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CONTENTS

ARTICLES

- 147 THE REAL MEANING OF *ZIVOTOFSKY* AND ITS IMPACT ON
TARGETED KILLINGS CASES

Samantha Goldstein

- 200 ONLINE TERRORISM ADVOCACY: HOW AEDPA AND
INCHOATE CRIME STATUTES CAN SIMULTANEOUSLY PROTECT
AMERICA'S SAFETY AND FREE SPEECH

Daniel Hoffman

COMMENTS

- 252 IMPROVING SCRUTINY OF APPLICANTS FOR TOP SECRET/SCI
CLEARANCES BY ADDING PSYCHOLOGICAL ASSESSMENTS

Francis X. Brickfield, M.D.

- 301 REVISION OF ARTICLE 60 AND THE MILITARY CONVENING
AUTHORITY'S CLEMENCY POWER: AN ALTERNATIVE TO THE
ENACTED LEGISLATION

Suzanne Simms





THE REAL MEANING OF *ZIVOTOFSKY* AND ITS IMPACT ON TARGETED KILLINGS CASES

Samantha Goldstein*

INTRODUCTION

In 2012, the Supreme Court decided *Zivotofsky*,¹ considered by many to be an immensely consequential political question case. Commentators called the decision “far-reaching”² and stated that the Court had “[gone] out of its way to remind everyone (especially the D.C. Circuit) of just how limited the political question doctrine really should be”³ Scholars of international law, in particular, said that *Zivotofsky* “point[ed] the way to greater judicial participation in foreign affairs.”⁴

* Harvard Law School, J.D., 2013.

¹ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

² VED P. NANDA & DAVID K. PANSIUS, 3 LITIGATION OF INT’L DISPUTES IN U.S. COURTS § 14:3, *Zivotofsky and Political Questions* (2012).

³ Steve Vladeck, *What’s Really Wrong With the Targeted Killing White Paper*, LAWFARE (Feb. 5, 2013, 6:44 PM), <http://www.lawfareblog.com/2013/02/whats-really-wrong-with-the-targeted-killing-white-paper/>.

⁴ Peter Spiro, *In Other Supreme Court News: Political Question Doctrine Takes a Hit in Jerusalem Passport Case*, OPINIO JURIS (Mar. 26, 2012, 11:49 AM), <http://opiniojuris.org/2012/03/26/in-other-supreme-court-news-political-question-doctrine-takes-a-hit-in-jerusalem-passport-case/>; see also Zachary D. Clopton, *Foreign Affairs Federalism and the Limits of Executive Power*, MICH. L. REV. FIRST IMPRESSIONS, <http://www.michiganlawreview.org/articles/foreign-affairs-federalism-and-the-limits-on-executive-power> (last visited Mar. 30, 2014) (“In *Zivotofsky*, the

More specifically, from a doctrinal perspective, some academics suggested that the Court in *Zivotofsky* signaled that it was returning to the classical, and away from the prudential, version of the political question doctrine.⁵ Such a shift would arguably be significant, in that it would lead to more frequent judicial involvement in foreign affairs disputes.⁶ Yet, given various factors, *Zivotofsky* is probably not a meaningful jurisprudential move on this score. In particular, the Supreme Court in prior cases had already demonstrated its preference for *Baker*'s classical factors over the prudential components of the *Baker* test,⁷ and lower courts continue to cite all six *Baker* factors in the wake of *Zivotofsky*.⁸

Nevertheless, three other aspects of the case that encouraged lower courts to decide even seemingly controversial foreign affairs disputes may prove to be systemically important: *Zivotofsky* (1) vigorously reasserted the narrowness of the political question doctrine; (2) stated that the existence of a statute and the question of its constitutionality meaningfully altered the political question analysis; and (3) was arguably path-breaking in its refusal to defer to the Executive Branch regarding the potential foreign policy costs of

Supreme Court called for increased judicial participation in contests between Congress and the President in foreign affairs.”).

⁵ Carol Szurkowski, Recent Development, *The Return of Classical Political Question Doctrine in Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), 37 HARV. J.L. & PUB. POL'Y 347, 358 (2014); *The Supreme Court 2011 Term: Leading Cases*, 126 HARV. L. REV. 307, 311 (2012) [hereinafter *Leading Cases*]. Under the classical version, a nonjusticiable political question exists where the Constitution has committed to another branch of government the determination of the issue. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 232 (6th ed. 2009) [hereinafter “HART & WECHSLER”] (citation omitted). By contrast, the prudential theory posits that a court must weigh the consequences of deciding a particular case, before proceeding to address a question on the merits. See David Gray Adler, *Court, Constitution, and Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 35 (David Gray Adler & Larry N. George, eds., 1996) (citations omitted).

⁶ *Leading Cases*, *supra* note 5, at 307 (*Zivotofsky*'s return to the classical version of the political question doctrine is “significant” because it “risk[s] drawing courts into separation of powers disputes that would be better left undecided.”).

⁷ See *infra* notes 41-43 and 102, and accompanying text.

⁸ See *infra* note 127, and accompanying text.

judicial review.⁹ Taken together, these components of *Zivotofsky* signal to Congress that it can encourage judicial review of, in particular, sensitive Executive-driven national security policies by enacting statutes on point.

If one's aim is to hold the Executive accountable for its policies, then one might, at first, think a broad, pro-justiciability reading of *Zivotofsky* will impel beneficial rule of law and accountability results. Congress can effectuate its resistance to Executive national security actions via statute, bolstered by judicial support *ex post*.¹⁰ More likely, however, encouraging judicial review in this way will be a dangerous avenue for critics of targeted killings¹¹ to take.¹² In particular, if Congress enacts a statute giving the families of those killed via targeting a cause of action, courts may use *Zivotofsky* to more frequently find cases involving that statute justiciable. But after so doing, those courts may actually legitimate questionable Executive policies, without providing any real oversight or review. Consequently, if one is interested in constraining the Executive in the national security realm, then—somewhat counter-intuitively—one should be skeptical of *Zivotofsky* as a means to effectuate such constraints.

This Article explores the likely impact of *Zivotofsky* on the political question doctrine. Because the Supreme Court had already heavily emphasized the classical *Baker* factors prior to 2012, *Zivotofsky*'s mere *implicit* rejection of *Baker*'s prudential considerations will not dramatically shift political question

⁹ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-30 (2012).

¹⁰ See, e.g., Kristen E. Eichensehr, Comment, *On Target? The Israel Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873 (2007) (arguing for *ex post* review).

¹¹ The term "targeted killings" refers to "premeditated acts of lethal force employed by states in times of peace or during armed conflict to eliminate specific individuals outside their custody." Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (May 23, 2013), <http://www.cfr.org/counterterrorism/targeted-killings/p9627>. It is not defined under international law, but has been used widely since Israel announced its policy of targeting alleged terrorists in the Palestinian territories. *Id.*

¹² See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 410 (2009) ("[N]othing could be more absurd than courts attempting to conform armed conflict to judicial norms.").

jurisprudence back toward the classical version of the doctrine. Nevertheless, *Zivotofsky* has changed the political question doctrine in other ways. Namely, the *Zivotofsky* Court relied upon a federal statute to frame the question presented so as to ensure a finding of justiciability. Likewise, the Court broke with prior precedent and refused to defer to the Executive's prediction that judicial review would lead to serious foreign policy harms. Consequently, *Zivotofsky*—notwithstanding its failure to definitively reject the prudential version of the political question doctrine—may yet spur more aggressive judicial review in at least some circumstances.

This Article proceeds as follows. Part I explores the origins of and differences between the classical and prudential versions of the political question doctrine. Part II discusses the *Zivotofsky* litigation. Part III argues that, although *Zivotofsky* portends only a modest shift in the tug-of-war between the classical and prudential versions of the political question doctrine, other facets of *Zivotofsky* may have significant effect in lower courts. To support that assertion, Part III discusses the likely impact of *Zivotofsky* on targeted killing cases in particular. Namely, this Article considers how *Zivotofsky*'s political question analysis would apply to a targeted killing case in the existing landscape, as well as its application in a hypothetical world in which Congress enacted a statute giving a private cause of action to the families of those killed by the U.S. government via targeted killing. The end of Part III discusses the normative implications of *Zivotofsky*'s likely effects, and argues that one seeking to curtail the Executive in the national security context should doubt that *Zivotofsky* provides appropriate means to establish such limitations. Part IV concludes.

I. THE HISTORICAL EVOLUTION OF THE POLITICAL QUESTION DOCTRINE

Generally, federal courts have a duty to decide those cases properly presented to them, even if they would “gladly avoid” doing so.¹³ However, in certain circumstances, a court may deem an issue,

¹³ *Zivotofsky*, 132 S. Ct. at 1427 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

otherwise validly before it, to be a nonjusticiable political question.¹⁴ The political question doctrine posits that some constitutional questions “are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution.”¹⁵ The doctrine, however, does not permit courts to avoid adjudicating every case with potentially significant policy consequences.¹⁶ Rather, the political question doctrine is an exception to the otherwise prevailing command that it is “emphatically the province and duty of the judicial department to say what the law is.”¹⁷

Yet, despite scholars’ facial agreement about the narrowness of the doctrine, the scope of and proper approach to the political question doctrine have been hotly contested.¹⁸ In particular, throughout the history of the federal judiciary, the doctrine has undulated between two primary theories: a categorical or classical version, and a prudential conception of the doctrine.¹⁹

Before 1962, when the seminal case of *Baker v. Carr*²⁰ was decided, the Supreme Court took a largely categorical approach to the political question doctrine.²¹ Under the classical version of the doctrine, courts “treated certain well-defined . . . decisions by the political branches as final and binding.”²² On this view, “the

¹⁴ *Id.* (citing *Japan Whaling Assn. v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

¹⁵ Martin H. Redish, *Judicial Review and the ‘Political Question’*, 79 NW. U. L. REV. 1031, 1031 (1984).

¹⁶ See Aziz Z. Huq, *Removal As A Political Question*, 65 STAN. L. REV. 1, 22 n.121 (2013) (stating that the Supreme Court will not treat every politically sensitive case as “nonjusticiable merely because of the complexity and magnitude of the [controversy’s] policy consequences . . .”).

¹⁷ *Marbury v. Madison*, 5 U.S. 137, 177 (1803); see also *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”).

¹⁸ See Adler, *supra* note 5, at 35.

¹⁹ *Id.*

²⁰ *Baker v. Carr*, 369 U.S. 186, 186 (1962).

²¹ CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 56 (4th ed. 2011).

²² Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1400 (1999) (citing Edwin D. Dickinson, *International Political Questions in National Courts*, 19 AM. J. INT’L L. 157 (1925)). Cases in which

existence of a political question in any particular issue [was] determined by ‘whether the Constitution has committed to another agency of government the autonomous determination of the issue.’”²³ This approach, then, was seen as constitutionally required.²⁴

The second predominant theory of the political question doctrine—the prudential view—asserts that courts must consider and weigh the consequences of deciding a particular case prior to adjudicating a question on its merits.²⁵ According to the prudential position, the political question doctrine “appropriately reflects prudential concerns about the exercise of judicial power.”²⁶ This is because, the theory goes, the legitimacy of judicial review (and therefore its longer term efficacy) depends on balancing principle and practicality, which vis-à-vis judicial review, can be achieved through well-timed judicial abstention.²⁷ According to Alexander Bickel, the prudential theory’s most famous proponent, that balancing hinges on the “distinction between judicial judgments on the merits, which . . . must be unyieldingly principled and determinations of justiciability, which . . . could and should turn largely on prudential concerns.”²⁸ On this view, courts could rightly abstain from a matter based on policy reasons, so as to avoid having to decide merits questions that could not be answered in any principled way.

courts treated determinations by the political branches as final and binding are “[w]hen the political branches declared war or peace, or asserted jurisdiction over a foreign territory, or when the President recognized a new government, or determined a territorial boundary under a treaty, or decided that a foreign government had the power to ratify a treaty” *Id.* at 1401-02 (citing, *inter alia*, *Jones v. United States*, 137 U.S. 202, 212 (1890), in which the Supreme Court stated, “[w]ho is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . [t]his principle has always been upheld by this [C]ourt, and has been affirmed under a great variety of circumstances.”).

²³ Adler, *supra* note 5, at 35 (quoting Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959)).

²⁴ *See id.*

²⁵ *Id.*

²⁶ HART & WECHSLER, *supra* note 5, at 233.

²⁷ *See id.*

²⁸ *Id.*

With *Baker v. Carr* in 1962, the Supreme Court shifted its political question jurisprudence toward this second, prudential theory.²⁹ *Baker* described the doctrine as “essentially a function of the separation of powers,”³⁰ and mandated that courts conduct a “case-by-case inquiry”³¹ using various factors that, in light of past cases, “may describe a political question.”³² The Court enumerated six relevant, but not explicitly exclusive, factors:

Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³³

While the first two factors reflect the classical, constitution-based formulation of the political question doctrine, the Court’s inclusion of the third through sixth factors demonstrated that it had also embraced the prudential, discretionary theory of the doctrine.³⁴

²⁹ See 369 U.S. 186 (1962).

³⁰ *Id.* at 217.

³¹ *Id.* at 211.

³² *Id.* at 217.

³³ *Id.*

³⁴ See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267 (2002); see also RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM SUPPLEMENT 22-23 (2012) [hereinafter “HART & WECHSLER’S 2012 SUPPLEMENT”].

Since *Baker*, lower courts have “incanted . . . [the] *Baker* clauses ritually.”³⁵ Yet many courts have criticized the case’s multi-factored analysis. In particular, many believe that the prudential version of the political question doctrine is indeterminate and inappropriate for judicial consideration.³⁶ Consequently, some commentators have asked the Supreme Court to provide a clearer definition of what constitutes a nonjusticiable political question.³⁷ Even more strongly, some have called for repudiation of the prudential approach to political questions.³⁸ Others have even urged the elimination of the doctrine in its entirety.³⁹

Despite such calls, the Supreme Court long persisted in reciting the entire *Baker* formulation.⁴⁰ Yet, in its more recent holdings, the Court has, in practice, relied predominantly on *Baker*’s classical factors.⁴¹ For example, in *Nixon v. United States*,⁴² the Court

³⁵ LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 89 (1990) (citing Comm’r. of Internal Revenue v. Sansome, 60 F.2d 931, 933 (2d Cir. 1932) (describing the *Baker* factors as “anodynes for the pains of reasoning”)).

³⁶ See, e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (“[T]he proper application of *Baker*’s six factors has generated substantial confusion in the lower courts.”); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 149-50 (5th ed. 2007) (arguing that “the[] [*Baker*] criteria seem useless in identifying what constitutes a political question” and that it is, therefore, “hardly . . . surprising that the doctrine is described as confusing and unsatisfactory”); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PENN. L. REV. 97, 107, 163 (1988) (“Most [lower court political question] cases do little more than cite *Baker v. Carr*.”).

³⁷ See, e.g., HENKIN, *supra* note 35, at 89; see also THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 9 (1992) (“[Given] [t]he current state of jurisprudential incoherence . . . [i]t is time, surely, to examine the history, theory, and practice that have shaped the way we treat foreign affairs in our courts and to explicate a principled role for the courts that comports with the nation’s highest purposes.”).

³⁸ Barkow, *supra* note 34, at 333.

³⁹ See, e.g., FRANCK, *supra* note 37, at 4-5 (arguing that the political question doctrine is “not only not required by but wholly incompatible with American constitutional theory”).

⁴⁰ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990); *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969).

⁴¹ See Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1307 (2012) [hereinafter *Canon*] (citing *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the

cursorily referenced the full *Baker* test, yet focused on only the first two *Baker* factors in finding that the question whether the Senate had properly “tried” an impeachment of a federal judge was a nonjusticiable political question.⁴³ In *Zivotofsky*, the Supreme Court seemed to go even further, explicitly referencing only those first two factors, and not even mentioning the remaining four *Baker* considerations.⁴⁴ Did the *Zivotofsky* Court reject the prudential approach to the political question doctrine and, thus, return emphatically to the classical conception of that doctrine?⁴⁵

II. THE *ZIVOTOFSKY* LITIGATION

It had been the longstanding policy of the United States to take no position in the debate regarding whether Jerusalem is part of Israel.⁴⁶ Then, in 2002, Congress passed the Foreign Relations Authorization Act (“Act”),⁴⁷ which, in part, challenged the Executive Branch’s established approach to the status of Jerusalem. In

judgment) (noting that, over the past fifty years, the Court has exclusively relied on these two *Baker* factors in applying the political question doctrine), *cert. denied*, 131 S. Ct. 997 (2011)).

⁴² *Nixon v. United States*, 506 U.S. 224 (1993).

⁴³ *Id.* at 228-29.

⁴⁴ *Ziting Nixon*, 132 S. Ct. at 1427 (citing *Nixon*, 506 U.S. at 228).

⁴⁵ HART & WECHSLER’S 2012 SUPPLEMENT, *supra* note 34, at 23 (“By framing the political question inquiry wholly in terms of the first two *Baker* factors—textual commitment and absence of judicially manageable standards—did *Zivotofsky* signal the Roberts Court’s endorsement of Professor Wechsler’s ‘classical’ position over Professor Bickel’s ‘prudential’ one?”).

⁴⁶ *Zivotofsky*, 132 S. Ct. at 1424. The State Department’s Foreign Affairs Manual mandates that “[w]here the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport.” 7 Foreign Affairs Manual § 1383.5-2, App. 108. The manual “specifically directs that passport officials should enter ‘JERUSALEM’ and should ‘not write Israel or Jordan’ when recording the birthplace of a person born in Jerusalem on a passport.” *Zivotofsky*, 132 S. Ct. at 1425 (citing 7 Foreign Affairs Manual §§ 1383.1-1383.5-6 (1987)); see also Adam Liptak, *Question of Birth Becomes One of President’s Power*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/2011/07/26/us/26bar.html> (“The status of Jerusalem has long divided not only Israelis and Arabs but also Congress and presidents of both parties.”).

⁴⁷ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

particular, Section 214 of the Act, entitled “United States Policy with Respect to Jerusalem as the Capital of Israel,” provided that if a citizen born in Jerusalem, or that citizen’s legal guardian, requests his place of birth be listed in his passport and consular report of birth abroad as “Israel,” then the “Secretary [of State] *shall* . . . record the place of birth as Israel.”⁴⁸ President George W. Bush, in 2002, signed the Act into law, but in so doing, attached a signing statement making clear that he believed Section 214 of the Act was unconstitutional.⁴⁹ If Section 214 is “construed as mandatory,” he said, then it would “interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.”⁵⁰

Menachem Binyamin Zivotofsky, the son of two American citizens (and, therefore, an American citizen himself), was born in Jerusalem in October of 2002, soon after Congress passed Section 214.⁵¹ Zivotofsky’s mother, in applying for a U.S. passport and a consular report of birth abroad for her son, requested that his place of birth be listed on both items as “Jerusalem, Israel.”⁵² U.S. officials refused.⁵³

Zivotofsky’s parents then filed suit on Zivotofsky’s behalf against the Secretary of State.⁵⁴ They sought declaratory and injunctive relief permanently requiring the Secretary to list Zivotofsky’s place of birth on his passport and consular report of birth as “Jerusalem, Israel.”⁵⁵ The District Court for the District of Columbia dismissed the complaint, holding that Zivotofsky lacked

⁴⁸ Foreign Relations Authorization Act § 214(d) (emphasis added).

⁴⁹ Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002).

⁵⁰ *Id.*

⁵¹ *Zivotofsky*, 132 S. Ct. at 1425 (citing 8 U.S.C. § 1401(c)); *Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (foreign-born children of American citizens acquire citizenship at birth through “congressional generosity”).

⁵² *Zivotofsky*, 132 S. Ct. at 1425.

⁵³ *Id.* at 1425–26.

⁵⁴ *Id.* at 1426.

⁵⁵ *Id.*

Article III standing and that the case presented a nonjusticiable political question.⁵⁶

The Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) reversed, finding that the child had suffered injury in fact and, thus, had standing to sue.⁵⁷ The D.C. Circuit then remanded the case to the district court so that it could develop a more complete record regarding whether the action presented a nonjusticiable political question.⁵⁸

After further findings, the district court held that Zivotofsky’s request to have his passport and consular report of birth identify his place of birth as “Israel” presented a nonjusticiable political question.⁵⁹ The D.C. Circuit affirmed, likewise finding the case nonjusticiable.⁶⁰ The D.C. Circuit framed the issue as whether the State Department could lawfully refuse to record a Jerusalem-born U.S. citizen’s place of birth as “Israel” on his official documentation. The court, citing *Baker*’s first factor, explained that the text of the Constitution exclusively commits to the Executive Branch the power to recognize foreign sovereigns,⁶¹ and that, consequently, the Executive’s exercise of that power was unreviewable by courts.⁶² The court then stated that “policy decisions made pursuant to the President’s recognition power”—

⁵⁶ Zivotofsky v. Sec’y of State, Nos. 03-1921 & 03-2048, 2004 WL 5835212, at *3-4 (D.D.C. Sept. 7, 2004).

⁵⁷ Zivotofsky v. Sec’y of State, 444 F.3d 614, 617 (D.C. Cir. 2006). The D.C. Circuit explained that while “it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by [a] statute” like the Foreign Relations Authorization Act. *Id.* at 619. Such a statutorily-based injury is sufficient under Article III’s case or controversy requirement because it is concrete, namely in “a form traditionally capable of judicial resolution,” *id.* (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974)), and, even more so, “because, as the violation of an *individual* right, it affects the plaintiff in a personal and individual way.” *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

⁵⁸ Zivotofsky v. Sec’y of State, 444 F.3d 614, 620 (D.C. Cir. 2006).

⁵⁹ Zivotofsky v. Sec’y of State, 511 F. Supp. 2d 97, 102 (D.D.C. 2007).

⁶⁰ Zivotofsky v. Sec’y of State, 571 F.3d 1227, 1333 (D.C. Cir. 2009).

⁶¹ *Id.* at 1231.

⁶² *Id.* at 1231-33.

such as a decision to record “Jerusalem” and not “Israel” on a Jerusalem-born U.S. citizen’s passport—are nonjusticiable political questions.⁶³ The court rejected Zivotofsky’s assertion that Section 214 changed the political question analysis.⁶⁴ Thereafter, the D.C. Circuit denied Zivotofsky’s petition for rehearing *en banc*.⁶⁵

The Supreme Court granted certiorari in 2011.⁶⁶ Upon review, the Supreme Court held in 2012 that Zivotofsky’s action was not barred under the political question doctrine.⁶⁷ Chief Justice Roberts, writing for the majority, first emphasized that “[i]n general, the Judiciary has a responsibility to decide cases properly before it” and that the political question doctrine is merely “a narrow exception to that rule.”⁶⁸ The Court explained that the case required a court to determine only if Zivotofsky was able to vindicate the statutory right granted to him by Congress in Section 214(d).⁶⁹ It did not require a court to “decide the political status of Jerusalem.”⁷⁰ The Court described Congress’s enactment of Section 214 as “relevant to the Judiciary’s power to decide Zivotofsky’s claim” because the courts were, by virtue of the statute, being asked to “enforce a specific statutory right,” and, thus, needed only to perform “a familiar judicial exercise.”⁷¹ The parties did not dispute the interpretation of

⁶³ *Id.* at 1231.

⁶⁴ *Id.* at 1233.

⁶⁵ Zivotofsky v. Sec’y of State, 610 F.3d 84, 84 (D.C. Cir. 2010).

⁶⁶ Zivotofsky v. Clinton, 131 S. Ct. 2897 (2011) (granting certiorari on the question whether “Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President’s power to recognize foreign sovereigns”).

⁶⁷ Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430-31 (2012).

⁶⁸ *Id.* at 1427.

⁶⁹ *Id.* In so describing the case, the Supreme Court rejected the stance taken by the D.C. Circuit. Whereas the D.C. Circuit focused on the President’s power that Zivotofsky’s claim had called into question, the Supreme Court “began from a different premise,” instead asking whether or not the source of Zivotofsky’s claimed statutory right was valid. *Leading Cases, supra* note 5, at 311; *see also* Curtis Bradley, *Interesting Case Concerning the President’s Recognition Power*, LAWFARE (May 10, 2011, 1:37 PM), <http://www.lawfareblog.com/2011/05/interesting-case-concerning-the-presidents-recognition-power/> (Because “the issue presented in this case is not whether to recognize Israeli sovereignty over Jerusalem but rather whether Section 214(d) invades the President’s exclusive authority to make that determination,” there is little reason that the question should be deemed nonjusticiable.).

⁷⁰ Zivotofsky, 132 S. Ct. at 1427.

⁷¹ *Id.* at 1427.

Section 214(d) and, therefore, the Court had a duty to decide the only question—namely, the constitutionality of the statute—before it.⁷²

Then, rather than citing the full *Baker* formulation, the Court stated—quoting *Nixon v. United States* (which only referenced the classical factors of the political question doctrine), not *Baker* itself—that a case “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’”⁷³ That is, the majority described the political question doctrine as consisting of only the first two classical *Baker* factors.⁷⁴ And the Court held that neither of those two factors was present in the controversy before it.

Under the “textual commitment” prong, the Court emphasized that there was “no exclusive commitment to the Executive of the power to determine the constitutionality of a statute.”⁷⁵ Rather, the Court said, such a decision is within the province of the judiciary.⁷⁶ With respect to the second, “judicially manageable standards” factor, the Court stated that, once the issue was properly framed in terms of the constitutional validity of Section 214(d) (rather than as hinging upon the political status of Jerusalem), it was clear that the issue required legal, not policy, analysis.⁷⁷ This case, even if not an easy one, the Court explained, “does not turn on standards that defy judicial application” but rather “demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers.”⁷⁸ That sort of inquiry, the Court concluded, is “what courts do.”⁷⁹ The Court then remanded the case

⁷² *Id.* at 1427–28.

⁷³ *Id.* at 1427 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (in turn quoting *Baker*, 369 U.S. at 217)).

⁷⁴ See *Zivotofsky*, 132 S. Ct. at 1427.

⁷⁵ *Id.* at 1428.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1428–29.

⁷⁸ *Id.* at 1430 (citing, in part, *Baker*, 369 U.S. at 211).

⁷⁹ *Id.*

for consideration by the lower courts of its merits in the first instance.⁸⁰

Justice Sotomayor agreed with the majority that the case did not present a nonjusticiable political question, but wrote separately to emphasize her belief that the political question doctrine required analysis “more demanding than that suggested by the Court.”⁸¹ Justice Sotomayor quoted, and then discussed, all six *Baker* factors as comprising the test governing the political question doctrine. She acknowledged, however, that *Baker* “left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication.”⁸² Justice Sotomayor thus sought to clarify the role and interplay of the *Baker* factors. As one commentator explained:

[Justice Sotomayor] grouped the factors into three categories: (1) where the Constitution textually commits the resolution of an issue to one of the political branches (*Baker*’s first factor), courts lack authority to decide; (2) where there are no “judicially discoverable and manageable standards” for resolving the issue, or where resolution requires an “initial policy determination” (*Baker*’s second and third factors), courts lack the ability to decide; and (3) where judicial resolution implicates various prudential concerns (*Baker*’s fourth, fifth, and sixth factors), courts should abstain from deciding the issue.⁸³

Justice Sotomayor noted that courts “should be particularly cautious” before finding a question nonjusticiable based on one of the reasons

⁸⁰ *Zivotofsky*, 132 S. Ct. at 1431. On remand, the D.C. Circuit held that Section 214 impermissibly intrudes upon the President’s exclusive recognition authority, and is therefore unconstitutional. *Zivotofsky v. Sec’y of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).

⁸¹ *Zivotofsky*, 132 S. Ct. at 1431.

⁸² *Id.* at 1431-34.

⁸³ Alan Rozenshtein, *Supreme Court Holds No Political Question in Zivotofsky, Remands for Decision on the Merits*, LAWFARE (Mar. 26, 2012, 1:22 PM), <http://www.lawfareblog.com/2012/03/supreme-court-holds-no-political-question-in-zivotofsky-remands-for-decision-on-the-merits/> (citing *Zivotofsky*, 132 S. Ct. at 1431-32).

contained in her third grouping.⁸⁴ Only in the most “unusual case,” she emphasized, should a court decline to adjudicate a case on the basis of its own prudential determination.⁸⁵ The *Zivotofsky*’s suit, she concluded, was not that sort of rare case.⁸⁶

Justice Alito concurred in the judgment.⁸⁷ He stated simply: “This case presents a narrow question, namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport.”⁸⁸ Although, under Supreme Court precedent, “determining the constitutionality of an Act of Congress *may* present a political question,” he said, the narrow question at issue here did not so qualify, even though “[d]elineating the precise dividing line between the powers of Congress and the President with respect to the contents of a passport is not an easy matter.”⁸⁹ Justice Alito thus found this case justiciable, in part, by framing the question as one of statutory and constitutional interpretation.⁹⁰ Yet he recognized—arguably more so than the majority—that not all cases implicating congressional enactments could automatically escape the political question doctrine’s net of nonjusticiability.

Justice Breyer, alone, dissented.⁹¹ He agreed with Justice Sotomayor that all six *Baker* factors remained relevant.⁹² However, parting ways with her and the other seven justices, Justice Breyer found that the case presented a nonjusticiable political question.⁹³ He based his finding on “four sets of prudential considerations, *taken together*,”⁹⁴ namely: (1) the case arose in the foreign affairs arena;⁹⁵

⁸⁴ *Zivotofsky*, 132 S. Ct. at 1432.

⁸⁵ *Id.* at 1433; Rozenstein, *supra* note 83 (According to Justice Sotomayor, “this third category could, albeit rarely, be enough to render a case nonjusticiable—for example, ‘if Congress passed a statute . . . purporting to award financial relief to those improperly ‘tried’ of impeachment offenses.”).

⁸⁶ See Rozenstein, *supra* note 83.

⁸⁷ *Zivotofsky*, 132 S. Ct. at 1436.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1436–37 (emphasis added).

⁹⁰ *Id.* at 1436.

⁹¹ *Id.* at 1437.

⁹² *Id.*

⁹³ *Zivotofsky*, 132 S. Ct. at 1437.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1437.

(2) answering the constitutional question presented in this case might require courts “to evaluate the foreign policy implications of foreign policy decisions”;⁹⁶ (3) the “countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones”;⁹⁷ and (4) the political branches have sufficient non-judicial means to resolve their differences at issue in this case.⁹⁸ Justice Breyer, thus, concluded that the case was nonjusticiable, and in so deciding, reaffirmed his commitment to the prudential version of the political question doctrine.⁹⁹

III. THE IMPACT OF THE COURT’S POLITICAL QUESTION APPROACH ON NATIONAL SECURITY POLICY

A. *Zivotofsky Portends a Modest Shift in Political Question Jurisprudence, But Does So for Reasons Ignored by Many Commentators*

Zivotofsky is unlikely to spur significant changes in federal courts’ political question jurisprudence vis-à-vis the tug-of-war between the classical and prudential versions of the political question doctrine. Nevertheless, it may increase the likelihood that lower courts find questions justiciable, particularly where federal statutes are involved. Thus, in turn, it may encourage Congress to assert its prerogatives via statutory enactment. If that is the case, then *Zivotofsky* may have a jurisprudential impact, albeit in an unanticipated way.

1. One (Small) Step Closer to Explicitly Repudiating the Prudential Political Question Doctrine

The Court only mentioned the two constitution-based *Baker* factors in analyzing the justiciability question in *Zivotofsky*. It

⁹⁶ *Id.* at 1438.

⁹⁷ *Id.* at 1440. In particular, Justice Breyer emphasized, *Zivotofsky* “[did not] assert an interest in vindicating a basic right of the kind that the Constitution grants to individuals and that courts traditionally have protected from invasion by the other branches of Government.” *Id.*

⁹⁸ *Zivotofsky*, 132 S. Ct. at 1441.

⁹⁹ *Id.*

ignored *Baker*'s other considerations, causing Justice Sotomayor—in contrast to the majority—to take pains to emphasize all six *Baker* factors.¹⁰⁰ But, that does not mean the Court in *Zivotofsky* unambiguously rejected the prudential approach to the political question doctrine.

The Court ignored, but did not explicitly eliminate, the prudential *Baker* factors from the political question doctrine test.¹⁰¹ In addition, the two factors cited by the *Zivotofsky* Court were, in recent years, already coming to be seen as the dominant—if not the only real—factors in federal courts' political question doctrine analysis.¹⁰² In fact, as in *Zivotofsky*, the Supreme Court in *Nixon v. United States* quoted only the first two *Baker* prongs.¹⁰³ Thus, it is not clear that *Zivotofsky* is, in a practical sense, any different from antecedent Supreme Court precedent.

¹⁰⁰ See Rozenshtein, *supra* note 83.

¹⁰¹ See *Constitutional Law: Political Question Doctrine Designation of Passport Applicant's Birthplace: Zivotofsky ex rel. Zivotofsky v. Clinton*, 126 HARV. L. REV. 307 (2012).

¹⁰² See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) ("These tests are probably listed in descending order of both importance and certainty."); *Nixon v. United States*, 506 U.S. 224, 228 (1993) (focusing on the first two *Baker* factors); *Canon*, *supra* note 41, at 1307 n.71 (citing *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment), *cert. denied*, 131 S. Ct. 997 (2011)); see also MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 329 (2007) (quoting *Goldwater v. Carter*, 444 U.S. 996, 1006-07 (1979) (Brennan, J. dissenting)) (internal quotation marks omitted) ("[T]he political-question doctrine . . . does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power."); HART & WECHSLER, *supra* note 5, at 236 ("[T]he Court's application of the political question doctrine still requires an interpretation of the underlying constitutional provision to determine where the relevant discretion or interpretive authority is vested."); Mark Tushnet, *Symposium: Baker v. Carr: A Commemorative Symposium: Panel I: Justiciability and the Political Thicket: Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1207 (2002) ("For the political question doctrine, the 'issue,' in the Court's sense, is: Who gets to decide what the right answer to a substantive constitutional question is?").

¹⁰³ *Nixon*, 506 U.S. at 228 ("A controversy is nonjusticiable—*i.e.*, involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it").

In fact, scholars have several times declared the death knell of the prudential approach, if not the entire doctrine. For example, one author wrote in 1984 that the doctrine had withered to nearly nothing, as “only once in the [prior] two decades ha[d] the Court decided that an issue raised a nonjusticiable political question.”¹⁰⁴ Likewise, some scholars thought the 1986 case of *Japan Whaling Association v. American Cetacean Society*¹⁰⁵—where the Supreme Court rejected the assertion that judicial review would be imprudent and held that an action alleging the Secretary of Commerce breached his statutory duty to enforce international whaling quotas was justiciable because it presented issues of statutory interpretation falling squarely within the province of the federal courts—marked a “retreat from [the] effects-based political question doctrine,” and apparently several lower courts did, too.¹⁰⁶ Thomas Franck, a professor of international law and author of an oft-cited book on the political question doctrine’s application to foreign affairs cases, wrote twenty years before *Zivotofsky* that “[p]articularly in the Supreme Court, the political-question doctrine is now quite rarely used” and, in its entirety, “may be falling into desuetude.”¹⁰⁷ Others predicted

¹⁰⁴ Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406 (1984).

¹⁰⁵ *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986).

¹⁰⁶ Jack L. Goldsmith, *The New Formalism in the United States Foreign Relations Law*, 70 COLO. L. REV. 1395, 1428 (1999) (citing *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993); *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991); *Chiles v. Thornborough*, 865 F.2d 1197 (11th Cir. 1989)) (“Several lower federal courts have invoked the [*Japan Whaling*] decision as a basis for rejecting the political question doctrine” when invoked by a litigant only because of the alleged “adverse foreign relations consequences of an adjudication.”).

¹⁰⁷ See FRANCK, *supra* note 37, at 61; see also *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (“Recent cases raise doubts about the contours and vitality of the political question doctrine, which continues to be the subject of scathing scholarly attack.”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984) (Edwards, J., concurring) (“Nonjusticiability based upon ‘political question’ is at best a limited doctrine . . .”). While Rachel Barkow rightly asserts that such “predictions proved premature . . . when the Court [in 1993] concluded in *Nixon v. United States* that whether the Senate could impeach a federal judge pursuant to Article I, Section 3, Clause 6 based on the report of a fact-finding committee presented a nonjusticiable political question,” she also acknowledges that “Rehnquist’s opinion for the Court [in *Nixon*] was based predominantly on the classical political question doctrine” and thus might still be consistent with the

the demise of the political question doctrine in the wake of the Supreme Court's decision in 2000 to adjudicate *Bush v. Gore*.¹⁰⁸ More pertinently for purposes of this Article, many took the Supreme Court's willingness to decide several controversial national security cases, like *Rasul v. Bush*¹⁰⁹ and *Boumediene v. Bush*,¹¹⁰ as yet another sign of the political question doctrine's expiry.¹¹¹

In addition, since *Baker* was decided in 1962, even that case's classical factors rarely—at least at the level of the Supreme Court—resulted in the finding of a nonjusticiable political question. “[O]nly twice in the past half-century has the Court relied on the existence of a ‘textually demonstrable commitment’ to another branch to dismiss a case on political question grounds, and the cases involving the absence of ‘judicially manageable standards’ have all fallen within the same subject-matter: challenges to ‘partisan’ gerrymandering.”¹¹² The finding of justiciability in *Zivotofsky* thus can hardly be called unusual. Rather than radically changing the Supreme Court's

theory that the *prudential* version of the doctrine had withered. Barkow, *supra* note 34 at 271-72.

¹⁰⁸ Margit Cohn, *Form, Formula and the Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, 59 AM. J. COMP. L. 675, 678-79 (2011).

¹⁰⁹ *Rasul v. Bush*, 542 U.S. 466, 483 (2004) (holding that, at the time, non-U.S. citizens detained as enemy combatants by the U.S. government at Guantanamo had a *statutory* right under the general federal habeas corpus statute, 28 U.S.C. § 2241, to seek habeas corpus review in U.S. federal court).

¹¹⁰ *Boumediene v. Bush*, 553 U.S. 723, 724 (2008) (holding that non-U.S. citizens detained as enemy combatants by the U.S. military at Guantanamo have a *constitutional* right to seek habeas corpus review in U.S. federal courts).

¹¹¹ Cohn, *supra* note 108, at 679. In *Boumediene*, for example, the Court carefully framed the issue before it so as to reject *on the merits* the Executive's claim that the Suspension Clause affords Guantanamo detainees no rights because the United States does not assert sovereignty over Guantanamo, the place of their detention. *Boumediene*, 553 U.S. at 753. The Court explained that, even though the Court would not question the Executive's position that Cuba, not the U.S., had *de jure* sovereignty over Guantanamo, the Court could inquire into the “objective degree of control” the United States exercises over the base. *Id.* at 754. That is, the Court narrowly defined which sovereignty-related questions are nonjusticiable and, in so doing, determined it could decide on the merits an otherwise highly controversial foreign affairs-related issue. *Id.*

¹¹² *Canon*, *supra* note 41, at 1308.

political question jurisprudence, *Zivotofsky* simply confirmed existing law.¹¹³

Nevertheless, there are signs¹¹⁴ that *Zivotofsky* evidences a more pro-justiciability conception of the political question doctrine than did prior cases only hinting at such a shift.¹¹⁵ First, it is potentially meaningful that Justices Sotomayor, Alito, and Breyer so explicitly took the majority to task for failing to cite the entire *Baker* formulation. This could indicate that the majority's truncated reference to *Baker* (even if not an explicit repudiation of its prudential factors) was significant. This is particularly so, given that even in cases like *Vieth v. Jubelirer*,¹¹⁶ where the Court emphasized *Baker*'s classical components, the Court continued to at least cite to the full *Baker* test.¹¹⁷ Second, the case built upon *Japan Whaling* to more strongly assert that the existence of a statutory question significantly affects the political question analysis.¹¹⁸ Similarly, the Court took pains to formulate the question presented to avoid finding a nonjusticiable political question. Third, even those few justices willing to consider the prudential *Baker* factors in *Zivotofsky* emphasized that justiciability should almost never be refused on such grounds.¹¹⁹ Lastly, the Court mechanically recited the full test for so

¹¹³ Cf. PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 60 (1996) (citing Symposium, *Comments on Powell v. McCormack*, 17 UCLA L. R. 1 (1969)).

¹¹⁴ See Spiro, *supra* note 4 ("In the long run, [*Zivotofsky*] could prove a watershed decision.").

¹¹⁵ Cf. HART & WECHSLER'S 2012 SUPPLEMENT, *supra* note 37, at 23.

¹¹⁶ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

¹¹⁷ *Id.* at 277-78 (plurality opinion) ("These tests are probably listed in descending order of both importance and certainty."). But see *Nixon v. United States*, 506 U.S. 224, 228 (1993).

¹¹⁸ Cf. Chris Michel, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 YALE L.J. 253, 254 (2013) ("[*Zivotofsky*] supports a sweeping and significant rule; a claim to a federal statutory right can never present a political question."); *Leading Cases*, *supra* note 5, at 311 ("In *Zivotofsky*, the Court aligned the D.C. Circuit's classical jurisprudence with the basic principle that executive and legislative power are interdependent. But read broadly, *Zivotofsky* also suggests that an entire category of cases—ones in which a plaintiff invokes a statutory constraint on the Executive—is inherently justiciable.").

¹¹⁹ See, e.g., *Zivotofsky*, 132 S. Ct. at 1433 (Sotomayor, J., concurring in part and concurring in the judgment).

long that any deviation from that baseline of rote repetition should be taken as a meaningful in and of itself. The *Zivotofsky* Court's quoting *Nixon*—which likewise cited only *Baker*'s classical factors as the source of the “textual commitment” and “judicially manageable standards” prongs—seems particularly significant on this score.

Still, *Zivotofsky*'s weakly pro-justiciability adoption of the classical theory is unlikely to tangibly affect the *lower* federal courts' approach to the political question doctrine, where most political question cases are decided.¹²⁰ On the one hand, the case seems to be having a modest impact: at least some litigants and lower courts have begun citing only the first two, classical factors from *Baker*.¹²¹ Lower courts more zealously apply the political question doctrine—that is, they are more likely to find cases nonjusticiable—than does the Supreme Court.¹²² And the political question doctrine has “become an increasingly prominent defense in post-September 11 national security cases.”¹²³ Viewed against that backdrop, one might understand *Zivotofsky* as sending a responsive signal to the lower

¹²⁰ Cf. Zachary D. Clopton, *Foreign Affairs Federalism and the Limits of Executive Power*, 111 MICH. L. REV. FIRST IMPRESSIONS 1 (2012) (“In *Zivotofsky*, the Supreme Court called for increased judicial participation in contests between Congress and the President in foreign affairs.”); see also 3 Litigation of International Disputes in U.S. Courts § 15:6, *Conflict and Comity*, n.19 (“[T]he political question doctrine may be more narrowly applied in the future considering the Supreme Court’s recent ruling in *Zivotofsky*.”).

¹²¹ See, e.g., *Doe v. Franklin Cnty., Mo.*, No. 4:12-CV-918-SNLJ, 2013 WL 2467926, at *6 (E.D. Mo. June 7, 2013) (quoting *Zivotofsky*, 132 S. Ct. at 1427) (“A political question exists ‘where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicial discoverable and manageable standards for resolving it.’”); Final Response/Principal Brief of Plaintiffs-Appellees/Cross Appellants at 52-53, *Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013) (Nos. 11-7096, 12-7025, 12-7026), 2012 WL 5460858, at *52-53 (citing only those two *Baker* factors cited by the *Zivotofsky* majority while undertaking a political question doctrine analysis); Reply Brief for Petitioners-Appellants at 2-3, *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (No. 12-5087), 2012 WL 6085407, at *2-3 (same); see also 16 C.J.S. *Constitutional Law* § 309 (2014) (quoting only those two *Baker* factors cited by the *Zivotofsky* majority).

¹²² See *Canon*, *supra* note 41, at 1307-08.

¹²³ *Id.* at 1321.

courts that they should resolve skirmishes between the political branches, even in the context of foreign affairs.¹²⁴

Yet, given the prevalence of the doctrine in the lower courts, it seems more likely that the relatively weak signal in *Zivotofsky* will not have that much of an impact there after all. Certainly, there is reason to be skeptical about the likely impact of *Zivotofsky*. One district court asserted that the case in no way altered existing doctrine,¹²⁵ and another cited Justice Breyer's *Zivotofsky* dissent for the proposition that the political branches have indefatigable primacy over the judiciary in matters relating to foreign affairs.¹²⁶ Moreover, several district court cases and appellate briefs have cited Justice Sotomayor's concurrence (which emphasizes the need to apply all six *Baker* factors), rather than the majority's opinion (which only references *Baker*'s two classical factors).¹²⁷ Other district court

¹²⁴ Cf. NANDA & PANSIUS, *supra* note 2.

¹²⁵ See, e.g., *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 3441578, at *4 (D. Kan. Aug. 15, 2012) ("*Zivotofsky*, however, did not substantially change the political question doctrine. It therefore does not constitute an intervening change in controlling law.").

¹²⁶ *In re Restraint of All Assets Contained or Formerly Contained in Certain Inv. Accounts at UBS Fin. Servs., Inc.*, 860 F. Supp. 2d 32, 41 (D.D.C. 2012) (quoting *Zivotofsky*, 132 S. Ct. at 1437 (Breyer, J., dissenting)) ("The Constitution primarily delegates the foreign affairs powers to the political departments of the government, Executive and Legislative, not to the Judiciary.").

¹²⁷ See, e.g., *Gill v. Arab Bank, PLC*, 891 F. Supp. 2d 335 (E.D.N.Y. 2012) (citing Justice Sotomayor's *Zivotofsky* concurrence and quoting all six factors from *Baker*); *Arunga v. Romney* No. 2:12-CV-873, 2012 WL 5269174, at *2 (S.D. Ohio Oct. 24, 2012) (citing Justice Sotomayor's *Zivotofsky* concurrence, although nothing that, among the factors set forth in *Baker*, a court is required to consider "a lack of judicial standards . . . and the impossibility of judicial resolution without policy determinations committed to other branches of government"); Motion of Professor Victor Williams for Leave to File a Brief Amicus Curiae in Support of Respondent NLRB Raising Political Question Nonjusticiability at 3, *Direct Holdings, LLC v. Nat'l Lab. Rel. Bd.* (Nos. 12-72526, 12-72639), 2013 WL 298322, at 3 (citing Justice Sotomayor's *Zivotofsky* concurrence) ("Justice Sotomayor helpfully detailed the 'demanding' inquiry required of a political question analysis.") (citation omitted); Reply Brief in Support of Defendant's Motion for Reconsideration of Motion to Dismiss for Lack of Subject Matter Jurisdiction or, Alternatively, for Judgment on the Pleadings, *In re Motor Fuel Temperature Sales Practices Litig.*, 2012 WL 3441578 (No. 07-MD-01840-KHV), 2012 WL 3176596; see also *Rangel v. Boehner* No. 13-540, 2013 WL 6487502, at *9-10, *21 n.24 (D.D.C. Dec. 11, 2013) (quoting *Baker*'s list of all six factors, but then asserting that the first two factors are the most

cases exhibit even more confusion about the scope of the political question doctrine in the wake of *Zivotofsky*, namely by citing *Zivotofsky*'s majority opinion to support the two *Baker* factors it mentioned, yet then applying the remaining four *Baker* factors as well.¹²⁸ Litigants—though, perhaps opportunistically—have asserted confusion in the doctrine, too.¹²⁹

But *Zivotofsky*'s modest repudiation of *Baker*'s prudential factors could synergize with other trends to more strongly influence national security doctrine. Specifically, even though *Zivotofsky* is

important and later referencing *Zivotofsky* for the proposition that the court could not reach the merits of the plaintiff's claims); *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 961 F. Supp. 2d 185, 191-92 (D.D.C. 2013) (citing *Baker*'s list of all six factors but then explicitly discussing only the two factors mentioned by the majority in *Zivotofsky*); *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518 (KBF), 2013 WL 1155576, at *20, *22 (S.D.N.Y. Mar. 13, 2013) (citing *Zivotofsky* for the proposition that "[c]ourts lack authority to decide non-justiciable political questions," but then quoting all of *Baker*'s six factor list).

¹²⁸ See, e.g., *Alaska v. Kerry*, No. 3:12-cv-00142-SLG, 2013 WL 5269760, at *7-18 (D. Alaska Sept. 17, 2013); *Kerr v. Hickenlooper*, 800 F. Supp. 2d 1112, 1147 n.35 (D. Colo. 2012), *aff'd and remanded by* 2014 WL 889445 ("Some recent Supreme Court decisions have only identified the first two *Baker* tests in describing the test for whether the political question doctrine applies in a particular case, suggesting the importance of the first two tests."); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 3441578 (D. Kan. Aug. 15, 2012) (citing to *Zivotofsky* and quoting the two *Baker* factors mentioned in *Zivotofsky*, but then discussed all six *Baker* factors); *Davis v. Detroit Fin. Review Team*, 821 N.W.2d 896, 927, 929 (Mich. Ct. App. 2012) (O'Connell, J., concurring in part and dissenting in part) (citing at first only those two *Baker* factors mentioned in *Zivotofsky*, but then perhaps referring to an additional *Baker* factor when stating that certain issues "by their very nature are beyond judicial competence").

¹²⁹ *Petition for Certiorari, Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, Dept. of Homeland Security*, 2013 WL 522043, at *17-18 (U.S. Feb. 12, 2013) (No. 12-996) (identifying a need for "the Court to clarify not only that the 'political question test' applies whenever 'foreign policy concerns' are raised, but [also] the exact nature of that test"); *Brief of Appellees, Lavergne v. Bryson*, No. 12-1171, 2012 WL 1649995, at *36-37 (3d Cir. Apr. 18, 2012) (citing *Zivotofsky* as "suggesting that 'political question' inquiry may be limited to first two *Baker* formulations" but then going on to quote all six *Baker* factors); see also Aziz Z. Huq, *Removal As A Political Question*, 65 STAN. L. REV. 1, 76 n.116 (2013) (citing *Zivotofsky* in one part of the article, but in another, analyzing all six *Baker* factors as still relevant "triggers" under current law); Risa E. Kaufman, "By Some Other Means": Considering the Executive's Role in Fostering Subnational Human Rights Compliance, 33 CARDOZO L. REV. 1971 (2012).

unlikely to push the jurisprudential pendulum any further away from the prudential and back toward the categorical political question approach, there are reasons to think that *Zivotofsky* will lead to increased judicial review, especially in the long run.¹³⁰ First, many of the cases mentioned above, even those that cite to *Zivotofsky* only via Justice Sotomayor's concurrence, did not find a nonjusticiable political question.¹³¹ Thus, such lower courts may have heeded the Supreme Court's command that they more rigorously apply the political question doctrine, even when applying *Baker's* prudential factors.

Second, with respect to the national security cases that are the subject of this Article, *Zivotofsky's* urging might interact synergistically with courts' increased—and growing—willingness to push back against the political branches. If one conceptualizes the September 11th attacks and the war in Afghanistan as the genesis of courts' current approach to national security jurisprudence, then as the United States and the world move further from that point, courts will likely become even more willing to engage with Congress and, especially, the Executive. This trend occurs in most conflicts. Judicial engagement becomes stronger as those wars become increasingly unpopular and controversial.¹³² The trend has been particularly strong in the post-9/11 context.¹³³ *Zivotofsky*—by calling for increased judicial action, even where it might touch upon controversial foreign affairs matters—could intensify this tendency,

¹³⁰ Cf. NANDA & PANSIUS, *supra* note 2 (internal citation omitted) (*Zivotofsky's* holding is “deceptively far-reaching,” although “[m]ost likely, it will take many years before the lower courts fully accept Chief Justice Roberts’ clear direction to resolve conflicts between Congress and the Executive.”).

¹³¹ See, e.g., *Gill v. Arab Bank. PLC*, No. 11-CV-3706, 2012 WL 4026941 (E.D.N.Y. Sept. 12, 2012).

¹³² Cf. Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 730-31 (1984) (explaining that the Court's willingness to decide foreign affairs cases grows in “response to domestic conditions: the growing unpopularity of the war among the general public, heightened conflict between Congress and the President, and increasingly bold assertions and acts of presidential prerogative”).

¹³³ See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003) (“[C]ourts have actually been more willing to stand up to the government in [the post-9/11] period than in many prior crises.”).

especially in a world where public mistrust of government is noticeably heightened.¹³⁴

2. Consequently, It is Other Facets of *Zivotofsky* That Are More Likely to Increase Judicial Involvement in Foreign Affairs Cases

From a practical perspective, *Zivotofsky*'s implicit rejection of *Baker*'s prudential factors is not the most important part of the case. That is, other aspects of *Zivotofsky* will probably have a greater jurisprudential impact than will the Court's adoption of the classical political question doctrine. In particular, the Court's emphasis on Congress's enactment of Section 214 as important to the political question issue is likely to be influential.¹³⁵ In contrast to the Court's *sub silentio* rejection of *Baker*'s prudential factors, the Court expressly expounded upon the importance of the case's statutory angle. In fact, at least seven of the Justices explicitly stated that the existence of Section 214 impacted their political question doctrine analysis.¹³⁶ Even though, as a general matter, lower courts are more

¹³⁴ Cf. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMM. 261, 282 (2003) (arguing that, today, courts may be marginally more willing to intervene in foreign affairs disputes, given increased public distrust in government (which arose, in part, from Vietnam and Watergate) and a "massively strengthened commitment to individual rights" in U.S. constitutional law).

¹³⁵ Even if unjustified, see *Leading Cases*, *supra* note 5, at 312, the Court wholeheartedly recognized the importance of Section 214(d) to the question of justiciability. See *Zivotofsky*, 132 S. Ct. at 1427; Michel, *supra* note 118, at 254. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (quoting *Zivotofsky*, 132 S. Ct. at 1427–28 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))) ("[I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then . . . [t]his would undermine the clear dictate of the separation-of-powers principle that 'when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"; *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) ("Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive.") (citing *Zivotofsky*, 132 S. Ct. at 1428)).

¹³⁶ See *Zivotofsky*, 132 S. Ct. at 1427 ("Zivotofsky requests that the courts enforce a specific statutory right," such that, "[t]o resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional," which "is a familiar judicial exercise."); *id.* at 1434, 1436 (Sotomayor,

likely than the Supreme Court to find a case nonjusticiable,¹³⁷ those courts appear to be responding to *Zivotofsky*'s signal that statutory cases should be decided on their merits.¹³⁸ This pro-justiciability aspect of *Zivotofsky* will probably have even more of an effect on lower courts in the future.¹³⁹

Likewise, *Zivotofsky* is important because, in rejecting the President's assertion of nonjusticiability, the Court refused to defer to the Executive Branch's claim that adjudication of the case would

J., concurring in part and concurring in the judgment) (internal quotation marks omitted) ("[T]he Court appropriately recognizes that petitioner's claim to a statutory right is relevant to the justiciability inquiry required in this case."). In addition, Justice Alito framed his analysis in terms of the statute in question. *See id.* at 1436 (Alito, J., concurring in the judgment) (describing the case as "present[ing] a narrow question, namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport"). Justice Breyer's opinion, too, although not going as far as the other eight justices, made clear that the existence of the statute did affect his analysis. *See id.* at 1439 (Breyer, J., dissenting) ("Were the statutory provision undisputedly concerned only with purely administrative matters (or were its enforcement undisputedly to involve only major foreign policy matters), judicial efforts to answer the constitutional question might not involve judges in trying to answer questions of foreign policy.").

¹³⁷ *See SHANE & BRUFF, supra* note 116 (citing Symposium, *Comments on Powell v. McCormack*, 17 UCLA L. R. 1 (1969)).

¹³⁸ *See, e.g., Kaplan v. Cent. Bank of Islamic Rep. of Iran*, Civ. No. 10-483 (RCL), 2013 WL 4427943, at *5 (D.D.C. Aug. 20, 2013) (quoting *Zivotofsky*, 132 S. Ct. at 1427) ("[T]he present case does not present a non justiciable political question [because] the plaintiffs in this action do not ask the Court to 'supplant a foreign policy decision of the political branches with the courts' own unmoored determination' of whether the rocket attacks at issue here were examples of 'war' or 'terrorism,' but rather seek relief under several federal statutes authorizing recovery for specific conduct."); *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1153-54 (D. Colo. 2012), *opinion amended and supplemented*, 11-CV-01350-WJM-BNB, 2012 WL 4359076 (D. Colo. Sept. 21, 2012) (citing *Zivotofsky*, 132 S. Ct. 1421) ("Earlier this year, the Supreme Court again reiterated the rule that federal courts have jurisdiction to interpret federal statutes, even in politically charged cases.").

¹³⁹ *See, e.g., Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 429, n.74 (2012) (reading *Zivotofsky* as "suggesting that the [political question] doctrine may have little application to cases involving the constitutionality of federal statutes. . . ."); Michel, *supra* note 118, at 254; NANDA & PANSISUS, *supra* note 2 (internal citation omitted) ("Chief Justice Roberts' language exhibits a tone that hints at impatience," and "[t]he crucial matter will be whether there is a direct conflict between branches of government as to give rise to a duty for the courts to resolve which governmental body should prevail.").

lead to drastic foreign policy consequences.¹⁴⁰ This rejection is in stark contrast to recent precedent.¹⁴¹ For instance, in two cases in 2004, *Republic of Austria v. Altmann*¹⁴² and *Sosa v. Alvarez-Machain*,¹⁴³ the Supreme Court insinuated that deference to the Executive in international affairs-related cases was requisite. Notwithstanding precedents like *Rasul* and *Boumediene*, which implied a narrowing of the political question doctrine,¹⁴⁴ “lower courts have taken” *Altmann* and *Sosa*, and their deference to the Executive in foreign relations cases, “as inspiration for an expansion of [that] doctrine.”¹⁴⁵ If one believes that “lower court decisions have only nominally followed the *Baker* test, using the *Baker* categories as thin pretexts for deferring to the wishes of the Executive,”¹⁴⁶ then *Zivotofsky*’s explicit rejection of such deference is particularly significant.¹⁴⁷ Moreover, the lower courts that have used deference-

¹⁴⁰ See *Zivotofsky*, 132 S. Ct. at 1427; see also John H. Cushman, Jr., *U.S. Justices Send Jerusalem Status Case Back to Lower Court*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/2012/03/27/us/justices-return-jerusalem-status-case-to-lower-court.html> (“The Obama administration said that the question was one that could be decided only by the president, and that the court should stay out of the matter.”).

¹⁴¹ Cf. *Access to Courts*, 122 HARV. L. REV. 1151, 1156 (2009).

¹⁴² *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (holding, contrary to the assertions of the Executive Branch, that the Foreign Sovereign Immunities Act applied retroactively against Austria and its state-owned art gallery for actions taken prior to the enactment of that Act, yet affirming that deference to the Executive might still be warranted in future cases).

¹⁴³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 733 n.21 (2004) (while holding that the Alien Tort Statute was intended only to give courts jurisdiction over certain well-defined international law violations, the Court noted that case-specific deference to the Executive might sometimes be another “principle limiting the availability of relief in the federal courts for violations of customary international law”).

¹⁴⁴ See *supra* notes 100-102 and accompanying text.

¹⁴⁵ *Access to Courts*, *supra* note 141, at 1156; see also *The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1193, 1193-94 (2009) (“Many courts have seemingly taken the Court’s references to ‘deference’ in *Republic of Austria v. Altmann* and *Sosa v. Alvarez-Machain* as invitations to defer to the executive branch’s opinions on justiciability.”).

¹⁴⁶ *Access to Courts*, *supra* note 141, at 1156 (emphasis added).

¹⁴⁷ Although lower courts had previously refused to grant the Executive such deference regarding justiciability questions, see, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (“[E]ven an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily

based arguments to justify their findings of nonjusticiability—and to thereby extend the political question doctrine—have done so in special reliance on *Baker*'s last three, prudential factors.¹⁴⁸ This lends additional significance to the *Zivotofsky* majority's decision to cite only the two classical *Baker* factors.

B. The Impact of Zivotofsky on Targeted Killing Cases

1. Introduction

As argued above, *Zivotofsky* probably will not lead to a watershed victory in the tug-of-war between the classical and prudential versions of the political question doctrine. Yet it may have real-world effect, largely due to its command to lower courts to adjudicate cases implicating statutory analysis and to refuse to so blindly defer to the Executive with regards to the applicability of the political question doctrine. More specifically, given these considerations, *Zivotofsky* will probably result in increased judicial review of national security-related cases in particular.

Zivotofsky tacitly encouraged lower courts to reframe questions presented so as to preclude a finding of nonjusticiability, urged them to view the Executive's anti-justiciability predictions of foreign affairs pandemonium with skepticism, and signaled to Congress that it could increase the likelihood of judicial review via statutory enactment. *Zivotofsky* may, thus, have only a marginal impact in the existing landscape, but have a greater effect if and when Congress intervenes. These two contexts will be discussed in turn: first, by analyzing how *Zivotofsky*'s political question analysis would be applied on the facts of *Al-Aulaqi v. Obama*,¹⁴⁹ and second, by considering a hypothetical statute providing the families of those killed via targeted killing with a private cause of action. A normative discussion of *Zivotofsky*'s likely effects follows.

preclude adjudication. . ."), the fact that, here, the Supreme Court approved that approach is important.

¹⁴⁸ *The Political Question Doctrine, Executive Deference, and Foreign Relations*, *supra* note 145, at 1196.

¹⁴⁹ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1 (D.D.C. 2010).

2. Revisiting the *Al-Aulaqi* Case in Light of *Zivotofsky*

Based upon the various considerations discussed above, *Zivotofsky* may lead lower courts to now decide even tough national security cases like those involving targeted killings. Consider, for example, *Al-Aulaqi v. Obama*, a 2010 case in which the U.S. District Court for the District of Columbia dismissed a targeting-related claim on political question grounds.¹⁵⁰ Anwar Al-Aulaqi was an American-born Muslim cleric with dual U.S.-Yemeni citizenship, who at the time of the *Al-Aulaqi* litigation was purportedly hiding in Yemen.¹⁵¹ The U.S. government alleged that Al-Aulaqi played an operational role in Al Qaeda in the Arabian Peninsula (“AQAP”), a terrorist organization affiliated with Al Qaeda.¹⁵² In particular, the government asserted that Al-Aulaqi facilitated terrorist training camps, recruited people to join AQAP, and planned attacks on the United States such as the failed “underwear bombing” of 2009.¹⁵³ Based on these allegations, the U.S. government added Al-Aulaqi to its secret targeted killing list.¹⁵⁴

After learning from media reports that his son was on the U.S. government’s “kill list,”¹⁵⁵ Al-Aulaqi’s father sought an injunction in the District Court for the District of Columbia prohibiting the government from intentionally killing Al-Aulaqi “unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat.”¹⁵⁶ Al-

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 8.

¹⁵² *Id.*

¹⁵³ *Id.* at 10.

¹⁵⁴ On September 30, 2011, the U.S. government killed Al-Aulaqi, with an armed drone operated by the CIA. Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>; see also Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America’s Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted%3Dall>.

¹⁵⁵ *Al-Aulaqi*, 727 F. Supp. 2d at 10.

¹⁵⁶ *Id.* at 8.

Aulaqi's father asserted that, where those requirements were not met, "the United States' alleged policy of authorizing the targeted killing of U.S. citizens, including [his] son, outside of armed conflict," violated his son's Fourth Amendment right to be free from unreasonable seizures; his Fifth Amendment right not to be deprived of life without due process of law; and, by virtue of its failure to disclose the criteria used to place someone on U.S. government "kill lists," the notice requirement of the Fifth Amendment Due Process Clause.¹⁵⁷ Judge Bates of the District Court for the District of Columbia, however, determined that Al-Aulaqi's father's claims presented traditionally nonjusticiable foreign policy questions.¹⁵⁸

Judge Bates began his discussion of the political question doctrine by citing all six *Baker* factors.¹⁵⁹ Judge Bates acknowledged that the "first two factors—a textual commitment to another branch of government and a lack of judicially manageable standards—are considered the most important,"¹⁶⁰ but emphasized that "in order for a case to be non-justiciable, the court need only conclude that [any] one [of the six *Baker*] factor[s] is present."¹⁶¹ Judge Bates framed the questions presented by *Al-Aulaqi* as follows:

Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al-Aulaqi's alleged terrorist activity renders him a concrete, specific, and imminent threat to life or physical safety . . . ; and (4) whether there are means short of lethal force that the United States

¹⁵⁷ *Id.* at 15.

¹⁵⁸ *See id.* at 44-53. Judge Bates also held that Al-Aulaqi's father lacked standing to sue because he failed to adequately explain his son's inability to appear on his own behalf. *Id.* at 14-35.

¹⁵⁹ *Id.* at 44.

¹⁶⁰ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1, 44 (D.D.C. 2010).

¹⁶¹ *Id.* at 44-45.

could reasonably employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests.¹⁶²

After framing the case as such, Judge Bates explained that “plaintiff’s claims pose[d] precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.”¹⁶³

Judge Bates began by relying on *Baker*’s classical factors. He found that *Baker*’s first factor was satisfied: the declaratory and injunctive relief Al-Aulaqi’s father had requested would require “judges to second-guess, with the benefit of hindsight, another branch’s determination that the interests of the United States call for military action” despite the fact that “[s]uch military determinations are textually committed to the political branches.”¹⁶⁴ Likewise, he found that there were no judicially manageable standards that he could use to decide such a case, as it would require him to determine the sort of national security threat posed by Al-Aulaqi.¹⁶⁵

Judge Bates then considered *Baker*’s prudential factors. He determined that the fourth and sixth factors “militate[d] against judicial review of [Al-Aulaqi’s father’s] claims.”¹⁶⁶ Specifically, *ex post* judicial review of an Executive Branch targeted killing abroad, he said, “would reveal a ‘lack of respect due coordinate branches of government and create the potentiality of embarrassment of multifarious pronouncements by various departments on one question.’”¹⁶⁷

The *Zivotofsky* Court’s hinting at the primacy of the categorical *Baker* factors probably would not change the result in *Al-Aulaqi*. Judge Bates not only relied on the prudential *Baker* factors in finding the case nonjusticiable; he also determined that the questions at issue were textually committed to the political branches and gave

¹⁶² *Id.* at 46 (internal quotation marks omitted).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 48 (citations omitted).

¹⁶⁵ *Id.* at 47.

¹⁶⁶ *Al-Aulaqi*, 727 F. Supp. 2d. at 48.

¹⁶⁷ *Id.* (quoting *Baker*, 369 U.S. at 217).

rise to no judicially manageable standards. Thus, taking Judge Bates' opinion at face value, one could easily conclude that *Zivotofsky* would have no impact on a case like *Al-Aulaqi*.

One could argue, however, that Judge Bates incorrectly found Al-Aulaqi's father's claims nonjusticiable under the post-*Zivotofsky* conception of *Baker's* classical factors.¹⁶⁸ For example, one might think that Judge Bates' finding of a "textual commitment" was untenable, particularly given his insistence that he was not holding that "the Executive possesses unreviewable authority to order the assassination of any American whom he labels an enemy of the state."¹⁶⁹ Likewise, one could take issue with Judge Bates' characterization of "the precise nature and extent of . . . Al-Aulaqi's affiliation with AQAP" as "pos[ing] precisely the type[] of complex policy question[] that the D.C. Circuit has historically held non-justiciable," since courts have routinely decided analogous questions in a series of post-9/11 habeas corpus cases.¹⁷⁰

Likewise, other *Zivotofsky*-spurred developments, such as *Zivotofsky's* insinuation that questions presented should be formulated in favor of justiciability where possible, and its encouraging courts to get involved even in seemingly controversial foreign affairs-related matters, could prompt a different result in the *Al-Aulaqi* case. Properly conceived, the questions presented in *Al-Aulaqi* might not implicate *Baker's* first two classical factors. Judge Bates described *Al-Aulaqi* as asking whether the U.S. government "unlawfully applied the war-making and national defense powers of

¹⁶⁸ See John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 179 (2011) ("While Judge Bates' decisions regarding the various standing issues were sound, his analysis of the political question doctrine seemed both unnecessary and imprecise."); see also Benjamin McKelvey, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1367-68 (2011) (internal citation omitted) (questions like that posed in *Al-Aulaqi* involve "general concepts of law, not political questions, and they are subject to judicial review").

¹⁶⁹ Dehn & Heller, *supra* note 168, at 186 (internal citation omitted).

¹⁷⁰ See BRADLEY & GOLDSMITH, *supra* note 21, at 416.

the political branches to conduct alleged missile strikes abroad.”¹⁷¹ But if he had instead framed the case as asking whether the government’s “use of lethal force against three American citizens violated their Fourth and Fifth Amendment rights,”¹⁷² he arguably should have been less likely to find the case nonjusticiable under *Baker*’s classical factors. This is because the latter hypothetical formulation arguably poses questions “squarely committed to the Judiciary”: Such “constitutional claims can be readily resolved under existing judicial standards; they involve legal issues, not policy choices; and their adjudication is not a display of disrespect to the political branches, but [federal courts’] constitutional duty.”¹⁷³ Because *Zivotofsky* apparently preferences such constitutionality-aimed reframing,¹⁷⁴ *Zivotofsky* could be read to require the latter approach to the *Al-Aulaqi* case.¹⁷⁵ Thus, presuming lower courts heed the Supreme Court’s urging, *Zivotofsky*’s influence might mean the U.S. government’s targeted killing program is more likely to be reviewed by a court.

Moreover, *Zivotofsky*’s emphasis on the relevance of statutory issues to its analysis should have encouraged Judge Bates to consider the impact of potentially pertinent existing statutes, such as the Authorization for the Use of Military Force (“AUMF”), on his analysis. For instance, Judge Bates “did not clearly indicate whether he believed that the case involved an extant armed conflict or a

¹⁷¹ Plaintiff’s Opposition to Defendant’s Motion to Dismiss at II(A), *Al-Aulaqi v. Panetta*, No. 12-cv-01192, 2013 WL 440710, at *13 (D.D.C. Feb. 5, 2013) (internal citation omitted).

¹⁷² *Id.*

¹⁷³ Plaintiff’s Opposition, *supra* note 171, at *12; see also McKelvey, *supra* note 168, at 1367 (“In the context of targeted killing, a federal court could evaluate the targeted killing program to determine whether it satisfies the constitutional standard for the use of defensive force by the Executive Branch.”); RAMSEY, *supra* note 102, at 329 (stating that questions that “turn[] on interpretation of the Constitution’s grants of power to the President and Congress” are not permitted to be treated as political questions, as “[t]hat interpretation is not committed to the political branches by any specific text”).

¹⁷⁴ See John Love, Note, *On the Record: Why the Senate Should Have Access to Treaty Negotiating Documents*, 113 Colum. L. Rev. 483, 511 (2013) (internal quotation marks omitted) (the Supreme Court in *Zivotofsky* conscientiously “reframed the issue” vis-à-vis the lower courts as a dispute about a statutory right).

¹⁷⁵ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

separate, discrete act of national defense,”¹⁷⁶ a distinction hinging on the AUMF. The “one-off use of force against a wholly foreign threat identified by the executive branch”—which usually involves a political question—is wholly different from “the executive’s prosecution of an armed conflict authorized by Congress”—which usually does not involve a political question.¹⁷⁷ In the latter case, a court is tasked not with making policy determinations of the sort outside of the judiciary’s expertise, but rather with reviewing the Executive’s action for “compliance with congressional authorization and other applicable law.”¹⁷⁸ Judge Bates thought that *Al-Aulaqi* sharply contrasted with cases requiring “interpretations of the Constitution and of federal statutes,” which are “quintessential tasks of the federal Judiciary.”¹⁷⁹ But the existence of a congressional war-making authorization, embodied by the AUMF, should have been “relevant to the Judiciary’s power to decide [Al-Aulaqi’s] claim” because the court, “by virtue of the statute,” was simply being asked to enforce a statutory boundary, which required only “a familiar judicial exercise.”¹⁸⁰ In sum, in light of *Zivotofsky*, lower courts should be more likely to deem cases like *Al-Aulaqi* justiciable, even under the statutory status quo.

3. The Potential Influence of Congressional Intervention

It is possible that courts, even without congressional intervention, will be more willing to adjudicate cases like *Al-Aulaqi* in the wake of *Zivotofsky*. Nevertheless, even post-*Zivotofsky*, the argument for judicial review of cases like *Al-Aulaqi* remains uncertain. This is particularly true because suits like *Al-Aulaqi* are not ideal vehicles for surmounting justiciability hurdles to review the U.S. government’s targeting program. For example, *Al-Aulaqi* asked

¹⁷⁶ Dehn & Heller, *supra* note 168, at 179.

¹⁷⁷ *Id.* at 180.

¹⁷⁸ *Id.* However, this would leave some of the U.S. government’s targeting decisions in the realm of nonjusticiable political questions. For instance, those targetings undertaken against a threat completely distinct from that posed by Al Qaeda and its associates may remain—under this piece of analysis—nonjusticiable. *Cf. id.* (arguing that the decision to target an “independent, imminent threat to the nation would arguably be a political question”).

¹⁷⁹ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1, 51 (D.D.C. 2010).

¹⁸⁰ *Zivotofsky*, 132 S. Ct. at 1427.

the judiciary to review a targeting *ex ante*, not *ex post*.¹⁸¹ *Al-Aulaqi* and similar cases also present hard standing questions.¹⁸²

Yet courts may be more likely to get involved if Congress were to enact a statute specifically relating to the U.S. government's targeted killing program, thus triggering another one of *Zivotofsky*'s justiciability buttons.¹⁸³ In particular, if Congress enacted a statute giving U.S. citizens killed via targeting by the U.S. government a statutory right to compensation, then courts would probably be willing to adjudicate more targeted killing-related cases.¹⁸⁴ If one thinks that oversight of the Executive's drone program is greatly needed, then one might wish to encourage such statutory action.¹⁸⁵

¹⁸¹ Michael Epstein, *The Curious Case of Anwar Al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation When the Terrorist is a United States Citizen?*, 19 MICH. ST. J. INT'L L. 723, 737 (2011) ("Although the courts have recently adjudicated several legal issues after detention in the battlefield, as seen in *Hamdi* and *Boumediene*, the question of prospective relief regarding potential military action seems to implicate specific policy judgments that may fall outside the scope of judicial review."); see also Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185, 186 (2013).

¹⁸² See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1, 14-35 (D.D.C. 2010); see also Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 392 (2011) ("In order to get to court, complainants must satisfy strict standing requirements, establish that the action does not fall foul of the political question doctrine, show that the case can be made without impinging upon the state secrets privilege, and must finally convince a court not to exercise its 'equitable discretion' to decline to rule on sensitive matters.").

¹⁸³ Cf. Jack Goldsmith, *John Brennan's Speech and the ACLU FOIA Cases*, LAWFARE BLOG (May 1, 2012, 11:12 AM), <http://www.lawfareblog.com/2012/05/john-brennans-speech-and-the-acclu-foia-cases/> ("One can perhaps argue that our legal system should have more robust accountability constraints on the Commander-in-Chief's targeted killing practices in an authorized conflict But until Congress imposes such a regime, and especially in light of the political question ruling in the *al-Aulaqi* decision, the government's practices are on firm legal ground.").

¹⁸⁴ Cf. *Al-Aulaqi v. Panetta*, No. 12-1192 (RMC), slip op. at 27-37 (D.D.C. Apr. 4, 2014) (concluding that, although *Al-Aulaqi*'s father stated a claim that the government violated his son's due process rights, there was no *Bivens* or other remedy under U.S. law for that claim because special factors—namely, separation of powers, national security, and the risk of interfering with military decisions—counseled hesitation in finding such a remedy).

¹⁸⁵ Dehn & Heller, *supra* note 168, at 180 ("While *ex ante* review of an unexecuted targeting decision in war is both legally and practically problematic, it is unclear why it would be improper after such force is used, particularly when a U.S. citizen has been targeted.").

However, it is plausible that such a route to increased judicial review would actually legitimate, not curtail, the Executive's program, thus undermining the objectives of those opposed to targeted killings.

One can ask two primary sorts of questions about the impact of congressional involvement in this realm. First, one must consider whether Congress's enactment of a statute like this hypothetical will, descriptively, result in additional judicial review or particular substantive outcomes. Second, one must ask whether such effects are, normatively, desirable. Each of these areas of concern will be discussed in turn.

a. A Court is Likely to Exercise Judicial Review Over a Targeting-Related Statute

Consider the following hypothetical: Congress enacts a law that grants the families or heirs of those wrongfully killed by U.S. drone strikes a statutory right to sue the government for compensation.¹⁸⁶ If such a family member files a complaint under that statute, then based upon the first two *Baker* factors, as applied in *Zivotofsky*, a court facing such a lawsuit will likely deem the case justiciable.

First, the Supreme Court has rarely—just twice in the past fifty years—found a case nonjusticiable based on the “textual commitment” prong.¹⁸⁷ A court should thus recognize that there is a

¹⁸⁶ Steve Vladeck, for instance, proposes the following:

If folks are really concerned about this issue, especially on the Hill, then Congress should create a cause of action—with nominal damages—for individuals who have been the targets of such operations (or, more honestly, their heirs). The cause of action could be for \$1 in damages; it could expressly abrogate the state secrets privilege and replace it with a procedure for the government to offer at least some of its evidence *ex parte* and *in camera*; and it could abrogate qualified immunity so that, in every case, the court makes law concerning how the government applies its criteria in a manner consistent with the Due Process Clause of the Fifth Amendment.

Vladeck, *supra* note 3.

¹⁸⁷ *Canon*, *supra* note 41, at 1308; *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (explaining that surveillance over the weaponry, training, and orders of the National Guard are responsibilities vested exclusively in the executive and legislative branches).

supremely high bar to finding a case nonjusticiable on “textual commitment” grounds. Moreover, the determination of the particular question at issue here—namely, the hypothetical statute’s constitutionality—is not textually committed to one of the political branches. Despite the Constitution’s granting certain foreign affairs and war-related powers to the political branches,¹⁸⁸ it “is difficult to identify a Supreme Court decision endorsing the . . . principle that the political question doctrine categorically precludes judicial second-guessing of sensitive military judgments and decisions.”¹⁸⁹ Consequently, and just as in *Zivotofsky*, a court considering our hypothetical statute should understand the litigant before it has simply “request[ed] that the courts enforce a specific statutory right,” such that, “[t]o resolve his claim, the Judiciary must decide if [his] interpretation of the statute is correct, and whether the statute is constitutional, [which] is a familiar judicial exercise.”¹⁹⁰ Thus, if anything, Congress’s injection of the statute into the targeted killing policy realm means that the pertinent question is committed to the *judiciary* itself, and not to the political branches.¹⁹¹

¹⁸⁸ HENKIN, *supra* note 35, at 26.

¹⁸⁹ *Canon*, *supra* note 41, at 1324. Importantly, for instance, the Court in the *Prize Cases* “did not believe that the executive’s determinations regarding who could be subjected to war measures were unreviewable political questions.” Dehn & Heller, *supra* note 168, at 181. See also John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 428 (2003) (“Federal courts still have a role to play with regard to the domestic effects of war, particularly when the war involves American citizens as enemies or when operations occur within the territory of the United States itself.”).

¹⁹⁰ *Zivotofsky*, 132 S. Ct. at 1427; see also Love, *supra* note 174, at 511-12.

¹⁹¹ Mulhern, *supra* note 36, at 166 n.260 (“There might be such a need, for example, if Congress and the president were engaged in a confrontation over some separation-of-powers question. Thus a case challenging a presidential decision to wage a ‘covert’ war in defil[ance] of a congressional ban on funding for that war may appropriate for judicial resolution, even if a challenge to the constitutionality of waging war with congressional cooperation, but without a formal declaration, is not.”); See also *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“The parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.”); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts [U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may

Likewise, a court considering this hypothetical statute would not suffer from a lack of judicially manageable standards. Certainly, and just as in *Zivotofsky*, adjudicating the constitutionality of the hypothetical statute would not be an easy endeavor.¹⁹² It would “demand[] careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of [Congress’s and the Executive’s constitutional] powers.”¹⁹³ It would require the court, as in *Zivotofsky*, to determine the dividing line between congressional and Executive authority.¹⁹⁴ But the judiciary is up to the task.¹⁹⁵

A court should be particularly loath to find this hypothetical case nonjusticiable under the second *Baker* prong for two reasons. First, recall that in the past half-century, “the cases involving the absence of judicially manageable standards have all fallen within the same subject-matter: challenges to ‘partisan’ gerrymandering.”¹⁹⁶ Clearly, this hypothetical is not that type of case. Second, the Court’s test in *Zivotofsky* regarding what constitutes a “judicially manageable standard” was “more forgiving” than it had been in the past.¹⁹⁷ *Zivotofsky*, then, seems to urge Martin Redish’s theory that any legal text “can be supplied with working standards of interpretation.”¹⁹⁸

have significant political overtones.”); *Massachusetts v. Laird*, 400 U.S. 886 (1970) (Douglas, J., dissenting from denial of certiorari) (arguing there was no reason the Court could not decide whether the Tonkin Gulf Resolution or subsequent acts of Congress were the constitutional equivalent of a declaration of war because the case presented an ordinary question of constitutional construction and statutory interpretation).

¹⁹² *Zivotofsky*, 132 S. Ct. at 1430.

¹⁹³ *Id.*

¹⁹⁴ See *id.*; see also HENKIN, *supra* note 35, at 26 (“There is no evidence that the Framers contemplated any significant independent role for the President as Commander in Chief when there was no war. . . . There was to be no standing army for the President to command . . . unless Congress raised or provided it.”); Yoo, *supra* note 189, at 436 (noting that, notwithstanding the President’s foreign affairs-related authority, “Congress has power over funding, and can thus deprive the president of any forces to command” and “by setting the size, armament, and capabilities of the armed forces . . . can determine the type, place, and duration of conflicts that the executive can wage”).

¹⁹⁵ *Zivotofsky*, 132 S. Ct. at 1430.

¹⁹⁶ *Canon*, *supra* note 41, at 1308 n.74.

¹⁹⁷ HART & WECHSLER’S 2012 SUPPLEMENT, *supra* note 34, at 23.

¹⁹⁸ Redish, *supra* note 15, at 1047.

Even if manageable standards are not readily apparent, it is the Court's "first duty," as John Hart Ely has stated, "to *fashion* [such] standards."¹⁹⁹

In addition, even if the court applied the prudential *Baker* factors to this hypothetical statute, it still should not find the suit nonjusticiable. Indeed, Justice Sotomayor, who explicitly reaffirmed the importance of those additional factors, emphasized that they should lead to a finding of nonjusticiability in only the rarest of cases.²⁰⁰ If considered at all, those factors should be applied in light of *Zivotofsky*'s language emphasizing the impact that a statute has on the question presented to the courts.²⁰¹ Likewise, *Zivotofsky* said that a court should be wary of, not unduly deferential to, Executive claims that a "parade of horrors" will result from judicial review.²⁰²

Moreover, even if not explicitly considered by the court, realpolitik considerations make it unlikely that the court would find our hypothetical nonjusticiable. As time goes on, and the United States—including its judiciary—moves further from 9/11, courts are likely to become more amenable to reviewing governmental targeting policies.²⁰³ For example, many think that the Supreme Court in *Youngstown* was willing to adjudicate a war powers related dispute

¹⁹⁹ JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 55-56 (1993). Some have even described the argument that cases like our hypothetical raise nonjusticiable political questions as "almost laughable." Vladeck, *supra* note 3. Throughout "Guantanamo-related habeas litigation, courts routinely inquire into the very questions that might well arise in such a damages suit, e.g., whether there is sufficient evidence to support the government's conclusion that the target is/was a senior operation leader of al Qaeda or one of its affiliates." *Id.* Moreover, in *Zivotofsky*, "the Supreme Court went out of its way to remind everyone (especially the D.C. Circuit) of just how limited the political question really should be," making it even more clear that "uses of military force against U.S. citizens neither 'turn on standards that defy the judicial application,' nor 'involve the exercise of a discretion demonstrably committed to the executive or legislature.'" *Id.*

²⁰⁰ *Zivotofsky*, 132 S. Ct. at 1433 (Sotomayor, J., concurring).

²⁰¹ *Leading Cases*, *supra* note 5, at 307 ("[A] broad reading of the case implies that courts must *always* confront the constitutionality of statutory constraints on the Executive.").

²⁰² *Zivotofsky*, 132 S. Ct. at 1427.

²⁰³ See JACK GOLDSMITH, POWER AND CONSTRAINT 166 (2012).

between Congress and the President, even during the Korean War,²⁰⁴ in part because that war had become so controversial. One might think similar factors are particularly likely to surface in this hypothetical because the United States is currently involved in an increasingly unpopular armed conflict. In this hypothetical, too, the populace, through its legislature, has expressed discontent with the Executive's targeting killing policy via congressional enactment pushing back against it. In fact, Congress' doing so would most likely require a supermajority vote to overcome a presidential veto, thus demonstrating even further widespread public support.²⁰⁵

b. Enacting a Statute and Thereby Increasing Judicial Review of National Security Policies Is Likely to Have General Rule of Law Benefits

i. Prudential Considerations Favoring Judicial Review

Generally speaking, judicial review in our hypothetical could be beneficial. First, the classical conception of the political question doctrine may be preferable to the prudential approach and to other, more expansive views of nonjusticiability.²⁰⁶ Some have argued that

²⁰⁴ See H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 126 (2002) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), as "the Supreme Court's most important contribution to debate over the best reading of the Constitution of foreign affairs").

²⁰⁵ Cf. Ratner & Cole, *supra* note 132, at 759. But see Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002).

²⁰⁶ Note that, on this score, some might argue *Zivotofsky* did not go far enough in restricting the political question doctrine to its classical—rather than prudential—roots. Cf. FRANCK, *supra* note 37, at 4-5 (The political question doctrine "is not only not required by but wholly incompatible with American constitutional theory."). But see Barkow, *supra* note 34, at 334 ("It would be unwise, however, to reject the entire political question doctrine because of the failings of the prudential doctrine, as the "classical political question doctrine is critically important in the constitutional order."); *id.* at 330 ("The same institutional and structural concerns that support giving some deference to Congress's interpretative decisions also justify giving absolute deference to the political branches in certain circumstances" since "questions are left to the political branches not only because of the judiciary's

the prudential approach is not permitted by the Constitution.²⁰⁷ As a corollary to that point, the classical conception of the political doctrine—arguably that accepted by the Court in *Zivotofsky*—is more in line with our national tradition and the framers’ original understanding of the U.S. constitutional scheme.²⁰⁸

It may be inappropriate for courts to consider the prudential *Baker* factors.²⁰⁹ Ironically, a court’s declining to decide a case by appealing to prudential considerations “seems troubling” because it is “little more than saying [the court] thought it best not to hear the case for [the] *policy* reasons” it claims to be ill-suited to make in the first place.²¹⁰ Courts may appear particularly weak if they allow what

limitations, but also because of the political branches’ virtues.”) (internal quotation marks and citation omitted).

²⁰⁷ RAMSEY, *supra* note 102, at 322 (“[T]he sweeping version of the political question doctrine suggested by *Goldwater* is not required and indeed not permitted by the Constitution.”); see also Louis Henkin, *Is There a Political Question Doctrine*, 85 YALE L.J. 597, 603 (1976) (“The courts ha[ve] no basis for, and no business abstaining except where the Constitution could fairly be interpreted as requiring them to abstain.”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (“[T]he only proper judgment that may lead to abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.”).

²⁰⁸ See Barkow, *supra* note 34, at 250 (“[A]lthough its critics believe the doctrine has no place in a country where judicial review is a fundamental part of the constitutional structure, the classical version of the political question doctrine can trace its pedigree to the Constitution itself and its original understanding.”) (internal citation omitted); Michael E. Tigar, *Judicial Power, The ‘Political Question Doctrine,’ and Foreign Relations*, 17 UCLA L. REV. 1135, 1154 (1970) (“[A]ttention to the doctrine’s history reveals that it is . . . a recent invention based upon a misreading or distortion of the early ‘political question’ cases.”).

²⁰⁹ Wechsler, *supra* note 207, at 7–8, 9 (“[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts” which “is *toto caelo* different from a broad discretion to abstain or intervene.”); cf. CHEMERINSKY, *supra* note 36, at 146 (arguing that “the[] [*Baker*] criteria seem useless in identifying what constitutes a political question” and it is therefore “hardly . . . surprisingly that the doctrine is described as confusing and unsatisfactory”).

²¹⁰ RAMSEY, *supra* note 102, at 326 (emphasis added); see also BRADLEY & GOLDSMITH, *supra* note 21, at 56; FRANCK, *supra* note 37, at 106 (“If there are prudential reasons favoring the courts’ taking jurisdiction in some foreign-affairs cases, perhaps the blanket invocation of prudential reasons for denying jurisdiction in others also needs to be reexamined.”); Goldsmith, *supra* note 106, at 1418.

many believe to be unconstitutional actions to continue unabated on such policy bases.²¹¹

Second, the costs of such review are lower than one might think. Here, where the question for the court to decide is properly framed, the prudential issues raised in *Baker* are not of concern. Somewhat counter-intuitively, the classical version of the political question doctrine may help courts avoid many of the prudential problems *Baker* was concerned with, yet do so without requiring the court to make the policy determinations *Baker* assumed courts were incapable of performing. For example, assuming that Congress and the Executive acquiesce in the judiciary's constitutional and statutory determinations, in cases like our hypothetical where the political branches are at odds, judicial review could actually ensure there is one voice in foreign affairs, rather than give rise to multifarious pronouncements on national policy.²¹²

Third, there are practical reasons why judicial review could be beneficial, even from a substantive foreign policymaking perspective. The judiciary—in contrast to the political branches—has a longer-term perspective, and, thus, might be thought of as an integral protector of our national system.²¹³ Federal judges have life tenure and are, therefore, at least relative to political actors, likely to be less sensitive to heat-of-the-moment concerns. Moreover, even

²¹¹ Redish, *supra* note 15, at 1055; see also FRANCK, *supra* note 37, at 11 (“The public in America expects that the legitimacy of almost any exercise of political power can be tested by referring it to the validating authority of the judiciary.”); Henkin, *supra* note 207, at 625 (“Would not the part of the courts in our system, the institution of judicial review, and their public and intellectual acceptance, fare better if we broke open th[e] package [of abstention principles often lumped together as the political question doctrine], assigned its authentic components elsewhere, and threw the package away?”).

²¹² Cf. RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 162 (2001) (suggesting that there were forceful “pragmatic” reasons for the Court to intervene in *Bush v. Gore*, as “[p]olitical considerations in a broad, nonpartisan sense will sometimes counsel the Court to . . . to intervene”). Although this argument may hold less water at the lower court level, the Supreme Court would be made more likely to grant certiorari to resolve any resultant inconsistency.

²¹³ Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1264 (2007).

though theoretically the Executive Branch is relatively expert on national security matters, “its self-interested and self-protective instincts cloud its judgment.”²¹⁴ Likewise, Congress may not be as expert in foreign policy matters as one might at first assume. “[M]ost of the members never develop the specialized expertise needed for real oversight” and “tend not to like responsibility for national security decisions.”²¹⁵ Thus, “in an increasing number of cases, the courts are both better positioned to decide disputes and less likely to provoke disaster, even if they get something wrong.”²¹⁶

More generally, judicial review, even of questions like those posed by our hypothetical, will foster the rule of law.²¹⁷ This not only has merit in and of itself, but also is invaluable to the United States’ counterterrorism efforts,²¹⁸ which are in part based on winning over hearts and minds.²¹⁹ For the court to call our hypothetical a political question will foster the political branches’ perception that such a question is a political issue, rather than a constitutional one, thus undermining the *ex ante* limiting effect of any applicable legal constraints.²²⁰ While, of course, the political branches have a

²¹⁴ GOLDSMITH, *supra* note 203, at 58.

²¹⁵ *Id.* at 91–92.

²¹⁶ Spiro, *supra* note 4 (internal citations omitted).

²¹⁷ See HENKIN, *supra* note 35, at 37, n.* (“Constitutionalism requires also that no part of governance be exempt from judicial review – not even in foreign affairs.”); see also McKelvey, *supra* note 168, at 1374 (“The Obama Administration’s assurances regarding the targeted killing program are unsatisfactory because they fail to address the primary concern at issue: the possibility that an unchecked targeted killing power within the Executive Branch is an invitation for abuse.”).

²¹⁸ See Cheri Kramer, *The Legality of Targeted Drone Attacks As U.S. Policy*, 9 SANTA CLARA J. INT’L L. 375, 391 (2011) (“Rule of law is critical to counter-terrorism, and it applies to all nations involved in counter-terrorism—including the United States.”); see also Editorial, *Passport Control*, N.Y. TIMES, Nov. 10, 2011, at A34.

²¹⁹ The United States’ allies and enemies may view the American targeted killing program, if subjected to no real independent oversight, as hypocritical, in light of America’s general tendency to push its human rights and democratic values agenda on other countries. Thus, judicial abstention may impact the credibility of the United States abroad, and may even provide fodder for the United States’ enemies. Consequently, unchecked targeted killings in the name of national security might actually place the United States in a more dangerous position, since such a choice could help America’s enemies build support and recruit potential terrorists.

²²⁰ See HENKIN, *supra* note 35, at 87 (“By calling a claim a political question courts foster the perception that it is not a constitutional question and encourage the

responsibility to interpret and apply the Constitution when deciding on their own course of action, one might think that the rigor of their compliance might decrease where there is no potential for judicial review *ex post*. This is likely to be particularly true in the national security realm, where, arguably, the political branches—namely, the Executive—are especially susceptible to efficiency-based arguments and have institutional incentives to be overzealous in the exercise of their war powers at the expense of individual rights.²²¹

ii. General Separation of Powers Values

Counter to critics' claims, judicial involvement in questions like those that surround this hypothetical statute would not controvert democratic will during times of crisis.²²² In fact, there may actually be representation-reinforcing value in *Zivotofsky's* pro-justiciability approach to the political question doctrine. First, generally speaking, one might think that judicial review in the foreign relations realm is "democracy-forcing *ex ante*, [as it] reassure[s] the legislature that it can pass laws without having them subject to wild-eyed, self-interested interpretations by the executive."²²³ Likewise, judicial review may be democracy-forcing *ex*

exercise of political power without regard to constitution prescriptions and restraints.").

²²¹ See *id.* at 108; see also Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005) (suggesting, on similar grounds, that individual rights-based claims should never be treated as presenting nonjusticiable political questions).

²²² Cf. Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 815 (1989) (stating that "judicial resolution of hot controversies merely encourages legislative buck-passing").

²²³ Jinks & Katyal, *supra* note 213, at 1276; see also Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 467 (1976) ("[T]he manner in which judicial decision making has been avoided (particularly through the 'political question' doctrine) has created a demarcation between law and politics which, in turn, has diminished the effectiveness of existing nonjudicial sanctions."); Michel, *supra* note 118, at 264 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) ("Rejecting statutory political questions redeems the deep structural premises of American democracy" because, "[b]y preventing courts from circumventing the legislature's ability to constrain the executive, the rule [that a federal statutory claim can never present a political question] would reinforce the principle that 'the Constitution diffuses power the better to secure liberty.'").

post, as “the political branches are most likely to redress judicial under-protection errors”—i.e., cases in which “courts do not believe that the foreign relations calculus requires abstention . . . , but the political branches would have wanted [that] result[.]”—because “political branch responsiveness is at its height when a gap in federal law harms U.S. foreign relations interests.”²²⁴

Second, in this hypothetical, Congress has already expressed its democratic preference via statute, and is at loggerheads with the also democratically-elected Executive, complicating any notions of pure democratic will. Thus, if *Zivotofsky*’s pro-justiciability stance is read as largely, if not solely, applying to cases in which Congress has spoken via federal statute, then political accountability concerns are minimal.

Third, our constitutional democracy is, in part, maintained through institutional features that are, in some ways, anti-democratic. Democratic values are not the be-all-end-all of our Constitution. Most obviously, the Bill of Rights is meant to protect certain fundamental liberties against the will of the majority. More broadly, our constitutional system includes a judiciary, which exists, in part, to uphold such rights against majoritarian overreaching.²²⁵ That is, judicial review exists, among other reasons, to ensure that we remain a *constitutional* democracy.²²⁶

Likewise, in this hypothetical, Congress enacted a statute to directly confront the Executive. Thus, one cannot claim that Congress has shirked responsibility by failing to utilize all of the political weapons that the Constitution has put at its disposal.²²⁷ This is because the hypothetical statute assumes that the country has reached a point—in time, history, and politics—in which Congress

²²⁴ Goldsmith, *supra* note 106, at 1419-20.

²²⁵ HENKIN, *supra* note 35, at 76 (internal citations omitted).

²²⁶ *Id.* at 78.

²²⁷ Cf. Glennon, *supra* note 222, at 815 (“[I]n separation of powers disputes particularly, there is little room for the Supreme Court to intervene because each department possesses an impressive arsenal of weapons to demand observance of constitutional dictates by the other.”) (internal quotation marks and citation omitted).

has already been able to surmount political barriers (and potentially the presidential veto) to enact legislation directly counter to the express policy of the President in the national security realm.

Moreover, if one thinks that the President is right, and Congress is wrong, then, perhaps, judicial review is requisite for pushing back against impermissible congressional action. That is, the courts' involvement may play a valuable role in policing constitutional boundaries, and ensuring that the Executive—arguably expert vis-à-vis Congress in matters of national security—can effectuate those policies to which he is entitled. Of course, the President already has numerous political powers²²⁸ with which to push back against Congress and to protect his constitutional prerogatives. In particular, his veto power is likely sufficient in most cases.²²⁹ But in cases like our hypothetical, judicial review may serve as a backstop against congressional overreaching.

In addition, as in *Zivotofsky*, it may be particularly valuable for courts to adjudicate foreign policy-related disputes when there is a statutory question involved.²³⁰ If, as in a case like our hypothetical, Congress and the Executive are at loggerheads, then abstention by the Court would encourage legislative buck passing. If Congress knows that its actions—even if right—will go unheeded by the Executive, Congress may choose not to act at all, thus leaving

²²⁸ See generally Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

²²⁹ Of course, and particularly in light of the statute at issue in *Zivotofsky*, one might question whether the presidential veto is a sufficient check against congressional overreaching. There, perhaps due to Congress's inclusion of Section 214 in an otherwise vitally necessary statute, or as a result of other political constraints, President Bush did not veto the legislation, but rather merely attached a signing statement to the law. See HENKIN, *supra* note 35. This might indicate, as some have argued, that in today's world the presidential veto is a far less significant check on congressional authority than the framers intended it to be. See, e.g., SHANE & BRUFF, *supra* note 113, at 137–39 (citing RICHARD A. WATSON, *PRESIDENTIAL VETOES AND PUBLIC POLICY* (1993)).

²³⁰ Cf. RAMSEY, *supra* note 102, at 335–36 (“Claims based on federal statutes may raise foreign affairs difficulties in two ways: statutes may affect the President’s foreign affairs power; and private statutory claims may embarrass the conduct of foreign affairs even where no part of the U.S. government is a party These require distinct treatment.”).

Executive policies wholly unchecked.²³¹ This is exacerbated by the fact that, often, the Executive acts swiftly in the foreign affairs realm, leaving Congress with no option but to acquiesce. *Zivotofsky* gives Congress another tool with which to push back against such overwhelming Executive action, thus enhancing (or restoring to its proper constitutional level) the ability of Congress to do what it feels is constitutionally or otherwise proper.²³²

The judiciary might need to get involved to restore the proper balance of powers in our system.²³³ Judicial review in our hypothetical would ensure that the relative powers of Congress and the Executive remain within the bounds intended by the framers.²³⁴ For instance, were a court instead to find our hypothetical case nonjusticiable, it would, practically speaking, give the Executive a trump card.²³⁵ Notwithstanding the Executive's key constitutional

²³¹ See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 922 (2d ed. 2006) (“[O]ne [might] view the decision on the merits as a better way to channel political energy by taking constitutional constraints off the table as a factor in political debate.”). *But see id.* (citing MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (1989) (noting the objection that “use of adjudication . . . divert[s] political energy away from” democratic challenges to disfavored policies)).

²³² See Tigar, *supra* note 208, 1179 (“Far from bespeaking a sensitive regard for a coordinate branch, therefore, judicial abdication in such cases contributes to the erosion of the formal structural guarantees which the Constitution codified.”).

²³³ See GOLDSMITH, *supra* note 203, at 166 (The Supreme Court “ultimately prov[ed] to be one of the most important agents for making the Constitution’s checks and balances work in the last decade.”); Ratner & Cole, *supra* note 132, at 751 (“[A] statute gains the force of law only where the judiciary performs its constitutional duty to enforce the law,” and that “is especially true where, as here, the statute is directed at the Executive, who has consistently ignored its proscription.”).

²³⁴ Cf. Jinks & Katyal, *supra* note 213, at 1281 (“To be sure, the President has accountability advantages (and comparative expertise advantages vis-à-vis the judiciary), but he does not possess those same advantages over Congress.”).

²³⁵ See Glennon, *supra* note 222, at 819 (“Arguments against judicial resolution of such disputes are often, in reality, thinly disguised pleas for executive hegemony, for the Executive almost always wins if the courts sit on the sidelines [because] the Executive can move quickly . . . leaving Congress, if and when it finds out, faced with a *fait accompli*.”) (internal citation omitted); see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659 (2000) (“Since early in the nation’s history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations.”); Adam Liptak, *Dispute Over Jerusalem Engages Court*, N.Y. TIMES (Nov. 7, 2011), <http://www.nytimes.com/2011/11/08/us/dispute-over->

role in our nation's foreign affairs, this is arguably troubling from a separation of powers perspective.²³⁶ Judicial review, one might hope, will thus serve to "check[] the steadily expanding foreign affairs powers of the Executive branch."²³⁷ Likewise, judicial review will help clarify the relative scope of Executive and congressional authorities, thus strengthening mechanisms for holding the political branches accountable, both in our specific hypothetical context and in other realms as well.

c. If One's Aim is to Constrain the Executive's Targeting Program, Then Increased Judicial Review Spurred by a Statutory Cause of Action Will Be Counterproductive

Nevertheless, there is an overriding danger of judicial review. Notably, judicial review of the President's policies might make them more legitimate—and persistent—than they would otherwise be.²³⁸ As Jesse Choper wrote:

[I]f it is fear of presidential abuse of power—whether generally usurping the authority of Congress or more specifically imposing on the interests of individuals—that triggers the call for judicial involvement (and that is its modern impetus),

jerusalem-engages-supreme-court.html ("Some of the justices [in the *Zivotofsky* oral arguments] said the case presented the sort of political question not fit for judicial resolution, a stance that would as a practical matter amount to a ruling for the executive branch."); Ratner & Cole, *supra* note 132, at 719 ("Without law, there is only politics; the carefully crafted checks and balances of the Constitution fall prey to the institution that acts first and speaks later: the Presidency.").

²³⁶ Specifically, "our Founders set up the tripartite government to make it difficult for government to take action that deprives people of their rights. Short of an emergency that precluded Congress from acting . . . Congress had to pass a law, the President had to enforce the law, and the courts had to uphold the law." Jinks & Katyal, *supra* note 213, at 1277. That is, "[a]ll three branches thus had to agree under this constitutional framework—a key feature of the document that led to greater deliberation and dialogue among the branches." *Id.*

²³⁷ Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1994-95 (1993) (internal citations omitted).

²³⁸ See, e.g., GOLDSMITH, *supra* note 203, at 196 ("[F]or those who believe that the terrorist threat remains real and scary, and that the nation needs a Commander in Chief empowered to meet the threat in unusual ways—embedding these presidential prerogatives in the rule of law is an enormous blessing.").

then, in the plausible judgment of distinguished observers, history teaches that the Court's participation has, on balance, been counterproductive. Rather than curtailing executive aggrandizement, many judicial holdings and dicta have . . . licensed the executive branch to secure the dominant voice in our society.²³⁹

This is because, with respect to foreign policy questions, courts—even when refusing to defer to the Executive on his claims of nonjusticiability—tend to be highly deferential to the President on the merits.²⁴⁰ Thus, judicial review might effectively act as a rubber stamp, solidifying even the most questionable of the Executive's practices, without providing a real procedural check on his actions.²⁴¹ Such legitimization is arguably that which is most dangerous about judicial review in the context of targeted killings, and more broadly in the foreign affairs realm.

In addition, even a judicial ruling that, on its face, seems to be a victory for individual rights²⁴² may have the unintended effect of incentivizing the Executive to shift to strategies that may be more

²³⁹ JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 314 (1980) (citation and internal quotation marks omitted).

²⁴⁰ See, e.g., *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy of deference to the President in matters of foreign affairs"); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993) (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)) ("[T]he nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of [the Supreme] Court.'"); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

²⁴¹ Cf. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) ("I would not lead people to rely on this Court for a review that seems to me wholly delusive The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.").

²⁴² See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that individuals detained by the U.S. military at Guantanamo have a constitutional right to seek habeas review in U.S. courts).

harmful to individuals' liberties.²⁴³ "Demands to raise legal standards for terrorist suspects in one arena often lead to compensating tactics in another arena that leave suspects (and, sometimes, innocent civilians) worse off."²⁴⁴ Consider, for example, what could happen if the military was ordered to prosecute criminally all those that it captured. Prosecution, with its procedural and other individual rights safeguards, might incentivize the military to circumvent the criminal justice system's protections and to push its efforts underground, utilizing more secretive and brutal means. It might even encourage U.S. agents and soldiers to kill, rather than capture, their enemies marginally more often. If one wishes to promote individual rights and civil liberties, then one might think it is better for the Court to stay out of national security questions altogether, rather than permitting risk of judicial error.²⁴⁵

Of course, it would be a mistake to reject out of hand judicial review based on the risks of courts' likely mistakes. The existence of risk—and one's desire to avoid it—is not and cannot be a trump card.²⁴⁶ One must weigh the costs and benefits of judicial involvement against those of inaction. But if one thinks the expected cost of erroneous review is greater than the costs of erroneous abstention—namely, the persistence of constitutional wrongs and the *ex ante* constraining effects lost through abdication²⁴⁷—then judicial abstention may remain the preferred outcome.²⁴⁸ Although this cost-

²⁴³ Jack Goldsmith, *The Shell Game on Detainees and Interrogation*, WASH. POST (May 31, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/29/AR2009052902989.html>.

²⁴⁴ *Id.*

²⁴⁵ *But see* FRANCK, *supra* note 37, at 159 ("[W]hen courts do take jurisdiction over foreign-affairs cases, the costs to national policy interests are generally far less than the government may have imagined.").

²⁴⁶ Cf. Adrian Vermeule, *Precautionary Principles in Constitutional Law*, 4 J. LEGAL ANALYSIS 181, 213 (2012) ("In general, second-order or indirectly consequentialist arguments for (some version of) the precautionary principle imply that it is not necessarily best for regulators to attempt to weigh all relevant risks, because they will predictably display certain biases in doing so.").

²⁴⁷ *See* Jaffer, *supra* note 181, at 186.

²⁴⁸ Vermeule, *supra* note 246, at 199 ("In many settings, the most forceful argument against precautions is simply that the optimal level of the target risk is not zero, and that some degree of expected harm from the target risk is necessary to obtain other goods."); *see also* FRANCK, *supra* note 37, at 159 ("[N]ot to decide has heavy costs,

benefit calculus, if done globally, is unknowable, the net effect of judicial review is more obviously negative in the specific context of our hypothetical.²⁴⁹

With respect to targeted killings in particular, courts are likely to reaffirm that the President, as Commander-in-Chief, has the constitutional authority to undertake such targetings as a military strategy should he so choose. Courts will probably be apprehensive about interposing themselves between the Executive and tactics he describes as invaluable to him in combating imminent, catastrophic threats. Given the unpopularity of and skepticism towards the so-called War on Terror, as well as the other pro-justiciability factors described above, courts will probably intervene, but do so rather timidly. For instance, while courts might be willing to impose minimal procedural requirements on the President's ability to choose and attack targets, they nevertheless will probably approve the broad brushstrokes of the U.S. government's targeting program. Consequently, judicial review in the targeted killings realm will likely provide legitimacy to the Executive's policy without effectively providing opponents desired procedural protections. This, in addition to realpolitik considerations, might mean that critics of the U.S. government's targeting policy should pursue congressional²⁵⁰ or

precisely in the area of foreign policy" because, today, "America's principal shield and sword . . . is the rule of law" and "to make the law's writ inoperable at the water's edge is nothing less than an exercise in unilateral moral disarmament.").

²⁴⁹ In a related vein, several commentators have proposed that the Foreign Intelligence Surveillance Act model—which provides for judicial oversight of Executive wiretapping decisions—be adapted to create a new court to oversee the Executive's targeted killing decisions. See, e.g., Daniel Byman, *Do Targeted Killings Work*, 85 FOR. AFF. 95, 111 (2006); W. Jason Fisher, *Targeted Killings, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 754-55 (2007); Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805, 834-35 (2007).

²⁵⁰ See, e.g., Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 615 (2011) (citing Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915) ("Congress should also take the opportunity to make a critical change to all such Gang of Eight reporting mechanisms, . . . possibly by permitting the chief majority and minority counsels for the relevant committees to attend as well (creating a Gang of Twelve)."); Graham Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT'L L. 377, 402 (2012) ("Congress needs to

other²⁵¹ non-judicial oversight mechanisms, rather than attempt to curtail that program directly (lawsuits) or indirectly (encouraging a statutory cause of action) via judicial review.

IV. CONCLUSION

Zivotofsky is not particularly significant in its alleged return to the classical version of the political question doctrine. Specifically, the Supreme Court, in prior cases, had already preferred *Baker*'s classical factors over the prudential components of that test, and many lower courts still use all six *Baker* factors in the wake of *Zivotofsky*. Despite this, other aspects of *Zivotofsky* are likely to shift the judicial landscape. In particular, *Zivotofsky* was forthrightly pro-justiciability with regards to cases implicating federal statutes, and was arguably meaningful in its refusal to defer to the Executive Branch regarding the potential foreign policy costs of judicial review. Taken together, these parts of *Zivotofsky* signal to Congress that it can encourage judicial review of national security policies—namely, targeted killings—by enacting relevant statutes. If one seeks to hold the Executive accountable for such policies, then one might, at first, think a broad, pro-justiciability reading of *Zivotofsky* will lead to rule of law and responsibility-forcing results. And, in general, increased judicial review is likely to do so. But with respect to targeted killings, this is probably not the most effective route for critics of targeted killings to take. In particular, if Congress enacts a law creating a cause of action for the families of those killed via targeting, then

specifically authorize force against groups outside of al-Qaeda and the Taliban.”); Nat’l Comm’n on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* 419-21 (2004) (recommending that congressional oversight of Executive wartime practices be improved by restructuring the House and Senate Intelligence Committees).

²⁵¹ See, e.g., Alston, *supra* note 182, at 420–21 (“[I]n order to achieve the necessary ‘public legitimacy,’ the executive should articulate more clearly the basis for its legal arguments (while not revealing ‘secret facts, programs, activities, and other things that ought to remain secret’).”); Chesney, *supra* note 250, at 543 (arguing that presidential approval should be required, at a minimum, for all targeted killings undertaken outside the combat zone); Murphy & Radsan, *supra* note 12, at 411 (“[E]xecutive authorities should . . . require an independent, intra-executive investigation of any targeted killing by the CIA . . . [and these] investigations should be as public as is reasonable consistent with national security.”).

courts may, after using *Zivotofsky* to find more cases justiciable, ultimately legitimate questionable Executive practices. In so doing, the courts will give Executive policies their imprimatur, yet provide little in the way of real oversight or review. Therefore, if one desires to constrain the Executive in the national security realm, then one should be skeptical of *Zivotofsky* as a means to pursue such limitation.





ONLINE TERRORISM ADVOCACY:
HOW AEDPA AND INCHOATE CRIME STATUTES
CAN SIMULTANEOUSLY PROTECT AMERICA'S
SAFETY AND FREE SPEECH

Daniel Hoffman*

INTRODUCTION

Dzhokhar Tsarnaev, a suspect in the April 15, 2013 Boston Marathon bombing, told investigators that online Al Qaeda extremist sermons influenced both him and his brother, and that the online jihadist magazine *Inspire* taught them bomb-making techniques.¹ Though the 1993 World Trade Center and 1995 Oklahoma City bombers used manuals to construct their bombs,² the Boston bombings are the most recent example of bombers using online information on American soil to great catastrophic effect.

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¹ Sari Horwitz, *Investigators Sharpen Focus on Boston Bombing Suspect's Wife*, WASH. POST (May 3, 2013), http://articles.washingtonpost.com/2013-05-03/world/39003173_1_law-enforcement-russell-s-brother.

² U.S. DEP'T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION 10 (1997) [hereinafter 1997 BOMBMAKING REPORT], *available at* <http://cryptome.org/abi.htm#II>.

Revelations similar to Tsarnaev's about online terror information are commonplace in foiled criminal plots. In late July 2011, authorities arrested a U.S. Army soldier with weapons, materials to make a bomb, and a copy of *Inspire's* article "Make a Bomb in the Kitchen of Your Mom."³ Also in July 2011, a grand jury in the Eastern District of Virginia charged Emerson Winfield Begolly with soliciting crimes of violence⁴ and distributing information relating to explosives⁵ for moderating the Ansar al-Mujahideen English Forum and encouraging others to engage in terrorism against U.S. infrastructure.⁶ Though the Boston tragedy graphically reiterates the threat, law enforcement has long known that online resources marrying terrorism advocacy with detailed and operational tactics, techniques, and procedures—abbreviated as "online terrorism advocacy" in this article—are dangerous tools for people motivated to deliver death and destruction.⁷

After events like the Boston bombings, it is natural for legislative, legal, and law enforcement professionals to examine if

³ Pierre Thomas, Martha Raddatz, Rhonda Schwartz & Jason Ryan, *Fort Hood Suspect Yells Nidal Hasan's Name in Court*, ABC NEWS (July 29, 2011), <http://abcnews.go.com/Blotter/fort-hood-suspect-naser-jason-abdo-yells-nidal-hasan/story?id=14187568>.

⁴ 18 U.S.C. § 373 (2012).

⁵ *Id.* § 842(p)(2)(A).

⁶ Grand Jury Indictment of Emerson Winfield Begolly, Criminal No 1:11 CR 326 [hereinafter Begolly Indictment], available at <http://www.lawfareblog.com/wp-content/uploads/2011/07/Begolly-Indictment.pdf>. Mr. Begolly subsequently pled guilty. Warren Richey, *American Muslim Pleads Guilty to Using the Internet to Solicit Terrorism*, CHRISTIAN SCI. MONITOR (Aug. 9, 2011), <http://www.csmonitor.com/USA/Justice/2011/0809/American-Muslim-pleads-guilty-to-using-the-Internet-to-solicit-terrorism>.

⁷ See Begolly Indictment, *supra* note 6, at 1, 2; 1997 BOMBMAKING REPORT, *supra* note 2, at 3 (discussing the need for additional laws relating to the dissemination of bomb-making information); John C. Richter, *Counter-Terrorism: A Federal Prosecutor's View*, 33 OKLA. CITY U. L. REV. 297, 326-28 (2008) (discussing a danger with websites that promote violent jihad and give "step-by-step instructions on how to build suicide vests and explosives"); Eric B. Easton, *Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DEPAUL. L. REV. 1, 45-46 (1995) (discussing Congress's acknowledgment of the threat in the debate on the Comprehensive Terrorism Prevention Act, which would later become the adopted Antiterrorism and Effective Death Penalty Act of 1996).

they could have done more to prevent the tragedy. In the spirit of that necessary reflection, this Article examines, in depth, the statutes available to federal prosecutors targeting online terrorism advocacy, the prosecutorial challenges those statutes create, and the way in which law enforcement and prosecutors can use the current law both effectively and constitutionally to prevent future attacks.

There are two primary avenues used to prosecute online terrorism advocacy: (1) the longstanding inchoate, or incomplete, crime statutes such as attempt, solicitation, and conspiracy,⁸ and (2) the relatively new Antiterrorism and Effective Death Penalty Act (“AEDPA”)⁹ statutes, which were passed in the wake of the 1995 Oklahoma City bombing.¹⁰ Each avenue provides law enforcement

⁸ 18 U.S.C. §§ 371, 373 (2012). See Martin J. King, *Criminal Speech Inducement and the First Amendment*, 77 FED. BUREAU OF INVESTIGATION LAW ENFORCEMENT BULL. 23, 24 (2008) available at <http://leb.fbi.gov/2008-pdfs/leb-april-2008> (stating the primary inchoate crimes are attempt, solicitation, and conspiracy). Cf. Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 669 (2009) (stating that free speech limitations have generally not been applied to threats, solicitations, criminal instructions, and conspiracy).

⁹ Though 18 U.S.C. § 842(p) was adopted subsequent to AEDPA due to it being removed from AEDPA for U.S. Attorney General review, 1997 BOMBMAKING REPORT, *supra* note 2, at 3, 4, it is generally referred to as an AEDPA act because the statute is rooted in that act. 141 CONG. REC. 14,757-58 (1995), CR-1995-0605 (ProQuest Congressional). This article addresses three AEDPA statutes, 18 U.S.C. § 842(p)(2)(A), § 2339B, and § 844(n), but primarily deals only with the first two because § 844(n) is essentially a sentencing statute which concerns assigning the same penalty to the person conspiring to commit the crime as the person committing the actual offense. Aiding and abetting, 18 U.S.C. § 2, is also addressed with the AEDPA statutes, even though it is not an AEDPA statute, in order to analyze it in parallel with AEDPA’s § 2339B, which is a terrorism-specific aiding and abetting statute.

¹⁰ This comment will not address the civil rights-related statutes and doctrines because of the very significant prosecutorial challenges these statutes create. See 18 U.S.C. § 231 (2012); *Virginia v. Black*, 538 U.S. 343, 363 (2003) (creating “true threat” doctrine and defining cross burning as intimidation not protected by First Amendment); *United States v. Featherstone*, 461 F.2d 1119, 1122 (5th Cir. 1972) (highlighting the *mens rea* requirement of the incendiary devices use in civil disorder); *Nat’l Mobilization Comm. to End the War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969) (stating the narrow scope of § 231(a)(1) (citing *Landry v. Daley*, 280 F. Supp. 938, 939 (N.D.Ill.1968))); Nina Pretraro, Comment, *Harmful Speech and True Threats: Virginia v. Black and the First Amendment in an Age of Terrorism*, 10 ST. JOHN’S J. C.R. & ECON. DEV. 531, 562-63 (2006) (noting the

and prosecutors certain advantages and disadvantages. For instance, courts hold that inchoate crimes are not required to meet *Brandenburg v. Ohio*'s¹¹ First Amendment requirement of "imminent lawless action," and, instead, apply a less rigorous "mere advocacy" of lawless action requirement.¹² Counterbalancing that prosecutorial advantage, however, are the inchoate crimes' higher *mens rea* requirements,¹³ which make it more difficult for a prosecutor to establish a speaker's intent to influence an inherently insulated online audience. In contrast to the inchoate crime statutes, the AEDPA statutes have a lower *mens rea* requirement, but often confront the higher *Brandenburg* First Amendment requirement of "imminent lawless action."¹⁴

These two sets of statutes—inchoate crimes and AEDPA—are perceived very differently by First Amendment proponents and those focused on prosecuting terrorism, national security, or criminal threats. First Amendment advocates generally believe prosecuting online terrorism advocacy improperly chills free speech, while prosecutors argue that *mens rea* requirements and *Brandenburg* challenges make existing statutes and case law inadequate for preventing online advocacy threats.¹⁵ Despite these disparate perceptions, the legal analysis conducted in this Article reveals that current statutes and cases actually offer a remarkable balance between the competing concerns by not only protecting most speech, but also facilitating necessary prosecutions under challenging scenarios such as online terrorism advocacy. In fact, analysis of AEDPA statute case law reveals the balance between constitutional and national security concerns that Congress sought after the Oklahoma City bombing has largely, albeit slowly, been implemented by both the federal district courts, circuit courts, and to some extent

dropping of charges against a person handing out leaflets near Ground Zero praising Osama Bin Laden's work immediately following the September 11, 2001 attacks, such conduct being the "outer limits" of a true threat).

¹¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam).

¹² *Id.* at 448-49 ("[S]tatute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.").

¹³ *Mens rea* refers to an evil intent or a guilty mind. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

¹⁴ *Brandenburg*, 395 U.S. at 447.

¹⁵ See *infra* Part I.C.

by the Supreme Court through abdication. Nevertheless, complete reconciliation of the free speech and prosecution priorities will not occur until online terrorism advocacy prosecutions build a stronger case law foundation by exploring the limits of *mens rea* and *Brandenburg* challenges. Without those prosecutions and court decisions, the long debated boundaries between permissible speech and prohibited online terrorism advocacy will remain a mystery.

Part I of this Article provides background on the First Amendment *Brandenburg* challenges to prosecuting online terrorism advocacy by examining the First Amendment considerations Congress made when originally passing the AEDPA statutes. Part II provides in depth statutory and case law analysis of the prosecution tools that are traditionally used against First Amendment challenges, including both traditional and AEDPA aiding and abetting statutes, 18 U.S.C. § 2¹⁶ and § 2339B (“§ 2” & “§ 2339B”),¹⁷ and also AEDPA’s material support and explosives information distribution statute, 18 U.S.C. § 842(p).¹⁸ Part III analyzes prosecutorial advantages and limitations of two of the inchoate crime statutes, solicitation and conspiracy, 18 U.S.C. § 373(a)¹⁹ and § 371²⁰ (“§ 373(a)” and “§ 371”) and the challenges they face even though *Brandenburg* traditionally does not apply.²¹ The Conclusion offers a brief summary of existing tools for prosecuting online terrorism advocacy, and a prescription for reconciling the ongoing conflict between America’s competing, but not mutually exclusive, First Amendment and national security priorities.

¹⁶ 18 U.S.C. § 2 (2012).

¹⁷ *Id.* § 2339B.

¹⁸ *Id.* § 842(p).

¹⁹ *Id.* § 373(a).

²⁰ *Id.* § 371.

²¹ This Article will not address the inchoate crime of attempt because online terrorism advocacy generally occurs at the earlier stages of criminal activity (i.e., solicitation and conspiracy) as opposed to a later stage (i.e., attempt). See Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 9 (1989) (“[C]onspiracy and solicitation can be viewed as early stages of an attempt to commit a completed offense.”).

I. *BRANDENBURG* IMMINENCE: THE PRIMARY CHALLENGE TO PROSECUTING ONLINE TERRORISM ADVOCACY

Congress passed the terrorism portions of the AEDPA statutes in 1996 in response to the 1995 Oklahoma City bombing.²² Nevertheless, terrorism related convictions are a remarkably small percentage of attempted prosecutions, even since September 11, 2001.²³ Given the overall prosecutorial record, it is slightly surprising that there is a split in the legal community over whether current statutes allow for adequate prosecution of terrorism.²⁴ However, an objective review of the applicable statutes and case law reveals that the First Amendment *Brandenburg* “imminence” requirement is a possible challenge to prosecuting online terrorism advocacy, and that Congress passed the AEDPA statutes with that challenge in mind.

A. *AEDPA Statutes and Congress’s First Amendment Concerns*

Prior to Congress passing the terrorism portions of the AEDPA legislation in 1996, Deputy Assistant Attorney General Robert Litt influenced the AEDPA legislation substantially by his testimony before the Senate Judiciary Committee.²⁵ Litt’s testimony

²² 1997 BOMBMaking REPORT, *supra* note 2, at 3, 4.

²³ Elizabeth M. Renieris, *Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and United Kingdom and the Need for International Solutions*, 11 VAND. J. ENT. & TECH. L. 673, 690 (2009) (stating that of almost 400 terrorist suspects since September 11th, only thirty-nine were convicted of terrorism or national security crimes). *But see Fact Check: Terrorism and Terrorism Related Prosecutions by the Bush Administration More than 300 after 9/11*, U.S. DEP’T OF JUSTICE (July 2, 2014), <http://www.justice.gov/cjs/docs/terrorism-bush-admin.html> (stating how the Justice Department in its 2009 budget request “noted that more than 300 individuals had been convicted of terrorism or terrorism-related violations in federal court since 9/11.”). When talking about “terrorism related” prosecutions the quantities fluctuate wildly depending on whether the data collector defines the word “related” widely or narrowly. For the purposes of this article, assume the word “related” is defined narrowly.

²⁴ See, e.g., Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN L. REV. 1095, 1106 (2005) (stating crime-facilitating speech should be protected except in extremely narrow circumstances). *But see*, e.g., Alan F. Williams, *Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What’s Broken*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 365, 366 (2007-2008) (arguing new federal criminal legislation is needed to combat terrorism on the web).

²⁵ See 1997 BOMBMaking REPORT, *supra* note 2, at 3.

outlined the ease of obtaining information about creating explosives on the Internet, and asked Congress to create laws to allow the Department of Justice to prosecute those assisting terrorism online.²⁶ As a result, 18 U.S.C. § 303, dealing generally with aiding and abetting terrorism, and 18 U.S.C. § 701, dealing generally with conspiracy penalties involving explosives,²⁷ were immediately added to AEDPA, and became § 2339B and 18 U.S.C. § 844(n) (“§844(n)”)²⁸ respectively.

The section of the law regarding the distribution of information related to explosives, was proposed by Senator Feinstein on June 5, 1995,²⁹ but did not become law until 1999,³⁰ precipitated by the tragic shootings at Columbine High School.³¹ Significant Congressional concerns about inadvertently prohibiting “legitimate” publication of information on explosives caused the delay³² of what eventually became 18 U.S.C. § 842(p) (“§ 842(p)”)³³. Because of these and other concerns, Congress removed proposed § 842(p) from the AEDPA legislation and, instead, inserted language requiring the Department of Justice to conduct a study addressing the availability of information on explosives, the information’s use in terrorism, and First Amendment concerns.³⁴ The study requirement highlighted Congress’s focus on the threat that information on explosives posed, as well as their parallel concerns for First Amendment rights.

Though a deep legislative analysis is beyond the scope of this Article, an adequate understanding of the legislative intent of §

²⁶ *Id.*

²⁷ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996); § 701, 110 Stat. at 1291.

²⁸ 18 U.S.C. § 844(n) (2012). Specifically, § 844(n) concerns assigning the same penalty to the person conspiring to commit the crime as the person committing the actual offense.

²⁹ 141 CONG. REC. S7682 (daily ed. June 5, 1995).

³⁰ Relief of Global Exploration and Development Corporation, Pub. L. 106-54, § 2(a), 113 Stat 398, 398-99 (1999).

³¹ Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973, 2011-12 (2005).

³² 1997 BOMBMAKING REPORT, *supra* note 2, at 24-25.

³³ 18 U.S.C. § 842(p).

³⁴ *Id.* at 1.

842(p), § 2339B, and § 844(n) is possible by examining the evolution of § 842(p). As proposed by Senator Feinstein, § 842(p) required the “making of explosive materials” with intentional or knowing *mens rea* that the materials “will likely be used for . . . a Federal criminal purpose affecting interstate commerce.”³⁵ After their extensive study of the issue, the Department of Justice broadened the *actus reus*³⁶ to include the “making or use of an explosive,” but narrowed the *mens rea* by changing “intends or knows” to simply “intends” and eliminating “will likely,” leaving only “be used for.”³⁷ Finally, prior to adoption, Congress further limited the *actus reus* of the statute by replacing “a Federal criminal offense . . . affecting interstate commerce” with “an activity that constitutes a Federal crime of violence.”³⁸ The final § 842(q) states:

It shall be unlawful for any person – (A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching,

³⁵ The Feinstein Amendment of § 842(q) states:

It shall be unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person intends or knows, that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal purpose affecting interstate commerce.

141 CONG. REC. S7875 (daily ed. June 5, 1995).

³⁶ *Actus reus* is the “wrongful deed that comprises the physical components of a crime.” BLACK’S LAW DICTIONARY 41 (9th ed. 2009).

³⁷ The DOJ’s proposed language of § 842(q) states:

It shall be unlawful for any person – (a) to teach or demonstrate the making or use of an explosive, destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of such an explosive, device or weapon, intending that such teaching, demonstration or information be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce.

1997 BOMBMaking REPORT, *supra* note 2, at 51.

³⁸ 18 U.S.C. § 842(p)(2)(A) (2012).

demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence.³⁹

Thus amended, § 842(p) protected the First Amendment more than proposed § 842(p) after both the Department of Justice and Congressional edits.

The context of the Congressional and Department of Justice efforts to narrow § 842(p) is very important. From even a casual read of the Congressional Record,⁴⁰ or the Department of Justice 1997 Report,⁴¹ it is clear that both organizations, in light of modern threats, worked hard to create legislation intended to survive First Amendment challenges.⁴² This is not surprising given that § 844(n) and § 2339B were drafted and passed in the wake of the Oklahoma City bombing, and § 842(p) was finalized and passed after the 1999 Columbine High School shootings.⁴³ Congress's intent to allow prosecutions, while simultaneously protecting the First Amendment, is largely realized in subsequent judicial decisions on these and related statutes.⁴⁴

B. First Amendment Challenges: Brandenburg and its Application

It is axiomatic in First Amendment speech law that statutes must protect free speech but simultaneously balance that protection

³⁹ *Id.*

⁴⁰ See 142 CONG. REC. H3336 (daily ed. Apr. 15, 1996) (requiring the Attorney General to render a legal analysis on the First Amendment issues).

⁴¹ See 1997 BOMBMAKING REPORT, *supra* note 2, at 51 (proposing modified statutory language that could “pass constitutional muster” after analyzing the First Amendment principles in context of dissemination of bomb-making information).

⁴² H. Brian Holland, *Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech That Performs a Teaching Function*, 39 U.S.F. L. REV. 353, 356 (2005) (“It took over four years, a full constitutional review, and the tragedies in Oklahoma City and Columbine to bring section 842(p) into law. The statute is thus inseparable from the seminal events, public perceptions, and politics that drove its enactment.”); Kendrick, *supra* note 31, at 2012.

⁴³ See Holland, *supra* note 42, at 356; Kendrick, *supra* note 31, at 2012.

⁴⁴ See *infra* Part II.

with other important priorities.⁴⁵ When someone believes this balancing inadequately protects speech, they may challenge a statute as: (1) facially overbroad;⁴⁶ (2) facially vague;⁴⁷ and, (3) overbroad as applied.⁴⁸ Facial challenges do not require a plaintiff to meet the traditional rules of standing and rarely succeed because the Supreme Court views them as an extreme, and often unnecessary, solution to the threat to speech.⁴⁹ In contrast, an applied challenge—now often known as a “*Brandenburg* challenge”—is generally more likely to succeed because of its more limited scope as well as the clear evidentiary record that allows the Court to evaluate real facts as opposed to innumerable and imprecise hypotheticals.⁵⁰ In *Brandenburg*, a Ku Klux Klan leader appealed his conviction under an Ohio criminal statute forbidding advocating for crime, violence, or terrorism to accomplish reform, or assembling with a group “to

⁴⁵ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.” (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911))).

⁴⁶ A law may be facially overbroad when “it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.” *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

⁴⁷ A law is facially vague if persons of “common intelligence must necessarily guess as to its meaning” and differ as to its application. *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) (holding an ordinance saying people on the street could not “annoy” police or another person was unconstitutionally vague because no standard of conduct is specified).

⁴⁸ Although “the distinction between facial and as-applied challenges is not so well defined,” *Citizens United v. FEC*, 558 U.S. 310, 331 (2010), an as-applied challenge, unlike a facial challenge to a statute that seeks to invalidate it in its entirety, seeks to invalidate a particular application of the statute. See *States v. Coronado*, 461 F. Supp. 2d 1209, 1215 (S.D. Cal. 2006) (distinguishing facial challenges, which focus on the statute, indictment, and well-established overbreadth principles, from as-applied challenges, which include factual arguments involving the evidentiary record).

⁴⁹ See *Broderick v. Oklahoma*, 413 U.S. 601, 613 (1973) (stating facial attack “has been employed by the Court sparingly and only as a last resort”).

⁵⁰ See *States v. Coronado*, 461 F. Supp. 2d 1209, 1215 (S.D. Cal. 2006).

teach or advocate the doctrines of criminal syndicalism.”⁵¹ The Court stated in *Brandenburg*:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, 367 U.S. 290, 297-98 (1961), ‘the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’ . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.⁵²

The rule of *Brandenburg*, though open to debate,⁵³ focuses on “imminent lawless action” as opposed to “mere abstract teaching . . . for violent action.”⁵⁴ Thus, terrorism advocacy defendants often counter inchoate crime or AEDPA statute charges with First Amendment challenges⁵⁵ because the “advocacy” that *Brandenburg* defends is often largely tantamount to terrorism’s political and social ideas.⁵⁶

Applying *Brandenburg* First Amendment law to the advocacy of terrorism over the Internet invokes a significant debate over the Supreme Court’s *Brandenburg* decision and its various interpretations.⁵⁷ The opinion uses the terms “incitement to

⁵¹ *Brandenburg v. Ohio*, 395 U.S. 444, 444 (1969) (per curiam).

⁵² *Id.* at 447-48 (citations omitted).

⁵³ See *Rice v. Paladin Enters. Inc.*, 128 F.3d 233, 264-65 (4th Cir. 1997) (“[T]he Court distinguishes between ‘mere advocacy’ and ‘incitement to imminent lawless action,’ a distinction which, as a matter of common sense and common parlance, appears different from the first distinction drawn, because ‘preparation and steeling’ can occur without ‘incitement,’ and vice-versa.” (quoting *Brandenburg*, 395 U.S. at 448)).

⁵⁴ *Brandenburg*, 395 U.S. at 447-48.

⁵⁵ See, e.g., *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (petitioners arguing 18 U.S.C. § 2339B(a)(1) violates their rights of free speech).

⁵⁶ *Brandenburg*, 395 U.S. at 448-49.

⁵⁷ See Healy, *supra* note 8, at 663-68 (outlining numerous reasons for the significant confusion surrounding *Brandenburg*).

imminent lawless action” and “preparation and steeling” interchangeably.⁵⁸ These terms, however, do not mean the same thing; someone can “prepare and steel” for lawless action, without that lawless action being imminent.⁵⁹ The fact that the Court has only applied *Brandenburg* in two other cases,⁶⁰ neither particularly enlightening, compounds the difficulty of interpreting *Brandenburg*. Thus, lower courts faced with challenging speech-related criminal prosecutions and without the luxury of choosing their cases,⁶¹ have various interpretations of *Brandenburg*, many of which appear to conflict with the Supreme Court’s original interpretation.⁶²

Nuance pervades the Supreme Court’s *Brandenburg* decision, and a more in-depth analysis of its applicability to various statutes follows. However, a basic understanding of *Brandenburg* applicability to a speech-related crime is possible by asking three questions. Does the act constitute an inchoate crime?⁶³ Does the speech have some amount of political or social advocacy?⁶⁴ Is there a completed criminal act?⁶⁵ The answers to these three questions guide the required First Amendment analysis.

Question one is important because the inchoate crimes such as conspiracy, attempt, and solicitation are largely excluded from having to satisfy the *Brandenburg* requirement.⁶⁶ Their exclusion is

⁵⁸ See *Paladin*, 128 F.3d at 264 (highlighting the distinction between “incitement to imminent lawless action” and “preparation and steeling”).

⁵⁹ *Id.*

⁶⁰ See *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982).

⁶¹ Healy, *supra* note 8, at 668.

⁶² Holland, *supra* note 42, at 380.

⁶³ Healy, *supra* note 8, at 669 (stating that free speech limitations have generally not been applied to threats, solicitations, criminal instructions, and conspiracy).

⁶⁴ See *United States v. White*, 610 F.3d 956, 959-60 (7th Cir. 2010); *Paladin*, 128 F.3d at 264-65, 267 (stating that *Brandenburg* only applies to “advocacy-speech” and that requiring “imminence” whenever the predicated act took the form of speech would change and undermine the criminal law and that the book in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, make the case unique).

⁶⁵ See *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985); *United States v. Kelley*, 769 F.2d 215, 216-17 (4th Cir. 1985).

⁶⁶ Healy, *supra* note 8, at 669 (stating that free speech limitations have generally not been applied to threats, solicitations, criminal instructions, and conspiracy).

necessary to facilitate law enforcement intervention based on sufficient intent, not “imminent lawless action.”⁶⁷ Question two is important because advocating crime without some level of political or social promotion of ideas will likely strip the speech of *Brandenburg* protection.⁶⁸

The third question, concerning a completed act, highlights the distinction between complete and inchoate criminal acts. This distinction is important for two reasons. First, in trying to prevent terrorism by interdicting online terrorism advocacy and tactics, successful law enforcement means preventing a serious criminal act.⁶⁹ Second, a court is less likely to find a reason to punish online terrorism advocacy and tactics without a criminal act with which to anchor the “menial” charges.⁷⁰ A representative example of menial charges is where a juror referred to a defendant’s jihad preaching in a chat room as a lack of “hard evidence.”⁷¹

⁶⁷ See *Am. Commc’ns Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 394-95 (1950) (“Government may cut him off only when his views are no longer merely views but threaten, clearly and imminently, to *ripen* into conduct against which the public has a right to protect itself.” (emphasis added)); King, *supra* note 8, at 24-25.

⁶⁸ See *Paladin*, 128 F.3d at 264-65, 267 (stating that *Brandenburg* only applies to “advocacy-speech” and that requiring “imminence” whenever the predicated act took the form of speech would change and undermine the criminal law and that the book in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, make the case unique). However, it is important to note that the in-depth analysis in *Paladin* applies to an aiding and abetting charge which involved an actual murder, a completed (as opposed to inchoate) criminal act, and most of the case law cited by the court similarly applies to case law involving completed criminal acts. See also *Freeman*, 761 F.2d at 551; *Kelley*, 769 F.2d at 216-17. But see *Haig v. Agee*, 453 U.S. 280, 308-09 (1981) (holding a former CIA employee’s release of intelligence information was unprotected despite no indication in the opinion of subsequent crime related to that information, only potential problems associated with the information disclosure).

⁶⁹ See *Begolly Indictment*, *supra* note 6, at 1-2.

⁷⁰ See *Freeman*, 761 F.2d at 551-52; *Kelley*, 769 F.2d at 216-17. But see *Agee*, 453 U.S. at 308-09.

⁷¹ See *infra* Part II.A.2.

Applying the above three questions to 18 U.S.C. § 2, traditional inchoate crime aiding and abetting,⁷² demonstrates both the usefulness of the questions and the confusion *Brandenburg* analysis can create. First, is it an inchoate crime? On one side, the U.S. Department of Justice 1997 *Report on the Availability of Bombmaking Information* says aiding and abetting is an inchoate crime.⁷³ However, no federal case law clearly states that, though there are various cases cited in the Department of Justice report and elsewhere that suggest it.⁷⁴ Second, does the speech have some amount of political or social advocacy? Existing case law supports that speech with a complete lack of social value will not receive *Brandenburg* protections from the court.⁷⁵ But the question of how much social value is required to receive protection remains open. Third, is there a completed act? Since aiding and abetting requires an act,⁷⁶ why does speech aiding and abetting not necessarily require *Brandenburg* imminence?⁷⁷

⁷² The definition of principals in federal law adopts traditional inchoate crime aiding and abetting:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2012).

⁷³ 1997 BOMBMAKING REPORT, *supra* note 2, at 2 (“[S]uch ‘speech acts’ – for instance, many cases of inchoate crimes such as aiding and abetting and conspiracy – may be proscribed without much, if any, concern about the First Amendment.”).

⁷⁴ *United States v. Bell*, 414 F.3d 474, 482 n.8 (3d Cir. 2005) (“*Brandenburg* clearly does not apply to the kind of unprotected or unlawful speech or speech-acts (e.g. *aiding and abetting*, extortion, criminal solicitation, conspiracy, harassment, or fighting words) at issue. . . here.” (emphasis added)).

⁷⁵ *See Rice v. Paladin Enters. Inc.*, 128 F.3d 233, 267 (4th Cir. 1997) (stating that the book at issue in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, makes the case unique).

⁷⁶ *See United States v. Sarracinao*, 131 F.3d 943, 946 (10th Cir. 1997) (stating that for an individual to aid and abet the commission of a crime, the proof must establish the commission of the offense by someone).

⁷⁷ *See United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (stating that “[T]he jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words were to produce or incite an imminent law-less act, one likely to occur.”); *see also United States v. Kelley*, 769

These ambiguities and nuances highlight both the obstacles and keys for a prosecutor facing a *Brandenburg* First Amendment challenge. The obstacles are surmountable given current case law, but the limited number of successful terrorism prosecutions also accurately reflects the difficulties facing prosecutors targeting online terrorism advocacy.⁷⁸

C. Terrorism Prosecutions: Too Few or Too Many?

Despite the perceived magnitude of the terrorism threat post-September 11, and the significant resources applied to terrorism in both prosecutorial manpower and statutes, of almost four hundred terrorism suspects since September 11, 2001, as of 2009, only thirty-nine were convicted of terrorism or national security crimes.⁷⁹ Even with the small percentage of convictions, scholars observe that prosecutors founded some of the successful convictions on the wrong doctrines and statutes, further confusing the appropriateness and applicability of various prosecution tools.⁸⁰ Given this large, checkered, and often contradictory prosecutorial record, it is not as surprising that academic analysis of the topic has called for change with significant numbers lining up at both ends of the spectrum.⁸¹ One side argues that existing law inappropriately restrains free

F.2d at 216-17 (“The cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law.”).

⁷⁸ See Renieris, *supra* note 23 at 690.

⁷⁹ *Id.*

⁸⁰ Healy, *supra* note 8 at 670-71 (stating that the charges in *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), though treated as solicitation, were actually more akin to advocacy).

⁸¹ However, supporters of the status quo do exist. Articles arguing that existing statutes are largely adequate. See, e.g., Brian P. Comerford, Note, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 756 (2005) (stating that the material support statute serves as an effective and viable tool for successful prosecutions of individuals who support terrorist organization); Healy, *supra* note 8, at 669 (stating that threats, solicitations, criminal instructions, and conspiracy are ways of doing things, not saying things, and thus prosecution outside of *Brandenburg* is appropriate); Isaac Molnar, Comment, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militas Beware*, 59 OHIO ST. L.J. 1333, 1335 (1998) (stating that existing First Amendment doctrines provide the tools necessary to determine what types of instructional speech should be protected).

speech and that even the very few recent convictions were ill founded.⁸² The other side, however, argues as vehemently that not only were the successful convictions required, but that Congress and courts must strengthen existing statutes and case law in order to facilitate more prosecutions.⁸³

⁸² See Holland, *supra* note 42, at 355 (stating a proposed public-danger doctrine would largely undermine free speech); see also Adam R. Kegley, Note, *Regulation of the Internet: The Application of Established Constitutional Law to Dangerous Electronic Communication*, 85 KY. L.J. 997, 999 (1997) (stating that publishing bomb-making information on the Internet should be protected under existing constitutional law); Chris Montgomery, Note, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?: The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 144 (2009) (criticizing the weakening of *Brandenburg* through the government's use of Internet service providers to prosecute speech); Eugene Volokh, *supra* note 24, 1105-06 (2005) (stating crime-facilitating speech should be protected except in extremely narrow circumstances); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1285-86 (2005) [hereinafter *Speech as Conduct*] (dismissing *Giboney's* speech act doctrine and calling on courts to admit that speech restrictions are indeed speech restrictions).

⁸³ See Kendrick, *supra* note 31, at 1995 (proposing a new test for criminally instructional speech); see also Holly S. Hawkins, Note, *A Sliding Scale Approach For Evaluating the Terrorist Threat Over the Internet*, 73 GEO. WASH. L. REV. 633, 634 (2005) (calling for the Supreme Court to adopt a new test, the *Zippo* test, for regulating terrorist activity conducted over the Internet); Megan Anne Healy, *How the Legal Regimes of the European Union and the United States Approach Islamic Terrorist Web Sites: A Comparative Analysis*, 84 TUL. L. REV. 165, 165 (2009) [hereinafter Megan Healy] (suggesting a new approach for acting against developers of terrorist websites); Chelsea Norell, Note, *Criminal Cookbooks: Proposing a New Categorical Exclusion for the First Amendment*, 84 S. CAL. L. REV. 933, 934 (2011) (proposing "a new categorical exclusion from the First Amendment for speech that specifically details how to commit a crime"); Liezl Irelne Pangilinan, "When A Nation is at War": *A Context-Dependent Theory of Free Speech for the Regulation of Weapon Recipes*, 22 CARDOZO ARTS & ENT. L.J. 683, 685 (2004) (arguing for a clear and present danger test during wartime); Renieris, *supra* note 23 at 702-05 (outlining options for creating new Internet specific laws); Mark Rohr, *Grand Illusion? The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 75-85 (2002) (proposing a new test to clarify *Brandenburg*); Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventative Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 804 (2011) (labeling the doctrine of true threats incoherent and outlining changes to the doctrine); S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV.

Those advocating for further protection of free speech argue that the Internet is a speech medium, and thus any prosecution based on information on the Internet should rightly run headlong into First Amendment challenges, primarily *Brandenburg*.⁸⁴ However, those advocating that the current statutory tools for prosecuting online terrorism advocacy are inadequate argue that the Internet is a speech medium that insulates the speaker from his or her audience, thus complicating the establishment of the criminal *mens rea* requirement but in no way reducing the threat.⁸⁵

Understanding the perspectives underlying these different opinions requires a deep analysis of the statutes and resulting case law currently applicable to prosecuting online terrorism advocacy. Part II begins the review by analyzing traditional statutory aiding and abetting, while focusing primarily on analyzing AEDPA's material support to terrorism statute (essentially an aiding and abetting statute) and its explosives information distribution statute.

II. REALIZING CONGRESSIONAL INTENT IN PROSECUTING AEDPA STATUTES

To prevent online terrorism advocacy, Congress passed two AEDPA statutes: § 2339B addressing material support of terrorism and § 842(p) addressing explosives information distribution.⁸⁶ In essence, Congress enacted § 2339B⁸⁷ specifically to address some of the prosecutorial shortcomings of the traditional aiding and abetting

1159, 1168 (2000) (advocating a new and unprotected category of speech, harm advocacy); Williams, *supra* note 24, at 366 (arguing new federal criminal legislation is needed to combat terrorism on the web).

⁸⁴ See *supra* note 82.

⁸⁵ See *supra* note 83.

⁸⁶ Relief of Global Exploration and Development Corporation, Pub. L. 106-54, § 2(a), 113 Stat. 398, 398-99 (1999); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996).

⁸⁷ See Antiterrorism and Effective Death Penalty Act § 303, 101 Stat. at 1250-53 ("Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.").

statute apparent in § 2.⁸⁸ Therefore, Section A of this Article analyzes § 2339B in conjunction with § 2, while AEDPA's distribution of information relating to explosives statute, § 842(p), is analyzed in Section B.

A. *The Aiding and Abetting Evolution of AEDPA — From 18 U.S.C. § 2 to § 2339B*

This Section will analyze both § 2, traditional aiding and abetting,⁸⁹ and AEDPA's § 2339B, material support to terrorism, in order to establish how effectively § 2339B has addressed § 2's shortcomings in prosecuting online terrorism advocacy. Applying traditional § 2 aiding and abetting to online terrorism advocacy faces three primary challenges: (1) "completed" crime challenges;⁹⁰ (2) *Brandenburg* challenges;⁹¹ and (3) *mens rea* challenges.⁹² Though existing case law expands the possibilities of § 2 aiding and abetting prosecution in the face of *Brandenburg* and *mens rea* challenges,⁹³ it provides no solution for the completed crime challenge. However, Congress tried to address the completed crime challenge in the terrorism context by passing § 2339B.⁹⁴ Under this provision, the intent (knowingly) and *Brandenburg* challenges of traditional aiding and abetting still apply, but the requirement for a crime charged

⁸⁸ See *United States v. White*, 610 F.3d 956, 959-60 (7th Cir. 2010) (illustrating cases in which § 2's requirement that a crime be charged against someone else was intended to address prosecutorial shortcoming).

⁸⁹ The federal statute adopting traditional aiding and abetting reads:

Principals (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2012).

⁹⁰ See *Colosacco v. United States*, 196 F.2d 168, 167 (10th Cir. 1952).

⁹¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (per curiam).

⁹² See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 267 (4th Cir. 1997).

⁹³ See *Paladin*, 128 F.3d at 253-54 (expanding the possibilities of § 2 aiding and abetting prosecution in the face of *Brandenburg* and *mens rea* challenges).

⁹⁴ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996).

against someone else is removed.⁹⁵ While a clear prosecutorial advantage over traditional aiding and abetting, this *actus reus* adjustment has not been the boon to prosecutions one might expect.⁹⁶

1. Prosecution Challenges and Solutions under § 2,
Traditional Aiding and Abetting

Aiding and abetting means assisting or facilitating the commission of a crime, or promoting its accomplishment.⁹⁷ Traditional aiding and abetting assigns “criminal responsibility for acts which one assists another in performing.”⁹⁸ It requires the defendant to “associate himself with the venture . . . participate in it as in something that he wishes to bring about,”⁹⁹ and there must be no reasonable doubt that an offense was committed by someone who was aided and abetted.¹⁰⁰ Understanding these requirements, there are apparent challenges in prosecuting online terrorism advocacy under traditional aiding and abetting. As § 2 suggests, and existing case law makes clear, for a prosecutor to charge someone with traditional aiding and abetting there must be a crime charged against

⁹⁵ See 18 U.S.C. § 2339B (2012); The Seventh Circuit also noted:

In the case of a criminal solicitation, the speech asking another to commit a crime is the punishable act. Solicitation is an in choate crime; the crime is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary.

United States v. White, 610 F.3d 956, 960 (7th Cir. 2010).

⁹⁶ Megan Healy, *supra* note 83, at 182 (“On the one hand, the material support statutes, especially section 2339B, are ideal for cyber-related terrorist activities. . . . [O]n the other hand, federal prosecutors have only convicted one person under sections 2339A or 2339B for developing and operating extremist Web sites.”).

⁹⁷ BLACK’S LAW DICTIONARY 81 (9th ed. 2009).

⁹⁸ Nye & Nissen v. United States, 336 U.S. 613, 620 (1949).

⁹⁹ United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

¹⁰⁰ Colosacco v. United States, 196 F.2d 165, 167 (10th Cir. 1952) (“While conviction of the principal is not a prerequisite to the conviction of the aider and abettor, the proof must establish beyond a reasonable doubt that the offense was committed by someone and that the person charged as an aider and abettor aided and abetted in its commission.”).

someone else.¹⁰¹ Thus, in trying to preempt the proliferation of terror advocacy, traditional aiding and abetting is of little help.¹⁰²

Preemption of online terrorism advocacy under § 2 is likely impossible, but if there is a chargeable offense against someone else it is probably more prosecutable now under § 2 aiding and abetting than ever before. The strongest support for this conclusion is the Fourth Circuit Court of Appeals decision in *Rice v. Paladin*.¹⁰³

The *Paladin* case involved a civil lawsuit for aiding and abetting against the publisher of a book entitled *Hit Man*, a very detailed “how to” manual for committing murder for hire.¹⁰⁴ A murder victim’s relatives brought the civil suit after learning that the killer used the manual extensively to prepare for the killings.¹⁰⁵ The bulk of the supporting cases analyzed and applied in *Paladin* are tax or drug related.¹⁰⁶ These cases are uniquely suited to the facts in *Paladin* because, like the *Hit Man* book in *Paladin*, courts in tax or drug cases can quickly dismiss any alleged First Amendment justification as a charade.¹⁰⁷ In contrast, terrorism websites often

¹⁰¹ See *id.*

¹⁰² See generally 1997 BOMBMaking REPORT, *supra* note 2.

¹⁰³ See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 266 (4th Cir. 1997) (“Admittedly, a holding that *Paladin* is not entitled to an absolute defense . . . may not bode well for those publishers . . . which are devoted exclusively to teaching techniques of violent activities that are criminal *per se*.”). See also Molnar, *supra* note 81, at 1366 (“Unfortunately, the Fourth Circuit’s approach towards instructional speech probably extends beyond the facts of the [*Paladin*] case.”).

¹⁰⁴ See *Paladin*, 128 F.3d at 233, 235-41.

¹⁰⁵ *Id.* at 241.

¹⁰⁶ See *id.* at 245 (discussing *United States v. Kelley*, 769 F.2d 215 (4th Cir. 1985) (tax case); *United States v. Rowlee*, 899 F.2d 1275 (2d Cir. 1990) (tax case); *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979) (tax case); *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) (tax case); and *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) (drug case)).

¹⁰⁷ See *United States v. Fleschner*, 98 F.3d 155, 159 (4th Cir. 1996) (finding the First Amendment claim to be frivolous and that “no reasonable juror could conclude that the defendants’ words and actions were merely advocating opposition to the income tax laws.”); *but see United States v. Freeman*, 761 F.2d 549, 551-52 (9th Cir. 1985) (stating “[w]here there is some evidence, however, that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury’s consideration.”).

advocate more than just criminal conduct¹⁰⁸ and thus are likely entitled to some level of *Brandenburg* protection.¹⁰⁹

The extensive *Brandenburg* analysis done by the *Paladin* trial court was reviewed comprehensively in the Department of Justice's *1997 Report on the Availability of Bombmaking Information*.¹¹⁰ The Fourth Circuit, in turn, was not shy about integrating many arguments from the DOJ Report into their decision.¹¹¹ For example, the *Paladin* court explained:

Indeed, as the Department of Justice recently advised Congress, the law is now well established that the First Amendment, and *Brandenburg*'s "imminence" requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because "culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes."¹¹²

The Fourth Circuit's statement is consistent with the express finding of the DOJ Report that "[t]he question of whether criminal conduct is 'imminent' is relevant for constitutional purposes only where, as in *Brandenburg* itself, the government attempts to restrict advocacy, as such."¹¹³ Though the Fourth Circuit's analysis certainly does not end

¹⁰⁸ See The AQ Chef, *Make a Bomb in the Kitchen of Your Mom*, INSPIRE, Summer 2010, at 33-40 [hereinafter *Make a Bomb*], available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf> ("[E]very Muslim is required to defend his religion and nation.").

¹⁰⁹ See *Freeman*, 761 F.2d at 552.

¹¹⁰ 1997 BOMBMAKING REPORT, *supra* note 2, at 28 n.43 ("[W]e think that the district court's First Amendment analysis in [*Paladin*] is, in some respects, open to question."). The report proceeds to provide ten pages of analysis countering the *Paladin* analysis.

¹¹¹ See *Paladin*, 128 F.3d at 244 (citing KENT GREENAWALT, *SPEECH CRIME & THE USES OF LANGUAGE* 85 (1989)); 1997 BOMBMAKING REPORT, *supra* note 2, at 36 n.60 (citing GREENAWALT, at 85)). However, Eugene Volokh takes some issue with Greenawalt's reasoning. See *Speech as Conduct*, *supra* note 82, 1326-35 (arguing that Greenawalt reaches many proper conclusions, but the reasoning is incomplete).

¹¹² *Paladin*, 128 F.3d at 246 (citing 1997 BOMBMAKING REPORT, *supra* note 2, at 37). See also GREENAWALT, *supra* note 111, at 261-65.

¹¹³ 1997 BOMBMAKING REPORT, *supra* note 2, at 37.

the confusion surrounding *Brandenburg*,¹¹⁴ it does highlight grey areas in *Brandenburg* that prosecutors should be aware of in online terrorism advocacy cases.¹¹⁵

Paladin interprets the decision in *Brandenburg* as recognizing three different categories for speech.¹¹⁶ One category is speech unprotected by the First Amendment, speech that “incite[s] to imminent lawless action.”¹¹⁷ The second category is speech protected by the First Amendment, relatively innocent speech, or “abstract advocacy,” and the third category is “preparation and steeling.”¹¹⁸ The *Paladin* court highlights that “‘preparation and steeling’ [for a criminal act] can occur without ‘incitement’ [to imminent lawless action], and vice versa.”¹¹⁹ These distinctions create ambiguities in the Supreme Court’s *Brandenburg* analysis. Per *Paladin*, the Court may have intended to protect “preparation and steeling” unless it resulted in “incitement to imminent lawless action.”¹²⁰ Another possible interpretation is that *Brandenburg* protects “abstract advocacy,” but “incitement to imminent lawless action” is unprotected, and “preparation and steeling” is a grey area somewhere in the middle.¹²¹ Though *Paladin*’s largely blanket endorsement of a more narrow interpretation of *Brandenburg* helps the prosecution possibilities under § 2, it is important to recognize that some of the case law cited to in *Paladin* has shortcomings when applied to terrorism.

Though *Brandenburg* and the lack of subsequent Supreme Court interpretation of the opinion leave open the debate about First

¹¹⁴ See *Paladin*, 128 F.3d at 264 (referring to the short *per curiam* opinion as “elliptical”).

¹¹⁵ *Id.* at 264-65.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* (“[T]he Court distinguishes between “mere advocacy” and “incitement to imminent lawless action,” a distinction which, as a matter of common sense and common parlance, appears different from the first distinction drawn, because “preparation and steeling” can occur without “incitement,” and vice-versa.” (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (*per curiam*))).

¹¹⁹ *Id.* at 264-65.

¹²⁰ See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 264 (4th Cir. 1997).

¹²¹ See *id.*

Amendment protections,¹²² there is some evidence that the modern Supreme Court would be supportive of less protection for “preparation and steeling.”¹²³ Specifically, Justice Stevens, in his denial of the Petition for Writ of Certiorari of *Stewart v. McCoy*, noted that preparation and steeling “raises a most important issue concerning the scope of our holding in *Brandenburg*, for our opinion expressly encompassed nothing more than ‘mere advocacy.’”¹²⁴ Stevens offered that while imminence is required to prosecute for mere advocacy, the imminence requirement does not necessarily apply to speech that performs “a teaching function.”¹²⁵ These statements are especially telling considering the facts of the case. In *Stewart*, the defendant had prior gang experience and very casually and sporadically mentored young gang members on how to operate their gang.¹²⁶ Under no circumstances could Justice Stevens consider this counseling “imminent” for *Brandenburg* purposes, as most of it occurred at a barbecue where significant gang activity was highly unlikely to immediately erupt.¹²⁷ Though certainly not dispositive of a *Brandenburg* imminence challenge, the *Paladin* analysis combined with the statements of Justice Stevens in *Stewart*¹²⁸ are colorable arguments that could lead to a relaxed standard in the context of § 2 traditional aiding and abetting.

Another obstacle to prosecuting § 2 aiding and abetting—especially in an Internet-based aiding and abetting scenario—is establishing intent.¹²⁹ The *Paladin* analysis provides valuable analogous support for establishing criminal intent because the court suggests that the intent required in *Paladin*, a civil case, is even

¹²² The Court has only applied *Brandenburg* in two other cases. See *Hess v. Indiana*, 414 U.S. 105, 108 (1973) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982).

¹²³ See *infra* Part II.A.2 for discussion of 18 U.S.C. § 2339B (2012).

¹²⁴ *Stewart v. McCoy*, 537 U.S. 993, 994-95 (2002) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam)).

¹²⁵ *Id.*

¹²⁶ *Arizona v. McCoy*, 928 P.2d 647, 648 (Ariz. Ct. App. 1996).

¹²⁷ *Id.*

¹²⁸ See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233 (4th Cir. 1997); *Stewart*, 537 U.S. at 993.

¹²⁹ See *Paladin*, 128 F.3d at 247-48 (stating generally the challenge of establishing intent).

higher than that required in a criminal case.¹³⁰ Therefore, the intent necessary in a criminal case, even one factually similar to *Paladin* where a publisher is detached from their audience—like someone operating through the Internet—would be comparable and perhaps even less than that required in *Paladin*. The *Paladin* court acknowledged, however, that the facts of the case were somewhat unique because the speech at issue was void of any “legitimate purpose,”¹³¹ and because the book publisher stipulated their intent to assist criminal activity, a stipulation unlikely to be repeated in a contested online terrorism advocacy prosecution.¹³² Regardless, the court’s analysis in *Paladin* could nonetheless be very applicable for establishing criminal intent under similar facts.

The Fourth Circuit’s *Paladin* analysis correctly states that intent is a question for the jury, the trier of fact.¹³³ More importantly, the evidence the *Paladin* decision states could establish intent for a jury is equally applicable to the scenario of online terrorism advocacy. To demonstrate *Paladin*’s applicability, one need only consider how its intent analysis could apply to the online Summer 2010 issue of *Inspire* magazine that the U.S. Army soldier mentioned in the Introduction possessed when he was arrested.¹³⁴

First, the book *Hit Man* was, and declared itself to be, a technical manual for the purpose of murder.¹³⁵ Similarly, the Summer 2010 issue of *Inspire* magazine includes a section titled

¹³⁰ The *Paladin* court stated:

The first, which obviously would have practical import principally in the civil context, is that the First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled.

Id.

¹³¹ *Id.* at 267 (stating the book at issue in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, does make the case unique).

¹³² However, though the case is factually similar, the analysis on intent is dicta because the book publisher stipulated their intent to assist criminal activity. *Id.* at 265.

¹³³ *Id.* at 253.

¹³⁴ Thomas et al., *supra* note 3.

¹³⁵ *Paladin*, 128 F.3d at 253.

“Open Source Jihad” which not only outlines specific instructions for making a pipe bomb, but also highlights possible targets with statements such as “every Muslim is required to defend his religion and nation,” and “[t]he Western governments today are waging a relentless war against Islam.”¹³⁶ Juxtaposing the *Paladin* court’s observations on the *Hit Man* book to *Inspire* magazine demonstrates the applicability of the court’s holding: “A jury need not, but plainly could, conclude from such prominent and unequivocal statements of criminal purpose that the publisher who disseminated the book intended to assist in the achievement of that purpose.”¹³⁷

Second, *Hit Man* not only instructed on murder, it also glamorized and promoted murder.¹³⁸ Although this type of promotion was clearly speech, it was still used as a basis for establishing the publisher’s intent.¹³⁹ Thus, although *Inspire* is a magazine largely filled with statements that are probably just abstract advocacy under *Brandenburg* (e.g., “every Muslim is required to defend his religion and nation”),¹⁴⁰ it is at least equally arguable that these abstract advocacy statements combine with other statements to promote and glamorize jihad. For example: “every Muslim is required to defend his religion and nation,” combined with “Nidal Hassan and Shahzad were imprisoned, but they have become heroes and icons that *are examples to be followed*” may move beyond abstract advocacy to promotion and glamorization.¹⁴¹

Third, the *Paladin* court highlighted that a particular marketing strategy can be indicative of intent.¹⁴² Admittedly, the parallels between *Hit Man* and *Inspire* in this prong of the analysis are not as direct. The *Paladin* court relies on the targeted nature of

¹³⁶ *Make a Bomb*, *supra* note 108, at 33-40.

¹³⁷ *Paladin*, 128 F.3d at 253.

¹³⁸ *Id.* at 254.

¹³⁹ *Id.* (“The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993))).

¹⁴⁰ *Make a Bomb*, *supra* note 108, at 33.

¹⁴¹ See *id.* (emphasis added).

¹⁴² *Paladin*, 128 F.3d at 254 (“[J]ury may infer intent to assist a criminal operation based upon a drug distributor’s marketing strategy” (quoting *Direct Sales v. United States*, 319 U.S. 703, 712-13 (1943))).

Hit Man's marketing, primarily the fact that the *Hit Man* text was available through advertisements in specialized magazines such as *Soldier of Fortune*, and therefore was not advocacy to the public.¹⁴³ The *Hit Man* marketing stands in sharp contrast to *Inspire* magazine, which is discoverable and obtainable online with no sort of filtering or gatekeeping through niche magazines or otherwise.¹⁴⁴ However, when discussing intent, the *Paladin* court clearly stated that they "d[id] not believe that the First Amendment insulates that speaker [who would, for profit or other motive, intentionally assist and encourage crime and then seek the First Amendment protection] from responsibility for his actions simply because he may have disseminated his message to a wide audience."¹⁴⁵ Further, the *Paladin* court also talked about the narrow focus of the subject matter in *Hit Man* as being evidence of marketing intent.¹⁴⁶ A narrow focus is also evident throughout *Inspire* magazine: jihad on the West.¹⁴⁷ Thus, although the marketing for *Inspire* is not equivalent to that for *Hit Man*, the dissimilarities would likely not extinguish intent.¹⁴⁸

Finally, the *Paladin* court stated that a jury could establish intent by finding that the only purpose of *Hit Man*'s speech was to facilitate murders.¹⁴⁹ This refers to the unique facts of the case, and

¹⁴³ *Id.* at 254-55.

¹⁴⁴ *Make a Bomb*, *supra* note 108, at 33-40.

¹⁴⁵ *Paladin*, 128 F.3d at 248.

¹⁴⁶ *Id.* at 254.

¹⁴⁷ There are numerous examples of this central jihad message throughout the issues of *Inspire*, and the degree to which this message is constant is impressive. In the "letter from the editor" section in the Summer 2010 issue, the very first paragraph outlines that the title of the magazine comes from the word "harid," which is commonly translated as "incite." *Letter from the editor*, INSPIRE, Summer 2010, at 2, available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf>. The editor goes on to explain that the verb "harid" deals with inspiring someone to do something that, if they fail to act and follow through, they will perish. *Id.* More concretely, the editor introduces the next paragraph with the sentence, "This Islamic Magazine is geared towards making the Muslim a mujahid in Allah's path." *Id.*

¹⁴⁸ *Id.*; see *Paladin*, 128 F.3d at 254.

¹⁴⁹ *Paladin*, 128 F.3d at 255.

Hit Man's lack of "legitimate purpose," mentioned previously.¹⁵⁰ *Inspire* is different than *Hit Man* because throughout the magazine it has an obvious religious, social, and political agenda.¹⁵¹ The distinction, however, may be surmountable by examining its purpose with a limited scope:¹⁵² for instance, a single article in *Inspire*, such as "Make a bomb in the kitchen of your Mom," rather than the entire magazine.¹⁵³ Taken in isolation, the article is very similar to the entire *Hit Man* text, which would create a significant challenge for someone advocating the legitimate uses of the information.¹⁵⁴ Specifically, statements about bomb sniffing dogs' inability to detect the recipe's ingredients, or that in one or two days a bomb could be made to kill roughly ten people, and in a month a bomb that could kill "tens of people," would be hard to innocently explain to a jury.¹⁵⁵

In the wake of the DOJ Report, *Paladin* did much to expand the possibilities of § 2 aiding and abetting prosecution in the face of *Brandenburg* and *mens rea* challenges. The *Paladin* court, however, provides no solutions for the first challenge mentioned in the beginning of this Part: the requirement of a criminal charge against someone else. Nevertheless, as recent events in Boston unfortunately demonstrate, there will be occasions where criminals' plans are successful, making § 2 aiding and abetting prosecutions possible, and under the *Paladin* analysis, more probable.

¹⁵⁰ See *id.* at 267 (stating the book at issue in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, does make the case unique).

¹⁵¹ See *INSPIRE*, Summer 2010, available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf>.

¹⁵² There is currently no statutory or legislative authority that would militate against such a limited examination.

¹⁵³ *Make a Bomb*, *supra* note 108, at 33-40.

¹⁵⁴ See *Paladin*, 128 F.3d at 255 ("The likelihood that *Hit Man* actually is, or would be, used in the legitimate manners hypothesized by *Paladin* is sufficiently remote that a jury could quite reasonably reject them altogether as alternative uses for the book.").

¹⁵⁵ *Make a Bomb*, *supra* note 108, at 33.

2. Reduced Prosecutorial Burden in AEDPA's Material Support to Terrorists Statute's

At the time of the *Paladin* decision, Congress had already tried to reduce the aforementioned "completed crime" requirement for terrorism. Congress passed § 2339B of AEDPA,¹⁵⁶ which forbids material support to terrorist organizations, specifically as a broader version of § 2 traditional aiding and abetting.¹⁵⁷ To find someone guilty of violating § 2339B, a prosecutor must prove the suspect knowingly provided material support or resources to a foreign terrorist organization.¹⁵⁸ Thus, the *mens rea* and *Brandenburg* challenges still apply, but unlike with prosecution under § 2, there is no requirement for a criminal act by someone else.¹⁵⁹ While it would be reasonable to think that § 2339B's requirements, which are essentially lower aiding and abetting requirements, would result in more § 2339B prosecutions, these prosecutions have in fact been rare for multiple reasons.¹⁶⁰

The scope of § 2339B was significantly broadened when the 2001 USA PATRIOT Act added the language "expert advice or assistance" to the definition of "material support or resources"

¹⁵⁶ The statute reads as follows:

(a) Prohibited Activities. – (1) Unlawful conduct. – Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned. . . .
(g) Definitions. – As used in this section – . . . (4) the term "material support or resources" has the same meaning given that term in section 2339A (including the definitions of "training" and "expert advice or assistance" in that section)[.]

18 U.S.C. § 2339B (2012).

¹⁵⁷ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996).

¹⁵⁸ 18 U.S.C. § 2339B (2012).

¹⁵⁹ See *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010) ("Solicitation is an inchoate crime; the crime is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary.").

¹⁶⁰ Megan Healy, *supra* note 83, at 182 ("On the one hand, the material support statutes, especially section 2339B, are ideal for cyber-related terrorist activities. . . . [O]n the other hand, federal prosecutors have only convicted one person under sections 2339A or 2339B for developing and operating extremist Web sites.").

provided in § 2339A.¹⁶¹ In addition to adding that language, the new § 2339A defined “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized skill.”¹⁶² This broadening created possible constitutional challenges for the material support statute, including both facial and *Brandenburg* challenges.¹⁶³ Additionally, the “knowingly” *mens rea* required by § 2339B, as opposed to the “intending” *mens rea* for § 2339A, has created some confusion for those looking to apply § 2339B to online terrorism advocacy.¹⁶⁴ In order to maintain the statute’s constitutionality, prosecutors can only apply the “knowingly” *mens rea* to the organization’s designation as a foreign terrorist organization or the activities causing it to be designated a foreign terrorist organization.¹⁶⁵ Further compounding the confusion, prosecutors can only apply § 2339B to someone supporting a foreign terrorist organization,¹⁶⁶ while § 2339A applies to a broader terrorist population.¹⁶⁷ The constitutional challenges, as well as a complicated

¹⁶¹ 18 U.S.C. § 2339A (2012). The definition of “material support or resources” provided in § 2339A originally provided a list of things including property, service, financial securities, lodging, training, safehouses, false documentation or identification, but did not include the language “expert advice or assistance.” Williams, *supra* note 24, at 374-75.

¹⁶² 18 U.S.C. § 2339A (2012).

¹⁶³ See Williams, *supra* note 24, at 380-82; see also *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712, 2718-19 (2010) (plaintiffs claimed that the “statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment.”); *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (petitioner argued that “by forbidding all persons within or subject to the jurisdiction of the United States from ‘knowingly provid[ing] material support or resources,’ 18 U.S.C. § 2339B(a)(1), to it as a designated foreign terrorist organization, the statute violates its rights of free speech and association guaranteed by the First Amendment.”); *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 177, 185 (E.D.N.Y. 2008) (defendant argued that § 2339B violates the Fifth Amendment’s Due Process Clause by permitting criminal liability to attach in the absence of personal guilt); *United States v. Sattar*, 272 F. Supp. 2d 348, 368 (S.D.N.Y. 2003) (defendant contended that the statute interfered with her First Amendment associational rights).

¹⁶⁴ See Williams, *supra* note 24, at 381-82.

¹⁶⁵ *Id.* at 381.

¹⁶⁶ 18 U.S.C. § 2339B (2012).

¹⁶⁷ See Williams, *supra* note 24, at 382.

mens rea requirement, have significantly dampened online terrorism advocacy prosecutions.¹⁶⁸

Reviewing prosecutors' application of § 2339B to online terrorism advocacy underscores the dampening. To date, federal prosecutors have only convicted one person with § 2339B. Though the conviction in *United States v. Kassir*¹⁶⁹ related to operations surrounding extremist terrorist websites,¹⁷⁰ that conviction's context is important because it involved setting up a jihad training camp in the United States in addition to the online activities.¹⁷¹ The acquittal in *United States v. Al-Hussayen*,¹⁷² with charges founded only on online terrorism advocacy, is a more representative § 2339B prosecution.

Prosecutors charged Al-Hussayen with two counts of § 2339A and one count of § 2339B.¹⁷³ The charges stemmed from four Internet-related activities: acting as webmaster for three Islamic websites, moderating and posting within an e-mail group advocating violent jihad and encouraging Muslims to donate money for jihad, setting up an online donation system for Hamas, and establishing websites for two Saudi clerics to publish violent jihad fatwas.¹⁷⁴ Al-Hussayen made numerous arguments in attempting to get the case dismissed, some of which had been previously successful against § 2339 charges.¹⁷⁵ The court, however, stood firm that whether Al-Hussayen provided material support to a terrorist organization was a

¹⁶⁸ See Megan Healy, *supra* note 83, at 185. As of November 2009, only one person has been convicted of materially supporting terrorism by operating a terrorist website. *Id.*

¹⁶⁹ *United States v. Kassir*, No. 04 Cr. 356 (JFK), 2009 U.S. Dist. LEXIS 83075, at *1 (S.D.N.Y. Sept. 11, 2009).

¹⁷⁰ See Megan Healy, *supra* note 83, at 182 (discussing the conviction of Oussama Kassir, convicted for material support under §2339B in connection with promoting terrorism and distributing terrorist manuals).

¹⁷¹ *Kassir*, 2009 U.S. Dist. LEXIS 83075, at *1.

¹⁷² Megan Healy, *supra* note 83, at 183. See *United States v. Al-Hussayen*, No. CR03-048-C-EJL, 2004 U.S. Dist. LEXIS 29793, at *9 (D. Idaho Apr. 6, 2004).

¹⁷³ Megan Healy, *supra* note 83, at 183.

¹⁷⁴ *Id.*

¹⁷⁵ See Williams, *supra* note 24, at 380-82 (discussing *United States v. Sattar*, 314 F. Supp. 2d 279, 301-02 (S.D.N.Y. 2004)).

question for the jury.¹⁷⁶ Al-Hussayen was ultimately found not guilty of the § 2339 charges, with one juror citing lack of “hard evidence.”¹⁷⁷

Al-Hussayen demonstrated that a § 2339B prosecution for online terrorism advocacy similar to *Inspire*’s could end in conviction. While Al-Hussayen advocated for jihad over the web and e-mail, his activity beyond that consisted only of facilitating websites and fundraising.¹⁷⁸ Although targeting this behavior is exactly what Congress intended when passing the statute,¹⁷⁹ it is not surprising that this low level of “terrorism” did not resonate with the jury. It is possible that advocacy similar to *Inspire*—a combination of advocating attacks on the West, idolizing Nidal Hassan, and extremely detailed tactical advice on explosives, weapons, and avoiding law enforcement detection—might constitute “hard evidence” for a jury.¹⁸⁰

While *Kassir* and *Al-Hussayen* raise interesting questions about § 2339B, the Supreme Court’s 2010 case, *Holder v. Humanitarian Law Project* (“HLP”),¹⁸¹ likely signals a shift in § 2339B interpretation that limits the cases’ applicability. In *HLP*, the Supreme Court found § 2339B constitutional as applied to defendants attempting to provide humanitarian and political support to two designated foreign terrorist organizations in the form of money, aid, legal training, and political advocacy, but reserved judgment on more difficult cases likely to arise.¹⁸² However, despite the opinion’s insistence that the holding only applied to the specific

¹⁷⁶ *Al-Hussayen*, 2004 U.S. Dist. LEXIS 29793, at *9; see also *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 253 (4th Cir. 1997) (under similar circumstances, stating it was a question for the jury).

¹⁷⁷ Megan Healy, *supra* note 83, at 185.

¹⁷⁸ *Id.* at 183.

¹⁷⁹ Williams, *supra* note 24, at 377 (“Congress believed that § 2339A continued to leave open this source of terrorist funding, and Congress now had determined to close it.”).

¹⁸⁰ See *Make a Bomb*, *supra* note 108 at 33-40.

¹⁸¹ See generally *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

¹⁸² *Id.* at 2712.

facts at issue, it has generated significant bar¹⁸³ and academic commentary.¹⁸⁴ For example, the defense bar states that the Supreme Court's most recent interpretation of "material support" in § 2339B criminalizes activities that are not only desirable, but also legal and protected by the First Amendment, and their interpretation has textual support in the case.¹⁸⁵ Academia voiced different concerns, highlighting the Court's inordinate deference to the political branches' judgment.¹⁸⁶ Regardless of its source, the concern signals a newly reinvigorated § 2339B.

Prior to *HLP*, a Florida district court judge outlined the three possible *mens rea* interpretations under § 2339B as: (1) knowledge that a person is providing "material support" under the statute; (2) number one *plus* the knowledge "that the recipient is a Foreign Terrorist Organization ("FTO") or is an entity that engaged in the type of terrorist activity that would lead to designation as an FTO;" or, (3) number two *plus* knowledge "that the recipient could or would utilize the support to further the illegal activities of the entity."¹⁸⁷ Number three traditionally established "knowledge" under § 2339B, but *HLP* effectively reduced the standard to include number two, stating: "Congress plainly spoke to the necessary mental state for violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."¹⁸⁸ Though this is by no means strict liability, the reduction of *mens rea* is significant. For instance, in the case of *Al-Hussayen*, Al-Hussayen was setting up online

¹⁸³ See, e.g., Michael Price, *Mens Rea and Material Support of Terrorism: How Congress Should Respond to Holder v. Humanitarian Law Project*, 34 CHAMPION 53, 53 (2010).

¹⁸⁴ See, e.g., *The Supreme Court, 2009 Term—Constitutional Law, Freedom of Speech and Expression, Material Support for Terrorism*, 124 HARV. L. REV. 259, 259 (2010) [hereinafter *The Supreme Court, 2009 Term*].

¹⁸⁵ Price, *supra* note 183, at 53.

¹⁸⁶ Note a seemingly significant shift from *Hamdi v. Rumsfeld* and *Boumediene v. Bush*. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008). See also *The Supreme Court, 2009 Term, supra* note 185, 266 (2010) (criticizing the Supreme Court's broad deference to the political branches for a First Amendment issue as raising a serious problem because "uncritically relying on such judgments does not seem consistent with the application of heightened scrutiny.").

¹⁸⁷ *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1298 (M.D. Fla. 2004).

¹⁸⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

donations for Hamas, a designated foreign terrorist organization.¹⁸⁹ Applying § 2339B as interpreted in *HLP* would have probably led to a successful prosecution.¹⁹⁰ While there are still prosecutorial challenges under *HLP*'s § 2339B interpretation, the odds of conviction have increased.

Another interesting part of the *HLP* majority opinion is its conspicuous failure to mention *Brandenburg*.¹⁹¹ As the dissent highlights, precedent seems to dictate that *Brandenburg* and its imminence requirement applies;¹⁹² however, in eight pages of discussion, the majority does not once mention *Brandenburg*.¹⁹³ In justifying its upholding of § 2339B, the Court focuses instead on the narrowness of who the statute applies to,¹⁹⁴ what the statute applies to,¹⁹⁵ general deference to Congress and the Executive,¹⁹⁶ Congress and the Executive's unique qualifications regarding foreign policy and terrorism,¹⁹⁷ and Congress's "stated intent not to abridge First Amendment rights."¹⁹⁸ Though the Court's majority heavily qualified its holding by stating that independent speech regulation would not pass constitutional muster even if the prohibited speech

¹⁸⁹ Megan Healy, *supra* note 83, at 183; *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE (Sept. 28, 2012) <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

¹⁹⁰ Megan Healy, *supra* note 83, at 182-83.

¹⁹¹ *Humanitarian Law Project*, 130 S. Ct. at 2722-30.

¹⁹² *Id.* at 2733 (Breyer, J., dissenting) ("Here the plaintiffs seek to advocate peaceful, lawful action to secure political ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*.").

¹⁹³ *Id.* at 2722-30.

¹⁹⁴ Chief Justice Roberts' majority opinion explained:

Rather, Congress has prohibited 'material support,' which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.

Id. at 2710.

¹⁹⁵ *Id.* at 2724 ("[P]laintiffs' speech is not barred if it imparts only general or unspecialized knowledge.").

¹⁹⁶ *Id.* at 2727 (stating Congress considered whether aid intended for peaceful purposes would have effect and justifiably rejected that view, and that the Executive, like Congress, is entitled to deference).

¹⁹⁷ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010).

¹⁹⁸ *Id.*

benefited foreign terrorist organizations, litigants in lower courts are already experiencing the results of the *HLP* decision.¹⁹⁹

The legal academic community may still be undecided about the wisdom of *HLP*'s *mens rea* standard and the lack of *Brandenburg* analysis, but this lack of legal consensus is not stopping prosecutors from applying *HLP*'s results in the lower federal courts. Indeed, the effect of the June 2010 *HLP* decision on § 2339B prosecutions was already evident in the January 2011 case *United States v. Mustafa*.²⁰⁰ There, the government accused Oussama Kassir, a co-defendant of Mustafa and the same Kassir discussed previously in *United States v. Kassir*, of providing training in how to conduct violent jihad, and hosting on the Internet terrorist training manuals unavailable from other sources.²⁰¹ Kassir appealed the § 2339B charges²⁰² against him as unconstitutionally vague, overly broad, and infringing on his First Amendment rights.²⁰³ The Second Circuit affirmed the district court's conviction, citing directly to *HLP*.²⁰⁴ Further, the Second Circuit imitated the Supreme Court by not mentioning *Brandenburg*, thereby avoiding the issue as done in *HLP*.²⁰⁵

Though challenges remain in applying § 2 or § 2339B to the online advocacy of terrorism, clearly the case law interpreting the statutes is now more favorable to prosecutors. Specifically, *Rice v. Paladin*, though not eliminating *Brandenburg* and *mens rea* challenges, has provided some precedent that can likely be applied equally as effectively to either § 2 or § 2339B prosecutions. Additionally, though online terrorism advocacy § 2339B prosecutions have historically been infrequent and unsuccessful, *Paladin* and *Al-Hussayen* affirm that aiding and abetting is a question for the jury, and that more compelling facts would likely reap a different result. Finally, *HLP* is both a *mens rea* and

¹⁹⁹ *Id.* at 2730.

²⁰⁰ *United States v. Mustafa*, 406 F. App'x 526 (2d Cir. 2011).

²⁰¹ *Id.* at 529-30.

²⁰² Ousaama Kassir was convicted of violating § 2339A, § 2339B, and § 2, as well as conspiring to violate § 2339A, § 2339B and § 2. *Id.* at 528, 530.

²⁰³ *Id.* at 528.

²⁰⁴ *Id.* at 530.

²⁰⁵ *Id.*

Brandenburg application sea change for § 2339B, the effect of which will likely be more online terrorism advocacy prosecutions, albeit limited to designated foreign terrorist organizations.

B. AEDPA's Distribution of Information Relating to Explosives Statute — Past is Not Prologue

The AEDPA statute designed to deal with the distribution of information relating to explosives, § 842(p)(2)(A), faces stiff prosecution challenges despite the statute's clear legislative intent. More significantly, it seems that the *Brandenburg* "incitement to imminent lawless action" requirement should apply to this statute because the criminal act, distributing information, does not fall under an established inchoate crime exception.²⁰⁶ Additionally, the intentional *mens rea* requirement is the highest requirement applied in criminal law. These are largely the same challenges faced by § 2 and § 2339B, with the important caveat that § 842(p) has "intentional" as opposed to the lower "knowing" *mens rea* afforded to § 2339B as a result of *HLP*. Finally, and somewhat surprisingly based on the controversy surrounding it,²⁰⁷ the one unique but surmountable challenge that § 842(p)(2)(A) faces is based on the relatively innocuous final term in the statute, "federal crime of violence."²⁰⁸

To find someone guilty of violating § 842(p)(2)(A)—distribution of information relating to explosives—a prosecutor must

²⁰⁶ However, to date there have been no *Brandenburg* challenges to the statute. See *Stewart v. McCoy*, 123 S. Ct. 468, 469-70 (2002); *Haig v. Agee*, 453 U.S. 280, 308-09 (1981); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Rice v. Paladin*, 128 F.3d 233, 266 (4th Cir. 1997); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); and *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979).

²⁰⁷ Circuit Judge Ackerman noted in his dissent:

If this Court were to consider the full course of the continuing offense of possession of a pipe bomb, I believe it would be compelled to conclude, as so many other courts have done already, that when a person unlawfully possesses a pipe bomb, there is a substantial risk that that person may intentionally use force against another.

United States v. Hull, 456 F.3d 133, 147 (3rd Cir. 2006) (Ackerman, J. dissenting).

²⁰⁸ 18 U.S.C. § 16 (2012). See *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004); *Hull*, 456 F.3d at 139.

prove that the suspect: (1) conveyed information; (2) about a destructive device or explosive; (3) intentionally; and, (4) in furtherance of a federal crime of violence.²⁰⁹ The legislative intent behind § 842(p)(2)(A) is much clearer when analyzed in the light of § 842(p)(2)(B). When compared, there are two key differences. First, § 842(p)(2)(B) requires that the teaching or demonstration occur “to any person,”²¹⁰ whereas § 842(p)(2)(A) does not require direct interaction.²¹¹ Second, § 842(p)(2)(A) has “intentional” *mens rea*, while § 842(p)(2)(B) has “knowing” *mens rea*.²¹² Thus, while § 842(p)(2)(A) does not require a direct interaction between the speaker and audience, lowering the *actus reus* does require the greater *mens rea* of intentional instead of knowing.²¹³ The opposite is true for § 842(p)(2)(B).²¹⁴ Because establishing the direct interaction between teacher and student via the Internet offers a more significant challenge for prosecution than establishing *mens rea*, § 842(p)(2)(A) has more potential for prosecuting online terrorism advocacy, and indeed, § 842(p)(2)(A) is the primary choice used by federal prosecutors in similar cases.²¹⁵

Given the legislative history surrounding § 842(p)(2)(A), two facts are striking: first, the extremely small number of prosecutions in the twelve years since Congress passed the statute,²¹⁶ and second, a

²⁰⁹ 18 U.S.C. § 842(p)(2)(A) (2012).

²¹⁰ *Id.* § 842(p)(2)(B).

²¹¹ *Id.* § 842(p)(2)(A).

²¹² *Id.* § 842(p)(2). See Kendrick, *supra* note 31, at 2013.

²¹³ 18 U.S.C. § 842(p)(2)(A) (2012).

²¹⁴ *Id.* § 842(p)(2)(B).

²¹⁵ See *United States v. Austin*, No. CR-02-884-SVW (C.D. Cal. Aug. 4, 2003); *United States v. El-Hindi*, No. 3:06CR719, 2009 WL 1373270, at *2 n.2 (N.D. Ohio May 15, 2009) *aff'd sub nom.* *United States v. Amawai*, 695 F.3d 47 (6th Cir. 2012). But see *United States v. Mahon*, No. CR 09-712-PHX-DGC, 2010 WL 4038605, at *1 (D.Ariz. 2010) (appears defendant could have been charged with § 842(p)(2)(B) based on direct contact with one of his “students”); Press Release, DOJ, Dennis Mahon Sentenced To 40 Years In Prison For Scottsdale Bombing Case (May 22, 2014) (on file with Department of Justice), available at <http://www.atf.gov/press/releases/2012/05/052212-pho-dennis-mahon-sentenced-to-40-years-in-prison-for-scottsdale-bombing-case.html>.

²¹⁶ See *United States v. Delaema*, 583 F. Supp. 2d 104, 105 (D.D.C. 2008) (§ 842(p)(2)(A) dismissed on plea); *United States v. Hull*, 456 F.3d 133, 137 (3rd Cir.

distinct lack of constitutional challenges. *United States v. Coronado*²¹⁷ is the only case addressing the constitutionality of § 842(p)(2)(A). In *Coronado*, the defendant challenged the statute as facially overbroad²¹⁸ and facially vague,²¹⁹ but both challenges failed.²²⁰ The facially overbroad challenge was dismissed based on the *mens rea* requirement in § 842(p)(2)(A),²²¹ and the facially vague challenge was dismissed based on the statute having little deterrent effect on legitimate expression.²²² However, the court did not decide whether the statute was overbroad as applied, ultimately a *Brandenburg* question, instead stating that this was an issue best solved by proper jury instructions.²²³

More than seven years after § 842(p)(2)(A) became law, the first issue arose with interpreting § 842's term "federal crime of violence" in the case *United States v. Hull*.²²⁴ Though § 842 does not define "federal crime of violence" within the statute,²²⁵ the Supreme Court in *Leocal v. Ashcroft*²²⁶ specifically mentioned using 18 U.S.C. § 16²²⁷ ("§ 16") to define the term as used in 18 U.S.C. § 842(p).²²⁸ To

2006) (actual trial); *United States v. Jordi*, 418 F.3d 1212, 1213-14 (11th Cir. 2005) (§ 842(p)(2)(A) dismissed); *El-Hindi*, WL 1373270, at *2 (actual trial).

²¹⁷ *States v. Coronado*, 461 F. Supp. 2d 1209 (S.D. Cal. 2006).

²¹⁸ *Id.* at 1212.

²¹⁹ *Id.* at 1216.

²²⁰ *Id.* at 1213, 1217.

²²¹ *Id.* at 1213 ("The specific focus of the statute is not on mere teaching . . . but upon teaching . . . with the specific intent that the knowledge be used to commit a federal crime of violence.").

²²² *Id.* at 1216-17. See *Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on the statute when it is surely valid 'in the vast majority of its intended applications.'" (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960))).

²²³ *Coronado*, 461 F. Supp. 2d at 1216. See *supra* Part II.A.1 for discussion of *Rice v. Paladin's Brandenburg* analysis.

²²⁴ The Third Circuit noted:

Hull's first argument presents a matter of first impression in this Court, and to our knowledge, in any court of appeals . . . Hull alleges that simple *possession* of a pipe bomb, as opposed to the *use* or detonation of a pipe bomb, cannot qualify as a 'Federal crime of violence' under § 842(p)(2)(A).

United States v. Hull, 456 F.3d 133, 137 (3rd Cir. 2006).

²²⁵ *Id.* at 138.

²²⁶ *Leocal v. Ashcroft*, 543 U.S. 1, 6-7 (2004).

²²⁷ 18 U.S.C. § 16 (2012).

establish a federal crime of violence under § 16, the prosecuting attorney must prove that elements of a charged offense include use (or attempted or threatened use) of physical force against the person or property of another, or is a felony that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.²²⁹ Looking at these two elements, it is not readily apparent that there is a *mens rea* requirement associated with 18 U.S.C. § 16. In *Leocal*, however, the Court established the requirement.²³⁰

In *Leocal*, the government wanted to establish that *Leocal*'s injury-causing DUI conviction was a "crime of violence" under § 16, and thus an "aggravated felony," in order to use the crime as a basis for deportation proceedings.²³¹ The Supreme Court focused on the phrase in § 16(a), "use . . . of physical force against the person or property of another," which the Court reasoned, "suggests a higher degree of intent than negligent or merely accidental conduct."²³² The Court held that because both § 16(a) and (b) require intent greater than negligent or merely accidental conduct, a DUI would not satisfy the requirements of either, even when one considers that a conviction under § 16(b), unlike § 16(a), does not require the defendant to have used physical force.²³³ Thus, "federal crimes of violence" for the purposes of 18 U.S.C. § 842(p) must have a *mens rea* greater than negligent or merely accidental.

In addition to *Leocal* establishing the connection between § 16 and § 842(p), that connection's application to *Hull* contains an important, albeit largely semantic, lesson for federal prosecutors. In *Hull*, the defendant was charged with possession of a pipe bomb, and the § 16(b) interpretation developed in *Leocal* was applied to

²²⁸ See *Leocal*, 543 U.S. at 7 n.4.

²²⁹ See *Hull*, 456 F.3d at 139-41.

²³⁰ See *Leocal*, 543 U.S. at 9.

²³¹ *Id.* at 3.

²³² *Id.* at 9-11 (stating that though § 16(b) is broader than § 16(a), it has the same "use" formulation).

²³³ *Id.* Though the question of accidental or negligent conduct seems solved, it appears a question about reckless conduct remains. That question, however, is beyond the scope of this Article.

§ 842(p).²³⁴ Citing *Leocal*, the *Hull* court stated that § 842(p) requires looking at “the elements and nature of the offense of conviction, rather than the particular facts relating to petitioner’s crime.”²³⁵ Thus, presumably focusing on the “use” language it read as important to the analysis in *Leocal*,²³⁶ the court in *Hull* held that the danger of a pipe bomb comes from using it, not possessing it, and reluctantly stated it was limited by the superseding indictment—possession—which under *Leocal* was not a federal crime of violence.²³⁷ The court, however, was clear in stating that had the indictment charged that the federal crime of violence was the *use* or detonation of a pipe bomb, rather than possession, then there would not have been an issue charging Hull with violating § 842(p), regardless of whether Hull actually used the pipe bomb.²³⁸ That is, one cannot even be charged with violating § 842(p) unless he is first charged with a federal crime of violence.

Applying the lessons of *Leocal* and *Hull* to online terrorism advocacy provides prosecutors with important guidance. For example, under *Leocal* and *Hull*, the charges filed in the July 28, 2011 incident against the Army soldier (discussed in the Introduction) would be examined by the Supreme Court for compliance with both the *mens rea* and use requirements. The complaint only deals with possession, which, considering *Hull*, would be inadequate for § 842(p).²³⁹ As stated in *Hull*, to satisfy § 842(p) the court only looks at the elements and nature of the offense in the indictment or conviction and not the crime itself.²⁴⁰ Applying this reasoning to the Army soldier, whatever federal crime of violence could be conceived of from the information that *Inspire* provided—such as use of an

²³⁴ *Hull*, 456 F.3d at 138-39.

²³⁵ *Id.* at 139.

²³⁶ 18 U.S.C. § 16(a) (2012) (“use . . . of physical force against the person or property of another”).

²³⁷ *Hull*, 456 F.3d at 139, 141.

²³⁸ *Id.* at 141.

²³⁹ Complaint at 2, *United States v. Abdo* (W.D. Tex. July 28, 2011) (No. 11CR182).

²⁴⁰ *Hull*, 456 F.3d at 139. Additionally, though there is case law other than *Leocal* and *Hull* that suggests possession could be construed as a federal crime of violence, because online terrorism advocacy is not prohibitively restricted by the *Leocal* and *Hull* requirement to establish a “federal crime of violence” with adequate *mens rea* and use, it is unnecessary to examine that case law.

explosive device—could be used to satisfy the § 16(b) requirements, thus making § 842(p) charges viable.²⁴¹ While the § 16(b) hurdle is definitely not high, awareness that the hurdle even exists is critical to successful § 842(p) online terrorism advocacy prosecutions.

As the court in *Hull* recognized, § 842(p)(2)(A) “has been applied only sparingly across the country,”²⁴² and most of these applications have resulted in pleas that did not ultimately involve § 842(p)(2)(A) charges.²⁴³ Thus, § 842(p)(2)(A) has not had the effect that Congress intended. However, § 842(p)(2)(A)’s past performance as a prosecution tool is not prologue, as the challenges faced in prosecuting under this statute are only slightly greater than those faced with § 2339B. Constitutional challenges based on being overbroad and vague have already failed,²⁴⁴ and to date there has not been an “as applied” *Brandenburg* challenge to the statute. The primary hurdle for § 842(p)(2)(A) prosecutions is the intentional *mens rea*, which, obviously, when applied to online terrorism advocacy facts, is a significant hurdle.

But could the intentional *mens rea* in § 842(p)(2)(A) be interpreted by courts as less than traditional criminal law intent? This possibility is not without some support at both the Supreme Court and circuit court levels. In *HLP*, a case with strong terrorist threat undercurrents, the Supreme Court reinterpreted “knowledge” to a lesser *mens rea*, citing Congress’s own aims in creating the statute.²⁴⁵ While not guaranteed, the Court’s review of the legislative history of § 842(p)(2)(A) could lead to a looser interpretation of “intentional” *mens rea*, similar to the looser interpretation of “knowledge” in *HLP*.²⁴⁶ Further, in *Paladin*, the Fourth Circuit undertook a flexible analysis of the intentional *mens rea* in the context of a *Brandenburg* imminence challenge to charges of civil

²⁴¹ See *id.*

²⁴² *Id.* at 137.

²⁴³ See *Delaema*, 583 F. Supp. 2d at 105 (§ 842(p)(2)(A) dismissed on plea); *Hull*, 456 F.3d at 137 (actual trial); *Jordi*, 418 F.3d at 1213-14 (§ 842(p)(2)(A) dismissed); *El-Hindi*, WL 1373270, at *2 (actual trial).

²⁴⁴ *Coronado*, 461 F. Supp. 2d at 1215, 1217.

²⁴⁵ *Humanitarian Law Project*, 130 S.Ct. at 2717.

²⁴⁶ 1997 BOMBAKING REPORT, *supra* note 2, at 25-26.

aiding and abetting.²⁴⁷ These flexible interpretations of the *mens rea* requirement in the face of First Amendment concerns have one thing in common: compelling facts. Thus, prosecutions undertaken on compelling facts, like those in the Introduction involving the U.S. Army soldier arrested with *Inspire* magazine,²⁴⁸ could possibly succeed even in the face of intentional *mens rea*.²⁴⁹

III. INCHOATE CRIMES — PROVEN PROSECUTION TOOLS APPLICABLE TO ONLINE TERRORISM ADVOCACY

The three major challenges in prosecuting online terrorism advocacy break down to two classics of criminal law, *mens rea* and *actus reus*, and a third challenge, the strong likelihood of a First Amendment, “as applied” *Brandenburg* challenge.²⁵⁰ Inchoate crimes generally escape the possibility of a *Brandenburg* challenge,²⁵¹ and the removal of this hurdle makes them powerful prosecution tools. Nonetheless, the *mens rea* and *actus reus* challenges remain.

Inchoate crimes cannot exist without an underlying crime as the objective of the conspiracy or solicitation, though the objective crime need not occur.²⁵² Prosecuting an inchoate crime requires careful selection of the underlying law because it supplies the *mens rea* required for the inchoate crime.²⁵³ Simply, the more difficult to prove the underlying criminal statute, the more difficult it will be to establish an inchoate crime to violate that statute. For example, if someone were advocating terrorism and teaching terror tactics over the Internet, it would likely be easier to prosecute them for solicitation or conspiracy to violate § 2339B than § 842(p) because

²⁴⁷ *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 248 (4th Cir. 1997); see *supra* Part II.A.1 for discussion of *Rice v. Paladin*.

²⁴⁸ Thomas et al., *supra* note 3.

²⁴⁹ See *United States v. Amawi*, No. 3:06CR719, 2011 WL 1373154, at *3-5 (N.D. Ohio May 15, 2009).

²⁵⁰ See *United States v. Coronado*, 461 F. Supp. 2d 1209, 1215-16 (S.D. Cal. 2006).

²⁵¹ *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010).

²⁵² *Mizrahi v. Gonzales*, 492 F.3d 156, 161 (2d Cir. 2007).

²⁵³ *Id.*

§ 2339B's "knowing" *mens rea* is lower than § 842(p)'s "intentional" *mens rea*.²⁵⁴

Though the *mens rea* for the inchoate crimes is provided by the underlying statute, each inchoate crime has its own *actus reus*, with attempt generally being the most difficult to prosecute,²⁵⁵ conspiracy less so,²⁵⁶ and solicitation the easiest.²⁵⁷ This relationship is similar to the differing *actus reus* requirements of § 2 aiding and abetting and AEDPA aiding and abetting, § 2339B.²⁵⁸ Though the *actus reus* requirement of the underlying statute does not establish the required *actus reus* for the inchoate crime, it is still important, especially when prosecuting a conspiracy. For example, it is easier to conspire to achieve something with a simple *actus reus* (e.g., conspiracy to commit § 2339B aiding and abetting) than something with a complicated *actus reus*. Hence, solicitation and conspiracy can be applied interchangeably to 18 U.S.C. § 2339B.²⁵⁹

Parts A and B below analyze the solicitation and conspiracy statutes, as well as the case law most applicable to prosecuting online terrorism advocacy.

A. *Solicitation to Commit a Crime of Violence, 18 U.S.C. § 373(a)*

Solicitation has been an effective tool to prosecute online advocacy of terrorism.²⁶⁰

²⁵⁴ See *supra* Part II.B.

²⁵⁵ Attempt generally requires a substantial step. MODEL PENAL CODE § 5.01 (1985) ("Criminal Attempt"). There is not a specific federal statute for attempt, only specific statutes such as attempted homicide, etc. See 18 U.S.C. § 1113 (2012) ("Attempt to commit murder or manslaughter").

²⁵⁶ Conspiracy does not require a substantial step, only collaboration. See 18 U.S.C. § 371 (2012).

²⁵⁷ Larry Alexander & Kimberly D. Kessler, *Criminal Law: Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1174 (1997) (explaining that the *actus reus* of solicitation is "conduct that encourages another to commit a crime.").

²⁵⁸ See *supra* Part II.

²⁵⁹ See *United States v. Mustafa*, 406 F. App'x 526, 528-29 (2d Cir. 2011).

²⁶⁰ See *United States v. White*, 610 F.3d 956, 959 (2010).

To prosecute solicitation the government must establish: “(1) with strongly corroborative circumstances that a defendant intended for another person to commit a violent federal crime, and (2) that a defendant solicited or otherwise endeavored to persuade the other person to carry out the crime.”²⁶¹ Corroborative circumstances include, but are not limited to, a defendant’s repeated solicitations, belief that the person solicited was capable of such offenses (evidenced by previous commission, etc.), and “whether the defendant acquired the tools or information suited for use by the person solicited.”²⁶²

Applying the *actus reus* standard in the statute to the various cases’ facts highlights its built-in prosecutorial flexibility. In *United States v. White*, defendant White called for the assassination of people involved in the Nathan Hale trial on his website, *Overthrow.com*.²⁶³ In 2008, over three years later, White posted specific personal information about a jury member including a picture, an address, and home and office phone numbers.²⁶⁴ When the hosting site shut down the links he posted, White reposted the information.²⁶⁵ Analyzing these facts under § 373, the Seventh Circuit found White’s indictment sufficient.²⁶⁶ Interestingly, the court did not take issue with the more than three-year gap between the post calling for harm to people involved with the trial and the post providing specific juror information; instead, the court focused on the adequacy of past links and postings being contemporaneously

²⁶¹ See *United States v. White*, 610 F.3d 956, 959 (7th Cir. 2010). Solicitation under 18 U.S.C. § 373(a) requires:

Whoever, with intent that another person engage in conduct constituting a felony that has an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces or otherwise endeavors to persuade such other person to engage in such conduct.

18 U.S.C. § 373(a) (2012).

²⁶² See *White*, 610 F.3d at 959.

²⁶³ *Id.* at 957; see *infra* notes 270-72 (discussing the facts of *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006)).

²⁶⁴ *White*, 610 F.3d at 957-58.

²⁶⁵ *Id.* at 958.

²⁶⁶ *Id.* at 959.

available.²⁶⁷ Additionally, the court viewed White's reposting as corroborative of his intent, and viewed the government's argument that "White knew the persons solicited were prone to violence" as enough to satisfy the indictment.²⁶⁸

White and other recent cases involving solicitation demonstrate that myriad facts can corroborate intent. An extreme example of this is *United States v. Hale*.²⁶⁹ The court in *Hale* upheld a solicitation conviction despite multiple statements by Hale designed to obscure his involvement in the activity.²⁷⁰ The court gave significant deference to the jury's ability to infer Hale's intentions despite his attempts at obfuscation.²⁷¹ *United States v. Sattar*²⁷² provides another example of the broad latitude in solicitation prosecutions. In *Sattar*, the defendant helped draft and distribute a fatwa calling for Muslims to kill Jews, the Islamic Group, and the government of Egypt.²⁷³ Despite the fatwa's generic statements such as urging "[b]loodshed of Israelis [e]verywhere" and "fight the Jews and to kill them," the court held the alleged acts sufficient to support possible conviction under § 373.²⁷⁴

The *White*, *Hale*, and *Sattar* courts' analyses demonstrate the broad list of corroborative facts under § 373. Though applying it to online terrorism advocacy would present unique challenges, facts could exist that a court or jury would find corroborative of solicitous intent. Specifically, websites advocating terrorism do not just solicit their offenses merely once, but rather, a site's jihad solicitation generally is constant and repetitive, making it much more constant

²⁶⁷ *Id.* at 957 ("At the time of the posting, Overthrow.com was an active website, and as such, each link and posting was contemporaneously accessible. So, a reader of this September 11 posting would have had access to the past posts about Hale, Hale's trial, and other calls for violence against 'anti-racists.'").

²⁶⁸ *Id.* at 959.

²⁶⁹ *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006).

²⁷⁰ *Id.* at 979.

²⁷¹ *Id.* at 984-85.

²⁷² *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

²⁷³ *Id.* at 374.

²⁷⁴ *Id.*

and repetitive than the three-year plus gap that occurred in *White*.²⁷⁵ For example, the articles in *Inspire* have a constant jihad theme: the Summer 2010 issue of *Inspire* featuring “Open Source Jihad: Make a Bomb in the Kitchen of your Mom;”²⁷⁶ the Fall 2010 issue featuring “The Ultimate Mowing Machine” (about using an automobile as a weapon);²⁷⁷ and the Winter 2010 issue featuring both “Destroying Buildings”²⁷⁸ and “Training with the AK.”²⁷⁹ Additionally, *Inspire*’s practical teaching of explosives is the quintessential example of the “tools or information suited for use by the person solicited” outlined in *White*.²⁸⁰

The challenge that online terrorism advocacy provides is possible insulation between the information’s transmitter and receiver. For example, it is possible for someone posting the aforementioned information not to have any interaction at all with the actual consumer of the information, thereby failing to establish corroborative circumstances with knowledge about the solicited person’s capabilities to commit the crime.²⁸¹ The facts of *Sattar* suggest that an indictment can go forward with little to almost no interaction between the information transmitter and receiver, but this does not confirm that such an indictment would eventually lead to a prosecution. While the proximity requirement could challenge prosecutions, transmitter-receiver insulation *ex ante* isolates solicitous terrorist advocates from their possible actors, possibly increasing deterrence. However, this may not be the case

²⁷⁵ See INSPIRE, Summer 2010, available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf>; INSPIRE, Fall 2010, available at <http://azelin.files.wordpress.com/2010/10/inspire-magazine-2.pdf>; INSPIRE, November 2010, available at <http://azelin.files.wordpress.com/2010/11/inspire-magazine-3.pdf>; INSPIRE, Winter 2010, available at <http://azelin.files.wordpress.com/2011/01/inspire-magazine-4.pdf>; INSPIRE, Spring 2011, available at <http://azelin.files.wordpress.com/2011/03/inspire-magazine-5.pdf>.

²⁷⁶ *Make a Bomb*, *supra* note 108, at 33.

²⁷⁷ See Yahya Ibrahim, *The Ultimate Mowing Machine*, INSPIRE, Fall 2010, at 53, available at <http://azelin.files.wordpress.com/2010/10/inspire-magazine-2.pdf>.

²⁷⁸ See The AQ Chef, *Destroying Buildings*, INSPIRE, Winter 2010, at 39, available at <http://azelin.files.wordpress.com/2011/01/inspire-magazine-4.pdf>.

²⁷⁹ See Abu Salih, *Training with the AK*, INSPIRE, Winter 2010, at 42, available at <http://azelin.files.wordpress.com/2011/01/inspire-magazine-4.pdf>.

²⁸⁰ *United States v. White*, 610 F.3d 956, 959 (7th Cir. 2010).

²⁸¹ *Id.*

considering that there is no doubt that the Tsarnaev brothers were isolated from the author of *Inspire's* support because the author was killed in Yemen by a U.S. CIA-led counterterrorism drone in September 2011.²⁸²

The facts in cases like *Hale* and *Sattar* show that calls for violence usually require much more than an anonymous post,²⁸³ but as the *White* case demonstrates, not soliciting a specific person does not necessarily preclude prosecution.²⁸⁴ In *White*, it was enough that White knew that the network of people who would view that post possibly included someone capable of executing the crime.²⁸⁵ Further, in this element of solicitation the prosecution can apply the sheer vastness of the Internet combined with the popularity of the defendant's web page as tools against the defendant. A defendant with a large audience and significant web page traffic is much more likely to be a successful solicitor, and therefore easier to prosecute.

In addition to the favorable rule for solicitation and test for corroborating circumstances, and unlike the AEDPA statutes analyzed in Part II above, § 373 is considered an inchoate crime, and thus removed from heightened level of *Brandenburg* intent.²⁸⁶ Numerous lower courts in recent cases have confirmed the lower intent standard required—even though it is speech—in deciding solicitation cases,²⁸⁷ and the Supreme Court recently confirmed this in both *United States v. Williams*²⁸⁸ and *HLP*.²⁸⁹ The *Williams* Court

²⁸² Hakim Almasmari, Margaret Coker & Siobhan Gorman, *Drone Kills Top Al Qaeda Figure*, WALL ST. J. (May 19, 2012), http://online.wsj.com/article/SB10001424052970204138204576602301252340820.html?mod=WSJINDIA_hpp_L EFTTopStories.

²⁸³ See *United States v. Hale*, 448 F.3d 971, 984-85 (7th Cir. 2006); see also *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

²⁸⁴ *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010).

²⁸⁵ *Id.* at 959, 962.

²⁸⁶ See *id.* at 960.

²⁸⁷ See *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004); see also *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008); *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998); and *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

²⁸⁸ See *United States v. Williams*, 535 U.S. 285, 298 (2008) ("In sum, we hold that offer to provide or requests to obtain child pornography are categorically excluded from the First Amendment.").

stated, “Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities.”²⁹⁰ In *Williams*, the Court also emphasized that there is “an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality,” but did not take the opportunity to further explain where that line is exactly drawn.²⁹¹ Given that the Supreme Court excludes solicitation from *Brandenburg* challenges, and the lower court’s application of the principle to numerous cases, it is safe to state that § 373 is outside of the *Brandenburg* requirements.

Solicitation under § 373 is likely the most powerful prosecution tool against online terrorism advocacy due to not only a function of the lack of *Brandenburg* requirements, but also the favorable elements of the statute and the highly flexible corroborating circumstances test.²⁹² Additionally, the proof of the validity of this statute as a prosecution tool is not only in abstract analysis, but it also rests with the actual successfully prosecuted cases.²⁹³ While prosecuting under the AEDPA statutes is possible, prosecutors have had more historical success prosecuting online advocacy of terrorism issues similar to the ones outlined in the Introduction of this Article with § 373 than under § 2339B or § 842(p).

B. Online Conspiracy and 18 U.S.C. § 371

Under 18 U.S.C. § 371 (“§ 371”), conspiracy requires two or more persons to collaborate to commit an offense against the United States, and one or more of those persons to act to accomplish the

²⁸⁹ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2733 (2011) (Breyer, J., dissenting) (“‘Coordination’ with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment’s protection under any traditional ‘categorical’ exception to its protection. The plaintiffs do not propose to solicit a crime.”).

²⁹⁰ *Williams*, 553 U.S. at 298.

²⁹¹ *Id.* at 298-99.

²⁹² See *United States v. White*, 610 F.3d 956, 959-60 (7th Cir. 2010).

²⁹³ See *supra* note 288.

object of the conspiracy.²⁹⁴ To prosecute conspiracy, the government must establish: “1) an agreement by two or more persons to perform some illegal act, 2) willing participation by the defendant, and 3) an overt act in furtherance of the conspiracy.”²⁹⁵ Conspiracy requires a slightly greater *actus reus*—collaboration, compared to solicitation—but there are greater prosecution challenges because of the relative lack of clarity in distinguishing criminal collaboration from normal day-to-day activities. Solicitation is a distinguishable crime, even if conducted over the Internet. By comparison, conspiracy is inherently more difficult to distinguish and often even more difficult to distinguish when conducted via the Internet.

However, like all the statutes and case law analyzed thus far, conspiracy-related case law has evolved in response to online terrorism advocacy. The modern foundational case involving conspiracy and terrorism is *United States v. Rahman*.²⁹⁶ There the Second Circuit could not broaden the *actus reus* requirement for conspiracy because the facts of the case were so compelling that a broader interpretation of *actus reus* was unnecessary.²⁹⁷ For instance, Rahman’s acts included directing fellow conspirators that they should assassinate the President of Egypt, bomb the United Nations Headquarters, and inflict damage to the American Army.²⁹⁸ Importantly though, *Rahman* holds that *Brandenburg* requirements only apply to the advocacy of force, not conspiring to use force.²⁹⁹ This clear statement interpreting the non-applicability of *Brandenburg* is particularly valuable precedent to prosecutors given the significant political and social underpinnings of Rahman’s acts.³⁰⁰

²⁹⁴ 18 U.S.C. § 371 (2012) (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . .”).

²⁹⁵ *United States v. Khan*, 309 F. Supp. 2d 789, 818 (E.D. Va. 2004).

²⁹⁶ *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

²⁹⁷ *Id.* at 108-09.

²⁹⁸ *Id.* at 117.

²⁹⁹ *Id.* at 115.

³⁰⁰ Abdel Rahman challenged his conviction contending it rested solely on his political and religious views. *Id.* at 114.

The more significant challenge in proving conspiracy is establishing *actus reus*. However, since September 11, 2001, a series of cases have systematically lowered this requirement by finding collaboration on facts far less compelling than *Rahman's*. This evolution began with *United States v. Khan*.³⁰¹ In that case, multiple defendants participated in paintball games as a way to practice for jihad, and a few of the defendants bought supplies to transfer to a known terrorist organization.³⁰² The powerful precedent for future prosecutors provided by *Khan's* holding is that one of the convicted defendants, Abdur-Raheem, only participated in the paintball games, not the supply shipments, but was still convicted of conspiracy to violate § 2339A and B.³⁰³ The court stated that though Abdur-Raheem did not participate in the technology transfer to the terrorist organization, his “stated intent to help militant Muslims fighting against India, prove[d] his participation in the conspiracy to provide material support.”³⁰⁴

A subsequent case, *United States v. Chandia*,³⁰⁵ demonstrates the prosecutorial power and perhaps the overreach of the *Khan* decision. Chandia was involved in the paintball training program discussed in *Khan*, but was separately charged in September 2005.³⁰⁶ Chandia was charged with conspiracy to violate § 2339B for the assistance he provided Khan, including picking Khan up at the airport, providing him e-mail access, and helping him ship paintballs to Pakistan.³⁰⁷

Chandia and Abdur-Raheem's conspiracy acts are not as isolated as online terrorism advocacy, but two recent cases suggest that the holdings in *Khan* and *Chandia* paved the way for online terrorism advocacy prosecutions. One such case is *United States v. Mustafa*.³⁰⁸ In that case, prosecutors charged co-defendant Kassir

³⁰¹ *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004).

³⁰² *Id.* at 803.

³⁰³ *Id.* at 822.

³⁰⁴ *Id.*

³⁰⁵ *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008).

³⁰⁶ *Id.* at 370.

³⁰⁷ *Id.*

³⁰⁸ See *supra* Part II.A.2.

with conspiracy to violate § 2339B by creating and maintaining terrorist websites.³⁰⁹ The conspiracy charges were in addition to the § 2339B charges discussed in Part II.A.2. Kassir appealed these charges arguing insufficient evidence of coconspirators.³¹⁰ However, the government's evidence that the websites were updated while Kassir was in prison without Internet access, along with the fact that people posting content on the website thanked Kassir for his assistance, was adequate to establish conspiracy.³¹¹ These facts, though not identical, are very similar to what is occurring on terrorist advocacy websites every day.³¹² Thus, prosecuting conspiracy by establishing *actus reus* comparable to that established in *Mustafa* and the requisite *mens rea* for § 2339B is probable under existing precedent.

Even with the *Mustafa* holding, however, questions remain about how much collaboration is required to establish a conspiracy. Under *Mustafa*, the requirement may be consistent support in maintaining terrorist websites, as opposed to infrequent or solitary support.³¹³ The Sixth Circuit's decision in *United States v. Amawi*³¹⁴ addressed these possibilities. In *Amawi*, the defendant provided explosives information to an undercover federal agent with the intent that it be used for jihad.³¹⁵ Though Amawi had only one contact with one of the collaborators in the conspiracy charge, the judge stated, "[a] single encounter suffices to create a conspiracy."³¹⁶ Additionally, it did not matter that Amawi did not explain the explosives information to the collaborator or that the collaborator read the

³⁰⁹ *United States v. Mustafa*, 406 F. App'x 526, 528-29 (2d Cir. 2011).

³¹⁰ *Id.* at 529.

³¹¹ *Id.*

³¹² See *Inspire Responses*, INSPIRE, Spring 2011, at 11-12, available at <http://azelin.files.wordpress.com/2011/03/inspire-magazine-5.pdf> ("I live in the East and greatly desire *hijrah* to the lands of jihad such as Afghanistan or Yemen . . . The problem is that I don't have any contact to meet the juhahidin. What do you recommend that I do?").

³¹³ See *United States v. Kassir*, No. S2 04 Cr. 356, 2008 U.S. Dist. LEXIS 52713, at *3 (S.D.N.Y. July 9, 2008).

³¹⁴ *United States v. Amawi*, No. 3:06-CR-719, 2009 WL 1373155 (N.D. Ohio 2009), *aff'd*, 695 F.3d 457 (6th Cir. 2012).

³¹⁵ *Id.* at *1.

³¹⁶ *Id.* at *1,3.

manual.³¹⁷ Based on the holding in *Amawi*, prosecutors could reasonably conclude that virtually any interaction between any terrorism advocacy website, beyond simply posting the information, would be adequate to establish conspiracy to provide material support under § 2339A.

For over ten years the trend in these cases shows that courts are loosening the *actus reus* requirement for conspiracy and the *mens rea* requirements from the underlying inchoate crime and the AEDPA statutes to combat terrorism. While to date there has not been a conspiracy case based solely on online terrorism advocacy as opposed to some level of in-person interaction, the emerging precedent above forms a plausible foundation for such a prosecution.

IV. CONCLUSION

Any attempts to preemptively prosecute online terrorism advocacy like that in *Inspire* magazine will obviously be a product of the current statutes and case law available to prosecutors. Though many in the legal community argue that current statutes are inadequate, the inchoate crime and the AEDPA statutes outlined in this Article do in fact give federal prosecutors significant tools. These statutes as a whole, combined with recent case law interpreting them, are probably adequate to support prosecutions under challenging online terrorism advocacy scenarios, like *Inspire* magazine. It is true that the AEDPA statutes have historically been much more difficult to prosecute because, unlike the inchoate crime statutes, they do not sidestep the *Brandenburg* requirement. However, it seems that many federal courts are beginning to interpret these statutes and their *Brandenburg* component in light of the terrorist threat and Congress's original AEDPA legislative intent. This is a reasonable result considering the significant evolution of the Internet as a terrorist tool in the years immediately following the enactment of AEDPA. Additionally, two of the inchoate statutes, the solicitation and conspiracy statutes, are possible tools that lie outside the *Brandenburg* imminence requirement, providing prosecutors yet another option.

³¹⁷ *Id.* at *2-3.

Since long before the Oklahoma City Bombing and the resulting AEDPA statutes, members of the American legal community have been divided on where to draw the line between protecting free speech and thwarting speech for the safety and security of Americans. The revelation that the alleged Boston bombers got their bomb-making information online from a known online terrorist source has reinvigorated this ongoing debate for legislative reform. However, such reform is not necessary. Like civil rights and physical security before it, the trajectory of the law surrounding online terrorism advocacy again demonstrates that the law can and will evolve to demands placed on it. Prosecutions in front of judge and jury that attempt to stop online terrorism advocacy before a crime occurs and preemptively reduce the advocacy's influence are necessary for this natural evolutionary process of effective deterrence to continue. To this end, new statutes and tests would be redundant to existing law and only confuse and further complicate the issue. By utilizing existing AEDPA and inchoate crime statutes and their associated case law, prosecutors currently have the tools to explore and better evolve the legal boundaries that Congress intended based on the threat. Free speech concerns about these prosecutions are valid, but to argue that prosecutions under existing statutes are inappropriate shows a lack of faith not only in Congress, but also, much more importantly, in the American jury system. As cases like *United States v. Al-Hussayen* demonstrate, American juries are effective protection against government overreach when speech is at issue. Ultimately, more prosecution attempts will not only better define current statute boundaries, but also demonstrate that online terrorism advocacy prosecutions will not threaten critical First Amendment rights.





COMMENT

IMPROVING SCRUTINY OF APPLICANTS FOR TOP SECRET / SCI CLEARANCES BY ADDING PSYCHOLOGICAL ASSESSMENTS

Francis X. Brickfield, M.D.*

INTRODUCTION

Edward Snowden became a contractor with Booz Allen Hamilton supporting IT systems at the National Security Agency (“NSA”) in 2012,¹ his last in a series of positions in the Intelligence Community (“IC”). Snowden first entered the IC as a staff employee at NSA, then transferred to the Central Intelligence Agency (“CIA”), where he worked on information systems security.² After three years, he left CIA as staff, and converted to contractor status because he was unhappy with IC operations and was considering exposing intelligence operations.³ In 2011, his Top Secret / Sensitive Compartmented Information (“TS/SCI”) security clearance came

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¹ Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN, June 10, 2013, <http://www.theguardian.com/world/2013/jun/09/Edward-snowden-nsa-whistleblower-surveillance>.

² *Id.*

³ *Id.*

due for reinvestigation, a process that has been heavily criticized after his revelations about NSA operations.⁴ A review by the Office of the National Counterintelligence Executive, a division of the Office of the Director of National Intelligence (“DNI”), found that the reinvestigation failed to provide “a comprehensive picture of Mr. Snowden.”⁵ Key differences exist between the processes Mr. Snowden underwent for his initial granting of a TS/SCI clearance as a staff employee and for his reinvestigation as a contractor. While news reports have not clarified whether he underwent a reinvestigation polygraph, he did not undergo the psychological reevaluation that both CIA and NSA require of staff hires, because he rejoined the IC as a contractor rather than as a staff member,⁶ once again working at NSA.

In the wake of the Snowden leaks of TS information about NSA and CIA operations, many questions have been raised about the nature and effectiveness of processing for TS/SCI clearances.⁷ The Navy Yard shootings on September 16, 2013, have spurred further calls for major reforms in the process, particularly those reforms focused on the mental health and stability of cleared individuals.⁸ Both of these unfortunate events have resulted in widespread agreement that the process is broken and needs change.⁹

⁴ Brent Kendall & Dion Nissenbaum, *Leaker’s Security Check Faulted*, WALL ST. J., Aug. 27, 2013, <http://online.wsj.com/articles/SB10001424127887324906304579039381125706104.html>.

⁵ *Id.*

⁶ See *infra* Part II.

⁷ See, e.g., Andrew Katz, *Potential Blind Spots in Clearance Process that Gave Snowden Top-Secret Access*, TIME, June 15, 2013, <http://nation.time.com/2013/6/15/potential-blind-spots-in-clearance-process>.

⁸ Ernesto Londono et al., *Mental-Health Warnings About Alexis Ignored*, WASH. POST, Sept. 19, 2013, at A1. Although the alleged shooter did not have a TS/SCI clearance, the incident nevertheless highlighted deficiencies in the security clearance process generally. *Id.*

⁹ *Safeguarding Our Nation’s Secrets: Examining the Security Clearance Process: Hearings Before the S. Subcomm. on the Efficiency and Effectiveness of Fed. Programs and the Fed. Workforce and Subcomm. on Financial and Contracting Oversight, S. Comm. on Homeland Sec. and Gov’t Affairs*, 113th Cong. (2013), available at <http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/examining-the-workforce-of-the-us-intelligence-community-and-the-role-of-private-contractors>.

Since September 11, 2001, the number of Americans granted TS clearances has exploded.¹⁰ In 2012, over 1.4 million people held TS clearances, with the IC issuing over 287,000 new TS clearances during that fiscal year.¹¹ Persons undergo differing levels of scrutiny while obtaining and retaining a TS clearance, depending on their status as staff or contractor, as well as the agency to which the individual is applying. While the factors considered by security professionals in issuance of clearances are uniform and described in 32 C.F.R. § 147.2-15,¹² how a particular agency evaluates applicants varies across the IC in some important respects. This variation includes evaluation by a mental health professional in the course of hiring and retention. According to the DNI, while all positions require completion of an extensive background investigation, few require a polygraph or psychological exam.¹³

This Comment argues for greater uniformity and closer scrutiny of applicants for TS/SCI clearances through greater use of psychological screening of clearance applicants. Psychological screening has been widely adopted in the post-offer, pre-employment evaluation of applicants to sensitive positions in law enforcement, with apparent good results. Based on data from within the IC and from law enforcement hiring, the addition of psychological screening to the TS/SCI process is likely to reduce selection errors.

See also John Hamre, Op-ed, *Making Clearances Secure*, WASH. POST, Sept. 19, 2013, at A17 (calling for greater scrutiny of the entire process).

¹⁰ Dana Priest & William A. Arkin, *Top Secret America: A Hidden World Growing Beyond Control*, WASH. POST, July 19, 2012, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print/>. Prior to the first DNI report on clearances in 2011, the Intelligence Community did not systematically collect data on the number of TS/SCI clearances issued or held. This article and accompanying series document the massive growth in personnel and expenditures supporting the IC after the Sept. 2001 attacks. *Id.*

¹¹ OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2012 REPORT ON SECURITY CLEARANCE DETERMINATIONS 3-4 (2013) [hereinafter DNI 2012 CLEARANCE REPORT], available at <http://www.dni.gov/files/documents/2012%20Report%20on%20Security%20Clearance%20Determinations%20Final.pdf>.

¹² 32 C.F.R. § 147.2-15 (2013).

¹³ *We Have Thousands of Opportunities in All Kinds of Fields*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, <http://www.intelligence.gov/careers-in-intelligence/> (last visited July 28, 2014).

Part I reviews the relevant statutory and regulatory provisions controlling the adjudication of security clearances, and the scrutiny courts apply to the clearance process, focusing on the Supreme Court rulings in *Department of the Navy v. Egan*¹⁴ and *NASA v. Nelson*.¹⁵ This section also discusses the legal status of psychological evaluations in applicant processing, especially in light of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act of 1973, as amended, and the limitations on their use arising from both the ADA and various federal regulations. This section then reviews the regulatory requirements for consideration of mental health issues, with a discussion of the flexibility inherent in the regulatory language. Lastly, this section explores law enforcement’s successful experience with psychological evaluations as part of its applicant selection process.

Part II reviews the current process for TS/SCI clearances, highlighting the differences among agencies regarding procedural safeguards and the use of various investigative and assessment techniques. It discusses the resulting disparities in clearance decisions, particularly as evidenced by the DNI’s annual reporting on clearance determinations.

Part III examines both the advantages and the legal challenges of introducing psychological evaluation to the TS/SCI clearance process. Because of the nature of the psychological evaluation as a form of medical examination,¹⁶ the law requires certain safeguards for the information derived from psychological evaluations that are distinct from other information gathered in the clearance process. A ready model already exists in the law enforcement realm for dealing with the issues implicated by the ADA, which the courts have found valid for reporting and decision-

¹⁴ Dep’t of the Navy v. Egan, 484 U.S. 518 (1988).

¹⁵ NASA v. Nelson, 131 S. Ct. 746 (2011).

¹⁶ The EEOC defines a medical examination as a procedure or test that seeks information about an individual’s physical or mental health. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC Notice 915.002, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS 13 (1995) [hereinafter EEOC ADA PREEMPLOYMENT GUIDANCE], available at <http://www.eeoc.gov/policy/docs/medfin5.pdf>.

making in police candidate selection. Expanding the circumstances under which a federal employer may perform psychological evaluations on staff employees to the language of 5 C.F.R § 339.301 should prevent confusion among agency authorities seeking to conduct such evaluations on government employees.

This Comment focuses on the agencies for which the DNI reports data on the security clearance process: CIA, Defense Intelligence Agency (“DIA”), Federal Bureau of Investigation (“FBI”), National Geospatial-Intelligence Agency (“NGA”); National Reconnaissance Office (“NRO”); NSA; and the Department of State.¹⁷ It also discusses the Department of Defense (“DoD”) clearance processes, as that Department is the largest grantor of TS/SCI clearances, although it does not separately report information for the IC.¹⁸

I. BACKGROUND

Executive Orders and regulations govern the security clearance process for TS/SCI access. Uniform adjudication standards apply across the IC, but the language of the standard for emotional, mental, and personality disorders allows considerable flexibility in its application to the security clearance process. This section provides some definitions for terms used frequently in this Comment, then examines the regulatory framework for adjudication and the view of the courts on the clearance process. This section will take a closer look at the laws and regulations governing use of psychological evaluations, and at the mental health criterion for adjudication. Finally, this section will discuss the application of psychological evaluations in another high risk hiring area, law enforcement.

A. *General Security Clearance Definitions*

Generally, a security clearance is “an administrative determination by competent authority that an individual is eligible,

¹⁷ DNI 2012 CLEARANCE REPORT, *supra* note 11, at 4.

¹⁸ *Id.*

from a security stand-point, for access to classified information.”¹⁹ The United States Government classifies information at three levels based on the degree of protection.²⁰ The highest designation is TS, for which unauthorized disclosure of the information “reasonably could be expected to cause exceptionally grave damage to the national security.”²¹ A TS clearance allows access to such information on a need-to-know basis, and is almost always required for both staff and contract employees at various agencies in the IC. To protect information further and minimize the impact of unauthorized disclosures, information is also compartmentalized, allowing specialized access to be granted to certain information known as SCI.²² Therefore, a person granted a TS/SCI clearance is not necessarily eligible to receive all information. Instead, one can access information classified as TS within a sensitive compartment, subject to a determination by the holder of the information that the individual needs that information to perform one’s job.²³

B. TS/SCI Clearance Determinations

A combination of Executive Orders and federal regulations govern the security clearance process for TS/SCI access. While these sources provide uniform adjudication standards across the IC, the language for emotional, mental, and personality disorders allows considerable flexibility in its application to the security clearance process. Generally, authority to perform security evaluations on

¹⁹ DEP’T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 478 (2005).

²⁰ *Id.* at 477-78. The three levels include Top Secret, Secret, and Confidential. This paper addresses only Top Secret clearances. *Id.*

²¹ *Id.* at 477. The DoD Dictionary explains that “Examples of ‘exceptionally grave damage’ include: armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security.” *Id.*

²² *Id.* at 480. The DoD Dictionary defines Sensitive Compartmented Information as “all information and materials bearing special community controls indicating restricted handling within present and future community intelligence collection programs and their end products for which community systems of compartmentation have been or will be formally established.” *Id.*

²³ *Id.* at 368.

both employees and contractors comes from Executive Orders.²⁴ Pursuant to that authority, security professionals evaluate candidates according to thirteen criteria defined in agency regulations, focusing on patterns of behavior that may raise concerns about granting access, a list of markers for increased concern, and a list of potential mitigating factors.²⁵ While the adjudicative criteria are the same for all agencies, agencies can and do differ on what procedures they use (such as the polygraph), and also what non-security procedures they require for employment (such as medical and psychological evaluations), as detailed in Section II.C.

1. The Courts and Security Clearances

The Supreme Court has shown great deference to Executive Branch decisions on security clearance determinations. When individuals have challenged adverse determinations in the federal courts, they have been unsuccessful in complaints based on the merits of the decision. Federal courts have also found that when a security clearance has been a job requirement, failure to obtain or keep a clearance will result in loss of one's job. In *Department of the Navy v. Egan*, the Supreme Court determined that discretion on the clearance decision resides with the Executive Branch.²⁶ The Court considered a challenge to a security clearance determination by a civilian Navy employee working at a submarine base.²⁷ The Navy denied him a clearance based on his past criminal record and past alcohol problems.²⁸ Denial of his clearance resulted in the loss of his

²⁴ See, e.g., Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2 1995). For a review of the development of Executive Orders defining the classification and security clearance system, see OFFICE OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., Report No. 04-INTEL-02, 4-6, DoD SECURITY ADJUDICATION AND APPEALS PROCESS (Dec.12, 2003) [hereinafter DoD OIG REPORT ON ADJUDICATION], available at <http://www.dodig.mil/lr/reports/fy04/04-INTEL-02.pdf>.

²⁵ 32 C.F.R. § 147.2-15 (2013). The criteria are: allegiance to the United States; foreign influence; foreign preference; sexual behavior; personal conduct; financial considerations; alcohol consumption; drug involvement; emotional, mental and personality disorders; criminal conduct; security violations; outside activities; and misuse of information technology systems. *Id.*

²⁶ Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

²⁷ *Id.* at 520.

²⁸ *Id.* at 521.

job because a clearance was a necessary condition for his position.²⁹ Egan appealed his clearance denial and resulting termination to the Merit Systems Protection Board,³⁰ which ruled that it had the authority to review the merits of the security decision.³¹ Reversing the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit, the U.S. Supreme Court determined that the grant of a security clearance is a discretionary matter entrusted solely to the President, as head of the Executive Branch and as Commander in Chief.³² Importantly, the Court clarified that no person has a legal right to a clearance, but rather a clearance is an affirmative act of discretion on the part of an agency.³³ The Court stated that such discretion necessarily resided with an agency to allow access to sensitive information, and that such decisions could not be judged by outside non-expert bodies.³⁴ Although the Court noted that there also was an internal appeals process, the Merit Systems Protection Board had a very limited role in review and was confined to ensuring that the process was fair.³⁵ The *Egan* decision has been widely applied by federal courts to preclude substantial review of such determinations by courts and non-Article III tribunals.³⁶

²⁹ *Id.*

³⁰ The Merit System Protection Board (“MSPB”) assumed the employee appeals function of the Civil Service Commission and is responsible for performing merit systems studies and reviewing significant actions of OPM. See *About the MSPB*, MERIT SYS. PROTECTION BD., <http://www.mspb.gov/about/about.htm> (last visited June 20, 2014). The *Egan* decision removed the MSBP from adjudication of any claims involving the substance of a security clearance determination. *Egan*, 484 U.S. at 523.

³¹ 484 U.S. at 523.

³² *Id.* at 527.

³³ *Id.* at 528.

³⁴ *Id.* at 529.

³⁵ *Id.* at 532.

³⁶ See, e.g., *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012) (reaffirming limits of MSPB review of security clearance determinations); *Hegab v. Long*, 716 F.3d 790 (4th Cir. 2012) (citing *Egan* in declining to review TS determination by NGA); *Cheney v. Dep’t of Justice*, 479 F.3d 1343 (Fed. Cir. 2007) (stating inability to review the substance of a clearance determination); *Hall v. U.S Dep’t of Labor Admin. Review Bd.*, 476 F.3d 847 (10th Cir. 2007) (finding security clearance determination unreviewable by the court, per *Egan*).

In *Stehney v. Perry*, the Third Circuit considered a challenge to NSA's polygraph requirement.³⁷ Stehney, a contract mathematician, challenged the use of the polygraph as a "random and arbitrary process."³⁸ While not reaching a decision on this arbitrariness question because the claim was not raised at trial, the Third Circuit did note that because the government could provide a rational basis for the polygraph exam, such a consideration would withstand "rational basis" scrutiny under a substantive due process challenge.³⁹ Therefore, the court effectively sustained the determination that Stehney failed to comply with NSA's security process, resulting in the revocation of her clearance and the loss of her job.

In *NASA v. Nelson*, the Supreme Court reviewed the government's ability to compel disclosure of personal information, including mental health treatment, as part of a background check.⁴⁰ In *Nelson*, twenty-eight employers working as contractors at the NASA Jet Propulsion Laboratory challenged a new requirement to comply with a background check as a condition of continued access to the facility.⁴¹ Many of the employees had worked at the facility for years and had not previously been required to obtain a security clearance or undergo any kind of background check.⁴² The level of clearance required was well below that of TS/SCI, but the information sought included past drug use and required that the applicant provide releases for investigators to seek information from references about drug use, mental health issues, and other behaviors.⁴³ The *Nelson* Court observed that the government could require such disclosure as a condition of continued access and that in balancing privacy rights versus the government's need to ensure security of its facilities, the government need not prove its inquiries are necessary or the least restrictive means of furthering its

³⁷ *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996).

³⁸ *Id.* at 937.

³⁹ *Id.*

⁴⁰ *NASA v. Nelson*, 131 S. Ct. 746 (2011).

⁴¹ *Id.* at 752.

⁴² *Id.*

⁴³ *Id.* at 752-53.

interests.⁴⁴ Instead, the government need only demonstrate that the inquiries are reasonable, employment-related inquiries that further its interest in managing its operations.⁴⁵ The Court specifically allowed gathering and reviewing mental health treatment information in the context of drug abuse and found this inquiry reasonable in light of the government's interests.⁴⁶

Essentially, *Nelson* upheld requirements for provision of financial information, employment data, and mental health information related to drug use, and held that failure to comply with security requirements—when a clearance was a condition of the position—meant that plaintiffs could no longer work in the facility.⁴⁷ Similarly, in *Egan*, the plaintiff lost his job when he could not obtain the necessary clearance.⁴⁸ By finding that loss of a clearance or failure to be granted one allows for removal, the Supreme Court has recognized a security clearance as an essential job element when the government mandates a clearance as a job requirement.⁴⁹

Since *Egan*, the courts have shown great deference to the Executive Branch on the substance of security clearance determinations. While providing for internal review and appeals processes, federal courts have not examined the material basis for determinations.

⁴⁴ *Id.* at 760.

⁴⁵ *Id.* at 759.

⁴⁶ *Nelson*, 131 S. Ct. at 760.

⁴⁷ *Id.* at 752-53.

⁴⁸ *Dep't of the Navy v. Egan*, 484 U.S. 518, 521 (1988).

⁴⁹ *See also Robinson v. Dep't of Homeland Sec.*, 498 F.3d 1361 (Fed. Cir. 2007) (upholding removal after clearance revoked); *Hesse v. Dep't of State*, 217 F.3d 1372 (Fed. Cir. 2000) (upholding removal after revocation of TS clearance); *Blankenship v. Martin Marietta Energy Sys., Inc.*, 83 F.3d 153 (6th Cir. 1996) (upholding failure to reassign employee to non-security position while clearance suspended).

2. Reciprocal Federal Agency Acceptance of TS/SCI Clearance

a. Determinations

To aid in uniformity and functionality, Executive Order (“Exec. Order”) 12,968 provides for reciprocal acceptance of clearance determinations among federal agencies.⁵⁰ Once one agency has conducted its background investigation and granted a clearance, other agencies must usually recognize and allow access based on that determination, without conducting their own review.⁵¹ Exec. Order 12,968 establishes two exceptions to its general rule. First, if an agency has substantial information indicating that an individual may no longer meet the adjudicative criteria, it may conduct its own investigation.⁵² Second, an agency head may add additional, but not duplicative criteria for access.⁵³ This latter provision allows agencies such as CIA or NSA to add security procedures, such as a polygraph, for individuals seeking to transfer into or serve on temporary duty at an agency when they have not already undergone these processes as part of the original clearance assessment, even when they already have an active TS/SCI clearance. But when an agency does not have such additive criteria, it may not routinely require re-investigation of a transferring staff employee or contractor; instead, it must accept the determination of the losing agency.

b. Reinvestigations

Exec. Order 12,968 also requires that individuals granted clearances continue to meet the requirements for approval.⁵⁴ Specifically, § 3.4 requires agencies to conduct periodic reinvestigations with the same priority and care as the initial investigation, and consider the same factors as in an initial clearance.⁵⁵ Although Exec. Order 12,968 does not specify a time

⁵⁰ Exec. Order No. 12,968 § 2.4(a), 60 Fed. Reg. 40,245 (Aug. 2, 1995).

⁵¹ *Id.*

⁵² *Id.* at § 2.4(b).

⁵³ *Id.* at § 2.4(c).

⁵⁴ *Id.* at § 1.2(d).

⁵⁵ *Id.* at § 3.4.

frame for reinvestigations, the Office of Personnel Management has issued a clarifying regulation requiring reinvestigation for a TS clearance every five years.⁵⁶

c. Adverse TS/SCI Clearance Determinations

A combination of Executive Orders and agency regulations also detail the process for challenging an adverse clearance determination.⁵⁷ These procedures include certain individual protections, such as entitlement to receive a detailed statement of the basis for refusal, access to the records and reports forming the basis for the decision, representation by an attorney when challenging the decision, and an opportunity to review and challenge the validity of the factual basis for the determination by appealing the decision in writing and/or appearing personally at some point in the review process.⁵⁸ Additionally, Exec. Order 10,865 provides contract employees the right to cross-examine witnesses either orally or with written interrogatories.⁵⁹

Beyond these individual procedural protections, there are also set institutional procedural mechanisms. To consider the appeal, deciding agencies must convene a review panel with no more than one security professional of the minimum three members.⁶⁰ An agency head may override a panel's decision.⁶¹

Federal courts have enforced a due process right to fairness in the clearance adjudication and review process. In *Greene v. McElroy*, the Supreme Court addressed the denial of a clearance to a contractor, which resulted in the loss of his job.⁶² The Court held that the Executive Branch could not deprive a person of his clearance in a process not authorized by the President or Congress, and required the Executive Branch or Congress to provide procedural

⁵⁶ 5 C.F.R. § 732.203 (2013).

⁵⁷ Exec. Order No. 12,968, at § 5.2.

⁵⁸ *Id.* at § 5.2.a(1-7).

⁵⁹ DOD OIG REPORT ON ADJUDICATION, *supra* note 24, at 5.

⁶⁰ Exec. Order No. 12,968, at § 5.2.a(6).

⁶¹ *Id.*

⁶² *Greene v. McElroy*, 360 U.S. 474, 475 (1959).

due process for contesting clearance decisions.⁶³ In response, the Executive Branch first created the appeals process for denial or revocation of clearances, with safeguards and procedural rights.⁶⁴ Since the enactment of these safeguards, federal courts have continued to hear cases by employees challenging adherence to the agency's process of adjudication and appeal as a due process matter⁶⁵ or in violation of Title VII of the Civil Right Act or of the ADA.⁶⁶

*C. Psychological Evaluations, Applicants, and Employees:
Limitations from the Americans with Disabilities Act, 5 C.F.R.
§ 339, and 5 C.F.R. § 7901*

An overlapping set of statutes and federal regulations govern the use of psychological evaluations with any job applicant and employee, independent of the security clearance process. The Americans with Disabilities Act ("ADA"), and its counterpart for federal employees, the Rehabilitation Act of 1973, as amended,⁶⁷ govern how and when such assessments may be used. For federal employees, but not contractors, agencies may conduct mental health evaluations when required as a job element. Further, under U.S. Code, an agency head may affirmatively establish mental health and other medical services as part of an appropriated medical program, but in doing so may provide such services, including psychological evaluations, only to staff employees, and not to contractors.⁶⁸ These restrictions inform the use of psychological evaluations in the current security paradigm, in that they restrict a medical office from performing psychological or any other medical evaluations on contract personnel. This restriction applies only to a medical

⁶³ *Id.* at 508.

⁶⁴ Exec. Order No. 12,968, at § 5.2; DoD OIG REPORT ON ADJUDICATION, *supra* note 24, at 6.

⁶⁵ *Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007). *See also* *El-Ganayni v. United States Dep't of Energy*, 591 F.3d 176, 186 (3d Cir. 2010) (stating that courts may review clearance denial to ensure agencies have followed their own regulations).

⁶⁶ *See Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) (conducting review of the information provided to adjudicators, not review of the decision); *Zeinali v. Raytheon Corp.* 636 F.3d 544 (9th Cir. 2010) (reviewing decision to retain employee after clearance denied, but not the clearance decision itself).

⁶⁷ 29 U.S.C. § 791 (2012).

⁶⁸ 5 U.S.C. § 7901 (2012).

department, and would not apply to a psychologist working in a program outside the appropriated medical program, such as a security office.

The Equal Employment Opportunity Commission (“EEOC”) and the courts, following the ADA, view mental health evaluations designed to detect diagnosable conditions or treatment as medical evaluations.⁶⁹ Psychological examinations are medical tests if they provide information that might reveal a mental disorder or impairment.⁷⁰ Testing and other evaluations that are designed to measure characteristics such as honesty or other traits—not mental health disorders—are usually not considered medical examinations.⁷¹

The ADA divides the employment process into first, the pre-offer; second, the post-offer, pre-employment; and third, employment stages.⁷² In the pre-offer stage, an employer may not ask any questions of an applicant that might reveal medical information and may not conduct medical evaluations of any kind.⁷³ In the post-offer pre-employment phase an employer may ask any medical questions as long as all applicants are subject to the same evaluations and the information obtained is segregated from other employment records.⁷⁴ The results of a medical evaluation may be shared with those making decisions on hiring in order to make appropriate employment decisions, as well as to provide accommodation for disabled persons.⁷⁵

Once a person becomes an employee, use of medical evaluations is again restricted under the ADA.⁷⁶ An employer may not conduct a medical examination, with or without a psychological evaluation, of an employee unless the inquiry is job-related and

⁶⁹ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16. See also *Karraker v. Rent-a-Center*, 411 F.3d 831, 835 (7th Cir. 2005) (citing EEOC guidance for definition of a psychological test as a medical examination).

⁷⁰ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

⁷¹ *Id.*

⁷² 42 U.S.C. § 12112(d) (2012).

⁷³ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 42 U.S.C. § 12112(d)(4) (2012).

consistent with business necessity.⁷⁷ The EEOC's guidance on this issue recognizes an exception for periodic reevaluations and specifically addresses their legality in public safety positions.⁷⁸ The EEOC's guidance cautions that the medical examination must be narrowly tailored to address specific job-related concerns.⁷⁹ An employer may act on the results of the exam, including removing the employee, provided it can demonstrate the employee cannot perform an essential job function.⁸⁰ If maintaining a clearance is an essential job function for IC employees, as federal courts have indicated in *Egan*, *Nelson*, and *Stehney*, then a psychological evaluation as part of the security clearance process should be permissible under the EEOC's analysis.

Federal regulation of medical examinations provides a second limitation on the use of psychological assessments of federal employees: under 5 C.F.R. § 339, medical evaluations are authorized only when periodic evaluations must be completed for positions that have medical or physical requirements, or when there is a direct question about an employee's ability to meet the position's psychological requirements.⁸¹ Under the regulation, if an employer wants to do periodic evaluations, it must establish a pre-determined medical standard for assessment. Even then, agencies may order a psychological evaluation only when a general medical examination fails to reveal a cause for the behavior or actions in question or when the mental health evaluation is specifically called for by the medical standards of the position.⁸² Thus, periodic psychological evaluations currently may be routinely conducted on an individual only if the job

⁷⁷ 42 U.S.C. § 12112(d)(4)(A) (2012).

⁷⁸ EQUAL EMP'T OPPORTUNITY COMM'N, EEOC 915.002, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000) [hereinafter EEOC ADA EMPLOYEE EXAMINATION GUIDANCE], available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 5 C.F.R. § 339.301(b), 302 (2013). Such "for cause" examinations go under the name "fitness for duty examinations" and are conducted under the guidance of the EEOC ADA EMPLOYEE EXAMINATION GUIDANCE, *supra* note 78.

⁸² 5 C.F.R. § 339.301(e)(1) (2013).

position requires such an examination as a medical standard.⁸³ Therefore, if the psychological evaluation becomes an element of the security clearance process and a security clearance is required for a position, then the periodic reevaluation should be allowed under this federal regulation.

Federal regulation also provides a financial limitation on the provision of psychological evaluations. When performed as part of a medical program, federal agencies are generally limited by 5 C.F.R. § 7901 in their use of appropriated funds to conduct medical evaluations or to provide medical services to staff employees only.⁸⁴ This limitation excludes contractors from access to health services, including evaluation services, provided by an appropriated medical program.⁸⁵ The range of permitted services for staff applicants and employees includes both pre-employment and periodic medical evaluations.⁸⁶ An agency may conduct psychological examinations under its medical program as part of pre-employment screening, but it may not conduct that evaluation on contractor personnel under this regulation. However this regulation does not speak to a medical evaluation for contractors conducted under a security program. The limits of this regulation apply only to medical programs and do not

⁸³ *Id.* § 339.302.

⁸⁴ 5 U.S.C. § 7901 starts in pertinent part:

- (a) The head of each agency of the Government of the United States may establish, within the limits of appropriations available, a health service program to promote and maintain the physical and mental fitness of employees under his jurisdiction.
- (b) A health service program may be established by contract or otherwise, but only—
 - (1) after consultation with the Secretary of Health, Education, and Welfare and consideration of its recommendations; and
 - (2) in localities where there are a sufficient number of employees to warrant providing the service.
- (c) A health service program is limited to—
 - (1) treatment of on-the-job illness and dental conditions requiring emergency attention;
 - (2) pre-employment and other examinations;
 - (3) referral of employees to private physicians and dentists; and
 - (4) preventive programs relating to health.

Id.

⁸⁵ *Id.* § 7901(a).

⁸⁶ *Id.* § 7901(c)(2).

address medical testing or assessments performed with other appropriated funds. This regulation would not therefore affect psychologists providing services in a security program.

Recently, DoD has created a protocol that requires contractors to undergo pre-deployment medical evaluations when deploying to certain high-risk areas.⁸⁷ The regulation provides a number of mental health conditions that would make contractors ineligible to be deployed.⁸⁸ The regulation does not mandate a specific mental health evaluation but does provide that contractors found unfit will not be deployed.⁸⁹ The regulation does not provide that the DoD conduct the examinations, avoiding the issue of use of appropriated funds and contractors raised in other regulations.⁹⁰ This moves the burden of obtaining the examinations onto the contractor personnel and their companies, incurring no responsibility on the part of the DoD to conduct the evaluations. Importantly, this protocol creates a paradigm for requiring performance of medical evaluations on contractors without implicating 5 U.S.C. § 7901 restrictions on using appropriated medical funds.

Whether conducted inside or outside a medical program, the ADA provides limits on the content of a psychological evaluation and on the handling of information collected. The DoD protocol suggests a way forward for agencies within the IC to expand psychological assessment into the security realm. As these procedures develop, regulators can address many of the issues related to the ADA by looking at law enforcement, an analogous employment area requiring high reliability, judgment, and stability, while also fulfilling compliance obligations.

D. Mental Health Criteria for Top Secret Clearance

The adjudication criteria for a security evaluation include mental health conditions and treatment, and a number of other

⁸⁷ 32 C.F.R. § 158.7(b) (2013).

⁸⁸ *Id.* § 158.7(j)(2)(xxvi-xxix).

⁸⁹ *Id.* § 158.7(b)(4).

⁹⁰ *Id.* § 158.7(a)(4).

behaviors that fall within the purview of mental professionals. Guideline I, “Emotional, Mental, and Personality Disorders” specifically raises mental health conditions and treatment:

(a) *The concern:* Emotional, mental, and personality disorders can cause a significant deficit in an individual’s psychological, social and occupation functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability. A credentialed mental health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual’s mental health care provider.⁹¹

The regulation outlines the basis for the concern and provides a definition for a “credentialed mental health professional,”⁹² which includes psychologists and psychiatrists. It specifies that the mental health professional consider the condition and/or treatment in question.⁹³ While the regulation allows for mental health professionals to conduct an evaluation, it does not prescribe the timing or contents of the evaluation, other than indicating that the individual’s personal mental health professional should be consulted.⁹⁴ Guideline I does not preclude a direct evaluation of the clearance candidate nor does it require that security personnel discover evidence of a mental health condition before a psychological evaluation.⁹⁵ Also, Guideline I permits the government to choose the mental health professional rendering the opinion, even while it requires that the mental health professional consult with an individual’s personal mental health provider.⁹⁶

In addition to the procedural flexibility of Guideline I, sections (b) and (c) of 32 C.F.R. § 147.11 describe situations that

⁹¹ 32 C.F.R. § 147.11(a) (2013).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

should increase or decrease the adjudicator's concern about the behaviors uncovered in the course of the investigation.⁹⁷ The regulation notes that high risk, aggressive, anti-social, or emotionally unstable behavior should cause concern regardless of whether the employee is formally diagnosed with a mental disorder:

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability; (2) Information that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication; (3) A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior; (4) Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.⁹⁸

The purpose of the mental health professional's recommendation is not the ascertainment of a condition or treatment; rather, it is the credentialed mental health professional's opinion of the effect of that condition or treatment on a person's judgment, reliability, or stability.⁹⁹ Indeed, the regulation does not define what a "condition" is, nor does it restrict a condition to a "diagnosis" because the relevant aspect of the mental health professional's opinion is a defensible prediction of future unwanted behavior, rather than an assessment of the candidate's current condition.¹⁰⁰

Similarly, § 147.11(c) provides conditional language to describe certain situations that should reduce concern about a past history of a mental condition.¹⁰¹

⁹⁷ 32 C.F.R. § 147.11(b) (2013).

⁹⁸ *Id.* § 147.11(b)(3-4).

⁹⁹ *Id.* § 147.11(a).

¹⁰⁰ *See id.*

¹⁰¹ *Id.* § 147.11(c).

(c) Conditions that could mitigate security concerns include: (1) There is no indication of a current problem; (2) Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission and has a low probability of recurrence or exacerbation; (3) The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable.¹⁰²

The conditional language in section (c), which addresses past mental health issues, does not require that the prior condition be discounted or ignored, only that it "could mitigate" security concerns.¹⁰³

Guideline I is one of several criteria that implicate mental health issues. Other elements of overall security evaluation include consideration of sexual behavior, personal conduct, financial irresponsibility, and substance abuse.¹⁰⁴ In fact, all of these areas may benefit from assessment by a mental health professional as behavioral issues that may implicate underlying mental health issues.¹⁰⁵

The choice of these criteria has an empiric basis. "Project Slammer," a long-running joint CIA-FBI examination of Americans who committed espionage against this country, has identified a number of behaviors and character traits common among 117 convicted spies.¹⁰⁶ Obsessive self-centeredness, selfishness, and

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 147.6-147.10.

¹⁰⁵ The Diagnostic and Statistical Manual V provides extensive discussion and assessment criteria in each of these behavioral areas for clinicians to reach provisional and definitive diagnoses and to guide treatment decisions. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-V) (5th ed. 2013). Relevant areas include "Disruptive, Impulse- Control and Conduct Disorders," *Id.* at 461-80; "Substance-Related and Addictive Disorders," *Id.* at 481-591; "Paraphilic Disorders," *Id.* at 685-705; and "Educational and Occupational Problems," *Id.* at 723-26. Gambling is considered under Substance Abuse Disorder, and financial issues are considered in the diagnosis of Bipolar I disorders. *Id.* at 124.

¹⁰⁶ See Lynn F. Fischer, *Espionage: Why Does It Happen?* DEP'T OF DEF. SEC. INST., Oct. 3, 2000, available at <http://www.hanford.gov/files.cfm/whyhappens.pdf>.

alcohol and drug abuse stood out as significant characteristics of these spies.¹⁰⁷ These are issues that mental health professionals have considerable expertise in evaluating.

In the mental health arena, as in other areas of clearance denials, persons may introduce for consideration the reports of mental health providers to add to information or offer an alternate prognosis and assessment of judgment, reliability, or stability.¹⁰⁸ But the government is not bound by such outside information and has the right to its own review and assessment.¹⁰⁹ The evidential burden the government must meet is the introduction of “substantial evidence.”¹¹⁰ The presumptions generally favor the government in adjudication and appeals because the applicant has the burden of proving he or she meets the criteria for granting a security clearance.¹¹¹

The adjudication criteria require assessments in a number of behavioral areas where mental health professionals have expertise. Guideline I in particular creates a role for mental health professionals, yet does not prescribe the extent of that role. Despite uniform reliance on Guideline I and the presence of other behavioral concerns among the adjudication criteria, agencies have varied in employing psychological evaluations in overall applicant evaluations as discussed below in part II.

¹⁰⁷ *Id.*

¹⁰⁸ See *In the Matter of: *** Applicant for Sec. Clearance*, DISCR Case No. 09-03718, 2012 WL 1416017 (D.I.S.C.R. Apr. 16, 2012); *In the Matter of: *** (Redacted) Applicant for Pub. Trust Position*, ADP Case No. 08-06228, 2011 WL 3667921 (D.I.S.C.R. Feb. 25, 2011) (explaining the introduction of expert information, burdens of proof, and presumptions in evaluating appeals for denial of clearances).

¹⁰⁹ *In the Matter of: *** (Redacted) Applicant for Pub. Trust Position*, 2011 WL 3667921 (D.I.S.C.R. Feb. 25, 2011).

¹¹⁰ *Id.* Black’s Law Dictionary defines “substantial evidence” as “[e]vidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla.” BLACK’S LAW DICTIONARY 640 (9th ed. 2009).

¹¹¹ Exec. Order No. 12,968 § 1.2(c), 60 Fed. Reg. 40,245 (Aug. 2, 1995).

E. Psychological Evaluation in Law Enforcement Selection

Law enforcement agencies may serve as a model for the IC since they routinely employ psychological evaluations in selection of personnel and require institutional screening demands analogous to those required in the IC. Survey data indicates that approximately 90% of state and local police forces use some type of psychological evaluation as part of their hiring process.¹¹² The International Association of Chiefs of Police – Police Psychological Services Section has promulgated standards for conducting such evaluation,¹¹³ although the content of evaluations varies widely.¹¹⁴ Such evaluations are not part of a security clearance process *per se*, but are used to evaluate police candidates for mental illness or emotional unfitness for police work,¹¹⁵ concerns similar to the security criteria of judgment, reliability, and stability applied in the IC.

Most police departments rely on a combination of standard psychological tests and in-person interviews.¹¹⁶ Psychologists may communicate their recommendations as a binary “yes/no” answer, but more commonly provide a rating on a five-point scale, ranging from “excellent suitability” to “unsuitable.”¹¹⁷ Publicly available data regarding the numbers of candidates screened out by such routine evaluations is scarce, although one study of 155 police departments found a 5% rejection rate based solely on psychological

¹¹² BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HIRING AND RETENTION OF STATE AND LOCAL LAW ENFORCEMENT OFFICERS 2008 - STATISTICAL TABLES, fig. 9, at 14 (2012).

¹¹³ IACP Police Psychological Services Section, Pre-Employment Psychological Evaluations Guidelines, 1 (2009), available at <http://www.theiacp.org/portals/0/documents/pdfs/Psych-PreemploymentPsychEval.pdf>.

¹¹⁴ Yossef S. Ben-Porath et. al., *Assessing the Psychological Suitability of Candidates for Law Enforcement Positions*, LXVIII POLICE CHIEF, n.8 (2012), available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=2448&issue_id=82011. See also M.L. Dantzker, *Psychological Preemployment Screening for Police Candidates: Seeking Consistency if Not Standardization*, 42 PROF. PSYCHOL.: RES. & PRACTICE 276 (2011).

¹¹⁵ Dantzker, *supra* note 114, at 277.

¹¹⁶ Frank J. Gallo & Richard P. Halgin, *A Guide for Establishing a Practice in Police Preemployment Postoffer Psychological Evaluation*, 42 PROF. PSYCHOL.: RES. & PRACTICE 269, 271-73 (2011).

¹¹⁷ *Id.* at 273-74.

evaluations.¹¹⁸ One provider of these evaluations estimated that it cost police departments \$300 per evaluation in 2010.¹¹⁹

Federal courts have upheld the use of psychological evaluations in police officer selection when used in a manner consistent with the EEOC's guidance on medical evaluations. For example, in *Nilsson v. City of Mesa*, the Ninth Circuit rejected a claim by an officer candidate that her rejection—based on the results of psychological evaluation—violated the ADA.¹²⁰ Although Nilsson claimed that her rejection was pretext for retaliation for prior EEOC actions, the court found that the independent assessment—performed in the post-offer phase—was a legitimate reason to not hire her and therefore valid under the ADA.¹²¹ The Second Circuit in *Daley v. Koch* also held that denial of employment on the basis of personality traits identified in a psychological assessment did not violate the Rehabilitation Act, the federal law upon which the ADA was modeled.¹²² Further, in *Martin v. Department of Veterans Affairs*, the Federal Circuit upheld the demotion of an employed federal police officer from armed to unarmed status on the basis of the recommendation from a routine annual psychological assessment,¹²³ suggesting that in the federal arena, such evaluations may be used in both officer retention and selection decisions.

These decisions appear to support the legal basis under the ADA for the widely adopted use of psychological evaluations by police departments in assessing the hiring and retention of police

¹¹⁸ Robert E. Cochrane et al., *Psychological Testing and the Selection of Police Officers*, 30 CRIM. JUSTICE & BEHAVIOR, 511 (2003). The authors were unable to estimate the additional contribution of the evaluation in the overall hiring decision when combined with other factors. *Id.*

¹¹⁹ Mark Zelig, Presentation at the American Psychological Association 2011 Annual Meeting, Pre-Employment Evaluations for High Risk Professions (Aug. 12, 2010).

¹²⁰ *Nilsson v. City of Mesa*, 503 F.3d 947 (9th Cir. 2007).

¹²¹ *Id.* at 955.

¹²² *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989). See also *Terry v. Town of Morristown*, 446 F. App'x 457, 462 (3d Cir. 2011) (upholding rejection based on psychological evaluation); *Damino v. City of New York*, 332 F. App'x 679, 681 (2d Cir. 2009) (finding rejection based on psychological evaluation was nondiscriminatory).

¹²³ *Martin v. Dep't of Veterans Affairs*, 412 F.3d 1258, 1264 (Fed. Cir. 2005).

officers at both the local and federal level. None of these decisions directly address the use of psychological evaluations with contractors, nor have they involved applicants for government employee status, nor applied a framework where the evaluation is included in a specific security clearance paradigm. However, these law enforcement cases provide a roadmap for incorporating psychological evaluations into the clearance process, and demonstrate that psychological evaluation can be used legally in both hiring and retention assessments. Should the IC choose to adopt psychological assessment in the security evaluation framework, the legal questions already answered in the analogous law enforcement arena provide a model for implementation.

II. PRESENT STATE OF THE SECURITY CLEARANCE PROCESS

The news is filled with consternation over serious problems in evaluating people for security clearances.¹²⁴ All applicants for a new or renewed TS/SCI clearance submit an Standard Form 86, Questionnaire for National Security Positions (“SF-86”),¹²⁵ and meet with an investigator. The investigator interviews the applicant, verifies the information on the SF-86, interviews references, and submits his or her report and the information to agency adjudicators for their review and decision. Issues in the process range from inadequate checks on information provided to inadequate interviewing and other corner cutting.¹²⁶ In the wake of the September 2013 Navy Yard shootings, criticism of the whole process has become widespread, and calls for closer scrutiny of candidates for security clearances have grown louder.¹²⁷ Review of the TS/SCI

¹²⁴ Kendall & Nissenbaum, *supra* note 4; Londono et al., *supra* note 8; Trip Gabriel, *Shortcuts Seen by Firm Doing Security Checks*, N.Y. TIMES, Sept. 28, 2013, <http://www.nytimes.com/2013/09/28/us/pressure-reported-in-rush-to-meet-security-clearances-including-edward-snowden-and-aaron-alexis.html>. The articles above report that private contractors conduct a large portion of the background investigations.

¹²⁵ SF-86, QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS, OMB No. 3206 0005 [hereinafter SF-86], available at http://www.opm.gov/forms/pdf_fill/sf86.pdf.

¹²⁶ Kendall & Nissenbaum, *supra* note 4; Londono et al., *supra* note 8; Gabriel, *supra* note 124.

¹²⁷ London et al., *supra* note 8; *Expect Security Clearance Delays*, FEDERAL TIMES ONLINE (June 24, 2013), <http://www.federaltimes.com/article/20130624/>

clearance process reveals a number of deficiencies that could be improved by the introduction of psychological screening across the IC.

A. Contents of the Process — The SF-86 and the Background Investigation

Uniform steps in the process for granting or renewing a TS/SCI clearance include submission of a complete SF-86, interview by an investigator (which may be the only direct contact in the process), and verification of the information provided by the applicant.¹²⁸ The degree of scrutiny an individual receives then begins to diverge within the IC depending on employment status and the hiring agency. While some applicants will undergo only a background investigation, others will undergo a polygraph examination, with a subset that will undergo psychological assessment as part of their medical evaluation for employment; this entire process occurs post-offer in order to abide by the ADA's guidelines.¹²⁹ Security professionals assess the data that is gathered during the clearance process to reach a decision to grant or deny a clearance. Individuals then have the option of appealing a clearance denial.

The SF-86 is the standard form submitted by applicants and employees for a TS/SCI clearance. It consists of 127 pages of information requirements that an applicant must provide in full.

PERSONNEL03/306240008/Expect-security-clearance-delays (noting that upgrades for TS/SCI could include both increased use of polygraph and psychological assessments).

¹²⁸ OFFICE OF PERS. MGMT., *Memorandum for Heads of Agencies: Aligning OPM Investigative Levels with Reform Concepts* (Aug. 24, 2010) [hereinafter OPM MEMO], available at http://www.opm.gov/investigations/background-investigations/federal-investigations-notice/2010/aligning_opm_investigative_levels.pdf.

¹²⁹ See generally *Application Process*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/careers/application-process/application-instructions> (last visited July 15, 2014); *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited July 15, 2014); *Criteria*, DEF. INTELLIGENCE AGENCY, <http://www.dia.mil/Careers/Criteria.aspx> (last visited July 15, 2014); *Careers*, INTELLIGENCE.GOV, <http://intelligence.gov/careers-in-intelligence> (last visited July 15, 2014).

The areas covered include:

- individually identifying information;
- residences for the previous ten years;
- education, beginning with high school;
- employment information for the previous ten years;
- prior federal service;
- prior military service;
- three personal references;
- names and other identifying information for all first degree relatives;
- foreign activities and foreign travel;
- mental health treatment or counseling in the previous seven years;
- police records for the previous ten years;
- illegal drug use and any related counseling and treatment for the past ten years;
- alcohol use in the previous seven years, including counseling and treatment;
- security clearance record;
- financial status, including bankruptcies, delinquencies and problems due to gambling;
- misuse of IT systems in the previous seven years;
- civil court actions in the previous ten years; and
- association with organizations involved in terrorism or seeking to overthrow the U.S. government.¹³⁰

Despite its extensive scope, the SF-86 fails to elicit from applicants certain types of information that might be relevant to judgment, reliability, or stability. Question 21 of the SF-86 deals specifically with mental health issues, but is limited because it asks only about counseling received, and not about the existence of a condition. Specifically, the question asks, “In the last 7 years, have you consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition?”¹³¹ The instruction advises applicants to answer “no” if

¹³⁰ SF-86, *supra* note 125.

¹³¹ *Id.* at sec. 21. MENTAL AND EMOTIONAL HEALTH.

the counseling was not court ordered, was strictly for marital counseling, family counseling, grief issues not related to violence by the applicant, or was strictly related to adjustments from service in a military combat environment.¹³² The Director of National Intelligence added another exclusion for counseling related to sexual assault in response to concerns about sexual assault within the military.¹³³ Question 23 asks about illegal drug use in the previous seven years and requires that the applicant provide the dates of treatment and the names and address of treatment providers, yet it does not require a description from the applicant regarding treatment outcome.¹³⁴ Question 24 requires the same information regarding alcohol use without any required description of treatment outcome.¹³⁵ However, by asking about negative impacts on work, relationships, finances, or encounters with law enforcement,¹³⁶ Question 24 does allow for the disclosure of certain consequences that mental health professionals often examine in diagnosing alcohol use disorders.¹³⁷

Applicants for clearance issuance or renewal must also provide two releases of information. The first authorizes the investigator to access financial, employment, educational, and government agency records.¹³⁸ The second specifically authorizes release of information by healthcare professionals under the Health Insurance Portability and Accountability Act ("HIPAA").¹³⁹ The medical release includes a practitioner box at the bottom of the page asking "[d]oes the person under investigation have a condition that could impair his judgment, reliability, or ability to properly safeguard

¹³² *Id.*

¹³³ ODNI News Release 05-13, *Director of National Intelligence Issues New Security Clearance Guidance* (Apr. 5, 2013), available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/828-director-of-national-intelligence-issues-new-security-clearance-guidance>.

¹³⁴ SF-86, *supra* note 125, at sec. 23. ILLEGAL USE OF DRUGS AND DRUG ACTIVITY.

¹³⁵ *Id.* at sec. 24. USE OF ALCOHOL.

¹³⁶ *Id.*

¹³⁷ DSM-V, *supra* note 105, at 490.

¹³⁸ SF-86, *supra* note 125, at AUTHORIZATION FOR RELEASE OF INFORMATION.

¹³⁹ *Id.* at AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION PURSUANT TO THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA).

classified national security information?”¹⁴⁰ If the practitioner answers “yes,” the practitioner is then asked to describe—in a space measuring one inch by seven inches on the hard copy form—the nature of the condition, extent and duration of the impairment or treatment, and to provide a prognosis.¹⁴¹ This limited opportunity for response implies that the investigator will receive little substantive information about issues in any of the several areas where mental health concerns might arise.

While all agencies require applicants to submit an SF-86, the internal procedures of the various agencies for reviewing the form can differ dramatically. Most background investigations are now conducted under the supervision of the Office of Personnel Management and include verification of the information provided by the applicant.¹⁴² All TS clearance investigations or reinvestigations include a field investigator interview with the applicant to review and verify the information on the SF-86 and ask additional questions about any ambiguous answers; obtaining records to verify the information provided; interviewing references; and conducting follow-up interviews for any issues identified in the course of the investigation.¹⁴³ Prior to submitting a field report, the investigator will review the answers provided by the applicant and may develop collateral information from personal references, employers, or law enforcement regarding behavioral issues. Increasingly, investigators perform electronic verification rather than engaging in conversation with information providers.¹⁴⁴

Investigators work under significant pressure to quickly complete their field investigations, with pressure principally coming

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Background Investigations*, OFFICE OF PERS. MGMT., <http://www.opm.gov/investigations/background-investigations> (last visited July 5, 2014).

¹⁴³ For details of the contents of clearance investigations, see OPM MEMO, *supra* note 128.

¹⁴⁴ *Personnel Security Clearance Reform: Hearing Before Subcomm. on Intelligence Cmty. Mgmt. Permanent Select Comm. on Intelligence*, 111th Cong. (2010) (statement by Kathy L. Dillaman, Associate Director for Federal Investigative Services, OPM), available at <http://www.opm.gov/news/testimony/111th-congress/personnel-security-clearance-reform>.

from two sources. First, because private companies performing field investigations¹⁴⁵ get paid only upon submission of a completed field report,¹⁴⁶ there is often enormous pressure throughout the organizations conducting the work, which sometimes may lead to incomplete and falsified reports¹⁴⁷ and neglect of secondary reviews before field reports are submitted to adjudicators.¹⁴⁸ Second, and more often the case, the 2004 Intelligence Reform and Terrorism Prevention Act (“IRTPA”) requires that the government complete 90% of clearance requests in sixty days.¹⁴⁹ Although there have been significant reductions in processing time since enacting IRTPA, the trade-off of incomplete investigations has become apparent in the aftermath of the Snowden leak and Navy Yard shooting events.¹⁵⁰ In fact, a sponsor of IRTPA noted that following the Snowden leaks, her confidence in the clearance system had been shaken by the revelations about the process.¹⁵¹

In all cases, the data-gathering phase of the investigation relies on, at the very least, an extensive questionnaire, a single in-person interview, and data verification. While the SF-86 is extensive and detailed, even touching aspects of mental health in a number of questions, the level of detail in areas of mental health concern is

¹⁴⁵ In 2013, USIS, a private firm located in Tyson’s Corner, VA that screened Snowden, performed the majority of field investigations. Tom Hamburger & Zachary A. Goldfarb, *Company Allegedly Misled Government about Security Clearance Checks*, WASH. POST, June 27, 2013, available at http://www.washingtonpost.com/business/economy/company-allegedly-misled-government-about-security-clearance-checks/2013/06/27/dfb7ee04-df5c-11e2-b2d4-ea6d8f477a01_story.html.

¹⁴⁶ Gabriel, *supra* note 124.

¹⁴⁷ *Id.*

¹⁴⁸ *USIS Under Investigation for Clearance Oversight*, MILITARY.COM (July 2, 2013), <http://www.military.com/veteran-jobs/security-clearance-jobs/2013/07/02/usis-under-investigation-for-clearance-oversight.html>. See also Hamburger & Goldfarb, *supra* note 145 (noting that the government was considering dropping USIS for performing sloppy field investigations, including Snowden’s evaluation).

¹⁴⁹ Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. 3301 § (g)(2)(A) (2012).

¹⁵⁰ Rebecca LaFlure, *Security Clearance Lapses Stemmed from Washington’s Heedless Emphasis on Speed Over Quality*, CTR. FOR PUBLIC INTEGRITY (Oct. 1, 2013), <http://www.publicintegrity.org/2013/10/01/13489/security-clearance-lapses-stemmed-washington-s-heedless-emphasis-speed-over-quality>.

¹⁵¹ Gabriel, *supra* note 124.

actually quite limited. These inadequacies are amplified by further structural pressures for investigators to quickly submit reports, sometimes leading to incomplete investigations. Beyond these inadequacies, the structure of the information gathered and the lack of expertise applied to the information has led to deviation in outcomes in the adjudication process.

B. Adjudication and Appeal of Denials

Once the field investigation is completed, the information goes to adjudicators for an initial decision on granting or renewing the TS clearance. The granting agency performs this function, although publicly available information is scant outside of DoD as to where the adjudication takes place within an organization. Within DoD, adjudication occurs in either the Central Adjudication Facility for military and civilian staff employees, or the Defense Industrial Clearance Office for contractors.¹⁵² Adjudicators follow the guidelines provided in federal regulation,¹⁵³ including guidance on assessing concerning issues and mitigating factors, and they may request additional information from the applicant to resolve any issues.¹⁵⁴

The underlying approach to evaluation is called the “whole person concept” and entails a consideration of nine factors in evaluating a behavior:

- (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recentness of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.¹⁵⁵

¹⁵² DoD OIG REPORT ON ADJUDICATION, *supra* note 24, at 6-12.

¹⁵³ 32 C.F.R. § 147 (2013).

¹⁵⁴ DoD OIG REPORT ON ADJUDICATION, *supra* note 24, at 7.

¹⁵⁵ § 147.2(a).

Federal regulation provides specific guidance on resolution of the issues, requiring that “[e]ach case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.”¹⁵⁶ Under this standard, the government has great discretion in its decision to grant a clearance.

The DoD appeals process includes a formal hearings process.¹⁵⁷ Although CIA and NSA have not made public their process for appeals, presumably they comply with the requirements of Exec. Order 12,968.¹⁵⁸ Of the other agencies reporting clearance data through the Office of the Director of National Intelligence, only the Department of State provides readily accessible information regarding its appeals process.¹⁵⁹

C. Differences Among the Agencies in Processing and Outcomes

Agencies within the IC differ in a number of respects in processing applicants for security clearances and for employment. First, agencies differ in their use of the polygraph as a routine screening tool.

¹⁵⁶ *Id.* § 147.2(b).

¹⁵⁷ See DoD OIG REPORT ON ADJUDICATION, *supra* note 24 at 10-12.

¹⁵⁸ Exec. Order No. 12,968 § 5.2, 60 Fed. Reg. 40,245 (Aug. 2, 1995).

¹⁵⁹ See, e.g., DEP'T OF STATE OFFICE OF INSPECTOR GEN., ISP-I-06-43, REPORT OF INSPECTION: REVIEW OF THE BUREAU OF DIPLOMATIC SECURITY'S REVOCATION PROCESS FOR SECURITY CLEARANCES 6 (Sept. 2006), available at <http://oig.state.gov/documents/organization/1034666.pdf>.

Table 1. Agency use of polygraph in the security clearance process in FY 2012¹⁶⁰

<i>Department or Agency</i>	<i>Employees</i>	<i>Contractors</i>
Central Intelligence Agency ¹⁶¹	All	All
Defense Intelligence Agency ¹⁶²	Limited	Limited
Federal Bureau of Investigation ¹⁶³	All	None
National Geospatial-Intelligence Agency ¹⁶⁴	Limited	All
National Reconnaissance Office ¹⁶⁵	N/A ¹⁶⁶	All
National Security Agency ¹⁶⁷	All	All
Department of State ¹⁶⁸	None	None
Department of Defense ¹⁶⁹	Selective	Selective

Second, agencies differ in their use of psychological screening of applicants.

¹⁶⁰ DNI employees and contractors undergo security processing through CIA. DNI 2012 CLEARANCE REPORT, *supra* note 11, at 5 n.3 (2013).

¹⁶¹ *Careers & Internships: Application Instructions*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/careers/application-process/application-instructions> (last visited Jul 15, 2014).

¹⁶² *Careers: Criteria*, DEF. INTELLIGENCE AGENCY, <http://www.dia.mil/Careers/Criteria.aspx> (last visited July 15, 2014).

¹⁶³ *Careers: Background Investigation*, FED. BUREAU OF INVESTIGATION, <https://www.fbijobs.gov/53.asp> (last visited July 15, 2014).

¹⁶⁴ *What to Expect*, NAT'L GEOSPATIAL-INTELLIGENCE AGENCY, <https://www1.nga.mil/Careers/ApplicationProc/Pages/ApplicationProcsWhatToExpect.aspx> (last visited July 15, 2014).

¹⁶⁵ OFFICE OF THE UNDER SEC'Y OF DEF. FOR INTELLIGENCE, DEPARTMENT OF DEFENSE POLYGRAPH PROGRAM PROCESS AND COMPLIANCE STUDY (Dec. 19, 2011) [hereinafter DOD POLYGRAPH STUDY], *available at* <http://www.fas.org/sgp/othergov/polygraph/DOD-poly.pdf>.

¹⁶⁶ NRO staff employees are detailed from other agencies, most notably the CIA and Department of the Air Force, while contractors are hired directly. *See Career Opportunities*, NAT'L RECONNAISSANCE OFFICE, <http://www.nro.gov/careers/careers.html> (last visited July 15, 2014).

¹⁶⁷ *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited July 15, 2014).

¹⁶⁸ U.S. Department of State Foreign Affairs Manual: Polygraph Policy, 12 FAM 251 (1994), *available at* <http://www.state.gov/documents/organization/88342.pdf>.

¹⁶⁹ DOD POLYGRAPH STUDY, *supra* note 165.

Table 2. Agency use of psychological screening for applicant evaluation

<i>Department or Agency</i>	<i>Employees</i>	<i>Contractors</i>
Central Intelligence Agency ¹⁷⁰	All	None
Defense Intelligence Agency ¹⁷¹	None	None
Federal Bureau of Investigation ¹⁷²	None	None
National Geospatial- Intelligence Agency ¹⁷³	None	None
National Reconnaissance Office	N/A ¹⁷⁴	None
National Security Agency ¹⁷⁵	All	None
Department of State ¹⁷⁶	None	None
Department of Defense ¹⁷⁷	Selective	None

Those agencies that currently perform psychological assessments of applicants do so under the rubric of medical evaluation for employment in the post-offer phase, with authorities derived from federal regulation.¹⁷⁸ Data on the numbers or

¹⁷⁰ *Application Process*, CENT. INTELLIGENCE AGENCY, <http://www.cia.gov/careers/application-process> (last visited June 20, 2014).

¹⁷¹ *Criteria*, DFEF. INTELLIGENCE AGENCY, <http://www.dia.mil/careers/criteria/> (last visited June 20, 2014).

¹⁷² *Background Investigation*, FED. BUREAU OF INVESTIGATION, <https://www.fbijobs.gov/53.asp> (last visited June 20, 2014).

¹⁷³ *What to Expect*, NAT'L GEOSPATIAL-INTELLIGENCE AGENCY, <https://www1.nga.mil/Careers/ApplicationProc/Pages/ApplicationProcsWhatToExpect.aspx> (last visited June 20, 2014).

¹⁷⁴ See DoD POLYGRAPH STUDY, *supra* note 165.

¹⁷⁵ *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited June 20, 2014).

¹⁷⁶ *Becoming a Foreign Service Officer*, DEP'T OF STATE, <http://careers.state.gov/officer/selection-process#nogo> (last visited June 20, 2014).

¹⁷⁷ The DoD has a wide array of mental health programs for a variety of purposes, such as screening of combat forces for posttraumatic stress disorder, and reliability for nuclear programs, but no identifiable ones linked to assessing individuals for access to TS/SCI programs. In the course of the recent wars in Iraq and Afghanistan, DoD has instead placed an emphasis on identifying and treating mental health issues, and delinking treatment from security clearances. See *DoD News Briefing with Adm. Mullen, Col. Sutton and Col. Horoho from the Pentagon* (May 1, 2008), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4221>; Donna Miles, *Gates Works to Reduce Mental Health Stigma*, AMERICAN FORCES PRESS SERVICE (May 1, 2008), <http://www.defense.gov/news/newsarticle.aspx?id=49738>.

¹⁷⁸ *Application Process*, CENT. INTELLIGENCE AGENCY, <http://www.cia.gov/careers/>

percentages of staff applicants rejected under this medical paradigm for psychological reasons are not publicly available. Notably, no agency requires psychological evaluations for contractors.

The third table compares clearance denial rates, as a percentage of clearance decisions, among the agencies reporting data to the DNI during FY 2011 and 2012. The reported data do not distinguish denial rates for staff and for contractors nor do they provide specifics on why clearance was denied.

Table 3. Percentage of Security Clearance Denials, FY 2011 and 2012¹⁷⁹

<i>Department or Agency</i>	<i>FY 2011</i>	<i>FY 2012</i>	<i>Two Year Average¹⁸⁰</i>
Central Intelligence Agency	5.3	4.9	5.1
Defense Intelligence Agency	1.2	0.0	0.6
Federal Bureau of Investigation	0.2	0.1	0.2
National Geospatial-Intelligence Agency	0.0	1.3	0.6
National Reconnaissance Office	3.8	5.9	4.9
National Security Agency	8.0	5.7	6.9
Department of State	0.5	0.6	0.6
Department of Defense ¹⁸¹	Unreported	Unreported	N/A

application-process (last visited July 15, 2014); *Hiring Requirements*, NAT'L SEC. AGENCY, http://www.nsa.gov/careers/jobs_search_apply/hirerequire.shtml (last visited June 20, 2014).

¹⁷⁹ See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2011 REPORT ON SECURITY CLEARANCE DETERMINATIONS 7 (2012), available at <http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/2011%20Report%20on%20Security%20Clearance%20Determinations.pdf>; see also DNI 2012 CLEARANCE REPORT, *supra* note 11, at 7.

¹⁸⁰ Assumes number of actions as fairly constant across the two years.

¹⁸¹ The 2011 and 2012 DNI Reports on Security Clearance Determinations state that DoD components other than those listed are unable to extract data specific to the Intelligence Community.

While DoD data on TS/SCI clearances are not available for comparison in the DNI reports, some inferences regarding clearance denial rates can be made based on information from other sources. For example, for FY 2010, denial rates for all types of clearances for the Defense Office of Hearings and Appeals (DOHA), which handles most civilian staff and contractor clearances and denial reviews, the Department of the Navy, and the Department of the Air Force ranged from 0.6 to 1.3%, while the Department of the Army reported a 6.0% rate.¹⁸² Also, a 2000 study that examined data on clearance denials for TS and SCI determinations found that in 1998, DOHA's denial and revocation rate for SCI access was 0.4%.¹⁸³

Comparing these three tables and the DoD data reveals a pattern: those agencies employing psychological screening for staff applicants, such as CIA and NSA, have much higher rates of security clearance denials than those that have no psychological screening, with or without polygraph testing. The only outlier is the NRO, which uses a polygraph, but not psychological screening, and whose denial rate is comparable to CIA and NSA. The reasons for this discrepancy between NRO and other agencies that do not employ psychological screening is not obvious, but may reflect in part the fact that security and mental health personnel at NRO are often CIA employees on assignment to NRO.¹⁸⁴ Recent press reports also indicate that the NRO polygraph program has been particularly aggressive in investigating issues of personal behavior that often fall outside the scope of a counterintelligence polygraph examination.¹⁸⁵

¹⁸² William Henderson, *2011 Security Clearance Year in Review*, CLEARANCEJOBS.COM, <http://news.clearancejobs.com/2012/02/06/2011-security-clearance-year-in-review/> (Feb. 6, 2012). Among the factors that may have led to increased Army denial rates is the high demand for recruits while fighting two wars in 2010. Soldiers are submitted for clearances post-hiring, not post-offer.

¹⁸³ KENT S. CRAWFORD ET AL., DEF. PERS. SEC. RESEARCH SERVICE, AN ANALYSIS OF CLEARANCE REVIEW DECISIONS BY THE DEFENSE OFFICE OF HEARINGS AND APPEALS 2 (Oct. 5, 2000), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA383527>.

¹⁸⁴ See generally *CIA Careers*, NAT'L RECONNAISSANCE OFFICE, <http://www.nro.gov/careers/cia.html> (last visited July 15, 2014).

¹⁸⁵ Marisa Taylor, *National Reconnaissance Office Accused of Collecting Personal Data*, MCCLATCHY NEWS SERVICE (July 10, 2012), <http://www.mcclatchydc.com/2012/07/10/155587/national-reconnaissance-office.html>.

These reports suggest that NRO security adjudicators are attempting to obtain information by the polygraph examination that might become available through psychological screening. Unsurprisingly, CIA, NSA and NRO denial rates are also comparable to those of police departments who rely on psychological screening of their applicants.¹⁸⁶

The data provided on denial rates within the IC do not distinguish between government employees and contractors. As noted in Table 2, medical evaluations, including psychological evaluations, are currently performed only on government employees, and not on contractors. Although DoD has added some requirements for assessment of psychological stability for contractors deploying to a war zone,¹⁸⁷ no agency within the IC requires such an assessment of contract employees. The available data does not allow an inference as to differential rates between staff and contract denials, but it does lead to some inferences about the utility of available screening mechanisms.

The process for evaluating government employees for entry into the IC may include only one (the investigator), two (the polygrapher), or three (the psychologist) face-to-face contacts with a trained interviewer. As described above, those agencies whose process includes only one or two contacts generally have a lower denial rate than those with all three. News reporting has documented numerous widespread deficiencies in the background investigative process, but some data also suggests that reliance on the SF-86 and background investigation is inherently flawed. For example, a DoD study in 2004 suggested that people may make other significant omissions, finding that 38% of persons did not report criminal arrests, charges, or convictions on their SF-86 submission.¹⁸⁸

Edward Snowden was originally hired by the NSA and then transferred to the CIA. His loyalty to the IC changed over time as he worked at the CIA.¹⁸⁹ When he became a contractor and went to

¹⁸⁶ Cochrane et al., *supra* note 118, at 511.

¹⁸⁷ See 32 C.F.R. § 158.7 (2013).

¹⁸⁸ DoD POLYGRAPH STUDY, *supra* note 165, at 9-10.

¹⁸⁹ Greenwald et al., *supra* note 1.

work at NSA, his 2011 reinvestigation would at most consist of a background interview and a polygraph examination. Media reports do not indicate whether he underwent a reinvestigation polygraph, but he certainly did not undergo any psychological screening on reentry into the IC.¹⁹⁰ Thus it appears possible, and even likely, that no one asked him about his attitudes toward the NSA, toward the programs he exposed, or about his intentions in working on highly sensitive information systems. As he has made clear to the media, his intention in working at the NSA was to expose government secrets.¹⁹¹

Beyond the specific situation involving Edward Snowden, institutionally the pressures to quickly produce reports has often led to incomplete investigations. The system's single face-to-face assessment by a background investigator as the sole direct interaction and agency variability in processing demonstrate that the current system is inherently deficient in assessing candidates for a TS/SCI clearance. These problems that have emerged about the current process suggest that something needs to be done to improve outcomes. Fortunately, some agencies, such as the CIA and NSA, are already employing effective additions to the clearance process by increasing the number of direct interactions with applicants, at least for staff employees. For agencies that impose a second or third direct interaction, rejection rates go up, approaching those of organizations in law enforcement that also impose a second look by a mental health professional. This reported data indicates that having a second look yields real benefit in disqualification rates across the IC.

III. PSYCHOLOGICAL EVALUATION FOR THE TS/SCI CLEARANCE PROCESS: RATIONALE AND BARRIERS

Adding psychological screening to the TS/SCI security clearance process would greatly improve the process. On philosophical and practical grounds, psychological evaluation would increase the information available in making a "whole person" judgment, and likely increase denial rates, which should reflect greater detection of unsuitable applicants. Implementation may

¹⁹⁰ Katz, *supra* note 7.

¹⁹¹ Greenwald et al., *supra* note 1.

require some adjustment to existing regulation, particularly in regards to current employees.¹⁹² But existing regulatory authority,¹⁹³ the latitude provided by federal courts to the Executive Branch regarding content and adjudication of clearances, and the court-approved successful integration of such evaluations into law enforcement applicant assessment, suggest that adding routine psychological evaluation to the TS/SCI clearance process can successfully be achieved with careful attention to current law.

A. Why Add Psychological Screening?

Most Americans granted a TS/SCI clearance prove to be reliable, stable, and of good judgment. They will not commit espionage or compromise national security information by their actions. But as events with Edward Snowden showed, this is not the calculus in granting security clearances. Rather, the concern is to screen out those who might engage in such activity. On theoretical, practical, and empirical grounds, psychological screening should be added to the TS/SCI clearance process to reduce these risks. Psychological evaluations will add to the information about the “whole person” and provide an opportunity for expert assessment of behaviors of concern in the clearance process

Psychological evaluation is a screening tool, and like all screening tools, it cannot guarantee that all unsuitable candidates will be identified or that suitable candidates will not be mislabeled as unsuitable. The experience of police departments, where the consequences of selecting an unsuitable candidate can be serious, indicates that those departments overall have found psychological evaluations to be an important tool in reducing that risk, to the point of requiring such evaluations for national accreditation.¹⁹⁴ The data suggest that when psychological evaluations comprise part of the

¹⁹² 5 C.F.R. § 339 (2013).

¹⁹³ *Id.* § 147.

¹⁹⁴ See COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., CALEA STANDARDS FOR LAW ENFORCEMENT AGENCIES: 32.2.8 PSYCHOLOGICAL FITNESS EXAMINATIONS (2012), available at <http://www.calea.org/content/standards-titles>.

overall evaluation process for staff applicants, there is an increased identification of persons deemed unsuitable for TS/SCI access.¹⁹⁵

Exec. Order 12,968 provides a guiding philosophy for clearance determination by establishing that “[e]ligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.”¹⁹⁶ This approach ensures the government receives the benefit of any doubt in reaching a clearance decision. Although federal regulation calls for the use of the “whole person” concept to evaluate each person in granting a clearance,¹⁹⁷ IC agencies vary widely as to how much information is required to assess the whole person.¹⁹⁸ Marked disparities exist in at least two crucial aspects, psychological evaluation and polygraph examination.

Polygraph examination is widely disparaged outside of the IC, and many IC agencies do not routinely employ it.¹⁹⁹ Even some agencies that employ these examinations, such as DoD and the Department of State, tightly regulate the practice despite evidence that it can yield useful information not provided in a background investigation.²⁰⁰ Continued controversy about accuracy²⁰¹ and the nature of the examination make it unpopular in scientific and lay circles.²⁰² While at least one commentator expects increased use of polygraph testing after the Snowden affair,²⁰³ its further adoption will

¹⁹⁵ See *supra* Part II.C.

¹⁹⁶ Exec. Order No. 12,968, at § 3.1(b) (Aug. 2 1995).

¹⁹⁷ § 147.2.

¹⁹⁸ See *supra* tables 1, 2.

¹⁹⁹ See *supra* table 1.

²⁰⁰ DoD POLYGRAPH STUDY, *supra* note 165, at 9-10.

²⁰¹ See NAT'L RESEARCH COUNCIL, THE POLYGRAPH AND LIE DETECTION 12 (2003), available at http://www.nap.edu/booksearch.php?booksearch=1&term=coercive&record_id=10420.

²⁰² For a sampling of anti-polygraph sentiment and collection of articles, see antipolygraph.org, *What We Want*, <https://antipolygraph.org/> (last visited July 15, 2014).

²⁰³ Stephen Losey, *Expect Security Clearance Delays*, FEDERAL TIMES (June 24, 2013), <http://www.federaltimes.com/article/20130624/PERSONNEL03/306240008/Expect-security-clearance-delays>.

likely face considerable resistance from employees, applicants and anti-polygraph advocates.

A psychological evaluation, without a polygraph test, would provide a second source of information and assessment to complete the “whole person” picture. It would supplement data obtained from the background investigation and SF-86, provide the opportunity for a second interaction with a trained interviewer, and afford the input of a professional skilled in assessing human behavior to those making the adjudication decision. Further, because people lie on the SF-86, the information the investigator has to work with can be flawed, if not outright deceptive.²⁰⁴ The current system relies on an often-harried field investigator to develop such information, often without review. Adding a psychological evaluation would provide a second interview, by a professional trained to detect, explore, and assess concerning behavioral traits, such as obsessive self-centeredness, selfishness, and alcohol and drug abuse.²⁰⁵

The empiric data on clearance determinations suggests that those IC agencies employing psychological screening in the post-offer, pre-employment stage of applicant processing in fact deny access to a larger percentage of individuals than those agencies that do not employ this approach.²⁰⁶ The evaluation, while employed merely as a component of a concurrent medical evaluation, appears to boost denial rates by a factor of three to five.²⁰⁷ These rates are consistent with those derived from law enforcement experience,²⁰⁸ suggesting they are a real and tangible effect of adding psychological evaluations to the process. While one might argue that the same outcome could be achieved by more aggressive use of the polygraph,²⁰⁹ the scientific, institutional, and political opposition to polygraphs may make expansion of the polygraph a more difficult path to improve the clearance process. Additionally, press reporting

²⁰⁴ DoD POLYGRAPH STUDY, *supra* note 165, at 9-10.

²⁰⁵ For a description of troublesome behaviors that screening psychologists should look for, *see* Fischer, *supra* note 106.

²⁰⁶ *See supra* Part II.C.

²⁰⁷ *See id.*

²⁰⁸ Cochrane et al, *supra* note 118.

²⁰⁹ As NRO did in recent years. *See* Taylor, *supra* note 185.

suggests that the NRO experience in raising disqualification rates derives in large part from targeting the behavioral areas in the psychological realm.²¹⁰ If true, this observation suggests that the introduction of a psychological assessment may best meet the challenge of focusing efforts on high risk behaviors at issue in the TS/SCI clearance process.

To expand psychological evaluation, policymakers would also have to consider resource issues. Assuming the number of TS/SCI clearance holders remains reasonably constant at 1,410,000 with each due for reinvestigation on a five year cycle, and assuming the IC continues to issue 290,000 initial clearances each year, annual demand for evaluations would be approximately 570,000 per year.²¹¹ Assuming 250 work days in a year and two hours allowed per evaluation, 570 full time equivalent mental health providers would be needed for this effort. Assuming a cost of \$300 per evaluation,²¹² the added costs to the IC for psychological evaluation could be as much as \$171,000,000. However, the additional \$300 per screening would increase the cost of a TS/SCI clearance by only approximately 3-10%²¹³ and would represent less than a 0.3% increase in the IC budget.²¹⁴ In fact, the cost may even be less because this increase does not account for resources already in place at those agencies,

²¹⁰ *Id.*

²¹¹ This is a high-end estimate because it assumes every TS clearance government-wide is at the TS/SCI level and granted to personnel working in the IC. In fact, many of these clearances will fall outside the population that is the subject of this paper. In addition, if the number of clearances relinquished equals the number of new clearances, and the IC has achieved a steady state of total numbers, then even the high-end estimate of total evaluations per year should approach about 300-350,000, and the projected cost should decline to around \$100M per year.

²¹² Mark Zelig, Presentation at the American Psychological Association 2011 Annual Meeting, Pre-Employment Evaluations for High Risk Professions (Aug. 12, 2010).

²¹³ Rod Powers, *Security Clearance Secrets*, ABOUT.COM, http://usmilitary.about.com/cs/generalinfo/a/security2_4.htm (last visited July 15, 2014). Current estimates for a TS/SCI clearance cost range between \$3,000 and \$15,000 for a completed clearance evaluation.

²¹⁴ Barton Gellman & Greg Miller, *U.S. Intelligence Community's Successes, Failures and Objectives Detailed in 'Black Budget' Summary*, WASH. POST, Aug. 29, 2013, http://articles.washingtonpost.com/2013-08-29/world/41709796_1_intelligence-community-intelligence-spending-national-intelligence-program. The reported Intelligence Community budget for FY 2013 is approximately \$52.6 billion. *Id.*

such as NSA and CIA, that already conduct such evaluations as part of their medical clearance process.

In addition to the financial cost of enhancing the clearance process, adding psychological evaluations should also be considered in light of the harms it may prevent. Intelligence agencies do not publish economic costs from their damage assessments after leaks and espionage, so one cannot easily put a dollar figure on each leak prevented. However, the Snowden affair does provide a graphic illustration of the extent of resulting damage that one unhappy employee can cause, with DoD stating that its damage mitigation will take at least two more years and cost billions of dollars.²¹⁵ The revelations of intelligence sources and methods to adversaries and the serious diplomatic repercussions among U.S. allies illustrate the gravity of the damage done.²¹⁶ Given the evident serious deficiencies of the existing clearance system, policymakers should opt to add psychological evaluation to the TS/SCI clearance process to improve screening of candidates. Adding such evaluations appears justified by the goals of the process, by many of the concerns adjudicators must consider in granting a clearance, and by the IC clearance data suggesting their effect on clearance denial rates where employed. If policymakers choose to go this route to enhance the security clearance process, they and their attorneys will have to address a number of issues to ensure its legality, including compliance with the ADA and with other federal regulations.

²¹⁵ Sara Socher, *Highest-ranking U.S. Military Officer Says Snowden's Security Breach Will Cost Billions*, NAT'L J., (Mar. 6, 2014), <http://www.nationaljournal.com/defense/highest-ranking-u-s-military-officer-says-snowden-s-security-breach-will-cost-billions-20140306>.

²¹⁶ Carlo Munoz, *NSA Conducting 'Damage Assessment' of Snowden Leak*, THE HILL (June 13, 2013), <http://thehill.com/policy/defense/305401-nsa-conducting-damage-assessment-of-snowden-leak->. See also Ali Weinberg, *Snowden Leaks Damage Obama Foreign Policy Agenda*, NBCNEWS.com (Nov. 7, 2013), http://firstread.nbcnews.com/_news/2013/11/07/21351474-snowden-leaks-damage-obama-foreign-policy-agenda.

B. Adding Psychological Screening in the Current Legal Framework

Including a psychological evaluation in the security clearance process will implicate several existing laws and regulations. The principle concerns will involve complying with the ADA and the Rehabilitation Act of 1973 as amended, as well as with restrictions on psychological evaluations found in 5 C.F.R. § 339.301. Compliance by the IC with the existing legal architecture requires individual consideration of four scenarios: evaluating government applicants; evaluating contractor applicants; re-investigating government employees; and re-investigating contractor employees. These issues should prove to be manageable given federal courts' deference to the Executive Branch in the security clearance arena.

Guideline I of the adjudicative factors allows for an assessment by a credentialed mental health professional of the condition or treatment and a judgment as to whether it will impair judgment, reliability, or stability.²¹⁷ A psychological evaluation that looks for evidence of emotional, mental, or personality disorders will be regarded as a medical examination under the EEOC's guidelines.²¹⁸

When screening government applicants, the psychological evaluation should take place after the initial job offer to ensure compliance with the ADA.²¹⁹ During a post-offer, pre-employment evaluation, the exam can be wide-ranging and does not face the narrower constraints of being job-related and consistent with business necessity.²²⁰ Although CIA and NSA currently conduct their psychological evaluations of staff applicants under their medical programs, there is currently no legal barrier to conducting the same psychological examination under the sponsorship of the security apparatus.²²¹ All that ADA compliance requires is that medical

²¹⁷ 32 C.F.R. § 147.11 (2013).

²¹⁸ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16; *Karraker v. Rent-a-Center*, 411 F.3d 831, 835 (7th Cir. 2005).

²¹⁹ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

²²⁰ *Id.*

²²¹ *Id.*

records are segregated from other files concerning the applicant. Presumably, agencies that already operate some type of medical program could be file custodians.

Disappointed applicants in this and other categories may argue that denial of a clearance is discrimination on the basis of a disability. Grounded in courts' reluctance to challenge the merits of a clearance determination, the requirement for a security clearance has created a strong exception in disability protections for law enforcement officers.²²² *Stehney*, a Third Circuit case, also provides some guidance as to how federal courts would view discrimination issues related to clearance denial in the IC.²²³ The *Stehney* court commented in dicta that it considered the NSA's stated reasons for polygraph examinations to constitute a rational basis for the practice.²²⁴ Given the data supporting the usefulness of psychological evaluations for screening purposes, it is likely that federal courts would find a rational basis for these evaluations in the IC context.

While evaluation of contractor applicants yields largely the same analysis, 5 U.S.C. § 7901 presents an additional nuance requiring moving the psychological screening into the security organizational structure and out of the medical program structure. Contractor applicants, like government employees, would be evaluated in the post-offer, pre-employment setting. The examiner would be evaluating the applicant as part of an assessment for an essential job element—the clearance—but not as part of an appropriated medical program. The examiner need not be a federal employee to conduct an evaluation but instead could be either a staff psychologist assigned to and paid within the security office, or retained by the proffering company or the background investigator, as long as she was deemed acceptable to the government.²²⁵ By including the psychological evaluation within the security clearance

²²² Keith Alan Byers, *No One Is Above the Law When It Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies*, 30 LOY. L.A. L. REV. 977, 1020 (1997) (discussing the courts' allowance of clearance denial to trump disability claims).

²²³ *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996).

²²⁴ *Id.* at 937.

²²⁵ 32 C.F.R. § 147.11(a) (2013).

process and organizational structure, the examination would likely be found consistent with federal regulation²²⁶ because the examination would no longer fall under the rubric of a medical evaluation for employment generally but would be a medical inquiry into ability to perform an essential job function—obtaining a security clearance. In fact, federal regulation affirmatively indicates that the government can impose requirements for medical evaluations on contractors that comply with government standards prior to acceptance of contractor personnel in certain circumstances, and include in those standards certain mental health requirements.²²⁷ To ensure ADA compliance, the examiner should keep the records of the psychological evaluation separate from other investigative files.²²⁸

Reinvestigations of government employees that include psychological evaluations would raise several additional issues, both under the ADA and Rehabilitation Act, as well as under federal regulations.²²⁹ Under the ADA, employers may conduct a medical evaluation of an employee only when the evaluation is job-related and consistent with business necessity.²³⁰ The EEOC has provided guidance that periodic medical evaluations are allowed in public safety positions²³¹ and the Executive Branch has determined the necessity of periodic reevaluations for retention of access to classified material.²³² A challenge under the ADA is unlikely to succeed because federal courts have regarded retention of a clearance as a job requirement and because the Executive Branch is likely able to demonstrate a rational basis for the requirement for periodic reinvestigation, including a psychological assessment. As with applicant evaluations, to comply with the ADA, separate record systems would be required for the information derived from the examination.

²²⁶ 5 U.S.C. § 7901(e) (2012).

²²⁷ 32 C.F.R. § 158.7 (2013).

²²⁸ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

²²⁹ As noted in Part I, reinvestigations follow the same procedures and consider the same factors as initial investigations.

²³⁰ EEOC ADA PREEMPLOYMENT GUIDANCE, *supra* note 16.

²³¹ *Id.*

²³² Exec. Order No. 12,968 § 3.4, 60 Fed. Reg. 40,245 (Aug. 2, 1995).

Under federal regulation, agencies may perform psychological evaluations on current employees under two conditions: when there is a question regarding an individual's fitness to perform the duties of the position or when the particular position has an established medical standard that calls for a psychological evaluation.²³³ Language adding psychological evaluations to the security clearance determination process may by implication create such a standard for positions requiring a TS/SCI clearance. Such language should most likely state: "a psychological evaluation is required as a condition of maintaining a security clearance necessary for the position." By linking the evaluation to the requirement of periodic reinvestigation, this regulatory change would provide notice to incumbents of the legality of the evaluation. Such routine periodic evaluations would differ from a fitness for duty examination because the trigger would not be a question raised about a medical issue interfering with performance of a job. Rather, the issue to be examined would be assessment for those factors prescribed in federal regulation and the individual's judgment, reliability, and stability in protecting national security information.²³⁴

Contractor employee reinvestigations raise fewer legal issues than those for government employees because 5 C.F.R. § 339.301 does not apply to contractors. The justification for the psychological evaluation must be tied to the security clearance process to meet ADA requirements for evaluation of employees, and a separate record system for psychological files must be implemented for the records of this medical evaluation. With federal courts consistently holding that a clearance may be regarded as a job requirement and that revocation of a clearance on the merits is not reviewable by the courts, a challenge on ADA grounds against conducting a psychological evaluation is unlikely to succeed. Also, including the psychological evaluation under the security process avoids issues regarding expenditures on contractors from an agency medical program.

²³³ 5 C.F.R. § 339.301(e)(1)(ii) (2013).

²³⁴ 32 C.F.R. § 147 (2013).

While generally such a reform will likely appeal to mental health professionals, they will likely not appreciate the potential burden of defending their recommendations in the appeals process. The appeals process allows persons who are denied a clearance to challenge that decision, including retaining counsel, obtaining the records on which the decision was based, introducing mitigating information, and in the case of contractors, submitting interrogatories and orally questioning practitioners.²³⁵ Mental health professionals would need to defend their recommendations to an appeals panel and be subject to cross-examination. This additional use of professional time may raise costs and frustrate mental health practitioners, but the procedural assurance of fairness to those denied a clearance on the recommendation of a mental health professional likely outweighs this objection. By having to convince the panel of the correctness of the recommendation, the psychologist would have to show consideration of all available information, including any provided by the applicant from outside providers.

Intelligence agencies could move to block the release of contents of psychological assessments to unsuccessful applicants on grounds that their disclosure might reveal methods in the selection process. CIA has used sources and methods exemptions to block release of employee information,²³⁶ and, like other U.S. intelligence agencies, has resorted to this defense to prevent disclosure on a wide range of issues. Yet despite this challenge, the Defense Office of Hearings and Appeals has for years dealt successfully with Guideline I challenges without apparent harm to U.S. national security. The solution to any such objection may be as simple as the agency providing the applicant and the reviewing officials with a summary of findings and recommendations, since the adjudicator and appellant reviewers, not the psychologist, make the actual clearance decision, and the details of the questions and concerns could be retained by the agency.

²³⁵ See *supra* section I.D.

²³⁶ See *Frugone v. Cent. Intelligence Agency*, 169 F.3d 972 (D.C. Cir. 1999) (upholding FOIA exemption to release employee's personnel records).

IV. CONCLUSION

In the wake of the Snowden affair and Navy Yard shootings, the need for security clearance process reform is evident. The IC could achieve increased scrutiny of applicants and current holders of TS/SCI clearances through implementation of routine psychological evaluations as part of the security clearance process. The addition of psychological screening would be less controversial than expanding polygraph screening and it would focus on behavioral issues of particular concern in the IC. This model has been widely adopted across the law enforcement community and been validated by federal courts in cases involving applicants and current employees. Clearance data within the IC demonstrates adopting such a reform would yield measurable positive results and the IC already has the systems in place to deal with appeals of clearance denials based on psychological evaluations. While implementation of such a practice would be a major policy decision given the financial cost, the legal barriers to adoption are few and such an addition to the clearance process could be implemented in compliance with the ADA. A change in language to 5 C.F.R. § 339.301, while perhaps not necessary, would ensure that agencies can implement psychological evaluations and that courts could uphold clearance denial based on the results of these evaluations.

Thus, with an adjustment to current federal regulation, the IC could add psychological assessment to the TS/SCI clearance process without significant statutory disruption. The advantages would include closer scrutiny of applicants and current holders of clearances, the routine review of behaviors of concern by a trained mental health professional, and most importantly a higher disqualification rate resulting from closer scrutiny, thereby contributing to a more reliable and stable IC workforce. This additional evaluation would also eliminate a disparity between the security assessments of contractors and those of staff personnel and reduce the risk of someone slipping back into the IC through a less rigorous assessment process. As legislators and senior administration officials are seeking to improve the clearance system, they should strongly consider the addition of psychological

evaluations, which provide a legally defensible and empirically attractive improvement.





COMMENT

REVISION OF ARTICLE 60 AND THE MILITARY CONVENING AUTHORITY'S CLEMENCY POWER: AN ALTERNATIVE TO THE ENACTED LEGISLATION

Suzanne Simms*

INTRODUCTION

Over the last two years, the U.S. military received a firestorm of criticism for its alleged inability to address sexual assault in the armed forces.¹ Social interest in the issue ignited following a quick succession of multiple sexual assault accusations.² A 2012

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¹ See Michael Doyle & Marisa Taylor, *Military Sexual Assault Case Triggers Political Furor*, McCLATCHY DC (Mar. 8, 2013), <http://www.mcclatchydc.com/2013/03/08/185271/military-sexual-assault-case-triggers.html>; see also Jackie Speier, *Military Justice Bungles Sex Cases*, CNN (Mar. 20, 2014, 3:00 PM), <http://www.cnn.com/2014/03/20/opinion/speier-military-prosecution/>; Craig Whitlock, *Air Force General to Retire After Criticism for Handling of Sexual-Assault Case*, WASH. POST (Jan. 8, 2014), http://www.washingtonpost.com/world/national-security/air-force-general-criticized-for-handling-of-sexual-assault-cases-to-retire/2014/01/08/9942df96-787d-11e3-b1c5-739e63e9c9a7_story.html.

² This included the Lackland training base assaults. For more on these assaults, see *Lackland Sex Scandal Prompts U.S. Air Force to Discipline Former Commanders*, CBS

Department of Defense (“DoD”) report³ estimated a thirty-four percent increase in reported incidents involving unwanted sexual contact from fiscal year 2010 to 2012.⁴ With heightened concern for assault victims and the salience of publicized military sexual assaults already in the public psyche, one high profile military case has even captured the attention of Congress.⁵

This case, *United States v. Wilkerson*,⁶ has been the subject of dispute since it was decided in 2012. Lieutenant Colonel (“Lt Col”) James Wilkerson was accused of sexually assaulting a woman in his home.⁷ The court-martial⁸ jury, consisting of four colonels and one lieutenant colonel, concluded Wilkerson was guilty.⁹ However, upon review of the evidence, witness testimony, and other items of consideration, Lieutenant General Craig Franklin exercised his rights as the convening authority¹⁰ and overturned the conviction based on

NEWS (May 2, 2013, 1:06 PM), http://www.cbsnews.com/8301-201_162-57582551/. Seventeen military training instructors at Lackland were convicted of misconduct with trainees, from fraternizing to sexual assault. *Id.*

³ This report’s mathematical data and legal definitions have been disputed as inaccurate. See Lindsay Rodman, *The Pentagon’s Bad Math on Sexual Assault*, WALL STREET J., May 19, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323582904578484941173658754>.

⁴ Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, A.B.A. J., Sept. 1, 2013, available at http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/.

⁵ Doyle & Taylor, *supra* note 1.

⁶ Molly O’Toole, *James Wilkerson, Air Force Pilot Convicted of Sexual Assault, Reassigned*, HUFFINGTON POST (Apr. 2, 2013 7:57 AM), http://www.huffingtonpost.com/2013/04/02/james-wilkerson-air-force-sexual-assault_n_2994998.html. For Wilkerson’s trial records, see *United States v. Wilkerson*, GCMO No. 10 (HQ 3 AF, Ramstein AB, Germany, Feb. 26, 2013), available at <http://www.foia.af.mil/shared/media/document/AFD-130403-023.pdf>.

⁷ O’Toole, *supra* note 6.

⁸ According to Black’s Law Dictionary, a court-martial is “[a]n ad hoc military court convened under military authority to try someone, particularly a member of the armed forces, accused of violating the Uniform Code of Military Justice.” BLACK’S LAW DICTIONARY 413 (9th ed. 2009).

⁹ O’Toole, *supra* note 6.

¹⁰ A convening authority is a military commanding officer that has the authority, among other responsibilities, to refer charges to and convene a court-martial. See Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It* 3 HERITAGE FOUND. (Nov. 6, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/SR149.pdf. Under the Uniform Code

his own determination that factual evidence of Wilkerson's guilt was not beyond a reasonable doubt.¹¹ Outcry over Franklin's decision led to a vociferous call from members of Congress to amend sections of Article 60 of the Uniform Code of Military Justice ("UCMJ"),¹² namely those that authorize the convening authority's control over case rulings and punishments.¹³ Perhaps in response to growing political pressure, Secretary of Defense Chuck Hagel also publicly acknowledged that revisions to Article 60 of the UCMJ were needed.¹⁴ Hagel's proposed alterations called for greater transparency and accountability,¹⁵ largely in line with the sentiments of lawmakers. Proposed legislation was folded into the National Defense Authorization Act for fiscal year 2014 ("NDAA"), which was passed by Congress in late 2013.¹⁶ The relevant portion of the NDAA strips the convening authority of his¹⁷ ability to alter court-martial findings for most major offenses¹⁸ and requires him to submit

of Military Justice, a commanding officer, as the convening authority, has the power to oversee every step of a court-martial, from the referral of charges to final approval of the verdict and sentencing. *Id.* For more on the convening authority, see *infra* Part I.

¹¹ See O'Toole, *supra* note 6; see also Memorandum from Lt Gen Craig Franklin to Michael Donley, Sec'y of the Air Force (Mar. 12, 2013) [hereinafter Franklin Memorandum], available at <http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf>.

¹² The UCMJ is codified at 10 U.S.C. §§ 801–946 (2012).

¹³ See Jennifer Hlad, *Congress Looks to Force Change in Military on Sexual Assault*, STARS & STRIPES (May 14, 2013), <http://www.stripes.com/news/congress-looks-to-force-change-in-military-on-sexual-assault-1.220879>.

¹⁴ Charles D. Stimson & Steven P. Bucci, *Changing the Military Justice System: Proceed with Caution* 1, HERITAGE FOUND. (May 9, 2013), available at http://thf_media.s3.amazonaws.com/2013/pdf/bg2795.pdf.

¹⁵ *Id.*

¹⁶ Stimson, *supra* note 10, at 1. When this Act was signed into law, its relevant portions did not take effect until 180 days after the Dec. 26, 2013 enactment date; until then, the previous U.S. Code was operational. *Id.*

¹⁷ A gender-neutral term should be used whenever referring to the convening authority. However, for the sake of brevity, "his" will be used in place of "his or her" and "he" will be used in place of "he or she" throughout this Comment when discussing the convening authority.

¹⁸ National Defense Authorization Act of 2014, Pub L. No. 113-66, § 1702, 127 Stat. 672, 954-58 (2013) (to be codified as 10 U.S.C. § 860) [hereinafter NDAA]. This section states that the convening authority may not change findings of a court-martial where the maximum sentence of confinement is greater than two years or the sentence adjudged includes a dishonorable or bad-conduct discharge or

written justification for changes made to minor cases, where his authorization to alter findings remains.¹⁹ While the 2014 changes to Article 60 in the NDAA also address the convening authority's power to refer charges, as well as other parts of the pre-trial process,²⁰ this Comment focuses on his power during the post-trial process—namely the power to review and revise courts-martial decisions.²¹

The newly legislated changes to Article 60, while attempting to address the apparent abuse of clemency power in sexual assault cases,²² do not honor the original purpose of the convening authority's role in the military justice process,²³ and are thought by some to be a knee-jerk reaction to social pressures.²⁴ Accordingly, this Comment contends that the newly enacted revision to strip reviewing power from the convening authority goes too far in curtailing commanders' sensible supervision of general courts-martial, and therefore must be reconsidered. As an equitable compromise, the instatement of a specially appointed review board, closely presiding over the convening authority's decisions and actions, offers a more balanced and pragmatic solution in the rare case that the convening authority should seek to overturn the findings of a court-martial.²⁵ In consideration of the convening authority's responsibility to fulfill the greater needs of the military, lawmakers seeking to refine Article 60 in future legislation should reinstate and preserve the convening authority's longstanding power of clemency, with the condition that an oversight board be created to

confinement for more than six months. *Id.* If the convening authority is authorized to act on the findings, he is required to submit a written explanation giving the reasons for the action. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Mark R. Strickland, *Rush to Justice: Amending Article 60 of the Uniform Code of Military Justice*, 60 FED. LAW. 56, 57 (2013) (stating that proposed changes to Article 60 attempted to address sexual assault in the military). See also Stimson & Bucci, *supra* note 14, at 1-2.

²³ See Stimson & Bucci, *supra* note 14, at 2-4.

²⁴ See Strickland, *supra* note 22, at 56.

²⁵ Doyle & Taylor, *supra* note 1 (citing Col. John Baker, USMC, the Chief Defense Counsel of the Marine Corps, stating that it was very rare for convictions to be dismissed); Stimson & Bucci, *supra* note 14, at 4.

supervise those extraordinary instances when the authority's clemency power is exercised.

Part I of this Comment contains a brief history of the convening authority's role in the UCMJ court-martial process. Part I also examines a few rare instances where the convening authority has acted to change or dismiss a court-martial sentence. Part II of this Comment evaluates popular critiques of Article 60, as well as the legislation revising it, highlighting the legislation's merits and flaws. Part III examines the importance of the convening authority's role in the military and proposes an effective solution to improve the recently revised Article 60. This solution recognizes the importance of the convening authority's review power, while also providing oversight of the convening authority's decisions to reduce or overturn a general court-martial sentence.

I. BACKGROUND: CONVENING AUTHORITY UNDER THE UCMJ PRIOR TO RECENT LEGISLATION

From its inception under General George Washington, the U.S. military justice system has been fundamentally different from its civilian counterpart.²⁶ Throughout its various revisions, the convening authority's power to review court-martial sentences granted by Article 60 remains unique to the military justice system.²⁷ Congress first enacted the UCMJ in 1950, later modified it, and made it part of Title 10 of the U.S. Code in 1956.²⁸ Article 60 has since been revised once, in 1983; however, scrutiny over the large role of the convening authority led to recent and significant changes to

²⁶ See Strickland, *supra* note 22, at 56-57. See also WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 17-56 (2d ed. 1896) (detailing a history of American military justice); 1776 Articles of War, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 976 (2d ed. 1920 reprint).

²⁷ Charles W. Schiesser & Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from the Military Justice Process*, 7 TEX. TECH. L. REV. 559, 595 (1975-1976); see Stimson & Bucci, *supra* note 14, at 4.

²⁸ Henry Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455, 461-62 (1971); Strickland, *supra* note 22, at 56.

Article 60, which were signed into law on December 26, 2013, and became effective on June 26, 2014.²⁹

Whereas the civilian system focuses on the enforcement of the peoples' laws and is punitive in nature, the military exists solely for national defense, emphasizing mission effectiveness through the good order and discipline of its troops.³⁰ This difference of purpose is exemplified by the distinctive role of the convening authority.³¹ A convening authority is a military commanding officer with the authority, among other responsibilities,³² to refer charges to and convene a court-martial.³³ This officer could be any military commander, as well as the President as Commander-in-Chief or other high-ranking officer in the military, provided he is appointed prior to acting in this capacity.³⁴ Because most courts-martial involve minor offenses, the convening authority is generally the accused's senior commanding officer and several ranks removed from the accused.³⁵ Whether on the battlefield or in the barracks, a military leader cannot fulfill the responsibilities entrusted to him without the obedience and discipline that his authority requires.³⁶ As convening authority, the UCMJ grants a commanding officer the power to oversee every step of a court-martial, from the referral of charges to final approval of the verdict and sentencing.³⁷ Perhaps surprisingly to those outside of the military, convening authorities have rarely used their broad discretion to overturn convictions.³⁸

²⁹ See Strickland, *supra* note 22, at 56; see also NDAA § 1702.

³⁰ Stimson, *supra* note 10, at 2-3.

³¹ *Id.* at 3; see Stimson & Bucci, *supra* note 14, at 2-4.

³² Stimson, *supra* note 10, at 3. The convening authority also has the responsibility to detail members for court-martial duty, decide whether a non-judicial punishment is more appropriate, accept or reject requests for expert witnesses, and decide whether to accept plea agreements. *Id.*

³³ The convening authority does not file charges, but rather, refers them to a court-martial. UCMJ art. 22-24.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Strickland, *supra* note 22.

³⁸ Doyle & Taylor, *supra* note 1 (citing Col. John Baker, USMC, stating that it was rare for convictions to be dismissed).

Regardless of how infrequently clemency authority is exercised by commanders,³⁹ recent legislation has revised large swaths of this power in an attempt to halt its perceived abuse, particularly in sexual assault cases.⁴⁰ In order to understand the revisions to Article 60, it is first imperative to understand the Article 60 system as it previously operated and the general power that was given to convening authorities.⁴¹

A. The Role of the Convening Authority in the Court-Martial Process

Convening authorities have the power to decide the type of court-martial in which to bring charges against an accused.⁴² These courts-martial range in severity from summary court-martial, in which the maximum punishment imposed can include confinement for up to thirty days, forfeiture of two-thirds pay for one month, and reduction to the lowest pay grade (E-1), to general court-martial, which is often reserved for only the most severe infractions. For servicemembers who are taken to general court-martial, the maximum sentence can range from life in prison to death, as well as a total forfeiture of pay and allowances and a reduction in pay grade to the rank of E-1.⁴³ In general, the convening authority does not refer a charge to a court-martial if the charge fails to state an offense, is unsupported by available evidence, or when there are other valid reasons why trial by court-martial is not appropriate.⁴⁴ Prior to the

³⁹ *Id.*

⁴⁰ Stimson, *supra* note 10, at 1 (referring to the reforms contained in the newly enacted NDAA).

⁴¹ To clearly reflect the fact that the following section concerns solely the convening authority's pre-amended Article 60 powers, all sentences related to such powers will be in the past tense. Of course, some aspects of the role of the convening authority in the court-martial process were unchanged by the recent legislation. See *infra* Part II.B for a full description of the relevant aspects of the court-martial process the legislation altered. Other revisions to the convening authority's power are outside of the scope of this Comment.

⁴² See UCMJ art. 22-4.

⁴³ *Id.* at art. 18, 20.

⁴⁴ See the "Discussion" following MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, Ch. IV, ¶ 401(c) (2012) [hereinafter MCM]. A convening authority may decide to dismiss charges if a trial would be detrimental to the war effort or for national security concerns. *Id.*

recent revisions to Article 60, a convening authority could even dismiss courts-martial charges in favor of other administrative action, if he deemed it appropriate.⁴⁵

Presently, for all courts-martial, the accused is given the option of being represented by military defense counsel, or he can request a civilian attorney at his own cost.⁴⁶ The convening authority can administer other administrative forms of discipline, including non-judicial punishment, to the accused.⁴⁷ Non-judicial punishment options provide the commander an administrative alternative for disciplining a military member that is usually less severe than a court-martial.⁴⁸ A convening authority also has the option of offering formal or informal counseling as a tool to enforce good order and discipline of those under his command.⁴⁹ This type of punishment is typically reserved for lesser offenses or first-time offenders.⁵⁰

Before a general court-martial can be convened, the convening authority is required to submit the charges to his staff judge advocate ("SJA"), a military attorney who provides legal counsel, for consideration and advice.⁵¹ The SJA is frequently lower in rank than the convening authority and can fall under the same chain of command.⁵² As both an officer and a lawyer, the SJA acts as an advisor for the convening authority, expressing his conclusions regarding each specification and giving the convening authority

⁴⁵ MCM, *supra* note 44, at pt. II, Ch. IV, ¶ 401(c).

⁴⁶ UCMJ art. 20.

⁴⁷ This type of punishment is outside the military judicial system and is instead imposed by the commanding officer. UCMJ Article 15 (nonjudicial punishment) allows the commander to impose disciplinary sanctions for minor offenses in place of a court-martial. *Id.* at art. 15.

⁴⁸ Stimson, *supra* note 10, at 3.

⁴⁹ *Id.* at 2.

⁵⁰ UCMJ art. 15(b).

⁵¹ UCMJ art. 34(a)-(b).

⁵² Rothblatt, *supra* note 28, at 462.

written advice.⁵³ This advice extends to both the referral of charges and the review of court-martial sentences.⁵⁴

Because there is no standing court at the trial-level in the military, a new court must be convened for each court-martial.⁵⁵ This situation, unique to military justice, requires the convening authority to select or “detail” jurors under his command, or choose from those made available by the juror’s respective commanders.⁵⁶ During a court-martial, the convening authority approves or disapproves requests for expert witnesses made by either party in the trial.⁵⁷ The convening authority can also enter into a pretrial agreement with the accused.⁵⁸

Following a conviction at court-martial, the assigned trial counsel, or the appointed officer in the case of a summary court-martial, submits the findings and sentence to the convening authority for review.⁵⁹ Before the convening authority takes action on the recommended sentence, he is required to obtain a written recommendation from his SJA.⁶⁰ This recommendation is meant to provide guidance to the convening authority as to whether or not he should affirm the findings and sentence as adjudged and order them executed (except for the case where a sentence includes punitive discharge from the military, which may only be executed after the appropriate service court’s appellate review).⁶¹

Under previous versions of Article 60, the convening authority could take action on the judgment or sentence as he

⁵³ *Id.* at 461-62.

⁵⁴ *Id.*

⁵⁵ *See id.* at 465.

⁵⁶ MCM, *supra* note 44, at pt. II, Ch. V, ¶ 503(a)(3).

⁵⁷ *See generally* MCM, *supra* note 44, at pt. II, Ch. VII, ¶ 703.

⁵⁸ MCM, *supra* note 44, at pt. II, Ch. VII, ¶ 705(a). Under the new legislation pretrial agreements are further limited, and are only discussed briefly in this paper. *See* UCMJ art. 60; *see also infra* Part II.B.

⁵⁹ UCMJ art. 60. This Article has been amended by the provisions in the NDAA for fiscal year 2014 and will be discussed in more detail later in this paper. *See infra* Part II.B.

⁶⁰ *Id.*

⁶¹ UCMJ art. 60.

deemed appropriate, after receiving the SJA's recommendation.⁶² This action could include a reduction of the adjudged sentence, or it could result in the convening authority's complete disapproval of portions of the adjudged sentence.⁶³ While the convening authority could issue clemency for a guilty verdict—resulting in a decreased sentence or even the setting aside of findings of guilt entirely—he could not increase the sentence in any way or levy punishment for a not guilty verdict.⁶⁴ Such actions were unreviewable by a court of appeals or any other judicial process; however, the convening authority rarely disregarded or circumvented the recommendation of his assigned SJA, emphasizing the importance of the SJA's recommendations and legal guidance.⁶⁵ Notably, the convening authority was not required to provide an explanation for reducing a sentence or vacating a judgment.⁶⁶

In general, convening authorities under previous versions of Article 60 were implicitly obligated to base their determination upon the record of trial but also to act in accordance with any pretrial agreements and consider any clemency matters submitted by the accused.⁶⁷ This could include materials not reviewed by the military judge, as well as statements submitted post-trial.⁶⁸ Also post-trial, convicted servicemembers were allowed to submit any matters or written statements to the convening authority that could be deemed relevant to the findings or sentence adjudged at court-martial.⁶⁹ Such

⁶² *Id.*

⁶³ *Id.* Stimson, *supra* note 10, at 3.

⁶⁴ UCMJ art. 60.

⁶⁵ R. CHUCK MASON, CONG. RESEARCH SERV., R43213, SEXUAL ASSAULTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ): SELECTED LEGISLATIVE PROPOSALS (2013), available at <http://fas.org/sgp/crs/natsec/R43213.pdf> (stating that the clemency authority and decision by the convening authority to disapprove, commute, or suspend a sentence, or to set aside a finding of guilty, is not appealable by the United States, and as a matter of command prerogative, is final upon issuance).

⁶⁶ See MCM, *supra* note 44, at pt. II, Ch.XI, ¶ 1107(d) (2012).

⁶⁷ See UCMJ art. 60 (2012).

⁶⁸ See *id.*

⁶⁹ See *id.*

statements could include mitigating evidence or statements not included in the court-martial record.⁷⁰

The responsibility given to the convening authority to review the adjudged findings and sentence confirmed his ability to use sound judgment to ultimately ensure the good order and discipline of his subordinates.⁷¹ As a result, the authority to modify the findings and sentence of a court-martial was deemed a matter of “command prerogative involving the sole discretion of the convening authority.”⁷² The many duties and responsibilities granted by the UCMJ highlight the convening authority’s integral role in the court-martial process.

B. Exceptional Cases where the Convening Authority has Acted to Change or Reduce the Sentence of a Court-Martial

The “pervasive power”⁷³ afforded to commanders during court-martial sentence review had continued relatively unchallenged for years.⁷⁴ However, in the years leading up to the recent revision of Article 60, a small number of cases—particularly those where findings of sex-related crimes were overturned or reduced—placed the convening authority’s role in the military justice system under public scrutiny.⁷⁵

⁷⁰ “In a clemency review, the commander looks not only at the record of trial but other evidence the defense puts forward, which can include character letters and evidence ruled inadmissible at trial.” Kristin Davis, *Court-Martial, then Clemency: Is this Justice?*, AIR FORCE TIMES (Mar. 11, 2013), <http://www.airforcetimes.com/article/20130311/NEWS/303110001/Court-martial-then-clemency-justice->. Under the amended Article 60, the victim of the crime will also be allowed to submit a statement to the convening authority before his review decision is made. NDAA § 1706.

⁷¹ See Stimson, *supra* note 10, at 2.

⁷² Michael Waddington, *Courts Martial: Process and Procedure*, 246 NEW JERSEY LAW. 16 (2007). UCMJ art. 60.

⁷³ Schiesser & Benson, *supra* note 27, at 565.

⁷⁴ *Id.* See Strickland, *supra* note 22, at 57 (stating that convening authorities have “unfettered clemency power” under the UCMJ).

⁷⁵ Doyle & Taylor, *supra* note 1 (stating that the *Wilkerson* case has brought sexual assault in the military to the public’s attention, resulting in proposed legislation from Congress).

Few cases exist where the convening authority has exercised the power to overturn a conviction in a sexual assault related trial.⁷⁶ In the Air Force for example,⁷⁷ a convening authority granted clemency in only five of the 327 sexual assault convictions in the last five years—less than two percent of the time.⁷⁸ But against a backdrop of disparate high profile sexual assault cases, the very nature of the crime garners disproportionate attention from the media and in turn, congressional legislators.⁷⁹ In one such sexual assault conviction that ended in clemency, *United States v. Gurney*, Air Force Chief Master Sergeant (“CMSgt”) William Gurney was accused of sending explicit texts and photos to a subordinate on his cellular phone, among other acts of sexual misconduct.⁸⁰ He pleaded guilty to thirteen specifications, despite having no plea deal.⁸¹ At the close of the court-martial, CMSgt Gurney pleaded guilty to, or was convicted of, fifteen specifications, including charges of failing to maintain a professional relationship, adultery,⁸² and indecent conduct.⁸³ CMSgt Gurney was sentenced to twenty months in confinement, a dishonorable discharge, and a reduction in rank to airman basic.⁸⁴

⁷⁶ *Id.* (citing Marine Corps Col. John Baker, the chief defense counsel of the Marine Corps, stating that it was very rare for convictions to be dismissed); Stimson & Bucci, *supra* note 13, at 4.

⁷⁷ Hlad, *supra* note 13. There are other cases from other services, but for this discussion, this Comment will be focusing on two recent Air Force cases.

⁷⁸ Kristin Davis, *Court-martial, then Clemency: Is this Justice?*, AIR FORCE TIMES (Mar. 11, 2013), <http://www.airforcetimes.com/article/20130311/NEWS/303110001/>.

⁷⁹ Doyle & Taylor, *supra* note 1.

⁸⁰ Scott Fontaine, *Witnesses: E-9 sent Racy Texts, Nude Photos*, AIR FORCE TIMES (Jan. 25, 2011), <http://www.airforcetimes.com/article/20110125/NEWS/101250301/Witnesses-E-9-sent-racy-texts-nude-photos>.

⁸¹ *Id.*

⁸² Under Article 134 of the UCMJ, adultery is a punishable criminal offense. UCMJ art. 134.

⁸³ Michelle Lindo McCluer, *Significant Clemency for Chief Gurney*, CAAFLOG (Apr. 21, 2011), <http://www.caaflag.com/2011/04/21/significant-clemency-for-chief-gurney/> (last visited Aug. 24, 2014).

⁸⁴ Michelle Lindo McCluer, *Chief Gurney Sentence Announced*, CAAFLOG (Jan. 28, 2011) [hereinafter *Gurney Sentence*], <http://www.caaflag.com/2011/01/28/chief-gurney-sentence-announced/> (last visited Aug. 24, 2014). In this case, the accused held one of the highest ranks possible for enlisted personnel, and was then reduced

Upon review of the record and other related materials, the convening authority for this case, Lieutenant General (“Lt Gen”) Robert Allardice, reduced CMSgt Gurney’s confinement from twenty months to four and reduced the dishonorable discharge to a bad-conduct discharge.⁸⁵ While the action on its face may seem questionable, the convening authority did have access to the complete record as well as other materials not entered as evidence during the court-martial.⁸⁶ The convening authority’s action was unreviewable by the Air Force Court of Criminal Appeals or any other judicial process.⁸⁷ Without formal oversight of the convening authority’s decision, or explanation of his rationale for reducing Gurney’s punishment,⁸⁸ Lt Gen Allardice left the public to guess what material swayed his judgment or why the sentence was reduced.⁸⁹

Given the publicized nature of its circumstances and the high-ranking officers involved, another case example, *United States v. Wilkerson*, underpins more recent discourse about Article 60 revisions than *United States v. Gurney*.⁹⁰ In *Wilkerson*, Lt Col James Wilkerson was convicted at a general court-martial of sexual assault for assaulting a woman in his own home during a party.⁹¹ The jury

in rank to airman basic, the lowest rank possible for Air Force enlisted personnel. *United States Military Enlisted Rank Insignia*, DEP’T OF DEF., <http://www.defense.gov/about/insignias/enlisted.aspx> (last visited Aug. 24, 2014).

⁸⁵ However, any punitive discharge would not take effect until the completion of appellate review. *Gurney Sentence*, *supra* note 84.

⁸⁶ See Davis, *supra* note 72; see also UCMJ art. 60 (2012).

⁸⁷ MASON, *supra* note 65. The clemency authority and decision by the convening authority to disapprove, commute, or suspend a sentence, or to set aside a finding of guilty, is not appealable by the United States, and as a matter of command prerogative is final upon issuance. *Id.*

⁸⁸ Article 60 does not require the convening authority to give an explanation for reducing the sentence. See Scott Fontaine, *Sentence Reduced for Convicted Command Chief*, AIR FORCE TIMES (Apr. 21, 2011), <http://www.airforcetimes.com/article/20110421/NEWS/104210337/Sentence-reduced-for-convicted-command-chief> (quoting Air Force unit spokesperson Maj. Michael Meridith stating that Lt Gen Allardice “exercised his independent judgment in deciding on the proper disposition”).

⁸⁹ Zachary D. Spilman, *Top Ten Military Justice Stories of 2013 – #1: Changes to the UCMJ*, CAAFLOG (Jan. 1, 2014), <http://www.caaalog.com/2014/01/01/top-ten-military-justice-stories-of-2013-1-changes-to-the-ucmj/> (last visited Aug. 24, 2014).

⁹⁰ Doyle & Taylor, *supra* note 1; O’Toole, *supra* note 6.

⁹¹ O’Toole, *supra* note 6.

sentenced Wilkerson to a year in jail, dismissal from the military, and total forfeiture of pay and allowances.⁹² The convening authority in this case, Lt Gen Craig Franklin, disapproved the findings and overturned the conviction of the accused.⁹³

Against a backdrop of public awareness and condemnation of sexual assault in the military, the convening authority's actions in each of these respective cases prompted calls for a change to Article 60, namely, stripping the convening authority of the power to dismiss charges or change court-martial sentences.⁹⁴ In response to this fervor, Lt Gen Franklin wrote a memorandum in which he cited the inconsistencies in testimony and a lack of physical evidence that led to his reasonable doubt of Wilkerson's guilt.⁹⁵ Though he knew his decision would be scrutinized, he stated that he could not commit the "cowardly" act of signing off on a guilty conviction he did not agree with.⁹⁶ Franklin's painstaking examination of the evidence and careful deliberation of testimony demonstrates that his assessment was not made lightly.⁹⁷ His memo, however, fell short of defending the overall power of the convening authority from its critics.⁹⁸ Indeed, the memo was denounced for being "filled with selective reasoning and assumptions from someone with no legal training,"⁹⁹ and lawmakers cited it as further proof of the need to curtail the convening authority's power.¹⁰⁰ Thus, despite Franklin's earnest and candid explanation of his decision, *Wilkerson* served as a rallying point for legislative change to Article 60, particularly during the 2013

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Doyle & Taylor, *supra* note 1.

⁹⁵ Franklin Memorandum, *supra* note 11, at 1.

⁹⁶ *Id.* at 6.

⁹⁷ See generally *id.*

⁹⁸ Press Release, Senator Claire McCaskill, Senator McCaskill's Statement on General's Explanation for Overturning Jury Verdict in Aviano Sexual Assault Case (Apr. 10, 2013), available at http://www.mccaskill.senate.gov/?p=press_release&id=1866.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Senate Armed Services Committee hearing on sexual assault in the military.¹⁰¹

From an external perspective, *Wilkerson* and *Gurney* seem to typify a wanton abuse of power within the military justice system, eliciting public cries for reform of the UCMJ. On the contrary, *Wilkerson* and *Gurney* exemplify only those rare and exceptional instances where the convening authority has acted to reduce or overturn the conviction of a sex-related crime following a court-martial.¹⁰² Instead of viewing these cases as aberrations from the norm, lawmakers have held them out as examples of unacceptable military injustices under the UCMJ against a backdrop of social stigma surrounding sexual assault in the military.¹⁰³

II. CRITIQUES OF PRE-AMENDED ARTICLE 60 AND CONGRESS' INCOMPLETE SOLUTION

The aforementioned critiques and concerns regarding Article 60 led Congress to revise this portion of the UCMJ.¹⁰⁴ Admirably, some of these changes aim to direct greater oversight of the convening authority's decisions.¹⁰⁵ However, the following discussion illustrates critical ways in which this zealous diminution of the convening authority's power ultimately hinders the commander's ability to effectively govern the unit as a whole, inhibiting the good order and discipline of his troops within the unique environment and circumstances of the military.¹⁰⁶

A. *The UCMJ Pre-Revised Article 60 Under Fire*

The most pervasive critique of the convening authority's power to review court-martial sentences is that, as a military

¹⁰¹ *Sexual Assaults in the Military: Hearing Before the Subcomm. on Pers. of the S. Armed Services Comm.*, 113th Cong. (2013) [hereinafter *Senate Hearing*], available at <http://www.armed-services.senate.gov/hearings/oversight-sexual-assaults-in-the-military>.

¹⁰² Doyle & Taylor, *supra* note 1.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ NDAA § 1702.

¹⁰⁶ See Stimson, *supra* note 10, at 23.

commander, the convening authority has no legal training or legal background.¹⁰⁷ This criticism often buttresses arguments against the convening authority's role in the military justice process as a whole.¹⁰⁸ These commanders are trained to "command, control and operate military units," yet are asked to perform the function of a judge and jury.¹⁰⁹ One scholar argues that military commanders do not have sufficient legal expertise to separate hearsay from other evidence.¹¹⁰ Still another scholar suggests that because the convening authority lacks legal training, he is ill-equipped to "pay the necessary deference to the legal niceties inherent in the concepts of probable cause and prima facie evidence."¹¹¹ These scholars also dismiss the input of the convening authority's SJA,¹¹² given that the convening authority is not required to follow the SJA's recommendation.¹¹³ Though one scholar admitted that, ordinarily, the convening authority follows the SJA's advice, "the point is [that the] convening authority need not do so."¹¹⁴ As a result, although critics acknowledge that the convening authority does not normally eschew the advice of his SJA, they are still quick to dismiss this counterpoint.¹¹⁵

The argument that a convening authority needs not follow the advice of his SJA is often suggested in tandem with the proposition that Article 60 creates the predicament of unlawful command influence.¹¹⁶ This reasoning suggests that the convening authority could exert undue influence, purposefully or not, over the SJA to submit a recommendation he would approve of, rather than one that is legally sound.¹¹⁷ The SJA, due to his lower rank, would be "disposed to recommend whatever he believes the commander

¹⁰⁷ See Schiesser & Benson, *supra* note 27, at 561.

¹⁰⁸ Laird, *supra* note 3.

¹⁰⁹ Schiesser & Benson, *supra* note 27, at 562.

¹¹⁰ *Id.* at 561.

¹¹¹ Rothblatt, *supra* note 28, at 461.

¹¹² *Id.* Schiesser & Benson, *supra* note 27, at 573.

¹¹³ UCMJ art. 60 (2012).

¹¹⁴ Schiesser & Benson, *supra* note 27, at 572-73.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 564-65.

¹¹⁷ *Id.*

wishes to hear.”¹¹⁸ Scholars have suggested that the structure of the military justice system “virtually ensures” that unlawful command influence will be “present in a variety of situations.”¹¹⁹ However, if the logic of this critique were followed, it would suggest that every officer in the military could exert undue influence over a lower-ranking service member simply because of their rank.¹²⁰ This flawed logic assumes that a military member lacks integrity, and will defer to what he thinks his commander will want to hear even if the very ethics binding his profession forbid this practice.¹²¹ In some cases, the SJA and convening authority are the same ranks or under a different command structure, undercutting the argument that the SJA is even subject to undue command influence.

Another critique against the convening authority’s ability to overturn or reduce the sentence of a court-martial is the “good old boys club” argument.¹²² This logic posits that commanders inherently give leeway to their troops, especially in cases of sexual assault. This amity in turn tempts the commander when acting as a convening authority to reduce or overturn their sentences.¹²³ This line of thinking is discredited by the apparent separation of rank between the accused and convening authority, as explained most notably in the 2013 Senate Armed Services Committee hearing discussing personnel and sexual assault in the military.¹²⁴ Specifically, the convening authority of a sexual assault court-martial

¹¹⁸ Rothblatt, *supra* note 28, at 461. Scholars argue that Article 60 gave so much power to the convening authority that he was “confronted at every turn by temptation to intervene unlawfully in the processes of military justice.” Schiesser & Benson, *supra* note 27, at 565.

¹¹⁹ Schiesser & Benson, *supra* note 27, at 565.

¹²⁰ *See id.*

¹²¹ An organization would cease to function if its members all behaved according to the assumptions made by this argument.

¹²² *See* Stimson, *supra* note 10, at 23.

¹²³ *See* Strickland, *supra* note 22, at 57.

¹²⁴ *Senate Hearing*, *supra* note 101. Senator Levin requested each branch to list statistics on the usual ranks of convening authorities, suggesting that the convening authority’s high rank “removes him” from the lower ranking accused. *Id.*

is normally a high-ranking general officer, and several ranks removed from the accused in the majority of cases.¹²⁵

B. New Legislation

Given recent criticism of the military justice process in light of the *Wilkerson* case, Congress and the Secretary of Defense both proposed changes to Article 60 of the UCMJ.¹²⁶ These changes, largely incorporated into the 2014 NDAA,¹²⁷ became effective on June 26, 2014.¹²⁸ Article 60, as amended, truncates a large portion of the convening authority's sentence review responsibilities, transforming the convening authority's role in the military justice process.¹²⁹

The amended Article 60 strips the convening authority's power to change a sentence for all but the most minor cases, and requires the convening authority to submit a written statement justifying certain decisions,¹³⁰ similar to Franklin's statement following the *Wilkerson* decision. The relevant portion of the legislation revising sentencing authority provides:

(4)(A) Except as provided in subparagraph (B) or (C), the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge.¹³¹

The exceptions in subparagraph (B) and (C) state that the convening authority may reduce a sentence of six months or greater only if there is an existing pretrial agreement, subject to certain

¹²⁵ *Id.*

¹²⁶ Stimson & Bucci, *supra* note 14, at 1; Strickland, *supra* note 22, at 58.

¹²⁷ Stimson, *supra* note 10, at 1; Tom Vanden Brook, *Congress Aims to Fix Military Sexual Assault Crisis*, AIR FORCE TIMES (Dec. 10, 2013), <http://www.airforcetimes.com/article/20131210/NEWS05/312100020/Congress-aims>.

¹²⁸ Spilman, *supra* note 87.

¹²⁹ *Id.*

¹³⁰ NDAA § 1702(b).

¹³¹ *Id.*

limitations,¹³² or upon recommendation of the trial counsel where the accused has been of substantial assistance in the investigation or prosecution of the case.¹³³ The power to review excludes reductions of sentences for Articles 120 (rape and carnal knowledge) and 125 (forcible sodomy).¹³⁴

In addition to sentencing, the convening authority is also restricted in his ability to act on the findings of a court-martial.¹³⁵ Under the new rules, a convening authority no longer has the ability to dismiss convictions for major offenses such as sexual assault,¹³⁶ leaving him no choice but to force a wrongly convicted servicemember to endure the time and anxiety of the appeals process.¹³⁷ Additionally, under the revised Article 60, the convening authority can only change a finding of guilty to that of guilty for a lesser-related offense if it constitutes a “qualifying” offense.¹³⁸ A qualifying offense is a type of minor violation where the maximum sentence of confinement is less than two years, the actual adjudicated sentence is less than six months, and there is no a punitive discharge.¹³⁹ In essence, under the new law, the convening authority is only able to modify or change the findings for certain minor offenses that might not warrant a court-martial in the first place.¹⁴⁰ Thus, not only is clemency power for major offenses removed, but additionally, if the convening authority is authorized by this new legislation to change the sentence of a case, he must provide a written explanation for this change.¹⁴¹

The revised legislation, however, does carve out certain allowances that keep some of the benefits of the convening

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ NDAA § 1702(b).

¹³⁷ See Stimson & Bucci, *supra* note 14, at 3, 4.

¹³⁸ NDAA § 1702(b).

¹³⁹ *Id.* This is almost never the case when adjudicating cases involving rape or sexual assault under Article 120. A qualifying offense is also not applicable to any offense under Article 120B or 125.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

authority's review power intact.¹⁴² For those cases where the accused has provided substantial assistance to the trial counsel, upon trial counsel's recommendation, the convening authority may disapprove, commute, or suspend the court-martial sentence.¹⁴³ This exception ensures the accused still has incentive to cooperate with the trial counsel during the court-martial process. The convening authority can also change the sentence of a court-martial where a pretrial agreement has been made allowing for such changes.¹⁴⁴ Again, this exception provides incentive to the accused to cooperate in a manner similar to the plea bargain system in the civilian criminal justice system. This authority under the pretrial agreement exception, however, is subject to restrictions; namely, if the accused has been found guilty of a charge where the mandatory minimum sentence is a dishonorable discharge, the convening authority may go no further than commuting the discharge to a bad conduct discharge.¹⁴⁵

While the revisions severely limit the convening authority's role in the post court-martial review process, these revisions do contain some changes that will have a positive impact on this process. The revision requiring a convening authority to explain in writing any reasons or rationale for making changes to court-martial findings or sentences is one example.¹⁴⁶ In those minor cases where clemency power is still retained, convening authorities must explain in writing any changes they make to the findings or sentence of a court-martial.¹⁴⁷ The intent of this particular change is to "ensure that convening authorities are required to justify—in an open, transparent, and recorded manner—any decision [they make] to modify [the findings or sentences of] a court-martial"¹⁴⁸ This move adds much-needed transparency to the military justice process. The written justification is included in the record¹⁴⁹ and can provide

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ NDAA § 1702(b).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Press Release, Sec'y of Def. Chuck Hagel, Statement from Secretary Hagel on Sexual Assault Prevention and Response (Apr. 8, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=15917>.

¹⁴⁹ NDAA § 1702(b).

a useful means of tracking trends in convening authority decisions in the future. As was the case with Franklin's letter in the *Wilkerson* case, some statements may be contentious, but the requirement allows those questioning the military justice system to observe first-hand the reasoning behind a sentence modification. While increased oversight and transparency of the convening authority's actions is warranted, the proposal to strip most clemency abilities from major court-martial findings is too extreme of a remedy.¹⁵⁰

III. THE CASE FOR A CONVENING AUTHORITY AND A SUGGESTED SOLUTION TO THE CONVENING AUTHORITY'S REVISION PROBLEM

The convening authority's role is vital to the military command and disciplinary structure.¹⁵¹ The current revisions to Article 60 weaken the commander's ability to effectively lead his troops.¹⁵² An alternative solution that balances the importance of the convening authority's review power with concerns for oversight of the convening authority's decisions is possible by modifying portions of recent revisions to Article 60.

A. *Addressing Critiques of Article 60: Why the Military Justice Process Still Needs a Convening Authority*

The convening authority is an important part of the military justice process.¹⁵³ Many supporters of the convening authority under Article 60 cite "good order and discipline" as a reason why he must retain influence,¹⁵⁴ but what does that mean? Essential to the successful functioning of the military is its rank structure and chain of command. In wartime environments, the rank structure is what keeps the military functional and efficient in an otherwise chaotic environment.¹⁵⁵ As stated by the prominent Union Army General

¹⁵⁰ Stimson, *supra* note 10, at 3.

¹⁵¹ See *id.* at 3-4; see also FRANCIS A. GILLIGAN & FREDERIC L. LEDERER, COURT-MARTIAL PROCEDURE (3rd ed. 2006).

¹⁵² Stimson, *supra* note 10, at 4.

¹⁵³ *Id.* at 2-3.

¹⁵⁴ Timothy W. Murphy, *A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline*, 28 REPORTER 3 (2001).

¹⁵⁵ *Id.*

William Tecumseh Sherman, “[a]n army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence.”¹⁵⁶ Commanders need this authority to conduct military operations, including holding courts-martial, in times of war and peace.¹⁵⁷

The need for good order and discipline among the troops to complete the mission of the military does not fully address concerns that the convening authority lacks legal training. As mentioned previously, the convening authority is required to have input from his legally trained SJA, but is not required to follow the recommendation of the SJA.¹⁵⁸ However, this lack of legal training does not hinder the referral of charges to courts-martial.¹⁵⁹ The convening authority relies on a standard of probable cause to determine whether to refer charges.¹⁶⁰ This means that where a legally trained SJA might not pursue a case due to lack of evidence demonstrating guilt beyond a reasonable doubt, a commander may refer charges in a case where there is merely probable cause that the accused has committed the crime.¹⁶¹

Convening authorities rely on the recommendation of their SJA for both referral of charges and review of court-martial sentences in the vast majority of cases.¹⁶² Occasionally, however, convening authorities have referred charges even though their SJAs advised against it due to a perceived lack of sufficient evidence.¹⁶³ Aside from

¹⁵⁶ Major Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1, 54 (1968).

¹⁵⁷ Stimson & Bucci, *supra* note 14, at 3.

¹⁵⁸ UCMJ art. 60 (2012).

¹⁵⁹ See Stimson, *supra* note 10, at 4.

¹⁶⁰ *Id.* Commanders need only “reason to believe that a member of command committed a crime.” *Id.* One may not need formal legal training to determine probable cause.

¹⁶¹ See *id.*

¹⁶² Schiesser & Benson, *supra* note 27, at 595.

¹⁶³ Doyle & Taylor, *supra* note 1 (stating that in their review of seventy military sexual assault cases, the convening authority has “aggressively pursued” a conviction even against the advice of investigators, resulting in a higher number of acquittals for these cases).

their aforementioned tendency to refer charges based solely on probable cause, a commander may also be more willing than those legally trained to pursue charges if he believes that, regardless of the outcome, it is the right thing to do or that it will convey a strong message to his subordinate units.¹⁶⁴ A thorough examination of the case and deliberate execution of the military judicial process shows the units under his command that discipline is paramount, which in turn promotes the good order and discipline of his subordinates.¹⁶⁵ Thus, pursuing a court-martial where there may not have been sufficient evidence for a conviction can result in higher acquittal rates.¹⁶⁶ These statistics can create an impression that the military is lenient on sexual assault cases, when in fact the opposite is true.¹⁶⁷

The significance of the convening authority's clemency power is also emphasized by the differences in the military justice process from that of the civilian judicial system.¹⁶⁸ Because our nation entrusts the military with the responsibility—and weaponry—to defend its freedom, military laws often hold its members to a higher standard of moral and ethical conduct than civilian laws.¹⁶⁹ For example, Article 134 criminalizes adultery, which is not considered a criminal activity for civilians in most states.¹⁷⁰ Adultery is criminalized because it can cause grave detrimental effects to the cohesiveness of a fighting unit, and its toleration undermines a commander's moral stature among those who entrust him with their lives.¹⁷¹ In addition, Article 134 also contains a general clause which states "all disorders and neglects to the prejudice of good order and discipline" are subject to punishment depending on the severity of

¹⁶⁴ Stimson, *supra* note 10, at 4.

¹⁶⁵ *See id.*

¹⁶⁶ Doyle & Taylor, *supra* note 1.

¹⁶⁷ *Id.*

¹⁶⁸ Stimson & Bucci, *supra* note 14, at 2.

¹⁶⁹ *See id.*

¹⁷⁰ UCMJ art. 134 (2012). Adultery is only considered an offense if "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline . . . or was of a nature to bring discredit upon the armed forces." *Id.*

¹⁷¹ James M. Winner, Comment, *Beds With Sheets But No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1103 (1998) (asserting that adultery is a legitimate crime because of its effect on unit cohesion and fighting ability).

the action, effectively criminalizing any conduct that interferes with the commander's ability to effectively maintain good order and discipline, conveying even more importance to the commander's discretion and ability to lead.¹⁷² Hence, the differences between civilian and military justice are based on the different purposes of the respective justice systems.¹⁷³ The separate military justice system supports the military's mission to defend the nation by facilitating the requirement for rapid mobility of personnel, a swift judicial process in locations worldwide, and the necessity for good order and discipline of troops.¹⁷⁴

The structure of the jury panel of a court-martial further illuminates the vital role of the convening authority.¹⁷⁵ A civilian jury is comprised of twelve jurists for federal cases and no fewer than six in state cases.¹⁷⁶ A military court-martial panel, on the other hand, can be as sparse as three servicemembers for special courts-martial and as small as five servicemembers for general courts-martial.¹⁷⁷ This difference in jury size can have an impact on the due process afforded to the accused military member.¹⁷⁸ For example, a small number of jurists in a panel might not provide an adequate cross section of society, a Constitutional requirement in civilian law,

¹⁷² UCMJ art. 134 (2012).

¹⁷³ Stimson & Bucci, *supra* note 14, at 2; Stimson, *supra* note 10, at 2. The civilian justice system focuses on the punitive aspects of justice for those who violate the law, while the focus of military justice is to support the primary goal of the military in its defense of the nation. Stimson, *supra* note 10, at 2.

¹⁷⁴ Stimson & Bucci, *supra* note 14, at 2.

¹⁷⁵ See Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 474 (2014) (stating that the difference between military panels and civilian juries "materially effects the reliability of verdicts").

¹⁷⁶ FED. R. CRIM. P. 23(b)(1); *Patton v. United States*, 281 U.S. 276 (1930) (reversing conviction because the federal jury did not have 12 jurors).

¹⁷⁷ UCMJ art. 16 (2012). The accused may choose the composition of the court-martial except in capital cases, where members are required. MCM, *supra* note 44, at pt. II, Ch. II, ¶ 201(f)(1)(C).

¹⁷⁸ Williams, *supra* note 175 (citing *Ballew v. Georgia*, 435 U.S. 223 (1978) (setting aside a conviction because a five-person jury was too small)) (stating that a jury's size may affect the quality of its deliberations and that while a jury is supposed to represent a cross-section of the community at large, a smaller number of jurors makes this representation difficult).

but not military law. Thus, a convening authority's review of the sentence ensures the accused person's right to a representative jury and due process is protected.¹⁷⁹

Even more significant than jury size is the difference in unanimity requirements between military panels and civilian juries for criminal sentencing and guilty verdicts.¹⁸⁰ In civilian federal courts at common law, a jury decision must be unanimous.¹⁸¹ Contrary to these civilian criminal trials, only two-thirds of the members of a military court-martial must agree to find the accused guilty.¹⁸² Thus, there are no "hung juries" in courts-martial.¹⁸³ Instead, clemency was built into the military system to offer a procedural safeguard for the convening authority to prudently exercise when a lack of evidence to support a unanimous guilty verdict calls into question the nature or severity of the crime.¹⁸⁴

The convening authority review process is a tested and proven method to ensure justice within the military system.¹⁸⁵ In general, the position of the convening authority in the military justice process ensures the fairness of the trial and the rights of the accused by adding a layer of review in judgment and sentencing.¹⁸⁶ This added layer counterbalances the lower unanimity requirements and smaller jury panel characteristic of a military trial.¹⁸⁷

Not only does this review process ensure due justice for the accused, but it allows a commander to consider implications of sentencing that go beyond merely punishing the accused.¹⁸⁸ For

¹⁷⁹ See Williams, *supra* note 175.

¹⁸⁰ *Id.*

¹⁸¹ MCM, *supra* note 44, at pt. II, Ch. IX, ¶ 921(c). The same is applicable to general courts-martial with the exception of offenses where the death penalty is mandatory, which require a unanimous verdict. UCMJ art. 52 (2012).

¹⁸² 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>.

¹⁸³ Williams, *supra* note 175 at 496, 499-500.

¹⁸⁴ See *id.* at pt. IV.

¹⁸⁵ *Id.* at 503-05.

¹⁸⁶ *Id.*

¹⁸⁷ See *id.*

¹⁸⁸ *Id.*

example, the convening authority is given the opportunity to look beyond the offense itself and evaluate the accused's personal or family situation.¹⁸⁹ In doing so, the convening authority is afforded the latitude to change a convicted servicemember's sentence, which may provide relief for the servicemember's family.¹⁹⁰ This is especially relevant where the adjudged sentence contains forfeitures of pay and allowances, as very often, military spouses find a steady career difficult to maintain due to the location changes and deployments that come with their spouse's military commitment.¹⁹¹ In instances where the servicemember is the sole monetary provider, the convening authority can grant clemency for this portion of the sentence, reducing the amount of pay forfeiture or stopping this portion of the penalty for a short time to allow the family to find other means of income.¹⁹² Without the clemency aspect of the convening authority's power, mitigation would not be possible should the sentence withhold pay, leaving the military spouse without any monetary income—effectively forcing the military family to share punishment for the servicemember's crime.¹⁹³

The convening authority review process ensures both fair treatment of the accused through due process and the holistic preservation of the overall wellbeing of the unit.¹⁹⁴ Outside of the unit, this clemency power also offers a means for a commander to ensure the accused's dependents are treated fairly in the military justice process.¹⁹⁵ A sweeping revision to Article 60 that does not acknowledge or account for the critical reasons that necessitate a

¹⁸⁹ See Strickland, *supra* note 22 at 58. Commanders often reduce monetary punishments to mitigate the negative impact on the servicemember's family. *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Molly Blake, *For Military Spouses, the Hard Road Between Careers and Family*, N.Y. TIMES (July 24, 2012), <http://atwar.blogs.nytimes.com/2012/07/24/for-military-spouses-the-hard-road-between-careers-and-family/>.

¹⁹² UCMJ art. 58(b) (2012).

¹⁹³ See *id.*

¹⁹⁴ Williams, *supra* note 175, at 25.

¹⁹⁵ *Id.* See also Stimson & Bucci, *supra* note 14, at 3 (stating that Article 60 clemency power acts as a way for commanders to correct legal error or errors in the military justice process).

convening authority harms the military justice process and ultimately the effective functioning of the military.¹⁹⁶

B. An Alternative to the Current Legislation

The recently enacted legislation offers a partial solution for convening authority oversight by requiring a written explanation for changing a court-martial sentence.¹⁹⁷ Although the Franklin letter failed to persuade an already-infuriated Congress, reforming Article 60 to include the requirement for this written explanation would indeed provide transparency to the post-trial process, stemming denuncements of unfairness or special treatment to those convicted.¹⁹⁸ Aside from this singular improvement, the new Article 60's broad denial of clemency power for all major courts-martial¹⁹⁹ constitutes a blunt, myopic solution for combating sexual assault merely by assuring maximum punishment of convicts including, occasionally, those wrongfully convicted by a misrepresentative jury or non-unanimous guilty verdict.

This Comment recommends an alternative solution that allows the convening authority to retain clemency power, while satisfying critics who believe this power is too often abused. A commander's decision for clemency need not be finalized in isolation. Instead, the convening authority's revision of a court-martial's findings could be subjected to a review board of qualified judges, hence alleviating public misgivings of wrongdoing or lack of legal training. This evaluation would institute a check to the power of the convening authority while still maintaining the convening authority's discretion in the outcome of a court-martial.

Ideally, review board members would be comprised of military appellate judges or even judges serving in the Court of Appeals for the Armed Forces. This would allow the convening authority's decision to be verified by those educated in the legal profession, mitigating the popular complaint that the convening

¹⁹⁶ See *id.* at 5.

¹⁹⁷ NDAA § 1702.

¹⁹⁸ Stimson & Bucci, *supra* note 14, at 5.

¹⁹⁹ See *id.*

authority lacks the requisite legal training to decipher the nuances of law or make legally valid decisions. Staffing the review board with competent, widely respected judges would assure the public that it can stem any miscarriage of justice, yet leave intact the authority necessary for the good order and discipline of the troops. An appellate level review would also reinforce the credibility of the court-martial process at the trial level and underscore the sensible, deliberate judgment of a convening authority choosing to amend a court-martial decision, maintaining his command influence.

The board of review would only be called to examine those decisions that reverse or reduce the sentence of a conviction in a general court-martial. The current amendment to Article 60 in the NDAA severely limits the convening authority's ability to act on court-martial findings by only allowing changes to findings where the actual sentence was confinement for less than six months, the maximum possible confinement was less than two years (with a few limited exceptions),²⁰⁰ and there was no requirement for punitive discharge.²⁰¹ The amendment to Article 60 also limits the convening authority's ability to disapprove, commute, or suspend an adjudged sentence.²⁰² The changes limit this authority, with a few exceptions, to those minor cases with adjudged sentences of confinement for less than six months and those sentences not containing dismissal, dishonorable discharge, or a bad conduct discharge.²⁰³ The board of review solution not only offers oversight of the convening authority's decisions from these courts-martial, but it allows the convening authority to review all cases rather than just minor ones.

In order to preserve the commander's legitimate authority over the case, the board of review must analyze the convening authority's decision with a presumption that he has ethically completed due diligence by incorporating a meticulous examination of evidence and considered the recommendations provided by his

²⁰⁰ As previously mentioned, these exceptions are limited to pretrial agreements for certain charges or upon recommendation of trial counsel based on the cooperation of the accused. See *supra* Part II.B.

²⁰¹ NDAA § 1702(b).

²⁰² *Id.*

²⁰³ *Id.*

SJA. This presumption limits the board's scope to evaluating only the sound reasoning and legal suitability of the decision—not opinions about the accused's moral character or perceived commander biases. Not only would board decisions based on these opinions elicit public scrutiny, but the ethical and moral judgments that inform a clemency decision must remain with the commander, as only he can decide how best to maintain the discipline and overall well-being of his subordinates. The board's respect for the convening authority's moral judgment also mitigates concerns that the commander would lack real power under this revised system. The presumption ensures that the convening authority maintains the necessary command authority to lead troops while allowing truly questionable decisions to undergo validation for legal soundness.

Should the board of review exercise its ability to veto the convening authority's clemency on the basis that he abused his power, changes in findings or sentencing would revert to the original court-martial trial findings and sentencing.²⁰⁴ Because the standard of review for this board would be "abuse of discretion,"²⁰⁵ any changes to convening authority decisions would be few in number, limited only to those decisions with egregious flaws or those that are based on erroneous conclusions of law.²⁰⁶ Abuse of discretion is an ideal standard of review when examining convening authority decisions because it can correct those decisions that are flawed from a legal standpoint while maintaining the discretion of the convening authority for most other decisions. Under this standard, abuse of discretion may be found when the convening authority's decision was clearly unreasonable or arbitrary, the decision was based on an erroneous conclusion of law, the convening authority's findings were clearly erroneous based on the record and materials relevant to the court-martial, or when the materials contained no evidence to rationally support the convening authority's decision.²⁰⁷ Consequently, the abuse of discretion standard would afford the

²⁰⁴ See generally Kevin Casey, Jade Camara, & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279 (2002).

²⁰⁵ See *id.* at 287.

²⁰⁶ *Id.*

²⁰⁷ See *id.*

convening authority the most deference possible, keeping his necessary command authority intact.

Granted, the review board solution may not fully assuage all fears that the convening authority may act improperly in reducing or commuting a sentence. Indeed, the convening authority would retain the ability to make these decisions based on his moral and ethical judgment, provided they are legally sound. Current legislation strips the convening authority of all but the most basic clemency powers, clearly undermining his ability to command troops, and taking discipline outside the chain of command.²⁰⁸ As an ideal compromise, a review board would allow the convening authority to maintain this command authority while ensuring greater legal oversight of his decision.

IV. CONCLUSION

Sexual assault—particularly among our country's uniformed servicemen—is considered an immediate and intolerable problem. Enacting legislation stripping the convening authority of the ability to grant clemency will not solve this problem. Despite good intentions, knee-jerk lawmaking in response to political pressures cannot result in well-thought-out or justiciable laws. Although it admirably calls for widespread oversight of a commander's actions, the portions of legislation that restrain clemency authority from courts-martial convening authorities will substantially, and negatively, alter the military justice process. As a compromise, allowing a board of review to look at those decisions that reduce or reverse a conviction or sentence in courts-martial strikes a balance between the desire for oversight of the convening authority and allowing the convening authority to retain the necessary influence to effectively command troops. This proposed solution resolves concerns for both opponents and proponents of the new changes to Article 60, strengthening the military justice system and securing the overall success of our fighting men and women.



²⁰⁸ See Stimson, *supra* note 10, at 23.