



**United States of America
Stakeholder Report for the United Nations Universal Periodic Review**

Submitted by The Advocates for Human Rights,
a non-governmental organization in special consultative status

and

The World Coalition Against the Death Penalty

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Founded in 1983, **The Advocates for Human Rights** (“The Advocates”) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact-finding, direct legal representation, education and training, and publication. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition against the Death Penalty.

The World Coalition Against the Death Penalty (“WCADP”), an alliance of more than 150 NGOs, bar associations, local authorities, and unions, was created in Rome on 13 May 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.

I. EXECUTIVE SUMMARY

1. This report addresses the United States' compliance with its human rights obligations with regard to the death penalty. Topics include racial disparities, disregard for Puerto Rico's longstanding rejection of the death penalty, application of the death penalty to crimes that are not the "most serious," execution methods that amount to cruel, inhuman, or degrading treatment, prolonged solitary confinement, administration of justice and fair trial issues, wrongful convictions and the absence of remedies, and deception targeting businesses that do not want their products to be used in executions.
2. Twenty-nine states, the U.S. federal government, and the U.S. military retain the death penalty, but four of those states have an official moratorium on the death penalty.¹ Since the last UPR, three more states—Delaware (2016), Washington (2018), and New Hampshire (2019)—have abolished the death penalty. During that same time period, however, 84 people were executed nationwide.² In 2019, the federal government announced plans to resume the death penalty and to schedule executions of five people on death row.³

II. BACKGROUND AND FRAMEWORK

A. 2015 Universal Periodic Review of the United States

1. *Ensure that the death penalty complies with minimum standards.*

Status of Implementation: Partially Accepted, Not Implemented

3. The United States accepted Sweden's recommendation to "take all necessary measures to ensure that the death penalty complies with minimum standards under international law."⁴ The United States has not implemented this recommendation.
2. *Abolish or impose a moratorium on the death penalty.*

Status of Implementation: Not Accepted, Not Implemented

4. The United States noted 39 recommendations to introduce a moratorium on the death penalty or to abolish it outright.⁵ It accepted Namibia's recommendation to "consider" ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.⁶ The United States has not implemented these recommendations and has lifted the de facto moratorium on federal executions.
3. *Eliminate racial and ethnic discrimination related to the death penalty*

Status of Implementation: Partially Accepted, Not Implemented

5. The United States supported recommendations from Angola to "[i]dentify the root causes of ethnic disparities concerning especially those sentenced to capital punishment in order to find ways [to] eliminate ethnic discrimination in the criminal justice system"⁷ from France to "[i]dentify the factors of racial disparity in the use of the death penalty and develop strategies to end possible discriminatory practices."⁸ The United States has not implemented these recommendations.

4. *Reconsider methods of execution*

Status of Implementation: Partially Accepted, Not Implemented

6. The United States supported a recommendation from the Democratic Republic of Congo to “reconsider the use of methods which give rise to cruel suffering when [the death penalty] is applied,”⁹ with the caveat that support is “to the extent provided for under our Eighth Amendment, which prohibits imposition of cruel and unusual punishment.”¹⁰ The United States has not implemented this recommendation.

5. *Commit to full transparency on lethal-injection drugs.*

Status of Implementation: Not Accepted, Not Implemented

7. The United States noted recommendations from France and Sweden to ensure full transparency regarding execution drugs.¹¹ The United States has not implemented these recommendations.

6. *Ensure that people with intellectual or psycho-social disabilities are not executed.*

Status of Implementation: Partially Accepted, Partially Implemented

8. Responding to Sweden’s recommendation to “[e]xempt persons with mental illness from execution,”¹² the United States accepted it “with respect to persons with certain intellectual disabilities, but not all persons with any mental illness.”¹³ The United States noted similar recommendations from France and Spain with respect to persons with intellectual and psycho-social disabilities.¹⁴ The United States prohibits execution of some persons with intellectual disabilities, but enforcement of this prohibition is inconsistent at the state level. Sweden’s recommendation is therefore partially implemented.

7. *Strengthen safeguards against wrongful convictions*

Status of Implementation: Accepted, Not Implemented

9. The United States accepted Poland’s recommendation to “[s]trengthen safeguards against wrongful sentencing to death and subsequent wrongful execution by ensuring, inter alia, effective representation for defendants in death penalty cases, including at the post-conviction stage,”¹⁵ and the DRC’s recommendation to “[s]trengthen the justice sector in order to avoid imposing the death penalty on those persons wrongly convicted.”¹⁶ The United States has not implemented these recommendations.

8. *Ensure consistent enforcement of consular notification.*

Status of Implementation: Accepted, Not Implemented

10. The United States supported recommendations from the United Kingdom and Greece to “[e]nsure consistent enforcement of consular notification at all levels of Government and support the passage of related legislation through Congress,” and to “[t]ake further legislative steps towards meeting consular notification and access obligations under the

Vienna Convention on Consular Relations.”¹⁷ The United States has not implemented these recommendations.

B. Domestic Legal Framework

11. The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments.” The Fifth Amendment states that no person shall “be deprived of life . . . without due process of law.”
12. At the federal level, the death penalty is available for a wide variety of crimes, including crimes that do not necessarily entail an intentional killing. For example, several crimes “resulting in death” are eligible for the death penalty, including harboring certain aliens,¹⁸ destruction of aircraft or motor vehicles,¹⁹ or civil rights offenses.²⁰ Treason and espionage are also capital crimes, regardless of whether they result in death.²¹ Trafficking in large quantities of drugs is a capital crime.²²
13. In 2008, the U.S. Supreme Court ruled that, “[a]s it relates to crimes against individuals, . . . the death penalty should not be expanded to instances where the victim’s life was not taken.”²³
14. Nonetheless, states may impose the death penalty in cases in which the defendant did not kill “but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.”²⁴ Under the “felony murder” rule or “law of parties,” a person may be convicted of murder (and in some states sentenced to death) if the person participated in a felony during which a victim died at the hands of another participant.²⁵
15. The federal wrongful conviction compensation statute offers compensation for people who have spent time on death row and subsequently been exonerated. It awards up to \$100,000 per year of wrongful imprisonment on death row.²⁶ States have a patchwork of wrongful conviction compensation statutes.²⁷ In May 2018, Kansas adopted a wrongful conviction compensation statute that the Innocence Project referred to as the “gold standard,” providing \$65,000 per year of wrongful imprisonment, but also providing social services to assist exonerees with short-term and long-term needs, such as housing, tuition assistance, counseling, health care, and financial literacy training.²⁸ The law also provides exonerees with a certificate of innocence and expungement of the wrongful conviction from state and federal records.²⁹
16. Implementing the United States’ obligations under Article 36 of the Vienna Convention on Consular Relations, federal regulations “establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers in [the Justice Department] on charges of criminal violations.”³⁰ Six states have statutes providing procedures for consular notification.³¹

III. IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Right or area 9. Racial discrimination

17. In nearly every state that retains the death penalty, there is a documented pattern of discrimination based on the race of the victim, the race of the defendant, or both.³² Approximately 34% of all persons executed since 1976 have been Black, while Black persons make up approximately 13% of the population. In capital cases, approximately

76% of the victims were White, even though approximately 50% of murder victims are White.³³ Racial and ethnic minorities account for 77% of individuals on death row at the federal level.³⁴ According to the Equal Justice Initiative, 41% of people currently under a sentence of death in the United States are Black.³⁵ In October 2018, the Supreme Court of the State of Washington struck down that state's death penalty law, finding that it had been imposed arbitrarily and with racial bias.³⁶

18. Federal authorities often disregard local objections to the death penalty, a practice that has particular salience in jurisdictions with large populations of racial and ethnic minorities. One of the individuals to be executed by federal authorities is a member of the Navajo Nation, Lexmond Mitchell.³⁷ Mitchell is the only indigenous person on federal death row. Navajo Nation officials had urged the federal government not to pursue the death penalty. The U.S. Attorney General insisted on seeking the death penalty, despite recommendations from the federal prosecutor and the Navajo Nation not to seek it.
19. Puerto Rico abolished the death penalty by statute on April 26, 1929.³⁸ In 1952, when Puerto Rico drafted and ratified its Constitution, it explicitly prohibited capital punishment.³⁹ The U.S. Congress amended the draft constitution, but did not amend the provision prohibiting the death penalty. Puerto Rico thus became one of the first jurisdictions in the world to ban the death penalty in its constitution.⁴⁰
20. Despite Puerto Rico's longstanding opposition to the death penalty, people in Puerto Rico can be sentenced to death for federal crimes. The Federal Death Penalty Act of 1994,⁴¹ as applied to Puerto Rico, violates the Puerto Rican people's right of self-determination. The people of Puerto Rico exist in a "democratic void," unable to seek adequate political or legal recourse due to their lack of representation in the federal government. In April 2019, a federal judge acknowledged that the "*total* disenfranchisement of United States Citizens in Puerto Rico within our National government is a historical fact that is not in dispute."⁴² The court held that electoral disenfranchisement of Puerto Ricans was "without question undemocratic and unacceptable," but not an unconstitutional violation of due process.⁴³
21. Federal prosecutors seek the death penalty in Puerto Rico at higher rates than other states. Between 1998 and July 2018, the Department of Justice authorized the certification of 516 death penalty cases throughout the U.S.⁴⁴ Of these cases, roughly 5% were in Puerto Rico,⁴⁵ although Puerto Rico accounts for only one percent of the U.S. population.⁴⁶ The likelihood the death penalty is sought in Puerto Rico is 3.5 times greater than in the rest of the United States.⁴⁷
22. Moreover, a defendant being prosecuted for capital offense in Puerto Rico is not guaranteed a jury of the defendant's peers. Only individuals who can speak, "read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form" can serve as jurors in federal court.⁴⁸ This requirement excludes 80% to 90% of the population of Puerto Rico.⁴⁹
23. Ethnic minorities constitute a disproportionate percentage of defendants being prosecuted with the death penalty in Puerto Rico. Of the 26 death penalty prosecutions in Puerto Rico between 1998 and 2018, all defendants belonged to ethnic or racial minority groups.⁵⁰

Right or area 12.4. Death penalty

24. As discussed in paragraphs 12–14 above, federal law and some state laws allow the death penalty for crimes in which the defendant has not committed an intentional killing.
25. The federal government has not executed anyone since 2003,⁵¹ although the Justice Department has sought the death penalty.⁵² Between 1988 and July 30, 2018, the federal government had taken to trial a total of 206 federal death penalty cases involving 301 defendants in 236 trials.⁵³
26. In August 2019, the federal government announced it would resume executions after a de facto moratorium of nearly two decades. Attorney General William Barr directed the Federal Bureau of Prisons to adopt an addendum to the Federal Execution Protocol and schedule executions of five people in December 2019 and January 2020.⁵⁴

Right or area 12.5. Prohibition of torture and cruel, inhuman or degrading treatment

27. All 29 states that retain the death penalty have adopted lethal injection as the exclusive or primary means of execution.⁵⁵ As of 2017, “[e]very [Food and Drug Administration]-approved supplier of drugs historically used by prisons for executions has now imposed distribution controls on its medicines, blocking their use in lethal injections.”⁵⁶
28. The Federal Execution Protocol Addendum outlines an execution protocol that mirrors protocols in Georgia, Missouri, and Texas.⁵⁷ It replaces the traditional three-drug protocol with a single drug—pentobarbital.⁵⁸
29. Reports document the dangers of pentobarbital and state efforts to conceal the drug’s origins. Between 2015 and 2018, Texas purchased the drug from Houston-based Greenpark Compounding Pharmacy, which the State Board of Pharmacy has cited for 48 violations over the past eight years, including “keeping out of date drugs in stock, using improper procedures to prepare IV solutions, and inadequate cleaning.”⁵⁹ An expert anesthesiologist wrote in a 2016 affidavit: “Improper compounding and testing procedures may leave fine particles undetectable by the naked eye in the solution, or larger particles that would not be detected by an untrained eye. These particles can cause great irritation to the vein, resulting in extraordinary pain.”⁶⁰
30. The House Committee on Oversight and Reform in August 2019 announced an investigation into the Justice Department’s plan to resume federal executions.⁶¹ The Committee requested information about the manufacturer of the pentobarbital and the government’s plans to procure the drug.⁶² The Committee noted with concern that states have obtained the drug from compounding pharmacies with dubious safety records, and that five people executed in Texas with pentobarbital complained during their executions that they felt as if they were burning.⁶³
31. States have turned to unregulated and non-transparent sourcing for drugs. Some states obtain drugs from compounding pharmacies, which produce drugs that the federal Food and Drug Administration does not regulate or verify for “safety, effectiveness, or quality.”⁶⁴ Between 2014 and 2017, 17 Missouri executions used drugs provided by a compounding pharmacy called Foundation Care after the FDA had warned the state’s Board of Pharmacy that Foundation Care’s health and safety practices could lead to

contamination of drugs.⁶⁵ Missouri’s secrecy laws barred people scheduled for executions from accessing information about the identity of the pharmacy, rendering them unable to challenge the execution protocol.⁶⁶ Similarly, Texas sought to conceal the identity of Greenpark Compounding Pharmacy.⁶⁷

32. Federal authorities now facilitate state efforts to obtain drugs from dubious sources. In 2013, a federal appellate court permanently enjoined the FDA from allowing the importation of apparently misbranded or unapproved drugs used in lethal injections.⁶⁸ But in May 2019, the Justice Department issued a directive stating that the FDA does not have authority over drugs used in lethal injections.⁶⁹ One death penalty expert said the move had “the potential to open the floodgates” for states seeking “access [to] drugs outside the country because they’re having so much difficulty doing so.”⁷⁰
33. Most states have adopted secrecy laws to conceal the identity of drug suppliers.⁷¹ All but one of the 17 states that have carried out lethal-injection executions since 2011 withheld information about the source of execution drugs.⁷² “State officials have expanded their secrecy laws to undermine pharmaceutical companies’ efforts to protect the integrity of their products.”⁷³ In April 2019, Arkansas made disclosure of execution-related information a felony.⁷⁴
34. In 2015, the Supreme Court rejected a challenge to the use of Midazolam in lethal injections, concluding that a person must identify a “known and available alternative method of execution that entails a lesser risk of pain” in order to mount a successful challenge to an execution procedure.⁷⁵ The Court also required a person challenging an execution method to prove that the method “entails a substantial risk of severe pain.”⁷⁶
35. Evidence suggests that lethal injection protocols initiated with Midazolam cause people to “suffer[] horrifying deaths beneath a ‘medically sterile aura of peace.’”⁷⁷ In 2017, “more than 60% of the executions carried out with midazolam produced eyewitness reports of an execution gone amiss.”⁷⁸ In 2017, Justice Sonia Sotomayor pointed to “the mounting firsthand evidence that midazolam is simply unable to render prisoners insensate to the pain of execution.”⁷⁹ She continued: “[O]ur lived experience belies any suggestion that midazolam reliably renders prisoners entirely unconscious to the searing pain of the latter two drugs.”⁸⁰ After describing four executions involving midazolam, she observed: “[t]hese accounts are especially terrifying considering that each of these men received doses of powerful paralytic agents, which likely masked the full extent of their pain.”⁸¹
36. Many people sentenced to death are subject to torture or cruel, inhuman, or degrading treatment as unqualified members of the execution team fail to properly insert an intravenous (IV) catheter for administering drugs.⁸²
37. The Annex sets forth 14 documented cases of “botched” executions since the last UPR of the United States.
38. States are now pursuing alternate execution methods that can amount to cruel, inhuman, or degrading treatment. Since 2018, Tennessee has executed three individuals by electrocution. David Earl Miller challenged the state’s three-drug lethal injection process, seeking to replace it with pentobarbital. Miller presented evidence that the three-drug protocol would result in unnecessary pain and suffering. The reviewing court denied his

request because he could not show that the single drug was readily available to the state. In turn, Miller elected to be executed by electrocution, but argued that his choice of electrocution instead of lethal injection was coerced and that both alternatives were unconstitutionally cruel and unusual. The Supreme Court refused to intervene, but Justice Sonya Sotomayor remarked, “Electrocution can be a dreadful way to die, [but there was] credible scientific evidence that lethal injection as currently practiced in Tennessee may well be even worse. [It was] perverse to require prisoners to prove that an alternative method was available to kill them.” She concluded: “such madness should not continue.”⁸³ Eight other states also allow execution by electrocution.⁸⁴

39. A new Utah law elects the firing squad in the event lethal injection is not available.⁸⁵ Mississippi and Oklahoma also allow execution by firing squad.⁸⁶
40. Oklahoma is taking steps to begin carrying out executions via nitrogen hypoxia—a method that is not even accepted for euthanizing cats and dogs.⁸⁷ This method of execution “has never been tried by any state or nation in the history of the world.”⁸⁸ The state legislature approved the procedure based on a report authored by three non-scientists based on three hours of work.⁸⁹ An anesthesiologist referred to the science behind the proposed procedure as “nonsense, empirically.”⁹⁰ Alabama and Missouri have also approved execution by nitrogen hypoxia.⁹¹

Right or area 12.6. Conditions of detention

41. People under sentence of death are typically held in solitary confinement, contrary to Nelson Mandela Rules 43-45 governing the treatment of prisoners. Cells range in size from 9.2 square meters to less than 3.7 square meters. People on death row are alone in their cells for the vast majority of the time, including for all meals.⁹² Approximately 60% of people who are on death row in the United States are isolated for 20 or more hours per day.⁹³
42. In 2019, one appellate court recognized “expert evidence establishing the risks and serious adverse psychological and emotional effects of prolonged solitary confinement” on Virginia’s death row.⁹⁴ On Texas’ death row, people spend up to 23 hours a day alone in a small cell and have little or no human contact or even exposure to natural light.⁹⁵ On Oklahoma’s death row, people live in conditions “that effectively constitute a dim underground bunker; there are no windows to the outside world from the cells and thus no natural light or air. [Death row] is an electronically controlled facility designed to minimize contact between the men incarcerated in the unit and prison staff.”⁹⁶ In September 2019, the interim director of the Oklahoma Department of Corrections agreed to move “qualifying” prisoners out of the unit, after civil society organizations threatened a lawsuit.⁹⁷
43. In 2009, Oklahoma prison authorities terminated a program allowing people on death row to attend congregational religious services, in violation of the federal Religious Land Use and Institutionalized Persons Act.⁹⁸ In many jurisdictions, people under sentence of death do not have access to educational, vocational, or rehabilitation programs.⁹⁹
44. States that have moved away from mandatory solitary confinement for people on death row have reported improved security, reduced violence, and cost savings.¹⁰⁰

Right or area 15.1. Administration of justice & fair trial

45. Inadequate representation for indigent persons charged with capital offenses remains widespread. According to a 2018 report by a committee appointed by Chief Justice John Roberts, these defendants often do not receive experienced and qualified counsel or the extensive resources needed to properly prepare a capital murder defense. The report recognizes that “disastrous” consequences result.¹⁰¹
46. The United States is a party to the Vienna Convention on Consular Relations (VCCR), which requires authorities arresting or detaining foreign nationals to inform such persons without delay of their right to have their consulate notified and, upon the foreign national’s request, to so notify the consulate of the arrest or detention without delay.¹⁰²
47. Foreign nationals often face significant disadvantages when interacting with the U.S. criminal justice system. Consular officials help these individuals,¹⁰³ and their assistance is invaluable when a foreign national faces the death penalty.
48. The United States has failed to comply with its consular notification obligations in capital cases.¹⁰⁴ The Supreme Court held that the International Court of Justice’s *Avena* decision is not binding on states without federal legislation.¹⁰⁵ California, Florida, Illinois, North Carolina, and Oregon have adopted statutes addressing consular notification, but these state measures do not always guarantee foreign nationals effective access to their consulate.¹⁰⁶
49. Compliance statistics demonstrate that the current patchwork of laws is ineffective. As of July 2019, 127 foreign nationals from 32 countries sit on the death rows of 14 states and the federal government,¹⁰⁷ with California, Florida, and Texas collectively holding 76% of the reported total.¹⁰⁸ The Death Penalty Information Center reports only two cases of complete compliance with Article 36, out of more than 130 reported death sentences.¹⁰⁹ Since *Avena*, state authorities have executed thirteen foreign nationals, only three of whom did not raise consular notification violations on appeal or in clemency proceedings.¹¹⁰ A number of high-population states with significant death row populations, such as Georgia, Kentucky, Mississippi, Missouri, Pennsylvania, and Tennessee, have yet to produce complete reports on foreigners incarcerated in their respective prison systems.¹¹¹
50. The State Department released the 5th edition of its Consular Notification and Access Manual in September 2018.¹¹² The State Department asserts that its “experts travel extensively throughout the United States to provide training on consular notification and access to federal, state, and local law enforcement, corrections and criminal justice officials free of charge.”¹¹³ Over the past 5 years, the State Department has conducted an average of 18.2 training sessions per year.¹¹⁴

Right or area 16. Right to an effective remedy, impunity

51. Since 1973, 166 individuals have been exonerated of all charges and released from death row.¹¹⁵ Of the 166, 52% are Black.¹¹⁶ Since 2015, 15 people sentenced to death have been exonerated, four of whom are White. The others are Black (8) and Latino (3).¹¹⁷ For those 15 people, the average time between sentencing and exoneration was 18.9 years; two men exonerated in 2019 were both convicted in 1976.¹¹⁸ There have been at least

sixteen individuals who were likely innocent but executed, and additional innocent individuals are at risk of being executed.¹¹⁹

52. Official misconduct and perjury or false accusations are the two most prevalent causes of wrongful convictions in capital cases.¹²⁰ Of the 230 people who have been exonerated through DNA testing, 75% were convicted based on eyewitness misidentification.¹²¹ A record number of exonerations in 2018 involved official misconduct.¹²²
53. The appeals process is focused on legal or procedural errors at the trial level, not the facts adduced at trial,¹²³ and therefore appellate courts do not usually afford people the chance to dispute the facts of their conviction.
54. Exonerees face numerous challenges in rebuilding their lives. Almost all exonerees possess no assets when released.¹²⁴ A study by the Life After Exoneration Program found that one-half of exonerees reside with their family, two-thirds are not economically independent, and one-third lost child custody due to their wrongful imprisonment.¹²⁵ Exonerees have difficulty securing employment and appropriate housing because expungement of the conviction is not automatic.¹²⁶
55. Most compensation statutes fail to provide services critical to a successful return to society, including housing, food, psychological counseling, medical and dental care, job skills training, education, and other relevant assistance.¹²⁷
56. Only ten state compensation schemes provide for social services.¹²⁸ Ironically, exonerees may be deemed ineligible for services from agencies that assist ex-offenders, because such services may be provided only to individuals who actually committed a crime.¹²⁹
57. Wrongful imprisonment results in additional health care needs resulting from prolonged incarceration, including post-traumatic stress disorder.¹³⁰ Many lack adequate access to health care, and exonerees are not automatically eligible for Medicaid.¹³¹ Because exonerees often work in short-term or low-paying jobs, they rarely receive employer-based health benefits.¹³²
58. Compensation is not guaranteed. The federal compensation law does not apply to exonerees wrongfully imprisoned by states, and the majority of state compensation laws do not meet the U.S. federal standard.¹³³ Some states compensate individuals only if “private legislation” is enacted, requiring the state legislature to introduce and pass a bill to compensate a specific person. For example, Anthony Ray Hinton spent 30 years on Alabama’s death row before his conviction was vacated and the charge dismissed in 2015 because the only evidence connecting him to the crime was false. The Alabama legislature refused to pass a bill to compensate Hinton.¹³⁴ Other states may require that exonerees affirmatively prove their innocence to be eligible for compensation.¹³⁵ Several states render any exoneree who entered a guilty plea or confessed ineligible.¹³⁶ In some states, the exoneree must not have “contributed” to his or her arrest or conviction to be eligible for an award.¹³⁷ These restrictions do not reflect the factors contributing to wrongful convictions in the first place, such as coerced false confessions.¹³⁸
59. Even when an exoneree successfully obtains compensation, the money may be redirected toward basic needs and legal fees.¹³⁹ Moreover, exonerees may have to wait years to receive the money.¹⁴⁰ The average amount of time to obtain state compensation is three years.¹⁴¹

60. Fifteen states that retain the death penalty have no compensation laws for wrongful convictions.¹⁴² Due to immunity provisions, civil lawsuits are usually unavailable when police, prosecutors, or judges are at fault.¹⁴³ Even if an exoneree prevails, the process can take years and involve costly litigation.¹⁴⁴

Right or area 28.1. Business & human rights

61. As discussed in paragraph 33, states are adopting secrecy laws regarding the sources of drugs used for lethal injections, in part “to undermine pharmaceutical companies’ efforts to protect the integrity of their products.”¹⁴⁵ Arkansas deliberately circumvented contracts prohibiting the sale of drugs for use in executions, causing one distributor to sue the state for obtaining drugs through “false pretense, trickery and bad faith.”¹⁴⁶ Manufacturers of two other drugs joined the suit, arguing that Arkansas had violated contractual supply-chain controls.¹⁴⁷ The Death Penalty Information Center has documented efforts by six states to obtain lethal injection drugs through deceit or subterfuge.¹⁴⁸

62. In September 2017, 58 countries joined together to create a global Alliance for Torture-Free Trade to halt the trade in goods used for capital punishment and torture.¹⁴⁹ Secrecy laws impede the ability of drug manufacturers to assess whether they will face liability under the regime.¹⁵⁰ In 2018, Fresenius Kabi filed suit alleging that Nebraska had obtained the company’s drugs through improper or illegal means for use in executions.¹⁵¹ Nebraska’s secrecy laws preclude the company from learning how the state acquired the drugs and whether a distributor is in violation of its distribution contracts.¹⁵²

Right or area 31. Persons with disabilities

63. Persons with documented psycho-social disabilities and intellectual disabilities have been executed in recent years. In 2017, Arkansas executed Lendell Lee, who was born with fetal alcohol syndrome disorder, a medical condition that left him with brain dysfunction and intellectual disability.¹⁵³ In 2016, Texas executed a person with an intellectually disability who had an IQ score of 67, and another person with psycho-social disabilities including delusions, paranoia, and bipolar disorder.¹⁵⁴ In 2015, Texas executed a person with an IQ score of 67.¹⁵⁵

64. Approximately 20% of people sentenced to death have serious psycho-social disabilities or intellectual disabilities, and such individuals are threatened and coerced into false confessions, have difficulty understanding their rights, and due to their disabilities, have less access to safeguards designed to protect fundamental rights, including the right to effective assistance of counsel.¹⁵⁶

65. Although the Supreme Court in 2002 held that people with “mental retardation” are exempt from the death penalty,¹⁵⁷ states have had wide latitude in determining what qualifies as intellectual disability. This latitude results in inconsistency, and as a result many people with intellectual disabilities are being sentenced to death. In 2014, the Court held that a strict IQ score cutoff was an insufficient method for determining intellectual disability but gave states discretion to fashion other criteria.¹⁵⁸

66. States also have broad discretion in determining whether persons with psycho-social disabilities are eligible to be sentenced to death or executed.

Right or area 34. Migrants

67. As discussed in paragraphs 46–50, authorities do not abide by their obligations under the Vienna Convention on Consular Relations when they arrest and detain foreign nationals on suspicion of death-eligible crimes.

IV. RECOMMENDATIONS

68. This stakeholder report suggests the following recommendations for the Government of the United States:

- Impose a formal moratorium on the death penalty and executions with a view to its eventual abolition.
- Conduct a comprehensive review of federal law to eliminate the death penalty for any crime that does not entail an intentional killing by the defendant.
- Prohibit states from using the felony murder rule or the law of parties to sentence people to death who neither killed nor intended to kill.
- Appoint an independent commission of experts to study and identify the root causes of racial and ethnic disparities pertaining to the death penalty and to make recommendations for eliminating bias and discrimination in the federal and state criminal justice systems.
- Promulgate and endorse science-based model jury instructions regarding the reliability of eyewitness identifications, including cross-racial eyewitness identifications.
- Adopt legislation and financial incentives for states to implement recommendations promulgated by the Innocence Project regarding compensation and assistance for individuals wrongly sentenced to death, including: untaxed financial compensation of at least \$100,000 per year on death row; legal assistance for seeking compensation; and adequate and appropriate services, including housing, transportation, education, physical and mental health care, employment assistance, and other reintegration assistance.
- Make all persons exonerated from death row automatically eligible for Medicaid.
- Ensure that there are adequate mechanisms to hold prosecutors, law enforcement, and judges accountable when their conduct leads to wrongful convictions and wrongful death sentences.
- Bar admission of evidence obtained from foreign nationals who had not been informed of their consular notification rights at the time the evidence was obtained.
- Mandate that all states that retain the death penalty adopt statutory schemes to require law enforcement to inform all suspects of their consular notification rights at the time the *Miranda* notification is given and to impose penalties for failure to notify foreign nationals of their rights.
- Expand State Department efforts to train local law enforcement about consular notification requirements, prioritizing jurisdictions where prosecutors have actively sought the death penalty in the last ten years.
- Ensure that all foreign nationals on federal death row receive the review and reconsideration mandated under *Avena*.¹⁵⁹
- Prohibit federal prosecutors from seeking the death penalty in Puerto Rico.

- Adopt all necessary measures, including interpretation services or a waiver of the English language requirement, to allow Spanish-speaking people to serve on juries in Puerto Rico and other territories with majority Spanish-speaking populations, to ensure defendants are judged by a jury of their peers.
- Fully implement the recommendations of the Ad Hoc Committee to Review the Criminal Justice Act as they pertain to providing adequate and adequately funded legal counsel in all capital cases, appeals, and habeas corpus proceedings, including the creation of an independent Defender Commission within the judicial branch that would have the sole authority to set policy and practices related to the provisions of federal defense in capital cases.
- Expand federal funding and significantly increase caps for capital counsel compensation and fees and expenses in capital cases, ensuring that caps are automatically adjusted for inflation.
- Provide state and federal trial court judges with guidance about the level of experience required for adequate counsel in capital cases, the amount of time required to provide an adequate defense in such cases, the funds counsel needs to provide experts and present a mitigation defense, and the importance of timely appointment of qualified post-conviction counsel.
- Reduce funding disparities across districts and circuits for capital cases in federal courts.
- Develop and offer ongoing, comprehensive training for counsel in capital cases, including post-conviction litigation.
- Require all states that retain the death penalty to fully fund a program to provide competent public defenders in all capital cases and to provide qualified legal assistance to people on death row.
- Restore the Food and Drug Administration's authority to prohibit importation of any drug found to violate 21 U.S.C. § 381(a).¹⁶⁰
- Prohibit the use of drugs produced by compounding pharmacies in executions.
- Ensure that federal and state authorities provide persons scheduled for execution with complete information about the execution protocol, the drugs to be used, and the source of those drugs.
- Prohibit states from using secrecy laws to circumvent contractual obligations established between drug manufacturers and distributors.
- Prohibit mandatory solitary confinement for persons sentenced to death and ensure that prison conditions for people sentenced to death comply with Nelson Mandela Rules 43-45.
- Ensure that all persons on death row may participate in congregate religious services, consistent with the federal Religious Land Use and Institutionalized Persons Act.
- Ensure that all persons on death row have access to educational, vocational, and rehabilitative programming available to people in the general prison population.
- Ensure that no person with an intellectual disability or a severe psycho-social disability is sentenced to death or executed.

¹ Death Penalty Information Center, State by State, *available at* <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last accessed Sept. 23, 2019).

² Death Penalty Information Center, www.deathpenaltyinfo.org (last visited Sept. 27, 2019).

³ Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse. UNITED STATES DEPARTMENT OF JUSTICE, *Office of Public Affairs* (July 25, 2019), *available at* <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> (last visited Sept. 23, 2019).

⁴ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States, U.N. Doc. A/HRC/30/12 (20 July 2015), ¶ 176.180; Report of the Working Group on the Universal Periodic Review, Addendum, (Sept. 14, 2015), U.N. Doc. A/HRC/30/12/Add.1 ¶ 9.

⁵ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States, U.N. Doc. A/HRC/30/12 (20 July 2015), ¶ 176.10 (Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Timor-Leste)); 76.11 (Sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Chile)); 176.13 (Establish a formal moratorium on the death penalty with a view to ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Australia)); 176.165 (Abolish the death penalty in those states where it is still used (Nicaragua) / Abolish the death penalty in all states of the Union (Ecuador)); 176.166 (Abolish the death penalty (Costa Rica)); 176.167 (Abolish the death penalty (Plurinational State of Bolivia)); 176.168 (Continue efforts towards abolishing the death penalty (Austria)); 176.169 (Reduce gradually the number of persons sentenced to death, and ensure that efforts on this matter are pursued (Congo)); 176.170 (Introduce a moratorium at the federal level with view to achieving nationwide moratorium of capital punishment as a first step to abolishing such penalty (Lithuania)); 176.171 (Establish a federal moratorium on the death penalty with a view to the total abolition of the death penalty in the United States (Luxembourg)); 176.172 (Establish a moratorium on death penalty at the federal and states levels with a view to ultimately achieve nationwide legal abolition (Nepal)); 176.173 (Establish a moratorium on the death penalty aiming at its complete abolition in all states (Uruguay)); 176.175 (Impose a moratorium on executions with a view to abolishing the death penalty at the federal and state levels (Namibia) / Institute a moratorium on the application of the death penalty with a view to abolition (Togo) / Establish, at the federal level, a moratorium on executions with a view to abolishing the death penalty (France) / Establish an official moratorium on the use of the death penalty (Montenegro) / Establish a moratorium on the application of the death penalty (Spain) / Impose a moratorium on executions and abolish the death penalty in all states of the United States (Turkey) / Ensure the establishment of a moratorium of the death penalty in those states that have not abolished it yet (Chile)); 176.176 (Work towards a moratorium on executions with a view of abolishing the death penalty (Rwanda)); 176.177 (That federal and state authorities impose a moratorium on executions with a view to abolishing the death penalty nationwide (Portugal)); 176.178 (Impose a moratorium on executions with a view to abolishing the death penalty nationwide (Iceland)); 176.179 (Impose a moratorium on executions with a view to abolishing the death penalty nationwide (Ireland)); 176.181 (Impose a moratorium on the use of the death penalty (Russian Federation)); 176.182 (Impose at least a moratorium on the death penalty (Azerbaijan)); 176.183 (Formally establish a moratorium on executions at the federal level while engaging with retentionist states to achieve a nationwide moratorium with the objective to ultimately abolish the death penalty nationwide (Germany)); 176.184 (Take all necessary steps to work towards an immediate moratorium on execution of the death penalty, with a view to a complete abolishment, in line with international human rights standards such as the right to live (Netherlands)); 176.185 (Take necessary steps to introduce a moratorium on the use of the death penalty at the federal and state levels (Slovakia)); 176.186 (Impose a moratorium on executions with a view to abolishing the death penalty for federal offences (New Zealand)); 176.187 (Impose a moratorium on executions with a view to abolishing the death penalty nationwide, and ensure that prosecutors in all jurisdictions cease pursuing death sentences (Estonia)); 176.188 (Continue efforts to establish a moratorium and eventually abolish capital punishment in all states (Sierra Leone)); 176.189 (Take into consideration the possibility of adopting a moratorium of capital executions at the state and federal levels, given that 26 states have abolished or adopted a moratorium on capital executions, (Italy)); 176.190 (Consider as a first step the application of a moratorium on executions, both at the state and federal levels, with a view to ultimately abolishing the death penalty (Cyprus) / Consider imposing an official moratorium on executions toward the complete abolition of the death penalty in the country (Greece)); 176.191 (Consider introducing at the federal level a moratorium on the use of the death penalty with a view to its permanent abolition (Holy See)); 176.192 (Consider adoption of a

moratorium on the death penalty at the federal level (Uzbekistan)); 176.193 (A review of federal and state legislation to restrict the number of offences carrying the death penalty and steps towards federal- and state-level moratoriums on executions with a view to its permanent abolition (Norway)); 176.201 (Continue the efforts on the progress towards the abolishment of the death penalty, based on the Department of Justice's review of how it is being applied in the country (Bulgaria)).

⁶ *Id.* □ 176.12.

⁷ *Id.* □ 176.194.

⁸ *Id.* □ 176.195.

⁹ *Id.* □ 176.199.

¹⁰ Report of the Working Group on the Universal Periodic Review: United States, Addendum, (Sept. 14, 2015), U.N. Doc. A/HRC/30/12/Add.1 ¶ 8.

¹¹ Report of the Working Group on the Universal Periodic Review: United States, (July 20 2015), U.N. Doc. A/HRC/30/12, □ 176.199. □□ 176.180, 176.202.

¹² *Id.* □ 176.199. □ 176.180.

¹³ Report of the Working Group on the Universal Periodic Review, Addendum, (Sept. 14, 2015), U.N. Doc. A/HRC/30/12/Add.1 ¶ 9.

¹⁴ Report of the Working Group on the Universal Periodic Review: United States, (July 20 2015), U.N. Doc. A/HRC/30/12, □ 176.199. □ 176.195-196.

¹⁵ *Id.* □ 176.199. □ 176.200.

¹⁶ *Id.* □ 176.199. □ 176.199.

¹⁷ *Id.* □ 176.199. □ 176.237-238.

¹⁸ 8 U.S.C. § 1342(B)(iv).

¹⁹ 18 U.S.C. §§ 32-34.

²⁰ 18 U.S.C. §§ 241, 242, 245, 247.

²¹ 18 U.S.C. §§ 794, 2381.

²² 18 U.S.C. § 3591(b).

²³ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

²⁴ *Ibid.*

²⁵ Death Penalty Information Center, *Executed But Did Not Directly Kill Victim*, <https://deathpenaltyinfo.org/executions/executions-overview/executed-but-did-not-directly-kill-victim> (last visited Sept. 29, 2019). In December 2018, Texas executed Joseph Garcia for his involvement in a robbery of a sporting goods store. Some of the other people involved in the robbery shot and killed a police officer who confronted them. See Keri Blakinger, *'Texas 7' escapee fights death sentence as Dec. 4 execution nears*, *Houston Chronicle*, Nov. 23, 2018, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-Seven-escapee-fights-death-sentence-13413007.php> (last visited Sept. 29, 2019).

²⁶ 28 U.S.C. §§ 1495, 2513.

²⁷ See University of Michigan Innocence Project, *Compensation Statutes: A National Overview*, May 21, 2018, https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf (last visited Sept. 29, 2019).

²⁸ *Governor Signs Gold-Standard Wrongful Conviction Compensation Law in Kansas*, *Innocence Project*, May 15, 2018, <https://www.innocenceproject.org/governor-signs-wrongful-conviction-compensation-law-kansas/> (last visited Sept. 29, 2019).

²⁹ *Ibid.*

³⁰ 28 C.F.R. § 50.5(a).

³¹ Cal. Penal Code § 834c; Fla. Stat. § 901.26; Ill. Pub. Act 099-0190; Nev. Rev. Stats. 228.135N; N.C. Gen. Stats. § 122C.344; Ore. Rev. Stats. §§ 181.1642, 426.228.

³² Equal Justice Initiative, *Race and Poverty*, www.eji.org/death-penalty/race-and-poverty (last visited Sept. 29, 2019).

³³ Death Penalty Information Center, *Facts about the death penalty*, May 31, 2019, <https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf> (last visited Sept. 29, 2019).

³⁴ ACLU, *Race and the Death Penalty*, [accessible at aclu.org/other/race-and-death-penalty](http://accessible.at.aclu.org/other/race-and-death-penalty) (last accessed Sept. 27, 2019).

³⁵ Equal Justice Initiative, *Race and Poverty* (Washington D.C., 2019), www.eji.org/death-penalty/race-and-poverty (last visited Sept. 29, 2019).

³⁶ *State v. Gregory*, No. 88086-7 (Wash. Oct. 11, 2018).

³⁷ *The Navajo Nation Opposed His Execution. The U.S. Plans to do it Anyways*, THE MARSHALL PROJECT, available at <https://www.themarshallproject.org/2019/09/17/the-navajo-nation-opposed-his-execution-the-u-s-plans-to-do-it-anyway> (last visited Sept. 24, 2019)

³⁸ See Act of Apr. 26, 1929, No. 42, § 1, 1929 P.R. Laws 232 (“The death penalty is hereby definitively abolished in Porto Rico.”). See also Elizabeth Vicens, *Application of the Federal Death Penalty Act in Puerto Rico: A New test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350 (2005). The last execution in Puerto Rico took place on Sept. 15, 1927.

³⁹ P.R. CONST. art. II, § 7.

⁴⁰ AMNESTY INTERNATIONAL, *Constitutional prohibitions of the death penalty* (Apr. 2005), AI Index: ACT 50/009/2005, available at <https://www.amnesty.org/en/documents/act50/009/2005/en/> (last visited Sept. 23, 2019).

⁴¹ See Pub. L. 103-322, Title VI, Sections 60001-26 (Sept. 13, 1994), 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591–3598). The federal crimes carrying the threat of capital punishment include murder during a carjacking, during a bank robbery, and while using an illegal weapon, along with various drug-related crimes and espionage or treason.

⁴² *United States v. Pedro-Vidal*, 371 F. Supp. 3d 57, 58 (2019) (emphasis in original).

⁴³ *Id.* at 59.

⁴⁴ FEDERAL DEATH PENALTY RESOURCE COUNSEL, *Current Statistics re Use of Federal Death Penalty* (July 31, 2018), available at <https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017> (last visited Sept. 9, 2019).

⁴⁵ *Ibid.*

⁴⁶ The estimated population of the United States is approximately 316 million, while the population of Puerto Rico is 3.7 million. UNITED STATES CENSUS BUREAU, *Annual Estimates of the Resident Population Estimates*, available at http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited Sept. 22, 2019).

⁴⁷ Carmelo Campos Cruz, *Puerto Rico: la dimensión desconocida de la pena de muerte* (June 2013).

⁴⁸ 28 U.S.C. § 1865(b) (2006); Act of June 25, 1906, Pub. L. No. 294, ch. 3542, 34 Stat. 466 (defining the qualifications of jurors in the United States District Court for the District of Puerto Rico).

⁴⁹ See generally Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497; see also U.S. Census Bureau, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Puerto Rico: 2006-2008* (April 2010), available at <https://www.census.gov/hhes/socdemo/language/>.

⁵⁰ Seventy-three percent of capital defendants are ethnic minorities. FEDERAL DEATH PENALTY RESOURCE COUNSEL, *Current Stats re. Use of Federal DP* (July 31, 2018), available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094 (last visited Sept. 27, 2019).

| Name | Race / Ethnic Group |
|-------------------------------|---------------------|
| Martinez, Ian Rosario | Hispanic |
| Colon-Miranda, Andres | Hispanic |
| Martinez-Velez, David Samuel | Hispanic |
| Rosario-Rodriguez, Edwin | Hispanic |
| Valle-Lassalle, Victor Manuel | Hispanic |
| Marrero, Jose Rodriguez | Hispanic |
| Gomez, Edsel Torres | Hispanic |
| Pena-Gonzalez | Hispanic |
| Nieves-Alonso, Heriberto | Hispanic |
| Perez, Luis Gines | Hispanic |
| Perez, Ricardo Melendez | Hispanic |
| Alejando, Joel Rivera | Hispanic |
| Martinez, Hector Acosta | Hispanic |
| Gomez-Olmeda, David | Hispanic |
| Vlillegas, Hernardo Medina | Hispanic |
| Roman, Lorenzo Catalan | Hispanic |
| Ayala-Lopez, Carlos L. | Hispanic |

| | |
|----------------------------|-----------------|
| Casey, Lashaun | <i>Black</i> |
| Burgos-Montes, Edison | <i>Hispanic</i> |
| Lopez-Matias, Rodney | <i>Hispanic</i> |
| Riera-Crespo, Eduardo | <i>Hispanic</i> |
| Alers-Santiago, Raymond | <i>Hispanic</i> |
| Candelario-Santana, Alexis | <i>Hispanic</i> |
| Jimenez-Bencevi, Xavier | <i>Hispanic</i> |
| Pedro-Vidal, Juan | <i>Hispanic</i> |

⁵¹ Federal Death Penalty, DEATH PENALTY INFORMATION CENTER, *available at* <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty> (last visited Sept. 23, 2019).

⁵² Kelley Czajka, *How Does the Federal Death Penalty Work?* PACIFIC STANDARD, Jul 25, 2019, *available at* <https://psmag.com/news/how-does-the-federal-death-penalty-work> (last visited Sept. 24, 2019).

⁵³ Current Statistics re Use of Federal Death Penalty, DEATH PENALTY INFORMATION CENTER, *available at* <https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017> (last visited Sept. 27, 2019).

⁵⁴ DEPARTMENT OF JUSTICE, Office of Public Affairs, *Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse*. UNITED STATES, (July 25, 2019), *available at* <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> (last visited Sept. 23, 2019).

⁵⁵ *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/methods-execution> (last visited Sept. 27, 2019).

⁵⁶ Death Penalty Information Center, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington D.C., 2018), by Robin Konrad, Robert Dunham and Ngozi Nduluw, <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> (last visited Sept. 28, 2019), 12.

⁵⁷ DEPARTMENT OF JUSTICE, Office of Public Affairs, *Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse*. UNITED STATES, (July 25, 2019), *available at* <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> (last visited Sept. 23, 2019).

⁵⁸ Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse. UNITED STATES DEPARTMENT OF JUSTICE, *Office of Public Affairs* (July 25, 2019), *available at* <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> (last visited Sept. 23, 2019).

⁵⁹ *Investigation Reveals Texas Obtained Possible Tainted Execution Drugs from Pharmacy with Tainted Safety Record*, DEATH PENALTY INFORMATION CENTER, November 29, 2018, *available at* <https://deathpenaltyinfo.org/news/investigation-reveals-texas-obtained-possibly-tainted-execution-drugs-from-pharmacy-with-tainted-safety-record>.

⁶⁰ *Ibid.*

⁶¹ *U.S. House Oversight Committee Launches Investigation into Resumption of Federal Executions*, DEATH PENALTY INFORMATION CENTER, August 19, 2019, *available at* <https://deathpenaltyinfo.org/news/u-s-house-oversight-committee-launches-investigation-into-resumption-of-federal-executions>.

⁶² *Ibid.*

⁶³ House Committee on Oversight and Reform, Oversight Subcommittee Investigates Trump Administration's Decision to Resume Federal Executions, (Aug. 14, 2019), <https://oversight.house.gov/news/press-releases/oversight-subcommittee-investigates-trump-administration-s-decision-to-resume> (last visited Sept. 29, 2019).

⁶⁴ U.S. Food and Drug Administration, *Compounding Laws and Policies*, <https://www.fda.gov/drugs/human-drug-compounding/compounding-laws-and-policies> (last visited Sept. 8, 2019).

⁶⁵ Death Penalty Information Center, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington D.C., 2018), by Robin Konrad, Robert Dunham and Ngozi Nduluw, <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> (last visited Sept. 28, 2019), 41, 26.

⁶⁶ *Ibid.*

⁶⁷ *Veil of Execution Secrecy Expands in Several Southern Death-Penalty States*, Apr. 19, 2019, Death Penalty Information Center, <https://deathpenaltyinfo.org/news/veil-of-execution-secrecy-expands-in-several-southern-death-penalty-states> (last visited Sept. 29, 2019).

⁶⁸ *Cook v. Food & Drug Admin.*, 733 F.3d 1, 3 (D.C. Cir. 2013).

⁶⁹ Laurie McGinley & Mark Berman, *Justice Department says FDA 'lacks jurisdiction' over death-penalty drugs*, Washington Post, May 14, 2019, https://www.washingtonpost.com/national/health-science/justice-department-says-fda-lacks-jurisdiction-over-death-penalty-drugs/2019/05/14/da056e6c-764d-11e9-b7ae-390de4259661_story.html (last visited Sept. 28, 2019); Slip Opinion, *Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions*, dated May 3, 2019.

⁷⁰ *Ibid.*

⁷¹ Death Penalty Information Center, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington D.C., 2018), by Robin Konrad, Robert Dunham and Ngozi Nduluw, <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> (last visited Sept. 28, 2019), 4.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Veil of Execution Secrecy Expands in Several Southern Death-Penalty States*, Apr. 19, 2019, Death Penalty Information Center, <https://deathpenaltyinfo.org/news/veil-of-execution-secrecy-expands-in-several-southern-death-penalty-states> (last visited Sept. 29, 2019).

⁷⁵ *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726, 2737, 2739 (2015).

⁷⁶ *Id.* at 2731.

⁷⁷ *Arthur v. Dunn*, 137 S.Ct. 725, 733 (2017) (Sotomayor, J., dissenting from denial of certiorari).

⁷⁸ Death Penalty Information Center, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington D.C., 2018), by Robin Konrad, Robert Dunham and Ngozi Nduluw, <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> (last visited Sept. 28, 2019), 5.

⁷⁹ *Arthur v. Dunn*, 137 S.Ct. 725, 733 (2017) (Sotomayor, J., dissenting from denial of certiorari).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Death Penalty Information Center, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington D.C., 2018), by Robin Konrad, Robert Dunham and Ngozi Nduluw, <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> (last visited Sept. 28, 2019), 12.

⁸³ *Tennessee Executes Mentally Ill and Sexually Abused Prisoner by Electrocution*, DEATH PENALTY INFORMATION CENTER, DEC. 7, 2018, available at <https://deathpenaltyinfo.org/news/tennessee-executes-mentally-ill-and-sexually-abused-prisoner-by-electrocution> (last visited Sept. 27, 2019); Chas Sisk & Samantha Max, *East Tennessee Man Put To Death By Electrocution For 1986 Double Murder*, Nashville Public Radio, Aug. 16, 2019, <https://www.nashvillepublicradio.org/post/east-tennessee-man-put-death-electrocution-1986-double-murder#stream/0> (last visited Sept. 29, 2019).

⁸⁴ Death Penalty Information Center, *Methods of Execution*, <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited Sept. 29, 2019).

⁸⁵ *Utah Brings Back Firing Squad Executions*, NPR, April 5, 2015, available at <https://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one> (last accessed Sept. 23, 2019).

⁸⁶ Death Penalty Information Center, *Methods of Execution*, <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited Sept. 29, 2019).

⁸⁷ Dylan Goforth, *Oklahoma poised to build own execution device*, Enid News & Eagle, Apr. 29, 2019, https://www.enidnews.com/news/state/oklahoma-poised-to-build-own-execution-device/article_eced0c6c-d4e9-5fb3-b7d2-ef282fd78cfb.html (last visited Sept. 28, 2019).

⁸⁸ Eli Hager, *Why Oklahoma Plans to Execute People with Nitrogen*, The Marshall Project, Mar. 15, 2018, <https://www.themarshallproject.org/2018/03/15/why-oklahoma-plans-to-execute-people-with-nitrogen> (last visited Sept. 28, 2019).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Dylan Goforth, *Oklahoma poised to build own execution device*, Enid News & Eagle, Apr. 29, 2019, https://www.enidnews.com/news/state/oklahoma-poised-to-build-own-execution-device/article_eced0c6c-d4e9-5fb3-b7d2-ef282fd78cfb.html (last visited Sept. 28, 2019).

⁹² Gabriella Robles, *Condemned to Death—And Solitary Confinement*, The Marshall Project, July 23, 2017, <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> (last visited Sept. 28, 2019).

⁹³ *Ibid.*

⁹⁴ Porter v. Clarke, No. 18-6257, slip op. at 10 (4th Cir. May 6, 2019), available at https://files.deathpenaltyinfo.org/legacy/files/pdf/PorterVClark_4Cir_DeathRowConditionsOpinion_2019-05-03.pdf.

⁹⁵ Gabriella Robles, *Condemned to Death—And Solitary Confinement*, The Marshall Project, July 23, 2017, <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> (last visited Sept. 28, 2019).

⁹⁶ ACLU Oklahoma, letter to Scott Crow, Interim Director, Oklahoma Department of Corrections, July 29, 2019, at 2, available at https://www.acluok.org/sites/default/files/field_documents/demand_letter_re_conditions_for_death-sentenced_people_incarcerated_at_h-unit.pdf (last visited Sept. 28, 2019).

⁹⁷ Elizabeth Weill-Greenberg, *Oklahoma Department of Corrections Agrees to Move “Qualifying” Death Row Prisoners out of Tomblike Unit*, The Appeal, Sept. 28, 2019, <https://theappeal.org/oklahoma-department-of-corrections-agrees-to-move-qualifying-death-row-prisoners-out-of-tomb-like-unit/?fbclid=IwAR2LeCBEHGVG8gIiefqkuB8lWnPVy7l-NybmH0Uzvz9fs9s5F7JIpugoFZA> (last visited Oct. 2, 2019).

⁹⁸ ACLU Oklahoma, letter to Scott Crow, Interim Director, Oklahoma Department of Corrections, July 29, 2019, at 2, 14, available at https://www.acluok.org/sites/default/files/field_documents/demand_letter_re_conditions_for_death-sentenced_people_incarcerated_at_h-unit.pdf (last visited Sept. 28, 2019).

⁹⁹ Arthur Liman Public Interest Program, Yale Law School, *Rethinking Death Row: Variations in the Housing of Individuals Sentenced to Death* (July 2016) at 7, available at ssrn.com/abstract=2806015 (last visited Sept. 29, 2019).

¹⁰⁰ Gabriella Robles, *Condemned to Death—And Solitary Confinement*, The Marshall Project, July 23, 2017, <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> (last visited Sept. 28, 2019).

¹⁰¹ Ad Hoc Committee, *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program*, (June 2018), <http://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf>, at 222 (last visited Sept. 29, 2019).

¹⁰² Vienna Convention on Consular Relations, signed Apr. 24, 1963, effective Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 262.

¹⁰³ Consular officials help by visiting them, communicating with family members, arranging for legal representation, and assisting with investigations and evidence collection within the individual’s native country.

¹⁰⁴ See, e.g., INTERNATIONAL COURT OF JUSTICE REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS, CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS, JUDGMENT OF 31 MARCH 2004, <https://files.deathpenaltyinfo.org/legacy/files/AvenaICJDecision.pdf>; *Honored in the Breach: The United States’ Failure to Observe Its Legal Obligations Under the Vienna Convention on Consular Relations (VCCR) in Capital Cases*, REPRIEVE 2 (2012), available at https://reprieve.org.uk/wp-content/uploads/2015/01/2013_02_26_PUB-VCCR-Report-WEB-VERSION-KEY-DOC.pdf, *passim*; Bruce Swartz, Deputy Assistant Att’y Gen., Crim. Div., Address Before the S. Judiciary Comm. (July 27, 2011) (“Despite the fact that these [consular notification] obligations already exist, instances in which notification is not provided continue to occur.”).

¹⁰⁵ *Medellín v. Texas*, 552 U.S. 491 (2008).

¹⁰⁶ Texas has insisted that procedurally defaulted VCCR claims (where defendants are assumed to have waived their right to object to VCCR violations because of a failure to raise that issue at the appropriate time, stage of proceedings, or using the appropriate procedure) cannot be reviewed, thus foreclosing relief for most death-sentenced foreigners in that state. Florida courts have generally not recognized Article 36 violations as cognizable claims. Florida amended its law in 2001 so the government’s failure to provide consular notification “shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national’s discharge from custody.” (FLA.STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.).

¹⁰⁷ DEATH PENALTY INFO. CENTER, “See Foreign Nationals Under Sentence of Death in the U.S.,” accessed Sept. 20, 2019, <https://deathpenaltyinfo.org/death-row/foreign-nationals/foreign-nationals-under-sentence-of-death-in-the-u-s>.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* Of the 10 foreign nationals executed since the *Avena* decision, five were from Mexico, three were from Cuba, one was from Honduras and one was from Jamaica. In seven of the 10 cases, Texas was the executing state. Two of the other cases were in Florida, and one was in Virginia. Only Angel Maturino Resendiz, a Mexican foreign

national executed by the State of Texas, reportedly received information regarding consular rights without delay after arrest as required under the VCCR.

¹¹¹ DEATH PENALTY INFO. CENTER, “See Foreign Nationals Under Sentence of Death in the U.S.,” accessed Sept. 20, 2019, <https://deathpenaltyinfo.org/death-row/foreign-nationals/foreign-nationals-under-sentence-of-death-in-the-u-s>.

¹¹² U.S. DEP’T OF STATE, *CONSULAR NOTIFICATION AND ACCESS* (2018), available at https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA%20Manual%205th%20Edition_September%202018.pdf.

¹¹³ U.S. Dep’t of State, “State Department Activities to Advance Consular Notification and Access Awareness and Compliance,” ACCESSED Sept. 20, 2019 <https://travel.state.gov/content/travel/en/consularnotification/training---outreach-by-the-state-department.html>.

¹¹⁴ U.S. DEP’T OF STATE, *CONSULAR NOTIFICATION AND ACCESS* (2018), available at https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA%20Manual%205th%20Edition_September%202018.pdf.

¹¹⁵ DEATH PENALTY INFORMATION CENTER, “Innocence,” accessed Sept. 8, 2019, <https://deathpenaltyinfo.org/policy-issues/innocence>.

¹¹⁶ DEATH PENALTY INFORMATION CENTER, “Exonerations by Race,” accessed Sept. 8, 2019 <https://deathpenaltyinfo.org/policy-issues/innocence>.

¹¹⁷ DEATH PENALTY INFORMATION CENTER, “Innocence Database,” accessed Sept. 29, 2019 <https://deathpenaltyinfo.org/policy-issues/innocence-database>; *Florida Man Exonerated 42 Years After Wrongful Conviction and Death Sentence*, Death Penalty Information Center, Mar. 29, 2019, <https://deathpenaltyinfo.org/news/florida-man-exonerated-42-years-after-wrongful-conviction-and-death-sentence> (last visited Sept. 29, 2019); *Charles Ray Finch Exonerated 43 Years After He Was Sentenced to Death in North Carolina*, Equal Justice Initiative, June 28, 2019, <https://eji.org/news/charles-ray-finch-exonerated-43-years-after-being-sentenced-to-death> (last visited Sept. 29, 2019).

¹¹⁸ DEATH PENALTY INFORMATION CENTER, “Innocence Database,” accessed Sept. 29, 2019, <https://deathpenaltyinfo.org/policy-issues/innocence-database>; *Florida Man Exonerated 42 Years After Wrongful Conviction and Death Sentence*, Death Penalty Information Center, Mar. 29, 2019, <https://deathpenaltyinfo.org/news/florida-man-exonerated-42-years-after-wrongful-conviction-and-death-sentence> (last visited Sept. 29, 2019); *Charles Ray Finch Exonerated 43 Years After He Was Sentenced to Death in North Carolina*, Equal Justice Initiative, June 28, 2019, <https://eji.org/news/charles-ray-finch-exonerated-43-years-after-being-sentenced-to-death> (last visited Sept. 29, 2019).

¹¹⁹ According to the Death Penalty Information Center, at least sixteen people with strong evidence of their innocence have been executed. See DEATH PENALTY INFORMATION CENTER, “Executed But Possibly Innocent,” accessed Sept. 8, 2019, <http://deathpenaltyinfo.org/executed-possibly-innocent>. These persons include Larry Swearingen, Carlton Michael Gary, Robert Pruitt, Richard Masterson, Brain Terrell, Lester Bower, Troy Davis, Cameron Willingham, Claude Jones, Gary Graham, Leo Jones, David Spence, Joseph O’Dell, Larry Griffin, Ruben Cantu, and Carlos DeLuna.

¹²⁰ THE NATIONAL REGISTRY OF EXONERATIONS, “Percent of Exonerations by Contributing Factor,” accessed Sept. 8, 2019, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

¹²¹ THE INNOCENCE PROJECT, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification* (2009), <https://www.innocenceproject.org/reevaluating-lineups-why-witnesses-make-mistakes-and-how-to-reduce-the-chance-of-a-misidentification/> (last visited Sept. 8, 2019).

¹²² *Record Number of Exonerations in 2018 Involved Official Misconduct*, Equal Justice Initiative, May 9, 2019, <https://eji.org/news/record-number-of-exonerations-involved-official-misconduct> (last visited Sept. 29, 2019).

¹²³ DEATH PENALTY INFORMATION CENTER, “Innocence,” accessed Sept. 8, 2019, <https://deathpenaltyinfo.org/policy-issues/innocence>.

¹²⁴ LIFE AFTER EXONERATION PROGRAM, “Remedies,” accessed Sept. 8, 2019, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88.

¹²⁵ LIFE AFTER EXONERATION PROGRAM, “Over 500 Exonerees: A Number That Keeps Growing Every Month,” accessed Sept. 8, 2019, http://www.exonerated.org/index.php?option=com_content&view=article&id=94&Itemid=87.

¹²⁶ *Ibid.*

¹²⁷ THE INNOCENCE PROJECT, “Compensating the Wrongly Convicted,” accessed Sept. 8, 2019, <https://www.innocenceproject.org/compensating-wrongly-convicted/>.

¹²⁸ THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 16.

¹²⁹ *Id.* at 10.

¹³⁰ *Id.* at 7. “Institutionalization” refers to how prisoners adjust to surviving the hostile living environment conditions of a prison; LIFE AFTER EXONERATION PROGRAM, “Over 500 Exonerees: A Number That Keeps Growing Every Month,” accessed Sept. 8, 2019, http://www.exonerated.org/index.php?option=com_content&view=article&id=94&Itemid=87.

¹³¹ THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 8.

¹³² *Ibid.*

¹³³ *Id.* at 15.

¹³⁴ *Alabama Refuses Compensation to Innocent Man Who Spent 30 Years on Death Row*, Equal Justice Initiative, July 31, 2017, <https://eji.org/news/alabama-refuses-compensation-to-anthony-ray-hinton-innocent-man-who-spent-30-years-death-row> (last visited Sept. 29, 2019).

¹³⁵ Matt Schudel, *Glenn Ford, wrongfully convicted in Louisiana murder case, dies at 65*, Washington Post, July 4, 2015, https://www.washingtonpost.com/national/glenn-ford-wrongfully-convicted-in-louisiana-murder-case-dies-at-65/2015/07/04/0dfa3cec-2266-11e5-84d5-eb37ee8eaa61_story.html (last visited Sept. 29, 2019).

¹³⁶ LIFE AFTER EXONERATION PROGRAM, “Compensation Laws,” accessed Sept. 8, 2019, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88.

¹³⁷ *Ibid.*

¹³⁸ For example, disqualification for pleading guilty fails to take into account cases where false confessions led to wrongful convictions; in one study, false confessions constituted nearly 18% of the causes behind wrongful convictions in death sentence exonerations. DEATH PENALTY INFORMATION CENTER, *Causes of Wrongful Convictions*, by Robert Dunham (May. 2017) <http://deathpenaltyinfo.org/causes-wrongful-convictions> (last visited Sept. 8, 2019).

¹³⁹ For example, Kirk Bloodsworth, who was wrongfully imprisoned by the state of Maryland for nine years (two years of which were on death row), applied for and received \$300,000 from the Maryland Board of Public Works. Most of the compensation, however, went toward paying legal fees Kirk Bloodsworth incurred by his wrongful conviction. K. Bloodsworth, Personal Communication, Aug. 15, 2013.

¹⁴⁰ Albert Burrell’s case illustrates how long and difficult seeking compensation can be. Mr. Burrell was released from Louisiana’s death row after serving 14 years for a crime he did not commit. Mr. Burrell filed for compensation under Louisiana’s compensation law, but was denied compensation on July 17, 2014, 13.5 years after his release. *Albert Ronnie Burrell v. Louisiana State*, Reasons for Judgment, Case No. 00000042613, Div. B 3d Jud. Dist. Ct., Parish of Union, State of Louisiana, July 17, 2014.

¹⁴¹ THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 17.

¹⁴² THE INNOCENCE PROJECT, “Compensating the Wrongly Convicted,” accessed Sept. 8, 2019, <https://www.innocenceproject.org/compensating-wrongly-convicted/>. These states are Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Kentucky, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming.

¹⁴³ LIFE AFTER EXONERATION PROGRAM, “Remedies,” accessed Sept. 8, 2019, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88; THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 12; *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

¹⁴⁴ THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 13.

¹⁴⁵ Death Penalty Information Center, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington D.C., 2018), by Robin Konrad, Robert Dunham and Ngozi Nduluw, <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> (last visited Sept. 28, 2019), 11.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Id.* at 11-12.

¹⁴⁸ *Id.* at 42-44.

¹⁴⁹ *Id.* at 26.

¹⁵⁰ *Ibid.*

¹⁵¹ *Id.* at 26-27.

¹⁵² Ibid.

¹⁵³ Cassandra Stubbs, *In Its Rush to Kill, Arkansas May Have Executed an Innocent Man*, ACLU, Apr. 24, 2017, <https://www.aclu.org/blog/capital-punishment/innocence-and-death-penalty/its-rush-kill-arkansas-may-have-executed> (last visited Sept. 8, 2019).

¹⁵⁴ Lucy Westcott, *Texas Executes Mentally Ill Man After Multiple Appeals*, NEWSWEEK, March 22, 2016, <https://www.newsweek.com/adam-ward-texas-execution-mental-illness-439570> (last visited Sept. 8, 2019).

¹⁵⁵ James Queally & Christine Mal-Duc, *Texas Executes Killer With IQ of 67*, LOS ANGELES TIMES, Jan. 29, 2015, available at <http://www.latimes.com/nation/nationnow/la-na-nn-texas-executes-robert-ladd-iq-67-20150129-story.html> (last visited Sept. 8, 2019).

¹⁵⁶ MENTAL HEALTH AMERICA, *Position Statement 54: Death Penalty and People with Mental Illnesses*, <https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses> (last visited Sept. 8, 2019).

¹⁵⁷ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁵⁸ *Hall v. Florida*, 134 S.Ct 1986 (2014).

¹⁵⁹ The American Bar Association's Sections of Litigation, Criminal Justice, Individual Rights and Responsibilities, and International Law, Death Penalty Representation Project, and Commission on Immigration have adopted these recommendations in a Report to the House of Delegates, available at http://www.americanbar.org/content/dam/aba/migrated/Vienna_Convention_on_Consular_Relations_Article_36__2_authcheckdam.pdf.

¹⁶⁰ 21 U.S.C. § 381(a)(1)-(4) states:

(1) such article has been manufactured, processed, or packed under insanitary conditions or, in the case of a device, the methods used in, or the facilities or controls used for, the manufacture, packing, storage, or installation of the device do not conform to the requirements of section 360j (f) of this title, or

(2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or

(3) such article is adulterated, misbranded, or in violation of section 355 of this title or the importer (as defined in section 384a of this title) is in violation of such section 384a of this title, or prohibited from introduction or delivery for introduction into interstate commerce under section 331 (ll) of this title, or

(4) the recordkeeping requirements under section 2223 of this title (other than the requirements under subsection (f) of such section) have not been complied with regarding such article, then such article shall be refused admission, except as provided in subsection (b) of this section. With respect to an article of food, if importation of such food is subject to, but not compliant with, the requirement under subsection (q) that such food be accompanied by a certification or other assurance that the food meets applicable requirements of this chapter, then such article shall be refused admission. If such article is subject to a requirement under section 379aa or 379aa-1 of this title and if the Secretary has credible evidence or information indicating that the responsible person (as defined in such section 379aa or 379aa-1 of this title) has not complied with a requirement of such section 379aa or 379aa-1 of this title with respect to any such article, or has not allowed access to records described in such section 379aa or 379aa-1 of this title, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations, except that the Secretary of Health and Human Services may destroy, without the opportunity for export, any drug refused admission under this section, if such drug is valued at an amount that is \$2,500 or less (or such higher amount as the Secretary of the Treasury may set by regulation pursuant to section 1498 (a)(1) of title 19) and was not brought into compliance as described under subsection (b).. [1] The Secretary of Health and Human Services shall issue regulations providing for notice and an opportunity to appear before the Secretary of Health and Human Services and introduce testimony, as described in the first sentence of this subsection, on destruction of a drug under the sixth sentence of this subsection. The regulations shall provide that prior to destruction, appropriate due process is available to the owner or consignee seeking to challenge the decision to destroy the drug. Where the Secretary of Health and Human Services provides notice and an opportunity to appear and introduce testimony on the destruction of a drug, the Secretary of Health and Human Services shall store and, as applicable, dispose of the drug after the issuance of the notice, except that the owner and consignee shall remain liable for costs pursuant to subsection (c). Such process may be combined with the notice and opportunity to appear before the Secretary and introduce

testimony, as described in the first sentence of this subsection, as long as appropriate notice is provided to the owner or consignee. Clause (2) of the third sentence of this paragraph [2] shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under the Controlled Substances Import and Export Act [21 U.S.C. 951 et seq.].