

Civil Society Follow-Up Strategy to the Implementation  
of the Quebec Plan of Action



## **UNITED STATES REPORT**

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**CITIZEN PARTICIPATION IN THE SUMMIT OF THE AMERICAS**

# **Civil Society Follow-Up Strategy to the Implementation of the Quebec Plan of Action UNITED STATES REPORT**

## **Coordinating Agency**



## **Supporting Agencies**

Canadian International Development Agency (CIDA)  
Inter-American Development Bank (IDB)  
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Inter-American Democracy Network (IADN)  
Partners of the Americas (POA)  
Corporación Andina de Fomento (CAF)

The opinions expressed in this document do not necessarily reflect those of the Organizations supporting the Project, neither of its bodies or of its staff nor that of the Member States of these Institutions.

## **Project Citizen Participation in the Summit of the Americas**

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## Introduction

Since 1994, the Summits of the Americas have brought together heads of state and government in the Western Hemisphere to discuss common concerns, seek solutions, and develop a shared vision for the future development of the region. As such, the Summits are a mechanism by which commitments are signed by national governments on issues that are of interest to citizens and to civil society organizations (CSOs). There have been three Summits of the Americas: Miami, Florida, United States, in 1994; Santiago, Chile, in 1998; and Quebec, Canada, in 2001. In addition, a Summit on Sustainable Development took place in Santa Cruz, Bolivia, in 1996, and a Special Summit of the Americas was held recently in Monterrey, Mexico, in January 2004. The fourth regularly scheduled Summit of the Americas will be held in Argentina in 2005.

The active involvement of CSOs enriches the Summit process with increased legitimacy and contributes to democratic governance in the region. Civil society organizations play an important role in the Summits by ensuring that civil society's, and thereby citizens', diverse points of view are heard by our governments as they draft the Plans of Action. CSOs can also pressure national governments to commit to and implement measures that strengthen democracy and social and economic development. In addition, CSOs can monitor implementation and hold governments accountable at the national level.

As part of a hemispheric follow-up strategy to the Summit of the Americas in Quebec in 2001, Partners of the Americas is one of 22 civil society organizations from 20 countries in the Western Hemisphere that are working together to assess that status of implementation of five democracy-related commitments made by the region's governments in the Quebec Summit of the Americas Plan of Action. The five areas of commitment are access to information, freedom of expression, access to justice, local government and decentralization, and civil society participation. These themes constitute the foundations required for the effective development of the other social, economic, and political mandates agreed to in the Quebec Plan of Action, and their advancement creates positive conditions for the strengthening of civil society and democracy. Because these themes are not being addressed by other CSO networks in the Americas, and because of their extensive experience supporting civil society participation in democracy, Partners and the CSOs in the network decided to implement a multi-country study to gauge the status of the five democracy-related themes throughout the region.

The Regional Coordination for Economic and Social Research (CRIES), the Department of Political Science of the University of the Andes in Colombia, the Latin American Political Science University of Chile (FLACSO-Chile), the Canadian Foundation for the Americas (FOCAL), and Corporación PARTICIPA of Chile are coordinating the hemispheric follow-up strategy. All of the national assessments, regional reports, and a hemispheric report can be found at the Civil Participation for the Summit of the Americas Web site administered by Corporación PARTICIPA at [www.sociedadcivil.org](http://www.sociedadcivil.org).

As the U.S. CSO member of the follow-up network, Partners implemented a review of the status of the five Quebec commitments in the United States. Partners' national assessment is not exhaustive; rather, it is intended to provide a general overview of these five aspects of democracy in the United States in order to spark discussion and build awareness of the Summits of the Americas. The methodology used for the report, as discussed in more detail below, was designed primarily for countries in Latin America and the Caribbean, where in many cases the freedoms and protections associated with democracy in the United States do not exist. For this reason, many topics addressed in the report deal with fundamental democratic rights and safeguards. In addition to secondary sources, research for the assessment has come from surveys and interviews with dozens of CSO representatives and local government officials

throughout the United States. Partners will use this report to launch more formal public deliberations on the Summit of the Americas in select U.S. cities. For the support of these and other activities to raise awareness about the Summits of the Americas, Partners is grateful to the OSI Development Foundation.

## **Methodology**

Vicente Espinoza of the University of Santiago in Chile designed the research strategy in cooperation with the coordinating group of the hemispheric follow-up strategy—CRIES, the Department of Political Science of the University of the Andes, FLACSO-Chile, FOCAL, and Corporación PARTICIPA. Espinoza and the coordinating group first divided the selected commitments in the Quebec Plan of Action into dimensions and subdimensions, or lines of investigation. Using these dimensions, the group then developed indicators with which to assess the status of implementation of each of the mandates. Finally, Espinoza and the coordinating organizations devised a uniform set of questionnaires based on these indicators.

Following this framework, the study combined three approaches to data collection: conversations with “expert informants” (researchers and practitioners) in each of the five areas of commitment, surveys of practitioners, and secondary research. The expert informants provided general information about each of the five themes and signalled the major debates arising within them. Partners used the information provided by the informants as an orientation to each of the issues and as background to secondary research. To conduct the assessment, Partners relied primarily on secondary sources, most of which came from the Web sites of CSOs working on these topics but also from the Web sites of government agencies. For local government and decentralization and civil society and participation, Partners gathered empirical data through surveys, which supplemented the secondary research and the interviews with experts on specific topic areas. Secondary sources are cited throughout the report.

While the assessments were intended to capture comparable data across countries, because there is so much variation among the countries in the Western Hemisphere, particularly between those in the North and those in the South, many of the specific lines of investigation do not always reveal the crux of these issues in the United States. Partners kept to the prescribed dimensions and subdimensions as much as possible, following the outline of the methodology but adding other relevant topics. For this reason, some of the section headings may sound more or less pertinent to the United States context. Partners recognizes, of course, that it is beyond the scope of the study to touch on every single point that impacts the implementation of these five commitments in the United States. Limited time and resources also curtailed the extent of coverage of the five democracy-related themes addressed in this report.

### Access to Information

In this chapter, Partners sought to investigate not only the laws that govern access to public information, but also how these laws work in practice. What is the process for requesting public information from the government? What kinds of information does the government restrict and what has been the impact of September 11, 2001, on access to information? How is the Internet used to make public information available? To answer these questions, Partners interviewed experts in the field and conducted secondary research.

Partners identified the expert informants using a snowball sample beginning with a list culled from the Inter-American Dialogue’s 2002 Conference on Access to Information in the Americas, university professors specializing in access-to-information topics, and CSOs working in this issue that are linked to the Organization of American States (OAS) Web site. These contacts provided additional contacts and so on until five informants were selected. Recognizing that the federal

government implements the procedures mandated by the Freedom of Information Act (FOIA), Partners also contacted government representatives. The resulting five expert informants included a private sector lawyer and one professional each from the OMB [Office of Management and Budget] Watch's Freedom of Information Project, the National Security Archives, the National Freedom of Information Coalition, and the Office of Information and Privacy (OIP) at the U.S. Department of Justice (DOJ). One of the CSO professionals is also a professor of journalism.

### Freedom of Expression

Court cases in the United States have played a key role in interpreting laws on free expression, defining what forms of expression are and are not protected. In addition to the law, media regulations and ownership can impact the variety of expression available in a society. With the help of expert informants, supplemented by secondary research, in this chapter Partners addresses these and other freedom of expression issues.

To select expert informants in freedom of expression, Partners also conducted a snowball sample starting with the participants in the Inter-American Dialogue's Press Freedom in the Americas Project, university professors working on issues related to freedom of expression, and freedom-of-expression-focused CSOs that are linked to the OAS Web site. The four experts consulted are from the following civil society organizations: the International Center for Journalists, the Reporters Committee for Freedom of the Press (RCFP), Public Citizen's Litigation Group, and the First Amendment Project. An academic affiliated with the Thomas Jefferson Center for the Protection of Free Expression also provided useful information for this report.

### Justice

Many elements contribute to a fair and accessible justice system. Partners looked into the laws and the practices around justice in the United States, paying particular attention to discrimination against minority groups and the poor, police treatment of suspects and detainees, and the independence of the judicial branch. Secondary research and the insights of experts in the field also informed this chapter.

As with the sections on access to information and freedom of expression, Partners used a snowball sample to identify the justice informants. The OAS Web site provided links to CSOs and law firms that work on access to justice cases. To this list, Partners added university professors and other CSOs involved in justice issues. The six expert informants interviewed included an American University professor of law and five CSO professionals—two from the American Bar Association (ABA) and one each from the American Judicature Society, the Advocacy Institute, and Amnesty International.

### Local Government and Decentralization

In local government and decentralization, Partners chose 27 cities in the United States according to the categories listed in the chart below: population size and level of public investment as measured by annual spending on primary and secondary education per pupil. Partners also sought geographic diversity. To identify the 27 cities, Partners began with the 30 cities included in the National League of Cities (NLC) Municipalities in Transition Project. NLC chose these cities because they are representative of the economic, demographic, geographic, and fiscal diversity of cities in the United States.<sup>1</sup> Using census data and information provided by states, cities, and school districts, Partners divided the cities into high, medium, and low annual public education expenditures. Partners also designated each city as large,

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<sup>1</sup> See the "Introduction and Overview" in the National League of Cities' "Major Factors Affecting America's Cities" (1998) at [http://www.nlc.org/nlc\\_org/site/files/reports/major.pdf](http://www.nlc.org/nlc_org/site/files/reports/major.pdf).

medium, or small based on population data from the census bureau. Not all of the cities in the National League of Cities' sample fit in the grid below, so Partners selected additional cities based on their location, size, and level of public education expenditures.

Annual expenditures on public education	Large city (over one million inhabitants)	Medium city (between 50,000 and one million inhabitants)	Small city (under 50,000 inhabitants)
High (over \$8,000 per pupil)	3	3	3
Medium (between \$5,000 and \$8,000)	3	3	3
Low (less than \$5,000 per pupil)	3	3	3

Partners sent questionnaires to one local government official in each city, preferring respondents who work with citizens or civil society organizations, when possible. The questionnaires asked about local government operations and opportunities for citizens and civil society organizations to participate in the creation of public policy. In addition to contacting the local governments, Partners also sent questionnaires on civil society and citizen participation in local government to three CSOs in each city, targeting local offices of the United Way and CSOs identified through [idealist.org](http://idealist.org), an online directory of over 37,000 CSOs. Due to the small sample size and the low response rate (less than 15 percent), the survey results reveal snapshots of the forms and activities of local government in the United States but are in no way representative of the range of city government experiences.

Partners received completed surveys from the governments of Madison, AL; San Jose, CA; Helena, MT; Columbus, OH; Yellow Springs, OH; and Galveston, TX. The following civil society organizations also responded to Partners' questionnaire: Anonymous; the United Way of Madison County (Huntsville, AL); the United Way Silicon Valley (San Jose, CA); the Yu-Ai Kai Japanese American Senior Service (San Jose, CA); the United Way of Greater Rochester (Rochester, NY); Chrysalis (Minneapolis, MN); PhillyCarShare (Philadelphia, PA); the United Way of Southeastern Pennsylvania (Philadelphia, PA); the Community Action Coalition of South Central Wisconsin, Inc. (Madison, WI); and the United Way of the National Capital Area (Alexandria, VA).

This chapter was intended to be largely empirically based and is less robust than the other sections because of the small number of returned surveys. Partners supplemented the local government and decentralization chapter with conversations with two expert informants—one each from the Local Government Institute and the International Municipal Lawyer's Association—and with secondary research.

### Civil Society and Participation

For the purpose of this study, "civil society organizations" are understood as "nonprofit organizations that seek to improve the population's quality of life through various means, based on diverse philosophies." This definition excludes grassroots community organizations and includes only formally-registered CSOs. The sample of organizations used for the survey component of the study included three structural types: network-affiliated organizations; non-network-affiliated organizations; and foundations and charities. Partners considered CSOs to be network-affiliated if they are branches or chapters that are dependent on a headquarters or central office for budgeting and management oversight. Non-network-affiliated CSOs may partner with other groups, but are structurally independent. Foundations and charities support the work of other CSOs through grants but do not run their own programs.

Partners contacted organizations from around the country that work in a range of topic areas, including economic development; social issues (hunger, poverty, housing, labor); citizenship and participation; environment; and ethnic or multicultural issues. Partners aimed to survey two CSOs in each of the categories shown in the grid below. Many CSOs interviewed meet more than one category of criteria and so were counted for each criterion they satisfied. Out of the 50 CSOs Partners contacted, a total of 13 completed surveys. The CSOs surveyed fulfill each category at least once; many categories are covered more than twice. Partners conducted additional interviews with CSOs working on specific issues addressed in this chapter.

Thematic Focus	Network affiliated	Non-network affiliated	Foundations and charities
Economic development or technical assistance	2	2	2
Social issues: poverty, gender, etc.	2	2	2
Citizenship and participation	2	2	2
Environmental and sustainable development issues	2	2	2
Ethnic or multicultural questions	2	2	2

The 13 CSOs surveyed include the Applied Research Center (Oakland, CA); the Common Counsel Foundation (Oakland, CA); Operation Frontline of Share Our Strength (Denver, CO); the Midwest Energy Efficiency Alliance (Chicago, IL); Acción USA (Boston, MA), the Nonprofit Finance Fund (Detroit, MI); the Cottonwood Foundation (White Bear Lake, MN); the Ford Foundation (New York, NY); Democracy South (Carrboro, NC); ACORN (Philadelphia, PA); the Academy for Educational Development (Washington, DC); the National Asian Pacific American Legal Consortium (Washington, DC); and the Points of Light Foundation (Washington, DC).

Partners conducted supplemental interviews with the Center for Civic Education, the Center for Multicultural Cooperation, the Center for Diversity Education, the Center on Budget and Policy Priorities, the U.S. Department of State’s Nongovernmental Organization Liaison Unit (NGO Unit), First Amendment Schools, and the Association for Supervision and Curriculum Development.

Finally, Partners of the Americas alone is responsible for the content of this report.



## Acronyms

ABA	American Bar Association
ACLU	American Civil Liberties Union
CBO	Congressional Budget Office
CDA	Communications Decency Act
CIRCLE	Center for Information and Research on Civic Learning and Engagement
COPA	Child Online Protection Act
CPPA	Child Pornography Prevention Act
CRIES	Regional Coordination for Economic and Social Research the Canadian
CRS	Congressional Research Service
CSO	Civil Society Organization
DHS	U.S. Department of Homeland Security
DOD	U.S. Department of Defense
DOE	U.S. Department of Education
DOJ	U.S. Department of Justice
E-FOIA	Electronic Freedom of Information Act
EPA	U.S. Environmental Protection Agency
FBI	Federal Bureau of Investigations
FCC	Federal Communications Commission
FLACSO-Chile	Latin American Political Science University of Chile
FOCAL	Canadian Foundation for the Americas
FOIA	Freedom of Information Act
FY	Fiscal Year
GAO	U.S. General Accounting Office
HHS	U.S. Department of Health and Human Services
IACHR	Inter-American Commission on Human Rights
ICMA	International City/County Management Association
IRS	Internal Revenue Service
LCCR	Leadership Conference on Civil Rights
LEP	Limited English Proficient
LSC	Legal Services Corporation
MDB	Multilateral Development Bank
NAEP	National Assessment of Educational Progress
NEA	National Endowment for the Arts
NGO	Nongovernmental Organization
NGO Unit	U.S. Department of State Nongovernmental Organization Liaison Unit
NLADA	National Legal Aid and Defender Association
NLC	National League of Cities
OAS	Organization of American States
OIP	Office of Information and Privacy
OMB	Office of Management and Budget
PACER	Public Access to Court Electronic Records
POW	Prisoner of War
RCFP	Reporters Committee for Freedom of the Press
TANF	Temporary Assistance to Needy Families
UNHCR	United Nations High Commissioner for Refugees

## I. ACCESS TO INFORMATION

### Commitments under the Quebec Plan of Action

In the Plan of Action, the governments pledged to “work jointly to facilitate cooperation among national institutions with the responsibility to guarantee . . . access to and freedom of information, with the aim of developing best practices to improve the administration of information held by governments on individuals and facilitating citizen access to that information.” This commitment is designed to contribute to increasing transparency and good governance in public institutions, with emphasis on the role of new information and communications technologies in the process.<sup>2</sup>

### Dimensions of the Issue

For the purpose of following up and reporting on access to information, the issue has been divided into the following dimensions: 1. Legislation on freedom of access to information and related regulations; 2. Effective access to public information; 3. Restrictions on the freedom of access to information; 4. The use of new information and communications technologies to facilitate access to public information.

#### **1. Legislation on Freedom of Access to Information and Related Regulations**

This section outlines the laws governing access to information in the United States. At the federal level, the U.S. attorney general and the president provide guidance to federal agencies in the interpretation of public access laws and, as history has shown, administrations vary in their degree of openness. Following the attacks of September 11, 2001, the George W. Bush administration urged that greater care be taken in decisions about whether or not to release information that relates to national security.

The Freedom of Information Act, passed in 1966, guarantees the right of “any person” to access federal agency records. FOIA applies only to federal agencies in the executive branch, excluding the federal judiciary and elected officials. It does not extend to records of the U.S. Congress, which makes many of its activities public, or to the records of state and local governments, which are governed by state (and some local) freedom of information laws. The Privacy Act of 1974 protects the public interest by regulating the use and collection of information about private individuals. Under this act, citizens have the right to investigate information about them held by the government and to correct it if there are errors.<sup>3</sup>

There are nine categories of exemptions to FOIA (listed in this chapter under 3. Restrictions on the Freedom of Access to Information), and the law places the burden on the government to provide justification when a request seeks information that falls into one of the nine categories and cannot be released. Exemptions to the principle of access are clearly stated and available to the public. The justice system has oversight authority, but in many cases defers to the decisions of other federal agencies regarding exemption. In cases of requests for exempt

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<sup>2</sup> The full text of the Quebec Plan of Action can be found <http://www.summit-america.org/Documents%20for%20Quebec%20City%20Summit/Quebec/plan-e.pdf>.

<sup>3</sup> The Freedom of Information Act can be accessed on the DOJ’s Web site at <http://www.usdoj.gov/04foia/foiastat.htm>. The Privacy Act is also available through the DOJ’s Web site at <http://www.usdoj.gov/04foia/privstat.htm>. The Freedom of Information Center at the University of Missouri (<http://www.missouri.edu/~foiwww/>) is a good source of information about freedom of information in the United States.

information, the principle of “reasonable segretability” requires that any nonexempt information in the request be provided.<sup>4</sup>

The implementation of FOIA, in particular the application of clauses of exemption, depends on both precedence and the direction given by the attorney general and the president of the United States. Therefore, barring amendments to the law itself, changes in interpretation are always possible. Each federal agency is responsible for managing its own FOIA requests, with the DOJ’s Office of Information and Privacy providing guidance and training. The attorney general’s interpretation of FOIA indicates to federal agencies the terms by which the DOJ will support agencies’ FOIA decisions.

The legal framework established by FOIA has served as a model for foreign governments interested in similar legislation. The DOJ’s Office of Information and Privacy has given guidance to representatives of more than 72 other countries on the formulation, implementation, and administration of freedom of information laws.<sup>5</sup>

### **Attorney General Janet Reno changes FOIA interpretation in 1993**

In October 1993, Attorney General Janet Reno issued a memo to heads of federal government agencies with guidelines for increasing the availability of information to the public and facilitating faster and more efficient processing of FOIA requests. Reno reversed the 1981 guidelines issued by then-Attorney General William French Smith, which had instructed the DOJ to defend the withholding of information on a “substantial legal basis.” Reno instead told the agencies to operate with a “presumption of disclosure” and to limit nondisclosure to instances of reasonably expected harm “to an interest protected by that exemption.” Even in cases in which a request technically falls under an area of exemption, Reno directed, an attempt should be made to release the information unless significant harm can be argued.<sup>6</sup>

### **E-FOIA**

In October 1996, with the goal of improving efficient public access, President Bill Clinton signed into law the Electronic Freedom of Information Act Amendments (E-FOIA), which established that federal agencies must provide electronic access to government agency information, including by making available electronic records and creating electronic reading rooms. E-FOIA also requires federal agencies to publish an annual FOIA report and to post it on their Web site. These reports must include the total number of FOIA requests received that year, and the numbers of requests granted, pending, and denied, including the reasons for denial.

### **Attorney General John Ashcroft reverses FOIA interpretation in 2001**

In October 2001, in the wake of the September 11 terrorist attacks, Attorney General John Ashcroft issued a memo altering FOIA guidelines. He effectively reversed Reno’s 1993 instructions to operate with a “presumption of disclosure” and limit exceptions to cases that would cause harm. Instead, Ashcroft’s memo urged federal agencies to carefully consider the implications of disclosure for national security. Ashcroft pledged the DOJ’s support for any “discretionary decision” to withhold requested information “unless they lack a sound legal basis or present an

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<sup>4</sup> See the FOIA Reference Guide available from the Department of Justice at [http://www.usdoj.gov/04foia/04\\_3.html](http://www.usdoj.gov/04foia/04_3.html). The National Security Archive also provides extensive information on FOIA at <http://www.gwu.edu/~nsarchiv/nsa/foia.html>.

<sup>5</sup> See FOIA Post, “OIP Gives FOIA Implementation Advice to Other Nations,” 12/12/02 at <http://www.usdoj.gov/oip/foiapost/2002foiapost30.htm>.

<sup>6</sup> See Janet Reno, memorandum for heads of departments and agencies, “The Freedom of Information Act,” 10/4/93 at <http://www.gwu.edu/~nsarchiv/nsa/foia/reno93.pdf>.

unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”<sup>7</sup>

In response to a request from Senator Patrick Leahy, the U.S. General Accounting Office (GAO), part of the legislative branch, conducted an evaluation of 25 federal agencies that receive 97 percent of federal FOIA requests to gauge the impact of the Ashcroft memo on FOIA processing. Out of the 24 agencies that responded to the GAO’s survey, 20 have disseminated the memo among their FOIA staff, and 11 have changed their FOIA materials to reflect the Ashcroft guidelines. Of the 205 FOIA officers contacted, 183, or 89 percent, responded. When asked whether or not the likelihood of their agency to disclose information under FOIA had changed in the past year:

- 48 percent of FOIA officers surveyed said they saw no change in the likelihood of their agency to disclose information;
- 23 percent stated that there was a slight decrease in their agency’s likelihood to disclose information;
- 8 percent reported a great or moderate decrease in the likelihood of their agency to disclose information;
- 7 percent cited an increase in their agency’s likelihood to disclose information;
- 14 percent answered “don’t know” or did not respond.

The GAO received the following responses to a question about the impact of Ashcroft’s memo on the application of FOIA exemptions:

- 62 percent said the application of exemptions has not increased compared with previous years;
- 25 percent reported that there has been an increase in the application of exemptions since the Ashcroft memo;
- 13 percent answered “don’t know” or did not respond.

The GAO report also found that only “3 percent or less” of FOIA officials surveyed said that the new guidelines had influenced the time required to process FOIA requests, the number of pending requests, or the age of pending requests.<sup>8</sup>

### **White House Issues Memo Regarding Weapons of Mass Destruction in 2002**

In March 2002, White House chief of staff Andrew Card issued a memo to all federal agencies that stressed increased caution in the disclosure of information regarding weapons of mass destruction.<sup>9</sup>

### **Intelligence Authorization Act**

In November 2002, President Bush signed into law the Intelligence Authorization Act for Fiscal Year 2003, which amends FOIA by restricting access to intelligence information requested by foreign entities. The act includes a provision entitled “Prohibition on Compliance with Requests for Information Submitted by Foreign Governments,” which forbids any U.S. agency that is part of the “intelligence community” to fulfill any FOIA request made by a foreign government,

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<sup>7</sup> See John Ashcroft, memorandum for heads of all federal departments and agencies, “The Freedom of Information Act,” 10/12/01 at <http://www.usdoj.gov/04foia/011012.htm>.

<sup>8</sup> See the GAO’s September 2003 Report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate, “Freedom of Information Act: Agency Views on Changes Resulting from New Administration Policy” at <http://www.gao.gov/new.items/d03981.pdf>.

<sup>9</sup> See FOIA Post, “Guidance on Homeland Security Information Issued,” 3/21/02 at <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>.

international governmental organization, or their representatives. According to Representative Stephen Horn, former chair of the House subcommittee with authority over FOIA-related issues, the bill “bypass[ed] the normal legislative process.” Congress approved the bill when none of the House and Senate committees with FOIA jurisdiction had intended to amend FOIA with the legislation. The result was the seventh time FOIA has ever been substantially amended.<sup>10</sup>

### **Department of Homeland Security**

In January 2003, the U.S. Department of Homeland Security (DHS), created in November 2002, issued regulations for managing freedom of information requests by the agency. The National Security Archive, a Washington, DC-based CSO that monitors access to information laws and practices, pronounced the rules insufficient. In a published response, the Archive recommended eight modifications to the DHS guidelines to better reflect congressional intent behind freedom of information legislation. Among the eight recommendations, the Archive urged DHS to create an office responsible for FOIA, include the 20-day response requirement in its regulations, and inform requesters of the right to seek judicial review in cases where DHS responses exceed 20 days.<sup>11</sup>

## **2. Effective Access to Public Information**

Laws are important, but their application is equally essential. This section outlines FOIA regulations that establish procedures for individuals and groups that request public information and for federal agencies that respond to requests. This section also addresses how well federal agencies comply with FOIA regulations. In addition to fulfilling FOIA requests, federal agencies provide extensive public information on their Web sites. Still, Partners found that locating and interpreting data can be difficult.

### **Effectiveness of FOIA request process**

The Department of Justice’s FOIA Web page provides background information on FOIA, a handbook on how to make FOIA requests, and links to other agencies’ FOIA pages. Many CSOs also have links to the DOJ FOIA page, which allows individuals with Internet access to easily locate instructions for making requests. In addition, the DOJ’s Office of Information and Privacy sponsors a FOIA Counselor service staffed by advisers who assist individuals with the request process.<sup>12</sup>

According to the DOJ FOIA handbook, requests for information must be made in writing, state that the request is being made under FOIA, indicate the requested records as precisely as possible, and include the name and address of the requestor. Regulations stipulate that agencies have 20 working days to fulfill or deny a request and that persons requesting information may ask for explanations of refusals or delays. In the cases of rejection or partial rejection of a request, requesters can initiate an appeal process. There is usually no charge for documents released under FOIA, although certain categories (commercial, educational, media) require payment—not to exceed “reasonable” charges—for the direct costs of locating, reviewing, or reproducing documents. In these cases, a fee waiver may be requested if the information is not intended for commercial purposes and will directly serve the public interest. Fees should not be paid until the information has been collected and is ready to be delivered.

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<sup>10</sup> See FOIA Post, “FOIA Amended by Intelligence Authorization Act,” 12/23/02 at <http://www.usdoj.gov/oip/foiapost/2002foiapost38.htm>.

<sup>11</sup> See “National Security Archive Files Comments on New Department’s FOIA Rules, Suggests Eight Specific Changes and Commends Initial Progress,” 2/26/03 at <http://www.gwu.edu/~nsarchiv/news/20030226/>.

<sup>12</sup> The FOIA Counselor service number is 202-514-FOIA. See the DOJ FOIA Web page at <http://www.usdoj.gov/04foia/index.html>.

The National Security Archive, a civil society organization, conducted an audit of compliance with FOIA by federal agencies and identified a pattern of limited disclosure in all agencies due to administrative weaknesses in the processing of information requests and an increase in the amount of information withheld by intelligence agencies as a result of the Ashcroft memo. As part of its FOIA audit, the Archive sent three requests for information to each of 35 federal agencies. The Archive's findings from this exercise include inaccurate or incomplete contact information on federal FOIA Web sites; often no acknowledgement by agencies of having received requests; lost requests; and delays in responding to requests due to backlog. The Archive also cited examples of increased secrecy on the part of the Bush administration, such as the withholding of the names of suspects detained for alleged involvement in terrorist activity.<sup>13</sup> [For more on this, See 3. Restrictions on the Freedom of Access to Information.]

The Office of Information and Privacy publishes a summary of the federal agencies' annual FOIA reports for each fiscal year (FY). For FY 2002, federal departments and seven agencies received more than 2.4 million FOIA and Privacy Act requests, an increase of nearly seven percent from FY 2001. Nine out of 14 federal departments granted more than half of the total number of requests received, and of all departments and agencies, 71 percent cited "no records" as the most common reason for nondisclosure. When exemptions were used to justify nondisclosure, exemptions six and seven regarding personal information and information related to law enforcement investigations were the most frequently invoked.

Tracking the processing time across agencies and departments is complicated because of the differences in the volume of requests, the type of tracking procedures used, the complexity of cases, and the staff available. Upon receipt, FOIA requests are put into one of three categories: simple, complex, and expedited. Expedited treatment may be granted in cases of "compelling need," such as life-threatening or other emergency circumstances. Within the Department of Justice, for example, the number of days for processing a simple request ranged from one to 71, and 38 percent of the DOJ offices that processed simple requests complied with the 20-day processing guideline. Two DOJ offices had processing times of more than 50 days for simple requests. For complex cases, the number of days for processing a request ranged from one to 558, with 19 percent of the offices meeting the 20-day guideline and 27 percent taking more than 300 days to fill complex FOIA requests. The processing time for expedited cases ranged from one to 80 days.<sup>14</sup>

When an access to information request is denied, the requester must first appeal to the particular agency, as stipulated by the principle of "constructive exhaustion." This stipulation is waived when an agency does not fulfill the initial request for information within the 20-day limit.<sup>15</sup> If a requester is not satisfied with the agency's decision, the requester has the right to take the case to court. If the court decides in favor of the agency and upholds the nondisclosure decision, the requester can appeal the case to a higher court. In contrast, if the court issues an imminent disclosure order to the agency involved, the agency must provide the information or file a stay of the court order within a given time frame to contest the decision.<sup>16</sup>

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<sup>13</sup> See "The Ashcroft Memo: 'Drastic' Change or 'More Thunder than Lightning'?" *The National Security Archive Freedom of Information Audit*, 3/14/03. The full report is available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/index.html>.

<sup>14</sup> "Summary of Annual FOIA Reports for Fiscal Year 2002," FOIA Post. <http://www.usdoj.gov/oip/foiapost/2002foiapost27.htm>. Expedited requests are described in FOIA as amended in 1996. See [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XVII\\_4/page2.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm).

<sup>15</sup> If the 20-day limit is exceeded, the principle of "constructive exhaustion" does not apply, and the requester does not need to appeal to the agency first but can take the case to court directly.

<sup>16</sup> This information was provided by the Office for Information and Privacy.

Statistics on the rate of appeals and their resolution are handled by individual departments and agencies. The Department of Justice reported that in FY 2003, 4,357 of its denied cases were appealed. Of those appeals, 1,764 were upheld because they fell under exempted categories, 2,321 were upheld because of administrative problems with the request or the availability of the information requested, and 272 were reversed completely or partially.<sup>17</sup> The ratio of appeals reversed to the total number of cases processed has ranged from four percent to 17 percent over the past five years; therefore, the FY 2003 figure of six percent of appeals reversed is consistent with the average for this time period.

The Department of Justice, through the Office of Information and Privacy, is responsible for ensuring that federal agencies comply with the FOIA laws and processing guidelines. According to one expert informant, the regulations granting the DOJ the power to ensure proper fulfillment of FOIA requests are weak. This informant characterized the sanction mechanisms for noncompliance as “useless and toothless.”

### **Public information availability and quality**

Partners was able to locate information on public finances, the activities of public officials, and government action and its impact. While the information is available through federal agency Web sites and in paper form, it is difficult to find and to understand, in effect creating barriers to access to information.<sup>18</sup>

### **Public finances**

The Congressional Budget Office (CBO) collects and analyzes federal budgetary information to help Congress plan and monitor federal spending. Cost estimates for specific legislation can be found on the CBO Web site. Information on the president’s budget, including data on the budgets for all federal agencies, is available through the Office of Management and Budget, which assists the president in the creation of the federal budget and oversees the implementation of the budget by federal agencies.<sup>19</sup>

Some parts of intelligence agencies’ budgets do not have to be made public because of their sensitive nature—for example, specific dollar amounts for some line items may be classified.<sup>20</sup> Information on government contracts is not centralized but is reported on by individual agencies and departments. Larger departments may have sub-agencies that manage their contracts. For example, the Defense Contract Management Agency manages all of the U.S. Department of Defense (DOD) contracts. The requirements for disclosure of contracting and procurement are outlined in the Federal Acquisition Regulations.<sup>21</sup>

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<sup>17</sup> See U.S. Department of Justice, “Freedom of Information Act (FOIA) Report for Fiscal Year 2003” at [http://www.usdoj.gov/oip/annual\\_report/2003/03contents.htm](http://www.usdoj.gov/oip/annual_report/2003/03contents.htm).

<sup>18</sup> A print version of the FOIA Guide and related regulations can be requested from the FOIA office in the corresponding federal agency or department, or it can be found at federal depository libraries.

<sup>19</sup> See the Web sites of the Congressional Budget Office and the Office of Management and Budget at <http://www.cbo.gov> and <http://www.whitehouse.gov/omb/>, respectively.

<sup>20</sup> Supplemental interview with director of the Office of Information and Privacy, 2/27/04. The “intelligence community” was defined in the National Security Act of 1947 as consisting of the CIA, NSA, DIA, other reconnaissance agencies, the intelligence elements within the branches of the military and other federal agencies.

<sup>21</sup> For more information on the DOD Defense Contracting Management Agency, see <http://www.dcmamilitary.com/>. For more information on the Federal Acquisitions Regulations, see <http://www.arnet.gov/far/>.

### **Public activities of government authorities and high public officials**

The Congressional Research Service (CRS), a division of the Library of Congress, produces fact sheets detailing the incomes of public servants that are available to the public via the Internet.<sup>22</sup> Both the Senate and the House of Representatives host Web sites with links to individual member pages. Regarding the votes of legislators, Project Vote Smart, a CSO dedicated to providing nonbiased and accurate campaign information, has extensive data on its Web site about members of congress and the administration, including voting records.<sup>23</sup>

Financial disclosures are not required of all public employees. According to the Ethics and Government Act, only political appointees and government officials above a certain level of responsibility within federal agencies are required to file information on their personal assets and other income-generating activities. Elected federal officials are also required to file this personal information. The Office of Government Ethics oversees the filing process and manages the data collected at the federal level.<sup>24</sup> States have their own financial disclosure laws.

### **Results of government action**

In 1993, Congress passed the Government Performance and Results Act in response to the lack of information on the effectiveness of government programs, an omission that Congress found was undermining public confidence in the government. The act sought to improve federal management by focusing federal programs on quality service delivery and results. To do so, the act requires the head of each agency to submit five-year strategic plans, annual performance plans, and reports for each agency program to the Office of Management and Budget.<sup>25</sup> Since 1999, the Mercatus Center of George Mason University has evaluated how well federal agencies inform the public about the results of their activities. In its "Annual Performance Report Scorecard," Mercatus rates agencies along three dimensions: transparency in reporting achievements and setbacks; documentation of the public benefits provided; and leadership in the use of performance information to structure improved programs. According to Mercatus, from 2000 to 2001 there was a decrease in the quality of program information. Mercatus reports that federal agencies moderately improved their program reporting in 2002 and, in 2003, the agencies' average total score increased 13 percent. The average score for all agencies in 2002 was 34 out of 60 possible points.<sup>26</sup>

The federal government provides data on national indicators, such as poverty rates and health information. National statistics on poverty are available from the Census Bureau.<sup>27</sup> Education statistics are available from the Census Bureau and the National Center for Education Statistics at the U.S. Department of Education (DOE). The Center for Disease Control's National Center for Health Statistics provides health information and statistics.<sup>28</sup> The U.S. Commission on Civil Rights and offices of civil rights within federal agencies provide data on human rights in the United States. Outside the government, information on human rights violations is reported by a number of CSOs, such as the ACLU, Human Rights Watch, and Amnesty International.

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<sup>22</sup> CRS reports can be accessed through several different Web sites, including <http://www.lib.umich.edu/govdocs/fedlegis.html#crs>.

<sup>23</sup> See the Project Vote Smart Web site at <http://www.vote-smart.org/>.

<sup>24</sup> See the Web site of the Office of Government Ethics at <http://www.usoge.gov/>.

<sup>25</sup> See the OMB Web site for the text of the act: <http://www.whitehouse.gov/omb/mgmt-gpra/gplaw2m.html#h1>.

<sup>26</sup> See the Mercatus Center's "5<sup>th</sup> Annual Performance Report Scorecard: Which Federal Agencies Best Inform the Public?" 4/30/03 at <http://www.mercatus.org/governmentaccountability/category.php/45.html>.

<sup>27</sup> See the Census Bureau at <http://www.census.gov/hhes/www/poverty.html>.

<sup>28</sup> See the National Center for Education Statistics at <http://nces.ed.gov> and the National Center for Health Statistics at <http://www.cdc.gov/nchs>.



### **Support provided to vulnerable groups and individuals—victims of domestic violence**

National services such as the National Domestic Violence Hotline respond to provide information and link callers to resources in the caller's area.<sup>29</sup> Additionally, the National Institute of Justice, part of the Department of Justice, provides funding for the Institute for Law and Justice, a CSO that makes resources and information available to victims of domestic violence via the Web.<sup>30</sup> Support for victims of domestic violence is addressed in Chapter III. Access to Justice; see the section entitled "Fair Treatment for the poor, the disadvantaged, and those subject to discrimination."

### **Support provided to vulnerable groups and individuals—refugees**

The United States has a long history of accepting refugee populations fleeing war and conflict situations. The first official policy, the Displaced Persons Act, was enacted in 1948. The Refugee Act of 1980 standardized resettlement services by creating the Federal Refugee Resettlement Program and the Office of Refugee Resettlement in the U.S. Department of Health and Human Services (HHS), which manages a variety of programs and support services for the resettlement of refugees in the United States. The act also created mechanisms for consultation with Congress on the number of refugees to be allowed into the country and on responses to emergency situations.

U.S. resettlement efforts have historically been based on public-private collaboration, and this collaboration continues today as evidenced in the complementary roles played by the U.S. Bureau of Immigration and Citizenship, the State Department, and the Department of Health and Human Services together with many CSOs, religious organizations, and networks of mutual assistance associations throughout the country.<sup>31</sup> The United States relies on the United Nations High Commissioner for Refugees (UNHCR) to manage the processing of refugee applications. Upon entry in the country, refugees are provided essential services and linked to longer-term resettlement programs. Benefits include cash support, health services, employment and skills-building assistance, and other social services provided by public and private sources.

Despite a system of refugee support services and integration programs, the Refugee Council U.S.A., a consortium of refugee advocacy groups in the country, claims that refugee programs in the United States are "in crisis" in the post-September 11 era (and were seriously debilitated prior to that date). The council has expressed concern about the administrative complexity of the UNHCR case-referral system, the lack of attention paid to family reunification in refugee processing, and the decrease in the number of annual refugee admissions slots to 70,000. According to the council, federal funds to maintain the system are insufficient and, because of security concerns, the administration of refugee processing has slowed considerably.<sup>32</sup> The council and a number of other CSOs have been advising federal agencies on policy changes to improve the administration of the refugee resettlement programs.

### **Finances, accounting, and audits of private companies and executives contracted by the government to provide public services**

The U.S. Consumer Product Safety Commission provides information on consumer products. The commission investigates safety issues and publicizes findings on a wide range of consumer goods, such as microwaves, children's toys, tires, and other products that might pose a danger if improperly constructed. The Federal Procurement Data Center of the U.S. General Services

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<sup>29</sup> See the National Domestic Violence Hotline Web site at <http://www.ndvh.org/>.

<sup>30</sup> See Institute for Law and Justice's information page on domestic violence at <http://www.ilj.org/dv/index.htm>.

<sup>31</sup> See the Office of Refugee Resettlement Web site at <http://www.acf.hhs.gov/programs/orr/index.htm>.

<sup>32</sup> Leonard S. Glickman, Chair, Refugee Council U.S.A., "Testimony Before the Subcommittee on Immigration, Senate Judiciary Committee On the Current Crisis in the United States Refugee Admissions Program," 2/12/02. See [http://www.refugees.org/news/press\\_releases/2002/021202glickman.cfm](http://www.refugees.org/news/press_releases/2002/021202glickman.cfm).

Administration furnishes information on federal contracting, including “who bought what, from whom, for how much, when and where.”<sup>33</sup> The Federal Reserve Board publishes information on interest rates, consumer credit, exchange rates, bank lending, and consumer and small business finances. The U.S. Department of the Treasury supplies financial market information. The U.S. Department of Commerce provides economic indicators, including home sales and construction, corporate profits, gross domestic product, international trade, manufacturing, and retail.<sup>34</sup>

### **3. Restrictions on the Freedom of Access to Information**

In addition to legal exemptions to FOIA, a number of CSOs and other groups claim that the Bush administration has been more secretive since the war on terrorism began after September 11, 2001, impeding the right to access to information. According to these CSOs, the administration’s secrecy includes withholding the names of non-U.S. citizen detainees and encouraging federal employees to carefully consider the FOIA exemptions before providing information that, while not classified, may impact national security. This section discusses legal and practical barriers to public information.

There are nine exemptions to the Freedom of Information Act:

1. Classified secret matters, national defense, and foreign policy;
2. Internal personnel rules and practices, internal matters of a trivial nature, internal matters that would risk circumvention of a legal requirement;
3. Information specifically exempted by other statutes;
4. Trade secrets, commercial or financial information to protect the interest of both the government and submitter of information;
5. Privileged interagency or intra-agency memoranda or letters;
6. Personal information affecting an individual’s privacy, except information pertaining to the requester himself/herself;
7. Investigatory records compiled for law enforcement purposes that could interfere with enforcement proceedings or deprive a person of a fair and impartial trial;
8. Records of financial institutions;
9. Geographical and geophysical information concerning wells.<sup>35</sup>

A U.S. News and World Report article based on a five-month investigation outlines a number of ways the U.S. government has been less open since President Bush assumed office. In March 2003, Bush signed an executive order granting authority to the Secretaries of Health and Human Services and Agriculture and the head of the Environmental Protection Agency (EPA) to classify documents. Previously, only national security agencies were allowed this privilege. In addition, the order increases the ability of government officials to classify material, to keep material classified longer, and to reclassify documents that have been unclassified. Other restrictive actions mentioned in the article include the withholding, in the name of national security, of information on drinking water quality and hazardous chemicals that might impact communities’ quality of life and a decision not to release safety information that tire manufacturers are legally required to report to the government.<sup>36</sup>

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<sup>33</sup> See the Federal Procurement Data Center at [http://www.fpdc.gov/fpdc/fpdc\\_home.htm](http://www.fpdc.gov/fpdc/fpdc_home.htm).

<sup>34</sup> See the U.S. Consumer Product Safety Commission Web site at <http://cpsc.gov>, the Department of the Treasury at <http://www.ustreas.gov/>, and the Department of Commerce at <http://www.commerce.gov/>.

<sup>35</sup> FOIA exemptions can be found at <http://www.rdc.noaa.gov/~foia/foiaex.html>.

<sup>36</sup> See “Keeping Secrets,” by Christopher H. Schmitt and Edward T. Pound in *U.S. News and World Report*, 12/12/03. See also “Bush Issues New Secrecy Executive Order” by the Society of American Archivists at <http://www.archivists.org/news/secrecyorder.asp>.

A diverse group of CSOs, including Human Rights Watch, the National Security Archive, and the American Civil Liberties Union, also see a trend toward less openness in the U.S. government. The National Security Archive, for example, publishes “news-making” cases of freedom of information requests that were rejected. The Archive’s FOIA Audit of 2003 cited a half dozen examples that demonstrate the efforts of the government to “curtail disclosure,” while at the same time acknowledging two instances of opening up previously classified information to the public. In conclusion, the report suggests that the government is slowly becoming less open and that the general public is unaware of this change.<sup>37</sup>

In addition to the Archive’s report, the Reporters Committee for Freedom of the Press, in “Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public’s Right to Know,” published in September 2003, reiterates the concern that the U.S. government is becoming less open. The report discusses the lack of information available about the more than 1,000 non-U.S. citizens who have been detained in connection with the September 11 terrorist attacks, many on immigration charges.<sup>38</sup> Human Rights Watch, Amnesty International, and Human Rights First have also documented government restrictions on information about the detention of suspects in the September 11 attacks. The names and locations of most of these detainees have not been made available to the public, closed immigration hearings have been held, and detainees’ lawyers have complained about a lack of transparency in the process and an inability to get information about their clients’ status.

The government justifies these measures as necessary for national security, claiming that releasing the names of the detainees would compromise the investigation of the World Trade Center attacks. Heather Mac Donald, a fellow at the Manhattan Institute, supports the government’s secrecy surrounding the detainees. Mac Donald argues that keeping the names of the captives and their status from the public is necessary in order not to alert al Qaeda to the capture of its members and therefore interfere with ongoing terrorism investigations. But Human Rights Watch contends that, because the detainees have been allowed outside communications, opening up information to the public would not pose an increased risk. In response to the holding of closed immigration hearings, Human Rights Watch agrees that the risk of revealing sensitive information might require part or all of certain cases to be closed to the public, but does not believe the risk justifies that all cases be systematically conducted in secret.<sup>39</sup>

The government’s restrictions on information about these detainees has been heard by various levels of the court system. In August 2002, a U.S. District Court required the DOJ to release the detainees’ names and the names of their attorneys unless it could prove that there was a legitimate reason not to. The court granted that the DOJ was lawful in withholding other information about the detentions. In June 2003, a U.S. Court of Appeals disagreed, ruling that the DOJ could withhold the names of the detainees according to an exemption to FOIA that allows for information to be withheld from the public if it may compromise an investigation. The Supreme Court refused to hear a further appeal. The Inter-American Commission on Human

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<sup>37</sup> See the National Security Archive, “The Ashcroft Memo: ‘Drastic’ Change or ‘More Thunder Than Lightning’?” at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/>.

<sup>38</sup> See the Reporters Committee for Freedom of the Press, “Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public’s Right to Know,” 4th ed., September 2003 <http://www.rcfp.org/homefrontconfidential/>.

<sup>39</sup> See Heather Mac Donald, “Bum ‘Rights’ Rap,” *New York Post*, 5/2/02 at [http://www.manhattan-institute.org/html/\\_nypost-bum\\_rights.htm](http://www.manhattan-institute.org/html/_nypost-bum_rights.htm) and Human Rights Watch, “Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees,” August 2002 at <http://www.hrw.org/reports/2002/us911/USA0802.pdf>.

Rights (IACHR) cited this case as a judicial action limiting free expression in its annual assessment of the current state of freedom of expression in the Americas.<sup>40</sup>

### **Protection of minors**

Legislation to protect the privacy of children exists. Most recently, Congress passed the Children's Online Privacy Protection Act of 1998, which required the Federal Trade Commission to enact and enforce regulations concerning children's online privacy. The primary goal of this legislation is to give parents control over the information collected from their children (under the age of 13) over the Internet.<sup>41</sup>

## **4. The Use of New Information and Communications Technologies to Facilitate Access to Public Information**

The rise of the Internet as a widely-used means of communication has created new opportunities for governments to make information available to the public. The passage of E-FOIA in 1996 required federal agencies to provide public information on their Web sites. Still, as this section shows, a general consensus has not yet been reached on what kinds of public records should be made accessible over the Internet, particularly in relation to the courts.

The 1996 E-FOIA Amendments mandated federal agencies to establish online reading rooms with access to records and information. These amendments also require that an annual FOIA report be published by all federal agencies, and that these reports be available via a single point of entry on the Web. A General Accounting Office report in March 2001 determined that all agencies have basically complied with E-FOIA.<sup>42</sup> Even so, the GAO identified the following shortfalls: incomplete postings of agency documents, low quality of data, and time lags for processing requests.<sup>43</sup> The Department of Justice's FOIA Web page currently hosts links to each department's reports from 1998 to 2002.<sup>44</sup>

A debate continues over whether or not to allow electronic access to court records. Journalists are particularly interested in securing easier access to such documents, but many groups worry about the risks to privacy that electronic access might pose. The Reporters Committee for Freedom of the Press advocates a policy that will allow for electronic access to court records while protecting sensitive information. CSOs such as the Justice Management Institute and the National Center for State Courts worked with court administrators, state judges, and others to develop recommendations for how to make court records available electronically, balancing increased access with privacy protection. The proposals, published in October 2002, call for access rules to remain the same for paper and electronic court records while recognizing that, in some cases, electronic records that allow the public to access information from outside the courthouse may be inappropriate, even if public access to paper records at the courthouse is

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<sup>40</sup> See Ed Bridis "Court Backs Secrecy for 9/11 Detainees," *Associated Press*, 6/17/03 at <http://foi.missouri.edu/secretcourts/courtbssecrecy.html> and Chapter II, number 127 of the IACHR's "Annual Report of the Special Rapporteur for Freedom of Expression 2002" at <http://www.cidh.oas.org/Relatoria/English/AnnualReports/AR02/TableofContent2002.htm>.

<sup>41</sup> For more information on the Children's Online Privacy Protection Act, see [http://www.ftc.gov/privacy/privacyinitiatives/childrens\\_educ.html](http://www.ftc.gov/privacy/privacyinitiatives/childrens_educ.html).

<sup>42</sup> See United States General Accounting Office, "Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments," March 2001: GAO-01-378 at <http://www.gao.gov/new.items/d01378.pdf>.

<sup>43</sup> The OIP's synopsis of the GAO report and its significance for FOIA management in federal agencies is available at <http://www.usdoj.gov/oip/foiapost/2001foiapost3.htm>. The GAO's report, entitled "Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments," is available at <http://www.gao.gov/new.items/d01378.pdf>.

<sup>44</sup> Federal agencies' FOIA reports from 1998 to 2002 can be found at [http://www.usdoj.gov/04foia/04\\_6.html](http://www.usdoj.gov/04foia/04_6.html).

allowed.<sup>45</sup> States and local courts have begun to develop and implement their own electronic access procedures for court records, although quality and availability vary widely.<sup>46</sup> At the federal level, U.S. Supreme Court cases are available online, and the Public Access to Court Electronic Records (PACER), a federal service, provides access to federal court calendars and case summaries to paid subscribers.

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<sup>45</sup> The report on the results of the advisory committee's work, "Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts," can be found at <http://www.courtaccess.org/modelpolicy/18Oct2002FinalReport.pdf>.

<sup>46</sup> General information on electronic access to court records can be found on the Reporters Committee for Freedom of the Press Web site at <http://www.rcfp.org/elecaccess/>. For information on PACER, see its Web site at <http://pacer.psc.uscourts.gov/>.

## II. FREEDOM OF EXPRESSION

### Commitments under the Quebec Plan of Action

In the Quebec Plan of Action, the governments pledged to “ensure that national legislation relating to freedom of expression is applied equitably to all, respecting freedom of expression and access to information of all citizens, and that journalists and opinion leaders are free to investigate and publish without fear of reprisals, harassment or retaliatory actions, including the misuse of anti-defamation laws.”

The governments also pledged to “continue to support the work of the inter-American human rights system in the area of freedom of expression through the Special Rapporteur for Freedom of Expression of the IACHR, as well as proceed with the dissemination of comparative jurisprudence, and seek to ensure that national legislation on freedom of expression is consistent with international legal obligations.”

### Dimensions of the Issue

For the purpose of following up and reporting on freedom of opinion and expression, the issue has been divided into the following dimensions: 1. Citizens' rights; 2. Communications media; 3. Artistic expression; 4. Non-media citizen expression; 5. New technologies; 6. Objective opportunities for citizens to express themselves freely; 7. Tendency of the population to express itself freely.

#### 1. Citizens' Rights

As this section will show, the United States has a long history of respect for free expression dating back to the signing of the Constitution. Court cases over the years have further clarified the parameters of legally-protected forms of expression, addressing obscenity, the regulation of protests, and the display of symbols. Still, the often murky issue of protected expression continues to make its way to the courts.

#### National legislation

The right to free expression is prescribed in the First Amendment to the U.S. Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Key events in the history of the application of the First Amendment include the 1868 ratification of the Fourteenth Amendment, which guarantees the right to equal treatment under the law for all citizens in every state. This amendment was important for extending the jurisdiction of the federal government and the Constitution to the states at a time when the relative powers of the federal and state governments were in flux. The 1925 Supreme Court case *Gitlow v. New York* clarified that the Fourteenth Amendment essentially encapsulates most of the Bill of Rights and applies those rights to the states. This “doctrine of incorporation” extended the constitutional protection of free expression to all states.

From the ratification of the First Amendment in 1791 through today, the meaning and exercise of free expression have continued to be debated. Court decisions have specified the following applications of the First Amendment:

### Limitations on speech content

In general, no speech or form of expression can be restricted because of its subject or message, although the Supreme Court has upheld a number of limitations:

- **Obscenity**—A debate over the legality of obscene language and images has led to a definition of “legally obscene” material, which is not protected. Defined in *Miller v. California* in 1973, legally obscene material must satisfy three criteria: the “average” person must consider it “[appealing] to the prurient interest”; it must portray sexual conduct in a “patently offensive way”; and it must not have “serious literary, artistic, political, or scientific value.”
- **Clear and present danger**—*Schenck v. United States* in 1919 established the “clear and present danger” test to determine the extent of protection for free speech, allowing for speech to be restricted only when it would directly cause a threat to public security. In 1969, in *Brandenburg v. Ohio*, the Supreme Court ruled that speech can only be suppressed if it is intended and likely to produce “imminent lawless action.”
- **Defamatory statements**—To protect public officials and private individuals from false statements that harm one’s reputation, a series of court cases have hammered out the extent of constitutional protection. Libel (written defamation) and slander (spoken defamation) laws were passed early in U.S. history, but court decisions over the years have clarified their application. In 1964, the Supreme Court ruled in *New York Times v. Sullivan* that a public official must prove that a defamatory statement was made with “actual malice”—knowledge of falsity or a lack of concern for the truth. In the 1974 decision in *Gertz v. Robert Welch Inc.*, the court decided that a private individual does not have to prove actual malice in defamation suits but must demonstrate negligence on the part of the defendant. Specific defamation laws vary from state to state.<sup>47</sup>

### Prohibition of censorship

No form of expression can be censored before it enters the marketplace of ideas. In *Near v. State of Minnesota* in 1931, the Supreme Court established the precedent that censorship before publication cannot be justified except in “exceptional cases” in which national security is at risk or obscenity is involved.<sup>48</sup> Incidences of government censorship are infrequent. In cases of the government censoring itself, such as when it will not release classified or other secret material, the government bears the burden of proof to justify such restraint.

### Freedom of symbolic speech

Freedom of speech has come to include symbolic forms of expression, such as wearing armbands to symbolize opposition to war and burning flags, although courts continue to debate the definition of symbolic speech as cases arise. In general, the tendency of the courts has been toward an expansive definition of (protected) symbolic expression, including what may be considered offensive or disagreeable symbolic messages.

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<sup>47</sup> See the First Amendment Center’s “Libel and Defamation: Overview” by David L. Hudson, Jr. at [http://www.firstamendmentcenter.org/Press/topic.aspx?topic=libel\\_defamation](http://www.firstamendmentcenter.org/Press/topic.aspx?topic=libel_defamation).

<sup>48</sup> See Douglas Lee, “Prior Restraint: Overview,” on the First Amendment Center Web site at [http://www.firstamendmentcenter.org/press/topic.aspx?topic=prior\\_restraint](http://www.firstamendmentcenter.org/press/topic.aspx?topic=prior_restraint).

### **Time and place restrictions**

The government may regulate free expression through “time, place, and manner” restrictions, as long as they are content neutral and do not preclude the message being expressed in another way. Such restrictions generally take the form of rules governing public spaces, such as roads and sidewalks, so as not to disrupt normal affairs. Many localities require that permits be obtained in advance of an activity.<sup>49</sup> See 4. Non-Media Citizen Expression for information on the right to protest.

### **Freedom of belief and association**

The Civil Rights Act of 1964 established that personal beliefs and associations must not be the basis of discriminatory actions by any government body (including public schools), private agency receiving government funding, or public establishment related to interstate commerce (such as restaurants, hotels, and entertainment venues). The principle of separation of church and state is rooted in the First Amendment, although debates continue over controversial dimensions of this issue, such as when government resources commingle with private spending by religious organizations or when religious expression overlaps with public space. Rules, fines, or other forceful mechanisms that compel citizens to profess beliefs that they do not hold are unlawful. For example, employees may not be penalized for refusing to join a labor union.

### **Consequences of violations**

Penalties for failure to respect legal restrictions on free expression are determined on a case-by-case basis in response to the harm caused and vary widely among states. Because such cases fall under the jurisdiction of civil law rather than criminal law, prison is unlikely. Fines and confiscations of material that has entered the marketplace are the most common penalties, while preemptive confiscations (prior restraint) almost never occur.

### **Mechanisms for lodging complaints**

There are no official mechanisms outside of the courts for lodging complaints of violations of the right to free expression. Media and advocacy groups provide an informal outlet for cases in which free expression and other rights are violated and often assist individuals in the process of seeking legal recourse.

### **International legal obligations related to freedom of expression**

The United States has signed various international treaties reaffirming its commitment to the principle of free expression. Examples of such treaties include the Universal Declaration of Human Rights in 1948 and, more recently, the Inter-American Declaration of Principles of Freedom of Expression in 2000.

Individuals and institutions may take cases of violations of freedom of expression to the Inter-American Court of Human Rights, although the United States is not legally bound by the decisions made therein. The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights is an independent body of the Organization of American States that promotes and protects human rights. IACHR expressed concern about the following freedom of expression-related incidents that occurred in the United States in 2002:

- January 2002—A correspondent for a Mexican daily newspaper was ordered by a U.S. court to submit materials she used for a news article about a Mexican family accused of drug trafficking. The case was still pending at the time the Special Rapporteur report was prepared.

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<sup>49</sup> See the National Coalition Against Censorship for more information on time, place, and manner restrictions at <http://www.ncac.org/artlaw/top-time.html>.



- July 2002—The publisher and the editor of *The Kansas City New Observer* were convicted of criminal defamation because of false statements made about a city mayor and her husband. This is the first case in 30 years of a news agency in the United States being convicted of libel. It has been appealed.<sup>50</sup>
- July 2002—Guards and a federal agent detained a reporter from the *National Review* after a State Department briefing and asked about the reporter's sources of information. The reporter denied having classified information and was released.
- August 2002—A challenge to the Creppy Memorandum, which limits public and media access to certain immigration cases when national security interests are at stake. Conflicting rulings by two circuit courts over the memorandum's constitutionality may send the case to the Supreme Court.<sup>51</sup>

### Equal enforcement of the law/anti-discrimination legislation

The extent of protection provided by the First Amendment is debated in the courts as issues of interpretation arise. Since freedom of expression is a constitutional issue, major cases often reach the Supreme Court, which has final jurisdiction. While a general environment of respect for free expression exists in the United States, complicated cases challenge the implementation of this basic right. In recent years, freedom of expression cases have addressed:

- Limits on protests and demonstrations;
- Censorship;
- Media ownership;
- Campaign financing;
- Regulation of the Internet and electronic communications;
- Equal opportunity employment regulations for private organizations;
- Religious expression in public schools.<sup>52</sup>

Two recent cases that fall under the category of freedom of expression include the following:

- *Boy Scouts of America v. Dale (2000)*—The Boy Scouts of America removed a scoutmaster (Dale) from his position after discovering that he was homosexual and a gay-rights activist. The Supreme Court ruled in favor of the Boy Scouts, arguing that when an organization advocates public or private viewpoints, it is a violation of that group's First Amendment rights to require it to accept a member it does not want. According to the Supreme Court, the Boy Scouts promotes a value system that is against homosexuality. Because Dale was an outspoken advocate of gay rights, the court found that his membership in Boy Scouts would hinder the organization's ability to promote its values.<sup>53</sup>

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<sup>50</sup> See the Center for Individual Freedom, "Extra! Extra! Kansas City Newspaper Convicted of Criminal Defamation," 8/1/02 at [http://www.cif.org/hdocs/legal\\_issues/legal\\_updates/first\\_amendment\\_cases/criminal\\_defamation.htm](http://www.cif.org/hdocs/legal_issues/legal_updates/first_amendment_cases/criminal_defamation.htm).

<sup>51</sup> See the Report of the Special Rapporteur for Freedom of Expression 2002, "Assessment of the Current State of Freedom of Expression in the Hemisphere," Chapter II, item numbers 125, 126, 128, 129, 130 at <http://www.cidh.org/relatoria/english/annualreports/ar02/chapterii2002-1.htm>.

<sup>52</sup> See [http://www.firstamendmentcenter.org/about.aspx?item=First\\_Amendment\\_timeline](http://www.firstamendmentcenter.org/about.aspx?item=First_Amendment_timeline) for a detailed timeline of related cases and events in First Amendment law.

<sup>53</sup> Summary based on syllabus provided by the Legal Information Institute, available at <http://supct.law.cornell.edu/supct/html/99-699.ZS.html>.

- *Ashcroft v. Free Speech Coalition (2002)*—The Child Pornography Prevention Act of 1996 (CPPA) bans any image that “is, or appears to be, of a minor engaging in sexually explicit conduct” [ § 2256(8)(B)] or “conveys the impression” that it presents “a minor engaging in sexually explicit conduct” [ § 2256(8)(D)]. CPPA, therefore, effectively bans sexually explicit images of children that are created by means other than using minors. The Free Speech Coalition claimed that CPPA uses unclear language and that it infringes on images that are protected by the First Amendment. The Supreme Court ruled in favor of the Free Speech Coalition, holding that the law bans material that is neither obscene, nor created by exploiting actual children.<sup>54</sup>

The right to free expression is supported not only by government legislation, but also by civil society organizations that monitor violations of the right to free expression. These CSOs increase the chances that such cases are brought to the attention of the public and the government by engaging in advocacy and education and by providing legal defense for individuals and groups whose rights have been breached. Some of the many organizations working to protect free expression include the American Civil Liberties Union, the Freedom Forum, the First Amendment Center, Project Censored, the Freedom of Information Center, the Digital Freedom Network, Human Rights Watch, the Reporters Committee for Freedom of the Press, and the Internet Free Expression Alliance.<sup>55</sup>

## **2. Communications Media**

What do the media look like in the United States? This section provides an overview of media in the United States—the landscape, the regulations governing ownership, and the holdings of major media conglomerates. Also addressed is the ability of journalists to work without fear of reprisal, another important component of free expression.

### **Ownership distribution of the public communications media**

In the United States, there are:

- 1,468 daily newspapers (85 percent have a circulation of fewer than 50,000 copies);
- 6,699 weekly newspapers;
- Over 2,300 newspapers that provide online services<sup>56</sup>;
- 1,340 commercial TV stations.<sup>57</sup>

The Federal Communications Commission (FCC) regulates the media and communications industry. The FCC works to promote competition, diverse ideas, and the representation of women and minorities in the media. The FCC is also guided by the principle of localism, or broadcast outlets that “serve the needs and interests of their local communities.”<sup>58</sup> For this reason, there are no national television stations, although there are seven national networks that link local stations with programming. FCC media ownership regulations aim to prevent large agglomerations from monopolizing nonsubscriber media sources. In 1975, the FCC prohibited

<sup>54</sup> Summary based on syllabus provided by the Legal Information Institute, available at <http://supct.law.cornell.edu/supct/html/00-795.ZS.html>.

<sup>55</sup> A complete list of civil society organizations involved in defending free expression can be found at [http://www.firstamendmentcenter.org/about.aspx?item=related\\_links](http://www.firstamendmentcenter.org/about.aspx?item=related_links).

<sup>56</sup> Based on figures for 2001 and 2002. For more information, see the Newspaper Association of America’s Web site at <http://www.naa.org>.

<sup>57</sup> See the FCC’s 6/2/03 press release, “FCC Sets Limits on Media Concentration,” at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf).

<sup>58</sup> See “FCC Sets Limits on Media Concentration” at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf).

cross ownership (when a company owns more than one kind of media source in the same community—for example, a newspaper and a radio station). Despite this interdiction, 17 instances of cross ownership were allowed in 2002.<sup>59</sup>

The 1996 Telecommunications Act deregulated cable service provision and removed imposed rate caps on cable subscription prices. In addition, the act increased the number of television stations that one company can own to correspond to a maximum of 35 percent of the population. The 1996 legislation also requires the FCC to review its media ownership rules every two years to ensure that regulations are in line with the public interest.<sup>60</sup> In June 2003, the FCC published what it calls the “most comprehensive review of media ownership regulation in the agency’s history.”<sup>61</sup> Studies have spurred much debate over cross ownership, with many arguing that cross ownership is necessary for local providers to operate more cost-effectively and that it does not hamper the diversity of view points or the autonomous control of content.<sup>62</sup>

Based on the findings from its study, the FCC changed its media ownership regulations in June 2003. The new regulations for television station ownership allow companies to own television stations that serve up to 45 percent of the national audience, an increase from the preexisting 35 percent limit. The regulations also permit companies to own multiple stations in the same market as long as only one station is among the top four watched stations in that market.<sup>63</sup> Despite the FCC’s regulations, media ownership in the United States is concentrated. For example, ten companies own over 51 percent of the nation’s weekday newspaper circulation.<sup>64</sup> Still, according to Adam Thierer and Clyde Wayne Crews Jr., scholars at the Cato Institute, the media industry today is less concentrated and more diverse than it has ever been. Imposing restrictions on the holdings of media companies, they say, serves only to reduce competition and, ultimately, the number of options available to the media consumer.<sup>65</sup> James Gattuso of the Heritage Foundation also claims that large media companies serve the interests of consumers because they can make more resources available for better quality programming. Furthermore, when one company owns multiple media outlets in the same market, program options can actually increase because each outlet can target distinct viewer groups instead of competing for the same market share.<sup>66</sup> The ownership of the three largest national television networks is illustrative of the holdings of media corporations in the United States:

- NBC—In 1986, the General Electric Corporation purchased RCA and NBC. In addition to the NBC TV Network, General Electric owns two other television networks, 14

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<sup>59</sup> As cited in “Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaigns,” by David Pritchard, September 2002: Media Ownership Working Group, FCC. These and other studies published by the FCC can be found on the FCC Web site at <http://www.fcc.gov/ownership/studies.html>.

<sup>60</sup> The text of the 1996 Telecommunications Act can be found on the FCC Web site at <http://www.fcc.gov/telecom.html>.

<sup>61</sup> See the FCC Web site at <http://www.fcc.gov/> for the report and related press releases.

<sup>62</sup> See, for example, information published by Presstime at <http://www.naa.org/presstime/> as well as the testimony of William Dean Singleton before the Senate Commerce Committee at <http://www.naa.org/about/pdf/SingletonsWrittenStatement.pdf>.

<sup>63</sup> See “FCC Sets Limits on Media Concentration,” 6/2/03 at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf).

<sup>64</sup> Based on figures for 2000 and 2001. For more information, see the Newspaper Association of America’s Web site at <http://www.naa.org/>.

<sup>65</sup> See Adam Thierer and Clyde Wayne Crews Jr., “What Media Monopolies?” 6/30/03 at <http://www.cato.org/tech/tk/030730-tk.html>.

<sup>66</sup> See James Gattuso, “The Myth of Media Concentration: Why the FCC’s Media Ownership Rules Are Unnecessary” 5/29/03 at <http://www.heritage.org/Research/InternetandTechnology/wm284.cfm>.

affiliated television stations, and three cable stations.<sup>67</sup> In late 2003, General Electric began negotiations with Vivendi Universal Entertainment to form NBC Universal, a media conglomerate controlling the NBC TV network and station groups, Universal Pictures, NBC and Universal production studios, cable networks (USA Network, Sci-Fi Channel, CNBC, MSNBC, Bravo, Trio), and Telemundo.<sup>68</sup>

- ABC—The Walt Disney Company took over Capital Cities/ABC, Inc. in 1996 and now owns ten broadcast television stations. Some of Disney's other holdings include eight cable channels (and seven more as co-owner), over 50 radio stations, 12 television and movie production and distribution businesses, and five music labels.<sup>69</sup>
- CBS—In 1999, Viacom merged with CBS and its holdings now include two television networks, three cable channels, 39 television stations, three television production companies, 185 radio stations, and movie and television production and distribution companies.<sup>70</sup>

The Project for Excellence in Journalism, a research organization affiliated with Columbia University, investigated the impact of media ownership on the quality of local television news.<sup>71</sup> The Project surveyed 172 news programs over a five-year period beginning in 1998 and found that smaller station groups (as opposed to big companies), stations with cross ownership, and network affiliated stations (rather than network owned) are all more likely to have higher quality newscasts than stations with other ownership configurations. But, according to the study, local ownership does not necessarily result in high quality newscasts. While some of its findings were mixed, the Project concluded that, in general, highly concentrated ownership negatively impacts the quality of local news.<sup>72</sup>

Complementing the growth in media outlets over the past 40 years has been a more recent expansion of the number of media sources serving ethnic communities. Ethnic and language groups have access to both local and more mainstream media. Black Entertainment Television, for example, is a cable television channel that targets African Americans, and Univision and Telemundo are Spanish-language cable TV channels. Studies conducted in New York City and California reveal substantial numbers of ethnic media outlets in these areas. In California, ethnic media reach 84 percent the state's Asian-American, African-American, and Hispanic-American populations. The Independent Press Association in New York publishes a guide to ethnic media in that city, listing close to 200 magazines and newspapers published in 36 different languages.<sup>73</sup>

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<sup>67</sup> More information is available on NBC's Web site at <http://www.nbc.com>.

<sup>68</sup> See General Electric's 10/8/03 press release, "General Electric and Vivendi Universal Sign Agreement To Merge NBC and Vivendi Universal Entertainment," at <http://www.ge.com/en/company/news/press/nbc10032003.htm>.

<sup>69</sup> See the Columbia Journalism Review's "Who Owns What" at <http://www.cjr.org/tools/owners/>.

<sup>70</sup> For more information, see Viacom's Web site at <http://www.viacom.com>.

<sup>71</sup> The quality of a newscast was rated along multiple dimensions. For example, a high quality news show was considered to consist of locally-focused stories that address the entire community and are important, informative, balanced and accurate. In addition, high quality reporting should be authoritative, innovative, and courageous.

<sup>72</sup> See the Project for Excellence in Journalism's findings in "Does Ownership Matter in Local Television News? A Five-Year Study of Ownership and Quality," available at <http://www.journalism.org/resources/research/reports/ownership/default.asp>.

<sup>73</sup> For more information, see Hua Hsu, "Ethnic Media Grows Up" *ColorLines* 5 (fall 2002) at [http://www.arc.org/C\\_Lines/CLArchive/story5\\_3\\_02.html](http://www.arc.org/C_Lines/CLArchive/story5_3_02.html); see the 2002 New California Media study at [http://news.ncmonline.com/news/view\\_article.html?article\\_id=796](http://news.ncmonline.com/news/view_article.html?article_id=796); the New York Independent Press Association publishes "Many Voices, One City," a guide to ethnic media in New York City, available at <http://www.indypressny.org/epexplosion.html>.

Still, the numbers of minorities working in television and radio news is low in comparison to the percentage of minorities in the country, almost one-third of the population in the 2000 census. According to a survey conducted by the Radio-Television News Directors Association and Foundation and Ball State University, minorities make up 18 percent of television news staff and just over six percent of radio news staff. The survey also found that only six percent of television news directors and five percent of radio news directors are minorities.<sup>74</sup>

### **Trust in the media**

Various polls and surveys have concluded that public confidence in news sources has been declining over the past 20 years. In 2002, the Pew Research Center for the People and the Press surveyed adults in the United States and found that 59 percent consider the media to be politically biased; 67 percent believe news organizations try to cover up their mistakes; and 58 percent think the news media do not help society solve its problems.<sup>75</sup> Only 35 percent think that news reporters usually have the facts right.<sup>76</sup> In addition, the American Journalism Review reports a trend in the media toward decreased coverage of the work of federal agencies and departments in Washington, which has led to a depressed sense of accountability for public servants.<sup>77</sup>

### **Free expression among journalists**

Overall, journalists in the United States can work without severe threats, control, or fear of being detained. Station owners and media sponsors (funders and commercial advertisers) do pressure media outlets and journalists about content and, although such pressures are common, they rarely become egregious violations of individual rights. Information gathered from the expert informants and a review of related CSO Web sites reveal additional challenges to journalists. Some of these include:

- FCC censures of indecent content;
- Warnings by President Bush to journalists regarding information sensitive to national security;
- Government censorship of military personnel and military information;
- Government restrictions on the publication of scientific information related to national security;
- Censorship and editorial control on university campuses.

In July 2001, Vanessa Leggett was jailed for 168 days for refusing to release information on her sources. Leggett was in Texas, which does not have a reporter's privilege law and, according to the Department of Justice, the agency did not intervene on behalf of Leggett because, at the time, she was writing a book and was not technically employed as a journalist.<sup>78</sup>

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<sup>74</sup> See the findings from the Radio-Television News Directors Association and Foundation and Ball State University 2003 study, "Women and Minorities: One Step Forward and Two Steps Back," at <http://www.rtnda.org/diversity/Diversity2003.pdf>.

<sup>75</sup> See "News Media's Improved Image Proves Short-Lived: The Sagging Stock Market's Big Audience," 8/4/02 at <http://people-press.org/reports/display.php3?ReportID=159> and the Pew Research Center for the People and the Press Web site at <http://people-press.org/>.

<sup>76</sup> See Journalism.org's "The State of the News Media 2004: An Annual Report on American Journalism" at <http://www.stateofthenewsmedia.org/index.asp>.

<sup>77</sup> Notra Trulock, "Just the Facts, Please," 8/16/02 at <http://www.newsmax.com/commentarchive.shtml?a=2002/8/16/135638>.

<sup>78</sup> More information on this case is available at the following Web sites: <http://www.freedomforum.org/templates/document.asp?documentID=14670> and <http://www.usatoday.com/news/washington/july01/2001-07-30-reporter.htm>.

The debate over the “reporter’s privilege,” which protects journalists from forced disclosure of their sources or from being required to testify, continues to varying degrees throughout the country. The Reporters Committee for Freedom of the Press offers a compendium of resources for journalists and lawyers involved in related cases. Although First Amendment protection for a reporter’s privilege was denied in a 1972 Supreme Court case, a variety of state court cases have upheld some form of qualified constitutional protection, making exception for cases in which such information is evidential. In addition to case law, the RCFP reports that 31 states and the District of Columbia have “shield laws” that protect journalists who do not want to reveal their sources but that most of these laws have limits on who qualifies as a journalist and what materials are covered.<sup>79</sup>

Issues have arisen regarding freedom of the press and speech since September 11, 2001, and throughout the military engagements in Afghanistan and Iraq. This period of conflict has brought unprecedented access for journalists to the battlefield as well as a public controversy over government secrecy and military intelligence. A 2003 public opinion survey found an increase in the percentage of people who believe that the press has too much freedom and that restrictions on freedoms of the press and speech are justified during periods of war.<sup>80</sup>

### **3. Artistic Expression**

Recognizing that art is an important form of cultural, and sometimes political, expression, this section outlines federal support for the arts in the United States.

#### **Laws or regulations promoting artistic creation**

Federal support for the arts and humanities began in the 1950s but was ad hoc and sporadic until the mid-1960s, when government funding for the arts became increasingly institutionalized. The National Arts and Cultural Development Act of 1964 established the advisory National Council on the Arts to recommend ways to increase art appreciation and the country’s cultural heritage. The National Foundation on the Arts and the Humanities Act of 1965 created the National Endowment for the Arts (NEA), an independent federal agency whose mission is to support the arts, including arts education and access to art for all Americans. In 1995, the federal government spent \$6 per person on the arts<sup>81</sup>, with much of that money going through the NEA. Currently the largest funder of art and cultural activity in the United States, the NEA gave almost a million dollars in grants to individuals, organizations, state and regional arts agencies, and other arts initiatives in 2002. The NEA’s “Challenge America” program, which seeks to make the arts more available to communities and individuals across the country, received \$17 million from Congress in fiscal year 2002.

In addition to the National Endowment for the Arts, the federal government also supports the following art and cultural institutions:

- The Smithsonian Institution (consisting of 16 museums);
- The National Gallery of Art;
- The John F. Kennedy Center for the Performing Arts;
- The Institute of Museum and Library Services;
- The U.S. Commission of Fine Arts;

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<sup>79</sup> “The Reporter’s Privilege Compendium,” produced by the Reporters Committee for Freedom of the Press is available at <http://www.rcfp.org/privilege/index.html>.

<sup>80</sup> See the Freedom Forum’s “State of the First Amendment 2003” at [http://www.firstamendmentcenter.org/about.aspx?item=state\\_of\\_First\\_Amendment\\_2003](http://www.firstamendmentcenter.org/about.aspx?item=state_of_First_Amendment_2003).

<sup>81</sup> See the NEA’s “International Data on Government Spending on the Arts” at <http://www.arts.gov/pub/Notes/74.pdf>.

- State and local art agencies.

A variety of private organizations, museums, and foundations also provide funding for the arts. In 2001, at just over \$2 billion, the arts ranked fourth out of total foundation money allocated (behind human services, health, and education).<sup>82</sup>

The arts landscape in the United States includes the following:

- 56 state and jurisdictional art agencies;
- Over 4000 local art agencies;
- 340 nonprofit theatres;
- 1,800 symphony orchestras;
- 113 opera companies.<sup>83</sup>

#### **4. Non-Media Citizen Expression**

What opportunities exist for citizens to communicate with the government outside of the media? Public protest is one way citizens can express their opinions to government (and to nongovernmental entities). Other mechanisms include citizen and CSO engagement at the local, state, and federal government levels (discussed in Chapters IV and V).

##### **The right to protest**

Legally, the right to freely express beliefs and opinions is well established in the United States. In practice, the population's right to demonstrate and protest is respected with few restrictions imposed. The following laws and regulations govern the right to protest:

- Permits are often required for events taking place in public space depending on the size and type of activity. The government should grant or deny permit requests within a reasonable time frame and cannot deny permits because of the content of the event or of fear of reactions to the activity;
- The government may manage the logistics of events taking place in public space;
- Public spaces include residential zones, but "focused picketing" targeting a single residence may be prohibited;
- Police have a duty to protect protesters and should not stop a demonstration if a hostile crowd forms;
- Protesters should not incite riots or violent actions to overthrow the government;
- Signs and banners may be displayed as long as they are not safety hazards;
- Cursing is protected speech, but obscenity, as defined legally, is prohibited in public;
- Flag burning is protected if it does not threaten the safety of others and if the flag is the property of the protester;
- Freedom of expression must be protected within public schools and universities, therefore the rights of students to protest must not be denied without adequate justification;
- In the exercise of free speech, including public demonstration, individuals have the right to remain anonymous, unless placed under arrest.<sup>84</sup>

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<sup>82</sup> See highlights from the Foundation Center's "Foundation Giving Trends" at [http://fdncenter.org/research/trends\\_analysis/pdf/03fgthl.pdf](http://fdncenter.org/research/trends_analysis/pdf/03fgthl.pdf).

<sup>83</sup> See the NEA's Web site at <http://www.arts.endow.gov/>, including its 2002 Annual Report at <http://www.arts.gov/about/02Annual/annual02.pdf> and "The National Endowment for the Arts, 1965-2000: A Brief Chronology of Federal Support for the Arts" at <http://www.arts.gov/pub/NEAChronWeb.pdf>.

<sup>84</sup> For more information, see the American Civil Liberties Union of Ohio's "The Right to Protest: Some Frequently Asked Questions Answered" at [http://www.acluohio.org/publications/right\\_to\\_protest.pdf](http://www.acluohio.org/publications/right_to_protest.pdf).

**Laws or regulations providing public access to political, legislative, and judicial authorities**  
(See Chapter IV. Local Government and Decentralization and Chapter V. Civil Society and Participation)

## **5. New Technologies**

Access to the World Wide Web and electronic communications has greatly expanded the opportunities for free expression around the world. Useful for publishing material, communicating ideas, conducting debates, and organizing groups, the Internet and related technologies touch upon all aspects of free expression.

### **Freedom of expression through access to the Internet**

In the United States, over 50 percent of the population uses the Internet. A relatively new phenomenon, the Internet is difficult to control or regulate because of its reach. Attempts to restrict expression on the Internet have taken many forms around the world and in the United States, and proponents of free expression are vigilant monitors of these efforts and vocal about their ramifications. Human Rights Watch, for example, publishes an annual global survey of free expression on the Internet. In 2000, the survey highlighted three mechanisms for controlling Internet expression: filtering and blocking, monitoring and surveillance, and encryption.<sup>85</sup> The American Civil Liberties Union has been a leader in contesting censorship legislation in court, and a number of other CSOs, including Human Rights Watch, the Electronic Information Privacy Center, and the Electronic Freedom Frontier, are also working on the issue of free expression and the Internet.

The debate over censorship and the filtering of Web sites has been going on in the United States since as early as 1996 (if not before) when the Telecommunications Act included the Communications Decency Act (CDA). The CDA was designed to protect children from harmful material by criminalizing the transmission over the Internet of "indecent" content accessible to minors. In the 1997 case *Reno v. ACLU*, the Supreme Court declared the CDA unconstitutional.<sup>86</sup>

The Child Online Protection Act of 1998 (COPA) went into effect in April 2000. COPA is intended to protect the privacy of children under the age of 13 from deceptive or exploitative uses of information collected from them by increasing parental involvement in children's use of the Internet and requiring parental permission to access Web sites that may request personal information from a child. The law also requires Web site operators to provide clear information about the content of the site, establish mechanisms for parental authorization if necessary, and guarantee full privacy protection for child users.<sup>87</sup> In March 2000 in *Ashcroft v. ACLU* (formerly *ACLU v. Reno II*), the Third Circuit Court of Appeals ruled that COPA was unconstitutional. The decision states that the law violated the First Amendment by restricting the free expression rights of adults.<sup>88</sup>

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<sup>85</sup> See Human Rights Watch, "Freedom of Expression on the Internet" at <http://www.hrw.org/wr2k/Issues-04.htm>.

<sup>86</sup> "Ashcroft v. ACLU: The Legal Challenge to the Child Online Protection Act," Electronic Privacy Information Center, [http://www.epic.org/free\\_speech/copa/](http://www.epic.org/free_speech/copa/).

<sup>87</sup> Vivian Polak and Peggy Miller, "Children's Online Privacy Protection Act," *the Internet Law Journal*, 8/1/01, <http://www.keytlaw.com/Articles/coppa.htm>.

<sup>88</sup> "Ashcroft v. ACLU: The Legal Challenge to the Child Online Protection Act," Electronic Privacy Information Center, [http://www.epic.org/free\\_speech/copa/](http://www.epic.org/free_speech/copa/).



## **6. Objective Opportunities for Citizens to Express Themselves Freely**

The practice of free expression depends on a citizen's capacities and opportunities for such expression; therefore, discrepancies in such factors may limit the right to free expression in practice. In the United States:

- Adult literacy is 97 percent;<sup>89</sup>
- Net primary school enrollment is 95 percent of school-aged children;<sup>90</sup>
- There are 667 telephone mainlines and 451 cellular subscribers per 1,000 people;
- 50 percent of the population uses the Internet<sup>91</sup>;
- There are 7.1 million high-speed Internet lines, 5.2 million of which reach residences and small businesses;<sup>92</sup>
- 98 percent of schools in the United States have Internet access, an increase in absolute numbers and distribution since 1994.<sup>93</sup>

FCC data show that while access to high-speed technology is concentrated in urban areas, it has been spreading to rural areas.

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<sup>89</sup> Percentage of adults over the age of 15 as of 2003, according to the CIA World Factbook. Go to <http://www.bartleby.com/151/us.html>.

<sup>90</sup> These statistics are for 2000 and 2001. See the United Nations Human Development Report 2003 at <http://www.undp.org/hdr2003/>.

<sup>91</sup> Ibid.

<sup>92</sup> See FCC data for 2001 at [http://www.fcc.gov/Bureaus/Common\\_Carrier/News\\_Releases/2001/nrcc0133.html](http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0133.html).

<sup>93</sup> See "Internet Access in U.S. Public Schools and Classrooms: 1994-2000" by the National Center for Education Statistics at <http://nces.ed.gov/pubs2001/InternetAccess/2.asp>.

### III. JUSTICE

#### Commitments under the Quebec Plan of Action

In the Quebec Plan of Action, the governments affirmed that “equal access to independent, impartial and timely justice is a cornerstone of democracy and economic and social development.” In recognition of this, they pledged to promote initiatives in the following areas:

**a) Access to justice.** “Support public and private initiatives and programs to educate people about their rights relating to access to justice, and promote measures that ensure prompt, equal and universal access to justice.”

and

“Promote cooperation to exchange experiences in alternative dispute resolution mechanisms to expedite the administration of justice, including among indigenous peoples.”

**b) Independence of the judiciary.** “Encourage measures to strengthen the independence of the judiciary, including transparent judicial selection, secure tenure on the bench, appropriate standards of conduct and systems of accountability.”

#### Dimensions of the Issue

For the purpose of following up and reporting on justice, the issue has been divided into the following dimensions: 1. Access to justice; 2. Independence of the judiciary.

##### 1. Access to Justice

Both the Constitution and the Bill of Rights guarantee equal access to justice in the United States. Later court cases translated the principle of equal access into concrete entitlements. But equal treatment under the law encompasses more than just the laws on record. As this section outlines, many elements contribute to equal access to justice in practice, including access to legal information, knowledge of legal rights, freedom from discrimination by police and others, and the recognition of indigenous systems of justice.

##### **Laws that guarantee access to justice**

The Declaration of Independence includes the memorable line, “We hold these truths to be self-evident, that all men are created equal...” Equal treatment under the law and the independence of the judicial branch were guaranteed by the Constitution early in the nation’s history and have become cemented in U.S. political culture over time. Three amendments in the Bill of Rights protect the rights of the accused: the Fifth Amendment provides for due process; the Sixth Amendment calls for a speedy and public trial, impartial jury, and the right to counsel; and the Eighth Amendment restricts excessive bail, fines, and cruel and unusual punishment. Still, equal treatment under the law has not always been granted to all in practice, although the U.S. government has arguably worked out major deficiencies in the application of the law through additional amendments to the Constitution, legislation, and judicial decisions.

Later amendments further codified equal treatment. In 1865, the Thirteenth Amendment abolished slavery. In 1868, the ratification of the Fourteenth Amendment broadened equal protection by limiting the power of the states for the first time, granting the federal government the authority to oversee state law: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The interpretation of what is known as the Equal Protection Clause of the Fourteenth Amendment evolved over time. In 1894, the Supreme Court decision in *Plessy v. Ferguson* established the “separate-but-equal” doctrine, allowing for segregation based on race (*Plessy v. Ferguson* was overturned in 1954 as a result of *Brown v. Board of Education*). The 1964 Civil Rights Act outlawed discrimination based on “race, color, religion, or national origin” in public schools and universities, government-run or supported programs and agencies, and public establishments engaged in or related to interstate commerce. The Civil Rights Act also declared illegal employment discrimination by organizations or businesses engaged in interstate commerce. In the 1970s, the legal debate turned to sex-based discrimination. Two unresolved conflicts relating to equal rights that continue to be debated are affirmative action and discrimination based on sexual orientation.<sup>94</sup>

Outside of the Constitution, there are separate realms of civil and criminal law, each with its own codes and penalties. Civil law has jurisdiction over cases in which a private party (plaintiff) files a lawsuit against another private party for an alleged harm. In such cases, the burden of proof usually lies with the plaintiff, and punishment takes the form of compensation by the defendant for losses caused. In contrast, criminal suits are always filed by the government against an individual or party that has allegedly violated the law. The burden of proof in criminal cases rests with the government. Each state has its own criminal code and procedure, so penalties vary. Still, punishment often takes the form of community service, a fine, incarceration, or even execution.

#### **Recent legislation—the U.S.A. Patriot Act**

The U.S.A. Patriot Act, passed following the attacks of September 11, 2001, aims to combat terrorism by restricting entry into the country, expanding the powers of law enforcement officials to monitor personal communications, and facilitating the apprehension of actual and suspected terrorists within the United States (among other provisions). The act is controversial, with some claiming it infringes too much on privacy and others contending it must do more to combat terrorism.<sup>95</sup> The Lawyers Committee on Human Rights decries the act as an encroachment on civil liberties because it gives the Federal Bureau of Investigations (FBI) the authority to demand the customer and business records of libraries, bookstores, hospitals, and other organizations and businesses if the FBI deems such information necessary for investigations of international terrorism. The Patriot Act also makes it easier for the FBI to monitor telephone and electronic communications and to obtain a search warrant without probable cause of a crime if the warrant is related to the gathering of foreign intelligence information.<sup>96</sup>

Edwin Feulner of the Heritage Foundation, on the other hand, heralds the act as a necessary aid in the war against terrorism. According to Feulner, the new powers the Patriot Act grants to law enforcement are being used judiciously, if at all, and individual privacy protection may actually be stronger in some instances under the new law. Judicial permission is required to access personal

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<sup>94</sup> Public debates over affirmative action quotas in schools and in the workplace continue. Similarly, marriage rights for gays and lesbians are currently being deliberated at the local, state, and federal levels.

<sup>95</sup> Charles Doyle, “The U.S.A Patriot Act: A Sketch,” *CRS Report for Congress*, Washington, DC: Congressional Research Service, The Library of Congress, 2002.

<sup>96</sup> For warrants to search U.S. citizens and permanent residents, the FBI must show that the suspects under investigation may be engaged in criminal activity. For non-U.S. citizens or permanent residents, the FBI has only to demonstrate probable cause that the suspects are agents of a foreign power. See the Lawyers Committee on Human Rights’ “Imbalance of Powers: How Changes to U.S. Law and Policy Since 9/11 Erode Human Rights and Civil Liberties” at [http://www.humanrightsfirst.org/us\\_law/loss/imbalance/powers.pdf](http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf).

and business records under the Patriot Act whereas for non-terrorism-related investigations, a subpoena is needed, which in most cases does not require a judge's authorization.<sup>97</sup>

The bipartisan Patriot Oversight Restoration Act of 2003 was introduced by Senator Patrick Leahy in the Senate and by Representative Barney Frank in the House of Representatives in October 2003. According to Senator Patrick Leahy, the proposed legislation seeks to increase the number of surveillance provisions in the U.S.A Patriot Act that are slated to expire at the end of 2005. Specifically targeted are those provisions that curtail individual privacy, such as greater access for law enforcement officials to email communication and bank, credit, and telephone records. Both houses have referred the bill to committee. At the state and local levels, anti-Patriot Act resolutions have been passed by 305 localities in 40 states, and four states have adopted statewide resolutions.<sup>98</sup>

### **Government initiatives relating to access to justice**

Both the federal government and CSOs provide information to the public about legal rights and channels for accessing the justice system. The Department of Justice's Office of Justice Programs and the National Criminal Justice Reference Service provide training and information on the justice system—including on indigent defense, juvenile justice, and violence against women—to CSOs and state and local government agencies.<sup>99</sup> State- and local-level government and CSO initiatives more often target citizens directly, providing, for example, programs for at-risk youth, families with incarcerated family members, and recently-released prisoners. The federal government provides grants to CSOs and to state and local governments to implement justice programs.

### **Education of individuals about their right of access to justice**

A nationwide survey by the American Bar Association on public knowledge of the justice system revealed that over 60 percent of people know their basic judicial rights, such as the right to be represented by a lawyer if accused of a crime and the right to be considered innocent until proven guilty. When asked questions about the three branches of government and how courts function, half the respondents demonstrated a moderate level of knowledge.<sup>100</sup>

Most people in the United States learn about their rights in the justice system through a civics class or component in school. State governments usually require some form of civic education in public schools (see V. Civil Society and Participation for more on civic education). In addition, civil society organizations, including the National Legal Aid and Defender Association (NLADA) and the American Bar Association, engage in public awareness projects and conduct research on reform initiatives and trends in the justice system. As part of its public education Web page, the ABA provides background information and explanations of cases currently on the docket at the Supreme Court. The ABA's Web page also includes legal information for consumers, lesson plans for educators, and resources for students and citizens. The NLADA recently conducted a national campaign to raise awareness of civil legal aid programs.

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<sup>97</sup> See Edwin J. Feulner, "Checking out the Patriot Act," 2/12/04 at <http://www.heritage.org/Press/Commentary/ed021204c.cfm> and Feulner, "Patriot Games," 10/22/03 at <http://www.heritage.org/Press/Commentary/ed102203a.cfm>.

<sup>98</sup> For more information on the Patriot Oversight Restoration Act of 2003, see [http://www.fas.org/irp/congress/2003\\_cr/s1695.html](http://www.fas.org/irp/congress/2003_cr/s1695.html). For more information on Anti-Patriot Act Resolutions, see the American Civil Liberties Union at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207>.

<sup>99</sup> See <http://www.ojp.usdoj.gov> and <http://www.ncjrs.org>.

<sup>100</sup> See the ABA's 1998 study "Perceptions of the U.S. Justice System" at <http://www.abanet.org/media/perception/perception.html>.

### **Expeditious, equitable, and universal access to justice**

Data published by the Administrative Office of the U.S. Courts includes the following 2002 statistics on the time between the filing of a case and the trial:

- U.S. Courts of Appeals:
  - Median time from notice to final disposition was 10.7 months, and median time from filing in a lower court to final appellate disposition was 25.9 months.
- U.S. District Courts:
  - Median time for civil cases was nine months;
  - Median time for criminal cases was 6.2 months (up from six months in 2001).<sup>101</sup>

Human Rights Watch has documented rights abuses in the criminal justice system in the United States, including police abuse, financial barriers to equal justice, and the status of prisoners at Guantánamo Bay.<sup>102</sup> All of these issues are touched on in this chapter.

### **Fair treatment for the poor, the disadvantaged, and those subject to discrimination**

In order to ensure equal treatment under the law, the federal government must provide legal defense for any individual who is unable to obtain such support privately. The right to counsel in criminal trials is guaranteed in the Sixth Amendment of the U.S. Constitution. But it was not until *Gideon v. Wainwright* in 1963 that the Supreme Court extended this right to all defendants in criminal prosecutions that carry a sentence of imprisonment regardless of ability to pay. The Criminal Justice Act of 1964 states that the government has the responsibility to provide legal representation and assistance to individuals with limited resources. The act requires each district to have a coverage plan to fill this need with local resources. The federal government is responsible for providing defense services to those involved in cases within the federal court system; states assume the responsibility for such services under their jurisdiction.

The Bureau of Justice Statistics published the following data from the country's 100 most populous counties in 1999:

- \$1.2 billion in government expenditures went to public defense, covering an estimated three percent of all local criminal justice expenditures for these counties;
- The total caseload in 1999 was 4.2 million: 80 percent criminal, eight percent juvenile, two percent civil, and nine percent other;
- Public defenders handled 82 percent of the 4.2 million cases;
- Public defender offices employed over 12,700 individuals, including assistant public defenders, investigators, social workers, support staff and paralegals;
- Effectively, each staff person in public defender offices serviced about 2,712 cases;
- Over 30,700 private attorneys were appointed as public defenders, and together they serviced 15 percent of the 4.2 million cases;
- Over 1,000 contracts were administered by contract attorney programs, representing three percent of the total caseload.

In addition, publicly-financed counsel represented 66 percent of federal and 82 percent of state and local felony defendants. Conviction rates were about the same for indigent defendants as for those defendants with private lawyers. Incarceration rates were higher for those with publicly

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<sup>101</sup> For more information, see "Judicial Business of the United States Courts 2002," Annual Report of the Director Leonidas Ralph Mecham, Administrative Office of the U.S. Courts at <http://www.uscourts.gov/judbus2002/contents.html>.

<sup>102</sup> These issues are prominent in the United States section of Human Rights Watch's "World Report 2001: United States" at <http://www.hrw.org/wr2k1/usa/> and were reiterated in the "World Report 2003: United States" at <http://www.hrw.org/wr2k3/us.html>.

financed defense, but average sentence length was shorter. At the state level, 69 percent of white prison inmates used publicly financed defense; 77 percent of black inmates; and 73 percent of Hispanic prisoners.<sup>103</sup>

Government support for public and low cost legal defense is channeled through the Legal Services Corporation (LSC), which was created in 1974 to promote access to justice for low-income people. In 2002, LSC funds reached 179 programs covering every county and congressional district in the nation, with special services to address the needs of Native Americans and migrant farm workers. The Bush administration has overseen an increase in the LSC budget from \$304 million in 2000 to \$329 million in 2002 and 2003.<sup>104</sup>

The National Legal Aid and Defender Association as well as the American Bar Association and other legal organizations continue to address deficiencies in legal services for the poor by raising awareness of the problem of low quality, mobilizing resources, and identifying ideas for better management. In "Five Problems Facing Public Defense on the 40<sup>th</sup> Anniversary of *Gideon v. Wainwright*," NLADA argues that:

- A significant number of defendants still receive no counsel at all;
- Excessive caseloads and a lack of enforceable standards diminish the quality of assistance;
- Programs are underfunded;
- Programs are hindered by political pressure.<sup>105</sup>

#### Police treatment of suspects and detainees

According to the American Civil Liberties Union (ACLU), police abuse remains a grave human rights problem in the United States, particularly in minority and poor communities. The DOJ's Bureau of Justice Statistics collects information on police abuse. In a 1999 survey, the bureau found that of the 44 million people who had face-to-face contact with the police that year, about one percent, or a half million, were threatened with or experienced the use of force.<sup>106</sup> Human Rights Watch claims that structural and resource inadequacies in police departments nationwide have resulted in the low level of accountability of police officers. Additionally, according to Human Rights Watch, individuals who file complaints of police abuse do not often succeed in getting their alleged wrong-doers properly tried.<sup>107</sup> Offering a different perspective on the issue, Heather Mac Donald of the Manhattan Institute believes that incidents of police abuse have been exaggerated and that the use of excessive force by police is actually an infrequent exception to the norm. The result of such overstated accounts, according to Mac Donald, has been low morale among police and strained police-community relations, particularly in poor and minority communities.<sup>108</sup>

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<sup>103</sup> Data from 1996 and 1998, Indigent Defense Statistics, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/id.htm>.

<sup>104</sup> See the Legal Services Corporation at <http://www.lsc.gov/>.

<sup>105</sup> See [http://www.nlada.org/Defender/Defender\\_Gideon/Defender\\_Gideon\\_5\\_Problems](http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems) for NLADA's report. See also Bill Rankin, "Right to Lawyer Still not Given for Poor Defendants," *Atlanta Journal-Constitution*, 3/24/03 at <http://www.nacdl.org/public.nsf/GideonAnniversary/news05?opendocument>.

<sup>106</sup> See the Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, "Contacts between Police and the Public: Findings from the 1999 National Survey," February 2001 at <http://www.ojp.usdoj.gov/bjs/abstract/cpp99.htm>.

<sup>107</sup> In FY 1999, Human Rights Watch estimated that about 12,000 civil rights complaints, most related to police abuse, were submitted. Only 31 of these complaints resulted in convictions or guilty pleas. See Human Rights Watch's "World Report 2001: United States" at <http://www.hrw.org/wr2k1/usa/index.html>.

<sup>108</sup> See Heather Mac Donald, "The War on the Police," 2/1/02 at [http://www.aei.org/news/newsID.13545.filter/news\\_detail.asp](http://www.aei.org/news/newsID.13545.filter/news_detail.asp).

### "Enemy combatants" at Guantánamo Bay

Over 600 "enemy combatants" are being held indefinitely at the U.S. military base at Guantánamo Bay, Cuba. Captives in the war on terror, secrecy surrounds the detainees, the names of whom have not been released. Journalists have been allowed access to the Caribbean base but have not been permitted to speak to the prisoners.

As enemy combatants, the Guantánamo detainees have not been granted all of the rights of prisoners of war (POW) as required under the Geneva conventions. The United States claims that the alleged al Qaeda members in custody are not protected by the Geneva conventions because they were fighting on behalf of a terrorist network and not of a country signatory to the international agreement. As for the Taliban fighters, the Bush administration does not recognize the Taliban as a legitimate government, thus arguing that its members should not be granted prisoner-of-war status. Frank Williams, Rhode Island Supreme Court Chief Justice and a member of the review panel for appeals from the military commission to be held at Guantánamo Bay, concurs with the administration's stance on the status of the Guantánamo Bay captives. While the United States has granted the enemy combatants almost all of the protections of the Geneva conventions for POWs, according to Williams, in order to be officially considered prisoners of war and granted full rights as such under the conventions, the combatants would have to have been fighting for a legitimate state or for a recognizable group that adhered to the rules of war.<sup>109</sup> Still, Human Rights Watch claims that, even as enemy combatants, under international human rights law the prisoners at Guantánamo Bay have the right to be charged and tried for a crime as well as to contest the legal justification for their captivity.<sup>110</sup>

The Geneva conventions, which address the treatment of prisoners of war, call for judicial investigations to be conducted as quickly as possible so that trials can be held for the accused POWs. POWs have the right to a lawyer and, according to the conventions, confinement before trial is not to exceed three months. To date, only two of the enemy combatants being held at Guantánamo Bay carry formal charges against them; six are awaiting trials by military tribunal; and fewer than ten have seen lawyers. Many of the enemy combatants have been at Guantánamo Bay for two years, though the United States claims it is trying to free as many of the combatants as possible under the circumstances. Close to 40 enemy combatants have been released so far.<sup>111</sup>

### Racial discrimination

As a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, the United States pledged to submit periodic reports to the Committee on the Elimination of Racial Discrimination on actions taken to end racial discrimination in the country, including in the criminal justice system. In a report to the United Nations in 2000, the U.S. government recognized the "persistence of racism, racial discrimination and de facto segregation in the United States," particularly in the criminal justice system. While the convention prohibits any legislation that differentiates treatment on the basis of race regardless of the intent of the law, constitutional law in the United States allows such racial disparities if they are without discriminatory intent.<sup>112</sup>

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<sup>109</sup> See Frank J. Williams, "Abraham Lincoln and Civil Liberties in Wartime," 5/4/04 at <http://www.heritage.org/Research/NationalSecurity/hl834.cfm>.

<sup>110</sup> See Human Rights Watch's "World Report 2003: United States" at <http://www.hrw.org/wr2k3/us.html>.

<sup>111</sup> See Scott Higham, Joe Stephens, and Margot Williams, "Guantanamo—A Holding Cell in a War on Terror: Prison Represents a Problem that's Tough to Get out of," *Washington Post*, 5/2/04, A1.

<sup>112</sup> A September 2000 report by the U.S. government to the United Nations Committee on the Elimination of Racial Discrimination recognized that despite progress in civil rights, the country's minorities continue to experience widespread discrimination. For more information, see the section on the United States in Human Rights Watch's "World Report 2001" at <http://www.hrw.org/wr2k1/usa/>.

Investigative reports and exposés document systematic police discrimination against minority groups. “Justice on Trial: Racial Disparities in the American Criminal Justice System,” a report by the Leadership Conference on Civil Rights (LCCR), addresses the practice of racial profiling. According to LCCR, racial profiling, or “the identification of potential criminal suspects on the basis of skin color or accent,” is a systematic method of crime management used by the U.S. Drug Enforcement Agency and by various police departments throughout the country. LCCR cited independent reports to corroborate its conclusion that “black motorists are disproportionately stopped for minor traffic offenses because the police assume that they are more likely to be engaged in more serious criminal activity.”<sup>113</sup>

Edwin J. Delattre, adjunct scholar at the American Enterprise Institute, agrees that police profiling based solely on race is unethical and erodes community trust in the police and therefore limits police effectiveness. But, according to Delattre, ethical profiling can take race into consideration along with other relevant characteristics of possible suspects.<sup>114</sup>

The Leadership Conference on Civil Rights has proposed reforms to the criminal justice system. LCCR argues that reforms must be pursued on a state-by-state basis and must be informed by an understanding of the source of the problem. According to LCCR, racial discrimination in the practice of criminal justice does not stem from discrepancies in the law, but from “deeply rooted, self-fulfilling stereotypes and assumptions.” LCCR concludes “Justice on Trial” with the following recommendations that extend beyond police discrimination and include low-income individuals’ access to quality legal aid and representation:

- Build accountability into the exercise of discretion by police and prosecutors;
- Improve the diversity of law enforcement personnel;
- Improve the collection of criminal justice data relevant to racial disparities;
- Suspend the operation of the death penalty;
- Repeal mandatory minimum sentencing laws;
- Reform sentencing guideline systems;
- Reject or repeal efforts to transfer juveniles into adult justice systems;
- Improve the quality of indigent defense counsel in criminal cases;
- Repeal felony disenfranchisement laws and other mandatory collateral consequences of criminal convictions;
- Restore balance to the national drug control strategy.

#### Support for victims of domestic violence

Anti-domestic violence initiatives are usually the domain of states, but the federal government and the White House have also been active in promoting such efforts. President Bush declared October 2003 National Domestic Violence Awareness Month. In addition, a National Advisory Committee on Violence Against Women was created to organize ongoing conferences and to manage a grants program. This committee also provides a telephone hotline and a Web site to disseminate information and provide access to resources.<sup>115</sup> The Violence Against Women Act of 2000 bolstered federal activities to address gender-based violence by providing for rural

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<sup>113</sup> See Ronald H. Weich and Carlos T. Angulo, “Justice On Trial: Racial Disparities in the American Criminal Justice System,” Washington, DC: Leadership Conference on Civil Rights/Leadership Conference Education Fund, 2000 at <http://www.civilrights.org/publications/reports/cj/index.html>.

<sup>114</sup> See Edwin J. Delattre, “Character and Cops—Ethics in Policing,” *AEI Newsletter* (April 2002) at [http://www.aei.org/news/newsID.15172.filter./news\\_detail.asp](http://www.aei.org/news/newsID.15172.filter./news_detail.asp).

<sup>115</sup> See the Web page of the Office on Violence Against Women at the Department of Justice at <http://www.ojp.usdoj.gov/vawo/about.htm>.



domestic violence and child victimization enforcement grants, reauthorizing a shelter program for battered women and children, and creating new protections for battered immigrants.<sup>116</sup>

### **Native American justice systems**

The Indian Tribal Justice Act of 1993 states that a government-to-government relationship exists between the United States and each federally-recognized Indian tribe. This act stipulates that the U.S. government must respect tribes' self-determination and self-reliance and that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems." Tribal justice systems are recognized as the appropriate forum for the resolution of disputes within tribal communities and, as such, are essential to the maintenance of tribal culture and identity. Native American justice systems do not have jurisdiction over offenses committed outside of Native American territory or involving non-Native Americans. Federal criminal laws apply in these cases.<sup>117</sup>

The Indian Tribal Justice Act also states that "tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation..." With the Indian Tribal Justice Technical and Legal Assistance Act passed in 2000, Congress appropriated financial resources to support tribal courts and judicial systems.<sup>118</sup> In addition to government support, organizations such as the Native American Rights Fund and the National Congress of American Indians advocate for the rights of U.S. Indians.

## **2. Independence of the Judiciary**

The Supreme Court of the United States was created as an independent branch of the federal government, designed to balance the elected, and therefore fluctuating, power of the executive and legislative branches. Under judicial review, the Supreme Court determines the constitutionality of laws brought before it. The Court may not set a legislative agenda, and its legislative power is limited to interpreting the cases brought before it.

### **Transparency in the selection of judicial authorities**

Various procedural principles, including life terms, presidential appointment and Senate approval of justices, and secret proceedings, as established in Article II, Section Two and Article III of the Constitution allow for the independent functioning of the Supreme Court. Transparency in the selection of judicial authorities is an established practice, with civil society actors playing a large but unofficial role in the nomination and appointment process by voicing opinions about individuals nominated by the president. Throughout U.S. history, conflicts between the Supreme Court and the president have demonstrated that the courts can and do act independently. Still, the independence of the judiciary continues to be debated, in particular the nomination and appointment of Supreme Court justices. Many CSOs maintain that the president utilizes the nomination process as a means of shifting the weight of the court for partisan gain.

The appointment of judges to federal circuit courts has also become a partisan battleground, with each political party accusing the other of attempting to stack the courts with sympathetic appointees. Also nominated by the president and confirmed by the Senate, this highly

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<sup>116</sup> Department of Justice, Office on Violence Against Women, "The Violence Against Women Act of 2000," [http://www.ojp.usdoj.gov/vawo/laws/vawa\\_summary2.htm](http://www.ojp.usdoj.gov/vawo/laws/vawa_summary2.htm).

<sup>117</sup> For more information, see the U.S. Department of Justice Office of Tribal Justice at <http://www.usdoj.gov/otj/sovtrb.htm> and the Native American Rights Fund at <http://www.narf.org/>.

<sup>118</sup> See U.S. Code Title 25, Chapter 38, Section 3601. Available at the Legal Information Institute online collection of U.S. Codes at <http://www4.law.cornell.edu/uscode/25/3601.html>. See the Native American Rights Fund for more information on the Indian Tribal Justice Technical and Legal Assistance Act at <http://www.narf.org/pubs/press/012601.htm>.

politicized appointment process has resulted in what some call a “judicial emergency,” with the large number of unfilled seats creating backlogs and delays.<sup>119</sup>

#### **Job security for judicial authorities**

Supreme Court justices hold their position for life, thereby reducing the political pressures of voting in accordance with a given administration. An impeachment process similar to that for the president can be invoked in cases of misdemeanor. In recent years, no Supreme Court justice has been removed or suspended because of political pressure.

#### **Appropriate codes of conduct**

All states have agencies that monitor judicial conduct and administer sanctions to judges who violate ethical behavior.<sup>120</sup>

#### **Accountability to society**

Information about the Supreme Court (its docket, decisions, and justices) is available to the public.

#### **Institutional mechanisms for filing complaints**

According to the Administrative Office of the United States Courts, there were 657 judicial complaints in 2002, down 14 percent from the previous year and the lowest number in six years. Out of the 780 complaints concluded in 2002, 761 were dismissed, eight were withdrawn, and 11 received corrective action.<sup>121</sup>

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<sup>119</sup> See Joan Biskupic, “Partisanship Delays Action on Judicial Nominees,” *USA Today*, 5/9/02, 4A.

<sup>120</sup> Legal Information Institute, “Judicial Ethics: An Overview,”  
[http://www.law.cornell.edu/topics/judicial\\_ethics.html](http://www.law.cornell.edu/topics/judicial_ethics.html).

<sup>121</sup> Administrative Office of the United States Court, “2002 Annual Report of the Director: Judicial Business of the United States Courts,” Washington, DC: U.S. Government Printing Office, 2003: 32-33.

## IV. LOCAL GOVERNMENT AND DECENTRALIZATION

### Commitments under the Quebec Plan of Action

In the Quebec Plan of Action, the governments affirmed that “citizen participation and appropriate political representation are the foundation of democracy, and that local governments are closest to the daily lives of citizens.” To empower local governments they pledged to:

- “Promote mechanisms to facilitate citizen participation in politics, especially in local or municipal government;
- Promote the development, autonomy and institutional strengthening of local government in order to promote favorable conditions for the sustainable economic and social development of their communities;
- Strengthen the institutional capacity of local governments to allow full and equal citizen participation in public policies without any discrimination, facilitate access to those services fundamental to improving citizens’ quality of life, and strengthen decentralization and the integral development of these services in part through commensurate and timely funding and initiatives that permit local governments to generate and administer their own resources;
- Promote sharing of information, best practices and administrative expertise among local government personnel, associations of local governments, community associations and the public, in part by facilitating access to information and communications technologies by municipalities and by encouraging cooperation and coordination among national, subregional and regional organizations of mayors and local government;
- Support the OAS Program of Cooperation and Decentralization in Local Government, including, with the support of the IDB [Inter-American Development Bank], the development of programs and the effective inclusion of citizens in decision-making processes.”

### Dimensions of the Issue

For the purpose of following up and reporting on local government and decentralization, the issue has been divided into the following dimensions: 1. Development of autonomy and institutional strengthening of local governments; 2. Mechanisms established by local governments for citizen participation in political life; 3. Non-discriminatory participation of citizens in public policy making.

“Local government” is here understood to refer to the entity responsible for the lowest level of territorial division within the country’s political system. Because local governments are closer to the daily lives of citizens, they are favorable to participation and representation. Therefore, decentralization is key to deepening democracy and promoting the population’s well-being.

#### **1. Development of Autonomy and Institutional Strengthening of Local Governments**

Nothing in the U.S. Constitution addresses local governments. Instead, state constitutions and statutes define the powers of cities. Although city governments vary widely in their powers and functions, both within states and between states, this section will attempt to describe general characteristics, beginning first with a historical overview.

## History

The United States is a country created out of struggle against centralized domination. In 1787, the founders specified in Article I, Section Eight of the Constitution what they considered to be the limited powers of the federal government. One year later, lingering fear of strong federal power resulted in the Tenth Amendment, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Despite early and ongoing attempts to limit the federal government, over the history of the United States, federal power has continued to grow vis-à-vis state and local governments. This has happened in four ways: legally, through court interpretations, as a result of national crises, and as part of the growth of the country.

Amendments to the Constitution that have asserted the power of the federal government over the states include the Thirteenth (abolishing slavery) and the Nineteenth (women's suffrage). The Supreme Court has also advanced federal power since the Tenth Amendment set out to limit it. In 1819, in *McCulloch v. Maryland*, the Supreme Court upheld the power of Congress over matters not specifically granted it in the Constitution. Further, the court ruled that federal law trumps state law in cases where the two conflict. More recently, in *Alaska Department of Environmental Conservation v. EPA* (2004), the Court gave the Environmental Protection Agency the power to overrule state-level decisions about pollution in certain cases. Other events that increased the federal role in people's lives include the Great Depression, the two world wars, and Lyndon Johnson's Great Society programs. During these periods, the federal government increased its scope and power by raising tax rates, beginning the practice of withholding income tax from wages, and becoming the purveyor of social security, Medicaid, welfare, and other national assistance programs. Since the 1950s, the federal government has also increased the number of grants to states and localities for infrastructure and other projects. While this money has bolstered the resources of states, as categorical grants it has also specified restrictions on states' decision-making power over the money. Block grants have allowed states more discretion in spending federal money. Of course, the respective powers held by the states and the federal government have seen a considerable back and forth over the years, and in many instances states have also successfully used the courts and legislation to retain their jurisdiction.<sup>122</sup>

The legal framework that supports decentralization/centralization in the United States is complicated. Outside of the Constitution, there are few laws that address the powers of the federal and state governments explicitly. Rather, the balance of power may shift as new legislation grants authority to states or to the federal government. The transfer of control over activities may be only partial. States may gain jurisdiction over an activity at the same time that federal funding restricts their discretion. For example, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 did away with the federal welfare program and replaced it with Temporary Assistance to Needy Families (TANF) at the state level. TANF consists of federal block grants to the states to administer their own welfare programs, but with certain restrictions.

More commonly, legislation and court decisions impact how states and local governments work without changing the balance of power. In *Bogan v. Scott-Harris* (1998), the Supreme Court

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<sup>122</sup> For a discussion of federal, state, and local government power in the United States, see Bruce A. Wallin's paper, "Forces behind Centralization and Decentralization in the United States," part of *Texts Submitted for the International Symposium on Fiscal Imbalance*, produced by Quebec's Commission on Fiscal Imbalance and available at [http://www.desequilibrefiscal.gouv.qc.ca/en/pdf/recueil\\_en.pdf](http://www.desequilibrefiscal.gouv.qc.ca/en/pdf/recueil_en.pdf). For more information on *McCulloch v. Maryland*, see the U.S. Department of State's Facts about the U.S.A on InfoU.S.A at <http://usinfo.state.gov/usa/infousa/facts>. See also "Justices Decide EPA Can Overrule States," *The Washington Post*, A12, 1/22/04. Robert Anselmi provided important context for this discussion.

ruled that local officials have absolute immunity for their legislative activities when sued under a particular federal statute. In 1997, in *Salinas v. United States*, the Supreme Court expanded the instances in which the federal government can prosecute local officials for bribery.

### **Operations of local government**

According to the U.S. Census Bureau, there are 35,937 local governments in the United States.<sup>123</sup> These local governments are often responsible for zoning (establishing business and residential districts) and service provision (water, police, fire, and parks and recreation). Special projects may include revitalization of a downtown area, affordable housing, and local business development. County governments are usually tasked with providing social services (health and welfare), and special school districts independent of city governments frequently manage local public schools.

### **Political, fiscal, and administrative autonomy**

There are several different forms of local government. The two most common types are the mayor-council and the council-manager structures. The mayor-council arrangement more closely resembles the federal and state systems because the mayor is elected separately from the council and serves a chief executive function, therefore maintaining a degree of separation of powers. In a council-manager government, the mayor tends to work closely with the council, and a city manager is appointed by the council and the mayor to be the chief executive officer. The chief executive officer, whether a mayor or a city manager, serves as a technical adviser to elected officials, develops projects for the city, and manages the city's budget and staff. In some cities, mayors have veto power over the council.<sup>124</sup>

Most mayors are directly elected, although some are selected by the council from among the council members. All city councils are directly elected. Councils most commonly consist of six members, although councils can have as many as 50 members in some cases. The frequency with which full councils meet varies, with some meeting on a monthly basis, and others meeting weekly. Councils in larger cities usually meet more often than those in smaller locales. City councils often rely on smaller committees to carry out more detailed work and make recommendations to the full council, which is the only body with the power to legislate (again, bigger cities often have a larger work load and so tend to use committees more than smaller towns do).

Cities raise money through the collection of fees for services (building and demolition permits, water); fines for noncompliance with local ordinances; property taxes; and, in some cases, sales taxes. Cities may also receive money from states and the federal government, usually in the form of grants for specific projects. A few states redistribute money collected at the state level to even out differences in the revenue-generating capacity of cities and towns.

### **How city governments see themselves**

As part of its Municipalities in Transition Project, the National League of Cities interviewed over 70 local officials in 27 cities in the United States about the environmental factors impacting cities. Many of the challenges that these officials identified fall outside of the jurisdiction of city governments. Education, for example, is considered a key city resource because a strong

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<sup>123</sup> This is the census bureau's 2002 count of cities, boroughs, towns, and villages. See the 2002 Census of Governments report "Government Units in 2002," issued July 2002 and available at [http://www.census.gov/govs/cog/2002COGprelim\\_report.pdf](http://www.census.gov/govs/cog/2002COGprelim_report.pdf).

<sup>124</sup> The International City/County Management Association's Municipal Year Book was helpful for these sections. In particular, see the 1998 Year Book's "Municipal Form of Government: Issues and Trends" by Tari Renner and Victor S. DeSantis and the 1999 Year Book's "U.S. City Managers and Administrators in a Global Perspective" by James H. Svava.

education system can attract new residents and businesses. But local public education is usually run by a special school district and is outside the control of city government. Officials also reported the decreased capacity of cities to generate revenue, in part as a result of federal and state limits on cities' ability to tax, but also because of a changing economy and suburbanization. An increasingly global economy has impacted cities in several ways: in some cities, booming financial and technology industries are straining the capacity of city services; in others, manufacturing positions are being replaced with lower-paying service industry jobs, reducing the tax base. Similarly, suburbanization is drawing tax- and fee-paying residents away from cities.

Another concern for many of the city officials interviewed is the kinds of opportunities for citizen engagement at the local level. Some cities have seen increased citizen participation. In Tempe, AZ, neighborhood associations now provide project recommendations to the city, a task once performed by city officials. Other officials characterize citizen participation in their cities as oppositional. In Iowa City, IA, local officials interpret citizens' frequent calls for public hearings and referendums as a sign of mistrust of government and believe these citizen-initiated processes impede city business.<sup>125</sup>

### **Associations**

There are countless regional, national, and international local government associations for municipal employees and elected officials in the United States. Some of these organizations include the North Alabama Mayors Association, the Mayors Association of Ohio, the U.S. Conference of Mayors, the International Municipal Lawyers Association, and the International City/County Management Association (ICMA).

### **Performance of municipal officials**

All municipal government hiring policies must comply with federal and state laws. City governments may not discriminate based on sex, race, color, religion, or national origin (for security reasons, it is legal to refuse to hire non-U.S. citizens for certain positions). Examples of performance incentives provided by the local government respondents include a Mayor's Award of Excellence, a staff recognition event, and an Employee Suggestion Program that provides monetary rewards for ideas that increase productivity and efficiency. A city with a low percentage of employees with higher education degrees provides tuition reimbursements to encourage further study. On the other side of rewarding good performance is dealing with dissatisfactory work. According to one local government official, two City Council members were tested by a recall election in 2000. Both remained in office. In another city, a council member resigned after alleged misconduct was made public.

### **Coordination and interchange of experience on the national and international levels**

The National League of Cities, the International City/County Management Association, and the International Municipal Lawyers Association are examples of organizations that provide workshops and share best practices with their members across states and some even across countries. ICMA also coordinates international exchanges between local government employees. Sister Cities International pairs U.S. cities with cities around the world in long-term partnerships to share experiences and facilitate exchanges in the areas of government, business, education, and culture. Partners of the Americas' American Fellows Program is a Department of State-funded exchange program for government employees at the local, state, and federal levels in the United States, Canada, Latin America, and the Caribbean.

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<sup>125</sup> For more information on what local officials see as the main challenges facing their cities, see the National League of Cities' "Major Factors Affecting America's Cities" (1998) at [http://www.nlc.org/nlc\\_org/site/files/reports/major.pdf](http://www.nlc.org/nlc_org/site/files/reports/major.pdf).

## **2. Mechanisms Established by Local Governments for Citizen Participation in Political Life**

While voting is the customary form of citizen participation in representative government, as this section shows, cities and towns also involve citizens in policy making through mechanisms ranging from consultation to incorporation into council and neighborhood committees involved in crafting policy recommendations.

### **Local political system: selection of authorities**

Most mayors are directly elected—although some are selected by the council from among the council members—and all city councils are directly elected. In local governments with a council-manager structure, the city manager is appointed by the city council and the mayor. Terms lengths and limits for elected city officials are usually set by the city charter, and terms for mayors, council members, and council committee members range from two to six years. Term limits exist in almost 3,000 cities in the United States.<sup>126</sup>

### **Opportunities to participate in decision making provided to the citizens by local government**

Sunshine laws in almost all states require local government records to be public. In accordance, all city business (ordinances, contracts, salaries) must be made available to citizens upon request (with exceptions made for privacy and public security). Many cities also provide information in the newspaper and on the Internet. Almost all cities now have a Web site, although the kind of data available electronically varies widely. City government Web sites commonly include contact information for city officials and departments and the city code of ordinances. Many cities also use their Web sites to highlight specific projects and to “sell” their city to businesses and families.

Citizen participation at the local level is largely advisory, but the proximity of local government to citizens tends to make local officials more accessible to their constituency. Most cities have open council meetings that usually include a space for public comment. Cities also frequently hold public hearings on key issues and, for those who cannot attend city meetings, many cities have agreements with a local cable provider that allows them to broadcast city council and other public meetings on a public access channel.

Citizens also participate in the work of local governments as members of special committees. While these committees usually cannot make binding decisions, as representatives of their constituency, city officials tend to take their recommendations seriously. One city mayor reported that citizen participation in committees facilitates agreement from all parties and helps move initiatives forward. Less common are citizen committees with decision-making power. Such committees are usually composed of a combination of local government officials and citizens. Other ways that cities solicit information and opinions from citizens include surveys and polls, workshops, and public hearings.

The city government officials and the CSO representatives surveyed reflect the wide variation in city government systems and practices in the United States. One city included in Partners' study conducts a regular survey of citizen opinions on the quality of city services and on what city priorities should be. Another attaches public information and surveys to city water bills. A West Coast city government uses a newsletter to inform citizens.

According to one civil society organization representative, citizens in her city use libraries, churches, synagogues, and other community facilities for meetings. Another CSO representative said that her local government involves citizens in many aspects of its work. Residents of this city

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<sup>126</sup> 1995 data from a U.S. Term Limits study. See [http://www.termlimits.org/Current\\_Info/microcosm/index.html](http://www.termlimits.org/Current_Info/microcosm/index.html).

participate in creating neighborhood development plans and are members of commissions that make decisions on issues such as affordable housing or a community garden. A CSO representative from a different city noted that her local government holds public council meetings and other public hearings, but beyond that does not use much formal activity to engage citizens and CSOs. Another city reported on invites residents to sit on neighborhood advisory councils.

Many cities and towns have a referendum process by which citizens can petition to get issues on the ballot for popular vote. City councils can also use the referendum process to take issues directly to citizens. Referenda can be binding, meaning that passage becomes law, or they can be only advisory. Other forms of “direct democracy” include recall elections and petitions, a mechanism by which citizens can keep proposed legislation from becoming a local law until it has been subject to a referendum.

### **3. Non-Discriminatory Participation of Citizens in Public Policy Making**

#### **Citizen participation in the formulation of public policies and decisions affecting their quality of life—budget**

Partners asked local governments and CSOs about citizen involvement in the local budgeting process. In one city, according to a CSO representative, the government invites citizens and local CSOs to attend preliminary budget meetings to determine budget priorities. Then, once a budget is drafted, the city holds public hearings on it before approval. In another city, the local government disseminates the proposed budget at public libraries and through the Internet. Then it engages community opinion leaders—including public employee unions, the editorial board of the local newspaper, CSO service providers, neighborhood-based CSOs, and business associations—in budget discussions. See Chapter V. Civil Society and Participation for more on CSO participation in the public-budgeting process.

#### **Citizen participation in the administration of public policies**

See above.



## V. CIVIL SOCIETY AND PARTICIPATION

### Commitments under the Quebec Plan of Action

In the Quebec Plan of Action, the governments affirmed the “important role of participation by civil society in the consolidation of democracy and that this participation constitutes one of the vital elements for the success of development policies, noting that men and women have the right to participate, with equality and equity, in the decision-making processes affecting their lives and well-being, and considering that the diversity of opinions, experience and technical expertise of civil society constitute a significant and valuable resource for initiatives and responses of government and democratic institutions.”

Accordingly, the governments pledged to strengthen civil society participation in hemispheric and national processes by:

- Seeking to “establish public and private funding instruments aimed at building the capacity of civil society organizations in order to highlight the work and contribution of these organizations and to promote accountability”;
- Developing “strategies at the national level and through the OAS, other multilateral organizations and MDBs [multilateral development banks] to increase the capacity of civil society to participate more fully in the inter-American system, as well as in the political, economic and social development of their communities and countries, fostering representativeness and facilitating the participation of all sectors of society; and increase the institutional capacity of governments to receive, absorb and act on civil society input and advocacy, particularly through the use of information and communications technologies”;
- Promoting “participation of all minority groups in forging a stronger civil society”;
- Developing “educational programs, in conjunction with relevant civil society organizations, academic experts and others, as appropriate, to provide democracy and human rights education and to promote the introduction of books and educational materials that reflect the ethnic, cultural and religious diversity of the Americas as part of primary and secondary school curricula.”

### Dimensions of the Issue

For the purpose of following up and reporting on civil society and participation, the issue has been divided into the following dimensions: 1. Government support for the strengthening of civil society, implying a positive linkage between the diversity of the social world and governments and democratic institutions; 2. The promotion of a culture that supports democracy, human rights, and diversity through public education.

### Overview of Civil Society in the United States

Data on the major groups of tax-exempt nongovernmental organizations—charitable, religious, and social welfare—are illustrative of the characteristics of civil society organizations in the United States.<sup>127</sup> These data reflect the total number of nonprofit organizations in the country, including groups that do not fall under the organizational categories used in the survey portion of this section. In 1998, there were 1.23 million organizations, reflecting an increase from 1.19 million in 1997, and a growth of 38 percent since 1992. In 1997, total revenue from this sector totaled \$664.8 billion and came from the following sources:

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<sup>127</sup> Tax-exempt nongovernmental organizations, or NGOs, are also called nonprofit organizations and CSOs.

- 37.5 percent: dues, fees, and other charges;
- 31.3 percent: government;
- 19.9 percent: private contributions;
- 11.4 percent: other revenue, such as investments and interest.

The civil society sector is comprised of organizations specializing in the following fields:

- 53.9 percent: health services (including hospitals);
- 18.3 percent: education and research;
- 12 percent: social and legal services;
- 9.7 percent: religious organizations;
- 3 percent: civic, social, and fraternal;
- 2.2 percent: arts and culture;
- 0.9 percent: foundations.<sup>128</sup>

### **1. Government Support for the Strengthening of Civil Society**

The government supports civil society organizations by regulating the industry, including licensing organizations, providing funds, and promoting the participation of minority groups in civil society and in dialogue with the government. Additionally, the government promotes mechanisms that foster government accountability to citizens and CSOs by disseminating information and maintaining open communication. Government accountability and transparency are necessary to build civil society's trust in government and to foster effective working relationships. The extent to which the government provides information and makes itself accessible to civil society indicates its level of support for positive and open public-private relations.

#### **Legal recognition of civil society organizations**

In the United States, the legal framework for the registration of civil society organizations is well established and largely effective. Independent organizations must register at the state level, and registration allows them to benefit from the legal provisions unique to the nonprofit sector, such as tax exemptions and access to public and charitable funds. A legal process for registering organizations ensures that a uniform set of standards is upheld and confers legitimacy to registered organizations. The tax codes in the United States encourage philanthropy, and private sources provide almost 20 percent of all revenue to nonprofit organizations.

Each state has a legal framework for the incorporation of nonprofit associations and charitable foundations. The specific procedure to register an organization varies by state. The steps that need to be completed in the state of Maryland to form a nonprofit organization illustrate the basic framework:

1. The creation of an organizing document (approved articles of incorporation, constitution, bylaws) according to state guidelines;
2. Filing for federal income tax-exempt status, a process that includes four forms;
3. Filing for state income tax exemption; five forms including an explanation of the organization's scope, nature, and purpose and the most recent financial statement;
4. Registration as a charitable organization in the state, enabling the nonprofit to solicit donations in state;
5. Optional filings for additional state tax exemptions, including a property tax exemption and sales and use tax exemptions.<sup>129</sup>

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<sup>128</sup> See the Independent Sector and the Urban Institute's "The New Nonprofit Almanac & Desk Reference," 2001 at <http://www.independentsector.org>.

The Internal Revenue Code exempts qualifying organization from federal income taxes. The purpose and mission of an organization determines its classification according to Internal Revenue Service (IRS) criteria, with more than 20 categories for nonprofit organizations. Organizations can claim 501(c)(3) or 501(c)(4) status if they operate for public benefit, which includes charitable, educational, literary, religious, or scientific purposes. The association cannot benefit private interests; no part of net earnings can go to any private shareholder. In addition, restrictions on lobbying and political activity apply to organizations in this category. The IRS provides extensive public information on the classification of organizations and application procedures on its Web site.<sup>130</sup> State governments are responsible for facilitating the incorporation of organizations at the state level and for providing adequate resources and support. See 3. Participation of CSOs in the Political, Economic, and Social Development of their Communities and Countries for more information on lobbying and CSOs.

In addition to the federal income tax exemption, each state can offer state income tax exemptions for qualifying organizations. Many states do provide exemptions and benefits, such as property and sales tax exemptions and discounts on state government equipment. Information on federal regulations and a list of state filing locations is available at FirstGov.gov, a federal Web site. Each state provides its own instructions on how to register a nonprofit organization, including contact information for questions and guidance.

Of the organizations Partners surveyed, all are registered nonprofit organizations, and at least eight have 501(c)(3) status with the IRS. Most expressed the opinion that difficulties gaining legal recognition are infrequent, although a few added that the registration process can be long and complicated and that some groups lack the resources necessary to complete the application process. Because the organizations surveyed range greatly in size, resources, and years in operation, it is of little value to compare their legal frameworks and the how easy or difficult it was for them to gain legal status.

#### **Financing for civil society organizations—federal level**

In the United States, funding at the federal level is divided by area of focus—education, health, housing, etc.—and managed by the corresponding federal agency.<sup>131</sup> Academic institutions and nonprofit organizations are eligible for funding based on the terms of each grant or contract available.

The Catalog of Federal Domestic Assistance Web site provides information on the types of funds available to state and local governments, Indian tribal governments, U.S. territories, individuals, and nonprofit organizations.<sup>132</sup> This site hosts a search feature to locate available funds. The complete catalog can also be found in print in public libraries, the Library of Congress, and from the U.S. Government Printing Office.

In October 2003, the Bush administration launched Grants.gov, a Web-based catalog of all federal competitive grant programs and an online application process. The Department of Health and Human Services is the managing partner of the Grants.gov program, which is part of the E-Government initiative for improving access to government information and services via the

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<sup>129</sup> From “How to Start a Non-Profit Organization in Maryland,” available at <http://www.sos.state.md.us/sos/charity/html/startnp.html>.

<sup>130</sup> See the Internal Revenue Service at <http://www.irs.gov/charities/>.

<sup>131</sup> Primary government Web sites direct interested parties to the appropriate agency and provide a portal to information regarding funding availability. See for example <http://www.firstgov.gov/Business/Nonprofit.shtml#resources>.

<sup>132</sup> See [http://12.46.245.173/servlet/page?\\_pageid=316&\\_dad=portal30&\\_schema=PORTAL30](http://12.46.245.173/servlet/page?_pageid=316&_dad=portal30&_schema=PORTAL30).

Web.<sup>133</sup> The government created this electronic service to comply with Public Law 106-107 in the President's Mandate (FY 2002), which states, "Agencies will allow applicants for Federal Grants to apply for and ultimately manage grant funds online through a common web site, simplifying grants management and eliminating redundancies." In 2003, the Web site was launched and began administering all competitive grant programs through the use of a common electronic application.

Grants.gov seeks to provide a simplified list of federal grants for all categories of applicants, including state and local governments, educational institutions, and nonprofit organizations. Intended to be user-friendly, Grants.gov features tutorials on how to navigate the Web site and how to apply for grants. The 900 grant programs are catalogued into 21 types as defined by the Catalog of Federal Domestic Assistance. Each grant type contains numerous grant programs administered by federal agencies. The customer services available via Grants.gov include answers to frequently asked questions, a users guide, a glossary of terms, a quick reference guide, and contact information for further questions and case-sensitive inquiries. In fiscal year 2002, the Grants.gov partner agencies disbursed over 180,000 awards through 900 grant programs, for a total of more than \$350 billion.<sup>134</sup>

To aid faith-based and community organizations in searching and applying for federal funds, President Bush created the White House Office of Faith Based and Community Initiatives and subsequent offices in a number of federal agencies related to social services.<sup>135</sup> The Department of Health and Human Services, for example, hosts the Center for Faith-Based and Community Initiatives, which works with faith-based organizations in addressing the social needs of communities. The center provides technical assistance and funding as part of Bush's "Leveling the Playing Field" initiative. While no federal funding has been set aside specifically for faith-based organizations, HHS has made resources available to such groups to facilitate their application for federal grants. Grants from HHS are still distributed on a competitive basis.

Other federal support for CSOs includes the sale of surplus government equipment and technology. Computers for Learning is a program that organizes the sale of surplus computers to schools and nonprofit educational organizations that work with children from elementary to high school.<sup>136</sup> The Historic Property Program, Lighthouses for State and Local Governments and Nonprofits, and the U.S. Government Auto Auctions are among the other programs run by the federal government to support local organizations and nonprofits.

In 2001, the Independent Sector, a nonpartisan CSO, reported that the level of government funding for civil society organizations has remained constant as a percentage of total revenues received by such organizations since 1992. From 1982 until 1992, the level of government funding rose consistently on a yearly basis. These data show that the absolute amount of total government funds for nonprofit organizations has increased at the same rate as new organization birth or expansion.<sup>137</sup>

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<sup>133</sup> The partner agencies included the Departments of Health and Human Services, Transportation, Education, Housing and Urban Development, Justice, Labor, Commerce, Defense, Agriculture, the Federal Emergency Management Agency, and the National Science Foundation.

<sup>134</sup> See <http://www.grants.gov/>.

<sup>135</sup> See <http://www.whitehouse.gov/government/fbci/>.

<sup>136</sup> See <http://www.computers.fed.gov/Public/home.asp>.

<sup>137</sup> See the Independent Sector and the Urban Institute's "The New Nonprofit Almanac & Desk Reference," 2001 at <http://www.independentsector.org/>.

### **Financing for civil society organizations—state and city levels**

Some resources are made available at the state level. Each state provides information about its resources for nonprofits.<sup>138</sup>

### **Financing for civil society organizations—private**

There are many sources of private funding for CSOs. For example, the Foundation Center, a civil society organization, serves as a clearinghouse on foundation funding for grant-seeking organizations. The Foundation Center also provides resources and tools, including a “Guide to Grant Seeking on the Web,” to assist organizations in the grant application process. This center hosts a comprehensive Web site and regional libraries where organizations can search for funding.<sup>139</sup> In addition to foundation support, some corporations also provide funding to CSOs. Such grants are generally limited to the immediate area of work or location of large corporations seeking to invest in community organizations and projects.

Research on funds available for charities and nonprofits indicates that there has been a decrease in philanthropic giving and institutional support from private sources. While large foundations and, in particular, family-managed foundations emerged in large numbers in the late 1990s, many of these foundations’ investment portfolios, and therefore their levels of giving, have declined. The Foundation Center published estimates of a ten percent to 12 percent loss in the value of foundation assets in 2002, and a continued decline in 2003 related to the fall in the stock market during that period.<sup>140</sup> A disaggregated analysis shows that corporate foundation and community foundation funding both increased in 2002. The Independent Sector reports that private funding has increased as a percentage of the total revenue of nonprofit organizations and now approaches 20 percent of the funding in the sector as a whole.<sup>141</sup>

Of the organizations surveyed, more than half rely entirely on private funding or revenues and do not receive any government support. Five receive direct institutional financing from government sources. Only three of the surveyed organizations have received financial assistance specifically for management or training purposes, publications, or media publicity. None of the organizations have been funded to start their own media services, although a few organizations mentioned that government funding does exist for this purpose.

### **Promotion of the participation of all minority groups in the creation of a stronger civil society**

In the United States, a multicultural society in which free association and expression is practiced and respected, there are a large number of civil society organizations founded by and serving ethnic communities. A number of culture- and ethnic-based groups, such as the NAACP or the National Council of La Raza, have long histories in the country and wield significant influence. Although quantifying the civil society sector and its component parts is challenging, of the almost 30,000 U.S. organizations listed by idealist.org, only 800 organizations, or less than three percent, are classified as having race and ethnicity as their area of focus.<sup>142</sup>

Foundation and corporate support for minority groups and organizations addressing diversity exist yet, because these groups often provide services for a targeted population, their ability to attract resources from public, private, or corporate sources may be limited. A recent report by

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<sup>138</sup> See [http://www.firstgov.gov/Business/Nonprofit\\_State.shtml](http://www.firstgov.gov/Business/Nonprofit_State.shtml).

<sup>139</sup> See the Foundation Center at <http://fdncenter.org/>.

<sup>140</sup> Press Release, “Prospects Less Promising for Maintaining Current Giving Levels in 2003,” 1/12/04, at [http://fdncenter.org/media/news/pr\\_0303a.html](http://fdncenter.org/media/news/pr_0303a.html).

<sup>141</sup> See the Independent Sector and the Urban Institute’s “The New Nonprofit Almanac & Desk Reference,” 2001 at <http://www.independentsector.org/>.

<sup>142</sup> Data from Idealist.org at <http://www.idealists.org>. Idealist.org is an online directory of over 37,000 CSOs throughout the world. It is not a complete listing of CSOs in the United States.

the Business Women’s Network on Diversity Best Practices reviews a number of studies on minority philanthropy in the United States. The report concludes that minority groups “have traditionally given generously—in both time and money—back to their communities” and tend to prefer donating to religious institutions, family and friends, and local organizations addressing immediate needs.<sup>143</sup> More specifically, among African Americans, Hispanics, Asian Americans, Native Americans, and disabled persons, giving more often takes the form of direct, informal support for children, elderly, or community members rather than through charitable contributions to organizations or foundations. The report also notes “some distrust of traditional nonprofit institutions which is related to the perception that these institutions have not met minority needs, as well as distrust of traditional forms of giving.” Other findings that shed light on minority-led CSOs include the following:

- African-American organizations have assets of less than \$2 million;
- Hispanics are generally underrepresented in grant-making institutions, comprising less than 0.5 percent of foundation and corporate boards of directors;
- Asian Americans have historically relied on existing structures in the community to funnel their philanthropic resources—such as schools, churches, community centers—and the evolving Asian-American nonprofit sector has matured to the point that it is now providing social, cultural, health, legal, educational, and human services to communities;
- Only 0.3 percent of foundation grants go to Asian-American organizations;
- Since the 1960s, Native-American entrepreneurship and institutional philanthropic activity have increased significantly and have tended to address the needs of Native-American communities.<sup>144</sup>

### **Role of minorities in decision-making bodies**

The presence of leaders who advocate for the interests of minority groups in policy making is important to ensure truly representative and equitable governance. Although the presence of minorities in high-level government and corporate positions has historically been low, recent years have shown increasing numbers of women and minorities in influential jobs.

While racism and segregation have played a significant role in the history of the United States, legislation and practice have changed throughout the country and within the majority of institutions, providing more equal access to decision-making power. Overall, the country’s current laws and regulations do not support discriminatory practices.<sup>145</sup> Yet, a vigorous debate has been going on for many years regarding laws that give special treatment to members of minority groups with the hope of reversing previous trends of marginalization. Affirmative action and quotas for employment and education have received the most attention. In general, these laws are being dismantled. Yet, CSOs such as the American Association for Affirmative Action continue to contest court rulings against quota systems and preferential admissions policies.<sup>146</sup>

The Office for Civil Rights in the Department of Education supports what are known as “race-neutral alternatives” to promoting diversity in schools. The office explains that “policies granting preferences on the basis of race and ethnicity raise constitutional questions and are increasingly being overturned in the courts... Moreover, voters in various jurisdictions have passed state and

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<sup>143</sup> See the 2002 Business Women’s Network, Chapter 69: Minority Philanthropy in “2002: Women and Diversity WOW! Facts 2002” at <http://www.ewowfacts.com>.

<sup>144</sup> See the Business Women’s Network’s “WOW! Facts 2002.”

<sup>145</sup> The conclusion that discrimination is not supported by the legal framework in the U.S. overall was supported by the organizations surveyed from across the country.

<sup>146</sup> See, for example, a statement by Robert Ethridge, President of the American Association for Affirmative Action as a response to the University of Michigan court cases at <http://www.affirmativeaction.org/UofM-Cases-2003.html>.

local initiatives restricting the use of racial preferences.”<sup>147</sup> In other words, attempts to guarantee diverse representation have been ruled unconstitutional in some cases, therefore the current trend is toward creating alternative strategies to achieve diversity without strict race- or ethnicity-based policies. For universities and colleges, this type of program could focus more on recruiting minorities, including forging partnerships with targeted high schools and offering more financial assistance to minority students.

### **Minority representation and leadership in U.S. government**

The extent of minority representation in the U.S. Congress provides a quantifiable indication of the voice of minority populations in decision-making bodies throughout the country. In the 108<sup>th</sup> Congress, there are currently 439 members of the U.S. House of Representatives and 100 senators. Among these, 76 are women—62 in the House and 14 in the Senate.<sup>148</sup> In 2002, a record 25 Hispanics were elected to the House of Representatives.<sup>149</sup> There are also 39 black members of Congress (all in the House); seven of Asian or Pacific Islander descent (five in the House, two in the Senate); and three Native Americans (two in the House, one in the Senate).<sup>150</sup>

Minority groups continue to be underrepresented in government at all levels. CSOs and academics are studying this trend and devising proposals to reverse it. Research groups such as the Race Project focus on understanding how race influences the electoral process.<sup>151</sup> Law professor Lani Guinier argues that the U.S. electoral system, which is based on a winner-take-all method, leads to the underrepresentation of minorities and women. Alternatively, a proportional representation method could translate into a body of elected officials that is more representative of its constituents.<sup>152</sup>

The federal government has created separate offices or units within federal agencies to provide a stronger voice for traditionally-disadvantaged groups in the creation and implementation of policies and programs. Offices of civil rights exist in many federal and state government agencies. The Department of Justice, for example, houses a Civil Rights Division, which is tasked with enforcing civil rights legislation that prohibits discrimination on the basis of race, sex, gender, religion, or handicap.<sup>153</sup> The Department of Education’s Office of Indian Education is charged with overseeing education for American Indians and Alaska Natives. The majority of funds administered by this office go to local education agencies, but the office also funds national programs in support of native peoples.<sup>154</sup>

### **Recognition of languages other than English**

In the United States, English is the dominant language, used in business, education, and government, although it is not legally mandated as the official language for the country. Some

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<sup>147</sup> See the U.S. Department of Education, Office for Civil Rights, “Race Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity,” March 2003, Education Publications Center, Jessup, MD, at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html>.

<sup>148</sup> See <http://clerk.house.gov/members/congProfile.php>.

<sup>149</sup> See Eric Green, “Record Number of Hispanics Elected to U.S. House of Representatives,” 11/12/02, U.S. Department of State International Information Programs at <http://usinfo.state.gov/usa/diversity/a111202.htm>.

<sup>150</sup> Hispanics, blacks, Asian and Pacific Islanders, and Native Americans make up roughly 12.5 percent, 13 percent, 4.5 percent, and 1.5 percent of the population, respectively.

<sup>151</sup> See <http://www.raceproject.org/>.

<sup>152</sup> June Zeitlin, “A U.S. Electoral Reform Agenda for Minorities and Women,” March 2001, published by WEDO, <http://www.wedo.org/news/Mar01/reform.htm>.

<sup>153</sup> See <http://www.usdoj.gov/crt/activity.html>.

<sup>154</sup> See the Department of Education Press Release, “U.S. Department of Education Elevates Office of Indian Education: Reorganization Reflects the Importance of Indian Education Programs,” 10/14/03, at <http://usinfo.state.gov/usa/diversity/pr101403.htm>.

states have established official languages, among them English, Spanish, and Hawaiian. Currently, 26 states have declared English as the official language, and the majority of these states enacted such legislation in the past 20 years. According to the 2000 census, English is the primary language spoken at home of more than 82 percent of the population, and Spanish is the primary language of almost 11 percent. In addition to English and Spanish, more than 35 other languages are spoken in the United States.<sup>155</sup>

Recent waves of migration and shifts in demographics have intensified a long-standing debate over promoting English as the dominant language in the country. The “English-only” movement has been active since the 1800s when the U.S. contemplated the Louisiana Purchase, which would (and did) mean the inclusion of a French-speaking population in the country. Similar discussions arose in relation to Spanish-speaking communities following the Spanish-American war. Legal trends have tended toward requiring English as the official language of education, even in Hawaii, where the Hawaiian language is also an official language of the state, and in Puerto Rico where Spanish and English are both official languages. Debates over bilingual education continue today with strong supporters on all sides of the issue.<sup>156</sup>

The government has assumed the responsibility of providing adequate and appropriate education for all students whose first language is not English. This position is supported by the Equal Protection Clause of the Fourteenth Amendment to the Constitution and the Civil Rights Act of 1964, which bans discrimination in federally funded programs. Even so, the Supreme Court decision in *Lau v. Nichols* in 1974 firmly established that public schools must provide services to help limited-English-proficient (LEP) students. Among these services, school districts can offer English as a Second Language classes, bilingual instruction, and other support. According to the National Association for Bilingual Education, there are more than 4.5 million LEP students currently enrolled in schools in the United States.<sup>157</sup>

### **The creation of mechanisms to promote the public sector’s accountability before citizens**

As detailed in the first chapter of this report on access to information, the amount and quality of information the various levels of government provide to society is characterized as good overall. Most government bodies, including the local and state levels, use Web sites to post public data, including contact information for elected officials and public employees. Still, CSO representatives commented that government Web sites are not updated in a timely manner. Even so, this dissemination of information ensures that the public sector is accountable to civil society, although there have been few efforts to use technology to dialogue with citizens (such as comment sections on Web sites). Beyond electronic forms of communication, survey data show that state and federal government bodies have both public information offices and public telephone lines. Public briefings, information sessions, and question and answer sessions with public authorities are also offered, though less regularly.

## **2. Participation of CSOs in the Political, Economic, and Social Development of their Communities and Countries**

At the heart of representative democracy is the idea that through voting, a community can delegate one or more people to represent their interests. With this mechanism, the citizens of the United States entrust their elected officials with the power to make decisions in their name. Yet, because of the diversity of the nation and the limitations on communication between

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<sup>155</sup> See, for example, Wikipedia’s “Languages in the United States” at <http://en.wikipedia.org> and “Languages in the USA” prepared by Ethnologue.com at [http://www.ethnologue.com/show\\_country.asp?name=USA](http://www.ethnologue.com/show_country.asp?name=USA).

<sup>156</sup> Wikipedia’s “Languages in the United States” at <http://en.wikipedia.org> provides an overview of the history of the English-only movement.

<sup>157</sup> See the Web site of the National Association for Bilingual Education at <http://www.nabe.org/>.



constituents and their individual representatives, the participation of civil society organizations is often desirable. This section outlines the legal framework regulating the political activity of CSOs, official linkages with CSOs in the form of public liaisons, and CSO participation in the public budgeting process.

### **Legal framework for political involvement of CSOs**

The legal framework for nonprofit organizations in the United States regulates the type and extent of political involvement in which these organizations can engage. In recent years, legislation has led to more controls or limits on the lobbying activities of tax-exempt organizations. Lobbying is defined as any effort to influence legislation by contacting members of Congress and their staff or other government employees involved in drafting legislation. Simply providing information is not considered lobbying. The Lobbying Disclosure Act of 1995 requires all lobbyists to register and report on their lobbying activities and stipulates that 501(c)(4) organizations engaged in lobbying are prohibited from receiving federal funds in the form of awards, grants, or loans.

Three regulatory “regimes” exist to govern the lobbying activities of nonprofits. First, 501(c)(3) public charities are allowed to lobby as long as lobbying does not constitute a “substantial part” of the organization’s total activities. Second, 501(c)(3) private foundations are taxed on any spending related to lobbying activities. Third, other 501(c)(4) organizations have no restrictions on lobbying activities that further the goals set forth by the organization’s mission.<sup>158</sup>

### **Public liaisons**

Government liaisons provide information to civil society and engage CSOs in consultation and dialogue. Thus, public liaisons can serve an important function in promoting CSO participation in government planning and decision making. The research and survey results included in this chapter suggest that the link between civil society and government is much stronger at the local and regional levels than at the federal level.

#### **Public liaisons—local level**

Of the organizations surveyed, 11 said that there is an official government liaison with civil society at the local level, although several respondents added that not all CSOs have equal access to the public liaison. The existence of public liaisons does not necessarily ensure that the government values the regular participation of diverse CSOs as the best way to formulate policy. The survey organizations made the following observations about public liaisons at the local level:

- The function of local public liaisons and the extent of government outreach depend on the government or administration in office and on the characteristics of the CSOs (prestige, contacts, etc.);
- CSOs working on specific issues usually interact with liaisons;
- Liaison activities primarily revolve around the monitoring of government contracts to CSOs; in these cases, advocacy or consultation is not the purpose.

#### **Public liaisons—state level**

Regional liaisons with civil society depend entirely on the state government and therefore vary considerably in their roles. The Governor’s Interagency Council for the Nonprofit Sector, for example, was created in Maryland in 1999 to coordinate the state’s policies for nonprofit organizations and to foster relationships with the nonprofit sector.<sup>159</sup> The Charitable Organizations

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<sup>158</sup> “Lobbying Issues” by Judith Kindell and John Francis Reilly is the most recent information provided by the IRS on nonprofit lobbying and political engagement. See <http://www.irs.gov/pub/irs-tege/topic-p.pdf>.

<sup>159</sup> See <http://www.mdarchives.state.md.us/msa/mdmanual/26excom/html/27nonpro.html>.

Division of the Office of the Secretary of State also facilitates the registration and management of nonprofits in Maryland.<sup>160</sup> When asked about liaisons at the state level, nine of the 13 organizations affirmed that such an office exists in their state; three claimed that no such office is in place; and one respondent declined to answer.

#### **Public liaisons—federal executive branch**

Most of the agencies in the federal executive branch have public liaisons. In the State Department, for example, the Bureau of Public Affairs houses the Office of Public Liaison, which is tasked with creating opportunities to communicate with the public and to improve awareness of the department and its work. This office coordinates speaking engagements, briefings, and seminars. The public liaison oversees the State Department's public communications (including responding to phone calls, emails, and letters), Washington and regional public programs (including town meetings with local organizations), and the Nongovernmental Organizations Liaison Unit. Among its responsibilities, the NGO Unit coordinates foreign policy briefings for CSOs, sponsors the National Foreign Policy Conference for CSO leaders, and arranges speakers for NGO conferences. Many of the events sponsored by the NGO Unit are organized jointly with CSOs and, while the unit tries to be as inclusive as possible, most of these events take place in Washington, DC.<sup>161</sup>

#### **Public liaisons—federal legislative branch**

The U.S. Congress does not have a centralized public liaison office to facilitate interactions with CSOs. Instead, each member of Congress serves as a liaison to interest groups, CSOs, businesses, and citizens. Congressional committees will often solicit the opinions of experts and may convene forums with civil society for the discussion of particular topics, but this occurs on an issue-specific basis and is not an institutionalized process.

#### **CSO participation in budgetary or investment decisions**

Since the Budget Act of 1974, the federal budgetary process in the United States has been carried out by the U.S. Congress and the president. Both the House of Representatives and the Senate have a budget committee where legislation is debated, drafted, and passed on to the full House or Senate for further deliberation and voting.<sup>162</sup> In addition to the congressional committees, the Congressional Budget Office, created as a result of the Budget Act of 1974, provides economic forecasts and baseline data. The president initiates the budget process by presenting Congress with the President's Budget Request, which details presidential funding priorities for the federal government. Congressional committees are then tasked with preparing concurrent resolutions, which are voted on by the House and Senate.<sup>163</sup>

Participation in budgetary design and implementation is important for CSOs because of the impact on their specific areas of work. Within the legal boundaries for the political action of nonprofit organizations as discussed above, CSOs can engage in lobbying activities to influence the budget process. Outside of lobbying, any organization or individual can provide information to members of Congress and to the budget committees. Specifically, senators and representatives are the government actors most open to listening to their constituents.

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<sup>160</sup> See <http://www.sos.state.md.us/sos/charity/html/startnp.html>.

<sup>161</sup> See <http://www.state.gov/r/pa/pil/>. The director of the NGO Unit at the U.S. Department of State provided useful information for this section.

<sup>162</sup> Each budget committee hosts its own Web site. See <http://www.senate.gov/~budget/republican/index.html> and <http://www.house.gov/budget/>.

<sup>163</sup> See "The Congressional Budget Process: An Explanation," Committee on the Budget, United States Senate, Revised December 1998, U.S. Government Printing Office, Washington at [http://www.house.gov/budget\\_democrats/budget\\_process/budget\\_process.pdf](http://www.house.gov/budget_democrats/budget_process/budget_process.pdf).

The role that CSOs play in the budget process is similar to their role in most legislation. Decision-making power cannot be delegated to members of civil society, since doing so would contradict the principle of representative government. In some cases, the president may form ad hoc working groups or committees and include CSOs in these groups and in the generation of ideas and proposals. Congress can also seek the assistance of CSOs in the budget process. Either of the two budgetary committees can ask for special testimonies by individuals or organizations to strengthen a case for or against a piece of legislation. Similarly, members may rely on civil society experts to help draft budgetary legislation. The nature of the two-party system and partisan politics means that the majority party controls the budget because it controls both the agenda and the process. This impacts the degree to which certain groups and individuals are able to influence legislation. Similarly, there is a natural limit to the number of CSOs whose ideas can be heard or incorporated into policy debates.<sup>164</sup> Budget and investment decision making at the state level function much like at the federal level, involving the governor, state legislators, and lobbyists.

According to the survey respondents, at the federal level, the most common role of CSOs in the budget or investment decision-making process is monitoring the implementation of the budget. The second most frequent form of CSO participation is the proposal of programs and policies to legislators and congressional committees. Similarly, at the local and state levels, CSOs engage in budget monitoring and, though less frequently, often propose programs and policies and organize the participation of CSOs in consultations with the government. The government may also make budgetary information available to CSOs through information sessions during the design and approval of a budget, for example.

#### **4. The Promotion of a Culture that Supports Democracy, Human Rights, and Diversity through Public Education**

A culture that values democracy, human rights, and diversity depends to a large degree on functioning democratic institutions and on an active, inclusive, and informed civil society—both of which should be rooted in respect for civil rights. A democratic culture can be fostered by informal education at home and in society in general, as well as by formal education. This section explores CSO and government initiatives in civic education.

##### **CSO collaboration with the government and academic experts to develop educational programs in the areas of democracy and human rights**

Education in the U.S. is the responsibility of states and localities; therefore, the content, quality, and management of education varies widely among the 50 states and the District of Columbia. Approximately 90 percent of all education financing comes from the states, and the federal government has no direct control over curricula. The federal role in education, primarily through the Department of Education, is to ensure equal access to public education and to promote educational excellence throughout the country. Consistent with this role, the federal government provides leadership in educational strategies, evaluations, and research initiatives.

According to the Center for Civic Education, “lack of civic engagement and civic literacy among American youth is widespread” and, although many states proclaim the value of civic education, in reality the quality of civic education in schools in the United States is often low. A 1999 study by the center revealed the following about civic education in the United States:

- Half of the states have statutes on civic education;
- 29 states require at least one government or civics course;

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<sup>164</sup> Conversation with staff person at the Center on Budget and Policy, 1/20/04.

- Even in cases where state standards exist, not all district administrators are familiar with these standards or implement them accordingly;
- Teachers are relying more on additional materials and the Internet to complement civics textbooks.<sup>165</sup>

The National Center for Education Statistics, part of the DOE's Office of Educational Research and Improvement, implements the National Assessment of Educational Progress (NAEP), a nationwide achievement test for students in eight curricular areas, including civics. The civics assessment tests students' knowledge of basic democratic principles, the history of the U.S. government, the role of citizens in a democracy, and civil rights and responsibilities. In 1998, two-thirds of the students participating in the NAEP civics assessment tested at or above the "basic" level of understanding, with about one-fourth of the students performing at or above the higher "proficient" level. Based on the assessment's results, the NAEP concluded that the civic knowledge of youth in the United States can and should be strengthened.<sup>166</sup>

In response to the NAEP's findings, the Center for Civic Education launched the Campaign to Promote Civic Education with the goal of stimulating a nationwide renovation of civics education. The Campaign, a collaboration between governments and CSOs in each of the 50 states, is intended to foster increased dialogue with local and regional school districts. Thus far, each state has organized a coalition of activists and organizations to lead state efforts. As part of the Campaign to Promote Civic Education, the Center for Civic Education, together with the Alliance for Representative Democracy, the National Conference of State Legislators and the Center on Congress from Indiana University, sponsored the First Annual Congressional Conference on Civic Education in September 2003. The conference brought together state delegations, U.S. Congressional leaders, and civil society representatives to review the status of civic action and develop state plans of action to strengthen the transmission of civic values.<sup>167</sup>

In February 2003, the Carnegie Corporation of New York and the Center for Information and Research on Civic Learning and Engagement (CIRCLE) published the results of a series of discussions among researchers and practitioners on civic education. "The Civic Mission of Schools" notes that government officials have begun to pay more attention to the issue of civic education. For example, the Education Commission of the States, the National Conference of State Legislatures, the Association for Supervision and Curriculum Development, and the State Education Agency K-12 Service-Learning Network have all undertaken civic education initiatives. In addition the newly-formed Subcommittee on Civic Education within the federal court system has called for better civic education to counteract the growing levels of civic disengagement among youth. The White House also recently held two meetings on civic education. Some of the recommendations from the report include the following:

- Schools should work with state education departments and local school district officials to develop and establish civic education curricula;
- The federal government should increase the amount of federal funding available to states for civic education...[and] consider establishing a new federal entity with responsibility for civic education...which would commission research on civic education, encourage the development of model programs, help design and

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<sup>165</sup> See the Policy Research Project on Civic Education Policies and Practices' report entitled "The Civic Education of American Youth: From State Policies to School District Practices" at [http://www.civiced.org/ceay\\_campaign\\_tolo.html](http://www.civiced.org/ceay_campaign_tolo.html).

<sup>166</sup> See "New National Assessment Reveals Majority of Students Have Basic Knowledge of Civics," produced by the National Center for Education Statistics, U.S. DOE at [http://nces.ed.gov/Pressrelease/rel1999/11\\_18\\_99.asp](http://nces.ed.gov/Pressrelease/rel1999/11_18_99.asp).

<sup>167</sup> The Campaign to Support Civic Education Information provided this information. See [http://www.civiced.org/campaign\\_intro.html](http://www.civiced.org/campaign_intro.html).

- implement curricula, and serve as a national clearinghouse on civic education for teachers and schools across the country;
- Standards should be implemented for civic education;
  - Colleges and universities should strengthen the civic dimensions of pre-service and in-service education for teachers and administrators;
  - Funders should support efforts to build national and state coalitions of educators, policymakers, parents, young people and community leaders in support of better quality civic education in schools.<sup>168</sup>

In October 2003, the California State Legislature partnered with the Center for Civic Education to develop a civic education curriculum guide for the public schools in California. Funded by the California Department of Education, Education for Democracy: California Civic Education Scope & Sequence specifically addresses the lack of separate standards for civics and government courses and provides civics guides and resources for teachers to use directly in the classroom.

In another initiative, civil society organizations the Association for Supervision and Curriculum Development and the First Amendment Center are collaborating on First Amendment Schools, a project to evaluate and strengthen the understanding and practice of First Amendment rights in school communities. A study conducted as a preliminary phase of this project established that public schools generally do a good job of educating teachers and students about First Amendment rights but do a weaker job of incorporating these freedoms into the school setting.<sup>169</sup>

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<sup>168</sup> The full text is downloadable at <http://www.civicmissionofschools.org>.

<sup>169</sup> See the First Amendment Schools Survey, 2001 at <http://www.firstamendmentschools.org/surveysummary.html>.