Statement by Mr. Berman of California Submitted Under General Leave for H.R. 7311

I, in concert with Mr. Conyers, the Chairman of the Committee on the Judiciary, make the following explanatory statement regarding H.R. 7311, the William Wilberforce Trafficking Victims Reauthorization Act of 2008.

H.R. 7311, the William Wilberforce Trafficking Victims Reauthorization Act of 2008, reauthorizes existing U.S. programs to combat human trafficking and establishes new requirements and programs regarding trafficking into both sexual exploitation and forced labor. Among a wide range of initiatives, the bill establishes new programs to prevent trafficking from occurring in foreign countries where trafficking begins, widens U.S. assistance programs to U.S. citizens, and provides additional protections for trafficking survivors who are threatened by trafficking perpetrators, and for children who are at risk of being repatriated into the hands of traffickers or abusers.

The Wilberforce Act also improves upon existing criminal prohibitions against human traffickers, including streamlining in the Slavery/Trafficking chapter of the federal criminal code, and creating new criminal tools to reach unscrupulous labor recruiters. Unlike previous reauthorizations, this reauthorization is for four years, from fiscal years 2008 to 2011, recognizing that U.S. anti-trafficking programs have become more established. The bill reflects an effort to develop a consensus between H.R. 3887, passed by the House on December 4, 2007, and S. 3061, ordered reported by the Senate Judiciary Committee on September 8, 2008. The legislation draws from the common approaches in both bills and develops alternative proposals where the two bills diverge. This explanatory statement draws attention to changes in several provisions of the bill from the approach in H.R. 3887. Many of the provisions of the bill and the intent behind them that are closely aligned with the original provisions of H.R. 3887 are described in the House Report 110-430, part I, the report accompanying H.R. 3887.

Title I

Title I of the bill draws from substantially similar positions in both the House and the Senate bills.

Section 102. Office to Monitor and Combat Trafficking

Section 102 provides more targeted amendments to section 105 of the Trafficking Victims Protection Act of 2000 with essentially the same objectives of requiring the establishment of the Office, promoting public-private partnerships to end trafficking and clarifying the role of the Director of the Office with regard to funding programs. Although the bill does not include several provisions from H.R. 3887, this should not be seen as failing to recognize the importance of the Office or the Director. The Office has been very effective in raising the awareness of the trafficking issue and should be considered for space in the new consolidated plan for relocating offices of the Department of State closer to the Harry S. Truman Building. When the head of the Office was changed to an Ambassadorial position, the pay rate for the position was actually reduced. That decision should be reassessed.

Section 105. Increasing Effectiveness of Anti-Trafficking Programs

This section draws from similar versions of both H.R. 3887 and S. 3061. In the new section 107A of the Trafficking Victims Protection Act of 2000, subsection (b) requires a self-certification that persons or entities providing services directly to trafficking victims have completed or will complete training. This self-certification, which is not expected to be monitored in every case by the U.S. Government, is intended to apply primarily to persons actually in direct contact with and providing services to the trafficking victims, not interns, other volunteers or administrative or supervisory staff of organizations involved in the assistance.

Section 106. Minimum Standards for the Elimination of Trafficking

This section, similar in both bills, makes a number of changes to section 108 of the Trafficking Victims Protection Act of 2000. With respect to the deletion of "a significant number of", the provision is intended to ensure that the broadest range of countries is reviewed by the Department. This section also separates out the provision regarding reducing the demand for commercial sex acts and participation in international sex tourism as a criteria for whether a country is making serious and sustained efforts to combat trafficking in persons, highlighting the importance of making progress in this area as the Office to Monitor and Combat Trafficking in Persons makes its decisions on tier ratings.

Title II

Title II reflects a number of changes to U.S. law, including amendments to the Immigration & Nationality Act (INA), and Title 18 of the United States Code (related to federal crimes). Many of the provisions, particularly those relating to amendments to the INA, were similar in H.R. 3887 and S. 3061.

Section 201. Protecting Trafficking Victims Against Retaliation

Section 201 provides a number of modifications to provisions relating to the T and U visa category, drawing from both H.R. 3887 and S. 3061. Among other matters, this section provides that a holder of a non-immigrant visa under Sections 101(A)(15)((T) or (U) of the Immigration and Nationality Act can adjust to permanent residency even if their T or U visas may have lapsed in the time period in which the adjustment regulations had not been promulgated. While adjustment regulations were released on December 8, 2008, and will control in the future, this provision is included as a stop-gap measure for those petitioners whose adjustment petitions were not processed because of the government's failure to issue regulations until that time.

Section 203. Protections, Remedies and Limitations on Issuance for A-3 and G-5 Visas.

This section addresses the issues of employees of diplomats and officers and employees of international organizations who perform domestic services in the homes of such individuals, drawing from provisions in section 110 of H.R. 3887 as well as section 203 of S. 3061. This provision is sensitive because of its effects on reciprocity to U.S. diplomats abroad. However, the failure of the Department of State to take seriously cases involving abuse has been troubling,

and this provision establishes a new framework for dealing with these cases. In particular, subsection (a)(2) provides that the Secretary of State shall suspend the issuance of certain visa classes to applicants seeking to work for officials of diplomatic missions or international organization "if the Secretary determines that there is credible evidence that 1 or more employees of such mission or international organization have abused or exploited 1 or more A-3 or G-5 non-immigrants and that the diplomatic mission or international organization tolerated such actions." It is expected that if the Department of Justice or another part of the U.S. Government provides information that such an act has occurred, or a non-governmental organization provides such information, and the information is credible, the Department should take steps to make the mission or organization aware of such information, and if the mission or organization does not take steps to rectify the situation, the denials of the visas provided under this section should start.

Section 222. Crimes

This section contains a number of modifications to the federal criminal code. Section 222 conforms the various crimes set forth in Title 18, United States Code, Chapter 77 ((Peonage, Slavery, and Trafficking in Persons) by extending the obstruction provisions of the Peonage statute (Section 1581) to the other substantive servitude offenses, by creating conspiracy liability within the Chapter, and by improving the treatment of restitution and asset forfeiture. None of those provisions are intended to foreclose the use of corresponding sections of the criminal code, where appropriate.

Section 222 also clarifies the definition of coercion in the core offenses created by the Trafficking Victims Protection Act, which responded to the Supreme Court's narrowing of the federal Involuntary Servitude statutes in United States v. Kozminski, 487 U.S. 931 (1988). Section 1589 covers offenses involving forms of forced labor, while Section 1591 is in the context of commercial sexual activity and can also be violated when a person uses a child for prostitution, as children are unable to give consent to commercial sexual activity. Those offenses returned the legal standard for a servitude conviction to the modern approach reflected in such cases as United States v. Mussry, 726 F.2d 1448 (9th Cir. 1984) and the lower court decisions in Kozminski (allowing conviction in servitude cases involving psychological coercion as well as overt violence).

Accordingly, the Trafficking Victims Protection Act of 2000 crafted Section 1589 and 1591 to only require a showing of a threat of "serious harm," or of a scheme, plan, or pattern intended to cause a person to believe that such harm would occur. The term "serious harm" refers to a broad array of harms, including both physical and nonphysical, and is intended to be subjectively construed in determining whether a particular type or certain degree of harm or coercion is sufficient to overcome a particular victim's will. Section 222 further clarifies these concepts to reflect the various and subtle forms of coercion used by traffickers in light of the experiences of prosecutors and non-governmental organizations in combating trafficking and assisting victims. Such modification was contemplated by the drafters of the Trafficking Victims Protection Act of 2000 (Pub. Law 106-386): "[T]he conferees are aware that the Department of Justice may seek additional statutory changes in future years to further address the issues raised in Kozminski, as courts and prosecutors develop experience with the new crimes created by this Act." Conference

Report Accompanying H.R. 3244, House Rep. 106-939, 106th Cong. 2nd Sess. 101 (printed in 146 Cong. Record H8855, H8881).

Thus, Section 222 clarifies that "[t]he term `abuse or threatened abuse of law or legal process' means the use or threatened use of a law or legal process, whether administrative, civil or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action," and that "The term `serious harm' means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing [in the case of section 1589, labor or services, or, in the case of section 1591, commercial sexual activity] in order to avoid incurring that harm." It is contemplated that these refinements will streamline the jury's consideration in cases involving coercion and will more fully capture the imbalance of power between trafficker and victim. A scheme, plan, or pattern intended to inculcate a belief of serious harm may refer to nonviolent and psychological coercion, including but not limited to isolation, denial of sleep and punishments, or preying on mental illness, infirmity, drug use or addictions (whether pre-existing or developed by the trafficker). "Commercial sexual activity" in this context is not limited to a particular sex act, but would include all aspects of prostitution, including time under the defendant's control in which the victim is not engaged with clients.

Another modification to Chapter 77 made by section 222 involves the level of scienter necessary for a violation of Section 1591. The current standard is enhanced through the addition of a "reckless disregard" option. Such an approach is well-established in other federal criminal statutes, and would have the advantage of reaching those who turn a willfully blind eye toward a person in commercial sexual activity who is being physically abused or is underage. Such an approach puts the responsibility on participants in commercial sex activity to not ignore indicia of abuse, such as bruising or distress, or indicia of youth on the part of those whom they recruit, entice, harbor, transport, provide, obtain, or maintain.

Additionally, a special evidentiary provision is added for those cases under Section 1591(a)(1) in which criminal liability attaches not because of the use of coercion but because of the use of a minor for commercial sexual activity. In such cases, the prosecution will be exempted from having to prove beyond a reasonable doubt that a defendant who had a reasonable opportunity to observe the person recruited, enticed, harbored, transported, provided, obtained or maintained knew that the person had not attained the age of 18 years. This special evidentiary provision reflects a similar provision in the aggravated sexual abuse offense, Title 18, United States Code, Section 2241(d), and is crafted in light of United States v. X-Citement Video, 513 U.S. 64, 70, n.2 (1994)(exception from presumption of *mens rea* more appropriate in statutes in which perpetrator necessarily "confronts the underage victim personally and may reasonably be required to ascertain that victim's age"). This approach comports with numerous appellate decisions in related areas of the law, such as the Mann Act. See, e.g., United States v. Jones, 471 F.3d 535 (4th Cir. 2006).

Section 222 also creates a new fraud crime, Title 18, United States Code, Section 1351, which prohibits the recruiting, solicitation, or hiring, with intent to defraud, foreign persons to be employed in the United States through false pretenses, representations, or promises about their

employment. For the purposes of this provision, "employment" is presumed to include, but not be limited to, such issues as terms and conditions of employment, housing, labor broker fees, employer or broker-provided food and transportation, ability to work outside of the offered place of employment, and other material aspects of the recruited person's work and life in America. This statute is intended to capture situations in which exploitative employers and recruiters have lured heavily-indebted workers to the United States, but did not obtain their labor or services through coercion sufficient to reach the level of the Chapter 77 Slavery/Trafficking offenses. Press accounts and Congressional briefings have highlighted cases with facts as egregious as situations in which defrauded workers were stranded in fenced compounds, reduced to catching pigeons for food and collecting rainwater to drink, all the while facing bankruptcy because of brokerage charges and debt incurred in their home country in reliance on the recruiters' false promises. This section will be of particular application in cases involving employment-based immigration ("guestworker") programs, but is not limited to employment under such a provision. This Section a five year statutory maximum in recognition that the victims of fraudulent labor recruiting are at high risk of being held in servitude, and that prosecutors should not have to wait for the abuse to rise to the highest levels of criminality before dismantling these criminal organizations.

H.R. 3887 updated Title 8, United State Code, Section 1328, a long-established statute that criminalizes the importation of aliens for immoral purposes and the harboring or employment of aliens so imported. The bill does not include this update, but rather directs the U.S. Sentencing Commission to assess the sentencing guideline pertaining to alien harboring, 18 United States Code, Section 1324(a)(1)(A)(iii), to determine whether the guideline for harboring should conform to the Mann Act guideline when the harboring was committed in furtherance of prostitution and the defendant is an organizer, leader, manager, or supervisor. Section 1324 is a more modern statute, penalizing harboring even without proof that it was done in furtherance of illegal importation. The elements of a 1324 offense do not vary based on the purpose for which the alien is being harbored. For instance, there is no difference in the knowledge required on the part of an employer, an alien smuggler, or a trafficker that the alien had come to, entered, or remained in the United States in violation of law. Section 1328 remains an effective tool to reach those who are kept in a brothel or other place in pursuance of importation for an immoral purpose, but this review of the sentencing structure is intended to guarantee that it will be supplemented by the general harboring statute.

Section 225 Promoting Effective State Enforcement.

This section, reflective of some of the goals of section 224 of the H.R. 3887, provides that nothing in previous acts related to trafficking, this Act, and any model law related to trafficking promulgated by the Department of Justice shall be read to legitimize prostitution as a valid form of labor, or to preempt, supplant or limit the effect of any State or Federal criminal law. In particular, it should be noted that financial transactions involving the proceeds of any trafficking activities, or any failure to report income obtained through any trafficking activities would remain reachable by applicable federal statutes, irrespective of the provision of section 225(a)(1).

Many states have modernized archaic slavery or forced prostitution statutes in line with the TVPA or the model state laws promulgated by the Department of Justice or non-governmental organizations. In recognition that many state statutes in the closely related area of prostitution

enforcement are also antiquated, the bill directs the Department of Justice to supplement its current anti-trafficking model law with modern anti-prostitution models, so that a holistic update is available for policymakers' use. Section 225 will also require that the new model law be distributed to each Attorney General as a means of promoting the new model law. The bill also will result in dissemination of a chapter of the Criminal Code of the District of Columbia as an example of a statute that reaches as felonies cases involving coercion, pandering, and exploitation alike.

Section 238. Processing of Certain Visas

Section 238 mandates a report from the Department of Homeland Security concerning the work of the Violence Against Women Act (VAWA) Unit at the U.S. Citizenship and Immigration Services' Vermont Service Center. The VAWA Unit is a highly-trained adjudication team that is responsible for a number of victim-related immigration applications, including but not limited to: the adjudications, adjustments, work authorizations, parole, fax-back benefits and employment verification, naturalization, and derivative beneficiaries related to such programs as Violence Against Women Act self-petitions (Section 101(a)(51) of the Immigration and Nationality Act); T visas (Section 101(a)(15)(T) of the Immigration and Nationality Act), U-visas (Section 101(a)(15)(U) of the Immigration and Nationality Act; battered spouse waivers (Section 216(c)(4)); abused immigrant work authorizations (Section 106 of the Immigration and Nationality Act) and parole for children of Violence Against Women Act cancellation recipients (Public Law 103-222, as reauthorized by Public Laws 106-326, 108-193, 109-162, and 109-164) and any other matters that are protected by the confidentiality provisions of the Violence Against Women Act.

The mandated report seeks information on funding, staffing, and training. The Unit should continue to be the responsible office for the processing of victim-related immigration applications, and such processing should be conducted in a manner consistent with applicable confidentiality requirements. Off-site adjudication of such applications should be considered an extraordinary circumstance, and if cases must be adjudicated elsewhere, special care should be taken to ensure compliance with confidentiality and adjudication standards of the Unit.

Immigrant victims of domestic violence, sexual assault and other violent crimes should not have to wait for up to a year before they can support themselves and their families. The Vermont Service Center should therefore strive to issue work authorization and deferred action in most instances within 60 days of filing, consistent with the need for safe and competent adjudication. The mandated report therefore seeks information on the timing adjudications, and steps taken to improve on this aspect of the Unit's mission.

The staff of the Unit are widely respected as experts in the effect of trauma and victimization and the heightened confidentiality mandated by the Violence Against Women Act, and have historically been not only an adjudication team but a policy resource. The mandated report thus includes a description of measures taken to ensure that the policy expertise of the Unit is fully incorporated into decision-making by the Department of Homeland Security.

Provisions from H.R. 3887 Not Included in Bill

Several provisions from H.R. 3887 do not appear in this version of the legislation. For example, the original House bill attempted to streamline the investigation and prosecution of certain sex trafficking and related offenses by amending the Mann Act, 18 U.S.C. § 2421, et seq. The Wilberforce Act reflects a different consensus, and achieves these ends through modifications to the Slavery/Trafficking Chapter of Title 18 discussed above.

Specific language regarding the surveys required by section 232 of H.R. 3887 is not included in the bill. However, the provisions of paragraph (B)(i) and (ii) of section 201(a)(1) of the Trafficking Victims Protection Reauthorization Act of 2005 (42 U.S.C. 14044(a)) still require the that the surveys contained in that provision be completed, and section 237(d) requires the Department of Justice to provide the relevant committees a report on the status of those surveys, including the projected date when such surveys will be completed. Also, section 234 of H.R. 3887 proposed a reorganization of functions within the Department of Justice. The Department of Justice should review the relationship between the Criminal Section of the Civil Rights Division and the Child Exploitation and Obscenity Section of the Criminal Division and promote a coordinated approach to the trafficking prosecutions that these Sections carry out. More critically, the Department and the Federal Bureau of Investigation should assess the division of labor within the Bureau as to trafficking offenses, with particular emphasis on servitude cases being considered a key civil rights enforcement priority.

Because efforts in the closely-related area of prostitution enforcement are important to prevent situations from ripening into servitude, the reporting requirements of Section 237 are intended to gain a better understanding of the Criminal Division and United States Attorneys Offices' activities to enforce the Mann Act or those local prostitution offenses that United States Attorneys may have jurisdiction over through operation of the District of Columbia Criminal Code or the Travel Act 18 U.S.C. §1952 or other racketeering tools.

Title III

Title III authorizes funds for programs, projects and activities related to human trafficking. In order to promote broad support for the bill, some of the authorization for program funding was reduced to levels closer to previously appropriated levels, and therefore represents a more realistic target for future spending. Any reductions in authorizations are not intended to indicate a decrease in the importance of any programs, but indeed are intended to encourage appropriations at those new levels. It should be noted that Department of Homeland Security, Immigration and Customs Enforcement is engaging in a number of important investigatory activities abroad and should continue to be fully supported.

Title IV

Title IV is drawn from title IV of both H.R. 3887 and S. 3061. The two versions were substantially similar, and the intent of title IV is described in House Report 110-430. As in both bills, section 404, revised from the text of both H.R. 3887 and S. 3061, provides that no assistance under section 516 of the Foreign Assistance Act (relating to transfers of excess defense articles), section 541 of the Foreign Assistance Act (relating to international military education and training) and section 23 of the Arms Export Control Act (relating to foreign military financing) shall be provided, and no licenses for commercial arm sales may be issued,

to countries that are determined to be using or permitting the use of child soldiers in governmental armed forces or government-supported armed forces. While requiring enhanced reporting on child soldiers in the annual country reports on human rights, the actual list of countries that are subject to this prohibition will be included in the annual Report on Trafficking in Persons, as provided for in H.R. 3887, instead of the annual country reports, as provided in S. 3061. The country reports should continue to be an objective assessment of human rights conditions around the world, and should not be used as the specific mechanism for imposing sanctions or other matters affecting U.S. relations with other countries.