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Department of Justice Declines to Defend the Constitutionality of a Statute Criminalizing Female Genital Mutilation

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On September 13, 2019, the Sixth Circuit dismissed the appeal of *United States v. Nagarwala*, a federal district court decision that had held unconstitutional the federal statute criminalizing the female genital mutilation (FGM) of minors. Jumana Nagarwala, an emergency room doctor, was one of eight defendants charged by the Department of Justice (DOJ) for performing or assisting in performing FGM on nine girls, at least some of whom were around age seven.[1] The federal district court judge in *Nagarwala* rejected arguments that Congress had the constitutional authority—under either its power to implement treaty obligations or its power to regulate interstate commerce—to enact the statute at issue. Although the DOJ appealed this decision, it changed its position while the case was on appeal and declined to defend the constitutionality of the statute. The Sixth Circuit's dismissal of the appeal came at the request of the DOJ, which opposed an effort by the House of Representatives to intervene in the case in defense of the statute's constitutionality.

In 1996, Congress passed several measures aimed at combatting FGM.[2] These measures included: (1) the criminalization of the practice of FGM on girls under the age of 18; (2) a directive to the Department of Health and Human Services to compile data on FGM and engage in educational outreach efforts to relevant communities; (3) a directive to the Immigration and Naturalization Service to provide information to new immigrants on the effects of FGM and on its criminalization; and (4) instructions to U.S. directors of international financial institutions to oppose certain types of loans to countries that had yet to take preventative measures against FGM.[3] *Nagarwala* concerned the first of these provisions, which is codified at 18 U.S.C. § 116 (FGM Criminalization Statute).

[1] United States v. Nagarwala, 350 F. Supp. 3d 613, 616 (E.D. Mich. 2018) (noting that four of the girls were residents of Michigan, where the mutilation was performed, while five of the girls were brought from out of state); Criminal Compl. at 5, United States v. Nagarwala, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 2:17-cr-20274), ECF No. 1.

[2] During the time period when FGM legislation passed, there were an estimated 168,000 girls and women living in the United States with or at risk for FGM or female circumcision. Wanda K. Jones, Jack Smith, Burney Kieke, Jr. & Lynne Wilcox, Centers for Disease Control & Prevention, *Female Genital Mutilation/Female Circumcision*, 112 Pub. Health Reports 368, 369, 372 (Sept.–Oct. 1997), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1381943/pdf/pubhealthrep00038-0014.pdf [https://perma.cc/ZQS2-GDSB]. A more recent study estimated the number to have increased to 513,000 by 2012. Howard Goldberg, et al., Centers for Disease Control & Prevention, *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk, 2012*, 131 Pub. Health Reports 1, 4, 7 (Mar.–Apr. 2016), *available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/fgmutilation.pdf [https://perma.cc/7JBR-DYZB] (noting that over half of these persons had Egypt, Ethiopia, Somalia, or Nigeria as the country of origin for themselves or their parents).

[3] *See* Pub. L. 104-208, at § 645, 110 Stat. 3009 (1996) (codified at 18 U.S.C. § 116) (criminalizing FGM); *id.*, § 644 (codified at 8 U.S.C. § 1374) (directing the provision of information to new immigrants); *id.*, § 579 (codified at 22 U.S.C. § 262k-2) (setting terms for financial loans); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 520(b), 110 Stat. 1321 (1996) (mandating the compilation of data); *see also* Khadijah F. Sharif, Comment, *Female Genital Mutilation: What Does the New Federal Law Really Mean?*, 24 Fordham Urb. L.J. 409, 418–20 (1997) (discussing the various provisions).

The FGM Criminalization Statute provides that "whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both."[4] The statute exempts certain operations necessary for the health of the minor (such as during childbirth), but makes clear that "no account shall be taken" of any beliefs "that the operation is required as a matter of custom or ritual."[5] As findings accompanying the statute, Congress observed that FGM "often results in the occurrence of physical and psychological health effects that harm the women involved" and that "the unique circumstances surrounding the practice of [FGM] place it beyond the ability of any single State or local jurisdiction to control."[6] Congress also found that it had the authority to criminalize FGM pursuant to specific provisions of the Constitution, pointing to its "affirmative power under section 8 of article I, the necessary and proper clause, section 5 of the fourteenth Amendment, as well as under the treaty clause."[7]

Since its enactment, the FGM Criminalization Statute had remained mostly untested, as federal prosecutors apparently filed charges based on it only once before the charging of Nagarwala in 2017.[8] Nagarwala's case eventually expanded to include seven co-defendants: another doctor, two assistants, and four mothers who had arranged for the performance of FGM on their young daughters.[9] While most of the federal charges stemmed from the FGM Criminalization Statute, Nagarwala was also charged with "conspiracy to travel with intent to engage in illicit sexual conduct," and four defendants were also charged with conspiring to tamper with witnesses.[10] The defendants moved to dismiss the charges that were based on the FGM Criminalization Statute on the ground that Congress lacked the constitutional authority to pass this statute.

In response, the DOJ defended the constitutionality of the FGM Criminalization Statute on two separate bases. The first was that Congress had the constitutional authority to pass the statute under the Necessary and Proper Clause, which, as interpreted by the Supreme Court in *Missouri v. Holland*, gives Congress the power to implement treaties through legislation.[11]

[4] 18 U.S.C. § 116(a). Pursuant to a later amendment, the statute also criminalizes foreign travel for the purpose of enabling FGM to be performed on a minor. *See* 18 U.S.C. § 116(d).

[5] 18 U.S.C. § 116(b)–(c).

[6] Pub. L. 104-208, at § 645(a).

[7] *Id.*, § 645(a)(6). One of these grounds—the Fourteenth Amendment—was not raised in defense of the constitutionality of the statute by the DOJ at the district court level. Instead, in response to Nagarwala's motion to dismiss, the DOJ relied only on Congress's treaty-implementing power and commerce power. *See generally* Response to Def.'s Mot. to Dismiss Counts One Through Five, United States v. Nagarwala, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 2:17-cr-20274), ECF No. 336 [hereinafter DOJ Response in the District Court]. A footnote observed that "[t]he government defends the prosecution here on only the grounds enumerated in this brief. It does not, however, waive the right to assert other grounds in future cases, should the facts and circumstances so merit." *Id.* at 15 n. 16.

[8] Daniel Rice, *Female Genital Mutilation and the Treaty Power: What Congress Can Do*, JUST SECURITY (Oct. 29, 2019), *at* https://www.justsecurity.org/66757/female-genital-mutilation-and-the-treaty-power-what-congress-can-do (observing that "federal prosecutors [had] brought only one set of charges under the FGM prohibition" prior to the charging of Nagarwala and co-defendants in 2017). This number reflects only federal prosecutions. Some U.S. states also criminalize FGM and, in addition, the perpetration of FGM could be criminally prosecuted as child abuse or assault. *See infra* notes 54–55 and accompanying text.

[9] *See* 350 F. Supp. 3d at 615–16.

[10] *See id.* at 616.

[11] DOJ Response in the District Court, *supra* note 7, at 15–16; *see also* U.S. CONST. Art. I, § 8, cl. 18; Missouri v. Holland, 252 U.S. 416, 435 (1920).

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The government argued that the FGM Criminalization Statute advances the objectives of the International Covenant on Civil and Political Rights (ICCPR), including two of its specific provisions.[12] One of these was Article 3, under which the signatories "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."[13] The other was Article 24, which provides that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[14] In arguing that the FGM Criminalization Statute was necessary and proper in light of these treaty provisions, the DOJ emphasized that "the U.N. body tasked with overseeing implementation of the ICCPR, the Human Rights Committee, has identified FGM as a gender-based impediment to women and girls' equal enjoyment of rights provided in the Covenant."[15] As its second, separate defense of the statute's constitutionality, the DOJ argued that Congress had the authority to pass this statute as part of its power to regulate commerce.[16]

Judge Bernard Friedman of the Eastern District of Michigan rejected both of the DOJ's arguments. He held that "Congress had no authority to pass this statute under either the Necessary and Proper Clause or the Commerce Clause."[17]

On the first issue, the district court concluded that "there is no [rational] relationship between the ICCPR and the FGM [Criminalization Statute]" and therefore that Congress's treaty-implementing power did not provide Congress with authority to pass the statute.[18] The court's analysis focused exclusively on the text of the ICCPR, without addressing how it had been interpreted and applied by the Human Rights Committee.[19] The court stated:

> [T]here is no rational relationship between the FGM [Criminalization Statute] and Article 3 [of the ICCPR] . . . . This article seeks to ensure equal civil and political rights (e.g., the freedom of expression, the right to participate in elections, and protections for defendants in criminal proceedings) for men and women, while the FGM Criminalization Statute seeks to protect girls aged seventeen and younger from a particular form of physical abuse. There is simply no rational relationship between Article 3 and the FGM statute. The latter does not effectuate the purposes of the former in any way.

[12] DOJ Response in the District Court, *supra* note 7, at 18–21 (noting that the Senate advised and consented to the ICCPR in 1992). The DOJ did not rely on Article 7 of the ICCPR, which prohibits cruel or degrading treatment, as the United States had entered a reservation limiting the scope of that article. *See id.* at 19 n. 18.

[13] International Covenant on Civil and Political Rights, Art. 3, Oct. 5, 1977, 999 UNTS 171 [hereinafter ICCPR]; *see also* DOJ Response in the District Court, *supra* note 7, at 19.

[14] ICCPR, *supra* note 13, Art. 24; *see also* DOJ Response in the District Court, *supra* note 7, at 19.

[15] DOJ Response in the District Court, *supra* note 7, at 19–20; *see also id.* at 27–28 (once again discussing the Human Rights Committee's treatment of FGM). General Comment 28 of the Human Rights Committee, for example, calls upon state parties to provide the Committee with information regarding "the practice of genital mutilation," including "on measures to eliminate it." Human Rights Committee, CCPR General Comment 28: Article 3 (Equality of Rights Between Men and Women), at 3, UN Doc. No. CCPR/C/21/rev.1/Add.10 (Mar. 29, 2000).

[16] DOJ Response in the District Court, *supra* note 7, at 29–44; *see also* U.S. CONST. Art. I, § 8, cl. 3.

[17] 350 F. Supp. 3d at 630. For a critique of the court's reasoning, see Rice, *supra* note 8.

[18] 350 F. Supp. 3d at 630.

[19] *See id.* at 617–18.

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> The relationship between the FGM [Criminalization Statute] and Article 24 is arguably closer . . . [but still] tenuous. Article 24 is an anti-discrimination provision, which calls for the protection of minors without regard to their race, color, sex, or other characteristics. As laudable as the prohibition of a particular type of abuse of girls may be, it does not logically further the goal of protecting children on a nondiscriminatory basis.[20]

As an alternative holding, the district court stated that "even assuming the treaty and the FGM [Criminalization Statute] are rationally related, federalism concerns deprive Congress of the power to enact this statute."[21] The court observed that, in advising and consenting to the ICCPR, the Senate had included an understanding indicating that federalism principles were relevant to the implementation of the ICCPR.[22] The court quoted at length from the Supreme Court's 2014 decision in *Bond v. United States*, which drew upon federalism principles in narrowly interpreting a criminal statute implementing the Chemical Weapons Convention.[23] After making these two references, the court concluded that "[l]ike the common law assault at issue in *Bond*, FGM is local criminal activity which, in keeping with longstanding tradition and our federal system of government, is for the states to regulate, not Congress."[24]

The district court separately held that Congress did not have the power under the Commerce Clause to enact the FGM Criminalization Statute.[25] The court determined that FGM could not be deemed an economic or commercial activity, concluding that the DOJ had failed to show an interstate market beyond the facts of the present case and that FGM could not be regulated as health care, notwithstanding its performance by medical professionals, because it "is a form of physical assault, not anything approaching a healthcare service."[26] The court also noted the absence of a jurisdictional element in the statute requiring that the victims or providers of FGM "traveled in, or had any effect on, interstate commerce."[27]

The DOJ appealed the district court decision to the Sixth Circuit.[28] But on April 10, 2019, after receiving two extensions to file an opening brief on appeal, the DOJ reversed its stance in identical letters from the solicitor general to the House and Senate Judiciary Committees.[29]

[20] *Id.*

[21] *Id.*

[22] *Id.* This understanding provided that the ICCPR "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments" and that "to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the" ICCPR. 138 CONG. REC. S4834 (Apr. 2, 1992).

[23] 350 F. Supp. 3d at 619–20; *see also* Bond v. United States, 572 U.S. 844, 847–49 (2014) (concluding as a matter of statutory interpretation that the federal statute implementing the Chemical Weapons Convention did not criminalize a woman's attempt to poison her husband's lover).

[24] 350 F. Supp. 3d at 620 (quotation marks omitted).

[25] *Id.* at 627–30.

[26] *Id.* at 628.

[27] *Id.* at 629.

[28] *See* Notice of Appeal, at 1–2, United States v. Nagarwala, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 2:17-cr-20274), ECF No. 378.

[29] Letter from Noel J. Francisco, Solicitor General, to Dianne Feinstein, Ranking Member of the Senate Committee on the Judiciary, at 2 (Apr. 10, 2019), *at* https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download [https://perma.cc/4FU6-EQ2E]; Letter from Noel J. Francisco, Solicitor General, to Jerrold Nadler, Chairman Member of the House Committee on the Judiciary, at 1–2 (Apr. 10, 2019), *available at* https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2019/04/530D-Letter-FGM-Statute.pdf

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The letters, as required by 28 U.S.C. § 530D (530D Letters),[30] acted as official notice to Congress that the DOJ would not defend the constitutionality of the FGM Criminalization Statute on appeal. The solicitor general stated that while FGM performed on minors is "an especially heinous practice . . . that should be universally condemned," the DOJ had "reluctantly determined that . . . it lacks a reasonable defense of the [FGM Criminalization Statute], as currently worded."[31] In the solicitor general's view, the FGM Criminalization Statute could not be defended as an exercise of Congress's treaty-implementing power and, as written, lacked the nexus to commerce necessary for it to be defensible as an exercise of Congress's commerce power. The solicitor general suggested that Congress could cure the constitutional issue with respect to the Commerce Clause by amending the FGM Criminalization Statute to include a nexus to interstate or foreign commerce as an element of the crime.[32]

The solicitor general offered the following explanation for why the DOJ would not defend the FGM Criminalization Statute as an exercise of Congress's treaty-implementing power:

> [T]he [DOJ] has determined that it does not have an adequate argument that Section 116(a) is within Congress's authority to enact legislation to implement the ICCPR, which does not address FGM. None of the ICCPR's provisions reference FGM at all. Nor do they provide a basis for the federal government itself (rather than the individual States) to criminalize FGM of minors by private parties. This case is therefore not analogous to *Holland*, which involved a treaty that more directly addressed the parties' obligation to protect certain migratory birds and to propose legislation to do so. Thus, even maintaining the full continuing validity of *Holland*, the [DOJ] does not believe it can defend Section 116(a) on this ground.[33]

On April 30, 2019, the House of Representatives filed a motion to intervene in the *Nagarwala* appeal in order to defend the constitutionality of the FGM Criminalization Statute.[34] In an accompanying press release, Speaker of the House Nancy Pelosi explained that the "Trump Administration's sudden refusal to advance legal arguments to defend a long-standing federal statute criminalizing this horrific act disrespects the health and futures of vulnerable women and girls."[35] In its motion, the House observed that 28 U.S.C. § 530D(b)(2) requires the DOJ to notify Congress of a decision not to defend the

[https://perma.cc/6ZJP-FXPZ] [collectively hereinafter 530D Letters]; *see also* Mot. of the U.S. House of Representatives to Intervene, at 6, United States v. Nagarwala (6th Cir. filed Apr. 30, 2019) (No. 19-1015), ECF No. 24 [hereinafter Motion to Intervene] (noting the two extensions sought by the DOJ).

[30] This statute provides that "[t]he Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . determines . . . to refrain (on the ground that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute." 28 U.S.C. § 530D(a)(1)(B)(ii).

[31] 530D Letters, *supra* note 29, at 1–2.

[32] *Id.* at 2. The solicitor general did not discuss whether, in his view, Congress would have the constitutional authority to enact the FGM Criminalization Statute if the United States were to ratify other human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of the Child. *See generally id.*

[33] *Id.* (citation omitted).

[34] Motion to Intervene, *supra* note 29.

[35] Nancy Pelosi, Speaker of the House Press Release, Pelosi Statement on Filing of House Intervention to Uphold Federal Statute Criminalizing Female Genital Mutilation (May 1, 2019), *at* https://www.speaker.gov/newsroom/5119-3 [https://perma.cc/HY2K-UDCG].

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constitutionality of a statute "'within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding.'"[36] The House pointed to several prior instances in which it had intervened in civil proceedings to defend a statute's constitutionality and argued that the same standard should be applicable to appeals in criminal cases.[37] The House reasoned that its intervention would "ensur[e] that the FGM [Criminalization Statute] receives a vigorous constitutional defense" since the "Executive Branch and defendants agree—incorrectly—that the FGM [Criminalization Statute] is unconstitutional."[38]

In response, the DOJ both opposed the House's intervention and moved to voluntarily dismiss the appeal.[39] The DOJ argued that the House had no authority to intervene in criminal proceedings, stating that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" and "[n]o court has ever permitted the Legislature to . . . extend a federal criminal prosecution that the United States has determined no longer to pursue on appeal."[40] The DOJ argued that the "proper role of the House in ensuring the viability of future prosecutions for [FGM] is its participation in the bicameralism and presentment process for enacting new laws."[41]

On September 13, 2019, the Sixth Circuit granted the DOJ's motion to voluntarily dismiss the appeal.[42] The court did not address the House's motion to intervene. Instead, it simply granted the motion to voluntarily dismiss the case, thus making the House's pending motion moot.[43] The court noted that it "generally grant[s] motions to voluntarily dismiss unless it would be unjust or unfair to do so" and found "no reason to disregard our general rule" after "[h]aving considered the parties' arguments."[44]

On the same day that the Sixth Circuit dismissed *Nagarwala*, the D.C. Circuit upheld a different congressional statute as a valid exercise of Congress's treaty-implementing power.[45] *United States v. Park* concerned the constitutionality of a federal statute that criminalized the sexual abuse of children by U.S. citizens abroad.[46] Reversing the federal district court, the D.C. Circuit held that Congress had the authority to enact this statute in order to implement the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which the United States had ratified in 2002.[47] While the court acknowledged that the

[36] Motion to Intervene, *supra* note 29, at 6 (quoting 28 U.S.C. § 530D(b)(2)).

[37] *Id.* at 8–9.

[38] *Id.* at 13–14.

[39] Opposition of the United States to Motion of the U.S. House of Representatives to Intervene, United States v. Nagarwala (6th Cir. filed May 31, 2019) (No. 19-1015), ECF No. 41 [hereinafter Opposition to Motion to Intervene]; Mot. to Voluntarily Dismiss Appeal, United States v. Nagarwala (6th Cir. filed May 31, 2019) (No. 19-1015), ECF. No. 40.

[40] Opposition to Motion to Intervene, *supra* note 39, at 5.

[41] *Id.*

[42] United States v. Nagarwala, No. 19-1015, 2019 WL 7425389, at *1 (6th Cir. Sept. 13, 2019).

[43] *Id.*

[44] *Id.*

[45] United States v. Park, 938 F.3d 354, 363–64 (D.C. Cir. 2019).

[46] *Id.* at 357–58 (considering the constitutionality of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, as codified at 18 U.S.C. § 2423). The DOJ "argue[d] on appeal that Congress's treaty [implementing] power and the Foreign Commerce Clause support[ed]" the constitutionality of the statute as applied to the criminal prosecution at issue in the case. *Id.* at 362.

[47] *Id.* at 357, 360.

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Optional Protocol only required the criminalization of child prostitution "'for remuneration or any other form of consideration,'" the court concluded that "the Optional Protocol's goal of eliminating commercial child sexual exploitation, including global sex tourism, could be undercut if Congress failed to criminalize non-commercial child sex abuse by U.S. residents abroad."[48] As one of its reasons, the court noted that while the "government may not simply point to any tangentially related treaty to defend a constitutionally suspect statute," nevertheless Congress's "power to give the treaty practical effect . . . is not confined to the Optional Protocol's minimum requirements."[49] The D.C. Circuit's decision is one of several federal appellate decisions in recent years upholding the constitutionality of an exercise of Congress's treaty-implementing power.[50]

The statutes at issue in both *Nagarwala* and *Park* reflect a congressional commitment to deterring and punishing abuses committed against children. In the wake of the DOJ's decision not to defend the FGM Criminalization Statute, the House passed an unopposed nonbinding resolution denouncing the practice of FGM and calling on the international community and the Department of State and United States Agency for International Development to accelerate efforts to eliminate it.[51] Members of Congress have also introduced various bills to fund efforts to combat FGM and to amend the FGM Criminalization Statute so that it includes a more explicit nexus to commerce.[52]

The district court decision in *Nagarwala* and the DOJ's subsequent decision not to defend the statute may animate efforts for more state law protection against FGM.[53] Roughly half of the states currently have laws specifically criminalizing FGM, at least with respect to minors, and the perpetration of FGM could also fall within the elements of more broadly phrased

[48] *Id.* at 368. The court separately held that Congress had the authority to criminalize the production of child pornography in order to implement the Optional Protocol, concluding that the statute's "criminalization of non-commercial child pornography production plainly implements the treaty and is constitutional" because "the Optional Protocol, by its terms, reaches both commercial and non-commercial production of child pornography." *Id.* at 366.

[49] *Id.* at 369.

[50] *See* United States v. Mikhel, 889 F.3d 1003, 1023–24 (9th Cir. 2018) (upholding the constitutionality of the Hostage Taking Act as implementing the International Convention Against the Taking of Hostages); United States v. Noel, 893 F.3d 1294, 1305 (11th Cir. 2018) (same); *see also* United States v. Ryan, _ F. Supp. 3d. __, 2019 WL 7556053, at *14 (W.D. Wis. Dec. 20, 2019) (finding that Congress had the constitutional authority to criminalize the possession of polonium-210 in order to implement the International Convention for the Suppression of Acts of Nuclear Terrorism).

[51] H.R. Res. 106, 116th Cong. (2019), *at* https://www.congress.gov/bill/116th-congress/house-resolution/106.

[52] H.R. 3583, 116th Cong. (2019), *at* https://www.congress.gov/bill/116th-congress/house-bill/3583 (proposing that the FGM Criminalization Statute be amended as suggested in the 530D Letters); S. 2017, 116th Cong. (2019), *at* https://www.congress.gov/bill/116th-congress/senate-bill/2017?s=1&r=5 (same); H.R. 960, 116th Cong. (2019), *at* https://www.congress.gov/bill/116th-congress/house-bill/960 (proposing increased grants to aid FGM victims and calling for data collection on FGM criminal occurrences); H.R. 959, 116th Congress (2019), *at* https://www.congress.gov/bill/116th-congress/house-bill/959/text (proposing the criminalization of FGM when individuals transport minors across state lines); H.Amdt.341 to H.R. 2740, Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020, 116th Cong. (2019), *at* https://www.congress.gov/amendment/116th-congress/house-amendment/341?s=a&r=46 (proposing funding for combatting FGM).

[53] *E.g.*, Hollie McKay, *Minnesota Lawmaker's Push for Tougher Female Genital Mutilation Law Faces Opposition*, Fox News (Feb. 19, 2019) *at* https://www.foxnews.com/politics/the-push-to-prosecute-parents-for-fgm-in-minnesota-proves-a-struggle-for-republican-lawmaker (noting a push for stronger FGM state statutes in Minnesota, where some of the *Nagarwala* victims resided); *see also* Shellie Sylvestri, *Female Genital Mutilation Bill Introduced in KY*, Wave 3 News (Jan. 13, 2020), *at* https://www.wave3.com/2020/01/14/female-genital-mutilation-bill-introduced-ky (noting the introduction of a bill in the Kentucky legislature).

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crimes.[54] There is considerable variation among these state laws, including whether they criminalize travel outside the state for the performance of FGM and what sentences they impose for FGM.[55] Unless Congress amends the FGM Criminalization Statute or the DOJ reverses its position that the statute is unconstitutional, there is no federal alternative to these state laws for the prosecution of FGM as a crime. But other federal criminal laws may be brought to bear against the perpetrators of FGM. In the Eastern District of Michigan, the DOJ continues to pursue charges against Jumana Nagarwala for the crime of conspiracy to travel with intent to engage in illicit sexual conduct.[56]

Secretary of State Describes Israeli Settlements in the West Bank as "Not Per Se Inconsistent with International Law"

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On November 18, 2019, Secretary of State Mike Pompeo stated that the "establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law."[1] This announcement contrasts with the approach taken by the State Department late in the Obama administration. Although embraced by Israel, the position announced by Pompeo was criticized by Palestinians, Security Council members and other states, who maintain that Israeli settlements in the West Bank violate international law. In January of 2020, the Trump administration released its proposed peace plan for the Israelis and Palestinians, which met with approval from Israeli leaders and rejection from Palestinian leaders.

Israeli citizens began moving to the West Bank after Israel captured the territory in the Six-Day War in 1967, and U.S. perspectives about the legality of the settlements have varied over the course of different administrations. The Carter administration declared the settlements to be illegal in a State Department letter, concluding that "[w]hile Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation . . . the civilian settlements in those territories is inconsistent with international law."[2] In 1981, President Reagan told reporters that he disagreed with his predecessor's position and did not consider the settlements to be illegal.[3] President

[54] *See* Limor Ezioni, *Contemporary Aspects of Female Genital Mutilation Prohibitions in the United States*, 28 AM. U. J. GENDER SOC. POL'Y & L. 39, 49–61 (2019) (surveying state laws); *see also id.* at 61 (concluding that "about half of the states have not enacted an anti-FGM bill").

[55] *See id.* at 49–61 (discussing the variation in state laws).

[56] *See* 18 U.S.C. § 2423(b); Gov.'s Response to Def.'s Mot. to Dismiss Count Seven (R.373), United States v. Nagarwala (E.D. Mich filed January 31, 2020) (No. 17-20274), ECF. No. 422.

[1] U.S. State Dep't Press Release, Secretary Michael R. Pompeo Remarks to the Press (Nov. 18, 2019), *at* https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press [https://perma.cc/5L3G-GMER] [hereinafter Pompeo Remarks].

[2] Letter from State Department Legal Adviser Concerning Legality of Israeli Settlements in the Occupied Territories, Apr. 21, 1978, 17 ILM 777.

[3] *Excerpts from Interview with President Reagan Conducted by Five Reporters*, N.Y. TIMES (Feb. 3, 1981), *at* https://www.nytimes.com/1981/02/03/world/excerpts-from-interview-with-president-reagan-conducted-by-five-reporters.html.