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ARTICLES

NOTES & COMMENTS

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FOREWORD

This issue marks the beginning of our third volume. We have come a long way over the last few years, thanks to the support of the students, faculty, and staff at George Mason University School of Law and the warm reception we have received from the community of professors and practitioners in the growing field of national security law. Thanks to this support—and the hard work of our student members—we have been able to emerge as one of the top publications in the field.

I would particularly like to thank Stacy Allen, our Executive Editor, who has kept our work on track. I would also like to thank Erica Calys, Matthew Morrison, Melissa Burgess, and all of our Editors and Candidate Members who worked long hours to produce this issue. It was truly a team effort.

In this issue, Lieutenant Colonel Eric Merriam, Assistant Professor of Law at the United States Air Force Academy, analyzes how the laws governing biological weapons apply to non-state actors; Professor Ronald Sievert from the University of Texas School of Law advocates for rewriting the Foreign Intelligence Surveillance Act; and Christopher Donesa, former Chief Counsel for the House Permanent Select Committee on Intelligence, provides insight into the hotly-debated Section 215 of the USA PATRIOT Act. This issue also contains two notes by Mason students: Stacy Allen analyzes a key case shaping the military's handling of sexual assault, and Melissa Burgess comments on laws preventing the reimportation of American military firearms.

If you like what you read here—or even if you disagree—I encourage you to visit us on Facebook (facebook.com/NatlSecLJ), follow us on Twitter (@NatlSecLJ), and watch top speakers on our YouTube channel (youtube.com/NatlSecLJ). However you choose to connect, I encourage you to join the conversation so that, together, we can continue to explore in depth the dynamic field of national security law.

Enjoy the issue.

Alexander Yesnik
Editor-in-Chief

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NOTES & COMMENTS

THE INTERNATIONAL LEGAL REGIME AFFECTING BIOTERRORISM PREVENTION

Eric Merriam*

For decades the international legal regime governing biological weapons has focused on limiting states' development, possession, and use of biological weapons. Though rogue states' interest in biological weapons remains a concern, a newer and perhaps more significant issue is the ability of non-state actors to develop and use bioweapons, with or without state assistance. This Article provides a description and assessment of the existing international legal infrastructure regarding the prevention of bioterrorism, focusing on non-proliferation. Though primarily focused on the modern era's two major international legal mechanisms affecting bioterrorism, the Biological Weapons Convention and United Nations Security Council Resolution 1540, other agreements are noted for completeness.

The Article discusses the advantages and problems of each instrument, addressing the "net effect" of the cumulative legal mechanisms, which lack crucial elements, including a clear definition of what constitutes bioweapons and banned agents, an adequate verification and inspection regime, significant enforcement mechanisms, and safety nets for developing states. These elements must be addressed, but even once these issues are rectified, the legal structure affecting biological weapons necessarily remains only one part of the global response to bioterrorism.

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"The destructive power of [biological] weapons is no less than that of nuclear weapons."[1]

– Ayman al-Zawahiri, Commander, Al Qaeda

"Biological weapons are considered the least complicated and the easiest to manufacture [of] all weapons of mass destruction."[2]

– Attributed to al Tawhid wal Jihad, a predecessor to the Islamic State of Iraq and the Levant (ISIL)

INTRODUCTION

For decades the international legal regime governing biological weapons, including the 1925 Geneva Protocol to the

[1] Alan Cullison & Andrew Higgins, *Computer in Kabul Holds Chilling Memos*, WALL ST. J., Dec. 31, 2001, at A1.

[2] Sammy Salama & Lydia Hansell, *Does Intent Equal Culpability?: Al-Qaeda and Weapons of Mass Destruction*, 12 NONPROLIFERATION REV. 615, 631 (2005) (citing an article on biological weapons appearing on a website for al Tawhid al Jihad, a predecessor to Al Qaeda in Iraq and the Islamic State of Iraq and the Levant).

Hague Convention ("Geneva Protocol")[3] and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction ("Biological Weapons Convention" or "BWC")[4] was focused on limiting *states'* development, possession, and use of biological weapons. Though rogue states' interest in biological weapons remains a concern, a newer and perhaps more significant issue is the ability of non-state actors—terrorists—to develop and use bioweapons, with or without state assistance.[5] This Article describes and assesses the adequacy of the existing international legal infrastructure regarding bioterrorism prevention, focusing on non-proliferation.[6] Though primarily focused on the modern era's two major international legal mechanisms affecting bioterrorism—the Biological Weapons Convention and United Nations Security Council Resolution 1540—other agreements are noted for completeness.

Policy assessments of broader concepts of global governance of terrorism and bioterrorism, as well as discussion regarding the advent of non-legal bioterrorism deterrence methods over the last decade, including actual and proposed non-binding partnerships, are outside the scope of the Article. Rather, it focuses on existing, binding legal mechanisms that directly affect bioterrorism. Additionally, the Article is focused on bioterrorism *prevention*—

[3] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter Geneva Protocol].

[4] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter BWC].

[5] "[W]hile the United States remains concerned about state-sponsored biological warfare and proliferation, we are equally, if not *more* concerned, about an act of bioterrorism, due to the increased access to advances in the life sciences." Ellen Tauser, Under Sec'y for Arms Control & Int'l Sec., U.S. Dep't of State, Preventing Biological Weapons Proliferation and Bioterrorism, Address to the Annual Meeting of the States Parties to the Biological Weapons Convention (Dec. 9, 2009), *available at* http://www.state.gov/t/us/133335.htm.

[6] "Bioterrorism" is the focus of this article, rather than the broader term "bioviolence," which is understood to be conducted by entities—particularly, states—for purposes that may include terrorism, but also may include non-terror activities.

especially in the form of non-proliferation efforts—and does not address another important aspect of bioterrorism: *response*.[7] The Article discusses the advantages and problems of each instrument as it is addressed, before concluding with comments regarding the current "net effect" of the cumulative legal mechanisms and offering brief recommendations for improvement.

I. CHRONOLOGICAL ASSESSMENT OF EXISTING INTERNATIONAL LEGAL INFRASTRUCTURE

The existing international regime affecting the prevention of bioterrorism derives from a collection of international agreements rather than one bioterrorism-specific document. This web of mechanisms has developed over many years in a variety of contexts and for a variety of purposes. The Hague Conventions and ensuing Geneva Protocol iterated the first legal restrictions applicable to bioterrorism, while the Biological Weapons Treaty of 1972 remains the most significant, most recent, addition to the present international regime.

A. The Hague Conventions and 1925 Geneva Protocol to the Hague Convention

The 1899 and 1907 conferences at The Hague produced two primary documents, now known as the Hague Conventions.[8] Both documents included principles governing aspects of the conduct of warfare.[9] In a declaration constituting part of the 1899 Hague Convention, signatory parties specifically agreed that "[t]he Contracting Powers agree to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases."[10] This ban on the use of *chemical* weapons is as close as the

[7] Admittedly, a robust public health response to bioterrorism could be considered a form of prevention if those response capabilities are known and serve to deter terrorists or others from taking action.

[8] Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague]; Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 453 [hereinafter 1899 Hague].

[9] *Id.*

[10] 1899 Hague, *supra* note 8.

1899 Hague Convention came to barring *biological* weapons. Notably, the declaration is "only binding on the Contracting Powers in the case of a war between two or more of them" and ceases "from the time when, in a war between the Contracting Powers, one of the belligerents shall be joined by a non-Contracting Power."[11]

The 1907 Hague Convention contained a possible reference to biological or similar weapons, stating only that "[i]n addition to the prohibitions provided by special Conventions, it is especially forbidden . . . [t]o employ poison or poisoned weapons . . . ."[12] This vague reference to poison likely reveals the reality that development of modern biological weapons was nascent, with the capability to isolate, identify, and culture microorganisms having only recently appeared. Even into the 1920s, bioweapons were not viewed as militarily credible, though French and German researchers were actively pursuing bioweapons production.[13]

The 1925 Geneva Protocol to the Hague Convention ("Geneva Protocol")[14] was the first agreement of the modern era to address biological weapons explicitly and significantly. Following the gruesome attrition-focused trench warfare of the First World War, many nations thought it important to limit further the manner in which future wars would be fought.[15] The Geneva Protocol provided greater specificity than the Hague Conventions regarding prohibited methods of warfare. Specifically, the parties to the Geneva Protocol "agree to extend [the prohibition on the use of chemical weapons] to the use of *bacteriological* methods of warfare

[11] *Id.*

[12] 1907 Hague, *supra* note 8, Annex art. 23. Though it is not entirely clear what constituted "poison or poisoned weapons" at the time, the International Court of Justice has opined that the term applied to "weapons whose prime, or even exclusive, effect is to poison or asphyxiate." Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 55 (Jul 8).

[13] BARRY KELLMAN, BIOVIOLENCE: PREVENTING BIOLOGICAL TERROR AND CRIME 56 (2007).

[14] Geneva Protocol, *supra* note 3.

[15] See *id.*

and agree to be bound as between themselves according to the terms of this declaration."[16]

Three important factors severely limit the utility of the Geneva Protocol in controlling modern international bioterrorism. First, like the Hague Conventions before it, the Geneva Protocol applied only to *use* and not to production, development, or acquisition.[17] Second, it applied only to states' use in warfare, not to non-state actors or use in situations other than "warfare," such as during peacetime or internal conflicts.[18] Along with this point, many nations have reserved the right to use biological weapons against non-parties to the convention and to respond in kind to biological weapons attacks.[19] Third, the Geneva Protocol applies only to "bacteriological methods," which on its face excludes non-bacteriological biological microorganisms such as viruses.[20]

B. The Biological Weapons Convention ("BWC") of 1972

1. Background

a. Historical Biological Weapon Development and Use Between the Geneva Protocol and BWC

For nearly 50 years following the signing of the Geneva Protocol, no additional international agreements were reached addressing biological weapons.[21] During this period several major

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[16] *Id.* (emphasis added).

[17] *Compare id.* ("Whereas the *use* in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world . . .") *and* 1899 Hague, *supra* note 8 ("The Contracting Powers agree to abstain from the *use* of projectiles the sole purpose of which is the diffusion of asphyxiating or deleterious gases.") (emphasis added).

[18] BAREND TER HAAR, THE FUTURE OF BIOLOGICAL WEAPONS 2-3 (1991).

[19] Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 481 (1999).

[20] TER HAAR, *supra* note 18, at 3 (noting that in 1925, microorganisms such as viruses and rickettsia were not known, but it is understood that the scope encompasses all types of microorganisms).

[21] In 1969, however, the U.N. General Assembly reinforced the Geneva Protocol and provided an additional definition by declaring:

conflicts were fought, including WWII, and a number of nations developed—and several used—biological weapons.[22]

Because the Geneva Protocol prohibited only *use*, countries continued to develop and produce biological weapons.[23] Many of the WWII belligerents, including Japan, Germany, France, Italy, Canada, the United Kingdom, the United States, and Russia, developed bioweapons programs either in the interwar period or, in the case of the United States, during WWII itself.[24] Indeed, the limited proscription of the Geneva Protocol permitted a veritable biological arms race.

In 1956, the United States adopted a policy to be "prepared to use chemical and bacteriological weapons in general war" and embarked on extensive programs to test the lethality, survivability,

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> . . . as contrary to the generally recognized rules of international law, as embodied in the [Geneva Protocol], . . . the use in international armed conflicts of . . . (b) Any biological agents of warfare—living organisms, whatever their nature, or infective material derived from them—which are intended to cause disease or death in man, animals or plants, and which depend for their effects on the ability to multiply in the person, animal or plant attacked.

Questions of Chemical and Bacteriological (Biological) Weapons, G.A. Res. 2603(XXIV)A, U.N. Doc. A/RES/2603(XXIV)A (Dec. 16, 1969).

[22] For example, the Japanese Army notoriously used bubonic plague in ceramic bomblets against Chinese targets during World War II. DANIEL BARENBLATT, A PLAGUE UPON HUMANITY: THE SECRET GENOCIDE OF AXIS JAPAN'S GERM WARFARE OPERATION 220-21 (2004). In 1948, Egypt allegedly caught Israeli soldiers poisoning an Egyptian well using typhoid and dysentery. Several Egyptian villages experienced disease outbreaks during this time. W. Seth Carus, *Bioterrorism and Biocrimes: The Illicit Use of Biological Agents Since 1900* 87-88 (Ctr. for Counterproliferation Research, Working Paper 2001), *available at* http://www.dtic.mil/dtic/tr/fulltext/u2/a402108.pdf. A variety of nations are alleged to have used biological weapons in assassination plots. *Id.* at 82-84. Brazil used smallpox, influenza, tuberculosis, and measles against its own aboriginal population in the 1950s and 1960s. CATHERINE CAUFIELD, IN THE RAINFOREST 12 (1984).

[23] TER HAAR, *supra* note 18, at 3 ("both parties and nonparties to the [Geneva Protocol (including the United Kingdom, Japan, and the United States)] believed they should acquire a stockpile of chemical [and biological] weapons to deter other countries from using them").

[24] Milton Leitenberg, *Biological Weapons: Where have we come from over the past 100 years*, 64 PUB. INTEREST REP, no. 3, Fall 2011, at 21-22 (2011).

and dispersal characteristics of biological agents.[25] Then, at the height of the Cold War biological arms race, President Richard M. Nixon took the dramatic and unexpected step on November 25, 1969, of unilaterally renouncing the possession and use by the United States of "lethal biological agents and weapons, and all other methods of biological warfare," and declaring that all biological research in the future would be confined to "defensive measures such as immunization and safety measures."[26] Although President Nixon's stated goal of renouncing bioweapons was to advance world peace, the lack of military utility of biological weapons led President Nixon and U.S. military leaders to have serious reservations about the effectiveness of biological weapons, believing instead that nuclear forces provided superior deterrence.[27] In fact, in an attitude exemplifying the total lack of concern for non-state actors using bioweapons prevalent at the time, President Nixon told his staff, "We'll never use the damn germs, so what good is biological warfare as a deterrent? If somebody uses germs on us, we'll nuke 'em."[28]

b. Immediate Context to BWC

In 1969, Britain and the United States agreed on the final wording of a treaty banning biological weapons. Though the Soviet Union initially opposed the effort, even after Britain removed provisions requiring enforceable verification measures, in August 1970, the Soviet Union suddenly, and without explanation, dropped its objections.[29] The Biological Weapons Convention was opened for

[25] ED REGIS, THE BIOLOGY OF DOOM: THE HISTORY OF AMERICA'S SECRET GERM WARFARE PROJECT 177 (1999) (quoting Nat'l Sec. Council, Reg. NSC 5062/1 (Mar. 15, 1956)).
[26] President Richard M. Nixon, Statement on Chemical and Biological Defense Policies and Programs, 1969 PUB. PAPERS 461 (Nov. 25, 1969).
[27] Jack M. Beard, *The Shortcoming of Indeterminancy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L L. 271, 279 (2007).
[28] *Id.* at n.48. Clearly, a nuclear deterrent is irrelevant to terrorist groups with suicidal inclinations who intermingle with innocent civilians.
[29] *Id.* at 279. The reason for the Soviet Union's compliance eventually became clear: a legally binding agreement gave the Soviets a deceptive legal cover for a massive offensive bioweapons program when an informal arrangement might not have falsely raised such expectations of their compliance. From the outset, Soviet acquiescence appears to have been a cynical maneuver that enabled the clandestine building of the largest bioweapons research and armament program in history. *Id.*

signature on April 10, 1972,[30] driven in large part by concerns, especially among western powers that were voluntarily disarming, about a continued biological weapons arms race—or worse, about lopsided bioweapons development by the Soviet Union, and bold public statements by some nations acknowledging the existence of bioweapons programs.[31]

2. BWC's Potential Applicability to Preventing Bioterrorism

As will be made clear below, the Biological Weapons Convention is not an anti-terrorism convention. Indeed, the participating states likely did not consider bioterrorism to be possible at the time the BWC was conceived.[32] Nevertheless, some key attributes and failures of the BWC affect the prevention of bioterrorism, and in some ways the history of the BWC has negatively impacted current and future ability to prevent bioterrorism. Crucial issues discussed here include the BWC's scope of prohibited weapons and activities, its application to non-state entities, required cooperation among states, and the nearly complete lack of verification and enforcement apparatus.

a. Scope of Prohibited Weapons and Activities

The BWC's scope of prohibited activities raises several concerns. First, it is difficult to determine exactly what is prohibited, because developing, producing, stockpiling, or otherwise acquiring or retaining biological agents is prohibited only in quantities that have no justification for prophylactic, protective, or other peaceful

[30] *Id.*; BWC, *supra* note 4. Following the Senate's advice and consent, President Gerald Ford ratified the treaty for the United States on January 22, 1975, and also finally ratified the Geneva Protocol, without reservations regarding the use of biological weapons. Beard, *supra* note 27, at n. 52.

[31] Initially a secret, in 1970, Egyptian President Anwar Sadat allegedly proclaimed, "Egypt has biological weapons stored in refrigerators and could use them against Israel's crowded population." *Biological Weapons Program – Egypt*, FED'N OF AM. SCIENTISTS, http://www.fas.org/nuke/guide/egypt/bw/ (last updated Oct. 2, 1999).

[32] This is why this Article is titled "The International Legal Regime *Affecting* Bioterrorism Prevention," rather than "The International Legal Regime *For* Bioterrorism Prevention."

purposes.[33] Additionally, the definition of biological agents is broad and the treaty does not include a list of specifically prohibited agents or quantities.[34] Finally, the BWC does not proscribe *use* of biological weapons.[35]

i. What is Prohibited? The Definition of Biological Weapons and Dual-Use Problems

In Article I, States Parties to the BWC agreed "never in any circumstances" to

> develop, produce, stockpile or otherwise acquire or retain:
> (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
> (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.[36]

Two improvements over the Geneva Protocol are immediately apparent. First, the use of the phrase "never in any circumstances" eliminated one of the principal problems discussed above regarding the Geneva Protocol: that it did not prohibit use in peacetime or in internal conflict.[37] Second, the term "bacteriological" was replaced with the much broader phrase "biological agents, or toxins whatever their origin or method of production," thus significantly broadening the definition of covered agents.[38]

However, the new definition poses serious problems. Many agents of concern to the international community, due to their potential use as weapons, also have peaceful purposes. This is typically referred to as a problem of "dual use." That is, an agent can be weaponized or used peacefully and it is often impossible to

[33] BWC, *supra* note 4, at art. I.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Compare id. with* TER HAAR, *supra* note 18.
[38] *Compare* BWC, *supra* note 4, *with* Geneva Protocol, *supra* note 3.

determine which use the possessor intends. Further, significant quantities of an agent are justifiable for peaceful purposes. For example, it is hard to say how much anthrax is needed when testing an anthrax vaccine.

An example of the dual use problem is clear in the situation involving Iran. In 2005, the U.S. State Department asserted:

> According to open press reporting, Iran is expanding its biotechnology and biomedical industries by building large, state-of-the-art research and pharmaceutical production facilities. These industries could easily hide pilot to industrial-scale production capabilities for a potential [bioweapons] program, and could mask procurement of [bioweapons]-related process equipment.
> . . .
> The Iranian [bioweapons] program has been embedded within Iran's extensive biotechnology and pharmaceutical industries so as to obscure its activities. The Iranian military has used medical, education, and scientific research organizations for many aspects of [bioweapons]-related agent procurement, research, and development.[39]

This "dual use" issue manifests itself both in the BWC's attempt to define and prohibit weapons in a sufficiently vague and broad way to allow for peaceful production and possession, and in practical questions of verification and enforcement.

Because of the dual-use nature of so many biological agents, the BWC does not absolutely bar all biological weapons—it bars "types" and "quantities" of biological agents and toxins that have "no justification for prophylactic, protective, or other peaceful

[39] U.S. DEP'T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 21 (2005), *available at* http://www.state.gov/documents/organization/52113.pdf. *But see* U.S. DEP'T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 8 (2011), *available at* http://www.state.gov/documents/organization/170652.pdf ("Available information indicated Iran continued during the reporting period to engage in activities with potential dual-use [bioweapons] applications. It remained unclear whether any of these activities were prohibited by the BWC.").

purposes."[40] This approach attempts to address the issue of dual use by allowing for production and possession of agents that also have non-weapon purposes and is perhaps an attempt to "future-proof" the treaty in light of anticipated scientific developments. But the result is a legal regime with no specificity, one that permits production and possession of biological agents so long as there is also some justification for prophylactic, protective, or peaceful purpose. The United States and Britain, whose militaries were unwilling to accept any clarifying distinctions between "peaceful" and prohibited bioweapons activities, intentionally sought this arguably fatal ambiguity in defining what was prohibited.[41] Thus, the BWC does not include definitions or rules identifying or distinguish between types of biological agents that have no justification for prophylactic, protective or other peaceful purposes.[42] Moreover, the obligation imposed upon States Parties in Article II to destroy or convert to peaceful purposes all prohibited agents, toxins, weapons, or equipment in their possession, and Article III's prohibition on States Parties transferring prohibited agents, toxins, weapons, or equipment, depend on what might be included within the undefined "peaceful purposes" found in Article I.[43]

Unlike the Chemical Weapons Convention ("CWC"),[44] its sister weapons of mass destruction ("WMD") arms control agreement, the BWC has never been supplemented with a list of agent types or quantities that are prohibited, or even further clarification regarding what constitutes "prophylactic, protective, or peaceful purposes."[45] Subsequent BWC Review Conferences have attempted, but been unable to agree on, an approved list of

[40] BWC, *supra* note 4, at art. I.
[41] Beard, *supra* note 27, at 281.
[42] *Id.* (quoting BWC, *supra* note 4, at art. I)
[43] *Id.* at 281.
[44] Formally known as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.
[45] *See generally* U.N. OFF. FOR DISARMAMENT AFF., ADDITIONAL AGREEMENTS REACHED BY PREVIOUS REVIEW CONFERENCES RELATING TO EACH ARTICLE OF THE CONVENTION (2012), *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/B34D45AAB6755F27C1257D0100523C2D/$file/BWC%20&%20Additional%20Agreements%20Post%207RC.pdf.

prohibited materials.[46] This lack of specificity leaves members of the international community to determine for themselves what types or quantities have no permitted purpose, thus leaving significant room for manipulation of the standards.

BWC Review Conferences have been somewhat successful in tackling the BWC's application to technological developments in the biological and toxin areas and in articulating guiding principles of the Convention's interpretation. The Fourth Review Conference in 1996 confirmed that the BWC covered developments in the fields of "microbiology, biotechnology, molecular biology, genetic engineering" and "any applications resulting from genome studies."[47]

ii. Use Not Prohibited by BWC

Largely because the widely accepted Geneva Protocol already banned use, and because the international community disagreed on exceptions to bans on use, the BWC does not prohibit *use* of biological weapons.[48] However, this is not as critical a hole in the dyke as it may appear. First, necessary antecedents to biological weapons use are prohibited (e.g., "use" of a weapon is difficult, if not impossible, if the user does not first "acquire" or "retain" it). Further, as applied to state actors, the problem posed by failure to prohibit use rarely has practical application because the vast majority of signatories to the BWC are also signatories to the Geneva Protocol, which is still in force and which *does* prohibit use of

[46] DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 91-92 (2009).

[47] Fourth Review Conference of the States Parties to the Biological Weapons Convention, Geneva, Switz., Nov. 25 – Dec. 6, 1996, *Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, U.N. DOC. BWC/CONF.IV/9, Final Document, Final Declaration, Article I, para. 6 (1996) [hereinafter Fourth Review Conference].

[48] *See generally* Seventh Review Conference of the States Parties to the Biological Weapons Convention, Geneva, Switz., Dec. 5-22, 2011, *Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, U.N. DOC. BWC/CONF.VII/7 (2011) [hereinafter Seventh Review Conference].

biological weapons.[49] Finally, use of biological weapons is so widely circumscribed in international law and practice that using them is arguably a violation of customary international law, whether or not a state is party to the Geneva Protocol or BWC.[50] Clearly, the resulting net impact of the various conventions is that use of biological weapons by state actors is prohibited. In fact, though not explicit in the text of the BWC, States Parties declared their understanding that the BWC effectively prohibits use at the BWC Fourth Review Conference in 1996:

> The Conference reaffirms that the use by the States Parties, in any way and under any circumstances, of microbial or other biological agents or toxins, that is not consistent with prophylactic, protective or other peaceful purposes, is effectively a violation of Article I of the convention.[51]

b. Application to Non-State Actors

Unlike the Geneva Protocol before it, the BWC is not limited by a focus only on *use* or *states*. Preambular language broadly pronounces the parties were "[d]etermined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons."[52] Despite the state-focused orientation of the BWC and multiple references in the preamble to *state* disarmament,[53] Article V of the BWC imposes an obligation on all States Parties to:

> [i]n accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in

[49] *See generally* U.N. OFF. AT GENEVA, *Membership of the Biological Weapons Convention*, http://unog.ch/__80256ee600585943.nsf/%28httpPages%29/7be6cbbea0477b52c12571860035fd5c?OpenDocument#_Section2 (last visited Oct. 11, 2014).
[50] *See generally Fact Sheets on Disarmament Issues,* U. N. OFF. FOR DISARMAMENT AFF., http://www.un.org/disarmament/factsheets/ (last visited Oct. 11, 2014).
[51] Fourth Review Conference, *supra* note 49, at art. I, para. 3..
[52] BWC, *supra* note 4, at 586.
[53] Parties reaffirmed their "[d]etermination to act with a view to achieving effective progress towards general and complete disarmament." Fourth Review Conference, *supra* note 47, at pt. II.

> Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.[54]

Thus, while the BWC is not self-executing and does not directly prohibit biological weapons development and retention by non-state actors, the Convention requires *states* to take any necessary measures to prevent such activity within their jurisdiction.[55] This is a large step forward from the Geneva Protocol, which applied only to state behavior. However, because the BWC leaves to the discretion of each State Party the domestic measures required to implement the Convention, only a small number of States Parties have enacted national legislation or taken administrative measures in accordance with this provision of the BWC.[56]

Notably, while Article IV compels states to prohibit and prevent "development, production, stockpiling, acquisition, or retention," there is no reference to a state's obligation to prevent *use* of biological weapons.[57] This, combined with the Geneva Protocol's application only to use of biological weapons by states, means that their use by non-state actors is not a violation of international law *per se*, nor do any international agreements up through and including the BWC require states to prohibit use by those within their jurisdiction.[58] Because using weapons necessarily requires acquiring and possessing them, as stated above, the overall course of conduct is proscribed. Nevertheless, it is curious that no international law specifically outlaws use of biological weapons by non-state actors, or even requires states to ban them within their jurisdictions.

c. Cooperation

Article X of the BWC codifies the right of States Parties to participate in peaceful cooperative endeavors related to biological agents. Specifically, parties agreed to:

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[54] BWC, *supra* note 4, at art. IV.
[55] *Id.*
[56] Masahiko Asada, *Security Council Resolution 1540 To Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, 13 J. CONFLICT & SEC. L. 303, 306-07 (2008).
[57] *See generally* BWC, *supra* note 4.
[58] *See supra* Part II.A.

> facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes. Parties to the Convention in a position to do so shall also cooperate in contributing individually or together with other States or international organizations to the further development and application of scientific discoveries in the field of bacteriology (biology) for prevention of disease, or for other peaceful purposes.[59]

Thus the BWC sets the stage for international cooperation in biological development for purposes other than weaponization. The problem of definition or distinction—that is, what constitutes appropriate types and quantities of biological agents and what are "peaceful purposes"—is also present here as it relates to international cooperation encouraged in Article X.[60] One significant "other peaceful purpose" is developing defensive countermeasures and appropriate public health response to biological weapon use. The vast majority of biological weapons research today is predicated on these bases.

Cooperation among states is further addressed in Article X(2), where the focus is specifically on the economic development of states, clarifying that the BWC should be implemented to "avoid hampering the economic or technological development of States Parties . . . ."[61] This was further applied to developing countries when the First Review Conference called upon developed countries to increase their "scientific and technological co-operation, particularly with developing countries, in the peaceful uses of bacteriological (biological) agents and toxins . . . [including] the transfer and exchange of information, training of personnel and transfer of materials and equipment on a more systematic and long-term basis."[62] This encouragement of assistance to, and cooperation with, biological programs in developing countries relates to bioterrorism,

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[59] BWC, *supra* note 4, at art. X(1).
[60] *Id.*
[61] BWC, *supra* note 4, at art. X(2).
[62] Final Declaration of the First Review Conference, Article X, *available at* http://www.opbw.org/rev_cons/1rc/docs/final_dec/1RC_final_dec_E.pdf.

as developing countries are often the location for suspected terrorist bioweapons development.

d. Verification and Enforcement

i. Problem

In part a problem caused by the dual use issue, verification and enforcement of states' compliance with the BWC is virtually nonexistent in the text of the treaty and in practice. The original BWC does not contain a practical verification provision and the only "compliance" or "enforcement" mechanisms in the BWC are the "consultative" function detailed in Article V:

> The States Parties to this Convention undertake to consult one another and to cooperate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention. Consultation and cooperation pursuant to this article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.[63]

The complaint mechanism of Article VI specifies:

> (1) Any State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.
> (2) Each State Party to this Convention undertakes to cooperate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.[64]

[63] BWC, *supra* note 4, at art. V.
[64] *Id.* at art VI.

Since the signing of the BWC, the States Parties have fleshed out a multilateral procedure under Article 5: a "formal consultative meeting" (FCM) can be held to consider an allegation of non-compliance.[65] The procedure allows for some limited information collection and assessment, but includes only information provided by states; no independent information collection is authorized.[66] Thus, the only enforcement available under the BWC is a complaint to the Security Council, which apparently would lead to an investigation.[67] The Security Council would likely have the authority under Chapter VII of the United Nations Charter to authorize action against a State Party that violates its obligations under the BWC. However, it takes time for a state to gather evidence and for the Security Council to conduct an investigation. These factors, combined with the ease of disposal, repurposing, or hiding many of the covered agents, as well as the likely political pressures inherent in the Security Council's permanent member veto system, make enforcement action against a violator highly unlikely, especially *prior* to use of the weapons.[68]

ii. Efforts To Strengthen Verification and Enforcement

From the outset, verification measures for biological weapons control were seen as "dispensable."[69] Though some

[65] Angela Woodward, *The BWC and UNSCR 1540*, in GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM, 103-04 (Peter van Ham & Olivia Bosch eds., 2007).
[66] *Id*.
[67] *Id*. at 104.
[68] Though Iraq's alleged noncompliance with earlier Security Council resolutions related to disarmament served as a basis for a new Security Council resolution relied upon by the United States for its 2003 invasion, it is hard to say whether Iraq's suspected development and possession of bioweapons alone would have been sufficient cause for action. That is, it seems unlikely that international political will would have been strong enough to act without the possibility of Saddam Hussein's possession of nuclear weapons as a partial basis for the resolution. Additionally, following the failure to identify significant WMD programs in Iraq after the 2003 invasion, it seems even less likely the world community will be willing to authorize military action in the future for suspected bioweapons development, without evidence of use or imminent use.
[69] JEZ LITTLEWOOD, THE BIOLOGICAL WEAPONS CONVENTION: A FAILED REVOLUTION 16 (2005).

countries were concerned with the lack of verification, apparently neither the United States nor the Soviet Union was sufficiently concerned to make verification a critical component of the BWC.

Subsequent repeated efforts have been made to institute a verification and enforcement mechanism, without significant success. These efforts have included a requirement for Confidence Building Measures ("CBMs"), the Ad Hoc Group of Government Experts, also known as VEREX ("Ad Hoc Group" or "VEREX"), and ultimately the failed proposal of a protocol that contained a verification system.[70]

(a.) Confidence Building Measures

By the time the second BWC review conference of the States Parties met in September 1986, allegations of Soviet treaty violations,[71] growing suspicions about easily concealable new biotechnology, and the absence of effective verification mechanisms, led to the adoption of several voluntary CBMs.[72] These called for the exchange of information about research centers and laboratories with high-containment facilities as well as data on unusual outbreaks of disease.[73] BWC States Parties agreed to a limited form of transparency by implementing a requirement for states to submit confidence building information annually.[74] These CBMs were augmented by additional requirements at the BWC Third Review

[70] Woodward, *supra* note 65, at 104-06.
[71] Less than a year after it signed the BWC, the Soviet Union embarked on a massive "clandestine effort in which it concealed a vast network of bioweapons research, development, testing, and production facilities within its existing civilian and military structures under the direction of an organization known as *Biopreparat*." Beard, *supra* note 27, at 282. Only after a major accident at a military microbiology factory in Sverdlovsk in 1979, and the subsequent defection of key scientists, did the size and scope of the secret Soviet effort begin to become apparent. Beard, *supra* note 27, at 282, *citing* Michael Moodie, *The Soviet Union, Russia, and the Biological and Toxin Weapons Convention*, NONPROLIFERATION REV. Spring 2001, at 59, 60-61.
[72] Michael Moodie, *The Soviet Union, Russia, and the Biological and Toxin Weapons Convention,* NONPROLIFERATION REV., Spring 2001, at 64.
[73] Beard, *supra* note 27, at 282-83.
[74] *See id*.

Conference in 1991.[75] The current CBM regime requires States Parties to report data on various issues to all other States Parties.[76] Reports must include information on laboratories and research centers, national biological defense research and development, outbreaks of infectious diseases that deviate from "normal patterns," and past activities in offensive or defensive biological research and development.[77] They also must cover efforts to encourage publication of results of biological research directly related to the BWC; declaration of legislation, regulations, or other measures states have taken to implement the BWC; and declaration of vaccine production facilities.[78]

Unfortunately, many states seem to have taken lightly their obligations to exchange information regarding their adherence to Article IV of the BWC, failing to provide it either by means of regular and meaningful participation in the CBM exchanges or at Convention Review Conferences.[79] Though the United Nations Department for Disarmament Affairs catalogued States Parties' reports on their measures to implement the BWC prohibitions, many states have apparently failed to review the *effectiveness* of their biological weapons legislation.[80]

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[75] *See* Third Review Conference of the States Parties to the Biological Weapons Convention, Geneva, Switz., Sept. 9-27 1991, *Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, U.N. DOC. BWC/CONF.III/23, Final Document, Final Declaration [hereinafter Third Review Conference].

[76] *See id.*

[77] *Id.* at 4-5.

[78] *Id.* The Third Review Conference promulgated forms on which the States Parties were to provide this information. *Id* at Annex to Final Declaration on Confidence Building Measures.

[79] Woodward, *supra* note 65, at 105.

[80] *Id.* at 105-06. In addition to these efforts, the non-governmental organization VERTIC collects and catalogs States Parties' implementing legislation. VERTIC DATASET: BIOLOGICAL WEAPONS CONVENTION: COLLECTION OF NATIONAL IMPLEMENTATION LEGISLATION, http://www.vertic.org/pages/homepage/programmes/national-implementation-measures/biological-weapons-and-materials/bwc-legislation-database/introduction.php (last visited Oct. 7, 2014).

(b) Ad Hoc Group and BWC Protocol

The Third Review Conference in 1991 took a more ambitious path to improve the BWC's effectiveness by devoting a substantial amount of time to remedying the verification problem. As noted above, this included augmented CBMs, but the Third Review Conference also established an Ad Hoc Group of Governmental Experts ("Ad Hoc Group" or "VEREX") to identify and examine potential verification measures from a scientific and technical standpoint.[81] Creation of the Ad Hoc Group was likely the most important development in pushing toward a verification regime. Over the course of nearly a decade and through twenty-four sessions, the Ad Hoc Group worked to produce a proposed protocol ("BWC Protocol"), which contained a specific list of prohibited materials and quantity thresholds, and called for (1) states to declare their biodefense programs and other bioresearch and commercial pharmaceutical facilities, (2) site-check visits to encourage accurate and honest declarations, and (3) challenge inspections in cases of alleged non-compliance.[82]

By 2001, the draft protocol had reached an advanced stage.[83] However, the United States, at one time a strong supporter of improved verification under the BWC, abruptly rejected the draft protocol.[84] The U.S. believed it would "misdirect world attention into non-productive channels" and "not enhance our confidence in compliance and . . . do little to deter those countries seeking to develop biological weapons, [and] would put national security and confidential business information at risk."[85]

This last-minute and rather spectacular rejection of the BWC Protocol, the United States' failure to offer significant alternative

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[81] Third Review Conference, *supra* note 75.
[82] JOYNER, *supra* note 46, at 97-98; KELLMAN, *supra* note 13, at 194.
[83] JOYNER, *supra* note 46, at 98.
[84] *Id*.
[85] Nicole Deller & John Burroughs, *Arms Control Abandoned: The Case of Biological Weapons*, 20 WORLD POL'Y J. no. 2, 2003, at 37 (quoting Donald Mahley, Special Negotiator for Chemical and Biological Arms Control, Head of the U.S. Ad Hoc Group Delegation).

ideas, and its disastrous, last-minute proposal at the BWC Fifth Review Conference to disband the Ad Hoc Group altogether, resulted in the termination of significant efforts to obtain approval of such a protocol or any significant strengthening of the BWC, a status that continues to present.[86] Though some nations continue to discuss the need for verification, without the support of several major actors on the world stage, such discussions are unlikely to advance to implementation of a verification regime.

Despite the procedures available under the BWC for referral to the Security Council, in practice no assertions of non-compliance have been referred to the Security Council, even in cases of overwhelming and credible evidence.[87] Additionally, the Security Council has initiated no actions under, or for violations of, the BWC.[88] Thus, the effectiveness of the "standard" enforcement regime articulated in BWC is untested and unknown.

C. U.N. Security Council Resolution 1540, 2004

Though not limited solely to biological weapons, United Nations Security Council Resolution 1540 ("UNSCR 1540"), passed in 2004, is currently the binding international agreement most directly, and arguably most effectively, addressing bioterrorism prevention.[89] UNSCR 1540 was adopted unanimously amidst post-9/11 concerns and urgency to keep WMD away from terrorists or rogue states.[90] While also working through the non-treaty Proliferation Security Initiative, the United States pushed the idea of

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[86] *See* JOYNER, *supra* note 46, at 98 (quoting, in part, Jez Littlewood); KELLMAN, *supra* note 13, at 195. The United States' current position remains consistent with that of the preceding Bush administration: "The Obama Administration will not seek to revive negotiations on a verification protocol to the Convention. We have carefully reviewed previous efforts to develop a verification protocol and have determined that a legally binding protocol would not achieve meaningful verification or greater security." Tauser, *supra* note 5.

[87] Woodward, *supra* note 65, at 104.

[88] *Id.*

[89] S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

[90] Giving flesh to these general post-9/11 concerns was the December 2003 revelation of the Khan global smuggling network for nuclear weapon-related technologies, which included end-users such as Iran, Libya, and North Korea. PETER VAN HAM & OLIVIA BOSCH, GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM, 3-4 (2007).

criminalizing WMD internationally.[91] In an address to the U.N. General Assembly, President George W. Bush specifically asked the U.N. Security Council "... to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation of ... weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders."[92]

Though UNSCR 1540 is most accurately labeled a non-proliferation measure, it is significant as a counter-terrorism tool.[93] In the bioterrorism context, UNSCR 1540's key developments beyond the BWC are (1) a focus on non-state actors; (2) the effect of a U.N. Security Council Resolution, including application to states not parties to BWC; (3) greater specificity regarding measures states must take to help prevent bioterrorism; and (4) a first step in the

[91] According to the U.S. State Department:

> The Proliferation Security Initiative (PSI) is a global effort that aims to stop trafficking of [WMD], their delivery systems, and related materials to and from states and non-state actors of proliferation concern. Launched on May 31, 2003, U.S. involvement in the PSI stems from the U.S. National Strategy to Combat Weapons of Mass Destruction issued in December 2002. That strategy recognizes the need for more robust tools to stop proliferation of WMD around the world, and specifically identifies interdiction as an area where greater focus will be placed. President Obama strongly supports the PSI. In his April 2009 Prague speech, President Obama first called for the PSI to continue as an enduring international counterproliferation effort.

U.S. DEP'T OF STATE, PROLIFERATION SECURITY INITIATIVE, http://www.state.gov/t/isn/c10390.htm (last visited Oct. 24, 2014). Though the PSI is a significant tool for bioterrorism prevention, it is not discussed in this Article because it is a non-binding, non-legal instrument.

[92] Press Release, The White House Office of the Press Secretary, President Bush Addresses United Nations General Assembly (Sept. 23, 2003) (available at http://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030923-4.html).

[93] It is important to note that in conjunction with other terrorism-related Security Council resolutions, such as UNSCR 1267 (resolution aimed at those supporting the Taliban or Al-Qaeda), UNSCR 1373 (requiring all UN states to combat terrorism, with the UN as the focal point at the global level), and UNSCR 1566 (condemning terrorism and offering a widely used definition of terrorism), UNSCR 1540 is part of a family of resolutions to combat terrorism and prevent use of WMD by terrorists. VAN HAM & BOSCH, *supra* note 90, at 7-9.

direction of a quasi-compliance body with some very limited verification and enforcement role.[94]

1. Focus on Non-State Actors

At the time of the BWC's passage, the international concern related to *states'* use of biological weapons. Accordingly, as noted above, the BWC, like its Nuclear Non-Proliferation Treaty ("NPT")[95] and CWC counterparts, applies primarily to states.[96] By contrast, at the time of the passage of UNSCR 1540, the concern had shifted to rogue states and terrorist organizations.[97] The focus on non-state actors is apparent from the first paragraphs of the resolution in which the United Nations Security Council:

> 1. *Decides that* all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;
> 2. *Decides also* that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them . . . .[98]

Thus, states are both prohibited from assisting non-state actors and compelled to adopt procedures and *effective* laws, which must be enforced, that prohibit non-state actors from using and developing biological weapons. Not only are non-state actors referenced, they are defined as an "individual or entity, not acting under the lawful

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[94] S.C. Res. 1540, *supra* note 89.
[95] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.
[96] BWC, *supra* note 4.
[97] According to the preambular language of the resolution, the UNSCR was "*gravely concerned* by the threat of terrorism and the risk that non-State actors . . . may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery . . . ." S.C. Res. 1540, *supra* note 89 (emphasis original).
[98] *Id.*

authority of any State in conducting activities which come within the scope of this resolution."[99] This demonstrates the central concern of the resolution's drafters, though UNSCR 1540 is not facially limited to terrorists.

2. The Effect of a U.N. Security Council Resolution, Including Application to States Not Parties to BWC

A significant element of UNSCR 1540's expansion beyond the BWC is the nature of the instrument itself: as a Security Council resolution under authority of Chapter VII of the United Nations Charter, it is binding on all states.[100] Thus, states may not avoid their legal obligations regarding biological weapons prevention—whether because they wish to permit non-state actors to develop such weapons or because of a lack of economic or political capacity—by

[99] *Id*.

[100] As with many other Security Council resolutions, UNSCR 1540 cites Chapter VII of the UN Charter as its source of authority without identifying specific articles. In the resolution, the Security Council declared that "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery . . . constitutes a threat to international peace and security." Ostensibly, the Security Council's authority for UNSCR 1540 comes from UN Charter Article 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security."), Article 42 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."), Article 48 ("The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."), and Article 49 ("The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."). U.N. Charter art. 39, 42, 48-49. Not all scholars agree the UN Security Council can adopt such binding resolutions under Chapter VII. *See* Daniel H. Joyner, *Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council*, 20(2) LEIDEN J. INT'L L. 489, 489-518 (2007) (arguing Resolution 1540 is null and void of legal effect, because it was adopted under Chapter VII rather than under Articles 11 and 26 of the UN Charter, the latter being the only authoritative basis for the creation of new non-proliferation law).

choosing not to be a party to the BWC.[101] Further, one could expect that even if the net content of obligations under a Security Council resolution were the same as those under a treaty, requirements stated in a legally binding Security Council resolution would be respected more and implemented better than those in a treaty, particularly if the insufficient implementation of treaty obligations is due to a lack of political will.[102]

It is important to note that this strength—namely, the muscle of a Security Council resolution that binds all nations—is subject to considerable controversy and is a source of possible weakness. The strongest objection to UNSCR 1540 is that it is a clear example—possibly the first of significance—of the Security Council *legislating* world policy. While the Security Council has repeatedly cited U.N. Charter Chapter VII as authority to impose new requirements and create new legal mechanisms (for example, the International Criminal Tribunals for Rwanda and Yugoslavia), such actions had previously focused on *specific situations* the Security Council determined to be a threat to the peace.[103] In contrast, the measures contained in UNSCR 1540's operative paragraphs are

[101] During the drafting of the resolution, India stated it would "not accept any interpretation of the draft resolution that imposes obligations arising from treaties that India has not signed or ratified, consistent with the fundamental principles of international law and the law of treaties." Asada, *supra* note 56, at 316. This and similar other concerns were somewhat accommodated in certain paragraphs of the resolution which, for instance, affirm the importance for 'all States parties' to WMD treaties to implement them fully, or call upon all states to promote the universal adoption and full implementation of WMD non-proliferation treaties 'to which they are parties.' *Id*. Nevertheless, such accommodations do not change the fact that UNSCR 1540 does oblige states not party to the BWC to take the kind of national measures that the States Parties to it are supposed to take. *Id.* Additionally, it should not be forgotten that what Resolution 1540 emphasizes is not those WMD treaties *per se* but the relevant national legislation and other regulations and controls that provide the basis for action against non-state actors. *Id.*

[102] Asada, *supra* note 56, at 315.

[103] *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

general in nature, applying globally to WMD non-proliferation, without reference to perceived problem states or situations.[104]

While the purpose of this Article is not to discuss the legality of this so-called "international legislation," one must understand the controversy surrounding UNSCR 1540 and its groundbreaking status in order to assess its effectiveness. Scholarly support for the Security Council legislating in this area is strong. For example, Professor Barry Kellman argues:

> If a matter of international peace and security requires implementation of obligations that, in another context, might be the substance of a treaty, the Security Council can (and, according to the charter process, should) trump the treaty-making process. One reason for this trump of authority is precisely because the Security Council is better able to shear away extraneous considerations from the treaty negotiation process and make decisions more quickly that have more direct and exclusive bearing on resolving the security threat. When the issue arises to the most important category of concerns (war and peace), the process is not meant to epitomize participatory democracy of sovereign states; it is meant to get the job done.[105]

Professor Masahiko Asada's outstanding discussion of the "international legislation" debate in the context of UNSCR 1540 identifies three principal objections to the UNSCR 1540 as "international legislation."[106] The first concerns the formulation of legal rules by a limited number of states. That is, legislation by the

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[104] Barry Kellman, *Criminalization and Control of WMD Proliferation: The Security Council Acts*, 11(2) NONPROLIFERATION REV. 142 (2004).

[105] *Id.* at 159; *see also* Asada, *supra* note 56, at 325 (citing Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 344, 345 (1993-IV) (arguing "If prevention is the philosophical concept underlying Article 39 [of the UN Charter], then it must also be possible that the Security Council, in a more abstract manner, without having regard to the particular nature of a regime, outlaws certain activities as being incompatible with fundamental interests of the international community")); K. Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27(1) N.Y.U. J. INT'L L. & POL. 149 (1994).

[106] Asada, *supra* note 56, at 322-23.

Security Council means fifteen states establish general rules that legally bind 192 members of the United Nations, binding the vast majority of states in the international community to the resulting rules without allowing them participation in the drafting process.[107] The second principal concern is the lack of process that would exist in treaty negotiations. Some states object that the Security Council simply lacks the competence to take all parties' interests into account and that compliance with treaty by fiat may be impossible for some states.[108] The third objection is the broadest and most significant: the imposition on freedom and sovereignty. In the case of treaty, states have the freedom to join or not to join, irrespective of their participation in the treaty-making process. With such a freedom, they can safeguard their national interest and sovereign rights. However, Security Council legislation does not allow such sovereign freedom.[109]

The weakness these issues inject is primarily a question of compliance: whether states who challenge the legality of the Security Council's action will comply, and if not, whether the Security Council will be willing to authorize action. If the fifteen Council members enact international legislation for the entire international community without broader outside support, states may argue such "legislation" is invalid and simply choose not to comply, thereby weakening the binding power of the Security Council's Chapter VII resolutions in general.[110] Thus, this method of last resort should be utilized with caution.

It is important to note that UNSCR 1540 does not *ipso facto* authorize enforcement action against states that fail or are unable to comply with the obligations imposed by the resolution.[111] According to the opinion of most nations and international law scholars,

[107] *Id.*
[108] *Id.*
[109] *Id.* at 324-25
[110] *Id.* at 324-25. This would be a serious blow to the UN collective security system as a whole. Frequent resort to the binding Council resolutions in place of multilateral treaty-making or treaty-amendment processes could also become a serious threat to the international legal order that is increasingly based on multilaterally negotiated treaties and agreements. *Id.*
[111] S.C. Res. 1540, *supra* note 89.

enforcement action against a violator would require an additional authorization from the Security Council.[112]

In addition to the increased "jurisdictional" reach of UNSCR 1540, its provisions are important because they further strengthen international and domestic norms against biological weapons development. From an international law perspective, UNSCR 1540's requirements establish customary international law norms. Many international law experts would likely argue that the BWC's prohibitions against bioweapons extended to all states even before the adoption of UNSCR 1540.[113] At a minimum, the resolution further cements the prohibition as customary international law. Additionally, some observers argue that the application of UNSCR 1540 to states not parties to the BWC may encourage those states to join the BWC.[114] Finally, states' individual efforts to implement legislation as a result of UNSCR 1540 create domestic norms.

3. New and More Specific Bioterrorism[115] Controls

UNSCR 1540 is significant in that it prescribes new and detailed measures regarding specific controls of a type not usually found in arms control treaties. On the matter of prescribing measures, the Security Council decided that

> all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:

[112] Asada, *supra* note 56, at n. 39 (noting the concerns of Philippines, Pakistan, and the United States).
[113] *See generally* Barry Kellman, DRAFT: *Preventing Bio-Violence – The Need for International Legal Action*, *available at* https://www.princeton.edu/sgs/seminars/biosecurity/archives/2005-2006-workshop/Kellman_Bio-essay-Draft-31January.pdf.
[114] Woodward, *supra* note 65, at 107.
[115] Though UNSCR 1540 relates to all WMD, not just biological weapons, its impact is greatest on bioterrorism because of the then-existing dearth of international law and enforcement in the biological weapons arena, especially as compared with nuclear and chemical WMD.

> (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;
> (b) Develop and maintain appropriate effective physical protection measures;
> (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;
> (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.[116]

By extending far beyond the BWC's banning of developing, acquiring, manufacturing, possessing, transporting, or transferring biological weapons, UNSCR 1540 provides specific actions states must take to meet their international obligations, including measures regarding security, physical protection, and border and export controls.[117]

Importantly, these specific controls relate not just to the weapons themselves, but to "related materials," which are broadly defined in UNSCR 1540 as "materials, equipment and technology

[116] S.C. Res. 1540, *supra* note 89, at 3.
[117] *Id.* UNSCR 1540 legally obligates all UN members to "[e]stablish, develop, review and maintain appropriate effective national export and transshipment controls" over WMD and their means of delivery as well as related materials, including appropriate laws and regulations to control export, transit, trans-shipment and reexport and establish and enforce appropriate criminal or civil penalties for violations. Asada, *supra* note 56, at 318. This is an extraordinary method of mandating extensive national export control systems so extensively in a manner much more quickly and effectively than at typical treaty. *Id.*

covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery."[118] Notably, this is the first time "means of delivery" are addressed in an international agreement related to biological weapons.[119] Thus, equipment that could be used to deliver bioweapons must be controlled.[120] This is an important feature of the resolution, as there exists no global treaty regulating their development, production, or possession in the bioweapons context.

UNSCR 1540 still does not provide a true independent international body for compliance and also does not prescribe specific standards (e.g., what specific physical protection measures must be taken to meet international standards).[121] However, it at least creates a regime whereby states do have obligations in a wide variety of areas, including security, physical protection, law enforcement, and export controls. Importantly, states are required not only to legislate in all these areas, but also to *enforce* such legislation.[122]

Though identifying specific areas governments must tackle is clearly a positive development, it does create complexity for states that wish to comply. When implementing legislation under UNSCR 1540, states must strike a difficult balance between biosecurity and biosafety, and scientific and commercial need. Like in the area of verification and enforcement, the problem of dual use arises here.

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[118] Press Release, Security Council, Security Council Decides All States Should Act to Prevent Proliferation of Mass Destruction Weapons, U.N. Press Release SC/8076 (Apr. 28, 2004).

[119] *Id.*

[120] *See id.* One naturally wonders how this provision could be enforced, given the rather common tools that can be used, such as crop-dusters, or even envelopes, in the case of anthrax.

[121] *See* Scott Jones, *Resolution 1540: Universalizing Export Control Standards?*, http://www.armscontrol.org/act/2006_05/1540 (last visited Oct. 1, 2014).

[122] Olivia Bosch, U.N. Committee Export Report, *United Nations Security Council Resolution 1540: Can Compliance be easy?*, *available at* http://www.un.org/en/sc/1540/transparency-and-outreach/outreach-events/pdf/expert-presentation-2012-3-malta.pdf (last visited Oct. 14, 2014).

The biological research laboratories of the world cannot be closed or research efforts significantly restricted because of concerns over bioterrorism.[123] Indeed, it may well be that the natural (evolutionary) disease threats they tackle are more dangerous to the global community than the threat of bioterrorism. Thus, while implementing specific legislation as required under UNSCR 1540, governments necessarily must consult with and develop laws around the needs of industry and academia, recognizing that nature and evolution can be more dangerous than terrorists.

4. First Step in Direction of a Quasi-Compliance Body

The BWC provides no organizing or compliance verification body similar to the International Atomic Energy Agency ("IAEA") for nuclear weapons and material and the Organization for the Prohibition of Chemical Weapons ("OPCW") for chemical weapons.[124] The lack of an institutional compliance body for *biological* weapons is explicitly clear in the text of UNSCR 1540, which calls upon states to multilateral cooperation "within the framework of the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons and the Biological and Toxin Weapons Convention . . . ."[125] Thus, in the nuclear and chemical arenas, states are exhorted to work with the compliance and oversight bodies, whereas in the biological arena, the only reference is to working within the "Convention." Though not its stated goal, and it is unlikely the Security Council intended it as such, in some respects UNSCR 1540 fills some of this void by creating a committee with some of the responsibilities those

[123] Jeffrey Almond, *Industry Codes of Conduct, in* GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM 125, 133 (Peter van Ham & Olivia Bosch eds., 2007).
[124] MELISSA GILLIS, DISARMAMENT: A BASIC GUIDE 45 (3d ed. 2012), *available at* http://www.un.org/disarmament/HomePage/ODAPublications/AdhocPublications/PDF/Basic_Guide-2011-web-Rev1.pdf. In fact, in the nuclear and chemical weapons arenas, some critics argue UNSCR 1540 unnecessarily duplicates the IAEA and OPCW. Thomas J. Biersteker, *Lessons for UNSCR 1540, in* GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM 24, 38 (Peter van Ham & Olivia Bosch eds., 2007).
[125] S.C. Res. 1540, *supra* note 89, at para. 8(c); Press Release, *supra* note 118.

international compliance bodies fulfill in the nuclear and chemical weapons arenas.[126]

Operative paragraph 4 of UNSCR 1540 creates a Security Council committee ("the 1540 Committee"), which receives and reviews state reports regarding the steps they have taken to implement UNSCR 1540.[127] For example, the 1540 Committee recently reported the following progress regarding state compliance with UNSCR 1540 in the area of biological weapons:

> 112 States have a national legal framework prohibiting the manufacture or production of biological weapons, compared to 86 in 2008. By 1 April 2011, 95 States had adopted enforcement measures related to the manufacture or production of biological weapons, compared to 83 in 2008.
> . . .
> By 1 April 2011, 133 States had adopted enforcement measures related to the manufacture, acquisition, possession, stockpiling, development, transfer, transport or use of such weapons, compared to 76 in the 2008 report.[128]

The Security Council has renewed the 1540 Committee several times, most recently for 10 years until 25 April 2021.[129] To date, this committee has acted as a clearinghouse for information exchange between states and has been the primary "verification" mechanism for determining states' compliance with UNSCR 1540.[130]

a. Clearinghouse

A key aspect of the 1540 Committee's work is acting as an information clearinghouse, through which states can provide or request information to or from other states regarding best practices, and a forum for

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[126] S.C. Res. 1540, *supra* note 89, at para. 4.
[127] *Id*.
[128] Report of the Committee established pursuant to Security Council Resolution 1540 (2004), U.N. Doc. S/2011/579, paras. 47-48 (Sep. 14, 2011) [hereinafter Third Report of the 1540 Committee].
[129] S.C. Res. 1977, U.N. Doc. S/RES/1977, para. 3 (Apr. 20, 2011).
[130] *See* Third Report of the 1540 Committee, *supra* note 128.

> identification of effective and efficient practices for sharing experience [which] promotes the implementation of [UNSCR 1540], improves the quality of measures taken by States, conserves their resources and can prevent unnecessary duplication of effort. More effective policies will attract greater international support, essential to the capacity-building required by most States and, more likely, also domestic support, upon which the implementation of the resolution depends.
> . . .
> To facilitate the sharing of experience, the Committee has prepared a list of relevant examples to which States may wish to refer in implementing [UNSCR 1540]. The set of practices for sharing experience appears in annex XVI.[131]

Additionally, the 1540 Committee provides what it terms a "matchmaking" service under which it matches requests for offers of assistance in implementing UNSCR 1540's mandates.[132]

b. Verification

The "verification" regime of UNSCR 1540, as conducted by the 1540 Committee, is meek. The 1540 Committee's assessment of states' reports is limited to cataloging the status of implementation efforts.[133] Importantly, the 1540 Committee does not assess the *effectiveness* of a state's enforcement of its laws. Verifying states' efforts at implementation is an important first step in verification of actual compliance with the norms against developing, producing, and using biological weapons.

UNSCR 1540's system for requiring and reviewing state declarations is more effective than the confidence building measure data exchange process under BWC, Article 5.[134] However, UNSCR 1540 does not provide the 1540 Committee with any independent

[131] Third Report of the 1540 Committee, *supra* note 128, at paras. 93-94.
[132] *Id.* at paras. 105-16.
[133] *See* Richard T. Cupitt, *Nearly at the Brink: The Tasks and Capacity of the 1540 Committee*, ARMS CONTROL ASSOCIATION, http://www.armscontrol.org/act/2012_09/Nearly-at-the-Brink-The-Tasks-and-Capacity-Of-the-1540-Committee (last visited Oct. 20, 2014).
[134] Woodward, *supra* note 65, at 106-07.

information-gathering authority, though it does gather and consider information made available by states either through reports to other treaty organizations or to the public.[135] The inability to collect evidence independently is certainly a gap in the effectiveness of the 1540 Committee, and is a key element of the recommendations made below for improvement to the international legal regime for prevention of bioterrorism.

D. Other International Law Mechanisms

A patchwork of other international law mechanisms affects bioterrorism, though to a much lesser degree than those discussed above. These instruments include the 1997 International Convention for the Suppression of Terrorist Bombings ("Terrorist Bombing Convention"),[136] the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the "SUA Protocol"),[137] and the 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation ("Beijing Convention").[138]

The Terrorist Bombing Convention criminalizes the unlawful and intentional use of "explosives and other lethal devices" in, into, or against various defined public places with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction of such a place. It also establishes a semi-universal jurisdiction as well as the *aut dedere aut judicare* principle for the offenses.[139] According to the definition given in the Convention, "explosives and other lethal devices" include "a weapon

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[135] *Id.* at 106.

[136] International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (Jan. 9, 1998) [hereinafter Terrorist Bombing Convention].

[137] INT'L MARITIME ORG. [IMO], *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, IMO Doc. LEG/CONF. 15/21 (Nov. 1, 2005), S. Treaty Doc. No. 110-8, 2006 WL 5003319 [hereinafter SUA Protocol].

[138] Convention on the Suppression of Unlawful Acts Relating to International Civil Action, Sept. 10, 2010, DCAS Doc No. 21 [hereinafter Beijing Convention], *available at* https://www.unodc.org/tldb/en/2010_convention_civil_aviation.html. As of this writing, the Beijing Convention is not yet in effect.

[139] Terrorist Bombing Convention, *supra* note 136, at art. 2, 4, 6, 8.

or device that is designed, or has the capability to cause death, serious bodily injury, or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material."[140]

Two transportation-related treaties also purport to control bioterrorism by criminalizing the transportation of various WMD, including biological weapons, in civil aviation (Beijing Convention) and maritime (SUA Protocol) modes.[141] Along with outlawing a number of other aviation-related terrorist acts, the Beijing Convention makes it an offense to unlawfully and intentionally transport by civil aircraft biological, chemical, and nuclear ("BCN") weapons or equipment, materials, or related technology that significantly contributes to the design, manufacture, or delivery of a BCN weapon.[142] The Beijing Convention creates broad jurisdiction over offenders and further reinforces the *aut dedere aut judicare* principle.[143] Both the Beijing Convention and SUA Protocol employ the BWC's definition of biological weapons.[144] In addition, the SUA Protocol provides useful ship boarding procedures in the event of suspected terrorist activity, including illegal transportation of WMD.[145]

Each of the international legal instruments discussed in this section is a possible useful tool in the prosecution of bioterrorist activity. However, given the existing mandate of UNSCR 1540 for broad criminalization of most of these activities, the bioweapons-related provisions of these treaties are more duplicative and confirmatory of the requirements of UNSCR 1540 than they are new and groundbreaking developments.

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[140] *Id*. at art. 1, para. 3(b).
[141] Beijing Convention, *supra* note 138; SUA Protocol, *supra* note 137.
[142] Beijing Convention, *supra* note 138, at art 1(i).
[143] Michael Jennison, *The Beijing Treaties of 2010: Building A "Modern Great Wall" Against Aviation-Related Terrorism*, 23 No. 3 AIR & SPACE L. 9, 10 (2011).
[144] Beijing Convention, *supra* note 138; SUA Protocol, *supra* note 137.
[145] SUA Protocol, *supra* note 137.

II. THE NET EFFECT OF INTERNATIONAL LAWS AFFECTING PREVENTION OF BIOTERRORISM

The international legal mechanisms discussed above are the only ones that significantly affect the prevention of bioterrorism. As discussed, each instrument suffers deficiencies. Also, the sum of those instruments—the "net effect"—leaves the international legal regime affecting the prevention of bioterrorism with several problems. These issues include (1) no clear definition of what constitutes a bioweapon and which agents are banned in what quantities, (2) no adequate verification and inspection regime or body, (3) no significant enforcement mechanism, and (4) no safety net for states that lack the capacity to implement and enforce meaningful restrictions on bioweapon development and production within their jurisdictions (especially for developing states where terrorist-driven bioweapons development is most likely to occur).[146] Each of these issues is summarized below, concluding with a brief recommendation for improvement in each area.[147]

A. No Meaningful Definition of Biological Weapon

1. The Issue

There is no internationally accepted legal definition of "biological weapon" that goes beyond the BWC's vague and nearly impossible-to-implement definition, which turns on the possessor's intent and whether there exists an alternative justification for possessing the agent in question. In addition, there is no

[146] This list is not exhaustive. Other problems also exist, such as the complicated area of regulating bioresearch under UNSCR 1540-mandated legislation. *See generally* S.C. Res. 1540, *supra* note 89. Prosecutions in the United States demonstrate the difficulty of legislating effectively and predictably enough for the scientific community to proceed with confidence they are doing so legally. *See* Gerald L. Epstein, *Law Enforcement and the Prevention of Bioterrorism: Its Impact on the U.S. Research Community*, *in* GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM, 180-85 (Peter van Ham & Olivia Bosch eds., 2007).

[147] Due to the myriad problems with the current international legal system affecting bioterrorism, identifying remedies and recommending fixes could fill an entire book. Such recommendations are outside the scope of this article, but are included to provoke thought for a possible way ahead.

authoritative list of prohibited agents. A primary objection of those who oppose creating an authoritative list of prohibited agents is that such schedules will immediately be obsolete and that no list could be permanent.

2. Recommendation: A Multi-Layered Definition

A multi-layered approach to defining bioweapons should be instituted, with the current intent-based definition maintained as the baseline. In addition to keeping that floor for defining a prohibited biological weapon, a list of agents that are prohibited in certain quantities, no matter the circumstances, should be promulgated either under the BWC or an addition to UNSCR 1540. This list, which would likely be fairly short, should include specific agents for which the international community believes there is no lawful non-offensive purpose, and should identify specific exceptions. For example, smallpox could be prohibited, with specific exceptions identifying which states may possess smallpox, and in what quantities. The list could be updated annually, by a process established by the States Parties to the BWC, by the 1540 Committee or similar body, or by the Security Council. Finally, this intent-based definition should be augmented with an objective definition that distinguishes between an illegal bioweapon and a legal biological agent based on the agent's characteristics, rather than the intent of the actor who possesses it. This augmented definition should be created under a process that can be used and modified as biotechnology advances.

B. Lack of Verification Mechanism

1. The Issue

As discussed above, unlike the nuclear and chemical weapons arenas, there exists no independent verification mechanism in the biological weapons arena. Without a verification mechanism, states and non-state actors alike can act with relative impunity, so long as their activities remain relatively hidden from international scrutiny. The political and practical difficulties of verification in the

bioweapons arena make it unlikely a comprehensive verification scheme will be implemented in the foreseeable future.

Unfortunately, there is little political will among some of the major players—importantly, the United States—for creating a verification mechanism. The United States' stated basis for opposing a verification mechanism is that it is unlikely to expose illicit activities, a claim with substantial merit given dual use problems and difficulty in locating biological activity without a state's assistance. However, the likely real primary basis for the United States' position is the objection of the United States pharmaceutical industry, based on concerns over trade secrets, industrial espionage, and commercial restrictions. Whether these fears are justified, especially in light of the chemical industry's ability to create a workable verification mechanism under the CWC that allows companies to protect trade secrets, is in large part immaterial, so long as the United States continues to oppose a verification mechanism.

Practical verification difficulties inherent in the area of biological agents also exist. As alluded to elsewhere in this Article, it is difficult to create a verification regime when any nation with a developed pharmaceutical industry has the potential to make biological weapons.[148] Further, because biological agents can be readily multiplied, it is unnecessary to produce or store agents in large quantities.[149] As a result, a biological warfare program does not require large production sites or storage sites.[150]

2. Recommendation: Use UNSCR 1540 Framework to Create Independent U.N. Body for Ad Hoc Verification of States' Implementation of UNSCR 1540 Mandates

With a routine reporting and verification mechanism politically untenable, recommendations for improvement are modest. Some improvement can be made. The BWC is likely the wrong vehicle; UNSCR 1540 may be the right one.

[148] Third Review Conference, *supra* note 75.
[149] Oliver Thränert, *Enhancing the Biological Weapons Convention, in* ENHANCING THE BIOLOGICAL WEAPONS CONVENTION 9, 16 (Oliver Thränert ed., 1996).
[150] *Id.*

Given the gaping holes in verification under the BWC, and its non-application to non-state actors, the BWC is clearly not the primary legal agreement for preventing bioterrorism. Even as applied to its original purpose—preventing states from developing, acquiring, and possessing bioweapons—it is largely considered a failure. In the words of one commentator, "[T]he BWC has been relegated to the status of an infirm elderly relative worthy of affection and respect yet not really expected to provide meaningful answers to current challenges."[151] Its primary role should be, as the United States now advocates, that of a mechanism for refining "cooperation, information exchange, and coordination," and as "the premier forum for discussion of the full range of biological threats—including bioterrorism—and mutually agreeable steps States can take for risk management."[152] In other words, the BWC will be a forum for discussion, not an instrument of enforcement. Clearly, the BWC does not, and will not in the foreseeable future, contain a verification mechanism.

UNSCR 1540, though not focused solely on biological weapons, has served to improve legal attention to biological weapons proliferation and preventing bioterrorism. The recent developments in state implementation of UNSCR 1540 discussed above are very encouraging. However, as with the BWC before it, UNSCR 1540's verification mechanism is weak, relying on state self-reporting to the 1540 Committee. The creation of the 1540 Committee can be viewed as a first step toward a compliance body. To improve verification, the Security Council should give the 1540 Committee additional authority—an idea that might be politically viable given the Security Council's recent decision to extend the 1540 Committee's existence for another ten years—or create a new body under the auspices of UNSCR 1540.

In either case, the primary source of "verification" of compliance with UNSCR 1540 would remain states reporting their implementation efforts, but the new compliance body would have broader capability to assess such reports and, when called upon by

[151] KELLMAN, *supra* note 13, at 193.
[152] Tauser, *supra* note 5.

the Security Council to do so, investigate suspected non-compliance. Such investigations should be conducted by experienced and preexisting teams, rather than ad hoc teams whose experience investigating compliance with the BWC or UNSCR 1540 may be minimal.

Though the practical difficulties of inspecting biological weapons production facilities caused by dual use are imposing, UNSCR 1540 could be improved by creating a body for the physical inspection and monitoring of biological weapons development and enforcement in states where specific concerns are raised and the Security Council believes greater attention is required. Though the nuclear and chemical weapons enforcement bodies are created by treaty, there is no legal need to use a treaty to do so. Chapter VII of the U.N. Charter is sufficient authority for the Security Council to create such a body and imbue it with rights to inspect and gather additional information from without and within states' borders.[153] Additionally, given the lack of enthusiasm for instituting substantive changes to the BWC, and seemingly positive contemporary efforts under UNSCR 1540, utilizing the Security Council may be a more realistic option politically.

Such a body—similar to the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons, though with far less authority—would be able to provide the Security Council what is sorely missing from the current regime: data regarding the presence of biological weapons development, production, and storage programs and facilities in states from an experienced and independent inspection team. This proposed independent body would not have authority to inspect absent specific authorization from the Security Council. Dependence on the Security Council for situation-specific inspection authority in limited instances of concern would allow permanent Security Council member states like the United States to control perceived overreaching. Once given authority, the independent body could conduct physical inspections of biological research, development, and production facilities in a way that no currently constituted

[153] *See generally* U.N. Charter, ch. VII.

international body can. Unlike the "challenge inspections" of the CWC, these inspections could not be triggered solely by another state's allegations. Further, no routine and reoccurring inspections would be conducted.

A multilateral verification body's physical inspection and monitoring activities could themselves serve as a deterrent, both to states who may support or allow biological weapons development by non-state actors, or to the non-state actors themselves. Perhaps more importantly, such a body's reports would offer independent and therefore more credible information upon which the Security Council could take action. Evidence from an independent inspection agency, or even a state's unwillingness to permit such inspections, would surpass the weight of evidence offered by a state that may be a rival of the alleged offending state. At a minimum, if one state were to offer such evidence, an independent body could verify it prior to the Security Council authorizing sanctions or military action against the accused state. If such a standing body existed, the Security Council would have the information necessary to take or to authorize action more quickly and effectively than if a new verification body had to be formed for each new particular situation. Finally, such a body could actually investigate and provide additional data and analysis regarding the *efficacy* of states' efforts to implement and enforce prohibitions on biological weapons development by non-state actors, rather than simply cataloging such efforts as is currently the case.

C. Lack of Enforcement Mechanisms

1. The Issue

Neither the BWC nor any other international instrument contains a separate enforcement mechanism for violations.[154] Though the power of the Security Council ostensibly backs all Security Council resolutions, in practice, the Security Council has thus far taken no action against non-complying states under UNSCR 1540.

[154] *See* BWC, *supra* note 4.

Enforcement against *states* is not the only problem. One understandably wonders whether enforcement serves as a deterrent at all when attempting to prevent *bioterrorism*. This is a problem endemic in attempting to curb all terrorist activity: enforcement based on punishment does not work for groups willing to engage in suicidal terrorist attacks. The main system of enforcement in anti-terrorism treaties is to criminalize terrorist acts with strong penalties and to ensure that offenders are punished. But the idea behind this system is the *ex post facto* punishment of terrorists, and not the prevention of terrorism. Though the existence of a heavy penalty has a deterrent and preventive effect, just how much it deters an attacker who may be willing to commit suicide is open to question. This problematic aspect of anti-terrorism conventions is shared by the WMD treaties that provide national implementation obligations, including enacting penal legislation.[155]

2. Recommendation: Stop Seeking a Separate Enforcement Mechanism

A separate enforcement mechanism is unnecessary. Under the modest verification system offered above, the Security Council would be provided with independent and sufficient information to know whether states were violating their obligations under the BWC, UNSCR 1540, or other international obligations. Practically speaking, no alternative enforcement mechanism is necessary or would provide greater incentive to comply with legal obligations. Ostensibly, even if an alternative system were established, meaningful action against a non-complying state would likely involve the Security Council. Other than possible extra-U.N. unilateral action by a state (meaning an alternative enforcement mechanism would also be bypassed), no military action would be taken absent Security Council sanction. As a potential deterrent, the possible enforcement options at the Security Council's disposal could be identified in the instrument establishing the permanent 1540 Committee-like body described above, so long as the instrument was clear that Security Council approval would be required for any enforcement action. Criminalization of terrorist biological activities

[155] Asada, *supra* note 56, at 312-13.

is important, but too strong a focus on enforcement in the terrorism context is likely counterproductive. Enforcement against *states* and their leaders might work to minimize terrorists' chances for obtaining and developing weapons, but a separate enforcement mechanism—beyond the threat of Security Council action—is unlikely to provide any additional incentive for state compliance.

D. States Lacking Capacity

1. The Issue

As long as the international regime governing the development and production of biological weapons relies solely on individual states for controlling bioweapons development and use, the world population remains at risk for biological weapons attacks. It is relatively easy to identify states that might themselves develop or use biological weapons in contravention of international law or actively support or permit such activities by non-state actors within their jurisdiction. However, a critical void in limiting the biological weapons threat is the additional likelihood that such weapons could be produced or stored in states that do not prevent such activities due simply to the *lack of capacity or information to do so*. Though several lists identifying implementing legislation have been created, at this point governing bodies do not even have the data to reach conclusions regarding the *effectiveness* of such efforts.[156] Further, UNSCR 1540 acts as an unfunded mandate—requiring implementation without providing resources to accomplish the implementation. Many developing or bankrupt nations—the same nations where bioterrorist activities are likely to proliferate—simply will not be able to comply, absent assistance.

2. Recommendation: An International Assistance Fund

It is in the international community's interest to ensure states implement required controls mandated by UNSCR 1540, whether those states have the internal capacity to do so. As discussed

[156] Convention on the Suppression of Unlawful Acts Relating to International Civil Action, Sep. 10, 2010, DCAS Doc No. 21, *available at* https://www.unodc.org/tldb/en/2010_convention_civil_aviation.html.

above, modest information sharing among countries already exists, facilitated by the 1540 Committee. While this work is extraordinary and effective, the more difficult hurdle is financial assistance for states simply lacking the ability to implement and enforce effective controls. This is a need the international community must fill collectively, rather than on the sporadic basis now experienced through the 1540 Committee's matchmaking service.[157] Because the need will surely exceed the supply, it is essential to establish a mechanism for prioritizing such international assistance. The 1540 Committee or similar verification body recommended above should be tasked with identifying for the UN the states most needing assistance and ensuring that assistance is used as intended for the prevention of bioterrorism.[158]

III. CONCLUSION

As it relates to preventing bioterrorism, the normative framework of the international legal regime preventing use of biological weapons is barely adequate as a statement of what is prohibited. The Biological Weapons Convention is largely not useful in the fight to prevent bioterrorism. However, the BWC, combined with the far more useful UNSCR 1540 and other anti-terrorism measures, sufficiently proscribes the development, production, acquisition, possession, and use of biological weapons by states and non-state actors. To this extent, the current legal regime is mostly successful as a normative statement of what is prohibited.

However, in an era of ever-expanding biological research and understanding, the problem of bioterrorism is growing rather than shrinking. Without a workable definition of what states and

[157] In its most recent report, the 1540 Committee reported only four requests for financial assistance from other states. Third Report of the 1540 Committee, *supra* note 128, para. 112. Clearly, there are more states in need of assistance. Knowing that most solicitations for financial assistance go unfulfilled probably keeps needy states from requesting funds in the first place.

[158] Importantly, nothing in this recommendation would preclude additional unilateral or multilateral assistance to needy countries, as such efforts are critically important. "Cooperative efforts to rectify deficiencies are more appropriate in ensuring national implementation, especially when non-compliance may realistically be due to lack of awareness or capacity." Woodward, *supra* note 65, at 106.

individual actors are prohibited from doing, the norms lose value and actors are encouraged to exploit the "gray areas," justifiably expecting enforcement will not occur there. Further, the practical application of existing norms, especially in the area of verification, is woefully lacking. Some type of regular verification ability is required for the global community to have any confidence that illegal bioweapons development is not occurring. Finally, in many of the most dangerous instances, non-compliance with international norms may be due not to a desire to flout norms for the benefit of terrorists, but to states' lack of capacity to enforce effective national implementation of the international norms.

The international legal regime discussed in this Article cannot and will not prevent bioterrorism alone. Fortunately, the international legal regime is only one element of the world's effort. Political and practical realities dictate that the effort must also involve other methods, including response-focused activities, non-binding partnerships, non-state industrial and academic self-regulation and cooperation, and a focus on bioterrorism response. Though this article focuses only on the international law affecting the prevention of bioterrorism, the law alone, as in every area of human experience, is insufficient.

TIME TO REWRITE THE ILL-CONCEIVED AND DANGEROUS FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

Ronald J. Sievert*

The Foreign Intelligence Surveillance Act's ("FISA") imposition of a civilian criminal law probable cause search standard on what should be recognized as straightforward intelligence collection activity has greatly obstructed our nation's ability to monitor and deter foreign-connected terrorists and agents in the United States. The result has been a protracted, bureaucratic FISA judicial process that has led to failure to uncover several terrorist conspiracies. The Supreme Court specifically exempted foreign-related domestic intelligence interceptions from its decision on intelligence collection, warrants, and traditional probable cause requirements. Further, the Supreme Court's established "special needs" exception to conventional Fourth Amendment warrants applies to intelligence surveillance, and the FISA Court of Review explicitly found that the "special needs" doctrine should apply to such cases. Moreover, a review of the laws related to domestic national security surveillance in several European nations reveals that none of them mandate an evidentiary standard as rigorous as probable cause before authorizing electronic interception in national security cases.

Due to these considerations, Congress should modify FISA to permit electronic surveillance where the government has established reasonable suspicion that a target in the United States, or a U.S. citizen overseas, is the subject of an Authorization for Use of Military Force, or is engaged in planning an attack using Weapons of Mass Destruction. Should Congress take this step, any fears that FISA would be used as a substitute for the stricter requirements of

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Title III could be eased by the inclusion of a condition that the product of such surveillance cannot be used in the prosecution of ordinary crimes unrelated to intelligence.

INTRODUCTION

The United States regrettably has not been able to dwell in a state of domestic peace and tranquility since the conclusion of World War II. We have instead existed in a state of continuous conflict that daily has threatened to explode in targeted or potentially massive attacks against American citizens. For almost fifty years, we operated under the understanding that the slightest misstep could lead at any moment to a cataclysmic war with the Soviet Union. Then, the 1996

bombing of Khobar towers[1] and the 2000 assault on the USS *Cole*[2] presaged the domestic attacks of a new enemy in 2001 as Al Qaeda directed strikes against our financial, military, and governmental centers of power.[3] Many are not aware of the multiple elements of the continuous onslaught because, thankfully, luck, skill, and, in at least two cases, minor technical mistakes on the part of our adversaries prevented their success.[4] The simultaneous destruction of twelve U.S. planes over the Atlantic in 2006 was averted with the discovery of the liquid explosives plot,[5] planned attacks on John F. Kennedy International Airport and New Jersey oil terminals were uncovered early in 2007,[6] Najibullah Zazi's plan to blow up the New York City subways was disrupted in 2009,[7] Umar Farouk Abdulmuttalab's underwear bomb failed to detonate on a passenger-laden plane over Detroit that same year,[8] and Faisal Shahzad's 2010 Times Square bomb fizzled after preliminary ignition.[9]

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[1] *Al Qaeda Is Now Suspected in 1996 Bombing of Barracks,* N.Y. TIMES (May 14, 2003), http://www.nytimes.com/2003/05/14/world/al-qaeda-is-now-suspected-in-1996-bombing-of-barracks.html.

[2] CNN Library, *USS Cole Bombing Fast Facts*, CNN WORLD (last updated Oct. 8, 2014, 5:40 PM), http://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/.

[3] *9/11 Attacks,* HISTORY.COM, http://www.history.com/topics/9-11-attacks (last visited Oct. 24, 2014).

[4] *See* Ben West & Scott Stewart, *Uncomfortable Truths and the Times Square Attack,* STRATFOR GLOBAL INTEL. (May 6, 2010, 3:56 PM), http://www.stratfor.com/weekly/20100505_uncomfortable_truths_times_square_attack; Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES (Dec. 25, 2009), http://www.nytimes.com/2009/12/26/us/26plane.html.

[5] Peter Wright, *UK 2006 Liquid Explosives Plot Trial Overview*, TRANSP. SEC. ADMIN. (Sept. 8, 2008), http://www.tsa.gov/press/releases/2008/09/08/uk-2006-liquid-explosives-plot-trial-overview.

[6] Cara Buckley & William K. Rashbaum, *Four Men Accused of Plot to Blow Up Kennedy Airport Terminal and Fuel Lines,* N.Y. TIMES (June 3, 2007), http://www.nytimes.com/2007/06/03/nyregion/03plot.html?pagewanted=all&_r=0.

[7] John Marzulli, *Zazi, Al Qaeda pals planned rush-hour attack on Grand Central, Times Square subway stations*, NY DAILY NEWS (Apr. 11, 2010, 11:00 PM), http://www.nydailynews.com/news/crime/zazi-al-qaeda-pals-planned-rush-hour-attack-grand-central-times-square-subway-stations-article-1.167379.

[8] O'Connor & Schmitt, *supra* note 4.

[9] West & Stewart, *supra* note 4.

Those who underestimate Al Qaeda in comparison with the Germany and Japan of former times ignore the fact that if Al Qaeda were to acquire Weapons of Mass Destruction ("WMD") it potentially would pose a greater threat than our previous enemies. As Judge Wilkinson stated in *Hamdi v. Rumsfeld*:

> We have emphasized that the 'unconventional aspects of the present struggle do not make its stakes any less grave.' . . . [N]either the absence of set-piece battles nor the intervals of calm between terrorist assaults (should) suffice to nullify the . . . authority entrusted to the executive and legislative branches.[10]

At the same time, looming in the background as a potential threat is China, a nation with unknown intentions that has been highly aggressive in penetrating our cyber infrastructure and defense establishment. The former Chief of Central Intelligence Agency ("CIA") Counter Intelligence noted it is likely that China has dispatched approximately 1,000 State Security Officers to the U.S. in an effort to obtain American military technology by any means possible.[11] "Among the many U.S. citizens implicated in espionage for the [Chinese Ministry of State Security] were Larry Wu-Tai Chin, a CIA employee; Peter Lee, a TRW employee; and James Smith, a special agent for the FBI."[12] In 2014, the Department of Justice ("DOJ") took the unusual step of directly exposing organized action aimed at the U.S. by the Chinese military when it charged five officers of the People's Liberation Army with conducting massive cyber espionage against U.S. interests.[13]

To counter these and other ongoing threats, the United States government has been burdened with the restrictions of the

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[10] Hamdi v. Rumsfeld, 316 F.3d 450, 464 (4th Cir. 2003) (citation omitted) (internal quotation marks omitted).

[11] JAMES OLSON, FAIR PLAY, THE MORAL DILEMMAS OF SPYING, 242 n.3 (2006); *see also Report: China Stole U.S. Nuke Secrets to 'Fulfill International Agenda,'* CNN (May 25, 1999, 8:13 PM), http://www.cnn.com/US/9905/25/cox.report.02/.

[12] OLSON, *supra* note 11, at 242.

[13] Kimberly Bennett, *US charges five Chinese army officers in cyber espionage case*, JURIST (May 20, 2014, 8:52 AM), http://jurist.org/paperchase/2014/05/us-charges-five-chinese-army-officers-in-cyber-espionage-case.php.

misguided and ill-conceived Foreign Intelligence Surveillance Act of 1978 ("FISA").[14] This statute requires that, in their effort to protect the nation's security, intelligence analysts, agents, and attorneys must produce evidence before members of the federal judiciary that meets the maximum criminal law search standard of probable cause before they can monitor the domestic conversations and emails of agents of a foreign power and terrorist organizations.[15] The procedure created by this statute is both confusing and, in the words of New York City Police Commissioner Raymond Kelly, "an unnecessarily protracted, risk-adverse process that is dominated by lawyers, not investigators and intelligence collectors."[16]

Both the 9/11 Commission[17] and Amy Zegart in her book *Spying Blind*[18] have detailed how FBI agents were stymied in tracking the hijackers before the September 11th attacks because, as a result of FISA interpretations, lawyers in the Department of Justice's "Office of Intelligence and Policy Review, FBI leadership and the FISA Court built barriers between agents—even agents serving on the same squads."[19] This "wall" was breached to some extent with the 2001 PATRIOT Act provisions permitting information sharing,[20] but the statute's basic restrictions and confusion surrounding its interpretation remain. The FBI had detained hijacker Zacarias Moussaoui in Minneapolis days before the 9/11 attacks, but agents were prevented from scanning his computer because a supervisor at

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[14] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. Ch. 36).

[15] 50 U.S.C. § 1805 (2010).

[16] *Surveillance and Shahzad*, *Are Wiretap Limits Making it Harder to Discover and Pre-empt Jihadists?*, WALL ST. J. (May 13, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748704250104575523844418292496.

[17] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 78 *passim* (2004).

[18] AMY ZEGART, SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11 *passim* (2007).

[19] 9/11 COMMISSION REPORT, *supra* note 17, at 79; *see also* Nola Breglio, *Leaving FISA Behind; The Need to Return to Warrantless Intelligence Surveillance*, 113 YALE L.J. 179 at 193-94 (for excellent quotes from various former DOJ officials regarding problems created by the "wall"). The "wall" and its effects are further explained in Ronald J. Sievert, *Patriot 2005-2007: Truth, Controversy and Consequences*, 11 TEX. REV. L. & POL. 319, 322-31 (2007).

[20] *See* Sievert, *supra*, note 19, at 322-28, 331-35.

FBI Headquarters concluded there was not probable cause for a FISA warrant. Meanwhile, according to the DOJ Inspector General's report, the Minneapolis office believed that "probable cause for the warrant was clear" and "became increasingly frustrated with the responses and guidance it was receiving."[21]

The Bush administration initiated the publicly criticized Terrorist Surveillance Program because, even with the PATRIOT Act's modifications, obtaining FISA warrants "incurr(ed) a delay that was unacceptable given the time-sensitivity and sheer volume of intelligence requirements after 9/11."[22] The government apparently knew that 2007 Times Square bomber Faisal Shahzad had "established interaction with the Pakistani Taliban, including bomb making training in Waziristan" and had made "thirteen trips to Pakistan in seven years," yet did not monitor him as he slowly assembled the materials to construct his potentially devastating weapon.[23] This led the *Wall Street Journal* to question whether the failure was due to "restrictions imposed on wiretapping by the Foreign Intelligence Surveillance Act" and to quote officials on the reduced effectiveness and excessive delays of the judicially regulated program.[24] In a very extensive, detailed investigation of the Boston Marathon bombing, Keith Maart further highlighted the confusion endemic to attempts at interpreting FISA.[25] He noted that the Russian Federal Security Service ("FSB") had twice informed the FBI and CIA that Tamerlan Tsarnaev "had contacts with foreign Islamic militants/agents, was visiting jihadist websites and was looking to join jihadist groups" and that he had travelled to Dagestan on an

[21] *See* U.S. DEP'T. OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S HANDLING OF INTELLIGENCE INFORMATION RELATED TO THE SEPTEMBER 11 ATTACKS 101-02 (Nov. 2004), *available at* http://www.justice.gov/oig/special/s0606/final.pdf (internal quotations omitted).

[22] John Andrews, *Time of Clear and Present Danger*, PUB. DISCOURSE (Oct. 4, 2010), http://www.thepublicdiscourse.com/2010/10/1659/.

[23] *Surveillance and Shazad*, WALL ST. J. (May 13, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748704250104575238444182924962.

[24] *Id.*

[25] Keith Maart, *The Boston Marathon Bombing One Year Later: A Detailed Look*, VETERANSTODAY.COM (Apr. 13, 2014), http://www.veteranstoday.com/2014/04/13/the-boston-marathon-bombing-one-year-later-a-detailed-look/.

unknown mission.[26] Maart offered that it would certainly appear there was "sufficient probable cause to obtain FISA warrants that would allow . . . more encompassing surveillance."[27] However, the FBI had apparently come to a contrary conclusion.[28]

By adhering to FISA, we are weakening our intelligence collection capabilities rather than strengthening our ability to prevent catastrophic attacks by those who do not hesitate to target and inflict mass casualties on innocents. At the same time, we are overreacting to the government's access to the limited information contained in metadata that has been routinely collected by telephone companies for decades.[29] This Article will explain how FISA was an excessive response to the Supreme Court's decision in *U.S. v. U.S District Court (Keith)*[30] and the Watergate era, and demonstrate why, because of the foreign affairs power and the Supreme Court's decisions on public safety searches, it is not constitutionally required.[31] Furthermore, this Article will show that most of our foreign partners in the supposedly sophisticated, privacy-protecting nations of Europe do not restrain their security forces in a similar manner in intelligence cases. This is due to the obvious reason that national security investigations involve threats that endanger the lives of thousands of people and potentially imperil the very existence of the nation, unlike the far more constrained menace of ordinary

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *See* Smith v. Maryland, 442 U.S. 735, 742 (1979) ("First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies 'for the purposes of checking billing operations, detecting fraud, and preventing violations of law.'") (quoting United States v. New York Tel. Co., 434 U.S. 159, 174-75).
[30] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972).
[31] See quotes from *Keith*, as well as numerous public safety cases discussed in this article.

crime.[32] It is well recognized that the arguments contained here are directly opposed to those who are demanding more, not fewer, government regulation in the wake of the revelations attributed to Edward Snowden.[33] Accordingly, this Article will also address why our recent media, political, and judicial reactions might once again lead to restrictions that are not constitutionally required, and that could further undermine the government's reasonable efforts to provide security for the American people.

I. THE CREATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

A. *United States v. U.S. District Court (Keith)*

The Foreign Intelligence Surveillance Act traces back to legislative hearings held immediately following the Supreme Court's decision in *United States v. U.S. District Court (Keith)* in 1972.[34] The Court's opinion in *Keith* related to electronic surveillance conducted against an entirely domestic conspiracy to bomb the CIA office in Ann Arbor, Michigan.[35] The Court held that the government should obtain a warrant from a neutral, detached magistrate before intercepting the conversations of wholly "domestic organizations."[36]

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[32] This will be discussed in great detail later in the Article. Several excellent sources are Daniel Saperstein, *The European Counterterrorist as the Next Cold Warrior*, 32 FORDHAM INT'L L. J. 1947 (2009); WINSTON MAXWELL & CHRISTOPHER WOLF, A GLOBAL REALITY: GOVERNMENT ACCESS TO DATA IN THE CLOUD (May 23, 2012), *available at* http://www.hldataprotection.com/uploads/file/Revised%20Government%20Access%20to%20Cloud%20Data%20Paper%20(18%20July%2012).pdf; MAXWELL & WOLF, A SOBER LOOK AT NATIONAL SECURITY ACCESS TO DATA IN THE CLOUD, (May 22, 2013), *available at* http://www.hldataprotection.com/2013/05/articles/international-eu-privacy/white-paper-cloud-national-security; PRIVACY INT'L, UNITED STATES OF AMERICA (2006), *available at* https://www.privacyinternational.org/resources/reports/united-states-of-america.

[33] Katherine Jacobsen & Elizabeth Barber, *NSA Revelations, A Timeline of What's Come Out Since Snowden Leaks Began*, CHRISTIAN SCI. MONITOR (Oct. 16, 2013), http://www.csmonitor.com/USA/2013/1016/NSA-revelations-A-timeline-of-what-s-come-out-since-Snowden-leaks-began/June-5-8-2013.

[34] Diane Carraway Piette & Jesselyn Radack, Symposium, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall"*, 17 STAN. L. & POL'Y REV. 437, 441-52 (2006).

[35] *See Keith*, 407 U.S. at 299.

[36] *Id.* at 316 n.8.

This phrase was defined as a group "composed of citizens of the United States which has no significant connection with a foreign power, its agents or agencies."[37] Recognizing that intelligence investigations such as the one at issue concerned long range attempts to prevent subversive actions, spanned long periods of time, and involved information "less precise" than in ordinary crime cases, the Court invited Congress to pass legislation that would be less restrictive than Title III (18 U.S.C. § 2510-2522).[38] Title III was passed in 1968 to control criminal investigations.[39] It required the government to establish, before a court, probable cause that a specific communication facility was being used to further an ongoing or imminent crime. Wiretaps would not be approved without a court finding of probable cause.[40] The Court stated with respect to purely domestic intelligence matters:

> In determining whether there is probable cause to issue a warrant for that inspection . . . the need for the inspection must be weighed in terms of the reasonable goals of (Code) enforcement. It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of Section 2518 but should allege other circumstances more appropriate to domestic security cases.[41]

Thus the Court held that there should be warrants for entirely domestic security cases but even these warrants need not follow the same strictures applied to ordinary crime.[42] Even more importantly for purposes of this Article, the Court repeatedly emphasized that "this case involves only the domestic aspects of national security."[43] No opinion was expressed "as to the issues which may be involved with respect to the activities of foreign

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[37] *Id.*
[38] *Id.* at 322.
[39] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, §§ 801-02, 82 Stat. 197; *see also* 18 U.S.C. §§ 2510-13, 2515-22.
[40] 18 U.S.C. § 2518(3) (1998).
[41] *Keith,* 407 U.S. at 323.
[42] *See id.* at 322-24.
[43] *Id.* at 321.

powers or their agents."[44] However, the Court hastened to add a footnote citing numerous sources, including the American Bar Association's standards on electronic surveillance, supporting "the view that warrantless surveillance . . . may be constitutional where foreign powers are involved."[45]

The Court's emphasis that it was not imposing a probable cause warrant requirement in foreign intelligence cases was grounded in legal and factual precedent. As the Court noted, President Roosevelt authorized Attorney General Robert Jackson to utilize wiretaps for national defense in 1940, Attorney General Tom Clark advised President Truman of the necessity of such wiretaps,[46] and Attorney General Herbert Brownell advocated their employment by President Eisenhower.[47] Furthermore, in the landmark case of *Katz v. United States*,[48] holding that wiretaps in ordinary crime cases required warrant authorization, Justice White stressed the Court's acknowledgement

> that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping.[49]

Accordingly, when Congress passed Title III in 1968, it inserted a special provision that the statute did not limit the constitutional power of the President

> to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to

[44] *Id.* at 322.
[45] *Id.* at 322 n. 20.
[46] *Id.* at 311 n. 10.
[47] *Keith*, 407 U.S. at 311.
[48] Katz v. United States, 389 U.S. 347 (1967).
[49] *Id.* at 363 (White, J., concurring).

> protect national security information against foreign intelligence activities.[50]

Keith demonstrates the Court believed that surveillance of an exclusively domestic organization was an entirely different matter, requiring at least some type of judicial warrant because it potentially infringed on the First Amendment right to dissent at home. As Justice Powell stated for the majority:

> As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government.
>
> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.[51]

Justice Douglas followed this up in his concurring opinion by writing that "the recurring drive of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that (Fourth Amendment) prohibition."[52]

The holding and reasoning of *Keith* is clear. The irony is that, after extensive legislative hearings for the next six years, Congress ultimately reacted by passing a statute that greatly restricted and imposed probable cause requirements on *foreign intelligence surveillance*. Congress completely failed to enact a law providing guidance for wholly *domestic security surveillance* as suggested by the Court. How did we get there from *Keith*?

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[50] 18 U.S.C. § 2511(3) (1967); *see also Keith*, 407 U.S. at 302 (citing the 1967 version of 18 U.S.C. § 2511(3)).
[51] *Keith*, 407 U.S. at 314 (internal citation omitted).
[52] *Id.* at 327 (Douglas, J., concurring).

B. Post-Keith Developments

Just ten days after the Supreme Court's decision in *Keith*, Senator Edward Kennedy chaired hearings on its implications before the Senate Judiciary Subcommittee on Administrative Priorities and Procedure.[53] His first witness was Deputy Assistant Attorney General Kevin Maroney of the DOJ's Internal Security Division. Kennedy's questioning of Maroney demonstrated that the Senator had a firm grasp on the exact scope of the *Keith* decision and revealed the Congressional response he hoped to obtain. Conceding that the Court did not prohibit collections targeted at agents of a foreign power,[54] Kennedy noted that the Court nevertheless rejected the Government's arguments that obtaining warrants in security cases could expose sensitive information and that determining probable cause in such cases involved complex and subtle factors beyond the competence of the judiciary.[55] In addition, he expressed his opinion that "there can be domestic groups with some significant foreign connection" which should still "retain their primarily domestic character for purpose of the First and Fourth Amendment."[56] Therefore, he asked Maroney if the case did not "affect your thinking about the legitimacy of (the government's) arguments (against warrants) in the foreign field?"[57] The Deputy Assistant Attorney General responded with a clear articulation of justice department policy, stating that "when you get into the area of foreign intelligence, the Court has recognized the President's Constitutional authority in the area of foreign affairs to protect the nation."[58] He noted that in such situations there are not "presently

[53] *Warrantless Wiretapping: Practices and Procedures of the Dept. of Justice for Warrantless Wiretapping and Other Electronic Surveillance, Hearing before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 92d Cong. 2 (1972) (statement of Sen. Edward M. Kennedy, Chairman, Subcomm. on Admin. Practice & Procedure) [hereinafter Kennedy Statement].
[54] *Id.* at 2-3, 8-9, 20-23.
[55] *Id.* at 2-3.
[56] *Id.* at 21.
[57] *Id.* at 9, 21.
[58] *Id.* at 10.

competing first amendment rights [as regards domestic dissent] that the Court found quite heavy in the Keith case."[59]

The Government's position prevailed and the President's ability to conduct foreign intelligence searches without probable cause warrants might have continued to this day if not for Watergate and the perceived abuses of the Vietnam era highlighted by the 1976 Church Committee report.[60] In the years immediately following *Keith*, four separate federal circuit courts "readily accepted the existence of a foreign intelligence exception to the warrant requirement based on the legal and policy arguments put forth by the Executive."[61] The Fifth Circuit, in *United States v. Brown*, upheld the legality of government-authorized warrantless surveillance that was targeted at the object of a genuine foreign intelligence investigation and incidentally acquired the communications of black activist, H. Rap. Brown.[62] The Third Circuit held, in *United States v. Butenko*, that warrantless surveillance, whose "primary purpose" was to obtain foreign intelligence information concerning the activities of foreign powers within the United States, was lawful even when conversations of American citizens were acquired.[63] The court noted that in foreign intelligence matters officials should not be required to interrupt their operations to "rush to the nearest available magistrate."[64] The Ninth Circuit, in *United States v. Buck*, held that electronic surveillance of foreign powers and their agents was considered a "recognized exception to the general warrant requirement of the fourth amendment."[65] The Fourth Circuit, in *United States v. Truong*, debated the issue of when an investigation

[59] Kennedy Statement, *supra* note 53, at 9 (1972).
[60] SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755 (1976).
[61] Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 804 (1989).
[62] United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974).
[63] United States v. Butenko, 494 F.2d 593, 606-08 (3d Cir. 1974), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974).
[64] *Id.* at 605.
[65] United States v. Buck, 548 F.2d 871 (9th Cir. 1977), *cert. denied*, 434 U.S. 890 (1977).

becomes a search for evidence of a crime rather than an intelligence gathering effort, but clearly recognized a warrant exception flowing from the Executive's presumed expertise in the foreign intelligence area.[66] Typical of the reasoning of these courts was the Third Circuits' en banc opinion in *Butenko*:

> In the present case, too, a strong public interest exists: the efficient operation of the Executive's foreign policy-making apparatus depends on a continuous flow of information. A court should be wary of interfering with this flow . . .
>
> Also, foreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance. Certainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, where exigent circumstances would excuse a warrant. To demand that such officers be so sensitive to the nuances of complex situations that they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties.[67]

At the same time, in 1975 Congress had commissioned the Library of Congress to do a comparative study of wiretapping laws in major foreign countries. The report found that, without exception, in national security matters the executive authority could authorize electronic surveillance without either probable cause or a judicial warrant.[68] In France, General Instruction 500-78 required telephone companies to comply with demands for wiretaps originating from military authorities, public prosecutors, or department prefects acting in matters of state security.[69] The German Federal Constitutional Court had held that "the exclusion of recourse to courts with respect to ordering and carrying out surveillance is compatible with the Basic Law [Constitution]" with the exception of provisions that might prevent the disclosure to those surveilled after

[66] United States v. Truong, 629 F.2d 908 (4th Cir. 1980).
[67] *Butenko*, 494 F.2d, at 605.
[68] *See* LIBRARY OF CONG. LAW LIBRARY, COMPARATIVE STUDY ON WIRETAPPING AND ELECTRONIC SURVEILLANCE LAWS IN MAJOR FOREIGN COUNTRIES *passim* (1975).
[69] *Id.* at France-5.

a point it would not interfere with the investigation.[70] According to the German Court, "[i]n the final analysis, prosecutorial surveillance requires a judicial order whereas intelligence surveillance needs only an order of an administrative agency."[71] In the United Kingdom, the Home Secretary had absolute authority to issue a surveillance warrant upon request of any governmental authority.[72] His power traced to the Crown's duty to "preserve the safety of the state and maintain order" or, historically, the "common law right of the Crown to safeguard the safety of the realm."[73]

However, after evidence of Presidential assassination plots and surveillance of domestic anti-government organizations emerged, Idaho Senator Frank Church convened the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans.[74] As reflected by the Committee's name, "the congressional mood at this time was one of antagonism towards the Executive because of Watergate and the disclosures in 1975 and 1976 of a broad range of perceived abuses of authority, especially in the area of intelligence and national security related activities."[75] Frederick Schwarz, Jr., Church's Chief Counsel at the hearings, recently recounted that the Committee found "shocking conduct by numerous agencies including the FBI, CIA, and NSA."[76] For example, the FBI targeted Martin Luther King, Jr., "the CIA enlisted the Mafia in its attempts to assassinate Fidel Castro, and the NSA obtained copies of most telegrams leaving America for a period of thirty years."[77] Exemplifying mission creep,

[70] *Id.* at FRG-3.
[71] *Id.* at FRG-13.
[72] *Id.* at Great Britain-2.
[73] *Id.* at Great Britain-1.
[74] S. REP NO. 94-465 at 1 (1976); S. REP. NO. 94-755, bk. II, at v (1976).
[75] Cinquegrana, *supra* note 61, at 806.
[76] Frederick A.O. Schwarz Jr., *Why We Need a New Church Committee to Fix Our Broken Intelligence System*, THE NATION (Mar. 31, 2014), http://www.thenation.com/article/178813/why-we-need-new-church-committee-fix-our-broken-intelligence-systeem.
[77] *Id.*

"the NSA trained its sights on anti-Vietnam War protesters and civil rights activists."[78]

Although not often reported in today's literature, many of these investigations were based on FBI documents indicating Communist connections and possible Soviet financing of some aspects of the Civil Rights and anti-war movements.[79] This is not to say that there were not government abuses, or that both movements did not have legitimacy on their own completely independent of Communist exploitation. Regardless of the Government's justifications for this surveillance and the foreign intelligence connections that existed, the Committee attributed what they perceived as domestic abuses in these foreign intelligence-related cases to the absence of clear congressional or judicial standards. Consequently they "urged a statutory framework restricting electronic surveillance for intelligence purposes within the United States to that conducted by the FBI pursuant to a judicial warrant."[80] The report and its recommendations "appeared to persuade many in Congress" that legislation was needed to remove national security collection in the United States from the sole discretion of the Executive,[81] irrespective of the fact that the surveillance involved foreign powers and their agents. Instead of fighting this position based on the practical arguments and presidential foreign affairs power highlighted in the numerous previously cited court opinions,[82] the incoming President, Georgia governor and Washington outsider Jimmy Carter, supported it. As Senator Birch Bayh stated in a 1978

[78] *Id.*

[79] For a revelation of FBI documents reflecting communist connection with these movements see AFRICAN AMERICAN INVOLVEMENT IN THE VIETNAM WAR, *Protest on the Homefront, Martin Luther King, Jr., The Backlash*, http://www.aavw.org/protest/homepage_king_backlash.html (last visited Oct. 25, 2014); *see also* 129 CONG. REC. 26,870-78 (1983) (for the full text of the remarks of Senator Jesse Helms). Although the far right reputation of Senator Helms is well recognized, the documents speak for themselves.

[80] *See* Cinquegrana, *supra* note 61, at 807 (citing S. REP. NO. 97-755, bk. II, at 29, 320, 325, 327-28 (1976)).

[81] *Id.* at 807-08.

[82] In addition to *Keith* and the Appellate Court cases cited after, for historical opinions on the foreign affairs power see United States v. Curtis Wright Exp. Co., 299 U.S. 304 (1936), and for Presidential protective power see *In re* Neagle 135 U.S. 1 (1890).

hearing before the Senate Select Intelligence Committee's Subcommittee on Intelligence and the Rights of Americans:

> For the first time, to my knowledge, in history we have a President of the United States, who does not claim implied authority, but sends his right arm, the Attorney General of the United States, up here to support and indeed to help in drafting of legislation which governs the exclusive means by which Presidential authority may be exercised in this very controversial yet critical area.[83]

The result of the Church Committee report and President Carter's support was the Foreign Intelligence Surveillance Act of 1978.

II. FOREIGN INTELLIGENCE SURVEILLANCE ACT

The statutory framework that Congress adopted to control foreign intelligence surveillance relies essentially on the same legal concept applied to criminal wiretaps in Title III of the Omnibus Safe Streets and Crime Control Act of 1968, but with some key modifications.[84] First, the statute is intended to provide procedures to obtain "foreign intelligence information" which is "information necessary to the national defense or security of the United States" or "the conduct of the foreign affairs of the United States."[85] Second,

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[83] *Foreign Intelligence Surveillance Act of 1978*: *Hearing on S. 1566 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong. 3 (1978) (statement of Sen. Birch Barh, Chairman, S. Subcomm. on Intelligence).

[84] *See generally* ELIZABETH B. BRAZAN, CONG. RESEARCH SERV., RL30465, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: AN OVERVIEW OF THE STATUTORY FRAMEWORK AND U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT AND U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW DECISIONS 5, 89-94 (2007) (discussing the Court of Review's comparison of the procedures in Title III with those in FISA, and finding in some respects that Title III had higher standards, while in others FISA included additional safeguards); *see also* Nicholas J. Whilt, *The Foreign Intelligence Surveillance Act: Protecting the Civil Liberties that Make Defense of Our Nation Worthwhile*, 35 SW. U. L. REV. 361, 371-83 (2006) (comparing FISA and Title III provisions to demonstrate the similarities between the two Acts and that Congress recognized the need to clearly distinguish foreign intelligence surveillance from criminal surveillance).

[85] 50 U.S.C. §§ 1801(e)(2)(A)-(B) (2012).

rather than establishing probable cause the target is committing a specific crime, the government must demonstrate probable cause to believe that the subject of the proposed surveillance is a foreign power or agent of a foreign power, which includes an international terror organization.[86]

To reduce the chance that FISA surveillance could interfere with the rights of U.S. persons, FISA requires "minimization procedures" that the Attorney General must adopt in order to prevent acquisition and retention and to prohibit dissemination of nonpublic information about U.S. persons.[87] In essence, FISA forbids disclosing information obtained from FISA surveillance except as provided in the minimization procedures,[88] although "information that is evidence of a crime which has been, is being, or is about to be committed can be retained or disseminated for law enforcement purposes."[89]

Subsequent amendments to the original legislation permitted physical searches according to a process parallel to electronic surveillance,[90] pen registers, trap and trace and business records acquisition,[91] interception of international communications that passed through the United States, and monitoring of "lone wolf" terrorists.[92] Another amendment imposed a requirement for a specially created FISA Court (also known as "FISC") approval before U.S. citizens could be targeted, even when outside the United States.[93] The amendment that caused the most angst among academics, scholars, and special interest groups, however, was a 2001 PATRIOT

[86] 50 U.S.C. §§ 1801(a)(4), 1805(2)-(3).
[87] 50 U.S.C. §§ 1801(h)(1), 1805(a)(4).
[88] *Id.* at § 1806(a).
[89] *Id.* at § 1801(h)(3); *see also* William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1231 (2007).
[90] Counterintelligence and Security Enhancements Act of 1994, Pub. L. No. 103-359, § 301(5), 108 Stat. 3423 (2001).
[91] Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 601, 112 Stat. 2396 (1998).
[92] 50 U.S.C. § 1801 (b)(1)(c).
[93] Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 702, 122 Stat. 2436.

Act change, which stated that only a "significant" intelligence purpose was required before a FISA order could be approved.[94]

Although no specific purpose was delineated in the original FISA legislation, the Fourth Circuit in *United States v. Truong*,[95] and subsequent DOJ practice, mandated that the "primary" purpose of FISA surveillance be intelligence collection.[96] This evolved into DOJ and FBI procedural requirements and interpretations that dictated there be virtually no communication between agents working towards a criminal prosecution and those concerned with obtaining foreign intelligence, even in an espionage or terrorism case.[97] As noted earlier in this Article, the 9/11 Commission highlighted the major problems in information sharing created by this "wall."[98] The PATRIOT Act brought the wall down by requiring the government to certify only that a "significant purpose" of the surveillance was intelligence collection,[99] leaving open the possibility that another purpose could be criminal prosecution. This in turn led to strenuous objections by FISA Court judges, the American Civil Liberties Union ("ACLU"), and the National Association of Criminal Defense Attorneys ("NACDA").[100] Their argument, in essence, was that the new FISA statute did not comply with the Fourth Amendment because it did not demand that the government show probable cause a crime was being committed, or a statement particularly describing

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[94] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, Pub. L. No. 105-56, § 218, 115 Stat. 272; 50 U.S.C. § 1804(6)(b). *See, e.g.,* David Hardin, Note, *The Fuss Over Two Small Words: The Unconstitutionality of the USA Patriot Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 294 (2003); Joshua Pike, Note, *The Impact of a Knee-Jerk Reaction: The Patriot Act Amendments to the Foreign Intelligence Surveillance Act and the Ability of One Word to Erase Established Constitutional Requirements*, 36 HOFSTRA L. REV. 185, 185 (2007).

[95] United States v. Truong, 629 F.2d 908, 914-15 (4th Cir. 1980).

[96] Banks, *supra* note 89, at 1237.

[97] *Id.* at 1238.

[98] 9/11 COMMISSION REPORT, *supra* note 17, at 79; Breglio, *supra* note 19, at 193-94; Sievert, *supra* note 19, at 323-28, 331-35.

[99] USA PATRIOT Act. The Act also permitted law enforcement and intelligence to coordinate; *see* 50 U.S.C. § 1806(k)(1).

[100] *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002); brief for ACLU & NACDA as Amici Curiae, *In re* Sealed Case, 310 F.3d 717.

what was to be seized.[101] Agents could use the theoretically lesser standard, probable cause that a surveillance target is the agent of a foreign power, to get around the stricter requirements of the Title III criminal surveillance standard.[102]

The phrase "theoretically lesser standard" is utilized above because, as a former DOJ attorney very familiar with both forms of surveillance, the author can attest that it was in practice more difficult to get FISA approval than Title III authorization. FBI Director and former U.S. Attorney and Deputy Attorney General James Comey confirmed this in an address at Yale when he stated that it was a misconception that the standards for obtaining FISA warrants are lower, as in most cases it is easier to establish that a target is involved in criminal activity than to prove that the target is an agent of a terrorist organization. Furthermore, the bureaucratic review process for FISA and Title III warrants at DOJ is "something above probable cause."[103] Obtaining surveillance approval is hardly a cakewalk for the government, as it can take experienced lawyers up to a week to prepare the paperwork and the documents are "like mortgage applications in their complexity."[104]

Regardless, the specially-appointed FISA Court of Review (also known as the "FISA Appellate Court") rejected the ACLU's, NACDA's, and FISA judges' challenges to the "significant purpose" test by finding (1) FISA required a neutral and detached magistrate, (2) probable cause that someone is an agent of a foreign power is defined in terms of criminal activity to include any person knowingly engaging in espionage, sabotage, or terrorism,[105] (3) to the extent there are limited "particularity" requirements, *Keith* had found that different standards could be appropriate in national security surveillance, and (4) FISA, as amended to authorize surveillance

[101] *Id.* at 38 *et. seq*.
[102] Omnibus Crime Control and Safety Street Acts of 1968, Pub. L. No. 90-351, tit. III, §2518(3), 82 Stat. 197, 219.
[103] Breglio, *supra* note 19, at 189 (quoting James Comey).
[104] Richard Lacayo, *Has Bush Gone Too Far? The President's Secret Directive to Let the National Security Agency Snoop on American Citizens Without Warrants Sets Off a Furor*, TIME, Jan. 9, 2006, at 7.
[105] 50 U.S.C. § 1801(e)(1).

where one purpose might be criminal prosecution was, therefore, "reasonable" under the Fourth Amendment.[106]

The FISA Appellate Court's holding was not well received by many who had objected to the change. One District Court refused to follow it,[107] and law review articles reflected continuous attacks on the modified statute.[108] National security scholar William Banks acknowledged that FISA may have collapsed under its own weight because of its "complex formulations regarding who the government may target, how the government must construct the applications, and how the government must minimize its dissemination of information collected."[109] *In re Sealed Case*, however, in Banks' opinion, had eliminated its core requirements and central premise and effectively helped kill the statute.[110]

What is interesting for purposes of this Article is that *In Re Sealed Case* highlighted that:

> The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. It was incumbent upon the court, therefore, to determine the boundaries [used in a criminal prosecution] of that constitutional authority in the case before it. We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.[111]

The Court followed this interesting explanation by summarizing prior Supreme Court holdings on "Special Needs," stating, "[T]he distinction between ordinary criminal prosecutions and extraordinary situations underlies the Supreme Court's approval of entirely warrantless and even suspicionless searches that are

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[106] *In re* Sealed Case, 310 F.3d 717, 737, 740, 746 (FISA Ct. Rev. 2002).
[107] Mayfield v. United States, 504 F. Supp. 2d 1023, 1041 (D. Or. 2007).
[108] *See, e.g.,* Banks, *supra* note 89; Hardin, *supra* note 94; Pike, *supra* note 94.
[109] Banks, *supra* note 89, at 1211.
[110] *Id.* at 1214-15.
[111] *In re* Sealed Case, 310 F.3d at 742 (brackets added by the author for clarification as consistent with the context of the case and the court's discussion).

designed to serve the government's special needs beyond the normal need for law enforcement."[112]

That is, in the author's interpretation, Congress had imposed the requirement that there be probable cause to believe that the target was an agent of a foreign power before a FISA warrant could be granted. This understanding would make sense if the government knew at the time FISA was enacted that it would want to use the surveillance for criminal prosecution as contemplated by *Truong*. This does not mean, however, that establishing probable cause before a judge is constitutionally mandated any time the government wants to conduct surveillance in the United States against an agent of a foreign power, because the President has inherent foreign affairs authority to obtain foreign intelligence.

This of course also raises the interesting question whether FISA was at the start essentially an unconstitutional legislative infringement on the president's foreign affairs and commander-in-chief powers. That was certainly suggested by the Bush administration when the *New York Times* caused an uproar by disclosing that the government was conducting domestic surveillance of a few Al Qaeda suspects under the Terrorist Surveillance Program without going through the FISA Court.[113] After that revelation, Senator Pat Roberts stated, "Congress, by statute, cannot extinguish a core constitutional authority of the president."[114] Congress relied on the Commerce Clause, the Necessary and Proper Clause, and its regulation of the Department of Defense to pass the statute.[115] An earlier case, *Youngstown*, maintained that Congress could not encroach on the president's *fundamental* constitutional powers.[116] Although *Youngstown* and the more recent Supreme Court decision

[112] *Id.* at 745.
[113] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0.
[114] Pete Yost, *Senate Intelligence Chairman: Bush Can Spy*, U-T SAN DIEGO (Feb. 3, 2006, 1:22 PM), http://legacy.utsandiego.com/news/nation/terror/20060203-1322-domesticspying.html.
[115] U.S. CONST. art. I, § 8, cl. 3; Banks, *supra* note 84, at 1279.
[116] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (majority opinion), 635, 637-38 (Jackson, J., concurring) (1952).

in *Hamdan v. Rumsfeld*[117] have been cited for the proposition that Congress can act to limit the president's authority with a statute like FISA, especially absent a declaration of war,[118] it is highly questionable whether, as the administration contended, the general Authorization for Use of Military Force ("AUMF") of 2001[119] would be a blanket grant of surveillance authority in the United States, especially in the face of the more specific FISA statute.[120]

The administration suspended the Terrorist Surveillance Program and there are no known cases before the Supreme Court challenging it or the original constitutionality of FISA. Thus FISA still stands today, and for the foreseeable future, as legislation mandating that the government demonstrate probable cause to believe a citizen or alien in the United States is an agent of a foreign power before electronic surveillance can be conducted against him for intelligence purposes.

III. FISA AND PROBABLE CAUSE

When Congress decided to require that the government show a court probable cause before it could electronically surveil an agent of a foreign power, it took a long-established criminal law standard and applied it to the completely different field of foreign intelligence collection. Although this standard may make a little more sense today, as surveillance conducted for a "significant purpose" has the potential to be used in a subsequent criminal case, the fact remains that the essence of FISA is intelligence gathering, not criminal prosecution. Title III was and continues to be the primary vehicle for criminal cases and no one, to the author's knowledge, has made a serious claim to the contrary.[121] As will be further discussed, in many other situations where there are substantial safety and security reasons for the search, the Supreme Court has consistently

[117] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[118] Banks, *supra* note 89, at 1211.
[119] *See* Authorization for of Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[120] Banks, *supra* note 89, at 1278-80.
[121] *See* 18 U.S.C. § 2510 (2002).

held that the standard of probable cause does not apply, regardless of the possibility of a later criminal indictment.

Probable cause is not simply a criminal law search standard, but the highest prerequisite for any search in U.S. law. The government can obtain a target's phone, financial, medical, and other records with a Grand Jury subpoena[122] or court order,[123] based only on the fact that the records are "relevant" to a federal investigation. If challenged, the court will uphold the government's authority unless "there is no reasonable possibility that the category of materials that the government seeks will produce information relevant to the general subject" of the investigation.[124] Police may stop your vehicle[125] or conduct a frisk of your person[126] based on "reasonable suspicion," meaning "specific and articulable facts . . . taken together with rational inferences from those facts" that suggest that criminal activity has occurred or is imminent.[127]

Searches of your home or the content of your communications in ordinary criminal cases are generally based on probable cause. This standard comes from the language of the Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[128]

Although, as will be discussed later, there is a very strong argument that the Fourth Amendment requires only "reasonable

[122] *See* FED. R. CRIM. P. 17(c)(1).
[123] 50 U.S.C. § 1861(d).
[124] United States v. R. Enters., 498 U.S. 292, 301 (1991).
[125] United States v. Arviza, 534 U.S. 266, 276-77 (2002).
[126] Terry v. Ohio, 392 U.S. 1, 30 (1968).
[127] *Id.* at 21.
[128] U.S. CONST. amend IV.

searches,"[129] and there are many exceptions to the probable cause rule, the Supreme Court has held as a general proposition that searches conducted without a probable cause warrant are unreasonable.[130] As the Court stated in *Chambers v. Maroney*, "[I]n enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."[131]

Probable cause can be defined as circumstances leading a reasonably cautious person to believe that certain facts are probably true,[132] or, in the words of the Supreme Court, there is a "fair probability" of their truth.[133] The Court has resisted efforts to define this in terms of a statistical percentage. "In dealing with probable cause . . . we deal with probabilities . . . The process does not deal with hard certainties."[134]

It would be helpful if the Supreme Court had addressed the exact meaning of probable cause in the context of national security. If the Court had articulated such a definition, it would be clear that probable cause in national security cases is a lesser standard than criminal law probable cause. The *Keith* Court certainly suggested this when it stated that a standard other than Title III may be compatible with the Fourth Amendment in a domestic security case.[135] The Court alluded to this concept decades later in dicta in a stop and frisk case, writing that "we do not say that the report of a person carrying a bomb need bear the same indicia of reliability we demand for the report of a person carrying a firearm before the police can constitutionally conduct a frisk."[136] The FISA Court of

[129] *See* Riley v. California, 134 S. Ct. 2473, 2482 (2014) (noting that "the ultimate touchstone of the Fourth Amendment is reasonableness") (internal quotations omitted).
[130] Chambers v. Maroney, 399 U.S. 42, 51 (1970).
[131] *Id.*
[132] BALLENTINE'S LAW DICTIONARY 431 (Legal Assistant ed. 1994).
[133] Illinois v. Gates, 462 U.S. 213, 238 (1983).
[134] *Id.* (quoting, in part, Brinegar v. United States, 338 U.S. 160, 176 (1949) and United States v. Cortez, 449 U.S. 411, 418 (1981)).
[135] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 322-23 (1972).
[136] Florida v. J.L., 529 U.S. 266, 273-74 (2000).

Review echoed this sentiment in *In Re Sealed Case*, stating that the "threat to society" should be a factor in determining the reasonableness of a search.[137] But the FISA Appellate Court also had to acknowledge that the Supreme Court, while conceding the need for "appropriately tailored roadblocks to thwart an imminent terrorist attack," cautioned in *Indianapolis v. Edmound* that in search cases "the gravity of the threat alone cannot be dispositive."[138]

Such language and speculation, while helpful for formulating a future approach, is far too vague to serve as concrete guidance to the police officer, federal agent, prosecutor, magistrate, or FISA judge who must make probable cause decisions on a daily basis. It should come as no surprise then that practitioners have come to focus on the word probable as meaning "more likely than not," so that

> [f]or practical purposes probable cause exists when an officer has trustworthy information sufficient to make a reasonable person think it more likely than not that the proposed arrest or search is justified. In math terms this implies that the officer or magistrate is more than 50 percent certain that the suspect has committed the offense or that the items can be found in a particular place.[139]

James Comey, when he was Deputy Attorney General, even stated that for FISA and Title III applications the government generally goes "beyond probable cause" to establish and maintain credibility with the courts.[140]

As noted at the beginning of this Article regarding the inability to obtain FISA warrants in the Moussaoui, Times Square Bomber, and Boston Marathon cases, this standard has created great difficulty in obtaining intelligence to defend the security of the United States. Terrorists and spies often operate in a loosely connected cell structure that can be hard to identify. They are well trained in avoiding detection, and their schemes can be quiet and

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[137] *In re* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).
[138] Indianapolis v. Edmond, 531 U.S. 32, 42-44 (2000).
[139] ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE LAW AND PRACTICE 68 (9th ed. 2014).
[140] *See* Breglio, *supra* note 19, at 189.

nascent before suddenly erupting with devastating consequences. A DOJ internal report prior to 9/11 strongly suggested that the failure to obtain these warrants hindered the FBI in the Wen Ho Lee and Aldrich Ames espionage investigations which involved the transfer of enormously damaging national security information to our potential enemies.[141]

Attorney General Alberto Gonzales defended the Administration's much-criticized warrantless Terrorist Surveillance Program against Al Qaeda suspects in the United States on the basis that the FBI needed more "speed and agility" in meeting the threat.[142] National Security Agency ("NSA") Director Michael Hayden amplified Gonzales' comment in noting that the FISA probable cause standard was "too onerous."[143] Testifying about the number of man-hours required to do the paperwork for a FISA application, Director of National Intelligence Mike McConnell stated that "the current statutory requirement to obtain a court order based on probable cause, slows, and in some cases prevents altogether, the Government's efforts to conduct surveillance of communications it believes are significant to the national security."[144] In his opinion, this standard required "substantial expert resources towards preparing applications . . . (diverting them) from the job of analyzing collection results and finding new leads."[145]

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[141] David A. Vise & Vernon Loeb, *Justice Study Faults FBI in Spy Case; Wen Ho Lee Probe Too Slow and Sloppy, Report Says,* WASH. POST, May 19, 2000, at A1, *available at* 2000 WLNR 10706687 (West).

[142] Alberto R. Gonzales, Att'y Gen of the United States, Prepared Remarks for Att'y Gen. Alberto R. Gonzales at the Georgetown University Law Center (Jan. 24, 2006), *available at* http://www.justice.gov/archive/ag/speeches/2006/ag_speech_0601241.html.

[143] Glenn Greenwald, *The Administration's New FISA Defense is Factually False*, UNCLAIMED TERRITORY (Jan. 24, 2006, 4:11 PM), http://glenngreenwald.blogspot.com/2006/01/administrations-new-fisa-defense-is.html.

[144] *Modernization of the Foreign Intelligence Surveillance Act: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 19 (2007) (Statement of J. Michael McConnell, Dir. of Nat'l Intelligence).

[145] *FISA Hearing: Hearing Before the H. Permanent Select Comm. on Intelligence*, 110th Cong. 23 (2007) (Statement of J. Michael McConnell, Dir. of Nat'l Intelligence).

Such comments are not new or confined to those attempting to defend Executive Branch actions. In 1982, Senator Malcom Wallop expressed the view that the "net effect of FISA has been to confuse intelligence gathering with criminal law" and that it is "nonsense" to attempt a formula for comprehensive surveillance of those who constitute a security threat.[146] Scholar Gerald Reimers wrote that FISA's "extraordinary procedures and high standards of proof result in unnecessary delay if not a bar" to intelligence investigations.[147] Author Kim Taipale has written that when information comes from computers that do not know who placed the calls or their exact content, but legitimately focus the attention of government, it is almost impossible to establish probable cause in the FISA context.[148] Federal Judge Richard Posner stated that FISA's requirement of probable cause is no help "when the desperate need is to find out who is a terrorist."[149] Although strongly criticizing the expansion of FISA to include broad generic surveillance operations, noted professor William C. Banks recently acknowledged that in ongoing counterterrorism investigations where it might be impractical to seek a warrant "it is no longer realistic to argue that the Warrant Clause and its traditional law enforcement warrants and the criminal law version of probable cause should apply in the foreign intelligence context."[150] As one commentator stated in the *Wall Street Journal*, "One would think that agents charged with protecting us from a 'dirty nuke' would enjoy the same discretionary

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[146] *Implementation of the Foreign Intelligence Surveillance Act of 1978*; *Report of the S. Select Comm. on Intelligence,* S. Rep. No. 97-691 at 10 (1982) (statement by Sen. Malcolm Wallop).

[147] Gerald F. Reimers II, *Foreign Intelligence Surveillance Act*, 4 J. NAT'L SECURITY L. 55, 101 (2000).

[148] Kim A. Taipale, *Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence Surveillance*, N.Y.U. REV. L. & SECURITY, No. VII SUPPL. BULL. ON L. & SEC. at n. 9 (Spring 2006), *available at* http://www.whisperingwires.info/.

[149] Richard A. Posner, Op-Ed., *A New Surveillance Act: A Better Way to Find the Needle in the Haystack,* WALL ST. J., Feb. 15, 2006, at A16.

[150] William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1653 (2010). The general context of the article was an analysis of the FISA Court of Review Opinion *In re* Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008), pertaining to overseas surveillance of U.S. persons, but the wording is directly on point.

search authority as a patrolman who makes a traffic stop. In fact, they have less."[151]

The public claim that the FISA Court is somehow a rubber stamp because most applications are eventually approved, is completely ludicrous. This view does not reflect the real difficulty of obtaining a FISA order.[152] When the defense made a "rubber stamp" objection before the Ninth Circuit in *United States v. Cavanaugh*, the court noted that the lack of rejections was "consistent with a practice of careful compliance with statutory requirements on the part of the government."[153] Royce Lamberth, a former Chief Judge of the FISA Court, attributed the government's perfect record to the "superb internal review process created within DOJ,"[154] which requires personal approval of both the Attorney General and the head of the requesting agency for each FISA application. This often results in the submission of forty to fifty page affidavits at a minimum to FISA judges.[155] Judge Lamberth also stated that far from granting automatic approval of FISA requests, the Court often comes back to the government with questions and comments about their requests and often requires intelligence agencies to modify them to meet the Court's standards.[156] In 2013, Reggie Walton, current FISA Court presiding judge, said that "the court alters numerous government requests for data collection or even refuses some of them, even though that may not be reflected in the final statistics that the court sends to Congress."[157] In the opinion of Judge Richard Posner, the positive statistics are a reflection of the fact that the government is actually far too conservative in seeking surveillance orders. He

[151] Mark Riebling, *Uncuff the FBI*, WALL ST. J., June 4, 2002, at A20.
[152] Frederic J. Frommer, *Federal judge: FISA court not a rubber stamp,* AP NEWS, THE BIG STORY (July 11, 2013, 5:39 PM), http://bigstory.ap.org/article/federal-judge-fisa-court-not-rubber-stamp.
[153] United States v. Cavanaugh, 807 F.2d 787, 790 (9th Cir. 1987).
[154] BENJAMIN WITTES, THE FISA COURT SPEAKS, 226-27 (2008).
[155] Interview by The Third Branch with Judge Royce C. Lamberth, U.S. Dist. Court for the Dist. of Columbia (June 2002), http://www.uscourts.gov/ttb/june02ttb/interview.html.
[156] *Id.*; Frommer, *supra* note 152.
[157] Tom Risen, *FISA Judge Denies Surveillance Court Offers 'Rubber Stamp'*, U.S. NEWS & WORLD REPORT (Oct. 16, 2013, 1:10 PM), http://www.usnews.com/news/articles/2013/10/16/fisa-judge-denies-surveillance-court-offers-rubber-stamp.

believes that in our legalistic culture the FBI tries to avoid violating the law and does not want to sail anywhere close to the wind. "The analogy is to a person who has never missed a plane in his life because he contrives always to arrive at the airport eight hours before the scheduled departure time."[158]

IV. CONSTITUTIONAL SEARCH WITHOUT PROBABLE CAUSE EVEN WHERE CRIME MAY BE DISCOVERED

In the words of Chief Justice Roberts, "As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is reasonableness.'" [159] In other words, although the Fourth Amendment states that warrants should be supported by probable cause, the ultimate test of the constitutionality of a search is whether it is reasonable, not whether the government has established probable cause. Noted constitutional law scholar Akhil Amar has written that those who seek to impose a "global probable cause requirement have yet to identify even a single early case, treatise, or state constitution that explicitly proclaims 'probable cause' as the prerequisite for all 'searches and seizures.'"[160] In *National Treasury Employees Union v. Von Raab*, the Court stated that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[161] Rather, the reasonableness of a search is determined essentially by balancing the government's interest against the intrusion and expectation of privacy in the particular context of the case.[162]

An analysis of the Supreme Court's opinions demonstrates that there really is no inherent constitutional requirement that the government show probable cause before conducting a search for foreign intelligence purposes. In the past fifty years, the Court has

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[158] Richard Posner, *Privacy, Surveillance and Law*, 75 U. CHI. L. REV. 245, 260 (2008).
[159] Riley v. California, 134 S. Ct. 2473, 2483 (2014) (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).
[160] Akhil Reed Amar, *Fourth Amendment First Principles,* 107 HARV. L. REV. 757, 782-83 (1994).
[161] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).
[162] *Id.* at 665-67.

repeatedly sanctioned searches conducted without probable cause where significant safety and security concerns were present. The Court has not deviated from these holdings even where such searches may very well uncover criminal activity and eventually result in prosecution.

In *Chimel v. California*,[163] the Supreme Court found that there was no constitutional violation when officers searched the area within a defendant's reach at the time of arrest, even though there was no reason for suspicion, or probable cause to believe evidence or weapons were at hand. This ruling was justified by the government's need to seize weapons that might be present and could be used to assault an officer, as well as the need to prevent the possible destruction of evidence.[164] Although prohibiting Indianapolis' use of internal roadblocks for no reason other than drug control, the Court in *Edmond* still recognized that historically it has authorized searches even for the purpose of discovering criminal acts where a strong government interest outweighed general privacy concerns. Thus, in *United States v. Martinez-Fuerte*, the Court permitted suspicionless searches in border regions because of the "formidable law enforcement problems posed by the northbound tide of illegal entrants into the US."[165] In *Michigan v. Sitz*, the Court sanctioned stops without individual cause at roadblocks to identify drunk drivers who certainly would have been prosecuted upon discovery.[166] The Court also approved warrantless inspections of operators in the vehicle-dismantling industry because of the need to identify those involved in motor vehicle theft.[167] Some of these searches have been quite intrusive, such as the strip searches authorized for prisoners in *Florence v. Board of Chosen Freeholders*.[168]

[163] Chimel v. California, 395 U.S. 752 (1969) (abrogation recognized by Davis v. United States, 131 S. Ct. 2419 (2011)).
[164] *Id.* at 764.
[165] Indianapolis v. Edmond, 531 U.S. 32, 38 (citing U.S. v. Martinez-Fuerte, 428 U.S. 543, 551-54 (1976)).
[166] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
[167] New York v. Burger, 482 U.S. 691, 702 (1987).
[168] Florence v. Bd. of Chosen Freeholders, 131 S. Ct. 1510, 1517 (2012).

At the same time, there is a long series of cases approving detailed searches without probable cause pursuant to government programs where public safety, not crime control, is the primary purpose. In each of these cases there existed the simultaneous possibility of detecting crime. Because the primary programmatic purpose of the searches in these special needs cases was safety and security, the Court's decisions are directly in line with the foundational arguments of this Article. Thus, in *Colonnade Catering Corp. v. United States*[169] the Court endorsed warrantless searches of the private property of those involved in the catering and liquor industry. Two years later in *United States v. Biswell*,[170] a case related to the firearms industry, the Court again sanctioned warrantless searches without suspicion.

Both of these actions arguably involved "closely regulated" businesses, but in *Camara v. Municipal Court*[171] and in *Marshall v. Barlows*[172] the Court authorized non-probable cause searches to insure compliance with general city housing, and occupational safety codes in simple electrical and plumbing businesses, respectively. These latter searches would have to be made in accordance with a warrant to insure that authorities did not unfairly target only particular corporations for political or other improper reasons. Yet, as the Court stated in *Barlows*, "Probable cause in the criminal sense is not required . . . [a warrant may issue] on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied."[173]

Colonnade, *Camara*, and *Barlows* permitted detailed and highly invasive searches for public safety purposes without any degree of suspicion. When reasonable suspicion is actually present and there is a compelling government interest, courts have approved what may be categorized as highly invasive searches. In *United States v. Flores-Montano*, the Supreme Court stated that because of the "longstanding right of the sovereign to protect itself" at the border,

[169] Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).
[170] United States v. Biswell, 406 U.S. 311, 317 (1972).
[171] Camara v. Municipal Court, 387 U.S. 523, 540 (1967).
[172] Marshall v. Barlows, 436 U.S. 307, 339 (1978).
[173] *Id.* at 320.

"highly intrusive searches of the person," "searches of property that are destructive," and even searches carried out in a "particularly offensive manner" may be permitted with reasonable suspicion.[174] The Ninth Circuit followed this reasoning in *United States v. Cotterman*, holding that computer contents could actually be forensically examined and copied at the border based on reasonable suspicion.[175]

It should be noted that in 2008 the FISA Court of Review took a step in the direction of acknowledging the applicability of the above-cited special needs cases in the domestic FISA context with its decision in *In Re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*.[176] The case involved a service provider's appeal of a FISA Court finding that it was constitutional for the Attorney General to direct the interception of the communications of a U.S. person located outside the United States.[177] At the time, this had been authorized without a FISA Court order pursuant to the Protect America Act of 2007 ("PAA").[178] One year later, Congress passed the FISA Amendments Act ("FAA")[179] requiring a FISA Court order when surveillance was directed against U.S. persons even if they were located outside the United States. Analyzing the controlling PAA, the FISA Court of Review expressly found there is a "foreign intelligence exception" to the warrant requirement that parallels the "special needs" exception, a notion previously only hinted at in the *In Re Sealed Case* opinion.[180] In the FISA Appellate Court's opinion:

> The [Supreme Court] has recognized a comparable exception, outside the foreign intelligence context, in so-called 'special needs' cases. In those cases, the Court excused compliance with the Warrant Clause when the purpose behind the

[174] United States v. Flores-Montano, 541 U.S. 149, 152, 156 n.2 (2006).
[175] United States v. Cotterman, 709 F.3d 952, 970 (9th Cir. 2012).
[176] *In re* Directives, 551 F.3d 1004 (FISA Ct. 2011).
[177] *Id.*
[178] Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (codified at 50 U.S.C. §§ 1805(a)-(c)) (2010)).
[179] FISA Amendments Act of 2008, Pub. L. No. 110–261, §§ 701-03, 122 Stat. 2436 (codified at 50 U.S.C. §§ 1881 (2008)).
[180] *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

> governmental action went beyond routine law enforcement and insisting upon a warrant would materially interfere with the accomplishment of that purpose.[181]

The FISA Court of Review further found that "here the relevant government interest—the government's interest in national security—was of the highest order of magnitude."[182] Individual privacy rights, on the other hand, were protected by executive branch findings, certifications, and minimization requirements restricting the distribution of the information. The surveillance therefore met the key "reasonableness" test of the Fourth Amendment. It is true that the particular circumstances of this case involved surveillance of U.S. persons outside the United States pursuant to numerous, undisclosed, classified restrictions, but the language and theory applied by the Court is highly significant.

There are certainly strong government interests in enforcing city housing and occupational safety codes, as well as stopping illegal immigration. But these cannot compare with the need of the government to protect the nation against a potentially devastating attack perpetrated by a rogue or ambitious nation or, more likely, by a terrorist organization with nothing to lose because it has no home territory to protect. This is an interest "of the highest order of magnitude."[183] As Judge Wilkinson wrote, that the current war is unconventional does not make its consequences any less grave.[184] This is especially true as non-state actors continually seek to obtain WMDs. Such weapons in the hands of committed terrorists pose a potentially existential threat to the nation and, in this context, our need for accurate, timely intelligence cannot be overstated.

On the other side of the balancing test suggested by the Court's cases, intelligence targets have a strong privacy interest in the confidentiality of their communications, but businesses, multi-unit home owners, and drivers have a significant privacy interest in

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[181] *In re* Directives, 551 F.3d at 1010.
[182] *Id.* at 1012.
[183] *Id.*
[184] Hamdi v. Rumsfeld, 316 F.3d 450, 464 (4th Cir. 2003) (quoting Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002)).

protecting against government intrusions on their property. These private entities did not prevail even where there was no reasonable suspicion and the government's need was much less than exists in the national security context.

There are other elements of the "reasonableness" equation that are mentioned in *Flores-Montano*, *Camara*, and *Barlows* that should be considered when evaluating what the Court might approve in national security surveillance cases. Specifically, *Flores-Montano* and *Cotterman* both held that when reasonable suspicion is present, government border searches of the person or their property could be "highly intrusive." *Camara* and *Barlows*, while acknowledging that probable cause was not needed, still inserted the need for some type of judicially approved warrant to insure that government's search decisions would be made on an objective, acceptable, non-political basis. As the Court said in *Barlows*, a warrant would show that the subject of the search was chosen after reviewing "neutral sources" and thus clearly protect an employer's Fourth Amendment rights.[185]

In 1969, former Nuremberg prosecutor, Justice Jackson protégé, and law professor Telford Taylor argued that the courts should not be involved in the surveillance process at all. Wiretaps were non-adversary steps in the investigative process and there was no case or controversy that would warrant judicial intervention. Such surveillance should be solely an executive decision.[186] This position appears rather naïve today in light of the complete interjection of the judiciary into the surveillance process under Title III in 1968 and FISA in 1978. In the author's opinion, it is also highly unlikely that the Supreme Court would find government intrusion without some type of judicial review to be constitutional.

The analysis above, however, strongly suggests that a statute authorizing intelligence surveillance warrants based on reasonable suspicion alone would and should pass constitutional muster. Time and again the Supreme Court has recognized that detailed searches can be conducted without establishing probable cause, even when the

[185] Marshall v. Barlows, 436 U.S. 307, 339 (1978).

[186] TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 83-90 (1969).

results of those searches could, as with intelligence surveillance, potentially result in criminal prosecution. Such a statute would insure that the government's overwhelming interest in safeguarding our population would be met far better than it is now with the obstacles created by the burdensome FISA standard of probable cause. Privacy would be protected by a warrant process guaranteeing judicial control and guidance so that surveillance could not be initiated for political, partisan, or personal reasons, and by the need to demonstrate there was reasonable suspicion, or specific articulable facts to suspect a specific target. Congress overreacted when it imposed the highest criminal law search standard on foreign intelligence surveillance and the result of their decision has proven hazardous to the American people. Meanwhile, our European allies have demonstrated a civilized respect for individual privacy but, as will be discussed in the next section, many recognize that imposing such hurdles is far too dangerous when it comes to protecting a nation's security.

V. NATIONAL SECURITY SURVEILLANCE IN EUROPE

Numerous legal commentators have written quite favorably about the European approach to privacy protection as opposed to what they consider more intrusive U.S. laws.[187] In their opinion, "The U.S. Constitutional amendment protections (as applied) and U.S. federal and state laws fall short" of international standards.[188] The European convention and the enforcement mechanisms

[187] Francesca Bignami, *European versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609 (2007); Paul M. Schwartz, *German and U.S. Telecommunications Privacy Law: Legal Regulation of Domestic Law Enforcement Surveillance*, 54 HASTINGS L. J. 751 (2003); Jeffery A. Brauch, *Human Rights Protections in the Post 9/11 World*, 31 QUINNIPIAC L. REV. 339 (2013); European Digital Rights Initiative (EDRi) & Fundamental Rights Experts Grp. (FREE), *Submission to the United States Cong., the European Parliament and Comm'n & the Council of the European Union, & the Secretary-General & the Parliamentary Assemb. of the Council of Eur. on the surveillance activities of the United States and certain European States' national security and "intelligence" agencies* (Aug. 2013), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/submission_us-europe_edri_final/submission_us-europe_edri_finalen.pdf.

[188] *EDRi* & *FREE*, *supra* note 187, at 15.

embodied by the European Court of Human Rights are considered to form the "most comprehensive and effective system for the protection of human rights in the world."[189] As might be expected, in Europe there was loud and public (if hypocritical) fury over what some believed to be Edward Snowden's "monstrous allegations of total monitoring of various telecommunications and internet services."[190]

Yet, according to a study by the Max Planck Institute, as observed by Stewart Baker, "[Y]ou're 100 times more likely to be surveilled by your own government if you live in the Netherlands or if you live in Italy . . . 30 to 50 times more likely to be surveilled if you're a French or German national than in the United States."[191] In national security matters, most of the major European powers, unlike the United States, do not require either judicial approval or probable cause before the executive branch with general legislative oversight can conduct electronic surveillance.[192] A more nuanced analysis of

[189] Brauch, *supra* note 187; MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 3 (2nd ed. 2000).

[190] David Wright & Reinhard Kreissl, *European Responses to the Snowden Revelations: A Discussion Paper* 8 (Dec. 2013), *available at* http://irissproject.eu/wp-content/uploads/2013/12/IRISS_European-responses-to-the-Snowden-revelations_18-Dec-2013_Final.pdf.; *see also id.* at 13 (for a discussion of the hypocrisy of European politicians criticizing the United States when their own agencies have been carrying out mass surveillance programs).

[191] Tom Gjelten, *Weekend Edition: Which Citizens Are Under More Surveillance, U.S. or European?* (NPR radio broadcast July 28, 2013), http://www.npr.org/2013/07/28/206231873/who-spies-more-the-united-states-or-europe (quoting statement by former NSA General Counsel Stewart Baker). Baker appears to be referring to HANS-JÖRG ALBRECHT ET AL., RECHTSWIRKLICHKEIT UND EFFIZIENZ DER ÜBERWACHUNG DER TELEKOMMUNIKATION NACH DEN §§ 100A, 100B STPO UND ANDERER VERDECKTER ERMITTLUNGSMAßNAHMEN [LEGAL REALITY AND EFFICIENCY OF THE SURVEILLANCE OF TELECOMMUNICATIONS UNDER §§ 100A, 100B OF THE CRIMINAL PROCEDURE CODE AND OTHER CONCEALED MEASURES FOR INVESTIGATIONS] (2003). *See* Stewart Baker, *Europe, the Cloud, and the New York Times*, VOLOKH CONSPIRACY (Oct. 16, 2013, 6:10 AM), http://www.volokh.com/2013/10/16/europe-cloud-new-york-times/. Paul M. Schwartz challenges the study on various grounds including the fact that the United States does not count consensual monitoring and the Max Plank Institute did. Paul M. Schwartz, *Evaluating Telecommunications Surveillance in Germany: The Lessons of The Max Planck Institute's Study*, 72 GEO. WASH. L. REV. 1244, 1251-52 (2004).

[192] A key survey was conducted by Christopher Wolf who summarized his findings with the following 2013 quote for NPR: "We can have a debate over whether or not

European culture and law suggests that citizens focus more on "personal dignity" and "interpersonal relations" than on fear of government action taken to protect the nation.[193] Although there is some dispute among scholars, there seems to be recognition that European citizens do not want the media or their neighbors to have access to their personal life, nor do they want a totalitarian government to marshal and manipulate files on private citizens, but, at the same time, they want to protect their country against invasion and terrorist threats.[194] Francesca Bignami traces this thinking to the Nazi invasions that first destroyed the sovereignty of European nations, then subjugated the citizenry, in part through access to personal files.[195]

It is interesting that the European Data Protection Directives and proposed regulations reflect these distinct purposes.[196] These documents, drafted in 1995, 2002, and 2012, which encourage harmonizing legislation among states and could eventually result in enforceable law, require that businesses should process "personal data" only with consent and only when absolutely necessary, and then only for a short time, so there is a "right to be forgotten."[197] At the same time, the European Union's Data Retention Directive of 2002 attempts to insure that internet and telephone companies maintain data as to the identity, source, time, duration, and

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the judicial and legislative approval process is working here in America, but the fact is, it exists, and in many places in Europe you don't have that kind of due process . . . You don't have legislative oversight. In fact, the national security investigations are done completely in the dark or mostly in the dark." Gjelten, *supra* note 191.

[193] *See* James Q. Whitman, *Two Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1155-62 (2004); Bignami, *supra* note 187, at 609-11; *see also* Saperstein, *supra* note 32, at 1965-67.

[194] *See* Bignami, *supra* note 187, at 621.

[195] *See id.* at 609-10; Saperstein, *supra* note 32, at 1965-66.

[196] *See* Council Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31-38; *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Data and on the Free Movement of Such Data*, at 1-2, 6-7, COM (2012) 11 final (Jan. 25, 2012).

[197] *See* Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn To Institutions and Procedures*, 126 HARV. L. REV. 1966, 1994-95 (2013).

destination of all communications for six to twenty-four months, to aid in "the fight against serious crime and terrorism."[198]

European law is complex, but in essence each State is responsible for maintaining law and order and safeguarding its national security[199] while complying with the privacy mandates of Article 8 of the European Convention on the Protection of Human Rights.[200] Article 8, "Right to respect for private and family life," provides that

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[201]

"Accordance with law" means that the law must be accessible to the public and precise enough that citizens understand the

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[198] *See* Benjamin Wittes, *Mark Klamberg on EU Metadata Collection*, LAWFARE (Sept. 29, 2013 1:03 PM), http://www.lawfareblog.com/2013/09/mark-klamberg-on-eu-metadata-collection/. The Court of Justice of the European Union rejected the Retention Directive in 2014 in a case brought by the Netherlands and Ireland. Joined Cases C-293/12 & C-594/12, Digital Rights Ireland Ltd. v. Minister for Comm'ns, Marine and Natural Res., 2014 EUR-Lex CELEX LEXIS ¶ 41 (Apr. 8, 2014). The ramifications of the decision are unclear as many nations passed legislation conforming to the guidance of the Directive and the ECHR has not found these statutes to be illegal. *Id.*

[199] *See* Kaarlo Tuori, *A European Security Constitution*, *in* LAW AND SECURITY IN EUROPE: RECONSIDERING THE SECURITY CONSTITUTION 59 (Massimo Fichera & Jen Kreme eds., 2013).

[200] *See* Wittes, *supra* note 198, at 2.

[201] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, art. 8, Nov. 4, 1950, ETS 5, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf.

requirements and consequences of violation.[202] "Necessary in a democratic society" means that the law must be proportionate to the legitimate aims pursued.[203] National courts, and ultimately the European Court on Human Rights ("ECHR"), will determine if a state statute is in accordance with law and necessary in a democratic society.[204] "A margin of appreciation is left to the competent national authorities" in assessing what is necessary, especially in matters of national security,[205] although it is not uncommon for each nation's law to be challenged before and ruled upon by the ECHR.[206]

The following summary of key national security surveillance law provisions and practices in the major European powers draws from studies conducted by Winston Maxwell and Christopher Wolf,[207] Privacy International,[208] law review articles, and instructive court decisions, along with numerous other cited sources.

Germany

1. In national security cases, German authorities may conduct individually targeted or strategic collection of communications without Court Order. The responsible Federal Minister of Federal State Authority may order these measures.[209]

2. Because the law is designed to be preventative in nature, a lower standard of "actual indications" rather than probable cause

[202] *E.g.,* Wittes, *supra* note 198, at 2. These formulations actually are mentioned in numerous ECHR decisions, some of which will be referenced in the following section on cases reviewing European state law.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *See, e.g.*, Press Release, Court of Justice of the European Union, The Court of Justice Declares the Date Retention Directive to be Invalid (April 8, 2014), http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf.
[207] *See* MAXWELL & WOLF, GLOBAL REALITY, *supra* note 32, at 8-12; MAXWELL& WOLF, A SOBER LOOK, *supra* note 32, at 5-9.
[208] *See* PRIVACY INT'L, *supra* note 32.
[209] MAXWELL & WOLF, A SOBER LOOK, *supra* note 32, at 8.

or reasonable belief was found to be a more appropriate standard for this non-judicial process.[210]

3. Oversight is provided by a parliamentary Control Panel that appoints a non-judicial, supervisory body called the G-10 Committee.[211]

4. In the landmark 1978 case of *Klass v. Germany*, the European Court of Human Rights found this system of oversight was not violative of Article 8 of the Convention and that "the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society."[212]

United Kingdom

1. Under the Regulatory and Investigatory Powers Act of 2000 ("RIPA"), authorities may order public and private telecommunications entities to provide data.[213] The Secretary of State (Home Secretary) may also issue orders for actual interception of communications in national security and other serious cases without judicial supervision. [214]

2. The standard for the above orders is that the Secretary must find them "necessary" for the interests of national security and "proportionate to what is sought to be achieved by the conduct."[215]

3. Oversight is provided by Interception of Communications and Intelligence Service Commissioners and an Investigatory Powers Tribunal which can hear complaints. Although members are appointed from the ranks of senior judges, this is not before-the-fact judicial review as "the operations of MI-5 and MI-6 are largely beyond the discretion of the courts, insulat(ing) serious

[210] Saperstein, *supra* note 32, at 1976 (citing IAIN CAMERON, NATIONAL SECURITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 110 (2000)).
[211] MAXWELL & WOLF, A SOBER LOOK, *supra* note 32, at 8.
[212] Saperstein, *supra* note 32, at 1977 (citing Klass v. Fed. Republic of Ger., 28 Eur. Ct. H.R. (ser. A) 1, at 20-21, 23 (1978)).
[213] RIPA, 2000, c. 23, § 22. See MAXWELL & WOLF, *supra* note 32, at 8 for a discussion of RIPA.
[214] RIPA, 2000, c. 23, § 5(3).
[215] *Id.* at §§ 5(2)(a), (3)(b).

crimes against the State such as terrorism and espionage from the scrutiny deserving of more ordinary criminal investigations."[216]

4. The specifics of the RIPA legislation are important, as the ECHR had previously found in *Malone v. U.K.*[217] and *Liberty v. U.K.*[218] that prior UK law was not precise and clear enough to meet the "in accordance with law" component of Article 8. The ECHR found in 2010 that RIPA, however, fully complied with Article 8 in *Kennedy v. United Kingdom*.[219]

France

1. The Government may conduct general untargeted monitoring of the airwaves and internet traffic without review.[220]

2. When "broad surveillance reveals a potential threat," under the Internal Security Code, a targeted interception can be implemented without judicial review after authorization from the Prime Minister's Office.[221]

3. A new Anti-Terror Act was enacted on January 23, 2006. It grants increased powers to the police and intelligence services, allowing them to get telecommunications data directly from Internet Service Providers, apparently with no need for permission from the Prime Minister's Office.[222] A recent French law will also permit the government to request connection data from telecommunications operators and Internet companies in real time, not only for national security reasons, but also "to

[216] Saperstein, *supra* note 32, at 1979-80.
[217] Malone v. U.K. 82 Eur. Ct. H.R. (ser. A) 1 *passim* (1984).
[218] Liberty v. U.K., Eur. Ct. H.R. (Jan. 10, 2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87207#{itemid":["001-87207"]}.
[219] Kennedy v. U.K., Eur. Ct. H.R. (May 18, 2010) http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98473#{"itemid":["001-98473"]}.
[220] MAXWELL & WOLF, A SOBER LOOK, *supra* note 32, at 7 n.53.
[221] *Id.*
[222] PRIVACY INT'L, *supra* note 32 (citing Contrôle de l'application de la loi relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers (Oct. 21, 2014), http://senat.fr./application-des-lois/pj105-109.html).

protect the scientific and economic potential of France" and "fight criminality."[223]

4. Oversight is provided by a special security commission made up of one person appointed by President, one member of the National Assembly, and one member of the Senate.[224]

5. Prior to 1991 there were no specific laws regulating surveillance. The laws mentioned above were passed after the ECHR, in *Kruslin v. France*, found that, pursuant to Article 8, France must have a specific code.[225]

Spain

1. Generally the government must obtain a court issued warrant to intercept communications, but in limited instances the government may obtain the information without a warrant and cloud service companies may provide the information voluntarily.[226] The National Police and Guardia Civil apparently have developed a program with SINTEL, a telephone installation company, that enables them to obtain telephonic communications without court authorization.[227]

2. Courts grant warrants using a standard of "sufficient evidence that the intercepted communication would be material to a criminal investigation."[228]

3. Spain has declared to the EU Data Protection Working Party that its law "provides for parliamentary oversight and/or control over the activities of intelligence services alongside the

[223] Emily Picy & Leila Aboud, *Opponents of French Surveillance Law Race to Get Support for Review*, REUTERS (Dec. 12. 2013), http://www.reuters.com/article/2013/12/12/us-france-surveillance-idUSBRE9BB15M20131212.
[224] MAXWELL & WOLFE, A GLOBAL LOOK, *supra* note 32, at 7.
[225] Kruslin v. France, Eur. Ct. H.R. (Apr. 24, 1990), http://hudoc.echr.coe.int/sites/eng/pages/search/aspx?i=001-5726#["itemid":["001-5727"]}.
[226] MAXWELL & WOLFE, GLOBAL REALITY, *supra* note 32, at 10-11.
[227] PRIVACY INT'L, *supra* note 32.
[228] MAXWELL & WOLF, GLOBAL REALITY, *supra* note 32, at 11.

competences of the data protection authorities for the data processing."[229]

4. Spain has been prompted by its national courts to set up a system of clear regulation.[230]

Italy

1. Italy conducts numerous wiretaps, with the number of phones targeted "widely seen as among the highest in Europe."[231] Under law 155/200, the Prime Minister decides whether or not to intercept, then submits an application to a three judge panel.[232] Traditionally judges have been investigative magistrates similar to US prosecutors.[233] "Preemptive wiretapping," where there is no public prosecutor investigation, is allowed in national security cases.[234]

2. The standard applied when determining wiretap approvals appears to be whether it is "indispensable" to the government's need in the investigation. Grave evidence of a crime is necessary for ordinary criminal wiretaps, but these restrictions do not apply to mafia and national security investigations.[235]

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[229] *Report of the Data Protection Working Party* (Apr. 10, 2014), http://www.cnpd.public.lu/fr/publications/groupe-art29/wp215 en.pdf.
[230] *See* PRIVACY INT'L, *supra* note 32; *El Supremo Cree Inaplazable Regular El Control de Teléfonos* (Dec. 13, 2004), http://elpais.com/diario/2004/12/13/espana/1102892412_850215.html.
[231] Rachel Donadio, *An Untapped Phone in Italy? It's Possible*, N.Y. TIMES (May 10, 2010), http://www.nytimes.com/2010/05/31/world/europe/31italy.html?pagewanted=all&_r=0 (reporting 112,000 phones targeted in 2009); Alesandro Rizzo & Colleen Barry, *Wiretap Bill Spurs Debate and Protests in Italy*, SALON (July 8, 2010), http://www.salon.com/2010/07/08/eu_italy_stop_listening/.
[232] Donadio, *supra* note 231.
[233] Eric Weiner, *Wiretapping European Style*, SLATE (Feb. 14, 2006), http://www.slate.com/articles/news_and_politics/how_they_do_it/2006/02/wiretapping_europeanstyle.html.
[234] PRIVACY INT'L, *supra* note 32.
[235] Stacy Meichtry & Margherita Stankaty, *Italy's Senate Approves Wiretap Bill*, WALL ST. J. (June 14, 2010), http://online.wsj.com/news/articles/SB10001424052748703627704575298771076540944.

3. The Italian Parliament and the Italian Data Protection Authority, known as the Garante, provide oversight of potential privacy violations.[236]

4. Italy's 2010 wiretap law has drawn protests from media who can be fined for publishing leaks, as well as from prosecutors who had even fewer restrictions in the past.[237]

A review of these laws reveals that four out of these five countries do not require judicial review before surveillance in national security cases and none demand that the government show probable cause. Phrases like "necessary and proportionate," "actual indications," "potential threat," "material," and "indispensable to the government" all suggest that the government cannot conduct surveillance without good reason. But none of these imply that the government must wait to obtain sufficient evidence to demonstrate to a court that, at the time surveillance is initiated, the target, more likely than not, is guilty of a crime or is an agent of a foreign power. European law is "designed to be preventative in nature," discovering plots in the planning stages before it may be too late to thwart an attack.[238] Yet each of these laws complies with "the most comprehensive and effective system for the protection of human rights in the world" as enforced by the European Court of Human Rights.[239]

As noted above, the fact that these European nations and courts have not burdened the government with excessive standards in national security cases can, in part, be attributed to cultures that focus on dignity and security after the "searing legacy of World War II."[240] But the repeated tragedies of terrorist attacks in France in the 1960's related to Algerian independence,[241] the horrific Munich

[236] *Italian Legislation Data Protection Code*, http://www.garanteprivacy.it/home_en/italian-legislation (last visited Oct. 28, 2014).
[237] Donadio, *supra* note 231; Rizzo & Barry, *supra* note 231.
[238] *See* Saperstein, *supra* note 32, at 1975-76 (quoting IAIN CAMERON, NATIONAL SECURITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 110 (discussing the incompatibility between rigorous legal standards and national security objectives)).
[239] Brauch, *supra* note 187.
[240] Saperstein, *supra* note 32, at 1966.
[241] *Id.* at 1970.

massacre, the outrages of the Bader-Meinhof gang in Germany,[242] the thirty year battle with the IRA in the UK,[243] and the shocking assaults of the Red Brigades in Italy, resulting in the assassination of popular Prime Minister Also Moro,[244] certainly had an impact on European populations, and created a political will to avoid imposing needless burdens on their security services. In the words of the ECHR, "Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction."[245]

The events of September 11th of course shocked the United States. Yet it is only through skill and luck that we have managed to avoid repeated attacks of the kind endured by Europe in the twentieth century. Our intelligence agencies continue to labor under the legally unjustifiable probable cause standard established by the ill-conceived Foreign Intelligence Surveillance Act of 1978. As shown above, probable cause and judicial review are not mandated by the rigorous standards of European Human Rights law or by U.S. Supreme Court decisions highlighting the requirement of reasonableness in Fourth Amendment searches. We must now ensure that we do not repeat past mistakes by overreacting to the Edward Snowden revelations of 2013.

VI. POTENTIAL LEGAL DANGER ASSOCIATED WITH THE METADATA REVELATIONS

As noted previously, there have been strong public reactions to the revelations of Edward Snowden which identified NSA surveillance in Europe, NSA access to European conversations

[242] *See Who Were the Baader-Meinhof Gang?*, BBC News (Feb. 12, 2007 6:18 GMT), http://news.bbc.co.uk/2/hi/europe/6314559.stm.
[243] *See* Ann Marie Imbornoni et al., *The Northern Irish Conflict: A Chronology*, INFOPLEASE, http://www.infoplease.com/spot/northireland1.html (last visited Oct. 28, 2014) for a discussion on the IRA conflict and resulting terrorism.
[244] *See 1978 Aldo Moro Snatched at Gunpoint*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/16/newsid_4232000/4232691.stm (last visited Oct. 28, 2014).
[245] Klass v. Fed. Republic of Ger., 28 Eur. Ct. H.R. (ser. A) 1, 48 (1978).

passing through the United States, NSA access to some content of the international conversations of U.S. persons, and the collection of metadata on all calls in the United States for a period of five years.[246] The primary concern for purposes of this Article is the metadata program and the litigation surrounding it.

Metadata refers to the accumulation by NSA of data on numbers dialed, and time and duration of calls made by telephone subscribers both overseas and in the United States. Metadata does not include content.[247] It is the same information routinely collected by the government with a pen register/trap and trace order based on simple "relevance" to a federal investigation.[248] The legal controversy surrounding the collection of this data has been highlighted in two excellent, but opposing, opinions by U.S. District Judges in *Klayman v. Obama*[249] and in *ACLU v. Clapper*.[250]

One of the focal points of both District Court decisions was the third party doctrine, developed by the Supreme Court with respect to bank records in *United States v. Miller* in 1976,[251] and with respect to telephone records in *Smith v. Maryland* in 1979.[252] Under this doctrine, since the Fourth Amendment applies only to government searches where one has a reasonable expectation of privacy, and since a person has no such expectation in what he shares with a third party, the government need not obtain a search warrant or show probable cause to obtain data shared with a third party.[253]

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[246] *See* Jacobsen & Barber, *supra* note 33; Jim Newell, *Thousands Gather in Washington in Anti-NSA 'Stop Watching US' Rally*, THE GUARDIAN (Oct. 26, 2013), http://www.theguardian.com/world/2013/oct/26/nsa-rally-stop-watching-washington-snowden.

[247] *See* Klayman v. Obama, 957 F. Supp. 2d 1, 31 (D.D.C. 2013) and ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) for descriptions of the metadata program.

[248] 18 U.S.C. §§ 3121-3127 (2014); Sievert, *supra* note 19, at 335-37.

[249] Klayman, 957 F. Supp. 2d. 1.

[250] Clapper, 959 F. Supp. 2d 724.

[251] United States v. Miller, 425 U.S. 435 (1976).

[252] Smith v. Maryland, 442 U.S. 735 (1979).

[253] *Id.* at 743-44.

Judge Leon in *Klayman* tried to distinguish *Smith* in part on the grounds that *Smith* involved a short-lived pen register, whereas the metadata program collected the records of hundreds of millions of citizens over five years.[254] He also believed that the ubiquity of cell phones today had dramatically altered the quantity of information that is available and what the information can tell about people's lives.[255] Therefore, in Judge Leon's opinion, the collection and search of these records compromised a strong privacy interest. Moreover, the government's claim that the program was needed "to identify unknown terrorist operatives and prevent terrorist attacks" was undermined by the fact that the government had not shown that identification through metadata collection had "actually stopped an imminent attack."[256] This latter point is curious, as stopping a criminal or terrorist attack in the planning stages is equally, if not more effective, than stopping it immediately before the act is committed. If authorities wait, there is never any guarantee they will be able to prevent conspirators from succeeding at a later date when the attack is "imminent."

Judge Pauley, in *Clapper*, countered the *Klayman* decision by noting that *Smith*'s bedrock holding is that individuals have no expectation of privacy in what they knowingly give to third parties, and that the information conveyed (basic call data) was no different than that obtained in *Smith*.[257] While people may have an entirely different relationship with telephones now than they did thirty-four years ago, "this Court observes that their relationship with their telecommunications providers has not changed and is just as frustrating."[258] The fact that there are more calls placed today does not undermine *Smith*'s holding that there is no expectation of privacy in metadata. In addition, the judge wrote, "the effectiveness of bulk telephony metadata collection cannot be seriously disputed." He then cited three instances in which plots to bomb major sites in

[254] Klayman, 957 F. Supp. 2d at 31.
[255] *Id.* at 34.
[256] *Id.* at 39-40.
[257] ACLU v. Clapper, 959 F. Supp. 2d 724, 750-51 (S.D.N.Y. 2013).
[258] *Id.* at 752.

New York and Denmark were uncovered in their planning stages because of metadata.[259]

President Obama may have solved the immediate crisis posed by metadata collection by directing that separate phone companies maintain the data instead of the NSA and that they provide access only upon receiving a subpoena or court order.[260] This of course will impede the government, as it will take time to contact the numerous distinct phone companies and Internet Service Providers. But the real long-term concern created by the metadata dispute and associated litigation, as well as by public opinion, is the challenge to the third party doctrine.

In *Klayman*, Judge Leon essentially rejected the third party doctrine, making repeated references to the concurring opinion of Justice Sotomayor and four other justices in *United States v. Jones*, finding that, even though the target was observed by third parties, the length of the surveillance was problematic.[261] *Jones* involved lengthy surveillance of a vehicle on public roads in the District of Columbia and Maryland utilizing a government-installed GPS tracking device.[262] The government naturally responded that the vehicle was in the plain view of third parties on the highway and, in accordance with *United States v. Knotts*, there was no expectation of privacy.[263] The *Jones* Court found the tracking illegal, with four judges objecting to the violation of property rights while installing the GPS device,[264] and four others finding the length of the surveillance to be problematic.[265] Perhaps even more troubling for the government, however, was the concurring opinion of Justice Sotomayor in which she stated:

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[259] *Id.* at 755.
[260] *See* David Jackson, *Obama unveils plan to change NSA data collection*, USA TODAY (Mar. 27, 2014), http://www.usatoday.com/story/news/nation/2014/03/27/obama-national-security-agency-edward-snowden-metadata-plam/6950657/.
[261] Klayman, 957 F. Supp. 2d at 31.
[262] United States v. Jones, 132 S. Ct. 945, 946 (2012).
[263] *Id.* at 951-52 (discussing in relevant part United States v. Knotts, 460 U.S. 276 (1983)).
[264] *Id.* at 946 (majority opinion).
[265] *Id.* at 964 (Alito, J., concurring).

> More fundamentally, it may be necessary to reconsider the premise that an individual has no expectation of privacy in information voluntarily disclosed to third parties [e.g., *Smith* and *Miller*]. This approach is ill suited to the digital age in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.[266]

As discussed in this Article, at present the government must demonstrate probable cause that a target is an agent of a foreign power before conducting FISA surveillance. The government also needs probable cause for physical searches, arrests, and indictments. Probable cause does not exist at the moment an informant advises an agent an individual is a dangerous terrorist, or when an agent observes a suspect clandestinely meet a terrorist or spy. It is generally established only after the receipt of corroborating evidence such as that contained in phone, bank, and travel records. These records are currently obtained with a Grand Jury subpoena or court order based merely on relevance to the federal investigation.[267] This lower standard exists because in the past the Supreme Court has held, in cases such as *Smith* and *Miller*, that there was no expectation of privacy in these records because of the third party doctrine. Probable cause is not needed and often is not present at this stage of an investigation.

Judge Leon's essential rejection of the third party doctrine finds support in the questions raised by Justice Sotomayor. It is also supported by the public outcry of those whose response to the Snowden revelations has been to demand probable cause before the government obtains records.[268] If this rejection of the third party doctrine were to lead to statutory or judicial requirements that the government meet a standard higher than legitimate relevance before obtaining phone, bank, travel, and other records shared with a third party, the government would often be stymied in the earliest stages of

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[266] *Id.* at 957 (Sotomayor, J., concurring).

[267] *See* Sievert, *supra* note 19, at 336.

[268] *See* Mark K. Matthews, *Grayson wants to halt government collection of citizens' phone, Internet records*, ORLANDO SENTINEL (June 11, 2013), http://articles.orlandosentinel.com/2013-06-11/news/os-grayson-stop-snooping-20130611_1_ phone-records-grayson-nsa.

an investigation. Probable cause, as defined, seldom if ever exists in these early stages. The ability to obtain the corroborating evidence that would support a FISA order, Title III warrant, or indictment, would be foreclosed.

As has been repeatedly stated in this Article, the mandate to demonstrate probable cause before conducting electronic surveillance in intelligence cases was an unjustified overreaction to the Watergate era. A further requirement that the government show probable cause to obtain basic records from a third party would be another overreaction, which would likely eviscerate the government's ability to protect the American people.

VII. CONCLUSION

There are countless ways FISA can be modified to enable the government to effectively monitor foreign intelligence in the United States without violating American civil liberties. Judge Posner has proposed that Congress appoint a special steering committee composed of executive branch officials and a retired federal judge to monitor surveillance.[269] Daniel Saperstein suggests greater congressional oversight through a secret commission and the creation of an Interception of Communications Commission.[270] Telford Taylor thought that the Congress and the Judiciary should not be involved at all.[271]

It is more important at this point to outline the key concepts that should form the basis of any future legislation, rather than to set forth another step-by-step proposal. First, to accommodate the demands of the executive and the civil liberties community in a realistic fashion, it will be necessary to establish a system that relies upon Congress, the Executive, and the Judiciary. Second, to insure a new law will pass constitutional muster, it must draw upon the major Supreme Court cases examined in this Article, which means it must require a judicial interception warrant of some type to guard against politically or personally motivated investigations. It must also

[269] Posner, *supra* note 149.
[270] *See* Saperstein, *supra* note 32, at 1983.
[271] *See* Taylor, *supra* note 186, at 86-87.

incorporate a standard of evidence such as reasonable or articulable suspicion that would permit a detailed search. As has been made clear, probable cause is simply not necessary in intelligence cases involving both the foreign affairs power and public safety interests, and attempting to comply with that standard has been and will continue to be detrimental to the safety of the people of the United States.

Although the author believes this reasonable suspicion standard should apply to all FISA interceptions, the most urgent need, and the one that may be most favorably considered by Congress, relates to the monitoring of Al Qaeda, ISIS (the Islamic State of Iraq and Syria, also known as "ISIL") and those who are attempting an attack with a WMD. Therefore, FISA should be changed to allow interception where there is reasonable suspicion to believe the target is a person subject to an AUMF or engaged in an effort to employ a WMD in the United States or against U.S. facilities. Harvard Law professor Jack Goldsmith argued when he was head of the Office of Legal Counsel in 2003 that both the AUMF as well as the concept of special needs should permit the President to monitor Al Qaeda without going through the traditional requirements of the FISA statute.[272] His argument was later supported by the wording of *Hamdi v. Rumsfeld*, stating that the AUMF allowed the President to utilize all necessary elements of military force against Al Qaeda and the Taliban.[273] Surely, monitoring the enemy is one such element of military force. Goldsmith's position is strongly opposed by those who state that FISA requires the President to follow the procedures established by Congress and not act without FISA court approval.[274] But as*suming*

[272] The memo, which is heavily redacted, was released on Sept. 7, 2014. Memorandum for the Attorney Gen. Re: STELLAR WIND – Implications of Hamdi v. Rumsfeld by Jack Goldsmith (July 16, 2004); see Matt Danzer, *The Legal Justifications for Domestic Surveillance: A Summary*, LAWFARE (Sept. 11, 2014, 7:00 PM), http://www.lawfareblog.com/2014/09/the-legal-justifications-for-domestic-surveillance-a-summary/ for a summary of the original memo.

[273] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

[274] *See, e.g.*, Geoffrey Stone, *Bush's Spy Program and FISA*, THE UNIV. OF CHICAGO LAW SCH. FACULTY BLOG (Jan. 4, 2006), http://uchicagolaw.typepad.com/faculty/2006/01/bushs_spy_progr_1.html; see Jeremy Neff, *Does (FISA + NSA)* AUMF = Illegal Domestic Spying?*, 75 U. CIN. L. REV. 887, 889-90 (2006).

Congress can intrude on the President's authority in this area, there is nothing preventing Congress from amending the FISA statute to provide for more efficient interception when the target is the subject of an AUMF or planning a WMD attack.

Abandoning probable cause would certainly raise legal concerns similar to those expressed in *United States v. Truong*[275] and by the petitioners in *In Re Sealed Case*,[276] if the intent and direct result was ordinary criminal prosecution as opposed to intelligence collection. At the same time, an interception intended to obtain intelligence is likely to pick up evidence of national security crimes (sabotage, terrorism, espionage). The government should be able to use this evidence under the doctrine that the government can use anything it finds while it is legally present.[277] The solution in part would be to draw upon the 2001 FISA Court's practice and prohibit criminal division direction and control of intelligence wiretaps. In addition, as Judge Posner has suggested, "the use of intercepted information for any other purpose other than investigating (or prosecuting) threats to national security would be forbidden. Information could not be used as evidence or leads in the prosecution of ordinary crime."[278] Finally, if the government thought it was likely to uncover criminal acts other than national security crimes, it would be wise in those few cases to go the extra step and seek to demonstrate probable cause instead of reasonable suspicion before obtaining a judicial warrant.

Any public fears regarding the creation of a new FISA could be assuaged by establishing an independent body to look after the concerns of the civilian community. We have seen such entities in

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[275] United States v. Truong, 629 F.2d 908, 913-14 (4th Cir. 1980).
[276] *In re* Sealed Case, 310 F.3d 717, 721-22 (FISA Ct. Rev. 2002).
[277] This type of action falls under a doctrine known as the "plain view doctrine." *See* Washington v. Chrisman, 455 U.S. 1, 2 (1982); Harris v. United States, 390 U.S. 234, 236 (1968); *see also* United States v. Kahn, 415 U.S. 143, 157 (1974); United Stated v. Schwartz, 535 F.2d 160, 163 (2d Cir. 1976).
[278] Posner, *supra* note 158, at 258; *see* William Pollak, *Shu'ubiyya or Security? Preserving Civil Liberties by Limiting FISA Evidence to National Security Prosecutions*, 42 U. MICH. J. L. REFORM 221 (2008) (arguing for a test whereby ordinary crime could only be prosecuted when uncovered by a FISA if it is "inextricably intertwined" with a national security offense).

Germany's G-10 committee, the U.K.'s Interception of Communications Commission, and Italy's Data Protection Authority. These organizations perform a variety of roles, from reviewing all surveillance after the fact to issuing reports to the legislature, or, in some cases, examining individual allegations of excessive surveillance. An American version of this independent body would exist alongside the judiciary, which would grant the initial interception warrant based on a finding of reasonable suspicion.

Any objective individual who steps back and reviews the series of attempted attacks on the United States in the last fifteen years understands our population is in great danger, and this is especially so if our adversaries obtain some type of WMD. It is folly to hamstring our intelligence services by imposing a criminal law search standard that is neither constitutionally required nor mandated by the recognized human rights principles of the international community. It is imperative, therefore, that we correct the mistakes of the past and enact a new, more effective Foreign Intelligence Surveillance Act.

IS "SECRET LAW" REALLY EITHER?

CONGRESSIONAL INTENT, LEGISLATIVE PROCESS, AND SECTION 215 OF THE USA PATRIOT ACT

Christopher A. Donesa*

After the U.S. Government disclosed the bulk collection of telephony metadata pursuant to Section 215 of the USA PATRIOT Act, debate arose as to whether Congress intended the provision to be interpreted to allow such collection. In addition, debaters wondered whether such interpretation constituted "secret law" inasmuch as it was not widely known among legislators or the public. These issues are best understood within the evolving legal structure surrounding intelligence activities, as well as in light of congressional rules governing legislation and oversight related to such activities. Congressional controversy over the intended scope and meaning of previously enacted legislation is nothing new, but as a matter of law and parliamentary procedure, Section 215 should be considered as properly reenacted and authorized as a basis for the activities at issue.

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INTRODUCTION

In June of 2013, the Director of National Intelligence ("DNI") issued an extraordinary public statement disclosing and confirming the nature and existence of a top-secret order of the Foreign Intelligence Surveillance Court ("FISC").[1] The order,[2] which had been disclosed without authorization earlier that month, was one of several orders enabling one of the United States' most sensitive intelligence programs under authority provided by Section 215 of the USA PATRIOT Act ("Section 215").[3] This program provided for the collection of telephony metadata in bulk for use in an intelligence program intended to assist in the detection and prevention of potential terrorist attacks against the United States.[4] At least certain

[1] James R. Clapper, *DNI Statement on Recent Unauthorized Disclosures of Classified Information*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE (June 6, 2013), http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information.

[2] *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13-80 (FISA Ct. Apr. 25, 2013), *available at* http://www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf.

[3] 50 U.S.C. § 1861 (2012).

[4] In light of the substantial attention devoted to the telephony metadata program following its disclosure, this article will not attempt to describe or analyze core issues relating to it. For two general primers, see Steven G. Bradbury, *Understanding the NSA Programs: Bulk Acquisition of Telephone Metadata Under Section 215 and Foreign-Targeted Collection Under Section 702*, 1 LAWFARE RES. PAPER SERIES 1

portions of all three branches of government were fully witting and ratified this surveillance activity in a manner consistent with their authorities. However, in the wake of the disclosure, advocates and scholars have asked whether a law such as Section 215 can truly be *law* if neither *all* lawmakers nor the public at large are reasonably aware of the potential scope and effect of its provisions.

The issue is profound on many levels. It ranges from the black letter mechanics of how the legislative process works for secret intelligence matters to the practical question of whether legislators must specifically assent to interpretive meanings behind plain legislative text to bestow legitimacy on those interpretations. Ultimately, these issues lead to core jurisprudential questions concerning whether democratic or lawmaking institutions can include features that "deliberately take public debate and decision making out of the loop."[5]

Part I of this Article explores the question of whether Section 215 is "secret law"[6] as applied to telephony metadata collection. Part

(Sept. 1, 2013); David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SEC. L. & POL'Y 209 (2014). For an advocacy paper taking a critical view, see Gregory T. Nojeim, *NSA Spying Under Section 215 of the Patriot Act: Illegal, Overbroad and Unnecessary*, CTR. FOR DEMOCRACY & TECH. (June 19, 2013), *available at* https://www.cdt.org/files/pdfs/Analysis-Section-215-Patriot-Act.pdf. For the current view of the executive branch, see *Administration White Paper, Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act*, HUFFINGTON POST (Aug. 9, 2013), *available at* https://big.assets.huffingtonpost.com/Section215.pdf.

[5] Steven Vladeck, *Espionage Porn and Democratic Platitudes: A Response to Rahul Sagar*, JUST SEC. (Feb. 21, 2014, 2:48 PM), http://justsecurity.org/2014/02/21/espionage-porn-democratic-platitudes-response-rahul-sagar/.

[6] Although the term has been used informally in many ways, Kevin Bankston appears to have first used the term "secret law" in connection with electronic surveillance in an academic context. Kevin Bankston, *Only the DOJ Knows: The Secret Law of Electronic Surveillance*, 41 U.S.F. L. REV. 589 (2007). The phrase became popularized in 2011, when Senator Ron Wyden offered an amendment that stated in part, "United States Government officials should not secretly reinterpret public laws and statutes in a manner that is inconsistent with the public's understanding of these laws . . . ." Press Release, Sen. Ron Wyden, Amendment Requires Government to End Practice of Secretly Interpreting Law (May 25, 2011), http://www.wyden.senate.gov/news/press-releases/amendment-requires-government-to-end-practice-of-secretly-interpreting-law. *See*, *e.g.*, Spencer

II examines how the evolution of the statute's interpretation and use relates to the processes by which Congress considers, adopts, and provides for secret and sensitive intelligence activities. This part emphasizes the nature and effect of parliamentary rules of procedure adopted pursuant to express constitutional authority. Part III considers whether and how congressional rules can be construed to include an express delegation of authority to more limited groups of Members of Congress with respect to sensitive intelligence matters, as well as the parliamentary and legal implications of such rulemaking.

The Article also explores whether and to what extent the understandings of individual Members of Congress affect the force or interpretation of the law. These issues are considered in light of evolutionary trends in post-9/11 national security authorities as well as scholarship arguing that legislation must be construed in light of the rulemaking processes that created it. Ultimately, this Article argues that the legislative authorization for the Section 215 telephony metadata program was legitimate and valid as a matter of congressional process and black letter law.

I. WAS THE TELEPHONY METADATA PROGRAM AUTHORIZED BY "SECRET LAW"?

The USA PATRIOT Act ("PATRIOT Act") was first enacted on October 26, 2001, in the wake of the September 11, 2001, terrorist attacks.[7] Although elements of the law have fed public debate almost continuously since its passage, the urgency of the national security threat at the time led to its adoption by overwhelming bipartisan majorities in both the House and Senate.[8] Notwithstanding the

Ackerman, *There's a Secret Patriot Act*, WIRED (May 25, 2011, 4:56 PM), http://www.wired.com/2011/05/secret-patriot-act/. For a more recent advocacy piece with respect to the idea of "secret law" in the context of the Foreign Intelligence Surveillance Act, see Alan Butler, *Standing Up to Clapper: How to Increase Transparency and Oversight of FISA Surveillance*, 48 NEW ENG. L. REV. 55, 63 (2013) ("Over the last decade, the FISC began developing a secret body of law governing FISA surveillance . . . .").

[7] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[8] The bill passed the House of Representatives on a vote to suspend the rules (with a two-thirds majority required) of 357-66 on October 24, 2001, 147 CONG. REC. 20,465

speed of its passage and the ultimate consensus in support of it, the bill received thorough and contested consideration during the legislative process.[9]

It is easy to refute the argument that the telephony metadata program was enabled by "secret law." Consideration of the PATRIOT Act did not involve the use of any congressional procedure available for handling sensitive national security information. The bill's reports had no separate classified annex, and no secret session of either House of Congress was convened incident to the bill.[10] Further, Section 215 was in the PATRIOT Act from the very beginning in 2001. Its initial form was even more permissive than the current text, which was amended incident to the 2005 renewal of the PATRIOT Act.[11] Thus, the authority that provides the basis for the program has been public law (in both the literal and descriptive senses) for well over a decade.[12]

(2001), and passed the Senate by a recorded vote of 98-1 on October 25, 2001. 147 CONG. REC. 20,669 (2001).

[9] *See* Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145 (2004). Howell, a Senate staff member at the time, argues that the Administration "did not get everything it asked for" and contributed only a third of the text that became the final bill, which was significantly modified. *Id*. at 1178-79. After a more scholarly-oriented consideration of whether emergency circumstances distorted the legislative process post-9/11, Professor Adrian Vermeule similarly observed in an aside that "the substantive scope of the statutory delegations in these cases did not go beyond what a rational legislature motivated to maximize social welfare would grant." Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155, 1190 (2008).

[10] *See* Mildred Amer, CONG. RESEARCH SERV., RS20145, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW 2-5 (2008), a*vailable at* https://www.fas.org/sgp/crs/secrecy/RS20145.pdf.

[11] The original text of Section 215 was amended in 2006 to add a requirement that an application for an order include "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation . . . ." USA PATRIOT Reauthorization and Improvement Act of 2005, Pub. L. No. 109-177, 120 Stat. 192.

[12] The law, and Section 215 in particular, has also been the subject of extensive and continuing debate for much of that period. *See, e.g.*, Letter from F. James Sensenbrenner, Member of Cong., to Eric Holder, United States Att'y Gen. (June 6, 2013), *available at* http://sensenbrenner.house.gov/uploadedfiles/holder_fisa_letter.pdf. While the implications of this debate will be addressed in further detail in Part II, for the moment it is worth simply noting that Members of

Of equal importance, the executive branch collected telephony metadata in bulk for many years after 2001 without relying on Section 215 as the operative legal authority to support its activities, and expressed the legal opinion that no statutory authority under the Foreign Intelligence Surveillance Act ("FISA") was necessary as a matter of law.[13] This course of action shows *no one* in 2001 manifested either an understanding or a specific intent that provisions of the PATRIOT Act would serve as the basis for bulk metadata collection, even though the plain text of Section 215 arguably is sufficiently broad on its face to support the program. While this has been understood in a general and speculative sense for many years, the executive branch revealed the key facts only recently.

On December 21, 2013, the DNI declassified the fact that in early October 2001 President Bush authorized the National Security Agency to collect "telephony and Internet non-content information (referred to as 'metadata') in bulk, subject to various conditions."[14] Further, the DNI specifically disclosed and explained, "The bulk collection of telephony metadata transitioned to the authority of the FISA in May 2006 and is collected pursuant to Section 501 of FISA."[15] Thus, between 2001 and May 2006, activities currently conducted under Section 215 were conducted under presidential authorization, as part of what has more popularly been known as the

Congress, advocates, and the public at large have understood for many years that these authorities were being used to enable key national security programs and that there has been no shortage of controversy with respect to the provision.

[13] *See* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006) [hereinafter LEGAL AUTHORITIES], a*vailable at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv39.pdf.

[14] OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001*, IC ON THE RECORD (Dec. 21, 2013) [hereinafter IC ON THE RECORD], http://icontherecord.tumblr.com/post/70683717031/dni-announces-the-declassification-of-the.

[15] *Id.*; *see also In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 06-05 (FISA Ct. May 24, 2006), *available at* http://www.dni.gov/files/documents/section/pub_May%2024%202006%20Order%20from%20FISC.pdf.

Terrorist Surveillance Program ("TSP").[16] While the reader may have been generally aware of both the TSP and the FISC-ordered collection from press accounts, partial declassifications, and speculation, the DNI's December 2013 disclosure marked the first official acknowledgment and description of how these two activities were linked and have evolved over time.

The executive branch in 2001 did not view Section 215 of the PATRIOT Act as necessary to support the bulk collection of telephony metadata. Instead, consistent with its long-held views with respect to electronic surveillance for foreign intelligence purposes, the executive branch relied on the President's inherent Article II constitutional authorities and the then-recently enacted Authorization for Use of Military Force ("AUMF").[17] Thus, Section 215 not only was not secret, it was not even the legal basis for developing and conducting the telephony metadata program in the first place.[18] Instead, the legal theories and authorities supporting the program evolved over time. In that sense, the issue is much more of a question of interpretation and congressional oversight than a question of "secret law."

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[16] *See* Unclassified Declaration of Francis J. Fleisch, National Security Agency at 18-19, Jewel v. Nat'l Sec. Agency, 2010 WL 235075 (2010) (No. 08-cv-4373-JSW), *available at* http://www.dni.gov/files/documents/1220/NSA%20Fleisch%202013%20Jewel%20Shubert%20Declaration%20Unclassified.pdf ("In light of the declassification decisions described above concerning the NSA's collection of telephony and Internet metadata and targeted collection content under FISC orders, the President has determined to publicly disclose the fact of the existence of these activities prior to the FISC orders, pursuant to presidential authorization."); *see also id.* at 16 ("The declaration also expressly acknowledges that these activities were a portion of the TSP.").

[17] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Beyond establishing that the executive branch in no way relied on Section 215 prior to 2006, the legal underpinnings of the presidentially-authorized bulk collection activities are beyond the scope of this Article. *See* LEGAL AUTHORITIES, *supra* note 13, for a general and contemporaneous description of the executive branch view of the matter.

[18] If there *was* a secret law related to bulk collection it would thus be the AUMF, which has been interpreted extraordinarily broadly to support many activities that were not debated or specifically contemplated by Congress. The Article will further explore the implications of such broad and unforeseen interpretation in Part II.

This historical background is important to place popular assumptions about the bulk metadata collection and Section 215 into a more precise legal and legislative context. At the same time, however, the fact that Section 215 was not originally enacted to enable the telephony metadata program does not answer broader questions about perceived gaps in the understanding of individual legislators with respect to the program as its legal and legislative underpinnings evolved over time. Understanding those issues first requires consideration of the processes for congressional oversight and renewal of sensitive intelligence activities in general, and then the particular issues related to the bulk collection program can be analyzed.

II. CONGRESSIONAL INTENT AND PROCESS RELATING TO SENSITIVE INTELLIGENCE PROGRAMS

Congressional process relating to sensitive intelligence programs flows first and foremost from the Constitution. Article I, Section 5, frequently referred to as the "Rulemaking Clause,"[19] provides, "Each House may determine the Rules of its proceedings . . . ."[20] The Rulemaking Clause directly vests a significant and broad power to each house of Congress to develop and specify processes and procedures relating to legislation and oversight. This authority is so strong that in 1892 the Supreme Court described it as "absolute and beyond the challenge of any other body or tribunal."[21] The Supreme Court has construed the Rulemaking

[19] *See, e.g.,* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1789 (2003).

[20] U.S. CONST. art. I, § 5, cl. 2.

[21] United States v. Ballin, 144 U.S. 1, 5 (1892). In *Ballin*, the Court noted only these limitations on congressional rulemaking: "It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." *Id*. Courts may, however, examine issues related to whether Congress or its Committees have actually followed whatever rules they make. *See, e.g*., Yellin v. United States, 374 U.S. 109 (1963); Christoffel v. United States, 338 U.S. 84 (1949). More recently, the Rulemaking Clause has been the subject of debate in the contexts of "entrenchment" of legislation (where a current majority imposes a requirement for a supermajority to

Clause to uphold congressional rules, interpretations, and actions flowing from them relating to such matters as quorum requirements [22] and whether the Senate could reconsider the confirmation of an appointed official. [23] As Professor Adrian Vermeule has observed, however, "Legal scholarship, on the other hand, has neglected legislative rules altogether . . . ."[24]

A. The Nature of Congressional Rulemaking

The Constitutional roots of the Rulemaking Clause appear to vest congressional rules with an even stronger legal foundation than judicial rulemaking.[25] This distinction is significant, because federal judicial rules are accorded deference and can have great effect against individuals, notwithstanding that they are not directly provided for in the Constitution.[26] For example, judicially created rules impose substantial grand jury secrecy requirements, often on matters of great

undo a controversial law) and filibuster reform. *See, e.g.*, Roberts & Chemerinsky, *supra* note 19; John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189 (2013). In light of debate over entrenchment issues, it is worth noting with respect to the Rules discussed in this article that the House of Representatives customarily adopts its rules at the beginning of each Congress and thus does not purport to bind future Congresses. WM. HOLMES BROWN ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 837 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf. The Senate is a continuing body. *See* McGrain v. Daugherty, 237 U.S. 125, 181-82 (1927). See Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401 (2010), for a critical discussion with respect to the force and effect of Senate rules in this context.

[22] *Ballin*, 141 U.S. at 5.

[23] United States v. Smith, 286 U.S. 6 (1932).

[24] Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 363 (2004).

[25] Since 1934, judicial rules have been given legal effect by statute—the Rules Enabling Act. 28 U.S.C. § 2072 (2012). It has been argued that Congress impinges the independence of the Judicial Branch by regulating its rulemaking with respect to judicial matters. *See, e.g.*, Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1995). Regardless, neither statutory nor inherent rulemaking authority of the judiciary is expressly provided for in the Constitution, in contrast to the congressional authority granted by the Rulemaking Clause. *See* U.S. CONST. art. I, § 5, cl. 2, art. III, § 2.

[26] *See* Mullenix, *supra* note 25, at 754.

public interest.[27] Court rules may require individuals to appear and to provide materials at a deposition.[28] Court rules also provide authority for *any party* to litigation to secure, by a mere request to the clerk of court, a subpoena requiring production of "any books, papers, documents, data, or other objects."[29]

The scope of rulemaking authority assumed by courts is broad, and (unlike congressional rules in most instances) it is often applied directly against individual citizens. Thus, it seems reasonable to extrapolate that congressional rules adopted pursuant to express constitutional authority should be given at least an equal scope of legitimacy and deference, not only because the authority is expressly vested, but also because the smooth function of the legislature is an essential part of the broader constitutional structure.[30]

The Constitution also explicitly contemplates the potential for secrecy in congressional proceedings, specifically providing that each House shall publish a journal of its proceedings, "excepting such Parts as may in their judgment require Secrecy . . . ."[31] Therefore, Congress is given direct authority to withhold certain portions of its proceedings from the public and to determine what matters require secrecy "in their judgment."[32]

B. Congressional Rules Relating to National Security

Against this backdrop, Congress has adopted several procedural rules relating to the consideration and management of sensitive national security issues. First, each house has provided for the conduct of secret sessions to discuss sensitive matters. The

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[27] FED. R. CRIM. P. 6(e). See Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1 (1996), for a thorough discussion of the roots and implications of grand jury secrecy.
[28] FED. R. CRIM. P. 15(a)(1).
[29] FED. R. CRIM. P. 17(c)(1).
[30] Vermeule, *supra* note 24, at 363. Professor Vermeule identifies several reasons why congressional rulemaking should be constitutionalized, among them contributing to well-informed and cognitively undistorted deliberation about policy, and making technically efficient use of legislative resources. *Id*. at 381-83.
[31] U.S. CONST. art. I, § 5.
[32] *See id.*

Senate has a procedural rule relating to secret sessions,[33] under which any Senator may move for a closed session. The move need only be seconded in order to pass.[34] Similarly, Clause 9 of House Rule XVII provides for a secret session whenever a confidential communication is received from the President or an individual Member informs the House that he or she has communications that he or she believes "ought to be kept secret for the present."[35] The House as a whole then determines whether to hold a secret session to receive the material.[36] The House held a secret session relating to surveillance in 2008.[37]

Both bodies also have rules that require Members and staff to observe secrecy with respect to classified information.[38] In the House, Members and staff are required to execute an oath before accessing classified information, and any violation of the oath is considered a violation of the Code of Official Conduct subject to action from the Ethics Committee.[39] The House and Senate also each have explicit rules that allow committee proceedings to be closed if public discussion would endanger national security.[40]

Although not expressly described in the House or Senate Rules, it is important to understand two basic procedural

[33] S. COMM. ON RULES & ADMIN, 113th Cong., STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 15 Rule XXI (2013) [hereinafter Senate Rules] ("Session with closed Doors").
[34] *Id*.
[35] RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 112-161, at 30 (2013) [hereinafter House Rules].
[36] BROWN ET AL., *supra* note 21, at 446.
[37] Press Release, House Republican Leader John Boehner, Historic Session Gives Speaker Pelosi, Democratic Leaders an Opportunity to Ask—and Answer—Key Questions on the Terrorist Surveillance Program (Mar. 12, 2008), http://www.speaker.gov/general/house-republicans-request-democrats-agree-secret-session-fisa-modernization#sthash.mUgo7FyK.dpuf.
[38] Senate Rules, *supra*, note 33, Rule XXIX ("All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy."); *see also* House Rules, *supra* note 35, Rules 4, 6, 38.
[39] House Rules, *supra* note 35, Rule 25.
[40] Senate Rules, *supra* note 33, Rule XXI; House Rules, *supra* note 35, Rule 16.

mechanisms that can be employed relating to the management and consideration of legislation that has sensitive national security aspects: the classified schedule of authorizations and the classified annex. As a matter of practice, these processes are usually used in connection with the annual authorizations and appropriations bills for national security activities. Both the annual public authorizations and appropriations bills and their respective accompanying classified materials provide budget and basic programmatic authorization for the conduct of day-to-day national security operations.

As an example of how these two processes come into play, consider the Intelligence Authorization Act for Fiscal Year 2013.[41] Section 102 of the law provides and publicly states that the funding amounts provided for authorized programs are those stated in the accompanying Classified Schedule of Authorizations.[42] Similarly, the report of the House Permanent Select Committee on Intelligence accompanying the bill expressly notes the existence of, and incorporates, the classified annex accompanying the bill, which discusses issues and Committee guidance underlying the funding levels provided in the authorization.[43] Without the use of these procedural mechanisms, it would be virtually impossible for the congressional intelligence committees to legislate the implementation of their oversight findings for Intelligence Community activities and programs because the legislation and accompanying materials could include only unclassified material.[44] Moreover, both documents were made available for review by all Members of Congress contemporaneously with the bill's

[41] Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, 128 Stat 1390.
[42] *Id.*
[43] H.R. Rep. No. 112-490, at 7 (2012).
[44] Press Release, Mike Rogers, Chairman Rogers & Ranking Member Ruppersberger Applaud House Passage of FY13 Intelligence Authorization Bill (June 1, 2012), http://mikerogers.house.gov/news/documentsingle.aspx?DocumentID=297928 ("The current challenging fiscal environment demands the accountability and financial oversight of our classified intelligence programs that can only come with an intelligence authorization bill. The bill's comprehensive classified annex provides detailed guidance on intelligence spending, including adjustments to costly but important programs.").

consideration, with the documents' availability publicly announced on the House floor.[45]

While these procedural mechanisms are important to understanding the basic framework and mechanisms used to handle classified issues relating to legislation, they relate predominantly to processes governing the handling of classified matters by each House of Congress with respect to potential disclosure incident to legislation. Neither the passage nor any subsequent renewal of the PATRIOT Act involved the use of any of these parliamentary procedures, which are the hallmarks of any law that contains any "secret" matter explaining intent with respect to the plain and publicly available legislative text.[46]

More relevant to bulk telephony metadata collection under Section 215 are a final group of relevant House congressional procedures that provide for internal processes with respect to *oversight* of sensitive intelligence matters. Clause 11 of House Rule X provides for the creation of the Permanent Select Committee on Intelligence, and provides the Committee with legislative jurisdiction for the Central Intelligence Agency, DNI, the National Intelligence Program, and "intelligence and intelligence-related activities of all other Departments and agencies of the Government . . . ."[47] The rule further includes a number of specific items relating to committee procedures for handling of classified information, including requirements for staff to obtain a security clearance and agree to rules and restrictions on disclosure of that information.[48]

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[45] 158 CONG. REC. H7466 (daily ed. Dec. 30, 2012) (statement of Rep. Rogers). Technically, the Committee votes to authorize the release to maintain consistency with its general procedures limiting release of classified information before the Committee. *See infra* note 66.

[46] The 2008 secret session of the House of Representatives occurred incident to consideration of the FISA Amendments Act. *See* Jonathan Weisman, *House Passes a Surveillance Bill Not to Bush's Liking*, WASH. POST (Mar. 15, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/03/14/AR2008031400803_2.html.

[47] House Rules, *supra* note 35, Rule 10, cl. 11(b)(1)(B).

[48] *Id.* Committee Rule 12 further restricts disclosure by Committee members and staff of the "classified substance" of the work of the Committee, and certain related

With that general background, it is particularly important to emphasize two specific rules that appear to provide special exclusionary authorities to the Permanent Select Committee on Intelligence with respect to intelligence sources and methods. First, a different rule relating to oversight contains a unique additional provision. Clause 3(m) of House Rule X relates to "special oversight functions" and specifies that the Permanent Select Committee on Intelligence shall "study on an exclusive basis the sources and methods of entities described in clause 11(b)(1)(A)," which in turn includes "the Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program, as defined in section 3(6) of the National Security Act of 1947."[49] The National Intelligence Program is statutorily defined to include "all programs, projects and activities of the intelligence community."[50]

The use of the word "exclusive" in the context of "special oversight" in House Rule X is highly significant. It is the only "exclusive" jurisdiction provided for anywhere in the Rules of the House.[51] Also, "special" oversight is specifically delegated by rule to certain committees, in contrast to "general legislative oversight," which is performed by all standing committees.[52]

Second, House Rules specifically *require* Committee members and staff not to make available to "any person" classified information in their possession relating to classified intelligence

information such as material received in executive session. RULES OF PROCEDURE FOR THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, UNITED STATES HOUSE OF REPRESENTATIVES, 113TH CONG. [hereinafter Intel. Rules], *available at* http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/HPSCI%20Rules%20of%20Procedure%20-%20113th%20Congress.pdf.

[49] House Rules, *supra* note 35, Rule 10, cl. 3(m), cl. 11(b)(1)(A). Section 3(6) of the National Security Act of 1947 is codified at 50 U.S.C. § 401(a).

[50] 50 U.S.C. § 401(a)(6).

[51] This fact is confirmed by a text search of the Rules of the House of Representatives for the word "exclusive." The word appears in three other instances in relation to the calculation of certain time limitations. Notably, the House effectively lifted this exclusivity in 2014 when it created and extended such jurisdiction to the Select Committee to Investigate the Events Surrounding the 2012 Terrorist Attacks in Benghazi. H.R. Res. 567, 113th Cong. (2014) (enacted).

[52] BROWN ET AL., *supra* note 21, at 248.

activities.[53] This provision literally prohibits sharing such information with other Members of Congress not on the Committee. Two additional rules reinforce this information-sharing prohibition. Clause 11(d)(1) of House Rule X expressly exempts the Committee from another rule requiring that all Members of Congress be given access to any Committee records "to the extent not inconsistent with this clause."[54] Further, Committee Rule 14 specifically provides a mechanism for Members not on the Committee to formally request access to information held by the Committee, as well as procedures for Committee consideration of such a request.[55]

These provisions together manifest a procedural intention in House Rules—adopted pursuant to the Rulemaking Clause—to provide for the delegation of oversight of sensitive intelligence matters, with particular emphasis on intelligence sources and methods, to the House Intelligence Committee, and to limit discussion and disclosure of such matters even to other Members of Congress outside of the provided exceptions and access procedures.[56]

C. The Aftermath of Disclosure

Notwithstanding congressional rules of procedure, the situation became significantly more complicated following the

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[53] House Rules, *supra* note 35, Rule 10, cl. 11(g)(3)(A).

[54] With respect to right of access to Committee records, House Rule 11, cl. 2(e)(2)(A) otherwise would provide that "each Member, Delegate, and the Resident Commissioner shall have access thereto" absent the exemption. This conclusion appears to be further reinforced by the House Practice manual, which specifically notes that the Permanent Select Committee on Intelligence is exempted from the rule. BROWN ET AL., *supra* note 21, at 272.

[55] Intel. Rules, *supra* note 48.

[56] A full discussion of the rationale and justification underlying such procedural mechanisms is for another day. Briefly, however, the procedural restriction supports an overall compelling governmental interest to protect sensitive national security information with respect to intelligence sources and methods. Arguably, restrictions on access to such information by Members of Congress outside the relevant congressional committees also furthers the interest of facilitating congressional oversight of intelligence programs. The absence of such protections is a significant disincentive to the executive branch to share information on such programs with Congress. *See* Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 815-18 (1985).

disclosure of the bulk metadata collection. Many Members of Congress were concerned about being "out of the loop" with respect to the details of the program. The facts and circumstances relating to who knew what and when are now a continual part of the debate. This Article is not intended to address those facts in detail beyond establishing that differently situated legislators had access to different information at different times, and that disputes now exist with respect to both the general issue and the specific understanding of some Members of Congress as to how the law was being interpreted. However, a few largely uncontested facts from the public record must first be understood in order to comprehend the background for the discussion below.

First, prior to 2006, the executive branch appears to have provided briefings on the TSP only to the congressional intelligence committees, the chair and ranking member of the appropriations committee and defense subcommittees, and certain congressional leadership.[57] Second, in May of 2006, the government transitioned telephony metadata collection to approval by the FISC under the authority of Section 215.[58] Third, in January of 2007, the Department of Justice informed the House and Senate Judiciary Committees that it had fully transitioned TSP activities to FISC authorities and offered briefings on the details of the orders.[59] In connection with this letter, it is important to note that, as a parliamentary matter, the House and Senate Judiciary Committees had been given primary referral of legislation relating to FISA. Fourth, following this notification, the Department of Justice regularly provided material to both the Judiciary and Intelligence Committees.[60]

[57] Letter from John Negroponte, Dir. of Nat'l Intelligence, to J. Dennis Hastert, Speaker of the House of Representatives (May 17, 2006), *available at* http://thinkprogress.org/wp-content/uploads/2007/07/may_17_tsp.pdf

[58] IC ON THE RECORD, *supra* note 14.

[59] Letter from Alberto Gonzales, Att'y Gen., to Patrick Leahy and Arlen Specter, Chairman and Ranking Member of the Sen. Comm. on the Judiciary (Jan. 17, 2007), a*vailable at* http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf.

[60] *See, e.g.,* Letter from Ronald Weich, Asst. Att'y. Gen., to Patrick Leahy, John Conyers Jr., Dianne Feinstein, and Silvestre Reyes, Chairman of the Senate & House

As Section 215 approached renewal, the Department of Justice provided a letter in December 2009 to the congressional intelligence committees describing the nature of the bulk collection and asked that it be made available to all Members of the House and Senate.[61] Congress temporarily extended Section 215 for an additional year in 2010.[62] Prior to the expiration of that extension, the Department of Justice again provided a descriptive letter and asked that it be made available to all Members of the House and Senate.[63] Section 215 was renewed for an additional four years in 2011.[64]

Following the public disclosure of the bulk collection, some Members of Congress publicly expressed various concerns. Congressman James Sensenbrenner, former Chairman of the House Judiciary Committee, sent a letter to Attorney General Holder suggesting that he had been given the impression that Section 215 authorities had been used "sparingly," and expressing his view that the interpretation underlying the FISC authorization was

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Committees on the Judiciary, Chairman of Select Comm. on Intelligence, and Chairman of Permanent Select Comm. on Intelligence (Sept. 3, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Sep%203%202009%20Cover%20letter%20to%20Chairman%20of%20the%20Intelligence%20and%20Judiciary%20Committees.pdf.

[61] *See, e.g.*, Letter from Ronald Weich, Asst. Att'y Gen., to Silvestre Reyes, Chairman of the House Permanent Select Comm. on Intelligence (Dec. 14, 2009), *available at* http://www.dni.gov/files/documents/2009_CoverLetter_Report_Collection.pdf. At this point, the reader may justifiably be confused how such a letter might be made available to all Members of Congress given the constraints on disclosure of classified information by members and staff of the House Intelligence Committee described earlier. Under Committee Rules, information may be shared with Members of Congress outside the Committee at the discretion of the Chairman if it is provided on a nonexclusive basis by the Executive Branch for the purpose of review by Members of Congress outside the Committee. Intel. Rules, *supra* note 48, Rule 13(c).

[62] USA PATRIOT—Extensions of Sunsets, Pub. L. No. 111-141, 124 Stat. 37 (2010).

[63] *See, e.g.*, Letter from Ronald Weich, Assistant Att'y General, to Dianne Feinstein and Saxby Chambliss, Chairman and Vice Chairman of the Senate Select Comm. on Intelligence (Feb. 2, 2011), *available at* http://www.dni.gov/files/documents/2011_CoverLetters_Report_Collection.pdf.

[64] USA PATRIOT—Extensions of Sunsets, Pub. L. No. 111-141, 124 Stat. 37 (2010).

inconsistent with the scope of the statutory authorization.[65] Other Members of Congress raised concerns publicly that the Department of Justice letter had not been made available to them in advance of the 2011 vote to renew Section 215, or that they had not been able to obtain information with respect to intelligence activities that they had requested be provided to them.[66]

Common to the issues raised, however, is a central theme *not* that Section 215 was itself "secret law," but instead that some individual Members of Congress believed that they had not had an opportunity to participate in oversight of the programs (notwithstanding the limitations and processes provided for by the rules), or that they had not been fully aware of how the law was being *interpreted* and implemented with respect to bulk metadata collection. While these disputes are of heightened attraction and interest in the context of foreign intelligence, in reality they are merely a manifestation of longstanding issues respecting the evolving interpretation of statutes and the degree to which the views of individual legislators play into the understanding and interpretation of those statutes. Although such questions flow from the legislative process itself and will continue to feed substantial analysis in the future, it is worth a brief review of how the issues raised fit into broader scholarship on such interpretive questions.

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[65] Letter from F. James Sensenbrenner, Member of Cong., to Eric Holder, Att'y Gen. (June 6, 2013), http://sensenbrenner.house.gov/uploadedfiles/holder_fisa_letter.pdf. At the same time, however, it has been pointed out that Congressman Sensenbrenner previously served as Ranking Member at a Judiciary Committee hearing in which a Department of Justice official testified that "[s]ome orders have also been used to support important and highly sensitive intelligence collection operations, on which this committee and others have been separately briefed" (quoting statement by Todd Hinnen, Acting Ass't. U.S. Att'y Gen. for National Security, before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security). Wells Bennett, *Sensenbrenner on DOJ Testimony Regarding Section 215*, LAWFARE (June 7, 2013, 4:26 PM), http://www.lawfareblog.com/2013/06/sensenbrenner-on-doj-testimony-regarding-section-215/.

[66] *See, e.g.,* Spencer Ackerman, *Intelligence Committee Withheld Key File Before Critical NSA Vote, Amash claims*, GUARDIAN (Aug. 12, 2013), http://www.theguardian.com/world/2013/aug/12/intelligence-committee-nsa-vote-justin-amash.

III. DOES "SECRET INTERPRETATION" UNDERMINE LAW?

As previously described, the legal basis and justification for bulk metadata collection has shifted and evolved frequently over the life of the program. It began rooted in constitutional authority reported to Congress strictly as a matter of oversight, moved under the broad auspices of the already-adopted Section 215 with the approval of federal judges, and ultimately was reauthorized. With respect to Congress, at least the leadership of multiple legislative committees knew or should have known that the renewal of the law was in part intended to facilitate the conduct of the program.[67] If similar questions in the past are any guide, shifting legal architecture and interpretation viewed in differing perspectives of lawmakers cannot alter the underlying scope of the statute beneath it nor undermine its legitimacy.[68]

This part will make two concluding observations why the use of Section 215 authorities to support activities that individual Members of Congress might not have specifically contemplated at the law's enactment or renewal should not undermine its legal force and effect for both practical and interpretive reasons.

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[67] The FISC and the U.S. District Court for the Southern District of New York have both considered the issue and held that the legislative ratification doctrine is applicable with respect to the renewal of Section 215 authorities as applied to bulk telephony metadata collection. *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13-09 (FISA Ct. Aug. 29, 2013), at 23-28, *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf ; ACLU v. Clapper, 959 F. Supp. 2d 724, 745-46 (S.D.N.Y. 2013). A notice of appeal was filed on January 2, 2014, in the Southern District of New York, and the Second Circuit heard oral arguments on September 2, 2014.

[68] Although not immediately relevant to the retrospective legal analysis, it is important to point out that the evolution and previous secrecy with respect to the program is not without legislative consequence or cost. The program now faces a difficult path to further renewal exacerbated in part by the way it was handled in the past. Secrecy and carefully controlled process arguably may be suitable for sensitive intelligence matters, but it should conversely be apparent that these attributes may not be of help in winning broader political support. *See* Austen D. Givens, *The NSA Surveillance Controversy: How the Ratchet Effect Can Impact Anti-Terrorism Laws,* HARV. NAT'L SEC. J., Online Content (July 2, 2013), http://harvardnsj.org/2013/07/the-nsa-surveillance-controversy-how-the-ratchet-effect-can-impact-anti-terrorism-laws/.

A. *The Evolving Nature of Section 215's Legal Foundation Does Not Undermine Its Legitimacy Any More than the Evolutionary Interpretation of All Statutes*

The constant evolution of the use and interpretation of Section 215 with respect to telephony metadata is certainly nothing new in the post-9/11 landscape, which was developed *ad hoc* and forced to grow into its application.[69] In fact, it echoes the interpretation of the AUMF, which has been used as authority to support a range of activities that in many instances have been similarly secret and do not appear to have been specifically contemplated by Congress when the resolution was enacted.[70]

Even before Congress adopted the PATRIOT Act in the wake of 9/11, it passed the AUMF.[71] The nature and scope of the operative provision was short and simple. It provides:

> Section 2 – Authorization For Use of United States Armed Forces
>
> (a) IN GENERAL—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[72]

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[69] Fundamental legal authorities for the post-9/11 national security landscape have proven remarkably adaptable and flexible. At the same time, however, the flaws and imperfections of the legal regimes surrounding these architectures have become apparent both over time and in light of over a decade of operational and interpretive experience. My argument is not that these laws are beyond reconsideration – in fact, the time is overdue to review and rationalize these authorities and develop a durable framework for the future. The point is instead a much more discrete one that existing statutes must continue to be understood and interpreted as they stand today until reformed.

[70] Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (2001).

[71] *Id.*; USA PATRIOT Act, Pub. L. 107–56, 115 Stat 272 (2001).

[72] Authorization for Use of Military Force § 2(a).

The AUMF was enacted on September 18, 2001,[73] at a time when little was known about either the specific nature of the threat faced after the 9/11 attacks or precisely how the United States intended to respond to them.[74] Since then, the quoted passage has served as the legal basis for an immensely broad array of activities. It has been cited as a justification for operations in Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq, and Somalia.[75] It has been cited to support a broad range of discrete activities, including warrantless surveillance,[76] a broad detention regime that even includes American citizens,[77] and targeted drone strikes against terrorists around the globe.[78]

The text of the AUMF does not expressly authorize any of these activities. Nor is there any indication that any of them (with the likely exception of military activity in Afghanistan) were specifically contemplated at the time of its passage.[79] Instead, the AUMF is generally understood as a manifestation of congressional intent to ratify and provide general authority to take necessary steps to accomplish a broader, known objective—an outcome consistent

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[73] *Id.*

[74] For one account of the circumstances surrounding the initial development and evolution in interpretation and use of the AUMF, see Gregory D. Johnsen, *60 Days and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BUZZFEED (Jan. 16, 2014, 11:52 PM), http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most. For a comprehensive review of broad legal issues underlying it, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*," 118 HARV. L. REV. 2047 (2005). This article is not intended to explore substantive issues related to the AUMF beyond drawing a parallel in the evolution and expansion of its use and interpretation to Section 215.

[75] Memorandum from Matthew Wood, Cong. Res. Serv., to Congresswoman Barbara Lee (July 10, 2013), *available at* https://www.fas.org/sgp/crs/natsec/aumf-071013.pdf.

[76] LEGAL AUTHORITIES, *supra* note 13.

[77] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[78] John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), *available at* http://www.lawfareblog.com/2012/04/brennanspeech/.

[79] *See generally* 147 CONG REC. S9440-61 (daily ed. Sept. 14, 2001); 147 CONG REC. H5632-80 (daily ed. Sept. 14, 2001).

with its status as emergency legislation.[80] In a political sense, legislators frequently have similar broad and undefined intentions in supporting a bill.[81]

As a recent example outside the national security context, equally fierce debate has arisen with respect to the question of whether and to what extent congressional Members and staff were to be included or exempted from requirements of the Affordable Care Act.[82] On its face, the statute literally provides that

> [n]otwithstanding any other provision of law . . . the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are: (I) created under this Act (or an amendment made by this Act); or (II) offered through an Exchange established under this Act (or an amendment made by this Act).[83]

The Office of Personnel Management subsequently issued a proposed (and later final) rule "delegat[ing] to the employing office of the Member of Congress the determination as to whether an

[80] *See* Bradley & Goldsmith, *supra* note 74, at 2111 (stating that "at least in those situations where constitutionally protected liberty interests do not mandate a clear statement requirement, delegations in the war context should be construed broadly to give the President flexibility to achieve the purposes for which the delegation was made."). For arguments that clear statements are required, see Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059 (2009).

[81] Johnsen, *supra* note 74 ("'I say bomb the hell out of them,' Democratic Sen. Zell Miller of Georgia had told The New York Times a day earlier. 'If there's collateral damage, so be it. They certainly found our civilians to be expendable.'"); *see also*147 CONG. REC. H5643 (daily ed. Sept. 14, 2001) (statement of Rep. Berman) ("I rise in support of this resolution …We must do whatever it takes, including the use of military force, to track down bin Laden and destroy his organization. But this is not just about bin Laden …To win the war against terrorism, we must eliminate the entire infrastructure that sustains these organizations.").

[82] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); John Fund, *Congress's Exemption from Obamacare,* NAT'L REV. ONLINE (Sept. 16, 2013, 4:00 AM), http://www.nationalreview.com/article/358550/congresss-exemption-obamacare-john-fund.

[83] Patient Protection and Affordable Care Act § 1312(D).

employed individual meets the statutory definition."[84] The effect was to allow each Member of Congress to make the determination on her own, even though Members believed (and the statutory text plainly seemed to indicate) that staff members would be subject to the law.[85] A heated controversy emerged between Members of Congress with respect to the meaning of the provision and how it should have been interpreted.[86]

Thus, the evolution and broad scope of application of the AUMF or potentially any statute is certainly not without controversy, but it has not been substantially argued that such evolving interpretation constitutes "secret law" or that legislators did not understand what they were voting for given such evolution.[87] Similarly, many of the activities undertaken under the AUMF are not publicly disclosed in detail or affirmatively briefed to all Members of Congress. As a practical matter, these similarities only further reinforce the notion that issues raised with respect to the interpretation of Section 215 ultimately are no different than core issues of statutory interpretation that arise in all legislative contexts.

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[84] Federal Employees Health Benefits Program, 78 Fed. Reg. 48,337 (proposed Aug. 8, 2013), with the cited text also found on that page; Federal Employees Health Benefits Program, 78 Fed. Reg. 60,653 (Oct. 2, 2013) (to be codified at 5 C.F.R. pt. 890).

[85] *See* Ron Johnson, *I'm Suing Over ObamaCare Exemptions for Congress*, WALL ST. J. (Jan. 5. 2014), http://online.wsj.com/news/articles/SB10001424052702304325004579296140856419808.

[86] *See* Elise Viebeck, *GOP senator hits Sensenbrenner, says O-Care suit not a 'stunt'*, THE HILL (Apr. 29, 2014), http://thehill.com/policy/healthcare/204678-gop-sen-hits-sensenbrenner-says-o-care-suit-not-a-stunt; Bill Cassidy, *No Congressional Obamacare Exemptions*, THE HILL (Sept. 30, 2013), http://thehill.com/blogs/congress-blog/healthcare/325201-no-congressional-obamacare-exemptions; Jon Terbush, *For the Last Time, Congress is Not Exempt From ObamaCare*, THE WEEK (Jan. 7, 2014), http://theweek.com/article/index/254747/for-the-last-time-congress-is-not-exempt-from-obamacare.

[87] The closest argument is that Administration's legal opinions underlying its interpretations should be more fully disclosed. *See, e.g.*, *Secret Law and the Threat to Democratic and Accountable Government: Hearing before the Subcomm. on the Constitution of the Comm. on the Judiciary U.S. S.*, 110 Cong. (2008) (statement of Dawn E. Johnsen, Professor, Indiana Univ. School of Law-Bloomington), *available at* http://www.judiciary.senate.gov/imo/media/doc/08-04-30Johnsen_Dawn_testimony.pdf.

B. Limited Understanding by Legislators of Section 215 Does Not Undermine Its Legitimacy Any More than the Differing Understandings among Legislatures for All Statutes

As an interpretive matter, differing understandings of the intended scope and effect of enacted laws among legislators are also nothing new, and cannot operate against the otherwise plain meaning of the statutory text.[88] Both the FISC and the U.S. District Court for the Southern District of New York have already considered the question and determined that Congress ratified the authorities.[89] For the FISC, Judge Claire Eagan wrote:

> It is unnecessary for the Court to inquire how many of the 535 individual Members of Congress took advantage of the opportunity to learn about how the Executive Branch was implementing Section 215 under this Court's Orders. Rather, the Court looks to congressional action on the whole, not the preparatory work of individual Members in anticipation of legislation. In fact, the Court is bound to presume regularity on the part of Congress. *See City of Richmond vs. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." (citing cases)). The ratification presumption applies here where each Member was presented with an opportunity to learn about a

[88] The plain text of Section 215 is extremely broad on its face, authorizing an order for "the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(a)(1) (2006). There is currently ongoing litigation with respect to whether bulk collection of telephony metadata can meet the statutory requirement that an application include a statement of facts "showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." ACLU v. Clapper, 959 F. Supp. 2d 724, 733 (S.D.N.Y. 2013). The District Court granted the government's motion to dismiss after considering and rejecting this argument, among others. *Id.* at 746-49. A notice of appeal was filed on January 2, 2014, in the Southern District of New York, and the Second Circuit heard oral arguments on September 2, 2014.

[89] *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. 13-109 at 23-28 (FISA Ct. Aug. 29, 2013) (memorandum opinion); *Clapper*, 959 F. Supp. 2d at 28-32.

> highly-sensitive classified program important to national security in preparation for upcoming legislative action.[90]

These rulings are fully consistent with recent scholarship considering similar issues within a broader general context of statutory interpretation. One particularly relevant theory in this context is that statutory interpretation must consider the legislative context and congressional rules that shaped the law's development. Professor Victoria Nourse has observed that "[m]ore than occasionally, law professors reveal a stunning lack of knowledge about Congress's rules," and argued that statutory interpretation should defer to "*Congress's own rules.*"[91] This concept is particularly important with respect to metadata collection pursuant to Section 215 given the clear and unique structures provided for in congressional rules to govern oversight and consideration of intelligence matters described earlier.

Professor Nourse's theory "posits that Congress's rules dominate members' preferences" in considering and acting on legislation.[92] A similar argument with respect to oversight and reauthorization of Section 215 within that framework might suggest, for example, that individual Members are aware that the rules largely delegate and cabin oversight responsibility to the intelligence committees (and possibly the Judiciary Committees with respect to legislative jurisdiction) and take broad cues and advice from members of those Committees when considering and voting on related legislation.[93] Such a conception is also consistent with longstanding interpretivist views of certain actors as favored

[90] *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted] at 26, n.24.
[91] Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72-73 (2012).
[92] *Id*. at 89.
[93] To be clear, Professor Nourse's points are much more complex and nuanced. The article nowhere suggests that congressional rules command rote adherence to the views of any specific group of legislators favored in the rules or inherently dictate any particular interpretive outcome, but rather that "[l]egislative history is at its best when understood within Congress's own rules." *Id*. at 91.

"congressional agents" with respect to legislation, a conception most prominently associated with Judge Learned Hand.[94]

Conversely, however, individual Members of Congress ultimately have a variety of independent legislative tools at their disposal to study, debate, and vote on bills even where the rules may make this more complicated than usual (as in the case of Section 215). As one example, a number of members of the Judiciary Committee publicly expressed concern as early as 2008 with respect to a legislative grant of immunity to telecommunications providers.[95] Any Member could have considered these issues in connection with the reauthorization of Section 215 in 2010 or 2011, as well as available and abundant other public speculation and commentary expressing concern about government intelligence activity generally and Section 215 in particular.[96] Indeed, several amendments were considered on related issues at various times incident to reauthorization.[97] While specific information related to sources and methods may have been controlled, the fact that Section 215 was controversial and raised potential issues was in no way a secret to any individual Member of Congress, and such disagreement was of course no different than with issues before Congress on a daily basis.

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[94] Note, *Why Learned Hand Would Never Consult Legislative History Today*," 105 HARV. L. REV. 1005, 1014 (1992). The interpretivist view is relevant to the extent that it offers tools to weigh the views of different legislators, but it is important to emphasize that the question here is not really one of interpreting the meaning of text.

[95] Nancy Pelosi, *Judiciary Committee Members: Administration Has Not Made the Case for Telecom Immunity*, DEMOCRATIC LEADER BLOG (Mar. 12, 2008), http://democraticleader.house.gov/?p=1204.

[96] *See, e.g.*, Laurie Thomas Lee, *The USA PATRIOT Act and Telecommunications: Privacy Under Attack*, 29 RUTGERS COMPUTER & TECH L.J. 371 (2003); Conor Friedersdorf, *Russ Feingold Tried to Warn Us About Section 215 of the Patriot Act*, THE ATLANTIC (Jun. 14, 2013, 8:00 AM), http://www.theatlantic.com/politics/archive/2013/06/russ-feingold-tried-to-warn-us-about-section-215-of-the-patriot-act/276878/.

[97] For example, the Center for Democracy and Technology compiled an extensive list of proposed amendments and reforms in 2009. Kim Zetter, *Handy Chart Tracks Proposed Amendments to Patriot Act*, WIRED (Nov. 16 2009, 2:06 PM), http://www.wired.com/2009/11/patriot-act/.

IV. CONCLUSION

However individual legislators may feel about intelligence programs generally, or the interpretation of Section 215 specifically, as a statutory, procedural, and interpretive matter, there can be little question that Section 215 should be considered as properly enacted and reauthorized. Further, while there may be grounds for substantive procedural and policy debate with respect to these issues, this discourse is no different from the ongoing give-and-take seen every day in legislation across the spectrum of issues considered by Congress. Indeed, procedural rules governing legislation of sensitive intelligence matters can be viewed as deliberate efforts to manage the political process in this unique context.

Is the authority secret? Not if the statutory text is plain and oversight is conducted at a minimum in the manner provided for by congressional rules. Is it law? Despite all the sound and smoke around the issue, that question appears yet to be significantly challenged with respect to congressional intent and process.

NOTE

SPECIAL VICTIM'S PRIVILEGES:
HOW JUDICIAL ACTIVISM AND A COURT'S EXPANSIVE APPLICATION OF LAW MADE FOR A GOOD RESULT

Stacy M. Allen*

As interest in the topic of sexual assaults in the military peaked among federal legislators, the Court of Appeals of the Armed Forces ("CAAF") heard the case of LRM v. Kastenberg. *This case is particularly significant because it was the first to address the role of the Special Victim's Counsel, military attorneys appointed to represent alleged victims during courts-martial proceedings arising from such assaults. While the* Kastenberg *majority found that hearing the case was appropriate under the circumstances, given the notion of judicial economy and CAAF's broad jurisdiction to hear cases, the dissenting judges felt that the majority's decision both circumvented established precedent and violated provisions of the Uniform Code of Military Justice.*

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This Note seeks to determine why Kastenberg *was heard when it was and whether the decision to do so was based upon sound legal principles. While political considerations may have influenced the timing of the Court's decision to hear the case to some degree, the majority achieved a proper outcome, despite the fact that one or both of the dissenters may have had a stronger legal argument.*

INTRODUCTION

Legal and constitutional scholars have been unable to agree upon a single meaning for the term "judicial activism" since Arthur Schlesinger, Jr. first coined it in 1947.[1] Indeed, at least five different definitions have been attached to the phrase over the past sixty-six years, including: "(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial 'legislation,' (4) departures from accepted interpretive methodology, and (5) result-oriented judging."[2] In addressing the issues in *LRM v. Kastenberg*, the Court of Appeals of the Armed

[1] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism*," 92 CALIF. L. REV. 1441, 1446 (2004).
[2] *Id.* at 1444.

Forces ("CAAF") appears to have engaged in both judicial legislation and result-oriented judging, most likely for reasons of judicial economy,[3] but perhaps also at least in part because of the political climate surrounding sexual assault in the military at that time. Further, by choosing to interpret prior case law and statutes in a manner that allowed it to address such offenses when it did, the CAAF majority imposed a novel interpretation on jurisdiction and third party standing that both cements the role of Special Victim's Counsel ("SVC") advocates in future cases and requires military judges to develop a more comprehensive record at the trial level.[4]

When an Article III court engages in judicial activism, it does so in violation of the principle of separation of powers.[5] CAAF, however, is an Article I court that has the "power to make 'rules for the conduct of its business' under the Judicial Code."[6] Additionally, unlike the trial-level military courts and the service courts of criminal appeals, CAAF, despite being the highest court in the military justice system, is controlled by civilian judges rather than active military personnel.[7] Because of this unique dynamic, CAAF has traditionally interpreted its jurisdiction very broadly, as demonstrated by its expansive approach to its ability to hear cases under the All Writs Act.[8] Likewise, CAAF has tended to "err on the side of generosity" when dealing with appellant issues because it views its role as achieving substantive justice and protecting the accused from "potential lapses on the part of the military or civilian defense counsel . . . ."[9] As a result, CAAF has on occasion broadened the

[3] LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013).
[4] *See id.*
[5] This principle is illustrated by the dissent in *Turpin v. Mailet*, which criticized the majority for stepping "beyond its constitutional bounds by adopting the function of a legislature." Kmiec, *supra* note 1, at 1460 (citing Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978)).
[6] The term "Judicial Code" utilized by the author of this source is synonymous with the UCMJ. EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 1 (13th ed. 2010); *see also* 53A AM. JUR. 2D *Military and Civil Defense* § 302 (2014).
[7] 53A AM. JUR. 2D, *supra* note 6 at § 302.
[8] FIDELL, *supra* note 6.
[9] *Id.*

scope of its review beyond issues framed by the parties.[10] Though these actions are largely opposite the approaches taken by CAAF's Article III counterparts, they offer some context as to why CAAF operates in this manner.

Procedurally, however, CAAF is required to make legal determinations in accordance with the Uniform Code of Military Justice ("UCMJ"), the Rules for Courts-Martial ("RCM"), and the Military Rules of Evidence ("MRE"), all of which are contained within the Manual for Courts-Martial ("MCM").[11] The UCMJ, established by Congress in 10 U.S.C. Chapter 47, serves as the foundation for all military law.[12] It allows for personal jurisdiction over all active-duty service members as well as other individuals attached to military units or activated under specific circumstances.[13] The RCM and MRE, respectively, dictate the rules of procedure and of evidence in court-martial proceedings.[14] Provisions within the MCM are reviewed each year by the Department of Defense ("DoD").[15] Once this review is complete, the President receives the DoD's recommendations and authorizes any revisions by an annual Executive Order.[16]

On July 18, 2013, CAAF decided *LRM v. Kastenberg*, a case involving an alleged sexual assault by Airman First Class ("A1C")[17]

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[10] *Id.*

[11] R. CHUCK MASON, CONG RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 2 (2013), *available at* http://fpc.state.gov/documents/organization/213982.pdf; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter MCM].

[12] *See generally Uniform Code of Military Justice Legislative History*, LIBRARY OF CONG., http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html (last visited Aug. 26, 2014).

[13] UNIFORM CODE OF MILITARY JUSTICE art. 2 (2012) [hereinafter UCMJ].

[14] *See* MCM, *supra* note 11, R.C.M. [hereinafter R.C.M.]; *see also* MCM, *supra* note 11, MIL. R. EVID. [hereinafter MIL. R. EVID.].

[15] Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984).

[16] *Id.*

[17] For pay grade purposes, an A1C is an E-3, which is the third enlisted grade a service member can attain in the military hierarchy. *See Grade and Insignia*, AIRFORCE.COM, http://www.airforce.com/pdf/insignia_enlisted_ranks.pdf (last visited Aug. 26, 2014).

Nicholas Daniels on A1C LRM.[18] The primary issue on appeal stemmed from a ruling by the trial-level military judge that LRM did not have the right to be heard at future evidentiary proceedings involving MRE 412 (Rape Shield) and 513 (Patient-Psychotherapist Privilege).[19] When LRM appealed that ruling to the Air Force Court of Criminal Appeals ("AFCCA"), that court dismissed her case for lack of subject-matter jurisdiction.[20] Nevertheless, The Air Force Judge Advocate General ("TJAG") certified three questions to CAAF, ostensibly as a *bona fide* "case" as defined in Article 67(a) of the UCMJ,[21] but actually as an interlocutory appeal by LRM. The critical question here was whether CAAF should have heard that application when it did.

The questions certified were (1) whether AFCCA erred in its determination that it lacked jurisdiction; (2) whether the trial judge's denial of LRM's demand to be heard violated her right to due process; and (3) whether CAAF should accept a writ of mandamus as the procedural vehicle to address these issues.[22] By a three-to-two majority, the CAAF judges determined that AFCCA had appropriate jurisdiction to hear the case and that LRM had standing to be heard before CAAF.[23] Even so, the CAAF majority also decided that a writ of mandamus was not the appropriate method by which LRM should have sought relief, and remanded the case to the trial court.[24] The focus of this Note, however, is not only to examine the majority's

[18] To protect the victim's identity, only the victim's initials, "LRM," are used in all available legal documentation.
[19] LRM v. Kastenberg, 72 M.J. 364, 366 (C.A.A.F. 2013).
[20] *Id.* at 367.
[21] Article 67(a) reads:

> The Court of Appeals for the Armed Forces shall review the record in: (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death; (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

UCMJ art. 67(a) (2012).
[22] *Kastenberg*, 72 M.J. at 366.
[23] *Id.* at 367.
[24] *Id.* at 372.

holdings on jurisdiction and standing, but also to address the fact that by choosing to hear LRM's interlocutory appeal at all at the point in the proceedings that it did, the CAAF majority may have at least partly engaged in judicial activism motivated by political considerations.

Part I of this Note will address relevant statutes and precedent affecting *Kastenberg*, including the development and application of MRE 412 and 513. It will also discuss some of the political and policy considerations surrounding the issue of sexual assault in the military at the time this case was heard. Part II will discuss the legal history of the case, including the decisions of the Military Judge and AFCCA, and the reason that CAAF heard the case. Part III will provide a brief statement of CAAF's analysis and holdings. Part IV will then discuss the three issues TJAG certified and the differences between the majority and the dissent in terms of their respective approaches to those issues and the outcomes they reached. This discussion will place particular emphasis on the issues of jurisdiction, standing, and the judicial activism that likely contributed to CAAF's decision to accept jurisdiction over the interlocutory appeal. In sum, while political considerations are perhaps one of the least supportable reasons to engage in judicial review, the political and social circumstances surrounding *Kastenberg* may well have contributed to the CAAF majority reaching appropriate conclusions, even though by strict construction standards, the process by which the court attained those results was both substantively and procedurally deficient.

I. LEGAL AND POLITICAL BACKGROUND

A. A Roadmap to the Military Justice System

To those unfamiliar with the military justice system, its processes and procedures can be complex and difficult to understand. As such, it is first important to understand that within the military justice system there are no permanently established trial-level courts.[25] Rather, when an accused is first charged with offenses,

[25] United States v. Denedo, 556 U.S. 904, 925-26 (2009) (Roberts, J., dissenting).

the convening authority (generally the accused's commanding officer or another officer higher in the accused's chain of command) has the ability to determine whether the accused has committed an offense worthy of a court-martial or if the offense(s) are better handled through administrative disciplinary processes that are unique to the military.[26] If the convening authority elects to refer charges to a court-martial, and provided that no bargain is struck in the interim that disposes of the charges through administrative channels,[27] a court-martial is convened on an "as needed" basis via a convening order that sets out the designated time and place for the court-martial.[28] The court-martial itself is a trial proceeding presided over either by a military judge alone (bench trial) or with members (the equivalent of a civilian jury, but with some aspects unique to the military system).[29] Once the adversarial aspect of the court-martial concludes, the military judge (if a bench trial) or the members (if it is a member trial) determine the accused's guilt or innocence.[30] If there are findings of guilt on one or more charges, the military judge (bench trial) or the members (if a member court-martial) determine the appropriate sentence.[31] If the sentence involves either a bad-conduct discharge or confinement for a year or more, the accused is entitled to appellate review under Article 66 of the UCMJ[32] (unless the accused waives that right).[33]

The first level of appellate review in the military justice system is the respective service's court of criminal appeals, which in this case is the AFCCA.[34] Once the appropriate service court conducts its review and issues a decision, the appellant (accused) has the right to petition the CAAF for further review.[35] Within the confines of Article 67 of the UCMJ, CAAF can choose first to accept or deny jurisdiction over the case, and then, if it accepts jurisdiction,

[26] *See* R.C.M. 501(a).
[27] R.C.M. 604.
[28] R.C.M. 601; *see also* R.C.M. 504(d).
[29] R.C.M. 501.
[30] R.C.M. 502(b).
[31] R.C.M. 1002, 1006.
[32] UCMJ art. 66 (2012).
[33] R.C.M. 1110.
[34] UCMJ art. 66.
[35] UCMJ art. 67.

to conduct its review accordingly.[36] Once CAAF's review is complete (barring exceptional circumstances or additional petitions), appellate review concludes at that point. On rare occasions, the U.S. Supreme Court will accept petitions for certiorari over military justice cases, but in general such high level review is rarely granted.[37]

B. CAAF's Power to Assume Jurisdiction

In *Kastenberg*, the CAAF majority and dissent each used various sections of Article 67, UCMJ to explain why, in their respective opinions, the court did or did not properly decide that CAAF had jurisdiction to accept this case for review.[38] The purpose of Article 67 is to outline the legal parameters within which CAAF, as a legislative court, may assume subject-matter jurisdiction to hear cases and appeals.[39] Article 67(a)(2) grants CAAF specific authority to hear "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the CAAF for review."[40] This provision is one of the primary issues addressed in this Note because, although TJAG does have such authority in certain instances, under the circumstances in this case, TJAG made unprecedented use of Article 67 by certifying issues to CAAF that involved a non-party claiming no current injury and only hypothetical future harm from a ruling that was not dispositive of the case.[41] As a result, as argued by Judge Ryan in her dissent, under Article 67 of the UCMJ, *Kastenberg*'s issues were not yet ripe for CAAF review.

In this same analytical vein, the All Writs Act states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[42] In *Noyd v. Bond,* the Supreme Court found that the All Writs Act applies in military cases, so while it is clear that a writ of mandamus

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[36] *Id.*
[37] *Id.*
[38] *See* LRM v. Kastenberg, 72 M.J. 364, 367, 371-76.
[39] *See* UCMJ art. 67.
[40] UCMJ art. 67(a)(2).
[41] *Kastenberg*, 72 M.J. at 373 (Ryan, J., dissenting).
[42] 28 U.S.C. § 1651 (2012).

could have issued in *Kastenberg,* whether such a writ should have issued remains an open question because the case did not come before the CAAF via that method.[43] Further, in *United States v. Denedo*, the Supreme Court held that the All Writs Act is not a source of subject-matter jurisdiction in all circumstances[44] and that appellate courts may invoke the All Writs Act only when it aids the "actual jurisdiction" granted under Articles 62, 66, 67, 69, or 73 of the UCMJ.[45] In *Kastenberg*, however, because the issues were presented to CAAF not as a writ, but as questions certified by TJAG after AFCCA had declined to hear LRM's interlocutory appeal in that court, by choosing to hear the issue at all, the CAAF majority at least arguably disregarded the dictates of Article 67, UCMJ, in finding that it had jurisdiction to accept the case.

C. Privileges and Standing

In this particular case, another issue of great concern to the dissenting judges was that LRM did not have standing to be heard by CAAF because she had suffered no injury-in-fact and could not demonstrate any impending harm that she would suffer if CAAF chose not to assume jurisdiction over her interlocutory application.[46] For obvious reasons, where issues involving sexual assaults are concerned, MRE 412 (Rape Shield) and MRE 513 (Patient-Psychotherapist Privilege) have become essential considerations. Not surprisingly then, another provision of the MCM that CAAF heavily relied upon in rationalizing LRM's right to be heard is MRE 412, a rule providing standing in certain cases involving "nonconsensual sexual acts."[47]

In 1978, Congress enacted the Privacy Protection for Rape Victims Act, which gave rise to Federal Rule of Evidence ("FRE")

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[43] Noyd v. Bond, 395 U.S. 683, 695-99 (1969).
[44] United States v. Denedo, 556 U.S. 904, 913 (2009) (citing Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999)).
[45] *See* Major Tyesha E. Lowery, *The More Things Change, the More They Stay the Same: Has the Scope of Military Appellate Courts' Jurisdiction Really Changed since* Clinton v. Goldsmith*?*, ARMY LAW. Mar. 2009, at 49.
[46] *Kastenberg*, 72 M.J. at 373-74 (Ryan, J., dissenting).
[47] *Id.* at 371. S*ee generally* MIL. R. EVID. 412(c)(2).

412.[48] FRE 412 protected rape victims from having to disclose details about themselves and their intimate relationships during rape trials.[49] Two years later, under a mandate by President Carter to bring the FRE and MRE into closer alignment, FRE 412 was adopted for military practice as MRE 412.[50] Unlike its federal counterpart, which applies only in cases of rape and sexual assault, however, MRE 412 is broader in scope in that it applies to all "nonconsensual sexual acts" and has less stringent procedural requirements.[51]

Regarding the procedural admissibility of evidence, MRE 412(c)(2) states, "Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. *The alleged victim must be afforded a reasonable opportunity to attend and be heard.*"[52] This language was crucial in *Kastenberg* since the majority cites it as the principal reason LRM had the right to be heard.[53]

Similarly, MRE 513 also bears upon LRM's request for documents made through her SVC because the impetus behind LRM's desire to argue before the military judge was to prevent A1C Daniels' trial defense counsel from admitting evidence related to her.[54] Like MRE 412, MRE 513 has its origin in civilian law. In 1965, an Advisory Committee drafted proposed Federal Rules of Evidence,[55] which the Supreme Court approved and passed on to

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[48] *See* Carol DiBattiste, *Federal and Military Rape Shield Rules: Are They Serving Their Purpose?*, 37 NAVAL L. REV. 123, 124 (1988); *see also* MCM, *supra* note 11, App. 22, at A22-36.
[49] DiBattiste, *supra* note 48, at 124.
[50] *Id.*
[51] *Id.*; *see also* MCM, *supra* note 11, App. 22, at A22-36.
[52] MIL R. EVID. 412(c)(2) (emphasis added).
[53] *Kastenberg*, 72 M.J. at 368-70.
[54] Although neither this case nor the briefs clarify what evidence the Trial Defense Counsel sought to admit against LRM's wishes, most often such matters involve either medical/counseling records or the prior sexual history of the victim (to include past interactions between the victim and the accused).
[55] Major Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAW. Sept. 2003, at 1, 2.

Congress in 1972.[56] Within these proposed rules, FRE 501 and 502 were the only portions adopted by Congress, so those two provisions, coupled with independent state laws, govern federal practice with respect to privileges. The Advisory Committee drafters had proposed nine additional privileges in 1965, including the attorney-client privilege, marital privileges, and patient-psychotherapist privileges.[57] However, because Congress never formally adopted these additional provisions, federal courts split over whether or not FRE 501's language extended to the patient-psychotherapist relationship until *Jaffee v. Redmond*, when the U.S. Supreme Court held that FRE 501 did include that privilege; even so, Congress has yet to explicitly adopt this privilege in the federal rules.[58]

While civilian law on this privilege remains precedential, not statutory, in 1999, at the specific behest of President Clinton, the military adopted most of the language from the proposed federal version of the patient-psychotherapist privilege and established MRE 513 as a stand-alone provision in the MCM.[59] Before that date, military courts had never recognized a patient-psychotherapist privilege and today, over fifteen years later, military courts still struggle to define its applicability and bounds within the military justice system.[60] Additionally, much like MRE 412, MRE 513 contains a provision with respect to procedural admissibility that allows patients to claim the privilege either personally or through trial counsel, affords victims the opportunity to attend hearings related to the privilege, and allows them to be heard if doing so does not unduly obstruct or delay the court-martial process.[61]

D. The Sexual Assault Problem

Beyond MRE 412 and 513 considerations, numerous legislative and policy initiatives have focused on addressing sexual assault throughout all branches of the military given the nature of

[56] *Id.* at 2.
[57] *Id.*
[58] *Id.* at 3.
[59] *Id.* at 2.
[60] *Id.*
[61] *See* MIL R. EVID. 513(c), 513(e)(2).

these crimes and their seemingly high incidence in recent years.[62] Major changes began in 2007 when, contrary to DoD Subcommittee recommendations, Congress approved significant changes to Article 120 of the UCMJ, a decision that caused it to read more like Title 18 of the United States Code and less like any other article in the MCM.[63] In the 2005 MCM, Article 120 was termed "Rape and Carnal Knowledge" and contained only four subsections;[64] the current version of Article 120 specifies 14 categories of sexual offenses, including rape, sexual assault, aggravated sexual contact, and abusive sexual contact.[65] Unfortunately, the fact that little legislative history, policy guidance, or congressional statements of intent accompanied this revision has made uniform application of this article difficult.[66]

As concern grew over the issue of sexual assaults in the military, the Air Force, the Senate Armed Services Committee ("SASC"), and DoD all took action. Perhaps partially in response to two high-profile incidents involving the Air Force's handling of sexual assault amongst its personnel,[67] in January 2013, the Air Force

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[62] *See* SEXUAL ASSAULT PREVENTION AND RESPONSE, U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 12-13, 25 (Vol. 1, 2012) [hereinafter SEXUAL ASSAULT REPORT], *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf; *see also* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672 (2013); Jackie Speier, *Why rapists in military get away with it*, CNN.COM (June 21, 2012), http://www.cnn.com/2012/06/21/opinion/speier-military-rape/ (last visited Aug. 26, 2014); Craig Whitlock, *Military chiefs balk at sexual-assault bill*, WASH. POST (June 4, 2012), http://www.washingtonpost.com/world/national-security/military-chiefs-balk-at-sex-assault-bill/2013/06/04/cd061cc4-cd1c-11e2-ac03-178510c9cc0a_story.html (last visited Aug. 26, 2014).

[63] Lieutenant Colonel Thomas E. Wand, *The New Article 120, UCMJ*, 34 REPORTER, no. 1, 2007, at 28, 29; *see also* 18 U.S.C. §§ 2241-2248 (2012).

[64] *See* UCMJ art. 120 (2005).

[65] Brigadier General (Ret.) Jack Nevin & Lieutenant Joshua R. Lorenz, *Neither a Model of Clarity nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the "New" Article 120*, 67 A.F. L. REV. 269, 277 (2011).

[66] *Id.* at 277.

[67] *See* United States v. Wilkerson, General Court-Martial Order No. 10, dated Feb. 26, 2013, *available at* http://www.foia.af.mil/shared/media/document/AFD-130403-023.pdf; *see also Lackland sex scandal prompts U.S. Air Force to discipline former commanders*, THE ASSOCIATED PRESS, May 2, 2013, *available at*

created SVC as a pilot program to assign military counsel to help victims of sexual crimes navigate the military justice system and to ensure that the victims' interests (predominantly as they pertained to MRE 412 and 513) were protected. Later that spring, the DoD's Sexual Assault and Prevention ("SAPR") Office released an extrapolated survey alleging that in 2011 alone, some 26,000 service members were victims of sexual assaults ranging in severity from unwanted touching to forcible rape.[68] A month later, SASC called on the Joint Chiefs of Staff to testify at hearings that addressed this survey and more generally the need to stem sex crimes in the military.[69] At the same time, members of Congress demanded the removal of military commanders from the court-martial process and began work on sweeping reforms to the UCMJ via the National Defense Authorization Act for Fiscal Year 2014, thereby tying compliance with these enactments to overall military funding.[70] In the midst of this volatile political atmosphere, CAAF decided *Kastenberg*, a case that may be one of its most influential decisions in recent years. Indeed, because it effectively determines the nature and extent of the SVC Program, the holding in *Kastenberg* will likely shape the way that Judge Advocates in all branches of military service approach, structure, and try cases in the future.

II. OVERVIEW OF THE CASE

In 2012, A1C Nicholas Daniels was accused of raping and sexually assaulting A1C LRM at Holloman Air Force Base in New Mexico.[71] His arraignment hearing occurred only one day after the

http://www.cbsnews.com/news/lackland-sex-scandal-prompts-us-air-force-to-discipline-former-commanders/.

[68] SEXUAL ASSAULT REPORT, *supra* note 62. *But see* Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 19, 2013, http://online.wsj.com/news/articles/SB10001424127887323582904578484941173658754 (disputing this 26,000 figure based on the methods of extrapolation used from the survey results).

[69] *Pending Legislation Regarding Sexual Assaults in the Military,* 113th Cong. (2013), *available at* http://www.armed-services.senate.gov/hearings/oversight-pending-legislation-regarding-sexual-assaults-in-the-military.

[70] The NDAA for Fiscal Year 2014, which included a provision requiring all branches of the Armed Forces to establish a SVC Program, became law on December 26, 2013. National Defense Authorization Act for Fiscal Year 2014 § 1716.

[71] LRM v. Kastenberg, 72 M.J. 364, 366 (C.A.A.F. 2013).

Air Force had established its SVC test program and, following that hearing, A1C Daniels was charged with three violations of Article 120, UCMJ.[72]

Prior to Daniels' arraignment hearing, LRM's SVC filed a formal notice of appearance.[73] Among other things, the notice asserted that LRM had standing to be heard on any MRE 412, 513, or 514 (Victim-Advocate Privilege)[74] issues in which she was either the victim, patient, or witness.[75] During the arraignment proceeding, LRM's SVC initially indicated that he did not wish to argue at any future MRE 412 or 513 hearing.[76] However, later in the same hearing, he alleged that there might be occasions where LRM's interests diverged from the government's prosecutorial interests[77] and that, in those instances, he wished to reserve LRM's right to present argument or otherwise participate in the proceeding.[78]

When the SVC attorney made this statement, Lieutenant Colonel Kastenberg, the Military Judge, using his statutory discretion,[79] chose to treat each of the attorney's requests for production of documents as a motion in fact, and then found that LRM had no standing either personally or through counsel to petition the court for such relief.[80] Judge Kastenberg further determined that LRM's SVC could not argue evidentiary matters that were in LRM's interest because it would force the accused to face two independent government attorneys on each of the same facts.[81]

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[72] *Id.*
[73] *Id.*
[74] *Id.* Reference to MRE 514 is made in this note as it is mentioned in the CAAF opinion. However, its implications are never explicitly addressed by the Court so it will not be discussed here either.
[75] *Kastenberg*, 72 M.J. at 366.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Military Judges are statutorily granted broad discretion with respect to the types of issues they choose to hear and the manner in which a court-martial is conducted. *See* R.C.M. 801.
[80] *Kastenberg*, 72 M.J. at 366*; see also* Brief for Appellant at 5, LRM v. Kastenberg, 72 M.J. 346 (C.A.A.F. 2013) (No. 2013-05).
[81] *Kastenberg*, 72 M.J. at 366-67.

Following this ruling, LRM filed a motion to reconsider.[82] In that motion, LRM

> ask[ed] for relief in the form of production and provision of documents, and that the military judge grant LRM limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, [Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)], and the United States Constitution.[83]

The Military Judge denied that motion.[84] This denial led LRM to apply for extraordinary relief in the form of a writ of mandamus addressed to AFCCA,[85] but that court dismissed the petition when the judges concluded that AFCCA lacked the jurisdiction necessary to review it.[86] This ruling prompted all of the further proceedings in the case.

III. THE COURT'S HOLDING

Following AFCCA's dismissal of the petition, TJAG's office certified three issues to CAAF, exercising what it believed to be its statutory prerogative under Article 67(a)(2) of the RCM:[87]

> I. Whether the AFCCA erred by holding that it lacked jurisdiction to hear A1C LRM's petition for a writ of mandamus;
>
> II. Whether the military judge erred by denying A1C LRM the opportunity to be heard through counsel thereby denying her due process under the military rules of evidence, the Crime Victims' Rights Act and the United States Constitution; and
>
> III. Whether this honorable court should issue a writ of mandamus.[88]

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[82] *Id.* at 367.
[83] *Id.* (internal quotation marks omitted).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Kastenberg*, 72 M.J. at 367.

In answering these questions, the CAAF majority in *Kastenberg* held three-to-two that the trial judge's ruling was erroneous for three reasons.[89] First, the majority decided that by preventing LRM from presenting arguments concerning MRE 412 and 513, the Military Judge improperly limited her ability to be heard on claims of privilege and admissibility.[90] Second, the majority believed that the Military Judge's ruling at the outset of the court-martial was a "blanket prohibition" that prematurely precluded LRM from being represented by counsel on MRE 412 or 513 issues without first knowing all of the circumstances surrounding those requests.[91] Third, CAAF stated that the Military Judge erroneously interpreted the law when he cast the issue as one of "judicial impartiality."[92]

In dissent, Judge Ryan, joined in part by one other CAAF judge, disagreed with the majority's holdings on two separate bases. First, the dissenting judges argued that LRM lacked standing to petition CAAF because she had not suffered any actual or "certainly impending" legal harm at that stage in the proceeding.[93] Second, Judge Ryan alone took exception to TJAG's certification of the three issues to CAAF because she believed TJAG did so prematurely and in violation of the United States Constitution and the UCMJ.[94]

IV. ANALYSIS

The CAAF majority's holding that AFCCA's determination that it lacked jurisdiction was erroneous is consistent with CAAF's traditionally expansive view of the military courts' appellate jurisdiction, and its own recent decision in *Center for Constitutional Rights v. United States*.[95] Nonetheless, because TJAG appears to have prematurely certified issues to CAAF in violation of Articles 67(a)(2), 62, 66, and 69, the ruling by those same judges that CAAF had

[88] *Id.* at 365.
[89] *Id.* at 364.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Kastenberg*, 72 M.J. at 373 (Ryan, J., dissenting).
[94] *Id.* at 376.
[95] Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129-30 (C.A.A.F. 2013).

proper authority to hear and decide the issue when it did was contrary to established precedent by other courts, including the U.S Supreme Court.

When examining LRM's right to be heard, the CAAF majority also found that LRM had a statutory right to be heard on matters related to MRE 412 and 513.[96] However, because TJAG's certified questions involved interlocutory matters raised by a non-party to the court-martial that were not necessarily finally dispositive of the case, the CAAF majority also appears to have circumvented the principle of justiciability because the issue was neither ripe for review nor had LRM sustained her burden of articulating a particularized present or future harm sufficient to warrant a finding of legal standing at that point in the proceeding.

CAAF's decision regarding a writ of mandamus provides substantive guidance to military judges who must exercise discretion in making trial determinations. Further, although it could have taken up LRM's writ of mandamus denied by the AFCCA, by choosing not to do so, CAAF reaffirmed its own long-standing deference to the discretion of military trial judges in hearing and deciding cases.

A. Subject-Matter Jurisdiction

The majority opinion in *Kastenberg* begins with the determination that CAAF had jurisdiction to hear this case under Article 67(a)(2) because the matter had been reviewed by AFCCA and TJAG had exercised its statutory prerogative to certify the case to CAAF under Article 62, UCMJ.[97] In support of its decision, the majority cited *United States v. Curtin* for the principle that LRM's application was properly considered a "case" under Article 67(a)(2) as, in *Curtin*, a petition for extraordinary relief filed by the government was denied by AFCCA, then subsequently certified by TJAG to CAAF.[98] Indeed, CAAF expressly held in *Curtin* that "the definition of a case as used within that statute [Article 67(a)(2)]

[96] *Kastenberg*, 72 M.J. at 369-70 (majority opinion).
[97] UCMJ art. 67(a)(2).
[98] *See* United States v. Curtin, 44 M.J. 439, 440 (C.A.A.F. 1996).

includes a final action by an intermediate appellate court on a petition for extraordinary relief."[99] In this case, the final action was the dismissal of LRM's petition by AFCCA, so it seems at first blush that jurisdiction exists.

The fallacy in this reasoning, however, is that *Curtin* relies on the holding in *United States v. Redding*, a case where, unlike here, CAAF dealt with an interlocutory ruling on the right to counsel that would unquestionably have ended the litigation at the trial level.[100] Indeed, in finding that CAAF must act in that case, the majority in *Redding* explicitly based their decision on the fact that the lower court ruling was dispositive of the entire proceeding.[101] Then, in *Curtin*, where the issue was a non-dispositive interlocutory order on issuance of subpoenas, with no discussion and contrary to its own precedent in *Redding*, the CAAF majority simply extended its ability to assume jurisdiction to those cases as well, a point emphasized in the *Kastenberg* dissent.[102] Thus, the majority's extension of *Redding*'s holding to *Curtin* as a way to find jurisdiction over LRM's interlocutory appeal in *Kastenberg* is potentially problematic because it circumvents the otherwise stringent requirements of Article 67(a)(2) that a "case" be properly certified.

After its determination that CAAF would accept jurisdiction over the matter, the CAAF majority found that AFCCA's determination regarding lack of jurisdiction was erroneous given the language contained in the All Writs Act[103] and Article 66 of the UCMJ.[104] As the first appellate court to hear this case, AFCCA had determined that it lacked jurisdiction to hear LRM's case under the

[99] *See id.* (citing United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981)).
[100] *Redding*, 11 M.J. at 104.
[101] *Kastenberg*, 72 M.J. at 375 (Ryan, J., dissenting).
[102] *See Curtin*, 44 M.J. at 440.
[103] The All Writs Act provides that "(t)he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law." 28 U.S.C. § 1651 (2012).
[104] Article 66 of the UCMJ provides for mandatory appellate review in any case where: (1) the approved sentence is death, dismissal, dishonorable discharge, or a bad conduct discharge and (2) appellate review has not been waived by the service member under Article 61. UCMJ art. 66.

All Writs Act because the judge believed that a finding of jurisdiction would grant rights and powers to AFCCA not otherwise enumerated in any enabling legislation.[105] However, the CAAF majority found that AFCCA did have jurisdiction to hear the matter[106] both under the plain language of the All Writs Act and the standard for application of that Act as articulated in *Denedo*.[107]

To buttress this conclusion, the *Kastenberg* majority observed that CAAF had previously extended the meaning of "in aid of" to include interlocutory matters where no finding or sentence had yet been adjudged.[108] Further, the majority noted that CAAF had also recently expanded the criteria necessary to satisfy the "in aid of" requirement by determining that the harm alleged must have the potential to affect the findings and sentence of the court-martial at issue directly.[109] Through these holdings, the CAAF majority determined that LRM met the required standard for jurisdiction because her request stemmed from the court-martial process rather than a civil or administrative proceeding, and that, as the alleged victim, she was not a stranger to that process. Therefore, the majority stated that the outcome of AFCCA and/or CAAF decisions in this case might well bear on the court-martial's ultimate findings and sentencing.[110]

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[105] LRM v. Kastenberg, 2013 WL 1874790 1, 6 (A.F. Ct. Crim. App. 2013) (referring to the UCMJ, MCM, federal statutes, governing precedent, or the SVC Program).
[106] Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) (stating that the standard application of the All Writs Act requires only that the requested writ be "in aid of" the court's existing jurisdiction and "necessary and appropriate" given the circumstances of the case).
[107] LRM v. Kastenberg, 72 M.J. 364, 367-68 (C.A.A.F. 2013) (citing Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008)).
[108] *See* Hasan v. Gross, 71 M.J. 416, 416-17 (C.A.A.F. 2008).
[109] *Kastenberg*, 72 M.J. at 368. *See also* Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129-30 (C.A.A.F. 2013).
[110] *Kastenberg*, 72 M.J. at 367; c*f. Ctr. for Constitutional Rights*, 72 M.J. at 129-30 (finding that the news media had not met their burden of establishing that the CAAF had jurisdiction to grant anticipatory jurisdiction to their claim because the matter concerned involved a civil action that was brought by strangers to the courts-martial process who were asking for relief, which had no bearing on the findings or sentence that may ultimately be adjudged at courts-martial).

While Judge Ryan's dissent did not take issue with the majority respecting AFCCA's jurisdiction to hear the case at some point, she did argue that it was inappropriate for CAAF to hear the certified issues when it did. Her contention was that CAAF hearing the case allowed TJAG to make "unprecedented use" of Article 67(a)(2) by subverting the otherwise stringent requirements of Article 62[111] and the jurisdictional requirements of Article 67 necessary for invoking the All Writs Act.[112] Stated another way, while it is true that LRM could have submitted an ex writ in accordance with the All Writs Act directly to CAAF after the AFCCA denied her application there that is not what happened. Instead, TJAG chose to certify questions to CAAF, which would require CAAF to accept jurisdiction on the basis of Article 67, UCMJ. Because this was the manner in which these issues reached CAAF, Judge Ryan found a variety of facts and circumstances that made TJAG's actions inappropriate.[113] In particular, she took issue with the fact that TJAG's certification was improper under the applicable provisions of the UCMJ, most notably Article 69(a)-(d).[114] That Article details the circumstances under which TJAG may seek to modify or set aside the findings and sentence adjudged by AFCCA, and specifically includes a requirement that there must be a finding or sentence before TJAG can certify any issues.[115] Based on these factors, Judge Ryan's dissent concluded that Article 69 provides no basis or authority by which the TJAG could pursue interlocutory relief on issues that are not dispositive to the case, let alone certify such issues to CAAF.[116] Indeed, under Article 67(a)(2) and CAAF's own decision in *Center for Constitutional Rights*, Judge Ryan opines that TJAG had not even properly certified a "case" on which relief could be granted within the meaning of the aforementioned

[111] Article 62 of the UCMJ describes the government appeals process, to include the instances in which appeals may be made and the process for making such appeals. UCMJ art. 62 (2012).
[112] *Kastenberg*, 72 M.J. at 374 (Ryan, J., dissenting). *See generally* Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012) (requiring that a heightened standard for mandamus relief be applied when determining whether a military judge should be removed for inability to exercise and maintain impartiality towards the defendant).
[113] *Kastenberg*, 72 M.J. at 374 (Ryan, J., dissenting).
[114] *Id.*
[115] UCMJ art. 69(a)-(d) (2012).
[116] *Kastenberg*, 72 M.J. at 374-75.

statute.[117] Finally, the dissent challenges the majority's use of *Curtin* (citing *Redding*) to legitimize CAAF's decision to hear the case on the ground that *Redding* is only applicable after a final disposition had been reached, and here the lower court ruling was not a final disposition.[118]

Given CAAF's propensity to interpret statutory construction broadly when deciding issues of jurisdiction, the majority's determination that AFCCA likely had jurisdiction in *Kastenberg* was nonetheless consistent with CAAF's history of expansive application of its own jurisdiction.[119] Specifically, because of CAAF's past liberal interpretation of its right to accept jurisdiction under the All Writs Act in *Denedo* and *Hasan*, the majority's determination to accept jurisdiction in this case is consistent, predictable, and defensible. Indeed, this is a particularly appropriate conclusion given that CAAF often relies almost entirely upon its own precedent to justify such decisions even when, as in *Curtin*, the legal basis for the precedent is quite weak.[120] By relying upon such precedent in this case, however, CAAF broadly interpreted its ability to accept jurisdiction of an interlocutory issue that did not reach CAAF via an ex writ, and was not dispositive of the case—a novel result that tends toward judicial activism.

From an activist standpoint, a prompt decision by CAAF on the SVC Program both promotes judicial economy and provides political and social benefits in future litigation, justifying the

[117] *Id.* at 375.
[118] *Id.* at 376 (citing United States v. Redding, 11 M.J. 100, 102-04 (C.M.A. 1981)).
[119] *Id.* at 367.
[120] While the subject matter and types of appeals or writs submitted for the CAAF's consideration varied, in both of these cases the CAAF found that subject-matter jurisdiction existed. *See* Denedo v. United States, 66 M.J. 114, 120 (C.A.A.F. 2008) (finding that despite the fact a final disposition was issued over seven years prior, the CAAF had subject-matter jurisdiction to review the findings and sentence under Article 66 given that Denedo's claim of ineffective assistance of counsel was "in aid of" the existing jurisdiction); *see also* Hasan v. Gross, 71 M.J. 416-17 (C.A.A.F. 2012) (finding that when applying a "heightened standard" for mandamus relief, the CAAF should issue the requested writ for removal of the military judge given that the surrounding circumstances of the case would impair the military judge's impartiality).

assumption of jurisdiction. From a more judicially restrained perspective, such as the position advocated by the dissent, the majority erred in its interpretation of Article 67(a)(2) and CAAF's prior holdings in *Curtin* and *Redding*, undermining the rule of law.[121] Indeed, from the dissent's strict constructionist viewpoint, although *Curtin* appears to lend support to the majority's position, the majority's improper extension of *Redding* and the distinguishable subject matter in that case make *Curtin* applicable only sparingly, if at all.[122] On the other hand, the CAAF majority's finding is generally in keeping with the expansive view these particular CAAF judges have shown in prior jurisdictional decisions under the All Writs Act, petitions for extraordinary relief, and on interlocutory appeals.[123]

Unlike CAAF, however, the U.S. Supreme Court does not favor interlocutory appeals and on many occasions has limited their use because intermediate applications and relief generally hinder judicial efficiency, waste judicial resources, and delay final dispositions.[124] For example, in *Clinton v. Goldsmith*, a case that involved predominantly administrative matters rather than legal issues, the Supreme Court limited CAAF's broad interpretation of its ability to assume jurisdiction over a wide array of issues by finding that CAAF had exceeded its jurisdictional limits in hearing the *Clinton* case at all.[125] *Clinton* is viewed by many as an effort by the Supreme Court to rein in CAAF's expansive interpretation of its jurisdictional prerogative.[126] Despite this ruling, CAAF continues to apply a broad approach to its jurisdictional limits when hearing cases involving the All Writs Act, extraordinary relief petitions (including writs of mandamus), and interlocutory appeals.[127]

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[121] *Kastenberg*, 72 M.J. at 375 (Ryan, J., dissenting).
[122] *See id.*
[123] *See Denedo*, 66 M.J. at 120; *see also Hasan*, 71 M.J. at 416-17.
[124] *See* Erwin Chemerinsky, *Court Keeps Tight Limits on Interlocutory Review*, 46 TRIAL 52 (Mar. 2010).
[125] Clinton v. Goldsmith, 526 U.S. 529, 1544-45 (1999) (stating that CAAF did not have authority to hear this case given that it focused predominantly on administrative matters that were outside the scope of CAAF's jurisdiction).
[126] *See* Lowery, *supra* note 45, at 51.
[127] *Id.* at 49; *see also Ctr. for Constitutional Rights*, 72 M.J. at 129-30; *Hasan*, 71 M.J. at 416-17; *Denedo*, 66 M.J. at 119.

What is likely happening in *Kastenberg* then is that, while acting in a manner consistent with its own history of broadly interpreting its ability to accept jurisdiction over a myriad of issues, by declining to remand this case back to the AFCCA or the trial court for lack of jurisdiction to hear the case when it did, CAAF has seemingly disregarded both procedural and substantive missteps by TJAG in order to weigh in on sexual assault in the military at the earliest opportunity, possibly because it is an issue of high current interest and the future success of the SVC Program would almost certainly be impacted by the outcome of the case. Further, by stepping in to hear *Kastenberg*, CAAF will necessarily shape the implementation and limitations (or lack thereof) for the SVC Program. Thus, despite the likely propriety of CAAF's finding that the trial court and the appellate court have jurisdiction to consider a victim's right to be heard independently, CAAF potentially sets a dangerous precedent by accepting the question on an interlocutory basis, without a fully developed record, and contrary to the petitioner's clear statutory obligation to show both harm and legal interests diverging from the government's case. Indeed, while it can be argued that an advisory opinion on a writ of mandamus may have been an appropriate avenue for CAAF to address the important issues in this case,[128] the case did not arrive at CAAF via such a writ, but through certification by TJAG. Under these circumstances, not even the significant legal, political, and social effects of sexual assault in the military warrant such an open approach to litigation.

Another practical factor that may have impacted CAAF's decision to hear this case on interlocutory appeal is the highly-charged political atmosphere currently surrounding the issue of sexual assaults in the military. Against that background, it is not surprising that CAAF heard this case and that the majority adopted an interpretation of MRE 412 and 513 that allows alleged victims (through counsel) to participate actively in the prosecution of such crimes. While this is a laudable end-state, such external considerations should not interfere with the legal procedure that allows cases to reach CAAF in the first place. Further, the impact of this case is multiplied because, being the first case that CAAF has

[128] Sampson v. United States, 724 F.3d 150, 159-160 (1st Cir. 2013).

heard involving the SVC Program, *Kastenberg*'s holding will undoubtedly have a significant influence upon all similar cases in the future.

In sum, *Kastenberg* illustrates how CAAF has used *Curtin* and *Redding* to once again support a liberal interpretation of its own jurisdiction. It does so by finding that LRM's appeal satisfied the requirements enunciated in *Hasan* and *Center for Constitutional Rights* and by disregarding the strictures of Article 67(a)(2) regarding the matter's presence before CAAF by way of an incorrect use of certification to seek review of an interlocutory trial-level ruling.[129] Additionally, while largely ignoring the statutory language of Article 67(a)(2) for jurisdiction, the CAAF majority then relies on literal application of MRE 412 and 513 to find that LRM has legal standing to be heard in this case.[130] As argued in Judge Ryan's dissent, however, *Curtin* and *Redding* are distinguishable cases that offer no sound legal basis for circumventing the clear statutory language of Article 67(a)(2) and the All Writs Act, and interpreting those cases otherwise invites significant problems in the future.[131] Indeed, in what can be construed as its zeal to find jurisdiction to hear a "hot button" case of high current interest, CAAF has opened the door to interlocutory appeals that would never have been granted in the past and which will likely tie up judicial resources and delay ultimate disposition of future cases in ways that CAAF and the framers of the statutes at issue never envisioned. This outcome is problematic with respect to the precedent it sets for future cases.

B. Standing

Regarding the question of whether or not LRM had standing to be heard in *Kastenberg*, the CAAF majority found that, although LRM was properly considered a nonparty in the government's original case, by the holding in *United States v. Daniels* she did have standing to be heard under MRE 412(c)(2) and 513(e)(2).[132] The quintessential test for standing was articulated by the Supreme Court

[129] LRM v. Kastenberg, 72 M.J. 364, 374-75 (C.A.A.F. 2013) (Ryan, J. dissenting).
[130] *Id.* at 369-70 (majority opinion).
[131] *Id.* at 374-75 (Ryan, J., dissenting).
[132] *Id.* at 368 (majority opinion).

in *Lujan v. Defenders of Wildlife*.[133] In *Lujan*, the Supreme Court stated that for a party to have standing, they must prove: (1) that the individual has suffered an "injury in fact;" (2) that a causal connection exists between the injury and conduct complained of; and (3) the injury is redressable by a favorable court decision.[134] In 2010, the Supreme Court qualified the *Lujan* test in *Monsanto Co. v. Geertson Seed Farms*, stating that "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'"[135] The Supreme Court reaffirmed that holding in *Clapper*, when it applied that language in determining whether an injury-in-fact had occurred.[136] By that standard, the dissent is correct that neither present nor future injury had been shown and, as a result, that TJAG's certified issues were not properly before the court.

Instead of adopting the legal precedent established by those cases, however, the majority chose to focus on the statutory language of MRE 412 and 513. Specifically, the majority relied upon the language that "before admitting evidence under the rule,[137] the military judge must conduct a hearing where 'the alleged victim must be afforded *a reasonable opportunity to attend and be heard*.'"[138] According to the majority, this language allows LRM to protect her rights and privileges by active participation in the litigation,[139] as both MRE 412 and 513 allow for the calling of witnesses and neither contains any indication that the legislative authors intended that a victim could or should be excluded as such a witness.[140]

Further, the majority stated that every other time that the MRE or RCM uses the term "to be heard," it appears in the context of

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[133] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
[134] *Id*.
[135] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 140 (2010).
[136] Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138, 1147 (2013).
[137] In this particular quotation, the majority is directly addressing MRE 412(c)(2). However, MRE 513(e)(2) contains nearly identical language. MIL. R. EVID. 412(c)(2), 513(e)(2).
[138] LRM v. Kastenberg, 72 M.J. 364, 369 (C.A.A.F. 2013) (citing MIL. R. EVID. 513(e)(2)) (emphasis added).
[139] *Id.* at 368.
[140] *Id*. at 370.

allowing parties to be heard through counsel on legal matters.[141] To support this argument, the majority cites *Carlson v. Smith*, a case where the petitioners were given the opportunity to present evidence, arguments, and legal authority to a military judge regarding the disclosure of covered documents. The majority used *Carlson* to show that on at least one other occasion CAAF had permitted extraordinary relief for sexual assault victims in cases involving MRE 412. [142] The majority concluded by discrediting Judge Kastenberg's assertion that LRM's request should be viewed as "novel" by citing a number of federal cases[143] that allow victims of sexual assault to be represented at pretrial proceedings by legal counsel[144] and by noting that the Supreme Court and other federal courts have frequently acknowledged and upheld limited participant standing.[145]

Judge Ryan's dissent counters the majority's arguments by asserting that LRM's request did not merit consideration because, at the time of her request, neither the prosecution nor the defense had objected to LRM receiving copies of any motion that pertained to MRE 412, 513, or 514,[146] and in fact had actually provided all documentation that had been requested by LRM's SVC up to that point in the proceedings.[147] Further, at the beginning of A1C Daniels' arraignment hearing, LRM's SVC attorney had stated that LRM's interests were aligned with those of the government.[148] Because the parties' interests were aligned, at the time this issue was certified to the appellate court, Judge Ryan argues that LRM had suffered no "actual harm" with respect to any rights or privileges

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[141] *Id.*
[142] According to the majority opinion, the case relied upon for this assertion is still in a summary disposition status. *Id.* at 370 (citing Carlson v. Smith, 43 M.J. 401 (C.A.A.F. 2005)).
[143] *See* Brandt v. Gooding, 636 F.3d 124, 136-37 (4th Cir. 2011); In re Dean, 527 F.3d 391, 393 (5th Cir. 2008).
[144] *Kastenberg*, 72 M.J. at 370.
[145] *Id.* at 368; *see also* Church of Scientology v. United States, 506 U.S. 9, 11, 17 (1992); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).
[146] *Kastenberg*, 72 M.J. at 373 (Ryan, J., dissenting).
[147] *See id.*
[148] *Id.*

pertaining to MRE 412 or 513.[149] In addition, LRM had not articulated any "impending harm" that she might suffer in the future if she were not allowed to present legal arguments at the hearing, as is necessary under the standard adopted by the Supreme Court in *Clapper v. Amnesty Int'l USA*.[150] Rather, according to the dissent, LRM's SVC merely sought to "reserve the right" to argue at future evidentiary hearings concerning MRE 412 or 513 should LRM's interests diverge from those of the government at some later time.[151] The dissent deemed this vague prospect of future injury insufficient to warrant a finding that LRM had standing as a party to the court-martial.[152]

Stated another way, the thrust of the dissent was not that the victim could never be entitled to participate in the proceeding at hand, but rather that LRM did not sustain the required procedural burden to do so at the time she brought this particular application. This is a strong argument given the Supreme Court's recent decision in *Hollingsworth v. Perry*, which reaffirmed its holding in *Clapper* concerning "impending harm."[153] Had LRM's SVC been able to articulate adequately the harms that LRM had suffered or likely would suffer in the future if she was not allowed to participate in MRE 412 or 513 hearings, then it is probable that the trial judge and/or the dissenting judges on appeal would have found that her request merited consideration. Since this did not occur, the dissent appears to be correct in its argument that LRM did not have current standing.

What LRM's SVC perhaps should have argued was that LRM would or could be severely prejudiced if, in the course of the government's prosecution or the accused's defense, exculpatory evidence was admitted under an exception to the military rape shield law's otherwise stringent protections against admission of a victim's prior sexual history. Such exceptions include proof that the source of

[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Kastenberg*, 72 M.J. at 374 (Ryan, J., dissenting) (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1136, 1143 (2013)).
[153] Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013).

evidentiary semen or physical injury to the victim came from someone other than the accused, evidence of sexual behavior by the alleged victim with the defendant that could be offered to prove consent, and/or evidence that if excluded could harm the constitutional rights of the defendant.[154] If any one or more of these exceptions are alleged, then the military judge would be compelled to weigh and balance the probative value of the evidence versus its prejudicial effect before deciding whether it will be admitted.[155]

The brief submitted on behalf of LRM gives reason to believe that LRM and Daniels were already engaged in or had previously engaged in sexual acts with one another at the time LRM demanded that Daniels cease sexual contact with her.[156] It is therefore likely that his trial counsel would seek to invoke at least the second or third exception, an effort that would clearly impact the government's case and implicate LRM's rights under MRE 412. Accordingly, had her attorney particularized the harm that would befall LRM by such disclosure (the victim's interests in the case would clearly be damaged if the defendant raised any of these exceptions but the victim was not present to refute them), it is likely that no one would have questioned her standing to be heard when the issues arose. By way of example, had LRM sought assistance from a mental health provider, signed a consent form in the belief that her disclosures to that provider would be confidential, then discovered that her case file had been subpoenaed by the defense for use in the court-martial, the CAAF majority would have had stronger justification to find that she had standing.[157] In the absence of such showings, however, the dissenting opinion makes a persuasive argument that, at least at that point in the proceedings, LRM's application merited no consideration at all.

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[154] DiBattiste, *supra* note 48, at 124.

[155] *Id.* at 133.

[156] Brief for Appellant, *supra* note 80, at 3 (implying that LRM and Daniels were already engaged in sexual activity when LRM requested that Daniels stop having sex with her, based on LRM's statement made to A1C Daniels that "[s]he was done having sex").

[157] *See* Major Christopher J. Goewert & Captain Seth W. Dilworth, *The Scope of a Victim's Right to be Heard Through Counsel*, 40 THE REPORTER no. 3 27, 29 (2013) (discussing a similar hypothetical for why it is insufficient to have trial counsel represent a victim's interests at court-martial).

C. *Writ of Mandamus*

The CAAF majority determined that deciding the issues raised in LRM's writ of mandamus to the AFCCA was not appropriate at their level, and chose instead to remand the case to the trial judge for further proceedings consistent with CAAF's opinion on the issues of jurisdiction and standing.[158] Given this determination, the argument that CAAF ought not have taken up this case at all is somewhat ameliorated by the fact that it ultimately followed its own precedent and that of Article III courts to allow writs of mandamus only sparingly.[159] Thus, though CAAF declined to make a first or final ruling on these matters at the appellate level,[160] its decision provides substantive guidance and broad parameters within which the Military Judge is required to operate regarding LRM's ability to be heard through her SVC on evidentiary matters.

The majority decision allows LRM to be heard through her SVC with respect to MRE 412 and 513 issues without requiring her to show personal interests contrary to the government's case or the possibility of present or future harm. However, by remanding the case without taking action on LRM's requested writ, CAAF adhered to its policy of deference to military trial judges under RCM 801.[161] Further, while requiring the lower court to afford LRM the opportunity to be heard, CAAF also stated that the trial judge could still impose limitations on LRM's opportunities.[162] Indeed, CAAF reminded practitioners that the military judge can prescribe restrictions concerning the manner in which the victim may be "heard," and that the majority's determination did not apply to victims who were not already represented by counsel at the time of their MRE 412 or 513 hearings. In addition, the *Kastenberg* decision

[158] LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013).
[159] *See* Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (citing Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986)) (stating that the use of the All Writs Act as the source of the Court's authority to issue a requested injunction should be used sparingly and only in exigent circumstances).
[160] *Kastenberg*, 72 M.J. at 372.
[161] R.C.M. 801; *see also* United States v. Mosley, 42 M.J. 300, 303 (C.A.A.F. 1995) ("[A] military judge enjoys broad discretion on evidentiary and procedural matters.").
[162] *Kastenberg*, 72 M.J. at 371.

did not allow for appeal of former adverse evidentiary rulings and reaffirmed that if the victim's interests are entirely aligned with the government's case, it could curtail the victim's ability to be heard.[163] Thus, the majority decision here may not be as arbitrary as it might otherwise seem.

V. CONCLUSION

Kastenberg illustrates how government policy can affect and even drive judicial decision-making. Arguably, the substantive and procedural defects in this case were sufficient to warrant affirming AFCCA's dismissal if, as urged by the dissenters, CAAF had strictly applied existing law and precedent. Such a course would still have preserved the issues for resolution after development of a full record at the trial level. Equally clear in this decision is the CAAF majority's desire to address the issue of sexual violence in the military promptly and in as comprehensive a manner as possible through utilization of the SVC Program. As a result, the majority struggled to disregard substantive and procedural defects, which in other circumstances might well have resulted in dismissal of the interlocutory application as premature. However, having decided to hear the interlocutory appeal at all, the majority made the proper decision concerning the court's jurisdiction and the victim's standing to participate in the court-martial in at least a limited fashion, and softened the blow by remanding the case to the trial court for further proceedings consistent with that decision.

The concern in this case arises from CAAF reaching its conclusions by finding implicit injury to the alleged victim instead of requiring her to make affirmative allegations and to prove interests divergent to the government's case, as well as actual or potential harm if the court denied her the right to participate in the proceeding through counsel. This "short-cutting" of settled statute and case law, while perhaps undertaken for salutary reasons of judicial economy and protection of victims of sexual assault, nonetheless sets a potentially dangerous precedent for the future. Even though CAAF did not take up the writ of mandamus before the AFCCA and decide

[163] *Id.*

Kastenberg on the merits, it certainly flirted with conduct cautioned against by the Supreme Court in *Hollingsworth* when it said that given the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." [164] Legislators make laws and, absent violence to Constitutional protections of life, liberty and property, courts owe deference to that process because a nation built on law must have the ability to know its laws. More importantly, the nation needs to know that its law and its courts are impervious to the vagaries of expediency and transient political winds.

Since the majority's decision in *Kastenberg*, the SVC Program has expanded from just the Air Force to all of the Armed Services in accordance with congressional mandates set forth in the 2014 National Defense Authorization Act.[165] Further, the rights of victims to be heard have been modestly expanded by the same legislation.[166] In the final analysis, then, regardless of whatever can be said about the manner and means by which the majority heard and decided the issues in the *Kastenberg* case, its determination ultimately led to a "good result" for victims of sexual assault in the military.

[164] Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).
[165] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672 (2013).
[166] *Id.*

COMMENT

ILLEGAL UPON EXIT:
EXAMINING AECA'S BAN ON THE REIMPORTATION OF AMERICAN MILITARY FIREARMS

Melissa Burgess *

Any military firearm manufactured in the United States, then exported, cannot return unless the reimportation meets one of three stringent exceptions. Foreign firearms meeting the same specifications are not blocked. The ban applies even when there are no domestic restrictions on ownership of that model, as the prohibition only concerns items made in the United States but outside of U.S. borders. The President has intervened at the last minute to block the importation of some firearms that meet one of the ban's exceptions, M1 Garands and carbines from the Korean War that are "curios" or "relics." Due to such executive intervention and the administrative requirements for reimportations, the proposed Collectible Firearms Protection Act attempts to revise the process, but in light of Export Control Reform it is at best a temporary fix. A more comprehensive change is necessary either to remove the ban altogether, or to preserve its original intent and place American-made firearms currently held outside the United States on an equal legal footing with their foreign and domestic counterparts.

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INTRODUCTION

From the beaches of Normandy to the jungles of Vietnam, they accompanied our grandfathers and great uncles everywhere. They were a tool, yes, but also a companion, a lifesaver, and a means of becoming a hero. They parachuted out of planes, stormed out of Higgins boats, and famously helped save Private Ryan.[1] They added

[1] The M1 Garand was the standard-issue service rifle in World War II. LEROY THOMPSON, THE M1 GARAND 4 (2012). It appears throughout the movie Saving Private Ryan, including in the hands of those sent to find Private Ryan. *See M1 Garand Rifle*, SAVING PRIVATE RYAN ONLINE ENCYC., (last updated Jan. 19, 2010); SAVING PRIVATE RYAN (1998). Firearms aficionados have a tendency to call the M1 Garand "the Saving Private Ryan gun," especially when discussing it with the broader public. The author believes this moniker helps non-enthusiasts realize that a Garand is not at all the high-powered black weapon with a pistol grip and a protruding magazine that most people visualize when they hear the term "military firearm."

to the greatness of the Greatest Generation.[2] Long since superseded by modern technology and the needs of modern warfare, these legendary firearms have been rendered obsolete for practical military fighting purposes.[3]

These storied American firearms are the M1 Garand and the M1 carbine. "To the Greatest Generation, and even their kids, the M1 [Garand] defined the word 'rifle,' "[4] and most modern Americans have seen them in World War II movies fighting Operation Overlord or poking out of foxholes near Bastogne.[5] History lovers can name the battles; firearms aficionados can tell you which models were used and their place of manufacture. But if you are a history lover, a firearms collector, or both, no matter how much you would like to own one of these celebrated historical instruments, you may never have the chance: the Arms Export Control Act ("AECA") bans the reimportation of American-made military firearms in all but three situations.

The M1 Garand and M1 carbine were standard issue for members of the United States military for most of three major wars. Millions of these firearms were manufactured between 1936 and the 1960s,[6] yet today they are hard to find in the United States, and

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[2] TOM BROKAW, THE GREATEST GENERATION xxx (1998) (coining the term, "The Greatest Generation").

[3] *See* CRAIG RIESCH, U.S. M1 CARBINES, WARTIME PRODUCTION 8 (7th ed., rev. 2007); *see also* Bob Seijas, *History of the M1 Garand*, THE GARAND COLLECTORS ASS'N, http://www.thegca.org/history-of-the-m1-garand-rifle (last visited Sept. 26, 2014).

[4] CHRIS KYLE WITH WILLIAM DOYLE, AMERICAN GUN: A HISTORY OF THE U.S. IN TEN FIREARMS 193 (Jim Defelice ed., 2013).

[5] *See, e.g.*, *Band of Brothers* (HBO television broadcast Sept. 9, 2001 – Nov. 4, 2001); SAVING PRIVATE RYAN, *supra* note 1; A BRIDGE TOO FAR (Joseph E. Levine Productions 1977).

[6] *See Bill Introduced to "Get State Department Out of the Gun Control Business*," NRA-ILA (June 7, 2013) [hereinafter NRA-ILA State Department], http://www.nraila.org/legislation/federal-legislation/2013/5/bill-introduced-to-get-state-department-out-of-the-gun-control-business.aspx. For a detailed history of the M1 Garand and M1 carbine, including information about manufacturers, quantities, uses, and dates, see BRUCE N. CANFIELD, COMPLETE GUIDE TO THE M1 GARAND AND THE M1 CARBINE (1998).

harder still to find in close to original condition.[7] But waiting on the other side of the Pacific, there is a collector's and historian's treasure trove of Garands and carbines begging to come home.

From 1950 to 1953, U.S. and South Korean soldiers fought with these firearms in the Korean War.[8] The United States gave or loaned hundreds of thousands of American-made firearms to South Korea during the war, and South Korea has held on to them ever since.[9] Sixty years have passed, the firearms are outdated,[10] and the South Korean Defense Ministry would like to upgrade to modern military rifles.[11] Aware that there is an eager market for these American-made M1 Garands and M1 carbines in the United States, the Defense Ministry offered to sell them back to American importers.[12]

American collectors and firearms enthusiasts were overjoyed, but the joy was short-lived and quickly replaced by frustration.[13] AECA and internal U.S. politics collided, and the Republic of Korea and American collectors have borne the brunt of executive branch indecision and technological misinformation. The

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[7] *See, e.g.*, *M1 Garand and M1 carbine store*, CIVILIAN MARKSMANSHIP PROGRAM, http://www.thecmp.org/Sales/m1garand.htm (last visited Sept. 26, 2014).
[8] Lee Tae-hoon, *US allows import of 86,000 M1 rifles from Korea*, THE KOREA TIMES (Jan. 18, 2012), http://www.koreatimes.co.kr/www/news/nation/2012/01/116_103154.html.
[9] Robert Kyle, *Old guns pose a new risk, thanks to Obama's edict*, AZCENTRAL.COM (Sept. 12, 2013), http://www.azcentral.com/opinions/articles/20130912obama-south-korea-rifles-kyle.html.
[10] *See, e.g.*, KYLE WITH DOYLE, *supra* note 4, at 209 (noting that even by the time of the Korean conflict, the Garand was outdated and impractical for military needs: "Being able to squeeze off eight shots without reloading had been a godsend in the 1940s. Now it was not enough by half.").
[11] *See* Tae-hoon, *supra* note 8.
[12] *See* J.R. Absher, *Bill Takes Aim at Blocked M1 Garand Imports*, SHOOTING ILLUSTRATED (July 16, 2013), http://www.shootingillustrated.com/index.php/28638/bill-takes-aim-at-blocked-m1-garand-imports/; S. H. Blannelberry, *US to Import 86,000 M1 Rifles from Korea*, GUNS.COM (Jan. 23, 2012), http://www.guns.com/2012/01/23/us-to-import-83000-m1-rifles-from-korea/.
[13] Aaron Smasel, *'Collectible Firearms Protection Act' fires back at South Korean M1 Import Embargo*, GUNS.COM (Oct. 7, 2010), http://www.guns.com/2010/10/07/proposed-collectible-firearms-protection-act-returns-fire-over-south-korean-m1-importation-embargo/.

Obama administration agreed to the reimportation in 2009, opposed it in 2010, decided to allow the Garands but not the carbines to come back home in 2011, and then let the Korean government and American companies start working out an import deal over the next sixteen months.[14] However, President Obama used an Executive action to reverse course yet again in August of 2013.[15] This prolonged flip-flopping raises the question of why the Executive cares that sixty-year-old American-made goods might return home.

Starting with the birth of the AECA ban on the reimportation of American-made firearms and continuing through its three explicit exceptions, this Comment investigates the legal framework of the military firearm import ban at issue in the Korean re-export situation. The Comment examines the reimport approval process, then discusses the impact of a recent Executive action on the import ban. Arguing the importation process needs to be amended for all outdated military firearms, or at least for those deemed curios or relics, the Comment examines the proposed Collectible Firearms Protection Act, which aims to revise the import approval process for curio or relic firearms, in the context of comprehensive export reform. Changing the approval process will streamline importations of outdated firearms, preserve the intent of the original ban, and put American-made firearms currently held outside the United States on an equal legal footing with their foreign and domestic counterparts. However, passage of this Act is an incomplete, temporary solution that fails to address the source of the problem: the unwieldy body of export laws and regulations administered by multiple government agencies having piecemeal control and uncertain foreign and domestic policy goals.

[14] Kyle, *supra* note 10.

[15] *See, e.g.*, Press Release, The White House, Office of the Press Secretary, Fact Sheet: New Executive Actions to Reduce Gun Violence (Aug. 29, 2013) [hereinafter Gun Violence Fact Sheet], http://www.whitehouse.gov/the-press-office/2013/08/29/fact-sheet-new-executive-actions-reduce-gun-violence.

I. ORIGINS OF THE BAN ON THE REIMPORTATION OF MILITARY FIREARMS

The M1 Garands and M1 carbines at issue in the Korean re-export deal were made in America by American companies, and given by the American government to America's allies. Because of their origin, reimporting them onto American soil is illegal. However, if the same model of firearms was manufactured by America's allies, there is no similar provision to prevent their importation. This situation seems to defy logic: items that can be legally manufactured and owned domestically become illegal if they leave the country with government approval. Korea's American-made M1 Garands and M1 carbines thus occupy a perplexing position.

Provided one has met any applicable background check and licensing requirements,[16] one can own a M1 Garand or M1 carbine if it never left the country,[17] or if it left but returned prior to 1958.[18] A

[16] To purchase a long gun such as Garands and carbines, one must be over 18 and pass a background check either through the National Instant Criminal Background Check System ("NICS") or a state equivalent. *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922(t) (2013); 18 U.S.C. § 922(b)(1) (2013). An increasing number of states require buyers to obtain additional certifications or licenses before purchasing long guns, such as California's Personal Firearms Eligibility Check ("PFEC"), or Illinois' Firearm Owner Identification Card ("FOID"). *See* CAL. PENAL CODE § 30105(a) (West 2012); 430 ILL. COMP. STAT. 65/2 (West 2013).

[17] Such firearms are legal at the federal level unless and until they leave the country. *See* 22 U.S.C. § 2778 (2012); 27 C.F.R. § 447.51 (2013). They remain legal in most states because they fail to qualify as assault weapons under state laws where assault weapon status is based on a one- or two-feature test. Such tests frequently ask whether a semi-automatic firearm has a detachable magazine (sometimes limited to a ten- or fifteen-round capacity) and one or two other features including pistol grips, bayonet lugs, flash suppressors, and collapsible stocks. *See, e.g.* CONN. GEN. STAT. § 53-202a (2014). The M1 Garand uses an eight-round clip instead of a magazine and therefore does not qualify as an assault weapon under the strictest state firearms laws. ARMAMENT RESEARCH, DEV., AND ENG'G CTR., M1 GARAND OPERATION AND MAINTENANCE GUIDE FOR VETERAN AND CIVILIAN SERVICE ORGANIZATIONS, LAW ENFORCEMENT, AND NATIONAL CEMETERIES 27 (2013), *available at* http:// www.mortuary.af.mil/shared/media/document/AFD-130702-050.pdf. The standard-issue M1 carbine has a detachable fifteen-round magazine, and later models usually have bayonet-lugs or other features such as folding stocks. U.S. WAR

person can own one if it was given away by his own government to a foreign country and was returned to be used by the military or law enforcement but has since passed into the general stream of commerce.[19] One can own a firearm with all the same specifications but of completely foreign manufacture,[20] or of similar specifications but reworked and repaired to such an extent that it is essentially an item of foreign manufacture.[21] However, such an American-made firearm is illegal to import and own if it is currently outside U.S. borders and is not yet old enough to be considered a curio or relic, or if the foreign government recipient sold it to a foreign third party.[22]

This reimport ban becomes even more perplexing when compared with legal provisions controlling the importation of other American-made items, including other defense articles. Firearms and tanks are both considered "significant military equipment,"[23] yet reimporting American-made firearms is expressly banned, while reimporting tanks for a private collection is not. Any U.S. person[24] who happens to have the money and storage space can own a

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DEP'T, FIELD MANUAL 23-7, U.S. CARBINE, CALIBER .30 M1 1, 5 (May 20, 1942). Even though these carbines share features common to assault weapons, many models of M1 carbines do not meet the relevant assault weapons tests and remain legal in states with strict firearms laws. *See, e.g.*, M.G.L. 140 § 121 (2014).

[18] Importations of these firearms were legal until the military firearm import ban was enacted in the Mutual Security Act of 1958. Pub. L. No. 85-477 § 205(k), 72 Stat. 267 (repealed by Pub. L. No. 94-329, Title II, § 212(b)(1), 90 Stat. 745 (1976)).

[19] This is the case if it was imported pursuant to § 2778(b)(1)(A)(i) (allowing importation for use by a state or local law enforcement agency). There is no general federal prohibition on owning either of these firearms if you are so lucky as to find one for sale. Surplus firearms owned by the Department of Defense can be resold to the public through the congressionally-chartered Civilian Marksmanship Program ("CMP"), one of the functions of which is to sell military firearms to civilians. *See* 36 U.S.C. § 40722(5) (2012). Amendments to the applicable statutes in the 1990s even ordered the Secretary of the Army to transfer certain surplus M1 Garands to the CMP. *See* § 40728(a).

[20] *See generally* 22 U.S.C. ch. 39 (2012) (provided that the firearm is lawful for import under the Gun Control Act).

[21] § 2778(b)(1)(A)(i).

[22] It would fail one of the two requirements of § 2778(b)(1)(B).

[23] 22 C.F.R. § 120.7 (2014); *see also* § 121.1, Category I(a), VII(a) (2014).

[24] As defined at § 120.15-16 (2014).

Sherman tank.[25] Such a person might even be able to have one with operational guns.[26] Its presence inside or outside the United States at any time is largely irrelevant—there is no AECA provision specifying that an American-made tank, given by America to a foreign nation, cannot be reimported. Likewise, there is no express prohibition on the reimportation of American-made fighter planes.[27] Thus one wonders why firearms given by America to our allies cannot come back when that ally no longer has a use for them. This prohibition first appeared in the Mutual Security Act in the 1950s, and became part of AECA about twenty years later.[28]

A. The Mutual Security Act of 1958

Throughout the 1950s there was a marked increase in the quantity of firearms imported into the United States, from 15,000 entering the country in 1955 to 200,000 arriving in 1958.[29] These imports created competition for domestic manufacturers as hunters and target shooters turned to the cheaper imported military rifles, modifying them to meet their sporting needs.[30] Meanwhile, domestic production was on the decline,[31] or at least appeared to be.[32] The

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[25] *See* Michael M. Phillips, *These Vehicles are Tons of Fun, and Good for Thwarting Road Rage*, WALL ST. J. (Feb. 26, 2013), http://online.wsj.com/articles/SB10001424127887324432004578302480951570270.

[26] AECA has no express prohibition on the reimportation of tanks. However, a tank owner would need to apply for and obtain a destructive device permit from ATF, and there could be a state or local prohibition against such ownership. *Id.*

[27] There is also no express prohibition on ownership of military aircraft, but planes must be stripped of weapons and meet Federal Aviation Administration requirements, including re-classification as vintage or experimental aircraft. *See Vintage & Experimental Aircraft Program,* FED. AVIATION ADMIN., http://www.faa.gov/licenses_certificates/vintage_experimental/ (last modified Nov. 27, 2013).

[28] The author is probably not the first to assume that AECA's adoption in 1976 meant that the firearm reimportation ban was originally linked to Cold War arms-trafficking concerns, and that it was an attempt by the U.S. to ensure that American money would not be used to update Soviet weapon systems. Research proved otherwise and inspired this Comment.

[29] Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 144 (1975).

[30] David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 596 (1987).

[31] Zimring, *supra* note 29.

Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI"), which counted among its members the likes of Remington Arms, Colt, and Sturm Ruger,[33] lobbied Congress for a ban on imported firearms.[34] Firearms importers learned about the proposed legislation by accident after some of their import licenses were held up by the Department of State.[35]

Throughout March of 1958, manufacturers and importers came before the House Committee on Foreign Affairs with their concerns about the state of the firearms industry.[36] The firearms importing community, composed largely of small businesses, feared that proposed amendments to the Mutual Security Act would drive them to serious financial difficulty, if not bankruptcy[37]—a fear that was realized in the Korean re-export half a century later.[38] The importers argued that big-business firearms manufacturers were misrepresenting the robust state of the firearms industry in an effort to decrease competition.[39] Arrayed against the small importers was the might of SAAMI, which proposed that the Mutual Security Act be amended to "provide that equipment furnished under the military aid programs may not be reimported into the United States in competition with American industry."[40]

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[32] The decline in domestic production of firearms and the state of the firearms market were hotly contested throughout the hearings and debates surrounding the 1958 amendments to the Mutual Security Act. *See, e.g.*, *Mutual Security Act of 1958: Hearings Before the H. Comm. on Foreign Affairs*, 85th Cong. 1455 (1958) [hereinafter *Hearings*].

[33] *Id.* at 1455, 1458, 1484. According to statements in these hearings, there were twenty-two small arms manufacturers in the United States in 1958, and ten of them were members of the Institute. SAAMI was created in 1926 and exists to this day. *See* SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC., http://www.saami.org (last visited Sep. 26, 2014).

[34] *See Hearings, supra* note 32, at 1478.

[35] *Id.*

[36] *Id.* at 1455 (statement of Fred. B. Rhodes).

[37] *Id.* at 1455-56.

[38] Chris Eger, *Century Arms lays off 41, blames Obama's denial of M1 imports from South Korea*, GUNS.COM (June 9, 2014), http://www.guns.com/2014/06/09/century-arms-lays-off-41-blames-obamas-denial-of-m1-imports-from-south-korea/.

[39] *See Hearings, supra* note 32, at 1455-56.

[40] 104 CONG. REC. H8729 (daily ed. May 14, 1958) (statement of Rep. Sikes, quoting William Hadley, SAAMI president).

The ban on the reimportation of U.S. origin firearms first appeared in bill form in both houses of Congress in April of 1958.[41] Then-Senator John F. Kennedy introduced S. 3714, an amendment to the Mutual Security Act of 1954 that would ban all imports of arms or ammunition originally manufactured for military purposes.[42] The bill provided that certain regulations promulgated pursuant to the Mutual Security Act

> shall prohibit the importation or re-importation into the United States of arms or ammunition originally manufactured for military purposes, or parts thereof, except those which are curios and antiques and are not in condition to be used as firearms, to be marketed in competition with arms and ammunition of domestic manufacture.[43]

Unlike other proposals for a military-firearm import ban, Kennedy's version was all-encompassing. It applied to all firearms manufactured for military purposes, regardless of their origin or current ownership. The "curio" firearm provision specified that such firearms must be non-functioning. The final clause of his proposal, with its mention of "market[ing]," "competition," and "domestic manufacture,"[44] indicates that the purpose of this law was to protect American manufacturers from foreign competition, and was not necessarily intended to keep military firearms out of civilian hands.

While Kennedy's bill did not pass, the idea of a military firearm import ban was far from dead.[45] The same day that the Senate first saw S. 3714, the House took its first look at H.R. 12181, which contained extensive changes to the Mutual Security Act of 1954.[46] Among those proposals was an amendment to § 414(b) relating to munitions control that would ban the import of arms

[41] S. 3714, 85th Cong. (2d Sess. 1958); H.R. 12181, 85th Cong. (2d Sess. 1958).
[42] 104 CONG. REC. S27441 (daily ed. Apr. 28, 1958).
[43] *Id.*
[44] S. 3714.
[45] Zimring, *supra* note 29 at 146.
[46] H.R. 12181, 85th Cong. (2d Sess. 1958).

manufactured for military purposes unless the import was for U.S. Armed Forces.[47]

Between April and June 1958, several congressmen heeded the cries of their states' firearms industries, proposing differing incarnations of a military firearm import ban.[48] During House debates on May 13 and 14, 1958,[49] congressmen voiced various reasons to enact such a ban, ranging from protecting American jobs, to protecting the public from "unsafe" foreign firearms, and, ultimately, to protecting domestic manufacturers from competition.[50]

By May 26, 1958, H.R. 12181 contained a provision that resembles the current statute more closely than Kennedy's proposed version. The bill provided that the Mutual Security Act regulations at issue

> shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies) of any military firearms of United States manufacture, whether or not advanced in value or improved in condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially

[47] *Id.* § 204(j). The original House proposal does not signal its inspiration as clearly as Kennedy's Senate version because it fails to mention competition to domestic industry. However, it included an end-user exception for the military that has changed over time but never disappeared. Section 204(j) states that

> such regulations shall prohibit the importation or reimportation into the United States (other than for the Armed Forces of the United States) of arms or ammunition originally manufactured for military purposes, or parts thereof, except those which are curios or antiques and are not in condition to be used as firearms.

Id. § 204(j).

[48] *See* 104 CONG. REC. H8612 (daily ed. May 14, 1958) (amendment proposed by Mr. Colmer); 104 CONG. REC. H8729 (daily ed. May 14, 1958) (amendment proposed by Mr. Sikes and Mr. Morano).

[49] Among the more substantive issues debated, Congress disagreed over whether the Mutual Security Act was the right place for such an import ban. *See* 104 CONG. REC. H8734 (daily ed. May 14, 1958) (statement by Rep. Collier).

[50] 104 CONG. REC. H8729-30 (daily ed. May 14, 1958) (statements of Reps. Sikes, Morano, and Kearney). Congressman Morano of Connecticut voiced concerns about the recent importation of remodeled old Italian Carcano rifles that had a tendency to blow up and also had a propensity to be used in gun-running. *See id.*

> transformed as to become, in effect, articles of foreign manufacture.[51]

The new proposal was no longer a broad import ban. It touched only American-made firearms and not those of foreign manufacture. It did not apply to ammunition, unlike Kennedy's proposal to the Senate, and it was concerned solely with reimportation.

In the House version, Kennedy's "originally manufactured for military purposes" limitation became "military firearms" in general. This distinction warrants notice—Kennedy's proposal indicates that the classification of a military firearm is determined by the manufacturer's intended end-use, whereas the House version employs the term with no indication how a firearm receives such a designation—leaving open the possibility that such firearms might one day lose their military purpose. However, the Kennedy bill's allowance for curio and antique firearms also hints that a strict intent-based definition is not reasonable as end-use and technology can change, while the House version does not seem to recognize that changing technology should lead to an exception for outdated firearms.

In keeping with creating a ban only on reimportation, the bill allows American-made firearms back in if they were reworked or repaired to such an extent that their American origins are essentially unrecognizable. This allowance is likely due to implicit recognition that extensive foreign work removes such firearms from being competitive products and places them in their own class of foreign reworks, making them equivalent to new imports. Or perhaps it was added in recognition of the fact that many ex-military rifles on both sides of the Atlantic were being reworked into hunting rifles.[52]

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[51] H.R. 12181, 85th Cong. § 8(m) (2d Sess. 1958) (as reported by Rep. Green, May 26, 1958) (amending § 414(b) of Title IV of the Mutual Security Act of 1954).

[52] It is not uncommon to find high-end custom hunting rifles built on extensively reworked military rifle actions such as Mausers and Enfields. *See* STEVEN DODD HUGHES, CUSTOM RIFLES IN BLACK & WHITE 3-4 (1999); *see also* Hardy, *supra* note 30, at 596.

By the beginning of June 1958, the import ban language had undergone further alterations. The latest version of the amendment stated that the licensing requirements at issue

> shall prohibit the return . . . of any military firearms of United States manufacture furnished to foreign governments by the United States under this Act or any other foreign assistance program of the United States . . . .[53]

The other provisions of the ban remained as they were in the version from May 26.

The executive branch weighed in on both the House and Senate versions, saying that it believed such an import ban was unnecessary.[54] Of the two variations, it preferred the Senate version, believing it to be more in line with the reason for enacting a ban: protecting domestic small arms manufacturers in the domestic market.[55] The executive opinion further stated that both versions of the ban were problematic from an administrative standpoint because it was hard to trace the origins of firearms provided before and during World War II, particularly since many had changed hands several times.[56] The executive branch advocated limiting the ban to firearms that left the country in May 1947 or later.[57]

Congress did not heed these concerns. By the time the bill crossed the President's desk on June 30, 1958, the prohibition again extended to "military firearms or ammunition,"[58] but the ban was limited to those items supplied under foreign assistance programs. Two exceptions to the prohibition were included: the firearms or ammunition could come back in if the end users were the Armed

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[53] H.R. 12181, 85th Cong. § 8(k) (2d Sess. 1958) (as ordered to be printed with amendment of the Senate, June 6, 1958) (emphasis added).
[54] STAFF OF CONFERENCE COMM., 85TH CONG., MUTUAL SECURITY ACT OF 1958: COMPARING THE HOUSE BILL WITH THE SENATE AMENDMENT 49 (Comm. Print 1958) [hereinafter Conf. Comm. Print].
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Mutual Security Act of 1958, Pub. L. No. 85-477, § 205(k), 72 Stat. 267 (repealed by Pub. L. No 94-329, Title II, § 212(b)(1), 90 Stat. 745 (1976)).

Forces of the United States or of one of its allies, or if the items were extensively modified and therefore essentially foreign.[59] Over time, the end-user exception for Armed Forces of the United States and its allies expanded to include a reimport exception for domestic law enforcement,[60] but the ban remained otherwise untouched for decades.

B. The Arms Export Control Act of 1976

Years after the passage of the Mutual Security Act, growing concern over a need for comprehensive arms export control legislation led Congress to enact AECA, which amended various laws including the Foreign Assistance Act of 1961 and the Foreign Military Sales Act.[61] Among its many provisions, AECA added the military firearm import ban as it existed in the Mutual Security Act to a new chapter of the Foreign Military Sales Act.[62] While the language of the ban remained essentially intact, the curio provision that appeared with Kennedy's initial proposal for an import ban eventually resurfaced in a less draconian form.[63]

AECA gives the President the power to control the import and export of defense articles and services in the interest of promoting world peace and furthering the foreign policy objectives of the United States.[64] It provides that decisions utilizing this power

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[59] *Id.*

[60] Foreign Assistance Act of 1967, Pub. L. No. 90-137 §403, 81 Stat. 445, 463 (codified as amended at 22 U.S.C. ch. 32 (2012)).

[61] International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended at 22 U.S.C. § 2751 (2012)); Peter K. Tompa, *The Arms Export Control Act and Congressional Codetermination over Arms Sales*, 1 AM. U. INT'L L. REV. 291, 297 (1986).

[62] International Security Assistance and Arms Export Control Act, § 212(a)(1). A comprehensive explanation of AECA is beyond the scope of this Comment; for a more detailed treatment of AECA's history and purpose, see Tompa, *supra* note 61, at 291-304. The decision to retain the ban appears conscious, and was not debated during any hearings. S. REP. NO. 94-605, at 51 (1976) (Conf. Rep.).

[63] Act of December 22, 1987, Pub. L. 100-202, 101 Stat. 1329-88 § 8142 (codified as amended at 22 U.S.C. § 2778(b)(1) (2012)) (making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1988).

[64] 22 U.S.C. § 2778(a)(1).

must take into account factors such as arms races, development of weapons of mass destruction, and support of international terrorism.[65] AECA further stipulates that such decisions must consider possible prejudicial effect on international agreements.[66] It provides for import and export licenses for manufacturers, exporters, and importers of defense articles and defense services, places certain conditions on what can and cannot leave or enter the country, and provides for Executive notification of the same.[67] AECA requires that anyone other than a U.S. government officer who wishes to be involved in international arms transactions must register as a manufacturer, importer, or broker and must abide by its implementing regulations,[68] which include the International Traffic in Arms Regulations ("ITAR").[69]

> AECA then requires that such implementing regulations
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> > shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) of any military firearms or ammunition of United States manufacture furnished to foreign governments by the United States under this Act or any other foreign assistance or sales program of the United States, whether or not enhanced in value or improved in condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.[70]

This provision declares that all military firearms or ammunition manufactured in the United States and provided to a foreign government through an official U.S. program presumptively cannot re-enter their country of origin. Two exceptions to the military firearm import ban are explicitly stated: the restriction does not apply if the United States military, a U.S. ally's military, or state or

[65] § 2778(a)(2).
[66] *See id.*
[67] § 2778.
[68] § 2778(b)(1)(A)(i)-(ii); *see also* 22 C.F.R. § 122.1, 129.1 (2013).
[69] 22 C.F.R. § 120.1 (2014).
[70] § 2778(b)(1)(A)(i).

local law enforcement will use the firearms; it also does not apply if the firearms were modified in a foreign country to such an extent that they can be considered foreign firearms. The statute points out that mere improvement or an increase in value during the firearm's sojourn abroad does not affect its importability.

Depending on how one interprets "any other foreign assistance or sales program," AECA has an implicit exception to the import ban. The statute does not address the importability of military firearms or ammunition that the United States supplied by some means other than a formal AECA or other foreign assistance or sales program, nor does it address the importability of items the United States may have given to non-governmental entities. This means the import ban does not apply to firearms that the United States could have supplied to groups like the French Resistance in World War II. It also means that the ban might not apply to firearms the United States informally transferred during a war. Nor would it apply to firearms that troops left behind accidentally or in an emergency, or that they handed to allies on the battlefield. Informal transfers of this sort may have been a wartime practice or custom. But by definition a practice is not a program, meaning firearms transferred in such manners are arguably exempt from the ban.[71]

A later amendment created a third explicit exception to the military firearm import ban. AECA provides under § 2778(b)(1)(B) that

> [t]he prohibition . . . shall not extend to any military firearms (or ammunition, components, parts, accessories, and attachments for such firearms) of United States manufacture furnished to any foreign government by the United States under this Act or any other foreign assistance or sales program of the United States if—

[71] *See, e.g.* OXFORD ENGLISH DICTIONARY (2d ed. 2008) (defining "practice" as something "usual" or "customary" while "program" is defined as "a planned series"). While it is unlikely that there are stockpiles of such weapons, American collectors or historians may find them more interesting than the Korean Garands and carbines because of their unique stories.

> (i) such firearms are among those firearms that the Secretary of the Treasury is, or was at any time, required to authorize the importation of by reason of the provisions of section 925(e) of title 18, United States Code (including the requirement for the listing of such firearms as curios or relics under section 921(a)(13) of that title); and
>
> (ii) such foreign government certifies to the United States Government that such firearms are owned by such foreign government.[72]

In essence, this third exception allows importation of military firearms and ammunition if they satisfy two conditions: they must qualify as curios or relics, and the original foreign government recipient must still own them.[73]

C. The Exceptions to the Ban on the Reimportation of Military Firearms

Of the three express exceptions to the import ban, two have existed since it became law. The first exception has expanded to include a new category of end users, while the second remains unchanged. The third exception appeared in various forms when Congress discussed creating the import ban, but it did not become part of AECA for another thirty years. This third exception, concerning curio or relic firearms, is the provision at issue in the Korean Garand and carbine re-export.

1. The Armed Forces and Law Enforcement End-User Exception

The first exception to the military firearm import ban is the only one with an end-user requirement: "[s]uch regulations shall prohibit the return . . . (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) . . . of any military firearms or ammunition."[74] Under this exception, American-manufactured items qualifying as military

[72] § 2778(b)(1)(B)(i)-(ii).
[73] § 2778(b)(1)(B).
[74] § 2778(b)(1)(A)(i).

firearms or ammunition that the United States gave to a foreign government can re-enter the country so long as the military or a state or local law enforcement agency will be using them.

AECA does not place a restriction on what type of party undertakes the importing as long as the end-user requirement is met. A private importer can transfer the firearms to the Armed Forces of the United States, but it is not clear whether that only includes transfers made directly to the Army or Navy, or whether it also includes transfers to individual members of the Armed Forces.[75] On the other hand, a state or local law enforcement agency can own the reimported military firearms, but individual law enforcement officers cannot because the statute expressly exempts agencies, and only agencies, from the ban. This means that an individual law enforcement officer could personally own a certain military firearm if it never left the country,[76] but he could not own one if it left and re-entered. Federal law enforcement agencies such as the FBI are not included in any of the exempted end-user categories.

2. Firearms Essentially of Foreign Manufacture

The second import-ban exception states that "[t]his prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture."[77] This exception has been in place since the enactment of the import ban and remains untouched. Until 1971, implementing regulations for AECA contained a specific definition

[75] Firearms statutes and regulations containing provisions specific to military and law enforcement frequently distinguish between or expressly include either category in their official, group capacity and each member in their individual capacities. *See, e.g.*, 18 U.S.C. § 922(v)(4)(A) (1994) (expressly exempting law enforcement officers "whether on or off duty" from provisions of the 1994 Assault Weapons Ban); N.Y. PENAL LAW § 265.20(a)(1)(a)-(b) (McKinney 2014); CONN. GEN. STAT. § 53-202b(b)(1) (2014).

[76] Many military-grade firearms are available for sale to law enforcement, either as new or government surplus arms. Some federal and state laws restrict the ownership of certain weapons to law enforcement agencies, but in certain states individual law enforcement officers can own firearms with military capabilities that are not available to the general public.

[77] § 2778(b)(1)(A)(i).

of this provision: substantial transformation, as applied to rifles and carbines, meant that the firearms had been either rechambered for a higher caliber or charge cartridge, or had received a new action.[78] The only other guidelines as to the meaning of "substantially transformed" appear in the clause preceding this import-ban exception: articles with enhanced value or improved condition due to their sojourn abroad are not exempted from the ban,[79] so the law requires something more to qualify as substantial transformation.

The 1968 implementing regulations specified that "[o]ther changes, such as rebarreling, modification of stocks, or grips, rebluing, or replacing of sights, singly or together, are not sufficient to so substantially transform the weapons as to become, in effect, articles of foreign manufacture."[80] While these particular regulations are no longer extant, when taken together with AECA's language they indicate that substantial transformation is achieved only if the firearm becomes altogether a different firearm than it was in its original configuration. Such transformation would make a Garand of little interest to a collector wishing to obtain an authentic piece of history.

3. Curio and Relic Firearms

While a curio exception to the military firearm import ban was proposed when the measure first appeared in Congress in 1958, the exception was not codified in AECA until 1988.[81] Kennedy's original proposal had envisioned allowing curios or antiques that were no longer in working condition.[82] As Congress noted at that

[78] 22 C.F.R. § 121.02(a) (1968). The 1971 version no longer contained this definition. "Substantial transformation" for imported American-made firearms appears to have been the subject of litigation just once, and the court there referred back to the 1968 definition. *See* A. N. Deringer, Inc. v. United States, 524 F.2d 1215 (C.C.P.A. 1975).
[79] § 2778(b)(1)(A)(i).
[80] § 121.02(c).
[81] Act of December 22, 1987, Pub. L. 100-202, 101 Stat. 1329-88 § 8142 (1988) (codified as amended at 22 U.S.C. § 2778(b)(1) (2012)) (making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1988).
[82] S. 3714, 85th Cong. (2d Sess. 1958).

time, no one wanted to import a firearm, even an antique one, if it did not work—its value and interest lay in it being in working condition, whether or not the American owner would ever decide to fire it.[83]

In a 1984 amendment to the Gun Control Act ("GCA"), Congress ordered the Attorney General to approve all imports of firearms designated "curio" or "relic."[84] However, a large number of such curio or relic firearms that Americans wanted to import were military firearms subject to the AECA import ban. For several years after the curio exception became law, one part of the United States Code ordered the Attorney General to approve imports of firearms that another part of the Code told the Department of State and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to deny, so the conflicting provisions meant that the approval order could apply only to foreign-origin firearms.[85] In 1988, Congress brought AECA in line with the GCA, creating the § 2778(b)(1)(B) curio and relic exception to the military firearm import ban so that the two laws did not conflict.[86]

As of 1988, AECA provides that the Secretary of the Treasury is required to authorize the importation of certain firearms furnished to foreign governments under foreign assistance programs, among them firearms designated as curio or relic, if the foreign government can certify that it still owns them.[87] The definition of what constitutes a curio or relic firearm falls to the Attorney General,[88]

[83] 104 CONG. REC. H8732 (1958) (statement by Rep. Broyhill).
[84] Trade and Tariff Act of 1984, Pub. L. 98-573 § 233, 98 Stat. 2978, 2991-92 (codified as amended at 19 U.S.C. § 2411 (1996)).
[85] Mark Barnes, *The Legal Side: V18N1*, SMALL ARMS REVIEW (Feb. 1, 2014), http://www.smallarmsreview.com/display.article.cfm?idarticles=2200.
[86] *See also Senator Jon Tester and Representative Cynthia Lummis Introduce Bills to Protect the Importation of Historically Significant U.S.-Made Rifles*, NRA-ILA (March 23, 2011) [hereinafter NRA-ILA Tester and Lummis], http://www.nraila.org/news-issues/fact-sheets/2011/senator-jon-tester-and-representative-c.aspx.
[87] 22 U.S.C. § 2778(b)(1)(B)(i) (2012).
[88] 18 U.S.C. §§ 921(a)(13), 925 (2012).

who has exercised the power to define these firearms through ATF's rulemaking process.[89]

A firearm is a curio or relic if it meets any one of three possible tests laid out in Title 27 of the Code of Federal Regulations.[90] A curio or relic is a firearm that is fifty years old, or has been certified as a curio or relic of interest to a firearms museum, or it derives a substantial part of its monetary value from, among other possibilities, its association with an historical period or event.[91] According to ATF, firearms automatically attain curio and relic status on their fiftieth birthday; no special classification or certificate is necessary to prove a firearm has attained this status, though ATF will make a classification if requested.[92] ATF maintains a Curios or Relics List, but a firearm can be a curio or relic even if it does not appear on the ATF list.[93]

The M1 Garands and carbines that Korea desires to re-export to the United States should be at least sixty years old, as Korea most likely received them no later than 1953.[94] They are of interest because of their association with the Korean War and WWII.[95] The South Korean Defense Ministry still owns these firearms, satisfying the second element of the curio or relic exception to the import ban.[96] Presumptively there is no reason to deny such an import. Yet the import was denied in 2009, partially approved in 2010, and then fell victim to an Executive action in 2013.[97]

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[89] *Id.; see also* 27 C.F.R. § 478.26 (2014).
[90] 27 C.F.R. § 478.11 (2013).
[91] *Id.*
[92] BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ATF PUBLICATION 5300.11, FIREARMS CURIOS OR RELICS LIST (2007), *available at* http://www.atf.gov/files/publications/firearms/curios-relics/p-5300-11-firearms-curios-or-relics-list.pdf.
[93] *Id.*
[94] *See* Tae-hoon, *supra* note 8.
[95] *See* NRA-ILA Tester and Lummis, *supra* note 86.
[96] 22 U.S.C. § 2778(b)(1)(B)(ii) (2012).
[97] *See* Kyle, *supra* note 10.

II. THE IMPORT PROCESS: AGENCY APPROVALS AND NOTIFICATION REQUIREMENTS

One might wonder why the White House is involved in American companies trying to reimport sixty-year-old American products, but the provisions of AECA, the Foreign Assistance Act, and internal U.S. politics have all played a role. As noted above, AECA gives the President the authority to control the import and export of defense articles and services and provide foreign policy guidance concerning the same.[98] "Defense articles" includes firearms as well as firearms parts and components, so firearms are subject to presidential import and export control.[99]

In 1977, the President delegated the authority to control arms imports and exports to various agencies, including to the Secretary of State, the Secretary of Defense, and the Secretary of the Treasury.[100] The original delegation was repealed and replaced on March 8, 2013, by Executive Order.[101] The Secretary of State currently controls the export and temporary import of defense articles and defense services through the Bureau of Political-Military Affairs,[102] while the Attorney General, through ATF and under the guidance of the views of the Secretary of State,[103] controls their permanent import.[104]

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[98] § 2778(a)(1).

[99] 27 C.F.R. § 447.21 (2013).

[100] *See* Exec. Order No. 11,958, 3 C.F.R. § 79 (1977); *see also* 22 C.F.R. § 120.1 (2014). Some authority was also delegated to the Director of the Arms Control and Disarmament Agency and the Secretary of Commerce. *See also* Johanna Reeves, *Retransfers of U.S.-Origin Firearms Part 1*, F.A.I.R. TRADE GROUP (Oct. 2011), *available at* http://www.reevesdola.com/wp-content/uploads/2012/03/FAIR-Trade-Article-3-Retransfers.pdf.

[101] Exec. Order No. 13,637, 78 Fed. Reg. 16,130 (Mar. 13, 2013).

[102] § 120.1. The Directorate of Defense Trade Controls ("DDTC") fulfills these duties for all items regulated by ITAR's United States Munitions List. 22 C.F.R. § 121.1 (2014).

[103] Exec. Order No. 13,637, 78 Fed. Reg. 16,130 (Mar. 13, 2013).

[104] § 120.18. The regulations of 27 C.F.R. § 447.21, administered by ATF, are the implementing regulations governing permanent imports for Section 38 of the Arms Export Control Act of 1976, which includes the ban at issue here. Section 447.21

Military firearms subject to the AECA reimportation restriction at issue in this Comment left the United States through direct commercial sales or under military assistance programs.[105] In order to receive firearms under such a program, the foreign country had to consent to obtain the U.S. President's prior approval before it could retransfer any of those firearms to a third party.[106] In some cases where the foreign country purchased the firearms from the United States, it does not have to obtain this prior consent for a retransfer, but this exemption applies only when certain conditions are met. For example, the recipient must be a North Atlantic Treaty Organization member state.[107] However, if the firearms were a grant from the United States, the Foreign Assistance Act requires that the foreign country return them to the United States when it no longer needs them, unless the President consents to their disposal in a different manner.[108]

In order to bring firearms into the United States, an importer must submit an Application and Permit for Importation of Firearms, Ammunition and Implements of War ("Form 6") to ATF.[109] When a company wishes to import U.S.-origin firearms that left the United States under a military assistance program, the company must obtain authorization from the Department of State before submitting the Form 6.[110] This step in the import approval process has a tendency to become drawn out, and can take months or even years,[111] because the Department of State needs to know how the foreign government obtained the firearms in order to determine what retransfer consent

contains the United States Munitions Import List, which specifies all of the items subject to permanent import control under AECA.

[105] 22 U.S.C. §§ 2314, 2753(a) (2012); *see also* Reeves, *supra* note 100.

[106] §§ 2314, 2753(a); *see also* Intrac Arms. Int'l, L.L.C. v. Albright, 1998 U.S. Dist. LEXIS 21858, at *12 (D.D.C. Dec. 28, 1998). The first retransfer consent statute was enacted as part of the Mutual Defense Assistance Act of 1949. Pub. L. No. 81-329, 63 Stat, 714, 717 (repealed 1954). Because the Republic of Korea received the Garands and carbines in the 1950s, presumably it would have had to agree to such conditions.

[107] § 2753(b)(2). While prior approval for a transfer is not required if all the conditions of § 2753(b) are met, the country must nevertheless notify the United States within thirty days of the transfer pursuant to § 2753(b)(5).

[108] § 2314(a)(4).

[109] *See* Reeves, *supra* note 100.

[110] *Id.*

[111] *Id.*

statutes apply. Given that most of these imports concern firearms dating from the 1950s or earlier, it can be difficult to obtain this information. Sometimes records simply are not available,[112] an issue that the executive branch foresaw in 1958 and had voiced as a reason not to enact the ban.[113] The import cannot proceed without this data: the Department of State must determine whether the firearms revert to the U.S. government pursuant to Foreign Assistance Act provisions, or whether the foreign country is allowed to sell them and keep the proceeds pursuant to AECA provisions.[114] Once the importing company provides this information and receives an authorization letter from the Department of State, it can then proceed to submit a Form 6 to ATF.[115] If ATF approves the Form 6, the company has two years in which to import the firearms.[116]

In some cases, such as the Korean re-export, the foreign government owner approaches the Department of State pursuant to its retransfer consent agreement. The Bureau of Political-Military Affairs handles such requests and passes them on to other offices within the Department of State, depending on the program through which they left the country.[117] If the firearms were part of a government-to-government sale, then the Office of Regional Sales and Arms Transfers reviews the request.[118] If they left the United States under a direct commercial sale, the Directorate of Defense Trade Controls ("DDTC") takes over.[119] Once the appropriate office has reviewed the request, it is sent back for final review by the Assistant Secretary for Political-Military Affairs or the Under Secretary for Arms Control and International Security along with a processing recommendation.[120]

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[112] *Id.* As noted above, the executive branch pointed out the difficulty of this tracing process when it first saw this provision in the Mutual Security Act. *See* Conf. Comm. Print, *supra* note 54.
[113] Conf. Comm. Print, *supra* note 54.
[114] 22 U.S.C. §§ 2314, 2753(a) (2012).
[115] *See* Reeves, *supra* note 100.
[116] 27 C.F.R. § 447.43(a) (2014).
[117] *See* Reeves, *supra* note 100.
[118] *Id.*
[119] *Id.*
[120] *Id.*

Import permission is not guaranteed even if all of the necessary levels of the Department of State approve the retransfer. The foreign government must find an American company that wishes to import the goods,[121] and the American company must obtain ATF approval of its Form 6 import application. Pursuant to Executive Order 13637, ATF is required to be "guided by the views" of the Department of State in these matters, but Department of State authorization does not translate to automatic ATF approval of a Form 6 import application.[122] Even when both ATF and the Department of State have approved an import, as happened in the Korean re-export, domestic U.S. politics and policy goals might prompt the White House to intervene at any step in this process.[123]

III. THE 2013 EXECUTIVE ACTION

On August 29, 2013, the President announced two new "common-sense" Executive actions to reduce gun violence, one of which directly impacts the military firearm import provisions of AECA.[124] The purpose of these actions is "to keep dangerous firearms out of the wrong hands and ban almost all re-imports of military surplus firearms to private entities."[125] As the announcement notes, only 250,000 firearms have been imported under the AECA ban since 2005,[126] and all of them were subject to Department of State and ATF import approval. The Executive action promotes what it considers a new policy: it will deny requests by private entities to bring military-grade firearms back into the United States, excepting only museums from this ban.[127]

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[121] Foreign governments cannot possess defense articles in sovereign U.S. territory.
[122] Exec. Order No. 13,637, 78 Fed. Reg. 16,130 (Mar. 13, 2013); Reeves, *supra* note 101; *see also* letter from Robert Talley, Executive Director of F.A.I.R. Trade Group, to Kenneth Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (Aug. 6, 2009), *available at* http://www.fairtradegroup.org/FAIR%20ATF%20USG%20Letter%208-6-09.pdf.
[123] Eger, *supra* note 38.
[124] Gun Violence Fact Sheet, *supra* note 15.
[125] *Id.*
[126] *Id.*
[127] *Id.*

A. *The Executive Action's Modifications to AECA's Firearm Reimportation Ban*

Due to the strict requirements in place under AECA and the Foreign Assistance Act, absent this Executive action reimports of military surplus firearms are already banned. Such military firearms can defeat the presumptive ban that has been in place since 1958 and return legally to the United States only if they meet one of the three exceptions: military or law enforcement end user, extensive modification in a foreign country, or curio or relic status.[128] If the firearm satisfies one of the three conditions, the importer must then obtain approval from the Department of State and ATF before bringing the item into the country.

Because an import ban has been in place since 1958, this Executive action is not creating a new ban. Instead, it eliminates parts of the already narrow exceptions to the existing ban. None of the AECA exceptions remain intact, though each one is affected in a different manner. The military or law enforcement end-user exception at first seems untouched. However, private parties now cannot undertake imports on behalf of these end users. Local law enforcement and the Department of Defense remain free to continue importing sixty-year-old rifles that are functionally obsolete as a military firearm. If the Department of Defense does bring in the Korean Garands and carbines, there is nothing to stop it from turning around and selling them to the American public through the Civilian Marksmanship Program,[129] which would override the purpose behind the Executive action.

Under this new iteration of the ban, the status of firearms that have been modified so extensively that they are considered

[128] 22 U.S.C. § 2778(b)(1)(A)-(B) (2012).

[129] It would not be surprising if a domestic resale restriction was eventually placed on law enforcement or the Department of Defense imports in order to achieve the Executive action's purported goal of keeping such firearms off the streets. However, at least in the case of the M1 Garands and the M1 carbines, that would create a confusing legal scenario where a private citizen could buy such a firearm if available on the domestic open market, but could not buy the same thing that the U.S. military or a police department wanted to surplus.

foreign is less certain. While the Executive action does not appear to touch this exception directly, in effect it may be eliminating it as an import exception. It is unlikely that either the military or law enforcement has much use for firearms that have undergone extensive reworking in a foreign country. Apart from repairs, work completed on a military rifle in a foreign country was more likely than not undertaken to make it better for sporting purposes.[130] Such rifles may be of interest to hunters and collectors, but their usefulness to military and law enforcement is doubtful.

The curio or relic exception to AECA's import ban is the hardest hit by the President's Executive action. AECA allows the importation of curios or relics so long as the original foreign recipient can prove possession.[131] This AECA exception does not specify an end-user condition: the only requirement is that the firearm be among those that the Secretary of the Treasury can approve for import.[132] A firearm obtains curio or relic status in part because it is of interest to a firearms museum,[133] but AECA does not require that a museum undertake the importation, nor does it specify that museums are the only parties authorized to buy such firearms. Because the Executive action makes only "a few exceptions such as for museums" to the import ban, it effectively inserts a museum end-user requirement into AECA.[134] The Executive action does not explain how a museum can go about importing such a firearm if private importing businesses are shut down by this ban.[135]

Whatever its intentions may be, this Executive action ignores the purpose of the original military firearm import ban, and runs

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[130] An excellent example would be the modification of Enfield rifles from the World War I era. *See* HUGHES, *supra* note 52.
[131] § 2778(b)(1)(B)(ii).
[132] § 2778(b)(1)(B)(i).
[133] 27 C.F.R. § 478.11 (2013).
[134] Gun Violence Fact Sheet, *supra* note 15.
[135] A firearms museum may have a collector's Type 03 Federal Firearms License ("FFL"). A Type 03 license does not allow importation, so the museum would have to find a licensed importer in order to obtain a firearm from a foreign entity. If private importers are no longer allowed to bring in such firearms, a museum wishing to obtain a particular rifle would be without recourse unless it is able to obtain a Type 08 importer's license.

counter to the decision-making parameters AECA provides the Executive. The provision was added to the Mutual Security Act of 1958 to protect domestic firearms manufacturers from foreign competition in the domestic market.[136] AECA limits the President's decision-making powers regarding arms imports and exports to concerns about arms races, weapons of mass destruction, and international terrorism, and requires him to take account of international treaties in his decisions.[137] The Executive action, however, views AECA's § 2778 ban as a crime-fighting measure filled with loopholes that need to be tightened.[138]

In doing so, it confuses the purpose of AECA's ban with those of the other major federal laws regulating firearms: unlike AECA, the National Firearms Act of 1934 and the Gun Control Act of 1968 are laws whose primary purpose is to fight crime.[139] Due to this confusion, the Executive action oversteps the bounds of power delegated to the President. AECA gives the Executive power to control arms imports and exports in order to further foreign policy objectives, not domestic crime-control policies. Operating at a domestic level, the Executive action hopes to keep military-grade firearms off our streets, not realizing or perhaps ignoring the fact that the firearms most affected by the AECA import ban have been militarily obsolete for over half a century.[140] Even if Executive power in this area was properly used to promote domestic safety policies,

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[136] *See, e.g.*, 104 CONG. REC. H8729-30 (daily ed. May 14, 1958).
[137] *See* § 2778(a)(2).
[138] This Executive action is an extension of twenty-three others that the President declared after the Newtown, Connecticut shootings to help law enforcement fight crime. *See, e.g.*, Progress Report, The White House, *Progress Report on the President's Executive Actions to Reduce Gun Violence* at 1, 4 (Dec. 2, 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/november_exec_actions_progress_report_final.pdf; Josh Lederman, *Powers Limited, Obama, Biden Seek Action on Guns*, ASSOCIATED PRESS (Aug. 29, 2013), http://bigstory.ap.org/article/ap-exclusive-obama-offers-new-gun-control-steps.
[139] Pub. L. No. 90-618 § 101, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. ch. 44 (1968)) ("The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence."); *see also* Michael A. Bellesiles, *Firearms Regulations: A Historical Overview,* 28 CRIME & JUST. 137, 174-75 (2001).
[140] Lederman, *supra* note 138.

the characteristics of the firearms at issue make one question the effectiveness of the restrictions imposed by the Executive action.

B. Characteristics of the M1 Garand and M1 Carbine[141]

Both the Garands and carbines at issue in the Korea deal are of value primarily due to their age and historical significance.[142] They are sought after by collectors, firearms enthusiasts, and veterans.[143] M1 Garands are used in color guards and shooting matches: in the former, their use is largely ceremonial, not functional; in the latter, specialized match models are generally used, and even those are often extensively reworked and modified.[144] Outside of those two scenarios, a Garand or carbine might be used for hunting or target shooting. However, they tend to be prized for their place in history far more than for their current end-uses.

Despite having been designed expressly for military purposes, the M1 Garand was notably excluded from the 1994 assault weapons ban,[145] as well as from attempts to reintroduce that ban.[146] It is a heavy, wood-stocked rifle that uses relatively expensive .30-06 cartridges.[147] It can be legally owned even under some of the strictest

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[141] *See* CANFIELD, *supra* note 6, for a more detailed explanation of the characteristics and history of these firearms. See KYLE WITH DOYLE, *supra* note 4, at 191-214, for a short history of the Garand.

[142] *See* NRA ILA State Department, *supra* note 6. This is evidenced in part by the quantity of books and collectors' guides extant detailing the history of the M1 Garand and M1 carbine, identifying manufacturers, serial numbers, how to discern whether a given rifle's components are original or repaired, and even where it might have seen action. *See, e.g.*, CANFIELD, *supra* note 6.

[143] Kyle Roerink, *Lummis wants M1 rifles to get import OK*, CASPER STAR-TRIB. (June 6. 2013), http://trib.com/news/local/govt-and-politics/lummis-wants-m-rifles-to-get-import-ok/article_5e483682-5d4c-51b6-b8c5-c5435b4e1187.html.

[144] *Id.*; CANFIELD, *supra* note 6, at 143.

[145] Symposium, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1304 & n.151 (2009).

[146] *See* S. 150, 113th Cong. (1st Sess. 2013).

[147] .30-06 ammunition generally retails for $1.00-2.00 whereas the ammunition for an AR15/M16-type rifle (5.56x45NATO/.223) costs about half that. *Rifle Ammunition,* CABELAS.COM, http://www.cabelas.com/catalog/browse/rifle-ammunition/_/N-1100190/Ns-CATEGORY_SEQ_104532480?WTz_l=SBC%3BMMcat104792580 %3Bcat104691780 (last visited Sep. 27, 2014).

state laws that classify assault weapons based on whether they contain various features: it lacks a pistol grip and a protruding or detachable magazine, instead using a drop-in eight-round capacity clip, and its one offending feature is a bayonet lug.[148] If one has been used recently in a crime, it was a rare occurrence, as Garands do not register on U.S. government crime statistics compilations.[149]

The semi-automatic M1 carbines are smaller, lighter, and less powerful than the M1 Garands because they were developed for use by non-combat troops and soldiers weighed down by other cumbersome gear.[150] The carbines use fifteen or thirty-round magazines, and many models from later years come with a bayonet lug, while versions used by airborne troops have folding stocks.[151] Like the Garands, one can legally posses the carbines even in states with strict firearms laws, though certain models may fall into the assault weapon category in states with more restrictive assault weapons tests.[152] Collectors and other firearms enthusiasts desire them for many of the same historical reasons that they value Garands.[153]

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[148] State assault weapons laws tend to regulate magazines, not clips. *See, e.g.* CONN. GEN. STAT. § 53-202a (2014).

[149] *See* Talley, *supra* note 122; *see also* Lederman, *supra* note 138 ("The ban will largely affect antiquated, World War II-era weapons that, while still deadly, rarely turn up at crime scenes, leaving some to question whether the new policy is much ado about nothing. 'Banning these rifles because of their use in quote-unquote crimes is like banning Model Ts because so many of them are being used as getaway cars in bank robberies.'").

[150] *Rifle Sales – Carbine*, CIVILIAN MARKSMANSHIP PROGRAM, http://thecmp.org/Sales/carbine.htm (*last visited* Sep. 20, 2014).

[151] *See id.*; *see also* RIESCH, *supra* note 3.

[152] Opinions differ as to the rationale for denying the import of Korean Garands and carbines, as well as the later decision to allow the return of the Garands but not the carbines. Reasons include fears of illicit use if so many firearms are imported all at once, concern that the carbines can use high-capacity magazines, and the possibility that someone could easily convert the carbines into automatic weapons. *See, e.g. Obama Administration Reverses Course, Forbids Sale of 850,000 Antique Rifles*, FOX NEWS (Sept. 1, 2010), http://www.foxnews.com/politics/2010/09/01/obama-administration-reverses-course-forbids-sale-antique-m-rifles/ (highlighting that the only response given by any federal agency is that the guns could "fall into the wrong hands").

[153] *See, e.g.*, KYLE WITH DOYLE, *supra* note 4.

Despite the fact that these firearms do not qualify as assault weapons under even some of the strictest state tests, and the fact that both have been militarily obsolete for decades, the Obama administration seems to view both the Garands and carbines as military-grade firearms prone to criminal use, and utilized the provisions of this Executive action to deny the Korean re-export.[154] But the Executive action ignores the fact that any imported firearm, including these Garands and carbines, can be sold only in accordance with the restrictions of the Gun Control Act, and where applicable, the National Firearms Act, as well as state laws, just like any other domestic firearm. It assumes that because the military used these firearms sixty years ago, criminals are likely to be the new primary end user, and completely ignores both history and the resale requirements contained in domestic law. The technological confusion evinced by the Executive action, and its misunderstanding of the purpose of the import ban, indicate that this provision of AECA is ripe for amendment.

IV. AMENDING THE BAN

In 2009, the President announced the Export Control Reform Initiative ("ECR Initiative"), which aims to strengthen national security while adapting export regulations to the changing economic and technological landscape.[155] This initiative recognizes that America's current export control regime dates from the Cold War, if not before, and proposes a multi-phase strategy for streamlining export control and bringing it up to date.[156] The plan

[154] Wilson Ring, *Vermont Importer Lays Off 41, Blames White House Denial of Deal with South Korea*, ASSOCIATED PRESS (June 6, 2014), http://bigstory.ap.org/article/vermont-gun-importer-lays-41-blames-rules; Justin Peters, *Banning the Reimportation of Obsolete Military Rifles Won't Curb Gun Violence,* SLATE.COM (Aug. 30, 2013, 1:51 PM), http://www.slate.com/blogs/crime/2013/08/30/executive_action_gun_control_banning_the_reimportation_of_obsolete_military.html.

[155] *About Export Control Reform,* EXPORT.GOV, http://export.gov/%5C/ecr/eg_main_047329.asp.

[156] Press Release, The White House, Office of the Press Secretary, Fact Sheet on President's Export Control Reform Initiative (Apr. 20, 2010), http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative.

realizes that comprehensive reform will require both time and legislation.[157] Prior to the 2013 Executive action, lawmakers had already addressed the military firearm import ban in appropriations bills and proposed legislation; however, if passed, the proposed legislation would at best be a temporary solution to the problem while Congress considers comprehensive export reform.

A. Appropriations Provisions

While Congress has not yet considered a complete repeal of the ban, in recent years it has made some effort to protect curio and relic firearms that are subject to the reimport prohibition. In 2012, for instance, the Consolidated and Continuing Appropriations Act stipulated that ATF could not use any taxpayer funds to change the definition of a curio or relic or remove a firearm from the existing curio or relic list.[158] The Act further ordered that no government department, agency, or instrumentality could use appropriated funds to cover the administrative expenses or salary of any individual to deny a curio or relic import.[159] This latter prohibition also appears in appropriations bills for later years, including the proposed Commerce, Justice, and Science Appropriations bill for 2015.[160] But these provisions do not prevent an import application from being shuffled from government office to government office or from gathering dust on a desktop, constituting an effective denial. Nor do they prohibit the White House from intervening whenever it assumes that doing so will constitute an effective domestic crime-control measure.

B. The Collectible Firearms Protection Act

In 2011 and again in 2013, Representative Cynthia Lummis of Wyoming introduced an amendment to AECA's military firearm

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[157] *Id.*

[158] Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 609.

[159] *Id.*

[160] *See* Commerce, Justice, Science, and Related Agencies Appropriations Bill, H.R. 4660, 113th Cong. (2nd Sess. 2014).

import ban.[161] The proposed Collectible Firearms Protection Act would change the exception codified in 22 U.S.C. § 2778(b)(1)(B) so that certification of ownership by a foreign government is no longer required to import military firearms classified as curios or relics.[162] Instead of documentation of government ownership, the person seeking import authorization would merely have to show that the firearms are lawfully possessed under the laws of the exporting country.[163]

The proposed act would also add a new provision to § 2778(b).[164] The addition would allow curio or relic firearms to be brought in by a licensed importer without requiring the importer to obtain Department of State or Department of Defense approval for the transfer of such firearms from the foreign party to the importer.[165] It would exempt the importer from having to pay any proceeds of the transfer to either the Department of State or the Department of Defense.[166] These provisions would apply notwithstanding any other law, regulation, or executive order.[167]

This bill may reach too far in some ways, yet not far enough in others towards fixing the import ban. The Department of State currently reviews these transfers not due to concerns about crime

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[161] Collectible Firearms Protection Act, H.R. 2247, 113th Cong. (1st Sess. 2013); Collectible Firearms Protection Act, H.R. 615, 112th Cong. (1st Sess. 2011).

[162] H.R. 2247 § 2(a)(2)(C); H.R. 615 § 2(a)(2)(C).

[163] H.R. 2247 § 2(a)(2)(C); H.R. 615 § 2(a)(2)(C).

[164] H.R. 2247 § 2(a)(3):

> Notwithstanding any other provision of law, regulation, or Executive order, any such firearms described in subparagraph (B) may be imported into the United States by an importer licensed under the provisions of chapter 44 of title 18, United States Code, without the importer or the person described in subparagraph (B)(ii)—
>
> (i) obtaining authorization from the Department of State or the Department of Defense for the transfer of such firearms by the person to the importer; or
>
> (ii) providing payment to the Department of State or the Department of Defense of any of the proceeds of the transfer of such firearms by the person to the importer.

[165] *Id.*

[166] *Id.*

[167] *Id.*

control and military firearms running rampant on the streets, but because some of these firearms were provided under foreign assistance programs.[168] If the United States gave the firearms away as a grant, American taxpayers footed the bill. The foreign government had to agree to certain terms to receive the firearms.[169] At least in some cases, those terms specified that the recipient government must notify the U.S. President before the firearms could be transferred to a third party, and Department of State approval is the current substitute for direct presidential notification pursuant to Executive Order 13637.[170] The present import denial problem is not the mere fact of the Department of State notification requirement; rather, it is the poorly informed political reason behind the approval or disapproval of a request for import authorization.

Such importations would be quicker and possibly cheaper for the U.S. government if the Department of State was not involved, like Lummis' bill envisions, as it would remove an entire agency from the approval process. Importers would be happier, and countries like the Republic of Korea who recognize a historical interest of the American public would not be buffeted about by the changing whims of the White House. Foreign and domestic government officials would not need to search for documents that may or may not exist showing how the firearms ended up on that foreign soil. The Department of State could stop worrying about fifty-year-old firearms whose practical military worth is obsolete.

If the Department of State is removed from this process, importers would still have to certify to the Attorney General, presumably through ATF,[171] that the firearms were not illegal foreign stockpiles.[172] Importers would remain subject to the strict laws and regulations in place for all firearms imports, including ATF pre-

[168] *See* 22 U.S.C. §§ 2314, 2753(a) (2012).
[169] § 2753(a), (g).
[170] *See* Exec. Order No. 13,637, 27 C.F.R. § 478 (2014).
[171] The Attorney General would most likely delegate this to ATF as he has done with his other firearms and explosives-related regulatory powers. *See generally* § 478.27 (delegating the authority to ATF to define and exclude objects as "destructive devices," and license those involved in firearms and ammunition importation and manufacturing).
[172] H.R. 2247 § 2(a)(3); *see also* 22 U.S.C. § 2778 (2010).

approval, Customs and Border Protection clearance, and ATF post-import notifications.[173] Domestic purchasers of such firearms would continue to be subject to all federal and state background check and licensing requirements, just as for any other firearm purchase, so any resulting influx of curio or relic firearms would not cause a sudden flood of illegal firearms transfers.

While the proposed Collectible Firearms Protection Act would require a concurrent change to the notification requirements of the Foreign Assistance Act or the pertinent aid provisions of AECA,[174] it may be the most plausible temporary route to amending firearms import law, as it will reach farther and be more effective than the various appropriations bills. The current ban is perplexing because firearms appear to be one of very few items that are illegal to reimport to the United States,[175] and the ban applies only to domestically-manufactured firearms that our government happens to have given away to a foreign country. Any imported firearm is subject to all of the ownership restrictions in place for firearms of domestic manufacture, so removing the ban and allowing a private company to import a military firearm without any of AECA's § 2778 restrictions will not permit unauthorized persons to buy a military-grade firearm.[176]

The extant angst over firearms in America and the continuing push for stricter gun control likely foreclose any attempt to repeal the military firearm import ban completely, making this proposed bill all the more attractive, especially to firearms owners and importers. However, when Congress considers comprehensive export control reform, the ban on the reimportation of American

[173] *See* § 478.112 (listing requirements for importers, including filing an ATF Form 6A (Release and Receipt of Imported Firearms, Ammunition and Implements of War)).

[174] *E.g.* 22 U.S.C. §§ 2314, 2753 (2010).

[175] The author is aware of no other reimportation prohibitions for defense articles, and knows of only one other reimportation prohibition involving non-defense articles, though that provision specifically allows the original manufacturer to reimport its U.S.-origin pharmaceuticals. *See* 21 U.S.C. § 381(d) (2012).

[176] *See* § 2778(b)(2)(B); H.R. 2247 § (2)(a)(3) (amending but not replacing other laws regarding firearms sales and highlighting that other law respecting firearms sales to individuals will remain in effect).

military firearms, at a minimum, should be thoroughly rewritten. If it is completely eliminated, such firearms would not suddenly run rampant on America's streets, as possession would still be subject to the provisions of the National Firearms Act and the Gun Control Act. If it is only rewritten, it should be removed from AECA or its successor and retained in revised form as a provision of the Gun Control Act, so that reimported firearms are subject to the same burden of ATF regulation as their domestic counterparts, instead of facing additional burdens merely because the United States once shared them with a foreign government.

V. CONCLUSION

Americans wish to possess M1 Garands and M1 carbines such as those currently held in Korea because of what they symbolize. Collectors want to hold American history in their hands. Shooting enthusiasts want to preserve and pass on a symbol of heroism, to remind a younger generation of how their grandfathers and great-grandfathers became America's Greatest Generation. ACEA's military firearm import ban did not intend to prevent us from holding history; it intended, perhaps unwisely, to protect domestic small arms manufacturers from competition.

Today, the firearms that most frequently come up against this ban are curio or relic arms whose military usefulness is past. Domestic manufacturers cannot fear them as competition because it is impossible to manufacture a sixty-year-old firearm, and a replica is of limited purpose when an M1's value lies in its age and provenance more than its features. The recent Executive action overlooks AECA's decision-making restrictions, fails to account for the nature of the firearms at issue, ignores the complex workings of firearms import and ownership laws already in place, and interferes with laws dating back fifty years without respecting their original purpose.

Recent appropriations protections have had limited effect, and the proposed Collectible Firearms Protection Act unconsciously intrudes on the requirements of foreign assistance laws. If those intrusions are remedied, the proposed Act can serve as a temporary solution to the import ban and will preserve both the intent of the

original ban and the rationale for the ban's curio and relic exception. However, as Congress considers comprehensive export control reform, it should take heed of the original discussions that gave rise to the ban, and consider carefully the purpose of such a ban, the need for its preservation in light of the Gun Control Act and National Firearms Act, and the proper body of law for administering such a ban. Such deliberation will encourage fair treatment of foreign governments who wish to comply with restrictions we imposed on them, and will ensure that Americans can better preserve their history and continue to honor the heroes and tools that shaped the Greatest Generation.