

**JESSICA LENAHAH (GONZALES) V. UNITED STATES AND THE  
INTERAMERICAN COMMISSION'S APPROACH TO EQUALITY***Kusum Joshi**Vivek Wilson*

In *Jessica Lenahan (Gonzales) v. United States*, the Inter-American Commission published a detailed report, which concluded, inter alia, that the United States violated one of its citizen's rights to equality and non discrimination under Article II of the American Declaration. The Commission stressed that international law requires states to act with "due diligence" to protect women from domestic violence. The Commission recommended that the United States adopt special protection measures and take positive action to protect at-risk groups, including young women. These measures include legislation to make the enforcement of protective orders mandatory and the creation of "effective implementation mechanisms" accompanied by "adequate resources to foster their implementation." The Commission further suggested training programs for law enforcement and judicial officials to reverse stereotypes about domestic violence victims and to help end "discriminatory socio-cultural patterns" that prevent women from receiving the full protection of the law.

This section will examine the Inter-American Commission Report's findings and recommendations with regard to the right to equality and the due diligence principle. It will also compare the Report to the Supreme Court's decision in *Town of Castle Rock v. Gonzales*, which held that Ms. Lenahan failed to state a cognizable claim for relief under the U.S. Constitution. To provide the proper

context for this comparison, we will first set forth the facts of this case on which both the Commission and the Supreme Court relied.

#### **4.1 Facts of the Case**

The facts underlying Jessica Lenahan's lawsuit are truly horrific. Ms. Lenahan, who is of Native American and Latin American descent, married Simon Gonzales in 1990. They lived in Castle Rock, Colorado and had three daughters: Leslie, Katheryn, and Rebecca. In 1999, Ms. Lenahan obtained a valid restraining order against her husband, Simon Gonzales.<sup>1</sup> The order granted Ms. Lenahan temporary sole custody of her three daughters and limited Mr. Gonzales' interactions with the girls to "a midweek dinner visit" that had to be arranged "upon reasonable notice" and alternate weekends. The order included a warning for Mr. Gonzales, stating that "a knowing violation of a restraining order is a crime" and that he "may be arrested" if police officers had probable cause to believe that he knowingly violated the order.<sup>1</sup> It also included a "Notice to Law Enforcement Officials," which read, in relevant part, that they "shall use every reasonable means to enforce this restraining order." The order was issued to protect Ms. Lenahan and her daughters from Mr. Gonzales' "erratic and emotionally" abusive behavior towards them, which included verbal, physical, and sexual abuse, and threats to kidnap the children.<sup>2</sup> Prior to the issuance of the order, Ms. Lenahan had reported at least four incidents of domestic violence to the Castle Rock Police. On June 22,

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<sup>1</sup> See *Town of Castle Rock v. Gonzales (Castle Rock IV)*, 545 U.S. 748, 751-52 (2005) (noting that because this case came to the Supreme Court from the dismissal of a complaint, the Court assumed the truth of Ms. Lenahan's allegations).

1999, around 5:00 or 5:30 p.m., Mr. Gonzales picked up his three daughters while they were playing outside Ms. Lenahan's home and drove away with them in his pickup truck.<sup>3</sup> No prior arrangements had been made for Mr. Gonzales to see his children that evening. Ms. Lenahan did not know that he had taken her children, though she suspected as much. She called the Castle Rock Police Station at 7:42 p.m., and reported that she filed a restraining order against her husband, but that she did not know "whether he picked them up today or not."<sup>4</sup> The station dispatched two officers to Ms. Lenahan's home, where she showed them a copy of the restraining order.<sup>5</sup> However, the officers told her that there was nothing they could do and suggested that she call the police station again at 10:00 p.m. if the children had not returned home by then. Ms. Lenahan made four further phone calls to the Castle Rock Police Station that night. At 8:43 p.m., she informed them that she had located her daughters: Mr. Gonzales had taken them to Denver outside the jurisdiction of the Castle Rock police without her permission.<sup>6</sup> She called again at 9:57 p.m.

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<sup>2</sup> See *Lenahan*, Case 12.626, Report No. 80/11, 65 (detailing Mr. Gonzales' abusive behavior to include stalking, exhibitions of suicidal behavior, and breaking and entering into Ms. Lenahan's home while high on drugs).

<sup>3</sup> *Castle Rock IV*, 545 U.S. at 753.

<sup>4</sup> See *Lenahan*, Case 12.626, Report No. 80/11, 72 (noting that they had agreed to a dinner hour on whatever night was best but no agreement had been made on this night).

<sup>5</sup> See *Castle Rock IV*, 545 U.S. at 753 (detailing that Ms. Lenahan requested that the restraining order be enforced immediately).

<sup>6</sup> See *Lenahan*, Case 12.626, Report No. 80/11, 74 (stating that the behavior was highly unusual and "wrong," especially since two of the girls had school the next day).

to report that the children were still missing, but she was told to wait until midnight.<sup>7</sup> At midnight, she called the police station a final time and told the dispatcher that her children remained missing.

Ms. Lenahan, now desperate to find her children, drove to her husband's apartment, and when she found it empty, called the police station for final time at 12:10 a.m. She was told to wait for an officer to arrive, but when no one arrived, she went to the police station at 12:50 a.m. and filed a missing person's report on the children. At 3:25 a.m., Simon Gonzales drove his truck to the Castle Rock Police Department and fired shots through the station's window with a semiautomatic handgun he had purchased that evening. Mr. Gonzales exchanged fire with police officers at the station, which resulted in his death. The police found the bodies of three young girls his daughters Leslie, Katheryn, and Rebecca Gonzales inside the cab of his pick-up truck. According to the police investigation, Mr. Gonzales had murdered all three girls before the shootout with the police.<sup>8</sup>

#### **4.2 Procedural History in U.S. Courts**

On January 23, 2001, Jessica Lenahan filed suit in the United States District Court for the District of Colorado under 42 U.S.C. § 1983. She alleged that the town of Castle Rock, Colorado, violated her rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution by failing to

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<sup>7</sup> See *Castle Rock IV*, 545 U.S. at 753; *Lenahan*, Case 12.626, Report No. 80/11, 75 (relating that she had spoken with Mr. Gonzales who was aware that he was not supposed to have the children overnight).

<sup>8</sup> See *Lenahan*, Case 12.626, Report No. 80/11, 82-85 (finding that the girls were shot at close range and not by any rounds of the police officers, although the exact location of the homicides of the children was unknown).

respond to reports that her estranged husband had violated the terms of a restraining order. Her complaint further alleged that the Castle Rock Police Department had an official policy of failing to respond to violations of restraining orders and that the town tolerated this lack of enforcement. Despite the Police Department's failure to respond to a mandatory protective order, the District Court held that Ms. Lenahan failed to state either a substantive or procedural due process claim under the Fourteenth Amendment.<sup>9</sup> It therefore granted defendant Castle Rock's motion to protective order; the District Court held that Ms. Lenahan failed to state either a substantive or procedural due process claim under the Fourteenth Amendment. It therefore granted defendant Castle Rock's motion to dismiss under F.R.C.P. 12(b) (6). On appeal, the Tenth Circuit Court of Appeals affirmed the District Court's rejection of Ms. Lenahan's substantive due process claim, but found that she had a cognizable procedural due process claim. An en banc panel reached the same conclusion on rehearing, finding that Ms. Lenahan had a "protected interest in the enforcement of the restraining order" for which she had a "right to be heard." The panel found that the Castle Rock Police violated this right as they "never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order." The police, according to the panel, also unconstitutionally denied Ms. Lenahan a different sort of process: they denied her "bona fide consideration of a request to enforce a restraining order." The U.S. Supreme Court granted certiorari and held that Ms. Lenahan had no

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<sup>9</sup> See *Gonzales v. City of Castle Rock* (*Castle Rock I*), No. Civ.A.00 D 1285, 2001 WL 35973820, at \*4-5 (D. Colo. Jan. 23, 2001) (concluding that the lack of a

constitutionally protected interest in having a restraining order against her husband enforced by the local police. The City of Castle Rock had not violated the Fourteenth Amendment, as it had not deprive Ms. Lenahan of property to which she was entitled any procedural protection under the Due Process Clause. The Court therefore reversed the judgment of the Court of Appeals. Justice Scalia, on behalf of seven justices, authored a majority opinion that hewed narrowly to Fourteenth Amendment precedent. The opinion stressed that the Due Process Clause does not protect “everything that might be described as a benefit,” but only those benefits to which an individual has a “legitimate claim of entitlement.” The majority then explained why Ms. Lenahan did not have such an entitlement under Due Process Clause. It relied on two principal justifications. First, the Court said that benefits that government officials have discretion to grant or deny do not constitute legitimate entitlements that are protected by the Due Process Clause. In this case, Colorado passed a domestic violence statute that instructed police officers on how to respond to restraining order violations. These instructions were restated on the back of the restraining order and required, *inter alia*, that the police use “every reasonable means to enforce a restraining order.”<sup>10</sup> The Tenth Circuit, after examining the text and legislative history in detail, concluded that the intent of the Colorado legislature was to make enforcement of the orders mandatory and “alter the fact that the police were not enforcing

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<sup>10</sup> See COLO. REV. STAT. § 18-6-803.5(3) (2012) (authorizing a police officer to arrest a violator of a protective order or, in the alternative, seek a warrant to arrest the person).

domestic abuse restraining orders.”<sup>11</sup> The Supreme Court did not adhere to the Tenth Circuit’s reading of the statute, despite the presumption of deference that it usually grants to federal court’s conclusions as to the law of a state within its jurisdiction.<sup>12</sup> To the contrary, the Court noted that “law enforcement discretion” is deeply rooted in the United States, and can only be overridden by a clear statement from the legislature. Here, the Colorado statute required the police to “use every reasonable means to enforce a restraining order.”<sup>13</sup> According to the Court, this language was not sufficiently strong to eliminate all police discretion.<sup>14</sup> This discretion, in the Court’s view, leads to indeterminacy in the enforcement of restraining orders, which “is not the hallmark of a duty that is mandatory.” Since only a mandatory duty to enforce would be constitutionally protected, and the police here retained some discretion in enforcing Ms. Lenahan’s restraining order; she did not have a legitimate “entitlement” to its enforcement under the Due Process Clause.

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11 See *Castle Rock III*, 366 F.3d 1093, 1101, 1108 (10th Cir. 2004) (characterizing police officer response to the enforcement of protective orders as “arbitrary denial of the entitlement”).

12 See *Castle Rock IV*, 545 U.S. at 757 (acknowledging this presumption of deference, but refusing to defer to the Tenth Circuit’s views because they were not based “upon a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and a state-legislative-hearing transcript.”).

13 See 18-6-803.5(3) (including assuming all information received from the registry is true in pursuing probable cause).

14 See *Castle Rock IV*, 545 U.S. at 761-63 (explaining that the Colorado domestic violence statute, other Colorado statutes, and domestic violence statutes in other jurisdictions still retain at least a modicum of police discretion).

A second (and related) reason the Court put forth to explain why Ms. Lenahan did not have a legitimate entitlement is that the enforcement of her restraining order which would include seeking an arrest warrant against Mr. Gonzales is itself merely a procedure, not a property interest. As Justice Souter explained in his concurring opinion, the sorts of property interests protected by the Due Process Clause are independent of the procedures used to enforce those interests. Justice Souter gave many examples of protected property interests, including welfare benefits, utility services, and professional licenses, which were “distinguishable from the procedural obligations imposed on the state officials to protect the property interests.” In this case, however, Ms. Lenahan’s claim would take the Court beyond any previously recognized property interest “by collapsing the distinction between property protected and the process that protects it.” The majority agreed with this view, but went even further to conclude that Ms. Lenahan’s claim to an entitlement of a procedure not only failed to specify a property interest, but was inadequate even to support standing. For these reasons, the Court held that Colorado had not created a legitimate entitlement that was protected by the Due Process Clause. The Court went on to state that even if Colorado had created such an entitlement, it would still not necessarily constitute a property interest for the purposes of the Due Process Clause. Justice Stevens, joined by Justice Ginsburg, wrote a dissenting opinion that disagreed with the majority’s interpretation of the Colorado statute. Justice Stevens found that “Colorado law has quite clearly eliminated the police’s discretion to deny enforcement” and Ms. Lenahan therefore had a legitimate claim of entitlement to



enforcement. With this established, Justice Stevens went on to conclude that state officials could not deprive Ms. Lenahan of this protected interest without following fair procedures. On this view, the Castle Rock police were obligated, at a minimum, to “listen to the claimant and then apply the relevant criteria” in reaching their decision. The Police Department’s failure to follow even these basic safeguards resulted in “an unacceptable risk of arbitrary and ‘erroneous deprivations’ of citizens’ private interests.”

#### **4.3 The Inter-American Commission Report**

In July 2011, six years after the Supreme Court’s ruling, the Inter- American Commission on Human Rights published a landmark report in *Jessica Lenahan (Gonzales) v. United States*, in which it concluded that the United States violated several rights protected by the American Declaration of the Rights and Duties of Man (American Declaration).<sup>15</sup> These rights include: Jessica Lenahan’s right to equality and non-discrimination under Article II; her daughters’ right to life under Article I, in conjunction with their right to special protection as female children under Article VII; and Ms. Lenahan and her next-of-kin’s right to judicial protection under Article XVIII. For the purposes of this Article, we will focus on the Commission’s findings with respect to Ms. Lenahan’s right to equality and non-discrimination. Article II of the American Declaration states that “all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex,

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<sup>15</sup> See *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, 5 (2011) (concluding that the state failed to act with due diligence).

language, creed or any other factor.”<sup>16</sup> According to the Commission, the right to equality requires states not only to provide for equal protection of the law, but also to “adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law.”<sup>17</sup> Since gender-based violence is “one of the most extreme and pervasive forms of discrimination” that severely impairs and nullifies the enforcement of women’s rights, states must take “positive action” to protect women from this sort of violence, which includes domestic violence.

The Commission noted that states have been held liable under international law for failing to take measures to protect women from gender-based violence. In the domestic violence context, the Commission observed that Article II requires states to prevent and eradicate both direct and indirect violence against women, including “domestic violence perpetrated by private actors in certain circumstances.”

According to the Commission, a state’s human rights obligations in this regard can be understood through the international legal principle of due diligence. This principle sets forth the circumstances under which a state must prevent and respond to the acts or omissions of private actors. It encompasses “the organization of the entire state structure including the State’s legislative framework, public policies, law enforcement machinery and judicial system.”

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<sup>16</sup> Organization of American States Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003).

<sup>17</sup> See *Lenahan*, Case 12.626, Report No. 80/11, 108-09 (establishing that states must adopt measures necessary to recognize and guarantee effective equality and abstain from discriminatory framework).

In this case, the Commission concluded that the state apparatus “was not duly organized, coordinated and ready to protect these victims from domestic violence by adequately and effectively implanting the restraining order,” which resulted in a violation of Article II of the American

Declaration. The Commission noted that this violation was exacerbated by a “historical problem with the enforcement of protection orders” that disproportionately affects women, particularly women from minority and low income groups. The Commission’s Report highlighted problems with the Castle Rock Police Department’s handling of the case. It found that the Police Department did not respond appropriately to Ms. Lenahan’s requests.

Despite her numerous phone calls and trip to the police station, the police made no serious effort to locate her daughters or to enforce the restraining orders. For example, when Ms. Lenahan called the police station at approximately 10:00 p.m. to report that she knew the children were with their father, the dispatcher responded dismissively that she was being “a little ridiculous making us freak out and thinking the kids are gone.” As the Report concluded, though Ms. Lenahan consistently conveyed her concerns regarding the whereabouts of her children, “the dispatchers and officers apparently applied only their personal perceptions in determining that the girls were safe because they were with their father.” The Report notes further that the police officers failed to conduct a “thorough check of Simon Gonzales’ previous criminal background,” which would have alerted them to his erratic and abusive behavior that Ms. Lenahan had reported earlier. The Police Department also did not appear to have any “protocols or directives in place

guiding police officers on how to respond” to reported restraining order violations, which led to delays in their response. Most glaringly, Castle Rock Police officers did not seem to understand that it was their responsibility and not Ms. Lenahan’s to determine whether the restraining order had been violated. As this was a domestic violence situation, Ms. Lenahan (and her children) might have been in danger if she confronted Mr. Gonzales and demanded the children’s return. Thus, instead of asking Ms. Lenahan to locate her children and then call them back (which they requested on at least two occasions), the police should have tried to locate Mr. Gonzales and the children themselves. The Report also criticized the investigation into the deaths of Ms. Lenahan’s daughters. While the investigation concluded that all three girls did not identify which bullets, those of the police or Mr. Gonzales, actually struck Leslie, Katheryn, and Rebecca Gonzales. As a result, the Commission recommended that a “serious, impartial and exhaustive investigation” be conducted to ascertain the exact cause, time, and place of the three deaths. In its recommendations, the Report also urged the U.S. government to conduct a thorough investigation into the “systematic failures that took place related to the enforcement of Jessica Lenahan’s protection order” and to conduct an inquiry “to determine the responsibilities of public officials for violating state and/or federal laws, and holding those responsible accountable.” It further recommended that the United States pass “multifaceted legislation” to improve the enforcement of mandatory protective orders and pay Ms. Lenahan and her family “full reparations.”

#### **4.4 Differences between the U.S. Supreme Court and Inter-American Commission Decisions**

While both the Inter-American Commission and the U.S. Supreme Court relied on comparable facts to rule on Jessica Lenahan's case, they reached completely different conclusions. At least two factors account for this divergence:

- 1 sources of law and
- 2 the breadth of inquiry undertaken by each body.

The Commission relied on a wider array of legal sources than the Supreme Court, and it conducted a much broader inquiry into the issue of domestic violence both in the United States and abroad. Justice Scalia, who wrote the majority opinion for the Court, is strongly against referring to international or foreign law sources when interpreting individual rights under the Constitution.<sup>18</sup> As a result, his opinion cited only U.S. sources, and confined itself to a narrow question whether Ms. Lenahan had stated a cognizable claim under the Due Process Clause of the Fourteenth Amendment.<sup>19</sup> Interestingly, though the Fourteenth Amendment also guarantees "equal protection of the laws," the Equal Protection Clause was conspicuously absent in the U.S. Supreme Court's analysis. This is because the Supreme Court has consistently interpreted the "equality" guaranteed under the U.S. Constitution to not require the government to protect marginalized or vulnerable groups (including

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<sup>18</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) ("I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment.").

<sup>19</sup> See *Castle Rock IV*, 545 U.S. 748, 751, 755 (2005) (restricting the analysis to a violation stemming from the failure of the police officers to respond pursuant to official policy or custom).

women) from private acts of violence and discrimination.<sup>20</sup> By contrast, the Inter-American Commission based its report on the American Declaration, which imposes a broad definition of “equality” on member states, including positive obligations to adopt legislation and other measures to protect vulnerable groups from both public and private acts of violence.<sup>21</sup> To interpret the content of state obligations under the Declaration, the Commission relied on principles of public international law and drew support from a wide range of sources, including international conventions, U.N. resolutions, U.N. reports, and the decisions of other international and regional bodies. The Commission also conducted its own investigation into the Lenahan case and the issue of domestic violence generally. This brought to light facts that the U.S. Supreme Court did not even consider. First, the Commission examined the incidence of domestic violence in the United States. It found that there were at least 3.5 million incidents over a four year period, and that certain women particularly Native American women and women from low-income groups were especially at risk. second, the Commission looked into the problem of domestic violence in Colorado specifically. It found that

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20 See *United States v. Morrison*, 529 U.S. 598, 620-21 (2000) (“[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. . . . Foremost among these limitations is the time-honoured principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”); see also *United States v. Harris*, 106 U.S. 629, 638 (1883) (holding that the Constitution places restraint upon state action); *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (stating that the Fourteenth Amendment does not authorize Congress to create a code to regulate private rights); *United States v. Cruikshank*, 92 U.S. 542, 542-43 (1876) (positing that the Fourteenth Amendment does not add to the rights of one citizen against another).

21 See *Lenahan*, Case 12.626, Report No. 80/11, 123 (basing its findings on the growing and broad international consensus to use due diligence to interpret State legal obligations).

the state experienced “alarming rates of domestic violence,” given that over a three-year period “45 percent of female homicide victims state wide was killed by an intimate partner.” Finally, the Commission looked at both federal and state laws in the United States that targeted domestic violence to determine if they provided adequate protection. The Commission’s Report traced the development of the restraining order as a state law remedy for domestic violence, and the enactment of the federal Violence Against Women Act of 1994 (VAWA).<sup>245</sup>

By gathering this data on the incidence of domestic violence, and by analyzing the legal framework created to combat it, the Commission was able to place this case in its broader socio political context. It looked beyond the facts of Ms. Lenahan’s legal claim to conclude that domestic violence remained a serious problem, especially for minority women, in both the State of Colorado and the United States generally. On this basis, the Commission recommended not only reparations for Ms. Lenahan, but legislation at both the federal and state levels to protect women and children from domestic violence, accompanied by “adequate resources to foster their implementation” and “training programs for law enforcement and justice system officials.”

However, the extent to which U.S. federal or state governments will actually follow these recommendations is unclear. Since the Commission’s conclusions are not legally binding and the U.S. Supreme Court did not find any constitutional violations in this case the United States is not compelled to adopt measures that would meet its obligations under the American Declaration.

Moreover, the United States is not a party to CEDAW, which has a number of provisions that relate to domestic violence.<sup>22</sup> These include Article 2 (comprehensive state obligation to prohibit and eliminate discrimination against women), Article 5 (elimination of prejudices and practices based upon the stereotyped roles of women and men), and Article 16 (elimination of discrimination against women in marriage and family relations). President Jimmy Carter signed the treaty in 1980, but the Senate has never ratified it.<sup>23</sup> As with many multilateral human rights treaties, the Senate is likely concerned that CEDAW would conflict with U.S. laws or dictate to federal and state governments how to tackle domestic violence. India, by contrast, signed the Convention in 1980 and ratified it in 1993. This might account for the Indian government's greater willingness to pass positive legislation to combat domestic violence.

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<sup>22</sup> See Convention on the Elimination of All Forms of Discrimination against Women arts. 2, 5, 16, Dec. 18, 1979, 1249 U.N.T.S. 13 (providing, inter alia, to pursue policies to eliminate discrimination and promote the principles of equality for women).

<sup>23</sup> See *Convention on the Elimination of All Forms of Discrimination against Women, States Parties*, UNITED NATIONSTREATYCOLLECTION(Aug.31,2012,1:09PM),[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (demonstrating that President Carter signed on July 17, 1980).