criminal offense. . . a [designated] Federal offense. . . [or] a military offense. . . .” 42 U.S.C. 16911(5)(A)(1). “The term ‘criminal offense’ means a State, local, tribal, foreign, or military offense. . . or other criminal offense,” 42 U.S.C. 16911(6). Thus, on its face the act’s registration requirements apply regardless of whether the conviction occurred prior to enactment of the act. The act vests, however, the Attorney General with authority to specify its application to offenders convicted prior to its effective date, 42 U.S.C. 16913(d). As least on an interim basis, the Attorney General has decided that the act applies to all offenders convicted prior to enactment, Interim Rule, 72 *Fed.Reg.* at 8896; 28 C.F.R. §72.3.

¹⁹ “The term ‘criminal offense’ means a State, local, tribal, foreign, or military offense. . . or other criminal offense,” 42 U.S.C. 16911(6). Violations of District and territorial law may be what drafters meant by “other criminal offenses.”

²⁰ “A sex offender shall register . . . in each jurisdiction where the offender resides” 42 U.S.C. 16913. “The term ‘jurisdiction’ means any of the following: (A) A State. (B) the District of Columbia. (C) the Commonwealth of Puerto Rico. (D) Guam. (E) The Northern Mariana Islands. (F) The United States Virgin Islands. (H) To the extent provided and subject to the requirements of Section 127 [relating to the tribal election maintain a separate registry or to participate in that of an applicable state], a federally recognized Indian tribe,” 42 U.S.C. 16911(10).

²¹ 42 U.S.C. 16911(5)(A).

- kidnaping of a minor, except by a parent or guardian;
- false imprisonment of a minor, except by a parent or guardian;
- solicitation of a minor to engage in sexual conduct;
- use of a minor in a sexual performance;
- solicitation to practice prostitution;
- video voyeurism (as described in 18 U.S.C. 1801);
- possession, production, or distribution of child pornography;
- criminal sexual conduct toward a minor, or the use of the Internet to facilitate or attempt such conduct;
- any conduct that by its nature is a sexual offense against a minor. 42 U.S.C. 16911 (5)(ii), (7), (6).

Virtually all the states require registration for convictions of the state’s criminal law version of these generic crimes. Their treatment of federal, foreign, military and out of state convictions has been a bit more individualistic.²²

Sex element crimes

The act simply states that the class of qualify offenses also includes any “criminal offense that has an element involving a sexual act or sexual contact with another.”²³ It does not define either the term “sexual act” or “sexual contact.” Elsewhere in the United States Code they are consistently defined as follows.

[T]he term “sexual act” means–

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

²² See e.g., Ky. Rev. Stat. §17.510(6)(covering state, out of state, federal, military and territorial convictions with no mention of foreign convictions); Iowa Code Ann. §692A.2 (covering state, out of state, military and foreign convictions with no mention of D.C. or territorial convictions); Va. Code §9.1-902 [B] (“‘Offense for which registration is required’ . . . shall also include any similar offense under the laws of (i) any foreign country or any political subdivision thereof, (ii) the United States or any political subdivision thereof and any offense for which registration in a sex offender or crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted”); *Creekmore v. Attorney General*, 341 F.Supp.2d 648 (E.D.Tex. 2004)(noting that the current Texas registration statute, unlike an earlier version, covers military convictions); *State v. Dickerson*, 142 Idaho 514, 129 P.3d 1263 (2006) (holding unconstitutional as a violation of the right to travel an Idaho statute that required registration of those convicted in Idaho after July 1, 1993 and those with out of state convictions who move into the State after that date regardless of the date of their out of state convictions).

²³ 42 U.S.C. 16911(5)(A)(i).

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

[T]he term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.²⁴

The class appears to have been intended as a residual group of sexual offenses that fall outside the coverage of the other classes of qualifying offenses. It applies to violations of state, local, tribal, foreign, military, and presumably D.C. and territorial law.²⁵

Federal qualifying offenses

The class of federal offenses that trigger registration requirements includes violations of:

- 18 U.S.C. 1591 (sex trafficking of children or by force or fraud)
- 18 U.S.C. 2241 (aggravated sexual abuse)
- 18 U.S.C. 2242 (sexual abuse)
- 18 U.S.C. 2243 (sexual abuse of ward or child)
- 18 U.S.C. 2244 (abusive sexual contact)
- 18 U.S.C. 2245 (sexual abuse resulting in death)
- 18 U.S.C. 2251 (sexual exploitation of children)
- 18 U.S.C. 2251A (selling or buying children)
- 18 U.S.C. 2252 (transporting, distributing or selling child sexually exploitive material)
- 18 U.S.C. 2252A (transporting or distributing child pornography)
- 18 U.S.C. 2252B (misleading Internet domain names)
- 18 U.S.C. 2252C (misleading Internet website source codes)
- 18 U.S.C. 2260 (making child sexually exploitative material overseas for export to the U.S.)
- 18 U.S.C. 2421 (transportation of illicit sexual purposes)
- 18 U.S.C. 2422 (coercing or enticing travel for illicit sexual purposes)
- 18 U.S.C. 2423 (travel involving illicit sexual activity with a child)
- 18 U.S.C. 2424 (filing false statement concerning an alien for illicit sexual purposes)

²⁴ 18 U.S.C. 2246(2), (3), adopted by cross reference in 20 U.S.C. 6777(e)(8); 20 U.S.C. 9134(f)(7)(E); 47 U.S.C. 254(h)(7)(H); 47 U.S.C. 902 note (P.L. 106-554, 114 Stat. 2763A-336 (2000)).

²⁵ 42 U.S.C. 16911(5)(A)(i), (6).

- 18 U.S.C. 2425 (interstate transmission of information about a child relating to illicit sexual activity), 42 U.S.C. 16911(5)(A)(iii).

Military offenses

Qualifying military offenses are those designed by the Secretary of Defense pursuant to P.L. 105-119, §115(a)(8)(C)(i), 111 Stat. 2466 (1998). Department of Defense Instruction 1325.7, Enclosure 27 lists following as qualifying offenses:

- UCMJ art. 120 (rape and carnal knowledge)
- UCMJ art. 125 (forcible sodomy and sodomy of a minor)
- UCMJ art. 133 (conduct unbecoming an officer involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping a minor or prostitution involving a minor)
- UCMJ art. 134 (indecent assault, assault with intent to commit rape or sodomy, indecent act with a minor, indecent language to a minor, kidnaping a minor other than by a parent, pornography involving a minor, conduct prejudicial to good order and discipline (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor) or assimilated crime conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor)
- UCMJ art. 80 (attempt to commit any of the foregoing)
- UCMJ art. 81 (conspiracy to commit any of the foregoing)
- UCMJ art. 82 (solicitation to commit any of the foregoing).

Attempt or conspiracy

The final class of qualifying offenses consists of the attempts or conspiracies to commit some offense described in one of the other classes.²⁶ The class is limited to instances where the offender is convicted of attempt or conspiracy.²⁷ The distinction is important since attempt or conspiracy to commit one of the other qualifying offenses may not always be a separate crime. For example, it is a federal qualifying offense to sell a child with the intent to promote child pornography,²⁸ but it is not a federal crime to attempt to do so.

Exceptions

The inventory of qualifying offenses is subject to exception. Conviction for an otherwise qualifying foreign offense does not necessitate registration if it was not secured in a manner which satisfies minimal due process requirements under guidelines or regulations promulgated by the Attorney General.²⁹ Nor does conviction of a consensual sex offense require registration if the

²⁶ 42 U.S.C. 16911(5)(A)(iv).

²⁷ 42 U.S.C. 16813, 16911(1).

²⁸ 18 U.S.C. 2251A.

²⁹ 42 U.S.C. 16911(5)(B), 16912(b).

victim is an adult not in the custody of the offender, or if the victim is 13 years of age or older and the offender no more than four years older.³⁰ Finally, juvenile delinquency adjudications do not constitute qualifying convictions unless the offender is 14 years of age or older at the time of the misconduct and the misconduct adjudicated is comparable to, or more severe than, aggravated sexual assault or attempt or conspiracy to commit such an offense.³¹

There are no specific limitations on registration based on convictions that have been overturned, sealed or expunged under state or foreign law or on convictions for which the offender has been pardoned. There are no specific limitations on requirements that flow from past convictions regardless for their vintage. Instead, the Attorney General is authorized to promulgate rules of applicability.³²

Registration Requirements

Those required to register must provide their name, social security number, the name and address of their employers, the name and address of places where they attend school, and the license plate numbers and descriptions of vehicles they own or operate.³³ The jurisdiction of registration must also include a physical description and current photograph of the registrant and a copy of his driver's license or government issued identification card; a set of fingerprints, palm prints, and a DNA sample; the text of the law under which he was convicted; a criminal record that includes the dates of any arrests and convictions, any outstanding warrants, as well as parole, probation, supervisory release, and registration status; and any other information required by the Attorney General.³⁴

When and For How Long

Those required to register must do so before they are released from incarceration;³⁵ those whose sentences do not include a term of imprisonment must register within three days of sentencing.³⁶ Those required to register who were released or sentenced without a term imprisonment before the effective date of the act are subject to the registration requirements announced by the Attorney General.³⁷ Those required to register when entering the United States are funneled into the system through a regime established and operated by the Secretaries of State and Homeland Security.³⁸

³⁰ 42 U.S.C. 16911(5)(C).

³¹ 42 U.S.C. 16911(8).

³² 42 U.S.C. 16913(d). The Attorney General's interim regulations call for registration regardless of the vintage of the conviction, 72 *Fed.Reg.* 8894 (Feb. 16, 2007)(28 C.F.R. §72.3).

³³ 42 U.S.C. 16914(a); 18 U.S.C. 4042(c)(3).

³⁴ 42 U.S.C. 16914(b).

³⁵ For those required to register, registration is a mandatory condition for probation and supervised release, 18 U.S.C. 3563(a)(8), 3583(d).

³⁶ 42 U.S.C. 16913(b).

³⁷ 42 U.S.C. 16913(d). The Attorney General has issued an interim rule requiring the registration of those convicted of qualifying offenses regardless of whether the conviction occurred prior to effective date of the act, 72 *Fed.Reg.* 8894 (Feb. 16, 2007)(28 C.F.R. §72.3).

³⁸ 42 U.S.C. 16928. Americans and permanent resident aliens who have convicted of a "specified offense against a minor" are ineligible the family-relate immigration visa participation by virtue of Section 402, 8 U.S.C. 1154(a)(1)(A)(viii), (B)(i)(I), 1101(a)(15) (K). A "specified offense against a minor" is any violation of state, local, tribal, foreign, or military law involving kidnaping of a minor, except by a parent or guardian; false imprisonment of a (continued...)

Custodians must notify those in their care of the obligation to register; notification of offenders who are not incarcerated is to be accomplished pursuant to instructions from the Attorney General.³⁹ Registrants have three days to notify at least one jurisdiction in which they are registered whenever they change their names, addresses, or places of employment or study.⁴⁰

The regularity with which registrants must appear for new photographs and to verify their registration information depends upon their status. It is at least every three months for Tier III offenders, that is, those convicted of a felony constituting or at least comparable in severity to kidnaping (other than by a parent or guardian); or to the felonious commission of, or attempt or conspiracy to commit, abusive sexual contact against a child under 13 years of age, or sexual abuse or aggravated sexual abuse; or those who have previously qualified as Tier II offenders at the time of conviction.

Tier II offenders must reappear no less frequently than every six months.⁴¹ Tier II offenders are those with a felony conviction for violation of either: one of several designated federal sex offenses (or at least its equivalent in severity), or one of three generically described sex offenses.⁴² The federal offenses are violations of 18 U.S.C. 1591 (sex trafficking), 2422(b) (use of a facility in interstate or foreign commerce to coerce or entice a child to engage in illicit sexual activity), 2423(a) (interstate transportation of a child for illicit sexual purposes), 2244 (abusive sexual contact).⁴³ The generic offenses are use of a child in a sexual performance, solicitation of a child to practice prostitution, and production or distribution of child pornography.⁴⁴ An offender is also a Tier II offender who prior to the conviction triggering the registration requirement was already been classified as a Tier I offender.⁴⁵

Tier I offenders are those required to register who are neither Tier II nor Tier III offenders,⁴⁶ and must reappear for new photographs and verification at least once a year.⁴⁷

Tier I offenders must maintain their registration for 15 years, which can be reduced to 10 years if during that time they avoid felony and sex offense convictions, complete a sex offender treatment program, and satisfy any supervised release, parole, and probation demands.⁴⁸ Tier II offenders must maintain their registration for 25 years.⁴⁹ Tier III offenders must maintain their registration

(...continued)

minor, except by a parent or guardian; solicitation of a minor to engage in sexual conduct; use of a minor in a sexual performance; solicitation to practice prostitution; video voyeurism (as described in 18 U.S.C. 1801); possession, production, or distribution of child pornography; criminal sexual conduct toward a minor, or the use of the Internet to facilitate or attempt such conduct; any conduct that by its nature is a sexual offense against a minor, 42 U.S.C. 16911 (5)(ii), (7), (6).

³⁹ 42 U.S.C. 16917.

⁴⁰ 42 U.S.C. 16913(c).

⁴¹ 42 U.S.C. 16916(2).

⁴² 42 U.S.C. 16911(3).

⁴³ 42 U.S.C. 16911(3)(A).

⁴⁴ 42 U.S.C. 16911(3)(B).

⁴⁵ 42 U.S.C. 16911(3)(C).

⁴⁶ 42 U.S.C. 16911(2).

⁴⁷ 42 U.S.C. 16916(1).

⁴⁸ 42 U.S.C. 16915(a)(1),(b).

⁴⁹ 42 U.S.C. 16915(a)(2).

for life, which can be reduced to 25 years if during that time they satisfy the same conditions that would meet Tier I reduction requirements.⁵⁰

Registration Information Online

The act insists that each jurisdiction make registration information publicly available on the Internet, accessible according to zip code and geographical radius.⁵¹ The site may not include the identity of the registrant's victim, mention arrests that have not resulted in conviction, list the registrant's social security number, or contain any other information banned by the Attorney General.⁵² Individual jurisdictions may elect not to include information relating to a Tier I offender other than one convicted of a "specific offense against a minor," the name of the registrant's employer, the name of the school where the registrant is a student, or any other information identified by the Attorney General.⁵³

The act directs the Attorney General to maintain a National Sex Offender Registry and to make sure that the evolving flow of registration information is contemporaneously forwarded electronically to the appropriate jurisdictions.⁵⁴ He has also been instructed to maintain the publicly available Dru Sjodin National Sex Offender Public Website, which now provides an online, public entryway to the Internet sex offender registries of the 50 states, the District of Columbia, Puerto Rico and Guam.⁵⁵

Finally, jurisdictions must participate in the Megan Nicole Kanka and Alexandra Nicole Zapp Communication Notification Program under which they are obligated to provide updated registration information within five days to the Attorney General; to law enforcement, school and public housing officials in the area where the registrant lives, works, or studies; to other jurisdictions where the registrant lives, works, or studies or recently did so; to National Child Protection Act background check agencies; to child welfare agencies; to certain volunteer organizations; and to individuals and entities that request notification under a jurisdiction's law.⁵⁶

During the two years following enactment, the Attorney General is to see to the development and support the software necessary to implement uniform registries within the jurisdictions.⁵⁷ In addition, he is to establish a sex offender management assistance (SOMA) grant program to assist states to implement the act.⁵⁸ Moreover, he is to assist jurisdictions to identify and locate registrants after the scattering associated a hurricane or other national disaster.⁵⁹

⁵⁰ 42 U.S.C. 16915(a)(3), (b).

⁵¹ 42 U.S.C. 16918(a).

⁵² 42 U.S.C. 16918(b).

⁵³ 42 U.S.C. 16918(c).

⁵⁴ 42 U.S.C. 16919.

⁵⁵ 42 U.S.C. 16920. As of March 22, 2007, however, it did not provide access to a Virgin Islands registry, *see*, http://www.nsopr.gov/conditions_main.htm.

⁵⁶ 42 U.S.C. 16921.

⁵⁷ 42 U.S.C. 16924.

⁵⁸ 42 U.S.C. 16926.

⁵⁹ 42 U.S.C. 16943.

The act establishes the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Training (SMART Office) within the Justice Department's Office of Justice Programs.⁶⁰ The Office is charged with the responsibility of administering the sex offender registration and notification standards and the associated grant program.⁶¹

Failure to Comply

Jurisdictions that fail to comply after the act becomes fully effective run the risk of having their Byrne program funds reduced by 10%.⁶² When considering whether to penalize a noncomplying jurisdiction, the Attorney General may consider the fact that the jurisdiction's highest court has held that full compliance would place the jurisdiction in violation of its constitution.⁶³

Other than tribal jurisdictions, each jurisdiction is obligated to criminalize an offender's failure to satisfy registration requirements with a maximum term of imprisonment greater than one year.⁶⁴ The comparable provision in prior law made no mention of how severely the offense was to be punished.⁶⁵ Furthermore, the act makes failure to register a federal crime for offenders convicted of a federal qualifying offense, or who travel in interstate commerce, or who travel in Indian country, or who live in Indian country.⁶⁶ Violations are punishable by imprisonment for not more than 10 years and by an addition penalty to be served consecutively of not less than five nor more than 30 years if the offender commits a crime of violence.⁶⁷ Moreover, violation exposes an offender to a term of supervised release for any term of years not less than five years or for life.⁶⁸ If the offender is a foreign national ("an alien") he becomes deportable upon conviction.⁶⁹

When an individual who is required to register (regardless of whether he has done so) commits one of the felonies outlawed in 18 U.S.C. 1201 (kidnaping), 1591 (sex trafficking), ch. 109A (sexual abuse), ch. 110 (sexual exploitation of children) or ch. 117 (travel for illicit sexual

⁶⁰ 42 U.S.C. 16945.

⁶¹ 42 U.S.C. 16945(c).

⁶² More precisely, failure to substantially implement the required registration system may result in the loss of "10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under sub part 1 of part E of Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42U.S.C. 3750 et seq.)," 42 U.S.C. 16925(a).

⁶³ 42 U.S.C. 16925.

⁶⁴ 42 U.S.C. 16913(e).

⁶⁵ 42 U.S.C. 14071(d).

⁶⁶ 18 U.S.C. 2250(a).

⁶⁷ 18 U.S.C. 2250(c). *Section 141(b)* instructs the United States Sentencing Commission to consider certain additional statutorily designated factors in formulating the guidelines for the failure to register offense. The Commission has issued proposed guidelines reflecting this command and the other modifications implicated by the new offenses and sentencing changes ushered in with the Act, 72 *Fed.Reg.* 4372 (Jan. 30, 2007).

⁶⁸ 18 U.S.C. 3583(k). Under Section 3583(k) several other offenses already carried a supervised term of release of any term of years and for life. For those offenses – violations of 18 U.S.C. 1591 (sex trafficking of children or by force or fraud), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2244(a)(1) (aggravated sexual abuse-like abusive sexual contact), 2244(a)(2) (sexual abuse-like abusive sexual contact), 2251 (sexual exploitation of children), 2251A (selling or buying children), 2252 (transporting, distributing or selling child sexually exploitive material), 2252A (transporting or distributing child pornography), 2260 (making child sexually exploitive material overseas for export to the U.S.), 2421 (transportation of illicit sexual purposes), 2422 (coercing or enticing travel for illicit sexual purposes), 2423 (travel involving illicit sexual activity with a child), and 2425 (interstate transmission of information about a child relating to illicit sexual activity) – the act also sets a five year minimum term of supervised release, 18 U.S.C. 3583.

⁶⁹ 8 U.S.C. 1227(a)(2)(A)(v).

purposes), his term of supervised release is to be revoked and he is to be sentenced to a term of imprisonment of not less than five years.⁷⁰

Additional appropriations have been authorized to permit the Attorney General to use the Marshals Service and other resources at his disposal to locate and apprehend those who have failed to register.⁷¹

Studies and Reports

The Attorney General must provide Congress with an annual report relating to sex offender registration covering prosecution for failure to register, the use of the Marshals Service to track down those who fail to register, and a description of compliance with registration system requirements by each jurisdiction and of the Justice Department's efforts to ensure compliance.⁷²

Section 637 calls for the Attorney General to assemble a task force comprised of federal, state and local representatives to study and report on various risk-based classification of sex offenders. *Section 638* asks that he examine and report on the effectiveness of various means to reducing recidivism among sex offenders. And *Section 63* – without any explicit reference to sex offenders or children – commands him to study the means of improving the effectiveness of federal, state and local homicide investigations.⁷³

The National Institute of Justice has been given five years to study and make recommendations to Congress for the reduction of the number of sex offenses committed against children and for improved effectiveness of the sex offender registration system.⁷⁴

Section 636 instructs the Government Accountability Office (GAO) to study the feasibility of a nationwide requirement comparable to that established in Chapter 507 of the Nevada Session Laws,⁷⁵ under which sex offender registration information is shared with motor vehicle authorities to ensure that those required to register as sex offenders have done so before a driver's license is issued.

Adjustments in Federal Criminal Law

The Adam Walsh Child Protection and Safety Act is focused, as its name implies, upon child protection and safety. Its efforts involve the creation of new federal crimes, the enhancement of the penalties for preexisting federal crimes, and the amendment of federal criminal procedure. Many of these efforts are child-specific; some are more general. The new federal crimes include the following.

- murder in the course of a wider range of federal sex offenses, 18 U.S.C. 2245

⁷⁰ 18 U.S.C. 3583(k).

⁷¹ 42 U.S.C. 16941.

⁷² 42 U.S.C. 16991.

⁷³ The section does suggest that he include within the report an examination of the extent of coordination between homicide investigators and the National Center for Missing Children as well as the National Center for Missing Adults.

⁷⁴ 42 U.S.C. 16990.

⁷⁵ Nev. Rev. Stat. §§179D.570, 483.283, 483.861, 483.929.,

- Internet date rape drug trafficking, 21 U.S.C. 841(b)(7)
- kidnaping that involves the use of interstate facilities, 18 U.S.C. 1201
- child abuse in Indian country, 18 U.S.C. 1153
- production of obscene material, 18 U.S.C. 1465, 1466
- obscenity or pornography in Internet source codes, 18 U.S.C. 2252C
- child exploitation enterprises, 18 U.S.C. 2252A(g).

The list of penalty increases is comparable, if somewhat more extensive.

- serious violent crimes against children, 18 U.S.C. 3559(f)
- coercion or enticement of a child for illicit sexual purposes, 18 U.S.C. 2422
- interstate transportation of a child for illicit sexual purposes, 18 U.S.C. 2423
- sexual abuse in a federal prison or enclave, 18 U.S.C. 2242
- aggravated sexual abuse of a child, 18 U.S.C. 2241
- abusive sexual contact with a child, 18 U.S.C. 2244
- sexual exploitation of a child, 18 U.S.C. 2251
- traffic in child exploitive material, 18 U.S.C. 2252
- traffic in child pornography, 18 U.S.C. 2252A
- use of a misleading Internet domain name to induce a child, 18 U.S.C. 2252B
- overseas production of child exploitive or pornographic material, 18 U.S.C. 2260
- sex trafficking, 18 U.S.C. 1591
- failure to report child abuse, 18 U.S.C. 2258
- false statements relating child or sexual offenses, 18 U.S.C. 1001.

The amendments to federal criminal procedure are a bit less numerous and somewhat more likely to implicate crimes in addition to those committed against children. Among their number are:

- random searches of sex offender registrants as a condition of probation or supervised release, 18 U.S.C. 3563, 3583
- expanded DNA collection from those facing federal charges or convicted of any federal offense, 42 U.S.C. 14135a(a)(1)(A)
- elimination of the statute of limitations for various sexual crimes or crimes committed against a child, 18 U.S.C. 3299
- participation of state crime victims in federal habeas proceedings, 18 U.S.C. 3771(b)(2)(B)
- study of the elimination of marital privileges in abuse cases
- preventive detention in cases involving a minor victim or a firearm, 18 U.S.C. 3142(g)(1)

- compensation for guardians ad litem, 18 U.S.C. 3509(h)
- government control of evidence in pornography cases, 18 U.S.C. 3509(m)
- forfeiture procedures in obscenity, exploitation and pornography cases, 18 U.S.C. 1467, 2253, 2254
- murder during course of various sex offenses as a felony murder predicate, 18 U.S.C. 3592(c)(1)
- civil commitment procedure for federal sex offenders, 18 U.S.C. 4248.

New Procedures

Warrantless searches

Section 210 amends federal law to expose sex offender registrants to warrantless, suspicionless (random) searches as a condition of their supervised release or probation.⁷⁶ As a general rule, random searches raise Fourth Amendment questions.

The Fourth Amendment states that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁷⁷ The Amendment’s facially absolute terms are subject to qualification. For example, the Supreme Court recently upheld the random search of the person of a parolee in *Sampson v. California*.⁷⁸

As the Court explained in that context, the hallmark of Fourth Amendment compliance is reasonableness, and the courts will “examine the totality of the circumstances to determine whether a search is reasonable.”⁷⁹ More precisely, “Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interest.”⁸⁰

The Court had previously upheld the suspicion-based, but warrantless, search of a probationer’s apartment in *United States v. Knights*.⁸¹ There the Court had observed that in balancing an individual’s privacy interest against the interests of the government the weight afforded the individual’s interest varies according to the individual’s justifiable expectation of privacy under the circumstances, and those subject to punishment by the government – like prisoners, parolees and probationers – may claim only a reduced expectation of privacy.⁸² Among them, however, there is a range of expectations corresponding to the continuum of punishments that accompanies

⁷⁶ 18 U.S.C. 3563(b)(23), 3583(d).

⁷⁷ U.S. Const. Amend. IV.

⁷⁸ 126 S.Ct. 2193 (2006). For a general discussion of *Sampson*, see CRS Report RL33664, *An Overview of the Supreme Court’s Search and Seizure Decisions from the October 2005 Term*, by (name redacted).

⁷⁹ *Id.* at 2197.

⁸⁰ *Id.*

⁸¹ 534 U.S. 112 (2001).

⁸² *Id.* at 119-20.

their status. “On this continuum, parolees have fewer expectations of privacy than probationers” and those on federal supervised release.⁸³ Moreover, a parolee’s acceptance of suspicionless searches as a condition of parole significantly diminishes the individual’s expectation of privacy.⁸⁴ Under these circumstances, the *Sampson* Court concluded Sampson had no legitimate expectation of privacy.

On the other hand, the Court considered the government’s interest substantial, “a State’s interest in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.”⁸⁵

In the absence of such an expectation, the Court found it unnecessary to consider the question of whether the search might be justified under the Fourth Amendment’s special needs doctrine or under the Amendment’s consent exception.⁸⁶ Some may believe that *Section 210* makes such an examination necessary, since it involves probationers and those on supervised release, individuals said to have a higher expectation of privacy than the parolee in *Sampson*.

Application of the Court’s special needs and consent jurisprudence, however, presents its own challenges. The special needs doctrine emerged from the Court’s school and drug testing cases.⁸⁷ Beginning there, the Court has identified circumstances under which the government’s particularly weighty special interests, balanced against the nature of the intrusion upon an individual’s privacy interests, justify a search without the usual protection of either probable cause or a warrant. Even here, however, the Court has been “particularly reluctant to recognize exceptions to the general rule of individualized suspicion where the government authorities primarily pursue their general crime control ends.”⁸⁸ Yet there are circumstances under which the Court has been able to overcome its reluctance.⁸⁹

As for consent, an individual could be said to have consented to a condition for parole and perhaps even probation where the alternative is incarceration, but supervised release is imposed in addition to, rather than in lieu of, imprisonment.⁹⁰ Unlike parole or probation, it is imposed rather than accepted. Imposition of the condition, however, is discretionary,⁹¹ and a court might impose alternative, less desirable conditions to be applied should the individual fail to consent to random searches. Whether this would be considered sufficient to constitute a voluntary waiver of an individual’s Fourth Amendment rights is unclear at best.⁹² Yet the question is unlikely to arise,

⁸³ *Sampson v. California*, 126 S.Ct. at 2198.

⁸⁴ *Id.* at 2199.

⁸⁵ *Id.* at 2200.

⁸⁶ *Id.* at 2199-200 n. 3.

⁸⁷ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985); *Skinner v. Railway Labor Executives*, 489 U.S. 602, 616-18 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-53(1995).

⁸⁸ *Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000); *see also, Ferguson v. Charleston*, 532 U.S.67, 79 (2001)(“In each of those earlier cases, the ‘special need’ that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement”).

⁸⁹ *See, Illinois v. Lidster*, 540 U.S. 419, 423 (2004)(law enforcement warrantless, suspicionless traffic stop to secure information concerning third party suspects).

⁹⁰ 18 U.S.C. 3583.

⁹¹ 18 U.S.C. 3583(d).

⁹² Voluntary consent constitutes a waiver of Fourth Amendment rights, *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (continued...)

since the case law in the lower federal courts on a comparable matter suggests that the changes worked by *Section 210* would pass constitutional muster.

Federal law requires consent to DNA sample collection as a mandatory condition of federal probation⁹³ and of federal supervised release.⁹⁴ Fourth Amendment challenges to the collection of DNA samples from prisoners, from those on probation and from those on supervised release have generally been unsuccessful in the lower federal courts, although the courts sometimes reach the same result from the different approaches – some favor a special needs analysis and others a *Knight* reasonable analysis.⁹⁵

Section 210 amends the provisions governing probation and supervised release to permit the court to impose as an explicit condition of probation or supervised release that an individual required to register as a sex offender remain subject to warrantless searches, without the need of suspicion if conducted by a probation officer as part of his supervisory duties, or upon reasonable suspicion that the individual has violated a condition of his probation or supervised release if conducted by other law enforcement officers.

The distinction between probation officers and other law enforcement officers in *Section 210* reflects the two modes of analysis under which random searches may be permissible. In *Knights*, the Court approved the warrantless search of a probationer by law enforcement officers with reasonable suspicion. In the school and drug cases, the Court approved random searches in the interests of special administrative needs, interests arguably comparable to the government's interest in the administration of the federal system probation and supervised release.

Expanded DNA collection

Prior to the 109th Congress, the DNA Analysis Backlog Elimination Act authorized the collection of DNA samples from individuals convicted of a federal qualifying offense,⁹⁶ and from individuals on probation, parole or supervised release relating to such an offense.⁹⁷ Qualifying offenses included any felony, any violation of Chapter 109A of Title 18 of the United State Code relating to sexual abuse, any crime of violence, or any attempt or conspiracy to commit any such offenses.⁹⁸ The statute directed and continues to direct that the samples be provided to the Federal Bureau of Investigation for analysis and inclusion in the Combined DNA Index System

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(1973). The Court in *Anobile v. Pelligrino*, 303 F.3d 107, 124-25 (2d Cir. 2002), noting that acceptance of a race track employment license conditioned upon a blanket consent to subsequent residential searches did not constitute valid consent sufficient to sanction an otherwise unreasonable search.

⁹³ 18 U.S.C. 3563(a)(5), (a)(9).

⁹⁴ 18 U.S.C. 3583(d).

⁹⁵ *United States v. Hook*, 471 F.3d 766, 771-73 (7th Cir. 2006); *United States v. Conley*, 453 F.3d 674, 676-80 (6th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922, 923-25 (8th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, (D.C. Cir. 2006); *United States v. Sczubelek*, 402 F.3d 175, 181-87 (3d Cir. 2005); *United States v. Kincaide*, 379 F.3d 813, 821-39 (9th Cir. 2004); *Groceman v. U.S. Dept. of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003).

⁹⁶ 42 U.S.C. 14135a(a)(1)(2000 ed. & Supp. IV).

⁹⁷ 42 U.S.C. 14135a(a)(2)(2000 ed. & Supp. IV). For background and policy issues associated with law enforcement DNA collection, see CRS Report RL32247, *DNA Testing for Law Enforcement: Legislative Issues for Congress*, by (name redacted); and CRS Report RL30717, *DNA Identification: Applications and Issues*, by (name redacted).

⁹⁸ 42 U.S.C. 14135a(d)(2000 ed. & Supp. IV).

(CODIS).⁹⁹ The record is to be expunged from the Index upon notification that the individual's conviction for the qualifying offense has been overturned.¹⁰⁰

As noted previously, the lower federal courts have generally rejected constitutional challenges to these and similar state DNA sample collection statutes involving inmates, probationers, parolees and those on supervised release.¹⁰¹

The Violence Against Women and Department of Justice Reauthorization Act of 2005, P.L. 109-162, 119 Stat. 2960, 3085 (2006), amended the DNA Act to authorize the collection of samples from individuals arrested under the laws of the United States (or from non-United States persons detained under the laws of the United States), without regard to whether a qualifying offense supplies the basis for the arrest or detention.¹⁰²

Section 155 further expands the Attorney General's authority to permit collection of samples from those (1) "facing charges" for a federal offense or (2) convicted of *any* federal offense rather than just those convicted of qualifying offenses. The act does not define the term "facing charges" nor is it defined in any other section of the Code. Without more it might be thought to refer to those under indictment, but use of the term later in same subparagraph suggests it was intended to refer to those released on bail but under pre-trial supervision.¹⁰³

The amendments in the 109th Congress may anticipate certain technical adjustments. For example, they do not amend the expungement provision that applies only to qualifying offenses; so that the records of individuals with overturned convictions for the more serious qualifying offenses continue to be subject to expungement, but those with overturned convictions for the less serious nonqualifying offenses are not.¹⁰⁴

The Violence Against Women and the Walsh amendments of the 109th Congress appear to have been too recently enacted to have been the subject of decided case law as yet.¹⁰⁵ Academicians

⁹⁹ 42 U.S.C. 14135a(b).

¹⁰⁰ 42 U.S.C. 14132(d).

¹⁰¹ Unsuccessful challenges include those under the: Fourth Amendment: *United States v. Hook*, 471 F.3d 766, 771-73 (7th Cir. 2006); *United States v. Conley*, 453 F.3d 674, 676-80 (6th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922, 923-25 (8th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, 492-500 (D.C.Cir. 2006); *United States v. Sczubelek*, 402 F.3d 175, 181-87 (3d Cir. 2005); *United States v. Kincade*, 379 F.3d 813, 821-39 (9th Cir. 2004); *Groceman v. U.S. Dept. of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); Fifth Amendment: *United States v. Reynard*, 473 F.3d 1008, 1021 (9th Cir. 2007); *United States v. Hook*, 471 F.3d 766, 773-74 (7th Cir. 2006); *Boling v. Romer*, 101 F.3d 1336, 1340-341 (10th Cir. 1997); Ex post facto: *United States v. Reynard*, 473 F.3d 1008, 1017-21 (9th Cir. 2007); *United States v. Hook*, 471 F.3d 766, 775-76 (7th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, 500-501 (D.C. Cir. 2006); Cruel and unusual punishment: *United States v. Hook*, 471 F.3d 766, 774-75 (7th Cir. 2006); Separation of powers: *United States v. Sczubelek*, 402 F.3d 175, 187-89 (3d Cir. 2005).

¹⁰² 42 U.S.C. 14135a(a) (1)(A).

¹⁰³ Subparagraph 14135a(a)(1)(A) reads in its entirety with emphasis added: "The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, *facing charges*, or convicted or from non-United States persons who are detained under the authority of the United States. The Attorney General may delegate this function within the Department of Justice as provided in Section 510 of Title 28, and may also authorize and direct any other agency of the United States that arrests or detains individuals or *supervises individuals facing charges* to carry out any function and exercise any power of the Attorney General under this section."

¹⁰⁴ 42 U.S.C. 14132.

¹⁰⁵ But see, *United States v. Purdy*, 2005 WL 3465721 (No. 8:05CR204)(D.Neb. Dec. 19, 2005)(an unreported case (continued...))

differ as to the constitutional prospects of arrestee DNA sampling practices.¹⁰⁶ And as noted earlier, the lower courts have generally rejected constitutional challenges to DNA collection statutes, particularly following conviction.¹⁰⁷ Yet, in a Fourth Amendment context, defendants whose convictions have been overturned and arrestees, particularly those never prosecuted, do not fit as readily into a special needs category as inmates, parolees and those on supervised release. Moreover, on the continuum of punishment mentioned in *Knight* and *Sampson*, they presumably have a greater expectation of privacy than inmates, parolees and those on supervised release, all of whom have been convicted. Whether a court would consider the difference sufficient to tip the balance remains to be seen.

Statute of limitations

The statute of limitations for most federal crimes is five years.¹⁰⁸ There is no statute of limitations for federal capital offenses or for any of federal crimes of terrorism involving a risk of serious injury.¹⁰⁹ Moreover, the statute of limitations for a federal crime involving kidnaping a child or sexual or physical abuse of child is the longer of 10 years or the life of the child.¹¹⁰

Section 211 eliminates the statute of limitations for the federal crimes of kidnaping of a child (18 U.S.C. 1201), sexual abuse (18 U.S.C. ch. 109A), sexual exploitation of a child (18 U.S.C. ch. 110), travel for illicit sexual purposes (18 U.S.C. ch. 117), or sex trafficking of a child or of an adult by force or fraud (18 U.S.C. 1591).¹¹¹

There is no indication whether *Section 211* was intended to apply only prospectively to crimes committed after its enactment or also retroactively to crimes committed before its enactment. In any event, the elimination cannot be applied to cases in which the earlier applicable statute of limitations had run by the time *Section 211* was enacted.¹¹² And in rare cases, due process and the passage of time may preclude prosecution notwithstanding the absence of a statute of limitations bar.¹¹³

(...continued)

finding DNA collection from arrestees under a Nebraska statute contrary to the remands of the Fourth Amendment).

¹⁰⁶ Compare, Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?* 34 JOURNAL OF LAW, MEDICINE AND ETHICS 165 (2006), and Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data From Arrestees*, 34 JOURNAL OF LAW, MEDICINE AND ETHICS 188 (2006).

¹⁰⁷ *Supra* footnote 94.

¹⁰⁸ 18 U.S.C. 3282.

¹⁰⁹ 18 U.S.C. 3281, 3286(b).

¹¹⁰ 18 U.S.C. 3283. *See generally*, CRS Report RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, by (name redacted).

¹¹¹ 18 U.S.C. 3299.

¹¹² *Stogner v. California*, 539 U.S. 607, 632-33 (2003) (“We conclude that a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution”).

¹¹³ *United States v. Marion*, 404 U.S. 307, 324 (1971). A successful due process challenge would ordinarily require the accused to show that he has been prejudiced by the delay and in at least some of the federal circuits that the government chose to suffer the delay for tactical or improper reasons, *United States v. Atchley*, 474 F.3d 840, 852 (6th Cir. 2007); *United States v. Abdush-Shakur*, 465 F.3d 458, 465 (10th Cir. 2006); *United States v. Avants*, 367 F.3d 433, 441 (5th Cir. 2004).

State crime victims in federal habeas proceedings

The victims of federal crimes enjoy limited statutory rights to notice, attendance and participation in related federal judicial proceedings, 18 U.S.C. 3771.¹¹⁴ The victims of state crimes generally enjoy comparable rights in state judicial proceedings as a matter of state law.¹¹⁵

Section 212 affords the victims of state crimes certain attendance and participation rights in federal habeas corpus proceedings involving the state crime of which they were the victim.¹¹⁶ It grants them the right not to be excluded from the habeas proceedings, the right to be reasonably heard there, the right to proceedings free from unreasonable delay, and the right to be treated fairly and with respect for their dignity and privacy.¹¹⁷ The rights are available to all victims, not merely those who were children at the time of the offense or those who were the victims of a sexual offense. The federal courts are obliged to honor these and the other rights vested in *Section 3771*, which are enforceable through writs of mandamus.¹¹⁸ The rights conveyed to the victims of state crimes in federal habeas proceedings, however, impose no obligations upon federal executive branch officials.¹¹⁹

All of which gives *Section 212* a number of interesting features. First, the section does not include a right to notification of the time or place of the habeas proceedings to which the other rights attach, although some state statutory or constitutional provisions may require notice by state officials.¹²⁰ Second, it seems to call for the right of victims to brief and argue the points of law raised in the habeas proceedings (the right to be reasonably heard), since the usual form of a victim's being heard, the victim impact statement, has no real place in a habeas proceeding.¹²¹ Third, it seems to promise no right of attendance or participation for the families or representatives of those victims who are children unless the child is dead or incapacitated.¹²²

A victim's right to habeas proceedings unmarred by unreasonable delays can be traced to hearing testimony and to an earlier short-lived section of the bill, which would have imposed time limits in federal habeas cases when they involved challenges to state convictions for the murder of a

¹¹⁴ See generally, CRS Report RL33679, *Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771*, by (name redacted).

¹¹⁵ See generally, Beloof, Cassell, & Twist, *VICTIMS IN CRIMINAL PROCEDURE* (2d ed. 2006); and CRS Report 97-735, *Victims' Rights Amendment: Background & Issues Associated With Proposals to Amend the United States Constitution*, by (name redacted) (appending citations and selected texts of state victims' rights provisions).

¹¹⁶ 18 U.S.C. 3771(b)(2).

¹¹⁷ 18 U.S.C. 3771(b)(2)(A); 3771(a)(3), (4), (7), (8).

¹¹⁸ 18 U.S.C. 3771(b)(2)(A), (B), (d).

¹¹⁹ 18 U.S.C. 3771(b)(2) (C).

¹²⁰ *Section 212* provides cross references to those federal victims rights which apply in habeas proceeding involving state prisoners, 18 U.S.C. 3771(b)(2)(A). It does not mention 18 U.S.C. 3771(a)(2) where the right to notice is found.

¹²¹ The participation right granted by *Section 212* is "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding," 18 U.S.C. 3771(a)(4); 3771(b)(2)(A).

¹²² *Section 212* defines "crime victim" as "the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative," 18 U.S.C. 3771(b)(2)(D). The definition of victims for other of *Section 3771*'s purposes seems more solicitous of the interests of the child victim: "'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense. ... In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter. . . ." 18 U.S.C. 3771(e) (emphasis added).

child.¹²³ A provision affording victims the right to fair and dignified treatment needs little explanation. The rationale for the section's other features is somewhat more difficult to ascertain.

Marital privileges

Evidentiary questions in federal criminal cases are governed in large measure by the Federal Rules of Evidence, which are generally formulated and amended by committees within the Judicial Conference working under the auspices of the Supreme Court and with at least tacit Congressional approval.¹²⁴ The general rule on federal privileges states that they “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.”¹²⁵ Under this rubric the federal courts have recognized two marital privileges. One protects confidential communications between spouses¹²⁶ and the other permits one spouse to refuse to testify against the other.¹²⁷ The federal courts have recognized an exception to the communications privilege in cases involving crimes committed by one spouse against the other or against children in the home,¹²⁸ but at least one court has refused to recognize a corresponding exception to the privilege against compelled spousal testimony.¹²⁹

Section 214 directs the Committee on Rules, Practice, Procedure and Evidence of the Judicial Conference to study the necessity and desirability of establishing an exception to both privileges in cases involve a crime committed by one spouse against a child or minor ward of either. The results will presumably be presented to Congress in the form a report transmitted through Conference and the Supreme Court, since by statute only Congress can create, abolish, or modify a federal rule of evidentiary privilege.¹³⁰

Civil Commitment

A little over a third of the states have enacted statutes that permit involuntary civil commitment of previously convicted sex offenders based on the prospect of their future commission of sexual offenses.¹³¹ In other states, involuntary civil commitment is available when the individual is

¹²³ *Protection Against Sexual Exploitation of Children Act of 2005, and the Prevention and Deterrence of Crimes Against Children Act of 2005: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary on H.R. 2318 and H.R. 2388, 109th Cong., 1st Sess. 17-8 (testimony of Carol Fornoff, mother of a murdered child)(2005); H.Rept. 109-218 at 12.*

¹²⁴ 28 U.S.C. 2071-2077.

¹²⁵ F.R.Evid. 501.

¹²⁶ *Blau v. United States*, 340 U.S. 332, 333-34 (1951); *United States v. Darif*, 446 F.3d 701, 705 (7th Cir. 2006); *United States v. Griffin*, 440 F.3d 1138, 1143-144 (9th Cir. 2006).

¹²⁷ *Trammel v. United States*, 445 U.S. 40, 53 (1980); *United States v. Thompson*, 454 F.3d 459, 464 (5th Cir. 2006); *United States v. Darif*, 446 F.3d 701, 707 (7th Cir. 2006); *United States v. Griffin*, 440 F.3d 1138, 1143-144 (9th Cir. 2006).

¹²⁸ *United States v. Bahe*, 128 F.3d 1440, 1444-446 (10th Cir. 1997); *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992); *United States v. Allery*, 526 F.2d 1362, 1366-367 (8th Cir. 1975); *United States v. Martinez*, 44 F.Supp.2d 835, 836-37 (W.D.Tex. 1999).

¹²⁹ *United States v. Jarvison*, 409 F.3d 1221, 1231 (10th Cir. 2005).

¹³⁰ 28 U.S.C. 2074(b).

¹³¹ Ariz. Rev. Stat. Ann. §§ 36-3701 to 36-3713; Cal. Welf. & Inst. Code §§ 6600-6609.3; Fla. Stat. Ann. § 394.910 to 394.931; Ga. Code Ann. § 42-1-12; 725 Ill. Comp. Stat. Ann. ¶¶ 207/1 to 207/99; Iowa Code Ann. §§ 229A.1 to 229A.16; Kan. Stat. Ann. §§ 59-29a01 to 59-29a15; Mass. Gen. Laws ch. 123A, §§ 1-16; Minn. Stat. Ann. §§ 253B.185(1) to (6); Mo. Ann. Stat. §§ 632.480 -632.513; N.H. Rev. Stat. Ann. §§ 135-E:1 to 135-E:12; N.J. Stat. Ann. (continued...)

found to be a danger to himself or others, a procedure that under some circumstances may be used to commit sex offenders.¹³²

The Supreme Court has addressed concerns that the sex offender civil commitment procedures could be used in lieu of a criminal trial to circumvent the constitutional protections afforded the criminally accused. Faced with the argument that the statutes might be used to punish an individual simply because he was thought to pose a risk of committing some undefined crime in the future, the Court upheld a narrowly crafted Kansas statute in *Kansas v. Hendricks*:

The challenged Act unambiguously requires as finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement. Commitment proceedings can be initiated only when a person has been convicted of a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. The statute thus requires proof of more than mere predisposition to violence; rather, it requires evidence of past sexual violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated. . . . A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a mental illness or mental abnormality. These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond they control. The Kansas Act is plainly of a kind with these other civil commitment statutes: it requires a finding of future dangerousness, and then links that finding to the existence of a mental abnormality or personality disorder that makes it difficult, if not impossible for the person to control his dangerous behavior. The precommitment requirement of a mental abnormality or personality disorder is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.¹³³

Soon thereafter the Court seemed to withdraw somewhat from its pronouncements in *Hendricks*. The Kansas Supreme Court read *Hendricks* to mean that civil commitment of sex offenders under the statute required proof that they could not control their criminal urges; not so, said the United States Supreme Court in *Kansas v. Crane*.¹³⁴

It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

The later courts have been of two minds when it comes to dealing with what standard of control will satisfy due process demands for sexual predator civil commitment statutes in light of

(...continued)

§§ 30:4-27.24 to 30:4-27.29; N.D. Cent. Code §§ 25-03.3-01 to 25-03.3-23; S.C. Code Ann. §§ 44-48-10 to 44-48-170; Tex. Health & Safety Code §§841.001-841.150; Va. Code Ann. §§ 37.1-70.1 to 37.1-70.16; Wash. Rev. Code Ann. §§ 71.09.010 - 71.09.902; Wis. Stat. Ann. §§ 980.01 - 980.13.

¹³² See e.g., *State ex rel. Harkavy v. Consilvio*, 34 A.D.3d 67, 819 N.Y.S.2d 499 (2006); cf., *In re Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007).

¹³³ *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997).

¹³⁴ 534 U.S. 407, 413 (2002).

Hendricks and *Crane*. Some assert that the government must show that the individual has “serious difficulty controlling his potentially dangerous behavior.”¹³⁵ Others conclude that it is sufficient to establish that by virtue of some mental disorder the individual is more likely than not to engage in sexual violence in the future, because such proof “implicitly includes proof that such persons’s mental disorder involves serious difficulty in controlling his or her sexually dangerous behavior.”¹³⁶

Section 302 establishes a federal civil commitment procedure for sexual offenders in which it takes the more cautious approach.¹³⁷ It permits commitment where the court finds by clear and convincing evidence that the individual is “a sexually dangerous person.”¹³⁸ A sexually dangerous person is one “who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”¹³⁹ A person is sexually dangerous to others who “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”¹⁴⁰

Section 301 creates a grant program to assist states in establishing, enhancing or operating effective civil commitment programs for “sexually dangerous persons,” whom it defines in explicit “control” terms.¹⁴¹

Bail

As a general rule, individuals arrested for the commission of federal offenses are entitled to be released under their own recognizance or under the least restrictive conditions necessary to ensure their appearance at later judicial proceedings and to ensure community safety.¹⁴² The bail statute cites a number of permissible conditions, such as continued employment, travel restrictions, and the like.¹⁴³ In the case of individuals charged with any of the specifically designated offenses

¹³⁵ *People v. Zapisek*, 147 Cal.App.4th 1151, 1159-164, 54 Cal.Rptr.3d 873, 878 (2007); *In re Care and Treatment of Murrell*, ___ S.W.3d ___, ___ (2007 WL 465932)(Mo. Feb. 13, 2007); *In re Detention of Barnes*, 6589 N.W.2d 98, 101 (Iowa 2003); *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 267 (Minn.App. 2002); *In re Commitment of W.Z.*, 173 N.J. 109, 126-30, 801 A.2d 205, 215-17 (2002).

¹³⁶ *In re Commitment of Laxton*, 254 Wis.2d 185,201, 647 N.W.2d 784, 793 (2002); *State v. White*, 891 So.2d 502, 504-10 (Fla. 2004); *In re the Detention of Thorell*, 149 Wash.2d 724, 745, 72 P.3d 708, 720 (2003); *In re Commitment of Almaguer*, 117 S.W.3d 500, 505-506 (Tex.App. 2003); *State v. Varner*, 207 Ill.2d 425, 432, 279 Ill.Dec. 506,510, 800 N.E.2d 794, 798 (2003); *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 143-44, 568 S.E.2d 338, 348-49 (2002); *In re Leon G.*, 204 Ariz. 15, 27, 59 P.3d 779, 788 (2002); *see also, Rose v. Mayberg*, 454 F.3d 958, 962 (9th Cir. 2006).

For a more extensive discussion of the division see, Gaines, *Instruct the Jury: Crane’s “Serious Difficult” Requirement and Due Process*, 56 SOUTH CAROLINA LAW REVIEW 291 (2004); *Ignoring the Supreme Court: State v. White, the Civil Commitment of Sexually Violent Predators, and Majoritarian Judicial Pressures*, 58 HASTINGS LAW JOURNAL 413 (2006).

¹³⁷ 18 U.S.C. 4247, 4248.

¹³⁸ 18 U.S.C. 4248(d).

¹³⁹ 18 U.S.C. 4247(5).

¹⁴⁰ 18 U.S.C. 4247(6).

¹⁴¹ “The term ‘sexually dangerous person’ means a person suffering from a serious mental illness, abnormality, or disorder, as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation,” 42 U.S.C. 16971(e)(2).

¹⁴² 18 U.S.C. 3142(a)-(c).

¹⁴³ 18 U.S.C. 3142(c)(B).

involving children, the law sets a rebuttable presumption that no set of conditions will ensure public safety or the individual's later appearance.¹⁴⁴ The list includes failing to register as a sex offender or violations of the following involving a child:

18 U.S.C. 1201 (kidnaping)

18 U.S.C. 1591 (sex trafficking of children or by force or fraud)

18 U.S.C. 2241 (aggravated sexual abuse)

18 U.S.C. 2242 (sexual abuse)

18 U.S.C. 2244 (a)(1)(abusive sexual contact that if abuse would have been aggravated sexual abuse)

18 U.S.C. 2245 (sexual abuse resulting in death)

18 U.S.C. 2251 (sexual exploitation of children)

18 U.S.C. 2251A (selling or buying children)

18 U.S.C. 2252 (transporting, distributing or selling child sexually exploitive material)

18 U.S.C. 2252A (transporting or distributing child pornography)

18 U.S.C. 2260 (making child sexually exploitative material overseas for export to the U.S.)

18 U.S.C. 2421 (transportation of illicit sexual purposes)

18 U.S.C. 2422 (coercing or enticing travel for illicit sexual purposes)

18 U.S.C. 2423 (travel involving illicit sexual activity with a child)

18 U.S.C. 2425 (interstate transmission of information about a child relating to illicit sexual activity), 18 U.S.C. 2245.

Section 216(1) provides that an individual, charged with an offense that would trigger such a presumption who is nevertheless released prior to trial, must be subject to (1) electronic monitoring; (2) restrictions on his personal associations, place of residence, and travel; (3) instructions to avoid contact with past and potential victims; (4) a requirement to report regularly to supervisory authorities; (5) a curfew; and (6) a prohibition on possession of a firearm, explosive or similar dangerous instrumentalities.¹⁴⁵

Federal law permits the court to order preventive detention upon the motion of the prosecution when an individual is charged with a crime of violence or other designated serious federal offense.¹⁴⁶ *Section 216(2)* adds to the list, nonviolent crimes if they involve a child victim; or the failure to register as a sex offender; or the possession of a firearm, destructive device, or other

¹⁴⁴ 18 U.S.C. 3142(e).

¹⁴⁵ 18 U.S.C. 3142(c)(1)(B).

¹⁴⁶ 18 U.S.C. 3142(f)(1).

dangerous weapon. In doing so, the section overturns the effect of the majority of circuit court decisions that had held that simple unlawful possession of a firearm is not a crime of violence for preventive detention purposes.¹⁴⁷

When considering whether to order preventive detention, the court was once instructed to consider, among other things, “The nature and circumstances of the offense charged, including whether the offense is a crime of violence, or an offense listed in Section 2332b(g)(5)(B)[(federal crime of terrorism)] *for which a maximum term of imprisonment of 10 years or more is prescribed or involves a narcotic drug.*”¹⁴⁸

Section 216(3) rewrites the provision so that it reads, “The nature and circumstances of the offense charged, including whether the offense is a crime of violence, a federal crime of terrorism, or *involves a minor victim* or a controlled substance, *firearm, explosive, or destructive device.*”¹⁴⁹ Several changes are obvious. Special consideration must now be given to any federal crime of terrorism not merely federal crimes of terrorism carrying a 10 year sentence. The offenses that carry less than a 10 year maximum penalty range from destruction of federal property valued at less than \$1000 to threats and involuntary manslaughter committed under a variety of jurisdictional circumstances.¹⁵⁰ The same preventive detention consideration now attends any federal crime committed against a child, including acts of fraud and other federal crimes which neither invoke nor risk physical injury of the child.

Guardian ad litem

Federal law allows the court to appoint guardians ad litem to protect the interests of children who witness or are the victims of a crime.¹⁵¹ *Section 507* amends the law to explicitly authorize federal courts to provide for such guardians’ compensation and expenses.¹⁵²

Prosecution pre-trial control of pornography

Rule 16 of the Federal Rules of Criminal Procedure states that the prosecution must permit the defendant to inspect and copy any papers, documents, data or tangible items in the government’s possession (1) that were obtained from the defendant, or (2) that the government intends to use at

¹⁴⁷ *United States v. Ingle*, 454 F.3d 1082, 1085-86 (10th Cir. 2004); *United States v. Bowers*, 432 F.3d 518, 524 (3d Cir. 2005); *United States v. Johnson*, 399 F.3d 1297, 1320 (11th Cir. 2005); *United States v. Twine*, 344 F.3d 987, 987-88 (9th Cir. 2003); *United States v. Lane*, 252 F.3d 905, 906-908 (7th Cir. 2001); *United States v. Singleton*, 182 F.3d 7, 16 (D.C. Cir. 1999); *contra, United States v. Dillard*, 214 F.3d 88, 104 (2d Cir. 2000).

¹⁴⁸ 18 U.S.C. 3142(g)(1)(2000 ed. & Supp. IV)(emphasis added).

¹⁴⁹ 18 U.S.C. 3142(g)(1).

¹⁵⁰ The inventory of federal crimes of terrorism punishable by imprisonment for a maximum term of less than 10 years includes 18 U.S.C. 32(c)(threat to destroy aircraft or aircraft facilities); 175b(b), (c) (biological weapon material, transfer to or possession by unregistered persons); 351, 1112 (involuntary manslaughter of a Member of Congress, Cabinet officer, or Supreme Court Justice); 930(c), 1112, 1113 (involuntary manslaughter or attempted manslaughter in a federal facility); 1361 (causing less than \$1000 damage to federal property); 1363 (damage to property within U.S. special maritime and territorial jurisdiction); 1751, 1112 (involuntary manslaughter of the President, Vice President, or senior White House staff); 2280(a)(2) (threat of violence against maritime navigation); 2281 (a)(2)(threat of violence against fixed maritime platforms); 2332 (involuntary manslaughter of an American overseas); and 49 U.S.C. 46506 (involuntary manslaughter or attempted manslaughter within the special aircraft jurisdiction of the United States).

¹⁵¹ 18 U.S.C. 3509(h).

¹⁵² *Id.*

trial, or (3) that are material to the preparation of a defense.¹⁵³ In view of these provisions, at least some district courts had instructed prosecutors to give defense counsel and defense experts copies of materials seized in child pornography prosecution when otherwise the defense would be under considerable burden and when there was no indication that either defense counsel or its experts were likely to disregard the court's protective order and abuse their access to the material.¹⁵⁴

Section 504 states that material constituting child pornography must remain in the care, custody, and control of the prosecution or the court.¹⁵⁵ Rule 16 notwithstanding, defense requests for copies must be denied as long as the prosecution makes the material reasonably available, i.e., with ample opportunity to inspect and examine the material at a government facility.¹⁵⁶

The few lower court cases to face the question to date have found no constitutional infirmity.¹⁵⁷ One court, however, has ordered that copies be provided to defense counsel because the increased cost and technical difficulties associated with examination and analysis by the defense at the government facility failed to provide an "ample opportunity" for examination and analysis by the defense.¹⁵⁸

Forfeiture

Property associated with obscenity or the sexual exploitation of children is subject to confiscation by the United States.¹⁵⁹ As a general rule, confiscation can be accomplished either as part of the criminal prosecution of the property owner (criminal forfeiture) and in civil proceedings in which the "offending" property is often treated as the defendant (civil forfeiture). Civil forfeiture requires neither the conviction nor even the complicity of the property owner; it is enough that the property satisfies the statutory nexus between the crime and the property. Civil forfeitures are often governed by the provisions of Chapter 46 of Title 18 of the United States Code;¹⁶⁰ criminal forfeiture by the provisions governing criminal forfeiture in controlled substance cases.¹⁶¹ Law enforcement agencies that investigate and prosecute the crimes that result in confiscation usually share in the proceeds of the forfeiture.¹⁶²

Preexisting federal law authorized the criminal forfeiture of obscene material, property constituting or traceable to obscenity violations, and property used to facilitate commission of

¹⁵³ F.R.Crim.P. 16(E).

¹⁵⁴ *United States v. Hill*, 322 F.Supp.2d 1081, 1091-94 (C.D. Cal. 2004); *United States v. Frabizio*, 341 F.Supp.2d 47, 48-51 (D.Mass. 2004); *United States v. Cadet*, 423 F.Supp.2d 1, 2-5 (E.D.N.Y. 2006).

¹⁵⁵ 18 U.S.C. 3509(m)(1).

¹⁵⁶ 18 U.S.C. 3509(m)(2), (3).

¹⁵⁷ *United States v. Johnson*, 456 F.Supp.2d 1016, 1018-20 (N.D. Iowa 2006)(18 U.S.C. 3509(m) is not contrary to the Fifth or Sixth Amendment either on its face or as applied); *United States v. O'Rourke*, ___ F.Supp.2d ___, ___ (D. Ariz. Jan. 17, 2007).

¹⁵⁸ *United States v. Knelling*, ___ F.Supp.2d ___, ___ (E.D.Va. Jan 25, 2007).

¹⁵⁹ 18 U.S.C. 1467, 2253, 2254.

¹⁶⁰ 18 U.S.C. 981-985.

¹⁶¹ 21 U.S.C. 853.

¹⁶² 28 U.S.C. 524(c).

such violations.¹⁶³ The obscenity statute spelled out the procedures to be used rather than relying on those that applied in controlled substance cases, and made no provision for civil forfeiture.¹⁶⁴

Section 505(a) repeals the individual criminal forfeiture provisions in the obscenity statute, adopts the controlled substance procedures by cross reference, and establishes a civil forfeiture provision adopting the procedures of Chapter 46.¹⁶⁵

Section 505(b) works much the same change in the forfeiture provisions that apply to the crimes of sexual exploitation of children.¹⁶⁶ It replaces individual criminal and civil forfeiture procedures with adoption of the generic procedures of Chapter 46 and the controlled substance statute, *id.* It eliminates from the coverage of the exploitation-related forfeiture sections Mann Act violations,¹⁶⁷ probably because the Mann Act has its own compatible criminal and civil forfeiture provisions.¹⁶⁸ The section also authorizes for the first time criminal and civil forfeiture of property generated by or used to facilitate violations of Chapter 109A (sexual abuse).¹⁶⁹

Capital punishment

Imposition of the death penalty for murder under federal law is confined to murders committed under one or more of a series of aggravating offenses. One such aggravating circumstance is the fact that the murder was committed during the course of another specifically designated federal crime.¹⁷⁰ The list of aggravating federal felonies includes crimes like treason, kidnaping, and aircraft sabotage. *Section 206(a)(4)* adds 18 U.S.C. 2245 (murder committed during the course of various sexual offenses) to the list.¹⁷¹

New Crimes

Murder in course of a federal sex offense

Section 2245, noted above, makes it a capital offense to murder an individual during the course of any of the crimes proscribed in the Chapter 109A of Title 18 of the United States Code relating to

¹⁶³ 18 U.S.C. 1467(a).

¹⁶⁴ 18 U.S.C. 1467 (2000 ed. & Supp. IV).

¹⁶⁵ 18 U.S.C. 1467(a), (b).

¹⁶⁶ 18 U.S.C. 2253, 2254.

¹⁶⁷ 18 U.S.C. 2421-2427 (transportation for illicit sexual purposes).

¹⁶⁸ 18 U.S.C. 2428.

¹⁶⁹ 18 U.S.C. 2253, 2254.

¹⁷⁰ 18 U.S.C. 3592(c)(1).

¹⁷¹ 18 U.S.C. 2245 makes it a capital offense to commit a murder during the course of any violation of 18 U.S.C. ch. 109A (sexual abuse); 18 U.S.C. 1591 (sex trafficking of children or by force or fraud); 18 U.S.C. 2251 (sexual exploitation of children); 18 U.S.C. 2251A (selling or buying children); 18 U.S.C. 2260 (making child sexually exploitative material overseas for export to the U.S.); 18 U.S.C. 2421 (transportation for illicit sexual purposes); 18 U.S.C. 2422 (coercing or enticing travel for illicit sexual purposes); 18 U.S.C. 2423 (travel involving illicit sexual activity with a child); or 18 U.S.C. 2425 (interstate transmission of information about a child relating to illicit sexual activity).

sexual abuse.¹⁷² *Section 206(a)(3)* amends the provision so that it is also a capital offense to commit a murder during the course of several other federal crimes, i.e.:

18 U.S.C. 1591 (sex trafficking of children or by force or fraud)

18 U.S.C. 2251 (sexual exploitation of children)

18 U.S.C. 2251A (selling or buying children)

18 U.S.C. 2260 (making child sexually exploitative material overseas for export to the U.S.)

18 U.S.C. 2421 (transportation for illicit sexual purposes)

18 U.S.C. 2422 (coercing or enticing travel for illicit sexual purposes)

18 U.S.C. 2423 (travel involving illicit sexual activity with a child)

18 U.S.C. 2425 (interstate transmission of information about a child relating to illicit sexual activity), 18 U.S.C. 2245.

Internet date rape drug trafficking

Drugs and other controlled substances are assigned to various schedules, are regulated, and penalties for their abuse are calibrated, according to the type and amount of the drug or substance and its capacity for abuse and legitimate use. Unlawful distribution of various “date rape drugs” is punishable as follows:

Substance	Amount	Term of Imprisonment
I. Flunitrazepam	less than 30 mg	not more than three years (2d offense: not more than six years), 21 U.S.C. 841(b)(2)
	30-999 mg	not more than five years (2d offense: not more than 10 years) 21 U.S.C. 841(b)(1)(D)
	1 gr or more	not more than 20 years; not less than 20 years or more than life if serious injury results (2d offense: not less than life) 21 U.S.C. 841(b)(1)(C)
II. GHB (Gamma Hydroxybutyric Acid)	any amount	not more than 20 years; not less than 20 years or more than life if serious injury results (2d offense: not less than life) 21 U.S.C. 841(b)(1)(C)
III. Ketamine (Sch.III) 21 C.F.R. §1308.13(c)(6)	any amount	not more than five years (2d offense: not more than 10 years) 21 U.S.C. 841(b)(1)(D)

In addition, surreptitiously administering any controlled substance with the intent to commit a crime of violence (including rape) is punishable by imprisonment for not more than 20 years.¹⁷³

¹⁷² 18 U.S.C. 2245.

¹⁷³ 21 U.S.C. 841(b)(7).

Section 201 makes use of the Internet to unlawfully distribute GHB, ketamine, flunitrazepam, or any substance designated by the Attorney General as similarly susceptible to abuse as a date rape drug, punishable by imprisonment for not more than 20 years.¹⁷⁴

Kidnaping

Section 213 expands federal kidnaping jurisdiction by amending 18 U.S.C. 1201 as follows:

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary ~~if the person was alive when the transportation began, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense ...~~ 18 U.S.C. 1201 (emphasis added to reflect amendment).

In addition to interstate transportation of the victim, Section 1201 prior to amendment and now includes kidnaping within U.S. special aircraft or special maritime and territorial jurisdiction or when the victim is a federal officer or employee or foreign dignitary.¹⁷⁵ Some may find the conversion of a local kidnaping into a federal offense if “the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense,” a substantial expansion in federal jurisdiction.

Indian country

Under federal law, “any Indian who commits against the person or property of another Indian or other person” any of several specifically designated crimes within Indian country is subject to the exclusive criminal jurisdiction of the United States.¹⁷⁶ Prior to enactment of the Adam Walsh Child Protection and Safety Act, the section covered a felony violation of federal sexual abuse law (18 U.S.C. ch.109A), incest, assault resulting in serious injury, and assault upon a child.¹⁷⁷ These crimes are defined by the law of the surrounding state when otherwise undefined by federal law.¹⁷⁸ *Section 215* supplements the list of Section 1153 offenses by adding any “felony child abuse or neglect.”¹⁷⁹ The change makes state child abuse and neglect felonies federal crimes subject to prosecution in federal court.

¹⁷⁴ 21 U.S.C. 841(g).

¹⁷⁵ 18 U.S.C. 1201(a)(2)-(5).

¹⁷⁶ 18 U.S.C. 1153.

¹⁷⁷ *Id.*

¹⁷⁸ 18 U.S.C. 1153(b).

¹⁷⁹ 18 U.S.C. 1153.

Production of obscene material

It has long been a federal crime to transport obscene material in interstate or foreign commerce,¹⁸⁰ and more recently to be engaged in the business of selling obscene material that has been so transported.¹⁸¹ *Section 506* makes it a federal crime to produce obscene material for such purposes.¹⁸² The new crime carries the same penalty as its predecessors, imprisonment for not more than five years.¹⁸³

Obscenity and pornography in Internet source codes

Preexisting federal law prohibits the use of misleading Internet domain names to deceptively induce children to view pornography.¹⁸⁴ *Section 703* makes it a federal crime to include words or digital images in Internet website source codes with the intent to deceptively induce a child to view pornography (punishable by imprisonment for not more than 20 years) or to deceptively induce an individual of any age to view obscene material (punishable by imprisonment for not more than 10 years).¹⁸⁵

Child exploitation enterprises

Section 701 outlaws child exploitation enterprises.¹⁸⁶ The new offense involves three or more persons who on three or more occasions commit one or more of a series federal felonies (generally sexual offenses) involving more than one child.¹⁸⁷ Offenders face imprisonment for any term of years not less than 20 years or for life.¹⁸⁸ The section makes no mention of whether the mandatory minimums are to be served consecutive to those of the predicate offenses, some of which carry more severe minimums than the enterprise offense. The class of predicate offenses when they involve a child consists of the following.

18 U.S.C. 1201 (kidnaping)¹⁸⁹

18 U.S.C. 1591 (sex trafficking of children or by force or fraud)

18 U.S.C. 2241 (aggravated sexual abuse)¹⁹⁰

18 U.S.C. 2242 (sexual abuse)

¹⁸⁰ 18 U.S.C. 1465.

¹⁸¹ 18 U.S.C. 1466.

¹⁸² 18 U.S.C. 1465, 1466.

¹⁸³ *Id.*

¹⁸⁴ 18 U.S.C. 2252B.

¹⁸⁵ 18 U.S.C. 2252C.

¹⁸⁶ 18 U.S.C. 2252A(g).

¹⁸⁷ 18 U.S.C. 2252A(g)(2).

¹⁸⁸ 18 U.S.C. 2252A(g)(1).

¹⁸⁹ Kidnaping a child is punishable by imprisonment for not less than 25 years by operation of Section 202, 18 U.S.C. 3559(f)(2).

¹⁹⁰ Aggravated sexual abuse of a child is punishable by imprisonment for not less than 30 years by operation of Section 206(a)(1), 18 U.S.C. 2241(c).

- 18 U.S.C. 2243 (sexual abuse of ward or child)
- 18 U.S.C. 2244 (abusive sexual contact)
- 18 U.S.C. 2245 (sexual abuse resulting in death)
- 18 U.S.C. 2251 (sexual exploitation of children)¹⁹¹
- 18 U.S.C. 2251A (selling or buying children)
- 18 U.S.C. 2252 (transporting, distributing or selling child sexually exploitive material)
- 18 U.S.C. 2252A (transporting or distributing child pornography)
- 18 U.S.C. 2252B (misleading Internet domain names)
- 18 U.S.C. 2252C (misleading Internet website source codes)
- 18 U.S.C. 2260 (making child sexually exploitive material overseas for export to the U.S.)¹⁹²
- 18 U.S.C. 2421 (transportation for illicit sexual purposes)
- 18 U.S.C. 2422 (coercing or enticing travel for illicit sexual purposes)
- 18 U.S.C. 2423 (travel involving illicit sexual activity with a child)
- 18 U.S.C. 2424 (filing false statement concerning an alien for illicit sexual purposes)
- 18 U.S.C. 2425 (interstate transmission of information about a child relating to illicit sexual activity), 18 U.S.C. 2252A(g).

New Penalties

Crimes against children

Although some federal crimes of violence subject offenders to a specific mandatory minimum term of imprisonment or to more severe penalties if the victim is a child, most do not. *Section 202* establishes new sentencing ranges for the federal crimes of murder, kidnaping, maiming, or aggravated assault (a crime of violence involving the use of a dangerous weapon or resulting in serious injury) when the victim is under 18 years of age.¹⁹³ In the case of murder, the penalty is imprisonment for any term of years not less than 30 years, imprisonment for life, or death;¹⁹⁴ in the case of kidnaping or maiming, imprisonment for life or any term of years not less than 25

¹⁹¹ Sexual exploitation involving a child by a recidivist or resulting in death is punishable by imprisonment for not less than 30 years by operation of Section 206(b)(1), 18 U.S.C. 2251(e).

¹⁹² By operation of Section 206f(b)(5), violations are punishable by imprisonment for not 25 years if committed by an offender with a prior conviction, by imprisonment for not more than 35 years if committed by an offender with 2 or more prior convictions; and by imprisonment for not more than 30 years if death results, 18 U.S.C. 2260(a), (c).

¹⁹³ 18 U.S.C. 3559(f).

¹⁹⁴ 18 U.S.C. 3559(f)(1).

years;¹⁹⁵ and in the case of aggravated assault, imprisonment for life or any term of years not less than 10 years.¹⁹⁶ The new minimum terms of imprisonment must yield to any otherwise applicable higher mandatory minimum, but the new maximum penalties trump any otherwise applicable maximum.¹⁹⁷

The new provision has the effect of making capital offenses out of several federal murder statutes that heretofore were punishable only by a term of imprisonment. A handful of earlier federal laws included a penalty escalator (but not capital punishment) when the offense they proscribe resulted in a death. The new provision only converts these to capital offenses when the victim is a child and when the misconduct involves the intentional killing of the victim or a reckless, fatal act of violence.¹⁹⁸ Among the statutes implicated are:

- 18 U.S.C. 38 (murder resulting from fraud involving aircraft and spacecraft parts)¹⁹⁹
- 18 U.S.C. 43 (murder in the course of an animal terrorism offense)
- 18 U.S.C. 175c (murder resulting from the use or possession of variola virus)
- 18 U.S.C. 248 (murder in the course of restricting access to abortion clinics)
- 18 U.S.C. 831 (murder resulting from the use or possession of nuclear materials)
- 18 U.S.C. 1347 (murder resulting from health care fraud)
- 18 U.S.C. 1365 (murder resulting from consumer product tampering)
- 18 U.S.C. 1652 (murder by an American pirate)
- 18 U.S.C. 1952 (murder in violation of the Travel Act)
- 18 U.S.C. 2118 (murder in the course of a drug store robbery or burglary)
- 18 U.S.C. 2155 (murder in the course destroying national defense material or utilities)
- 18 U.S.C. 2261-2262 (murder in the course of a federal crime of stalking).

Penalty increases attributable to the new statute may appear less dramatic in the case of kidnaping and maiming, because there are fewer federal statutes proscribing those crimes and because they were already fairly severely punished. Apart from the operation of the new Section 3559(f), kidnaping is punishable under federal law by imprisonment for any term of years or for life.²⁰⁰ And maiming when a federal crime and except when subject to the new penalty structure is punishable by imprisonment for not more than 20 years.²⁰¹ On the other hand, neither carries a

¹⁹⁵ 18 U.S.C. 3559(f)(2).

¹⁹⁶ 18 U.S.C. 3559(f) (3).

¹⁹⁷ 18 U.S.C. 3559(f).

¹⁹⁸ 18 U.S.C. 3559(f)(1), 3591(a)(2).

¹⁹⁹ It remains to be seen whether the courts would consider fraud a “crime of violence” even if it involved the concealment or introduction of a lethal product defect.

²⁰⁰ 18 U.S.C. 1201, 245.

²⁰¹ 18 U.S.C. 114.

mandatory minimum sentence, and the mandatory minimum under Section 3559(f) for maiming (25 years) is greater than the sentence otherwise authorized for the crime (20 years).

The impact of Section 3559(f) on federal assault law may be difficult to assess. There are scores of federal assault statutes.²⁰² Many prohibit assaults directed at federal officials and consequently are not likely to involve children as victims in most instances. Of the others, some impose more severe penalties when an assault involves a dangerous weapon or bodily injury, but many simply condemn assault. Few impose a sanction as severe as the life sentence or the 10 year mandatory minimum called for in Section 3559(f). Moreover, though the section defines fairly narrowly the injuries that trigger its application,²⁰³ it leaves undefined and open to liberal description the range of dangerous weapons whose use may result in the accelerated sanctions of Section 3559(f). In other federal criminal statutes, the term dangerous weapon has been understood to include shoes,²⁰⁴ belts,²⁰⁵ rings,²⁰⁶ chairs,²⁰⁷ desks,²⁰⁸ teeth,²⁰⁹ and a host of other ordinarily innocent objects that can be misused to inflict serious injury.

A sampling of the federal assault statutes whose sanctions Section 3559(f) replaces (when a child is victimized) with imprisonment for any term of years not less than 10 years or for life, along with the authorized penalties for their violation in the absence of child victim, appears in the margin.²¹⁰

In addition to the enhancements accomplished through Section 3559(f), the act increases penalties for several other child offenses, including the following.

²⁰² One incomplete inventory lists over 60 (CRS Report 94-166, *Extraterritorial Application of American Criminal Law*, by (name redacted), at 56-9).

²⁰³ Section 3559(f) incorporates by cross reference the definition of serious bodily injury found in 18 U.S.C. 1365, i.e., “the term ‘serious bodily injury’ means bodily injury which involves – (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental facility,” 18 U.S.C. 1365(h)(3).

²⁰⁴ *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994).

²⁰⁵ *Id.*

²⁰⁶ *United States v. Serrata*, 425 F.3d 886, 910 (10th Cir. 2005).

²⁰⁷ *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963).

²⁰⁸ *United States v. Gholston*, 932 F.2d 904, 904-905 (11th Cir. 1991).

²⁰⁹ *United States v. Sturgis*, 48 F.3d 784, 788 (4th Cir. 1995).

²¹⁰ 18 U.S.C. 112 (assault with a dangerous weapon or inflicting injury upon an internationally protected person: imprisonment for not more than 10 years); 113 (assault within the special maritime and territorial jurisdiction of the U.S. with a dangerous weapon or inflicting injury: imprisonment for not more than 10 years); 115 (assault on a member of the family of a federal official because of the relationship involving a deadly weapon or inflicting injury: imprisonment for not more than 20 years); 1512(a)(3)(use of physical force to obstruct justice: imprisonment for not more than 10 years); 1952 (Travel Act violations involving the commission of a crime of violence: imprisonment for not more than 20 years); 1959 (violent crimes in aid of racketeering involving assault with a dangerous weapon or serious injury: imprisonment for not more than 20 years); 2113 (assault with a dangerous weapon in the course of bank robbery: imprisonment for not more than 25 years); 2332 (terrorist assault upon an American overseas resulting or intended to result in injury: imprisonment for not more than 10 years); 2332b (terrorist assault transcending national boundaries and involving a dangerous weapon or serious injury: imprisonment for not more than 30 years).

Crime	Imprisonment: Prior	Imprisonment: New
Use of mail/interstate commerce facilities to coerce or entice a child to engage in sexual activities, 18 U.S.C.2422(b)	Not less than five years/not more than 30 years	Not less than 10 years/not more than life, §203
Transporting a child in interstate commerce for sexual activity, 18 U.S.C. 2423(a)	Not less than five years/not more than 30 years	Not less than 10 years/not more than life, §204
Sexual abuse in a federal prison or enclave, 18 U.S.C. 2242(a)	Not more than 20 years	Any term of years or for life, §205
Aggravated sexual abuse of a child, 18 U.S.C. 2241 (c)	Any term of years or for life	Not less than 30 years or for life, §206(a)(1)
Abusive sexual contact with a child, 18 U.S.C. 2244(a)(1)	Not more than 10 years	Any term of years or for life (18 U.S.C. 2244(a) (5)), §206(2)
Sexual exploitation of a child by an offender with a prior federal conviction for sex trafficking or a state conviction for sexual abuse, sexual contact of a ward, or child pornography, 18 U.S.C. 2251 (e)	Not less than 15 years/not more than 30 years	Not less than 30 years or for life, §206(b)(1)(A), (B)
Sexual exploitation of a child resulting in death, 18 U.S.C. 2251 (e)	Death or imprisonment for any term of years or for life	Death or imprisonment for not less than 30 years or for life, §206(b)(1)(C)
Traffic in child sexually exploitive material by an offender with a prior state or federal conviction for sex trafficking in children, 18 U.S.C. 2252(b)	Not less than five years/not more than 20 years	Not less than 15 years/not more than 40 years, §206 (b)(2)
Traffic in child pornography by an offender with a prior state or federal conviction for sex trafficking in children, 18 U.S.C. 2252A(b)	Not less than five years/not more than 20 years	Not less than 15 years/not more than 40 years, §206 (b)(3)
Use of a misleading Internet domain name to induce a child to view harmful material, 18 U.S.C. 2252B	Not more than four years	Not more than 10 years, §206 (b)(4)
Overseas production of child sexually exploitive material for export to the U.S., 18 U.S.C. 2260 (a),(c)	Not more than 10 years; not more than 20 years for recidivists	Not less than 15 years/ not more than 30 years; not less than 25 years/ not more than 50 years for 2d offenders; not less than 35 years nor more than life for offenders with 2 or more prior convictions; death or not less than 30 years or for life if death results, §206 (b)(5)
Overseas production of child pornography material for export to the U.S., 18 U.S.C. 2260 (b), (c)	Not more than 10 years/ not more than 20 years for recidivists	Not less than five years/ not more than 20 years; not less than 15 years/ not more than 40 years for recidivists,§206 (b)(5)
A. Sex trafficking in children by a recidivist, 18 U.S.C. 1591 B. Commission of certain federal sex crimes by an offender with a prior federal sex crime conviction (18 U.S.C. 1591 not a predicate), 18 U.S.C. 3559(e)	A. Not more than 40 years (if the victim is 14 to 18 years old); any term of years or life (if the victim is under 14) B. life imprisonment	A/B. life imprisonment (18 U.S.C. 1591 becomes a predicate for Section 3559(e) purposes), §206 (c)

Crime	Imprisonment: Prior	Imprisonment: New
Sexual abuse of a ward in a federal prison or enclave, 18 U.S.C. 2243 (b)	Not more than five years	Not more than 15 years, §207
Sex trafficking in children by a recidivist, 18 U.S.C. 1591	Not more than 40 years (if the victim is 14 to 18 years old); any term of years or life (if the victim is under 14)	Not less than 10 years or for life (if the victim is 14 to 18 years old); any term of years but not less than 15 years or life (if the victim is under 14), §208
Failure to report child abuse on federal land or facility, 18 U.S.C. 2258, 3581(b)(7)	Not more than six months	Not more than one year, §209
False statements relating to an offense 1591 (sex trafficking), 2250 (failure to register), chs. 109A (sexual abuse), 110 (sexual exploitation of children), 117 (travel for illicit sexual purposes), 18 U.S.C. 1001	Not more than five years	Not more than eight years, §141(c)

Crimes by Sex Offenders

Section 702 provides a flat additional 10 year term of imprisonment to be imposed upon any individual, required to register as a sex offender under either state or federal law, who commits a subsequent felony violation of any of several federal offenses, if the crime involves a child.²¹¹ The 10 year term and the sentence for the predicate offense are to be served consecutively.²¹² The predicate offense list consists of felony violations of:

- 18 U.S.C. 1201 (kidnaping)
- 18 U.S.C. 1466A (obscene visual representation of sexual child abuse)
- 18 U.S.C. 1470 (transfer of obscene material to children)
- 18 U.S.C. 1591 (sex trafficking of children or by force or fraud)
- 18 U.S.C. 2241 (aggravated sexual abuse)
- 18 U.S.C. 2242 (sexual abuse)
- 18 U.S.C. 2243 (sexual abuse of a ward or child)
- 18 U.S.C. 2244 (abusive sexual contact)
- 18 U.S.C. 2245 (sexual abuse resulting in death)
- 18 U.S.C. 2251 (sexual exploitation of children)

²¹¹ 18 U.S.C. 2260A.

²¹² *Id.*

18 U.S.C. 2251A (selling or buying children)

18 U.S.C. 2260 (making child sexually exploitative material overseas for export to the U.S.)

18 U.S.C. 2421 (transportation for illicit sexual purposes)

18 U.S.C. 2422 (coercing or enticing travel for illicit sexual purposes)

18 U.S.C. 2423 (travel involving illicit sexual activity with a child)

18 U.S.C. 2425 (interstate transmission of information about a child relating to illicit sexual activity).

Grant Programs

The act establishes, reinforces, and revives several grant programs devoted to child and community safety.

Section 603 authorizes mentoring grants for the Big Brothers Big Sisters of America.²¹³ *Section 604* requires the organization to provide the Administrator of the Office of Juvenile Justice and Delinquency Prevent with progress reports twice a year.²¹⁴ *Section 605* authorizes appropriations for these purposes of \$9 million (for FY2007), \$10 million (for FY2008), \$11.5 million (for FY2009), \$13 million (for FY2010), and \$15 million (for FY2011).²¹⁵

The National Police Athletic League Youth Enrichment Act established a grant program for the Police Athletic League, with an authorization of appropriations in the amount of \$16 million a year through FY2005.²¹⁶ Subtitle VI-B, §§611-617, reauthorizes appropriations at the same levels for fiscal years 2006 through 2010 and revises the factual information found in the organic legislation relating to the League.²¹⁷

Section 621 empowers the Attorney General to make grants to state, local and tribal governments in order to outfit sex offenders with electronic monitoring devices.²¹⁸ It authorizes appropriations of \$5 million for each of fiscal years 2007, 2008 and 2009 and thereafter requests the Attorney General to report on the effectiveness of the program.²¹⁹

Section 623 creates a grant program available to both public and private entities that assist in treatment of juvenile sex offenders or that assist the states in their enforcement of sex offender registration requirements.²²⁰ Appropriations are authorized for FY2007 through FY2009 in such

²¹³ 42 U.S.C. 5611 note.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ P.L. 106-367, 114 Stat 1412 (2000); 42 U.S.C. 13751 note (2000 ed.).

²¹⁷ 42 U.S.C. 13701 note.

²¹⁸ 42 U.S.C. 16981(a).

²¹⁹ 42 U.S.C. 16981(c).

²²⁰ 42 U.S.C. 3797ee, 3797ee-1.

amounts as are necessary in the case of the enforcement grants and in the amount \$10 million per year in the case of the juvenile sex offender grants.²²¹

Section 624 permits the Attorney General to award grants to facilitate the prosecution of cases cleared as a consequence of the DNA backlog elimination.²²² It authorizes appropriations of such sums as are necessary for that purpose for FY2007 through FY2011.²²³

Section 625 establishes a grant program for law enforcement agencies to combat sexual abuse of children with authorized appropriations of the necessary sums for FY2007 through FY2009.²²⁴

Section 626 calls for grants to a national private, nonprofit organization for a program of crime prevention media campaign.²²⁵ For such purposes, it authorizes appropriations of \$7 million (for FY2007), \$8 million (for FY2008), \$9 million (for FY2009), and \$10 million (for FY2010).²²⁶

Section 627 permits the Attorney General to award grants to state, local and tribal government programs for the voluntary fingerprinting of children.²²⁷ It authorizes the appropriations totaling \$20 million for use through FY2011 for the task.²²⁸

Section 628 authorizes grants to enable a private, nonprofit organization – the Rape, Abuse & Incest National Network (RAINN) – to operate a sexual assault hotline, conduct media campaigns, and provide technical assistance for law enforcement.²²⁹ It authorizes appropriations of \$3 million per year for fiscal years 2007 through 2010.²³⁰

Section 630 permits the Attorney General to establish an online child safety grant program for the benefit of state, territorial and nonprofit grantees, subject to the availability of appropriations.²³¹

Section 631 creates the Jessica Lunsford Address Verification Grant Program to enable state, local and tribal grantees to verify the addresses of registered sex offenders with authorization of the necessary appropriations for FY2007 through FY2009 and the requirement of an Attorney General's report on the effectiveness of the program.²³²

Other Child Safety Initiatives

The act sets forth a wide assortment of other provisions designed to prevent, prosecute or punish the victimization of children. Among them are sections that broaden access to federal criminal

²²¹ *Id.*

²²² 42 U.S.C. 16982(a).

²²³ 42 U.S.C. 16982(b).

²²⁴ 42 U.S.C. 16983.

²²⁵ 42 U.S.C. 3765.

²²⁶ *Id.*

²²⁷ 42 U.S.C. 16984.

²²⁸ 42 U.S.C. 16984(e).

²²⁹ 42 U.S.C. 16985.

²³⁰ *Id.*

²³¹ 42 U.S.C. 16987.

²³² 42 U.S.C. 16988.

records information systems, create a national child abuse registry, expand recordkeeping requirements for those in the business of producing sexually explicit material, immunize officials from civil liability for activities involving sexual offender registration, and authorize and direct the Department of Justice to establish and maintain a number of child protective activities.

National Child Abuse Registry

Section 633 directs the Secretary of Health and Human Services to establish a registry of substantiated instances of child abuse or neglect collected from state and tribal sources.²³³ The registry is only to be made available to federal, state, local and tribal entities obligated to protect children against abuse and neglect.²³⁴

Background Checks

The Federal Bureau of Investigation (FBI) maintains a number of criminal information databases, consisting of information supplied by state and federal law enforcement officials, that can be used to determine the existence and extent if any of a particular individual's criminal record.²³⁵ The system is used primarily for law enforcement purposes, but is also available for such purposes as background checks of employees or prospective employees for certain occupations.²³⁶

Section 151 directs the Attorney General to make the FBI's national criminal information databases available to governmental child protective service agencies and, when related to responsibilities under federal law, to the National Center for Missing and Exploited Children.²³⁷

Section 152 expands the obligation of states, territories and tribes that receive payments under Title IV-E of the Social Security Act for foster care and adoption assistance to expand the background checks conducted on prospective foster and adoptive parents.²³⁸ Under prior law, unless a state had "opted out," it was required to conduct a criminal records check of prospective foster and adoptive parents of a child for whose benefit assistance payments were to be made and to withhold payments from those convicted of various child abuse or neglect offenses, crimes of violence, or sex offenses.²³⁹

Section 152 makes the obligation more specific and expansive by insisting that the states do a fingerprint criminal record check using the FBI's national crime information databases of all

²³³ 42 U.S.C. 16990.

²³⁴ 42 U.S.C. 16990(e).

²³⁵ 28 U.S.C. 534; 28 C.F.R. pt.20.

²³⁶ 28 U.S.C. 534 note.

²³⁷ The National Center for Missing and Exploited Children is a private nonprofit organization that is authorized, among other things, to receive an annual grant to maintain a national hotline for reporting the location of missing children; to operate a clearinghouse of information concerning missing and exploited children; to provide information relating free or low cost legal, transportation, sustenance and lodging for missing and exploited children; to train law enforcement officials in the prevention, investigation, prosecution and treatment of missing and exploited children; to locate missing children; and to operate a cyber tip line as a means of reporting Internet-related sexual misconduct involving children, 42 U.S.C. 5773.

²³⁸ For a more extensive discussion, see CRS Report RL31242, *Child Welfare: Federal Program Requirements for States*, by (name redacted).

²³⁹ 42 U.S.C. 671 (a)(20) (2000 ed.).

prospective foster and adoptive parents regardless of the prospect of receiving assistance.²⁴⁰ They are obligated to check the child abuse and neglect registry in any state in which a prospective parent or an adult member of their household has lived in the previous five years as well.²⁴¹ And they must honor reciprocal registry requests from other states and take steps to prevent unauthorized dissemination of the information.²⁴² Moreover, *Section 152(b)* phases out (by October 1, 2008) the ability to opt out of the criminal records check responsibility for the states that had previously elected to do so.

Section 153 makes the FBI's national criminal information databases available for fingerprint-based background checks not only of prospective foster and adoptive parents, but also for employees or prospective employees of public and private schools or when sought in child abuse or child neglect investigation by state welfare officials.²⁴³

Law enforcement agencies that report missing children to the FBI's national criminal information databases have long been precluded from imposing a waiting period before they would accept a missing person report.²⁴⁴ *Section 154* precludes them from imposing a policy dictating removal from the system based solely on the age of the missing person.²⁴⁵

Record Keeping by Porn Producers

The producers of sexually explicit material must maintain records designed to ensure that they are not using children as subjects.²⁴⁶ They must keep detailed records, available for inspection, on the name, age, and means of verification of those whose performances are depicted in their material.²⁴⁷ The Attorney General has authority to issue implementing regulations and has done so.²⁴⁸

Enforcement of the regulations was preliminarily enjoined initially, however, on the grounds that while the statute covered only primary producers, the regulations purported to reach as well secondary producers who did not arrange for the appearance of the performers.²⁴⁹ Moreover, the prospects of enforcement were clouded by uncertainty over the implications of *Ashcroft v. Free Speech Coalition*,²⁵⁰ in which the Supreme Court held that inclusion of "virtual child

²⁴⁰ 42 U.S.C. 671(a)(20)(A).

²⁴¹ 42 U.S.C. 671(a)(20)(C)(i).

²⁴² 42 U.S.C. 671(a)(20)(C)(ii), (iii).

²⁴³ 42 U.S.C. 16962.

²⁴⁴ 42 U.S.C. 5780(1)(2000 ed.).

²⁴⁵ 42 U.S.C. 5780(2).

²⁴⁶ 18 U.S.C. 2257.

²⁴⁷ 18 U.S.C. 2257(b).

²⁴⁸ 28 C.F.R. pt. 75.

²⁴⁹ *Free Speech Coalition v. Gonzales*, 406 F.Supp.2d 1196, 1202 (D.Colo. 2005). Under the law in effect at the time, "the term 'produces' mean[t] to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer generated image, digital image or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted," 18 U.S.C. 2257(h)(3)(2000 ed. & Supp. III).

²⁵⁰ 535 U.S. 234 (2002).

pornography” within class of proscribed child pornography offended First Amendment principles.²⁵¹

Section 502 addresses those concerns by amending 18 U.S.C. 2257 to make it clear that it applies to secondary producers, and that it applies to the producers of digitally created or computer manipulated explicit sexual activities but only where those depicted are actually human beings.²⁵² The definitions of pornography regularly refer to “actual or simulated sexual” activity.²⁵³ In order distance itself from the difficulties the Court found in “virtual” sexual activity, Section 2257 refers only to “actual” activity.²⁵⁴ In order to deal with simulated sexual activity by human beings, Section 503 creates a companion recording keeping mandate for the producers of “simulated sexually explicit conduct.”²⁵⁵ The new section likewise applies only where there are human performers,²⁵⁶ and reaches the same kinds of producers that Section 2257 touches.²⁵⁷

Civil Liability and Immunity

At one time, child victims injured as a result of various federal sexual offenses had a cause of action against the offender for attorneys fees and the greater of actual damages or \$50,000.²⁵⁸ Section 707 increased the minimum to \$150,000.²⁵⁹ The underlying sex offenses are violations of 18 U.S.C. 2241(c) (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor or ward), 2251 (sexual exploitation of a child), 2251A (selling or buying a child for sexual purposes), 2252 (transporting, distributing or selling child sexually exploitive material), 2252A (transporting or distributing child pornography), 2260 (overseas production of child pornography), 2421 (interstate travel of illicit sexual purposes), 2422 (coercion or enticement for illicit sexual purposes), and 2423 (transportation of a minor of illicit sexual purposes).²⁶⁰ Section

²⁵¹ See generally, CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Recent Developments and Pending Issues*, by (name redacted); and CRS Report 95-800, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by (name redacted).

²⁵² “(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter ... (h) In this section – (1) the term ‘actual sexually explicit conduct’ means *actual but not simulated conduct* as defined in clauses (i) through (v) of Section 2256(2)(A) of this title; (2) the term ‘produces’ – (A) means – (i) actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human being; (ii) digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or (iii) inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content, of a computer site or service that contains a visual depiction of, sexually explicit conduct; and (B) does not include activities that are limited to ... (iii) any activity, *other than those activities identified in subparagraph (A)*, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers ... 18 U.S.C. 2257(a), (h)(1), (2)(A), 2(B)(iii)(emphasis added).

²⁵³ See e.g., *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 661 (2004); *New York v. Ferber*, 458 U.S. 747, 751 (1982).

²⁵⁴ 18 U.S.C. 2257(h)(1).

²⁵⁵ 18 U.S.C. 2257A.

²⁵⁶ 18 U.S.C. 2257A(a).

²⁵⁷ 18 U.S.C. 2257A(h)(1).

²⁵⁸ 18 U.S.C. 2255 (2000 ed.).

²⁵⁹ 18 U.S.C. 2255.

²⁶⁰ 18 U.S.C. 2255.

707 also amends Section 2255 to permit recovery even if the injury caused by the offense only occurs after the child is an adult.²⁶¹

Immunity

Federal law requires electronic service providers who discover evidence of child pornography to report the matter to law enforcement authorities by way of the Cyber Tip Line of the National Center for Missing and Exploited Children, a private nonprofit organization.²⁶² The provision affords service providers immunity from civil liability for good faith compliance.²⁶³ With an exception of intentional, malicious, or reckless misconduct, *Section 130* of the act affords the Center, its officers, employees and agents civil and criminal immunity for performance related to the provision.²⁶⁴ The new immunity is similar to that found in the PROTECT Act which, although it does not provide immunity from criminal liability, seems to grant more all encompassing civil immunity.²⁶⁵

Civil immunity for government officers, employees and their agents for conduct involving the sexual offender registration system established in Title I of the act is found in *Section 131*.²⁶⁶

Whether the safe harbor shields the Center and those associated with it from both federal and state liability under either provision remains to be seen. The same question may be asked of the immunity bath afforded government officers, employees and agents.

²⁶¹ 18 U.S.C. 2255.

²⁶² 42 U.S.C. 13032.

²⁶³ 42 U.S.C. 13032(c).

²⁶⁴ “(1) In general. Except as provided in paragraphs (2) and (3), the National Center for Missing and Exploited Children, including any of its directors, officers, employees, or agents, is not liable in any civil or criminal action arising from the performance of its Cyber Tipline responsibilities and functions, as defined by this section, or from its efforts to identify child victims.

“(2) Intentional, reckless, or other misconduct. Paragraph (1) does not apply in an action in which a party proves that the National Center for Missing and Exploited Children, or its officer, employee, or agent as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this section.

“(3) Ordinary business activities. Paragraph (1) does not apply to an act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management,” 42 U.S.C. 13032(g).

²⁶⁵ “(a) Except as provided in subsection (b) of this section, the National Center for Missing and Exploited Children, including any of its officers, employees, or agents, shall not be liable for damages in any civil action for defamation, libel, slander, or harm to reputation arising out of any action or communication by the National Center for Missing and Exploited Children, its officers, employees, or agents, in connection with any clearinghouse, hotline or complaint intake or forwarding program or in connection with activity that is wholly or partially funded by the United States and undertaken in cooperation with, or at the direction of a Federal law enforcement agency. (b) The limitation in subsection (a) of this section does not apply in any action in which the plaintiff proves that the National Center for Missing and Exploited Children, its officers, employees, or agents acted with actual malice, or provided information or took action for a purpose unrelated to an activity mandated by Federal law. For purposes of this subsection, the prevention, or detection of crime, and the safety, recovery, or protection of missing or exploited children shall be deemed, per se, to be an activity mandated by Federal law,” 42 U.S.C. 1591d.

²⁶⁶ 42 U.S.C. 16929.

Department of Justice

The act includes several sections in which the Department of Justice is authorized, directed or encouraged to take action in the greater interest of child protection and safety.

Project Safe Childhood

Section 142 provides the legal foundation for Justice Department's Project Safe Childhood, established shortly before passage of the act.²⁶⁷ The Project directs the various United States Attorneys to coordinate federal, state, local and tribal efforts to investigate and prosecute Internet crimes against children.²⁶⁸ It features strategic planning, training, and information sharing at the judicial district level.²⁶⁹ Participants include the FBI (Innocent Images Unit); the Secret Service; the Postal Service (Child Exploitation Task Forces); Immigration and Customs Enforcement (Cyber Crime Center); the Justice Department's Criminal Division and Internet Crimes Against Children (ICAC) Task Forces;²⁷⁰ state, local and tribal law enforcement officials, and the National Center for Missing and Exploited Children.²⁷¹

Training to Combat Internet Abuse

Section 145 instructs the Attorney General to expand his efforts to prevent misuse of the Internet by sex offenders.²⁷² It ask that he expand training opportunities for federal, state and local law enforcement officials and prosecutors and that he involve members of the computer industry and other agencies in efforts to combat the sexual victimization of children through the Internet.²⁷³

Prison Programs

Section 622 authorizes the Bureau of Prisons to establish residential and nonresidential sex offender monitoring programs to treat and supervise sex offenders.²⁷⁴

Awareness Campaign

Section 629 authorizes the Attorney General, in consultation with the National Center for Missing and Exploited Children, to develop and execute public awareness programs relating to child-safe use of the Internet and to access to federal and state sexual offender registries.²⁷⁵

²⁶⁷ 42 U.S.C. 16942. *See also*, Department of Justice, *Fact Sheet: Department of Justice Project Safe Childhood Initiative* (Feb. 15, 2006), available on March 22, 2007 at http://www.usdoj.gov/opa/pr/2006/February/06_opa_081.html; Department of Justice, *Project Safe Childhood*, available on March 22, 2007 at <http://www.projectsafechildhood.gov/guide.htm>.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Section 706 authorizes creation of no less than 10 additional ICAC Task Forces in FY2007 to the extent that funds are appropriated for that purpose.

²⁷¹ *Id.*

²⁷² 42 U.S.C. 16944.

²⁷³ *Id.*

²⁷⁴ 18 U.S.C. 3621(f).

Fugitive Safe Surrender

Section 632 instructs the Marshals Service to establish and coordinate a Fugitive Safe Surrender program in designated cities for the capture of fugitives from federal, state and local justice.²⁷⁶ It authorizes appropriations for that purpose in the amounts of \$3 million (for FY2007), \$5 million (for FY2008), and \$8 million (for FY2009).²⁷⁷

More Prosecutors

Section 704 directs the Attorney General to increase by not less than 200 attorneys the number of prosecutors dedicated to child sexual exploitation cases and assigned to the various United States Attorneys offices – subject to the availability of appropriations.

Forensic Resources

Section 705 asks the Attorney General and the Secretary of Homeland Security to increase the number of computer forensic examiners devoted to the investigation of sexual exploitation of children and related offenses – by not fewer than 30 examiners in the case of the Department of Justice and not fewer than 15 in the Department of Homeland Security.

Author Contact Information

(name redacted)
Senior Specialist in American Public Law
[redacted]@crs.loc.gov, 7-....

(...continued)

²⁷⁵ 42 U.S.C. 16986.

²⁷⁶ 42 U.S.C. 16989.

²⁷⁷ 42 U.S.C. 16989(c).

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