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# NATIONAL SECURITY LAW JOURNAL

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FISA COURT OF REVIEW

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The *National Security Law Journal* ("NSLJ") is a student-edited legal periodical published twice annually at Antonin Scalia Law School at George Mason University in Arlington, Virginia. We print timely, insightful scholarship on pressing matters that further the dynamic field of national security law, including topics relating to foreign affairs, homeland security, intelligence, and national defense.

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## FOREWORD

This issue marks the beginning of our fifth volume. While still young, the *National Security Law Journal* continues to grow and garner support from students, practitioners, military professionals, members of academia, and others interested in national security law and policy. Our success as a top national security law publication is due to the hard work of our student members and the support of our many dedicated readers.

In this issue, Deborah Sills, Intelligence Community Fellow at the Georgetown University Law Center, analyzes appellate review of Federal Intelligence Surveillance Court decisions through the use of certified question jurisdiction; and Ryan Santicola evaluates the use of freedom of navigation operations as a legal imperative for the protection of U.S. interests. Next, Jeremy Rabkin, Professor of Law at Antonin Scalia Law School, provides a book review of Andreas Harald Aure's *The Right to Wage War* (*jus ad bellum*). Following is a summary of our Spring 2016 Symposium, a full-day cybersecurity tabletop legal exercise. Rounding out this issue are two Comments by Mason students: T. Jaren Stanton explores compliance with the National Environmental Protection Act and the disclosure of national security secrets; and Richard Sterns argues for a federal framework for the regulation of small maritime vessels that considers national security interests.

I hope that you enjoy this issue and the diverse topics and ideas discussed within. I invite you to continue the discussion with us on social media via Facebook ([facebook.com/NatlSecLJ](https://facebook.com/NatlSecLJ)) and Twitter (@NatlSecLJ), and subscribe to our YouTube channel ([youtube.com/NatlSecLJ](https://youtube.com/NatlSecLJ)).

*Chelsea Smith*  
*Editor-in-Chief*



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CERTIFIED QUESTION JURISDICTION:  
A SIGNIFICANT NEW AUTHORITY FOR THE FISA COURT  
AND FISA COURT OF REVIEW

**Deborah Samuel Sills\***

*The Foreign Intelligence Surveillance Court (“FISC” or “FISA Court”) authorizes some of the most vital national security activities in our country. In deciding these significant matters, the FISC regularly balances individual privacy interests with the need to safeguard the security of individuals. While the FISC must decide such fundamental matters impacting both privacy rights and national security interests, until recently, few opportunities for appellate review of FISC decisions existed. In 2015, Congress addressed this absence of meaningful appellate review in the USA FREEDOM Act. The USA FREEDOM Act amended the Foreign Intelligence Surveillance Act (“FISA”) of 1978 to include certified question jurisdiction. Since the*

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\*Intelligence Community Fellow at the Georgetown University Law Center, attorney at the Federal Bureau of Investigation, and former Counsel to the President’s Intelligence Oversight Board. The views expressed in this paper are my personal views and do not necessarily represent the views of any person or entity, including the United States Government. Nothing in the contents of this article should be construed as implying United States Government authentication of information. I would like to thank Professor David Koplow, Professor Laura Donohue, Professor Mary DeRosa, Robert Litt, my colleagues, especially Karen Davis Miller, and my husband, Jonathan Sills, for their valuable and insightful comments. I am grateful to Professor Donohue and Susan Gibson for creating the fellowship program between the Georgetown University Law Center and the United States Intelligence Community. I also appreciate the dedication of the editorial staff of the National Security Law Journal, Antonin Scalia Law School, George Mason University, particularly Chelsea Smith, Anna Miller, Alexandra Diaz, Richard Sterns, and Xue Franco, for their tremendous work on this article.

*enactment of the USA FREEDOM Act, the FISC already has certified one known question of law to the Foreign Intelligence Surveillance Court of Review (“FISCR” or “FISA Court of Review”).*

*Appellate review of difficult legal issues, through the use of certified question jurisdiction, may lead to greater public confidence in the integrity of the FISC and FISCR processes. Certified question jurisdiction will provide further judicial scrutiny of surveillance techniques and broaden the body of decisional law addressing such issues. In light of rapidly evolving technologies, an expanded body of decisional law will guide the executive branch in developing future surveillance programs, the judicial branch in interpreting whether certain surveillance techniques comply with the Constitution and FISA, and the legislative branch in developing laws regarding the scope of surveillance authorities.*

*This article provides a historical overview of the establishment of the FISC and FISCR and the evolution of certified question jurisdiction. Further, this article analyzes the language in the USA FREEDOM Act that authorizes certified question jurisdiction. Moreover, this article contends that certified question jurisdiction complies with Article III of the Constitution and discusses how increased opportunities for appellate review of FISC decisions, through the use of certified question jurisdiction, may help alleviate concerns raised about the integrity of the FISC. Finally, this article explores how a recent FISCR decision, *In re Certified Question of Law*, can guide the FISC and FISCR in determining whether it should certify a question of law to a higher court.*

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## INTRODUCTION

The Foreign Intelligence Surveillance Court (“FISC” or “FISA Court”) authorizes some of the most vital national security activities within our country. The FISC considers government requests to conduct electronic surveillance, engage in physical searches, collect business records, and carry out other investigative techniques for foreign intelligence purposes.<sup>1</sup> In deciding these important and often complex matters, the FISC regularly balances individual privacy interests with the need to safeguard individuals in our country. These

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<sup>1</sup> UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT, <http://www.fisc.uscourts.gov> (“The Court entertains applications made by the United States Government for approval of electronic surveillance, physical search, and certain other forms of investigative actions for foreign intelligence purposes.”).

are difficult issues. And yet, while the FISC must frequently decide such fundamental matters impacting both privacy rights and national security interests, until recently, few opportunities for appellate review of FISC decisions existed. Congress addressed the absence of meaningful appellate review in the USA FREEDOM Act.<sup>2</sup> Specifically, the USA FREEDOM Act, enacted on June 2, 2015,<sup>3</sup> amended the Foreign Intelligence Surveillance Act (“FISA”) of 1978 to include, for the first time, certified question jurisdiction.<sup>4</sup> By amending FISA to include certified question jurisdiction, the USA FREEDOM Act increases the opportunities for appellate review of decisions issued by the FISC and the Foreign Intelligence Surveillance Court of Review (“FISCR” or “FISA Court of Review”).<sup>5</sup>

Certified question jurisdiction allows one court to ask another court to clarify a question of law, “the resolution of which will assist the certifying court in reaching a judgment in a case pending before it.”<sup>6</sup> FISA, as amended by the USA FREEDOM Act, authorizes the

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<sup>2</sup> Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 or the USA FREEDOM Act of 2015, H.R. Res. 2048, 114th Cong. (2015) (enacted).

<sup>3</sup> *Id.*

<sup>4</sup> 50 U.S.C. § 1803(j), (k) (2015). Certified question jurisdiction is one of many reforms that were included in the enactment of the USA FREEDOM Act. This paper focuses on certified question jurisdiction. Other modifications to FISA are generally beyond the scope of this paper. See Benjamin Wittes, Jodie Liu, *So What’s in the New USA Freedom Act, Anyway?*, LAWFARE (May 14, 2015, 11:51 PM), <https://www.lawfareblog.com/so-whats-new-usa-freedom-act-anyway>.

<sup>5</sup> PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, RECOMMENDATIONS ASSESSMENT REPORT 6 (Feb. 5, 2016) [hereinafter PCLOB, RECOMMENDATIONS ASSESSMENT REPORT]. Overall, the PCLOB noted that all of its recommendations “have been implemented in full or in part, or the relevant government agency has taken significant steps toward adoption and implementation.” *Id.* at 1.

<sup>6</sup> Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification*, 78 GEO. WASH. L. REV. 1310, 1315 (2009) (citing James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 1-2 (1949)).

FISC, after issuing an order, to certify questions of law to the FISC.<sup>7</sup> Similarly, FISA, as amended, allows the FISC to certify questions of law for review by the Supreme Court.<sup>8</sup> Prior to the enactment of the USA FREEDOM Act, concerns were raised about the lack of appellate review of FISC decisions.<sup>9</sup> Some critics believed that FISC judges might incorrectly interpret the law, and without appellate review, the erroneous interpretations could be perpetuated.<sup>10</sup> Others believed that the dearth of appellate review of FISC decisions weakened the integrity of the FISC.<sup>11</sup> Certified question jurisdiction will provide, and indeed already has provided, greater opportunities for appellate review.<sup>12</sup> This is critical, as the FISC routinely decides serious matters that are often at the intersection between individual privacy rights and the safety of the American public. Moreover, and importantly, these FISC and possibly Supreme Court decisions will add to the body of decisional law addressing the collection of information pursuant to FISA. Once these decisions are issued, FISC judges, who serve on a rotating basis, will be able to refer to them for guidance. Likewise, an expanded body of decisional law will provide the executive branch

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<sup>7</sup> 50 U.S.C. § 1803(j) (2015).

<sup>8</sup> 50 U.S.C. § 1803(k) (2015).

<sup>9</sup> See, e.g., Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 6, 2013, at A1 (“Unlike the Supreme Court, the FISA court hears from only one side in the case — the government — and its findings are almost never made public. A Court of Review is empaneled to hear appeals, but that is known to have happened only a handful of times in the court’s history, and no case has ever been taken to the Supreme Court.”).

<sup>10</sup> ELIZABETH GOITEIN & FAIZA PATEL, WHAT WENT WRONG WITH THE FISA COURT 31 (Brennan Center for Justice, 2015) (With little chance for appellate review of FISC decisions in a non-adversarial process, the Brennan Center believed that the “chances that FISA Court judges will misinterpret the law — and perpetuate that misinterpretation in subsequent decisions — [are] high.”).

<sup>11</sup> PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, 187 (Jan. 23, 2014) [hereinafter PCLOB, SECTION 215 AND FISC REPORT].

<sup>12</sup> *In re* Certified Question of Law, Docket No. 16-01 (FISA Ct. Rev. 2016).

with further judicial guidance regarding the acquisition of information under FISA. In light of rapidly changing technologies, this judicial guidance will aid the executive branch in developing future surveillance programs.<sup>13</sup>

This Article is divided into six parts. Part I provides an overview of the establishment of the FISC and FISCR. Part I also considers outside events that precipitated a review of the FISC's structure with a focus on the evolution of certified question jurisdiction. Part II discusses how certified question jurisdiction is used in the Supreme Court and federal appellate courts. Part III analyzes the language in the USA FREEDOM Act that provides for certified question jurisdiction. Part IV contends that certified question jurisdiction complies with the constitutional mandates of Article III of the Constitution. Part V discusses three FISCR opinions, including a recently released FISCR opinion addressing a certified question of law from the FISC, *In re Certified Question of Law*.<sup>14</sup> Part V also explains, using the three FISCR decisions as examples, how increased appellate review of FISC decisions may help alleviate concerns raised about the integrity of the FISC. Finally, Part VI explores how *In re Certified Question of Law* can guide the FISC and FISCR in determining whether it should certify a question of law to a higher court.

## I. OVERVIEW OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

### A. *Background of the FISC*

Prior to the enactment of FISA in 1978, the executive branch conducted surveillance for foreign intelligence purposes under

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<sup>13</sup> See, e.g., *United States v. Jones*, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring).

<sup>14</sup> *In re Certified Question of Law*, Docket No. 16-01 (FISA Ct. Rev. 2016).

presidential authorities pursuant to Article II of the Constitution.<sup>15</sup> Judicial approval was not required for the executive branch to acquire such information.<sup>16</sup> In the early 1970s, evidence that the executive branch had been misusing its intelligence and law enforcement authorities led Congress to investigate executive branch activities.<sup>17</sup> In 1975, the Senate established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, known as the “Church Committee,” to perform a comprehensive review of intelligence community activities.<sup>18</sup> The Church Committee released a series of reports documenting the executive branch’s misuses of its intelligence authorities within the United States.<sup>19</sup> Meanwhile, the Supreme Court, in *United States v. U.S. District Court (Keith)*, while determining that the Fourth Amendment warrant

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<sup>15</sup> See e.g., *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 308 (1972); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir.1973), *cert. denied*, 415 U.S. 960 (1974); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974), *cert. denied sub nom. Ivanov v. United States*, 419 U.S. 881 (1974); *United States v. Truong Dinh Hung*, 629 F.2d 908, 914-15 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

<sup>16</sup> PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 3. “Congress created the FISA court in 1978 in response to concerns about the abuse of electronic surveillance. This represented a major restructuring of the domestic conduct of foreign intelligence surveillance, with constitutional implications. Prior to then, successive Presidents had authorized national security wiretaps and other searches solely on the basis of their executive powers under Article II of the Constitution.” *Id.* at 13.

<sup>17</sup> STRENGTHENING INTELLIGENCE OVERSIGHT, 3 (Michael German, Ed., Brennan Ctr. for Justice, 2015).

<sup>18</sup> *Id.*

<sup>19</sup> S. Rep. No. 94-755, at 138 (1976). The Church Committee revealed that the Central Intelligence Agency had construed its authorities to investigate “domestic groups whose activities, including demonstrations, have potential, however remote, for creating threat to CIA installations, recruiters, or contractors.” *Id.* The committee further reported that the Federal Bureau of Investigation had engaged in illicit strategies of using “media contacts to ridicule and otherwise discredit” activists, including Dr. Martin Luther King, Jr., Stokely Carmichael, and Elijah Muhammad. *Id.* at 87.

requirement applied to collection of intelligence related to domestic security, left open the question of the scope of the President's surveillance authorities with respect to collecting foreign intelligence information inside our country or abroad.<sup>20</sup> Against this backdrop of misused authorities and open constitutional questions regarding the collection of foreign intelligence information within the United States, the Foreign Intelligence Surveillance Act was enacted in 1978.

As part of FISA, Congress established the FISC.<sup>21</sup> The FISC is comprised of 11 federal district court judges who are designated to serve by the Chief Justice of the Supreme Court.<sup>22</sup> FISC judges serve for a maximum of seven years and their "terms are staggered to ensure continuity on the Court."<sup>23</sup> When the FISC was created, its primary responsibility was to consider executive branch applications for authorization to conduct electronic surveillance in the United States.<sup>24</sup> Since the enactment of FISA, and largely in response to outside events, the scope of the FISC's review of surveillance techniques has increased as the acquisition of foreign intelligence governed by FISA has expanded.<sup>25</sup> For example, FISA was amended in 1994 to include the acquisition of foreign intelligence information through physical

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<sup>20</sup> *Keith*, 407 U.S. at 308.

<sup>21</sup> 50 U.S.C. § 1803(a) (2015); see Letter from Judge Reggie Walton, Presiding Judge of the FISC, to Chairman Leahy, Committee on the Judiciary, U.S. Senate (July 29, 2013), <http://www.fisc.uscourts.gov/sites/default/files/Leahy.pdf>.

<sup>22</sup> 50 U.S.C. § 1803(a)(1) (2015).

<sup>23</sup> *About the Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT, <http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court> (last visited Feb. 27, 2017) ("Each judge serves for a maximum of seven years and their terms are staggered to ensure continuity on the Court"); see 50 U.S.C. § 1803(d) (2015).

<sup>24</sup> See Jonathan W. Gannon, *From Executive Order to Judicial Approval: Tracing the History of Surveillance of U.S. Persons Abroad in Light of Recent Terrorism Investigations*, 6 GEO. J. OF NAT'L SECURITY L. & POL'Y 59, 71-72 (2012).

<sup>25</sup> *Id.*



searches.<sup>26</sup> In 1998, FISA was modified to include the collection of foreign intelligence information of certain business records and information from pen register and trap and trace devices.<sup>27</sup> In 2001, Congress expanded the scope of the business records provision through Section 215 of the USA PATRIOT Act.<sup>28</sup> In 2008, the FISA Amendments Act (“FAA”) modified FISA to include acquisition of foreign intelligence information of non-U.S. persons reasonably believed to be located outside of the United States without seeking individualized FISC orders for each such acquisition.<sup>29</sup>

Concurrent with the FISC’s creation, Congress established the Foreign Intelligence Surveillance Court of Review to review decisions from the FISC.<sup>30</sup> Three federal district or appellate court judges, who are designated by the Chief Justice of the Supreme Court, compose the FISC.<sup>31</sup> FISC judges serve for a maximum of seven years.<sup>32</sup> Since its creation, the FISC has issued only three publicly known decisions. These decisions include *In re Sealed Case*, in which the government appealed an adverse decision to the FISC;<sup>33</sup> *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, in which a communications service provider challenged a directive issued by the government by appealing to the FISC;<sup>34</sup> and, following the

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<sup>26</sup> See ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RL30465, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 39 (2007).

<sup>27</sup> Pub. L. No. 105-272, § 602, 112 Stat. 2396, 241 (1998); see Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015).

<sup>28</sup> Pub. L. No. 107-56, § 215, 115 Stat. 272, 287–88 (2001) (codified at 50 U.S.C. § 1861 (2012)); see Vladeck, *supra* note 27.

<sup>29</sup> 50 U.S.C. § 1881(a) (2008).

<sup>30</sup> 50 U.S.C. § 1803(b) (2015).

<sup>31</sup> *Id.*

<sup>32</sup> 50 U.S.C. § 1803(d) (2015).

<sup>33</sup> *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

<sup>34</sup> *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008).

enactment of the USA FREEDOM Act, *In re Certified Question of Law*, in which the FISC certified a question of law to the FISC.<sup>35</sup>

*B. Events Leading to a Review of the Structure of the FISC*

On June 5, 2013, based upon Edward Snowden's illegal disclosures,<sup>36</sup> *The Guardian* reported that the National Security Agency ("NSA") was "collecting the telephone records of millions" of customers of telecommunications providers.<sup>37</sup> According to *The Guardian*, the communications records of Americans were being collected "indiscriminately and in bulk – regardless of whether they are suspected of any wrongdoing."<sup>38</sup> *The Guardian* reported that the bulk collection program was authorized pursuant to a top secret court

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<sup>35</sup> *In re Certified Question of Law*, Docket No. 16-01 (FISA Ct. Rev. 2016).

<sup>36</sup> The Snowden disclosures have been described as "the most damaging leaks in U.S. intelligence history," and "the most destructive hemorrhaging of American secrets in the history of the Republic." Peter Baker, *Moves to Curb Spying Help Drive the Clemency Argument for Snowden*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/us/moves-to-curb-spying-help-drive-the-clemency-argument-for-snowden.html> (quoting John McLaughlin and Michael V. Hayden). The House Permanent Select Committee on Intelligence ("HPSCI") conducted a comprehensive review of Snowden's unauthorized disclosures and concluded that "Snowden caused tremendous damage to national security, and the vast majority of the documents he stole have nothing to do with programs impacting individual privacy interests—they instead pertain to military, defense, and intelligence programs of great interest to America's adversaries." H. PERMANENT SELECT COMM. ON INTELLIGENCE, 114TH CONG., EXEC. SUMMARY OF REV. OF THE UNAUTHORIZED DISCLOSURES OF FORMER NAT'L SECURITY. AGENCY CONTRACTOR EDWARD SNOWDEN 1 (Comm. Print 2016). HPSCI further determined that Snowden "handed over secrets that protect American troops overseas and secrets that provide vital defenses against terrorists and nation-states. Some of Snowden's disclosures exacerbated and accelerated existing trends that diminished the IC's capabilities to collect against legitimate foreign intelligence targets, while others resulted in the loss of intelligence streams that had saved American lives." *Id.*

<sup>37</sup> Glenn Greenwald, *NSA Collecting Phone Records of Millions Of Verizon Customers Daily*, THE GUARDIAN (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>38</sup> *Id.*

order issued by the FISC.<sup>39</sup> In addition to *The Guardian*, other media outlets published similar reports. For example, *The New York Times* reported that the “Obama administration is secretly carrying out a domestic surveillance program under which it is collecting business communications records involving Americans” under Section 215 of the USA PATRIOT Act amendments to FISA.<sup>40</sup> Likewise, *The Washington Post* reported that the “revelation has led to a renewed debate over the legality and policy merits of indiscriminate government surveillance of Americans.”<sup>41</sup>

Disclosure of the Section 215 bulk collection program, and the fact that it was authorized by the FISC, brought increased scrutiny of the FISC itself. Concerns were raised that the FISC was creating “a secret body of law” where the government was the only party who appeared before the court.<sup>42</sup> Critics were also troubled by the rarity of appellate review of FISC decisions.<sup>43</sup> For example, James G. Carr, a senior federal judge for the Northern District of Ohio who served on the FISC from 2002 to 2008, believed that attorneys should be appointed in FISC proceedings for “novel legal assertions.”<sup>44</sup> In his opinion, an adversarial proceeding where novel issues were presented

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<sup>39</sup> *Id.*; Charlie Savage & Edward Wyatt, *U.S. Is Secretly Collecting Records of Verizon Calls*, N.Y. TIMES (June 5, 2013), <http://www.nytimes.com/topic/subject/foreign-intelligence-surveillance-act-fisa>.

<sup>40</sup> Savage & Wyatt, *supra* note 39; 50 U.S.C. § 1861(a)(1) (2013); 50 U.S.C. § 1861(b)(2)(A) (2013); *see, e.g.*, *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 795 (2d Cir. 2015); 50 U.S.C. § 1861 (2015).

<sup>41</sup> Timothy B. Lee, *Everything You Need to Know About The NSA's Phone Records Scandal*, WASH. POST (June 6, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/06/everything-you-need-to-know-about-the-nsa-scandal/>.

<sup>42</sup> Lichtblau, *supra* note 9.

<sup>43</sup> *Id.*

<sup>44</sup> James G. Carr, *A Better Secret Court*, N.Y. TIMES (July 22, 2013), <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html>; *see also* Vladeck, *supra* note 27 (“One of the “more common” suggested “reforms to United States surveillance law and policy has been to provide for more adversarial participation before the FISC.”).

“would result in better judicial outcomes.”<sup>45</sup> Moreover, Judge Carr believed that it was equally important for the appointed lawyer to have the ability to appeal decisions to the FISC and Supreme Court.<sup>46</sup> He criticized the fact that, under the procedural authorities at that time, no opportunity for such review existed because only the government could appeal a FISC decision.<sup>47</sup>

A report issued by the Brennan Center for Justice echoed similar concerns.<sup>48</sup> The Brennan Center maintained that an adversarial system ensures that different viewpoints are heard in judicial proceedings.<sup>49</sup> By considering more than one perspective, courts are in a better position to reach more accurate decisions.<sup>50</sup> With respect to appellate review of FISC decisions, the Brennan Center wrote: “Of course, it is well understood that judges make mistakes; that is why the federal judicial system has two levels of appeal. . . . In the FISA context, however, there is no opportunity to appeal an erroneous grant of an application, because the government is generally the only party.”<sup>51</sup> With little chance for appellate review of FISC decisions in a non-adversarial process, the Brennan Center believed that there was a high probability that FISC judges would “misinterpret the law — and perpetuate that misinterpretation in subsequent decisions.”<sup>52</sup>

These were not the only concerns raised about the FISC.<sup>53</sup> Critics also believed that the FISC suffered from a lack of

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<sup>45</sup> See Carr, *supra* note 44.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*; see also Vladeck, *supra* note 27.

<sup>48</sup> See generally ELIZABETH GOITEIN & FAIZA PATEL, WHAT WENT WRONG WITH THE FISA COURT (Brennan Center for Justice, 2015).

<sup>49</sup> *Id.* at 31.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See, Carol D. Leonnig et al., *Secret-Court Judges Upset at Portrayal of “Collaboration” with Government*, WASH. POST (June 29, 2013),

transparency.<sup>54</sup> They found it problematic that the vast majority of FISC decisions were classified and believed such secrecy “hampers democratic self-government and sound policymaking.”<sup>55</sup> In a similar vein, critics maintained that the FISC was a “rubber stamp” court because it denied only a “miniscule fraction” of government requests.<sup>56</sup> To support this assertion, critics cited the FISC’s high approval rates of the government’s surveillance requests.<sup>57</sup> They believed that “the FISC had failed to serve as a meaningful check on the Executive Branch, at least largely because it had too easily accepted and signed off on the government’s debatable (if not dubious) interpretations of the relevant statutory authorities.”<sup>58</sup>

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[https://www.washingtonpost.com/politics/secret-court-judges-upset-at-portrayal-of-collaboration-with-government/2013/06/29/ed73fb68-e01b-11e2-b94a-452948b95ca8\\_story.html](https://www.washingtonpost.com/politics/secret-court-judges-upset-at-portrayal-of-collaboration-with-government/2013/06/29/ed73fb68-e01b-11e2-b94a-452948b95ca8_story.html) (“Some critics say the court is a rubber stamp for government investigators because it almost never has turned down a warrant application.”).

<sup>54</sup> Goitein and Patel, *supra* note 10, at 46.

<sup>55</sup> *Id.*

<sup>56</sup> Herb Lin, *On the FISA Court and "Rubber Stamping,"* LAWFARE (Apr. 13, 2015, 2:07 PM), <https://www.lawfareblog.com/fisa-court-and-rubber-stamping>; Michael Glennon, *National Security and Double Government*, 5 HARV. NAT'L SECURITY J. 1, 100 (2014) (The FISC “approved 99.9% of all warrant requests between 1979 and 2011.”).

<sup>57</sup> See, e.g., Goitein & Patel, *supra* note 10.

<sup>58</sup> Vladeck, *supra* note 27, at 1161. Some critics question whether certain of the FISC’s actions are permissible under Article III of the U.S. Constitution. For example, these critics believe that the FISC’s “move from adjudicating applications for surveillance in individual cases to approving broad programs based on vague standards arguably runs afoul of Article III of the Constitution.” Goitein & Patel, *supra* note 10, at 29; accord Vladeck, *supra* note 27, at 1178 (“[T]he far closer question is whether the FISC is also acting consistently with Article III when it issues production orders under § 215 of the USA PATRIOT Act, or when it issues directives under § 702 of FISA as provided in the FISA Amendments Act.”). Professor Vladeck noted that the “harder question” was “whether there is an Article III case or controversy *in the first place* when the government makes applications to the FISA Court.” Steve Vladeck, *Article III, Appellate Review, and the Leahy Bill: A Response to Orin Kerr*, LAWFARE

To address some of these concerns, a bipartisan group of 13 Senators asked the Privacy and Civil Liberties Oversight Board (“PCLOB”), a bipartisan oversight agency within the executive branch,<sup>59</sup> to investigate the Section 215 program. In connection with this review of the Section 215 program, House Minority Leader Nancy Pelosi requested that the PCLOB review the operations and procedures of the FISC.<sup>60</sup> Pelosi encouraged the PCLOB to provide recommendations on how to improve the FISC to help the “American public to better understand FISA Court decisions and the appropriateness of its interpretation of relevant case law.”<sup>61</sup> In addition to Congress, President Barack Obama believed that the PCLOB was the appropriate board to review the Section 215 program.<sup>62</sup>

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(July 31, 2014, 10:54 AM), <https://www.lawfareblog.com/article-iii-appellate-review-and-leahy-bill-response-orin-kerr>. Whether there is an Article III case or controversy each time that the government submits an application or request for certification is a complex issue that is beyond the scope of this paper. For the purposes of this paper, it is assumed that when the government submits an application or certification to the FISC, it satisfies the Article III case or controversy requirement.

<sup>59</sup> The PCLOB’s primary mission is to ensure that the executive branch’s efforts to protect the United States from terrorist activities are balanced with “the need to protect privacy and civil liberties.” PRIVACY AND CIVIL LIBERTIES BOARD, *About the Board*, <https://www.pclob.gov/about-us.html> (last visited Feb. 20, 2017). It was established by the Implementing Recommendations of the 9/11 Commission Act, Pub. L. 110-53, signed into law in August 2007 (codified at 42 U.S.C. § 2000ee). *Id.*

<sup>60</sup> Letter from Nancy Pelosi, Minority Leader of the U.S. House of Representatives, to David Medine, PCLOB Chairman (July 11, 2013), <https://www.pclob.gov/library/Letter-Pelosi.pdf>.

<sup>61</sup> *Id.*

<sup>62</sup> Ezra Mechaber, *President Obama Holds a Press Conference* (Aug. 9, 2013), <https://www.whitehouse.gov/blog/2013/08/09/president-obama-holds-press-conference> (During an August 9, 2013, press conference, President Obama stated: “I’ve asked the Privacy and Civil Liberties Oversight Board to review where our counterterrorism efforts and our values come into tension.”).

*C. PCLOB Recommendation with Respect to Appellate Review of FISC Decisions*

As directed by Congress and President Obama, the PCLOB conducted a comprehensive review of the Section 215 program and the FISC.<sup>63</sup> In its review of the FISC, the PCLOB gave significant weight to two factors.<sup>64</sup> First, the PCLOB recognized that the FISC, its judges, their staff, and the government lawyers who appear before the court “operate with integrity and give fastidious attention and review” to surveillance applications.<sup>65</sup> Second, despite this favorable observation, the PCLOB believed that it was also “critical to the integrity of the process that the public have confidence in its impartiality and rigor.”<sup>66</sup> To improve the integrity of the judicial process, the PCLOB recommended that the structure of the FISC could be improved by: (1) providing a greater range of views and legal arguments to the FISC as it considers novel and significant issues; (2) facilitating appellate review of such decisions; and (3) providing increased opportunity for the FISC to receive technical assistance and legal input from outside parties.<sup>67</sup>

The PCLOB believed that these proposed FISC reforms would help enhance public confidence in the integrity of the FISC’s procedures.<sup>68</sup> With respect to facilitating appellate review of FISC decisions, the PCLOB made the following recommendation: Congress

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<sup>63</sup> PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 2.

<sup>64</sup> *Id.* at 182.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (noting that “The PCLOB heard from three judges who formerly served on the FISC. Judge James Robertson, who served on the FISC from 2002 through 2005, participated in the Board’s July 9, 2013, public workshop; Judge James Carr, who served on the FISC from 2002 through 2008, participated in our November 4, 2013, public hearing; Judge John Bates, who served on the Court from 2006 to February 2013 and as its presiding judge from 2009 to 2013, met with the Board on October 16, 2013.”).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 14.

should enact legislation to expand the opportunities for appellate review of FISC decisions by the FISCRC and for review of FISCRC decisions by the Supreme Court of the United States.<sup>69</sup>

In setting forth this recommendation, the PCLOB recognized that the opportunity for appellate review of FISC decisions was much more limited than appellate review of federal courts decisions.<sup>70</sup> Indeed, the PCLOB observed that, at the time it issued its report, only two FISC decisions had been appealed to the FISCRC since the creation of the FISC and FISCRC.<sup>71</sup> The PCLOB noted that almost all advocates of FISC reform, including judges who have served on the court, agree that there should be increased opportunities for appellate review of FISC and FISCRC decisions.<sup>72</sup> The PCLOB believed that providing for “greater appellate review of FISC and FISCRC rulings will strengthen the integrity of judicial review under FISA.”<sup>73</sup>

To address these concerns, the PCLOB proposed two ways in which a “special advocate” could seek appellate review of a FISC decision: (1) “by directly filing a petition for review with the FISCRC of orders that the Special Advocate believes are inconsistent with FISA or the Constitution;” or (2) “by requesting that the FISC certify an appeal of its order.”<sup>74</sup> With respect to this second suggestion, *i.e.*, certified question jurisdiction, the PCLOB contemplated that Congress could enable FISC judges to certify their decisions to the FISCRC.<sup>75</sup> Further, the PCLOB suggested that Congress could modify 28 U.S.C. §1254(2) to add the FISCRC as a court authorized to certify a

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<sup>69</sup> *Id.* at 187.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 199. Subsequent to the PCLOB’s report, the FISCRC publicly released a third decision, *In re Certified Question of Law*, Docket No. 16-01 (FISA Ct. Rev. 2016).

<sup>72</sup> PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 187

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 188.



question of law to the Supreme Court for its review.<sup>76</sup> The PCLOB believed that it should be within the FISC or FICSR's discretion whether to certify a question for review.<sup>77</sup> Moreover, in making its recommendation, the PCLOB assumed that, similar to "traditional litigation in federal court, a FISC order would take effect immediately unless the court granted a stay of its order."<sup>78</sup> Accordingly, if a FISC decision were appealed or if the FISC certified a question for review by the FICSR, FISC-approved authorization to conduct surveillance should typically be allowed to begin pending further review by the higher court.<sup>79</sup>

The idea of certified question jurisdiction was discussed by Professor Stephen Vladeck during a public hearing conducted by the PCLOB on November 4, 2013.<sup>80</sup> At the hearing, Professor Vladeck noted that certified question jurisdiction could be a possible option for appellate review of FISC decisions.<sup>81</sup> Certified question jurisdiction would permit the FISC to certify "particularly difficult legal questions to FICSR."<sup>82</sup> He believed that such certification could be modeled on 28 U.S.C. § 1254(2), which permits federal appellate courts to certify legal questions to the Supreme Court.<sup>83</sup> In addition, Professor Vladeck advocated that 28 U.S.C. § 1254(2) could be modified to permit the FICSR to certify questions to the Supreme Court "if there were cases

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<sup>76</sup> *Id.*

<sup>77</sup> PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 188.

<sup>78</sup> *Id.* at 189.

<sup>79</sup> *Id.*

<sup>80</sup> *Privacy and Civil Liberties Oversight Board: Public Hearing on Consideration of Recommendations for Change: The Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, 239-40 (Nov. 4, 2013) (statement of Stephen Vladeck, then a professor at American University Washington College of Law and now at the University of Texas School of Law), <https://www.pclob.gov/library/20131104-Transcript.pdf>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 239-40.

<sup>83</sup> *Id.*

where FISCER thought it was a sufficiently important question to raise it to the justices' attention.”<sup>84</sup> He recognized, however, that the Supreme Court has not answered a certified question since 1981, but he offered that “at least FISCER would have the ability to try to get their attention.”<sup>85</sup>

## II. CERTIFIED QUESTION JURISDICTION IN FEDERAL APPELLATE COURTS AND THE SUPREME COURT

To understand the significance of certified question jurisdiction with respect to FISC and FISCER decisions, this article will first discuss how this procedural tool is used in other courts. Certified question jurisdiction essentially allows “one court to put questions of law to another court, the resolution of which will assist the certifying court in reaching a judgment in a case pending before it.”<sup>86</sup> A statute providing for certified question jurisdiction was first enacted in 1802, allowing federal circuit court judges to certify questions to the Supreme Court.<sup>87</sup> This statute provided in pertinent part that the Supreme Court “shall . . . finally decide[ ]’ questions put to it by circuit court judges unable to reach agreement on the matter.”<sup>88</sup>

For approximately 90 years, certification was the only statutory procedure by which cases could advance to the Supreme Court.<sup>89</sup> Even after other ways to reach the Supreme Court emerged, certification was frequently used until the mid-1930s. For example, between 1927 and 1936, 72 questions from federal appellate courts

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<sup>84</sup> *Id.* at 259-60.

<sup>85</sup> *Id.* at 260.

<sup>86</sup> Tyler, *supra* note 6, at 1319-20.

<sup>87</sup> See 28 U.S.C. § 1254(2) (1988).

<sup>88</sup> Tyler, *supra* note 6, at 1323 (quoting Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159); see also Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 486 (2010) (quoting Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159).

<sup>89</sup> Nielson, *supra* note 88, at 485.

were certified for review by the Supreme Court.<sup>90</sup> After the mid-1930s, however, the number of questions certified to the Supreme Court decreased substantially. The following decade, between 1937 and 1946, a total of 20 cases were successfully certified.<sup>91</sup> Since 1946, the Supreme Court has only accepted four certified questions, and it has not accepted a case for certification since 1981.<sup>92</sup> Currently, cases certified to the Supreme Court are “nearly unheard of.”<sup>93</sup> In fact, Professor Aaron Nielson of the J. Reuben Clark Law School, Brigham Young University Law, pronounced in 2010 that certification to the Supreme Court was “dead” with “little hope of resurrection.”<sup>94</sup>

Although declared “dead” in legal scholarship,<sup>95</sup> the procedure for certifying questions to the Supreme Court remains viable law. The process for certification is now codified at 28 U.S.C. § 1254(2) and provides:

By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.<sup>96</sup>

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<sup>90</sup> *Id.* at 486 (quoting Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1710 (2000)).

<sup>91</sup> *Id.* at 486-87 (citing James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 25-26 n.99 (1949)).

<sup>92</sup> *Id.* at 486. (citing Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1712 (2000)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 487.

<sup>95</sup> *Id.* at 485; Tyler, *supra* note 6, at 1312.

<sup>96</sup> 28 U.S.C. § 1254(2) (1988).

Many agree that certifying questions to the Supreme Court is a valuable procedural mechanism.<sup>97</sup> As noted by Professor Nielson, “Supreme Court precedent . . . can be opaque. In such circumstances, why not just let appellate courts ask the Supreme Court what the law is?”<sup>98</sup> Likewise, Professor Amanda Tyler of Berkeley Law believes that certification to the Supreme Court “deserves a good dusting off.”<sup>99</sup> She emphasizes that many federal court judges believe that they receive insufficient guidance from the Supreme Court on certain legal issues.<sup>100</sup> Certification would allow federal appellate judges to request direction from the Supreme Court on legal matters that they believe are significant and unresolved.<sup>101</sup>

Justice John Paul Stevens agreed with the importance of certification as a procedural tool. When the Supreme Court dismissed a request for certification in 2009, Justice Stevens reflected in his dissenting opinion:

The certification process has all but disappeared in recent decades. The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification.

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<sup>97</sup> Nielson, *supra* note 88, at 491 (quoting *United States v. Seale*, 558 U.S. 985 (2009) (Stevens, J., dissenting from dismissal of certified question)).

<sup>98</sup> Nielson, *supra* note 88, at 491.

<sup>99</sup> Tyler, *supra* note 6, at 1312. Professor Tyler further wrote: “I recommend that the courts of appeals consider reviving certification by dusting off this tool and using it to place before the Supreme Court those issues that they believe warrant the Court’s timely attention. In turn, I suggest that the Supreme Court abandon its practice of routinely dismissing such requests out of hand and take more seriously invitations from appellate judges to provide direction on matters of great concern to them.” *Id.* at 1319.

<sup>100</sup> Tyler, *supra* note 6, at 1315 (citing Honorable Gerald B. Tjoflat, Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, Remarks at The George Washington University Law School Conference: Re- thinking the Law Governing the Structure and Operation of the Supreme Court: Altering the Certiorari Process (Nov. 20, 2009) (transcript on file with The George Washington Law Review)).

<sup>101</sup> *Id.* at 1326.

Section 1254(2) and this Court's Rule 19 remain part of our law because the certification process serves a valuable, if limited, function. We ought to avail ourselves of it in an appropriate case.<sup>102</sup>

Justice Stevens worried that the Supreme Court “has, in effect, abandoned this important means by which lower court judges can prod the Court to take up issues of great importance to the lower courts.”<sup>103</sup> Justice Stevens was not alone in his assessment of the value of certified question jurisdiction. Justice Oliver Wendell Holmes, Jr. observed that “[certified] questions are to be encouraged as a mode of disposing of cases in the least cumbersome and most expeditious way.”<sup>104</sup> Likewise, Chief Justice William Howard Taft believed that “certification would serve as a means pursuant to which the courts of appeals could exercise their own ‘discretion’ to ‘place’ particular legal issues before the Supreme Court.”<sup>105</sup>

In addition to procedures authorizing federal appellate courts to certify questions to the Supreme Court, most states have adopted certification procedures that allow a federal court to request the State’s highest court to resolve a novel state-law issue.<sup>106</sup> The state’s highest court has the option of deciding whether to resolve the certified question with the understanding that the litigants will return to federal

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<sup>102</sup> *United States v. Seale*, 558 U.S. 985, 986 (2009).

<sup>103</sup> Tyler, *supra* note 6, at 1321 (citing *Seale*, 558 U.S. 985, 986 (Stevens, J., dissenting from dismissal of certified question)).

<sup>104</sup> Tyler, *supra* note 6, at 1323 (quoting *Chi., Burlington & Quincy Ry. v. Williams*, 214 U.S. 492, 495-96 (1909) (Holmes, J., dissenting)).

<sup>105</sup> Tyler, *supra* note 6, at 1324 (citing *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10,749 Before the H. Comm. on the Judiciary*, 67th Cong. 20 (1922)).

<sup>106</sup> *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (citing Beth A. Hardy, *Federal Courts—Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217 (1990)); see Deborah J. Challener, *Interactive Federalism and the Certification of State Law Questions in Diversity Cases*, MISS. COLL. SCH. OF LAW RESEARCH PAPER 1, 31 (2009).

court to continue their proceedings.<sup>107</sup> The evolution of this process is explained as follows:

Certification developed in this country in response to difficulties arising out of the 1938 case *Erie Railroad Co. v. Tompkins*. *Erie* demands that a federal court decide substantive state law questions exactly as a state court would. Obeying *Erie* is straightforward if state law is clear, but predicting how the state supreme court would decide an unclear issue is neither easy nor value-free.<sup>108</sup>

In *Clay v. Sun Insurance Office Ltd.*, a 1960 decision, the Supreme Court encouraged federal courts to certify “uncertain” or “unresolved” state law questions to a state’s highest court.<sup>109</sup> The *Clay* decision “touched off a steady movement toward consensus: the Uniform Certification of Questions of Law Act appeared in 1967, to be adopted by eighteen states, the District of Columbia, and Puerto Rico over the following twenty years.”<sup>110</sup> Currently, all states except North Carolina have adopted certification procedures.<sup>111</sup>

Certification of questions to a state’s highest court is a valuable procedural tool. As Justice Ruth Bader Ginsburg remarked in *Arizonans for Official English v. Arizona*, the certification of a “novel or unsettled” question of state law may provide “authoritative answers

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<sup>107</sup> Eric Eisenberg, *A Divine Comity: Certification (At Last) In North Carolina*, 58 DUKE L.J. 69, 71 (2008). Some certification procedures allow other states’ appellate courts to certify as well. *Id.* (citing W. VA. CODE ANN. § 51-1A-3 (LexisNexis 2000) (allowing interstate certification.)).

<sup>108</sup> *Id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see *Waste Control Specialists, LLC v. Envirocare of Tex., Inc.*, 199 F.3d 781, 785 n.2 (5th Cir. 2000)).

<sup>109</sup> *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960).

<sup>110</sup> Eisenberg, *supra* note 107, at 74.

<sup>111</sup> Eisenberg, *supra* note 107, at 102 (“North Carolina is the only states never to have enacted a certification procedure.”).

by a State's highest court.”<sup>112</sup> She believed that such a certification process plays an important role in “reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.”<sup>113</sup> Likewise, as Justice William Douglas reflected in *Lehman Brothers v. Schein*, the certification process “in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism.”<sup>114</sup> Justice William Rehnquist echoed these same views in his concurrence in *Lehman Brothers*, writing that state certification procedures “are a very desirable means by which a federal court may ascertain an undecided point of state law.”<sup>115</sup>

### III. INCLUSION OF CERTIFIED QUESTION JURISDICTION IN THE USA FREEDOM ACT

The USA FREEDOM Act amended FISA to include, for the first time, certified question jurisdiction.<sup>116</sup> By amending FISA to include certified question jurisdiction, the USA FREEDOM Act increased the opportunities for appellate review of FISC and FISCER decisions.<sup>117</sup> Specifically, FISA now authorizes the FISC, after issuing

<sup>112</sup> *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1977) (quoting *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974)).

<sup>113</sup> *Id.* at 76 (citing Beth A. Hardy *Federal Courts—Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217 (1990)); see *Bellotti v. Baird*, 428 U.S. 132, 148 (1976).

<sup>114</sup> *Lehman Brothers*, 416 U.S. at 391 (citing J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967)); Philip B. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963); Note, *Florida's Interjurisdictional Certification: A Reexamination To Promote Expanded National Use*, 22 U. FLA. L. REV. 21 (1969)).

<sup>115</sup> *Id.* at 394.

<sup>116</sup> *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015*, H.R. Res. 2048, 114th Cong. (2015); 50 U.S.C. § 1803(j), (k) (2015).

<sup>117</sup> PCLOB, RECOMMENDATIONS ASSESSMENT REPORT, *supra* note 5, at 6. Overall, the PCLOB noted that all of its recommendations “have been implemented in full or in

an order, to certify questions of law to the FISC. <sup>118</sup> The Act authorizes the FISC in turn to certify questions of law to the Supreme Court. <sup>119</sup> Certification of questions from the FISC to the Supreme Court is based upon existing procedures for certified questions of law from federal appellate courts to the Supreme Court. <sup>[17] SEP]</sup>

As noted in its legislative history, the USA FREEDOM Act expands the opportunities for appellate review of FISC and FISC decisions through certified question jurisdiction. <sup>120</sup> Congress believed that certified question jurisdiction would enhance the public's trust in the FISC to "get the question right." <sup>121</sup> Congress considered appellate review, including certified question review, an essential safeguard. <sup>122</sup> As explained in the legislative history, appellate review, including certified question review of FISC decisions, "will help ensure that strictures of our Constitution are obeyed in spirit and letter. It will help ensure that programs designed to keep Americans safe can command the respect and trust they need to be effective." <sup>123</sup>

Based upon these beliefs, Congress included certified question jurisdiction in the USA FREEDOM Act as follows:

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part, or the relevant government agency has taken significant steps toward adoption and implementation." *Id.* at 1.

<sup>118</sup> 50 U.S.C. § 1803(j) (2015).

<sup>119</sup> 50 U.S.C. § 1803(k) (2015).

<sup>120</sup> 161 CONG. REC. S3092, S3142 (daily ed. May 20, 2015) (statement of Senator Manchin).

<sup>121</sup> *E.g.*, 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Senator Blumenthal).

<sup>122</sup> 161 CONG. REC. S2772, S2778, (daily ed. May 12, 2015) (statement of Senator Daines) ("The lack of an adversarial process, as well as transparency and effective appellate review, is one of the reasons the USA FREEDOM Act is absolutely necessary.")

<sup>123</sup> 161 CONG. REC. S3092, S3164 (daily ed. May 20, 2015) (statement of Senator Blumenthal).



**(j) Review of FISA court decisions:**

Following issuance of an order under this chapter, a court established under subsection (a) [*i.e.*, FISC] shall certify for review to the court established under subsection (b) [*i.e.*, FISC] any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because of a need for uniformity or because consideration by the court established under subsection (b) would serve the interests of justice. Upon certification of a question of law under this subsection, the court established under subsection (b) may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.<sup>124</sup>

**(k) Review of FISA court of review decisions****(1) Certification**

For purposes of section 1254(2) of Title 28, the court of review established under subsection (b) [*i.e.*, FISC] shall be considered to be a court of appeals.

**(2) Amicus curiae briefing**

Upon certification of an application under paragraph (1), the Supreme Court of the United States may appoint an amicus curiae designated under subsection (i)(1), or any other person, to provide briefing or other assistance.<sup>125</sup>

As provided in the USA FREEDOM Act, only the FISC and the FISC—*not* the litigants—have the authority to certify a

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<sup>124</sup> 50 U.S.C. § 1803(j) (2015). Pursuant to the FISC Rules of Procedures, when “the FISC certifies for review a question of law under 50 U.S.C. § 1803(j), the FISC will certify, by appropriate order, the procedures to be followed.” FISC R. P. 5(b) (MEANS OF REQUESTING RELIEF FROM THE COURT) (Feb. 29, 2016).

<sup>125</sup> 50 U.S.C. § 1803(k) (2015).

question of law to a higher court.<sup>126</sup> Moreover, the FISC and FISCER are afforded broad discretion in determining whether to certify a question of law. For example, the FISC shall certify “any question of law that may affect resolution of the matter in controversy *that the court determines warrants such review* because of a need for uniformity or because consideration by the [FISCER] would serve the interests of justice.”<sup>127</sup> Similarly, the FISCER has complete discretion whether to certify questions to the Supreme Court. As provided in the statute, the FISCER may certify questions of law to the Supreme Court “*as to which instructions are desired.*”<sup>128</sup> Indeed, the legislative history notes that it is within the FISC and FISCER judges’ discretion whether to certify a legal issue to a higher court.<sup>129</sup>

Moreover, the USA FREEDOM Act gives the FISCER or Supreme Court, as applicable, discretion whether to accept or deny consideration of the certified question, whether to only consider the

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<sup>126</sup> The FISC may only certify a “question of law” that “may affect resolution of the matter in controversy.” 50 U.S.C. § 1803(j) (2015). With respect to certifying questions from the FISCER to the Supreme Court, the USA FREEDOM Act requires that the FISCER may only seek certification of questions of law. 50 U.S.C. § 1803(k)(1) (2015) (“For purposes of section 1254(2) of Title 28, the court of review established under subsection (b) shall be considered to be a court of appeals.”).

<sup>127</sup> 50 U.S.C. § 1803(j) (2015) (emphasis added).

<sup>128</sup> 28 U.S.C. § 1254(2) (1988) (emphasis added); *see also* 50 U.S.C. § 1803(k)(1) (2015).

<sup>129</sup> H.R. REP. NO. 114-109, at 25 (2015). In its legislative history, 50 U.S.C. § 1803(j) “authorizes the FISC, *in the judge’s discretion* and following issuance of a FISA order, to certify a question of law to the FISCER if such question of law may affect the resolution of the matter in controversy because of a need for uniformity or to serve the interests of justice. This section also *permits* the FISCER to certify questions of law to the U.S. Supreme Court and authorizes the Supreme Court to appoint an individual to serve as an amicus curiae from among those designated by the FISC and FISCER under this section. This provision is based upon and conforms to existing procedures for certified questions of law from the Federal Courts of Appeals to the U.S. Supreme Court in Section 1254(2) of Title 28, United States Code.” *Id.* (emphasis added).

certified question in and of itself and not the entire matter, or whether to consider the “entire matter in controversy.”<sup>130</sup> The USA FREEDOM Act provides in pertinent part that the reviewing courts “*may* give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.”<sup>131</sup> This language directly mirrors the language in 28 U.S.C. § 1254(2), the statute authorizing federal appellate courts to certify questions to the Supreme Court.

An amicus curiae, or “friend of the court,” may also play a role when the FISC or FISCER seeks to certify a question of law to a higher court. While the decision on whether to appoint an amicus curiae is independent of the certification proceedings, the FISC or FISCER has the discretion to appoint an amicus curiae “to assist such court in the consideration of any application for an order or review that, *in the opinion of the court, presents a novel or significant interpretation of the law*, unless the court issues a finding that such appointment is not appropriate.”<sup>132</sup> As such, while the processes for appointing an amicus curiae and certifying a question are distinct, if the FISC or FISCER believes that the legal issue being certified “presents a novel or significant interpretation of the law,” the FISC or FISCER may appoint one.<sup>133</sup> In addition to this provision, for certifications from the FISCER to the Supreme Court, the USA FREEDOM Act provides that the Supreme Court “*may* appoint an amicus curiae” to assist in the proceedings.<sup>134</sup> These authorities can be summarized as follows:

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<sup>130</sup> 28 U.S.C. § 1254(2) (2015); *see also* 50 U.S.C. § 1803(j), (k) (2015).

<sup>131</sup> 28 U.S.C. § 1254(2) (2015) (emphasis added); *cf.* 50 U.S.C. § 1803(j), (k) (2015).

<sup>132</sup> 50 U.S.C. § 1803(i)(2)(A) (2015). This section is narrower than recommended. The PCLOB recommended that “when a legal question is accepted for review by the FISCER, the Special Advocate would be permitted to participate in the matter, just as in the FISC.” PCLOB, RECOMMENDATIONS ASSESSMENT REPORT, *supra* note 5, at 6.

<sup>133</sup> 50 U.S.C. § 1803(i)(2)(A) (2015).

<sup>134</sup> 50 U.S.C. § 1803(k)(2) (2015) (emphasis added). Since USA FREEDOM Act’s enactment, six people have been designated eligible to serve as amici curiae pursuant

Question	FISA Court	FISA Court of Review	Supreme Court
<b>What type of issue may be certified to a higher court?</b>	“[A]ny question of law that may affect resolution of the matter in controversy.” <sup>135</sup>	“[A]ny question of law in . . . which instructions are desired.” <sup>136</sup>	Not applicable
<b>When may certified question jurisdiction be exercised?</b>	(1) When there is a “need for uniformity” or (2) when consideration of a legal issue by the FISC “would serve the interests of justice.” <sup>137</sup>	At “any time” for “any question of law in any . . . case as to which instructions are desired.” <sup>138</sup>	Not applicable

to 50 U.S.C. § 1803(i)(1). UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT, *Amici Curiae*, <http://www.fisc.uscourts.gov/amici-curiae> (last accessed Feb. 20, 2017) (lists individuals designated as eligible to serve pursuant to 50 U.S.C. § 1803(i)(1) (2015)). The PCLOB envisioned a more predominant role for amici curiae than what Congress passed in the USA FREEDOM Act. With respect to the involvement of amici curiae in appellate review, the PCLOB noted that the USA FREEDOM Act “provides fewer guarantees than the Board’s proposal that any participating amicus curiae will be allowed to participate in the appellate review process.” PCLOB, RECOMMENDATIONS ASSESSMENT REPORT, *supra* note 5, at 6. Amici curiae will have less involvement “both in the decision about whether to certify a question of law for review, and in the proceedings that take place once a question has been certified.” *Id.* Unlike the recommendation, the USA FREEDOM Act “provides no mechanism for an amicus curiae to request certification of a FISC or FISCER decision, and it provides no mechanism by which an amicus curiae can challenge the FISC’s decision not to certify a legal question for appellate review.” *Id.*

<sup>135</sup> 50 U.S.C. § 1803(j) (2015).

<sup>136</sup> 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

<sup>137</sup> 50 U.S.C. § 1803(j) (2015).

<sup>138</sup> 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

<b>Who has the discretion to certify an issue to a higher court?</b>	FISC <sup>139</sup>	FISA Court of Review <sup>140</sup>	Not applicable
<b>What is the higher court's responsibility upon receiving a certified question of law?</b>	Not applicable	Complete discretion whether to accept; <i>may</i> give "binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." <sup>141</sup>	Complete discretion whether to accept; <i>may</i> give "binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." <sup>142</sup>
<b>When may an amicus curiae be appointed?</b>	When, in the opinion of the court, the legal issue "presents a novel or significant interpretation of the law." <sup>143</sup>	When, in the opinion of the court, the legal issue "presents a novel or significant interpretation of the law." <sup>144</sup>	The Supreme Court " <i>may</i> appoint an amicus curiae" or "other person, to provide briefing or other assistance." <sup>145</sup>

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<sup>139</sup> 50 U.S.C. § 1803(j) (2015).

<sup>140</sup> 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

<sup>141</sup> 50 U.S.C. § 1803(j) (2015).

<sup>142</sup> 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

<sup>143</sup> 50 U.S.C. § 1803(i)(2)(A) (2015).

<sup>144</sup> 50 U.S.C. § 1803(i)(2)(A) (2015).

<sup>145</sup> 50 U.S.C. § 1803(k)(2) (2015).

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#### IV. CERTIFIED QUESTION JURISDICTION AT THE FISC AND FISCR IS CONSTITUTIONAL

On July 29, 2014, prior to the enactment of the USA FREEDOM Act, Senator Patrick Leahy proposed legislation amending FISA to include, among other modifications, certified question jurisdiction (“Leahy bill”).<sup>146</sup> The proposed language for certified question jurisdiction in the Leahy bill was similar to the provisions that ultimately were included in the USA FREEDOM Act.<sup>147</sup> Concerns were raised, however, that the proposed certification process set forth in the Leahy bill violated Article III’s case or controversy

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<sup>146</sup> On July 29, 2014, Senator Patrick Leahy introduced the USA FREEDOM Act of 2014, S. 2685, 113th Cong. (2014).

<sup>147</sup> With respect to certified question jurisdiction, the statutory language proposed by Senator Leahy in USA FREEDOM Act S. 2685 was as follows:

(j) **Review of FISA Court Decisions.**—After issuing an order, a court established under subsection (a) shall certify for review to the court established under subsection (b) any question of law that the court determines warrants such review because of a need for uniformity or because consideration by the court established under subsection (b) would serve the interests of justice. Upon certification of a question of law under this paragraph, the court established under subsection (b) may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(k) **Review of FISA Court of Review Decisions.**—

(1) **CERTIFICATION.**—For any decision issued by the court of review established under subsection (b) approving, in whole or in part, an application by the Government under this Act, such court may certify at any time, including after a decision, a question of law to be reviewed by the Supreme Court of the United States.

(2) **SPECIAL ADVOCATE BRIEFING.**—Upon certification of an application under paragraph (1), the court of review established under subsection (b) may designate a special advocate to provide briefing as prescribed by the Supreme Court.

(3) **REVIEW.**—The Supreme Court may review any question of law certified under paragraph (1) by the court of review established under subsection (b) in the same manner as the Supreme Court reviews questions certified under section 1254(2) of title 28, United States Code. § 2685.

requirement.<sup>148</sup> The Supreme Court has long recognized that the exercise of judicial authority under Article III of the Constitution “depends on the existence of a case or controversy.”<sup>149</sup> The requirement for “litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III.”<sup>150</sup> A case “is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”<sup>151</sup> Courts may not render advisory opinions, and may not “proceed to hear an action if, subsequent to its initiation, the dispute loses ‘its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law.’”<sup>152</sup>

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<sup>148</sup> *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 137 (3d Cir. 2009) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.1 (5th ed. 2007)). For views expressing that the certified jurisdiction provision set forth in the Leahy bill violated Article III, see Orin Kerr, *Article III Problems with Appellate Review in the Leahy Bill?*, *LAWFARE* (July 30, 2014, 4:26 PM), <https://www.lawfareblog.com/article-iii-problems-appellate-review-leahy-bill>; Letter from the Honorable John D. Bates, U.S. Dist. Judge for the U.S. Dist. Court for the Dist. of Columbia, served on FISC from 2006 to 2013, to the Honorable Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (Aug. 5, 2014), <http://online.wsj.com/public/resources/documents/LeahyLetter.pdf> (Judge Bates, former Chief Judge of the FISC, believed that proposed language might have some constitutional infirmities. In the August 5, 2014, letter to Senator Leahy, Judge Bates wrote: “the certification provision appears to raise serious legal questions that may not be resolvable through clarifying changes to the proposed statutory language. Insofar as it may contemplate appellate review, including Supreme Court review, of issues in absence of a case or controversy, it is potentially inconsistent with the requirements of Article III of the Constitution.”).

<sup>149</sup> *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

<sup>150</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 212-13 (2000).

<sup>151</sup> *Id.* (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

<sup>152</sup> *Id.* (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)) (citing *Preiser*, 422 U.S. at 401; *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)).

Professor Orin Kerr, George Washington University Law School, was one legal scholar who expressed concern that certification procedures recommended in the Leahy bill violated Article III's case or controversy requirement. Professor Kerr noted that after the FISC issued an order authorizing the government to conduct surveillance, no application would be pending before the FISC.<sup>153</sup> Accordingly, Professor Kerr was concerned that the FISC would be issuing an advisory opinion because no application would be pending at the time that the FISC issued its decision.<sup>154</sup> He believed the goal of the bill was "to overcome the lack of an adversarial process by giving lower courts a way to bring the case upstairs."<sup>155</sup>

To correct this perceived constitutional weakness, Professor Kerr recommended three modifications to the Leahy bill: (1) require the FISC to "conduct a review of orders in place when a certified decision is handed down;"<sup>156</sup> (2) "make clear that the certification [standard] is limited to legal questions that are outcome-determinative to some aspect of the order issued, not just any legal issues that strike the FISC as interesting;"<sup>157</sup> and (3) require that the entire application with recommended legal issues be reviewed by the FISC so that the appellate court would "have de novo review of the whole application."<sup>158</sup> Professor Kerr believed that these modifications would address the "advisory opinion problem."<sup>159</sup>

In contrast to Professor Kerr's contentions, Professor Vladeck believed that Senator Leahy's proposal did not present a constitutional

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<sup>153</sup> Orin Kerr, *Article III Problems with Appellate Review in the Leahy Bill?*, LAWFARE (July 30, 2014, 4:26 PM), <https://www.lawfareblog.com/article-iii-problems-appellate-review-leahy-bill>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*



problem.<sup>160</sup> He contended that certifying a question from the FISC to the FISCR would not raise Article III justiciability issues as long as the court that certified the question of law did so “in the context of an ongoing case-or-controversy.”<sup>161</sup> Professor Vladeck maintained that the appellate court derives jurisdiction from the certifying court,<sup>162</sup> and that the FISC retained jurisdiction after an application for surveillance was approved. He explained his reasoning as follows:

FISA Court orders are best viewed as *prospective*, not retrospective. That is to say, they authorize government action going forward (often for a specific period of time) that is subject to compliance with various procedural rules imposed (and administered) by the FISA Court. Thus, if the government’s application suffices to create a case or controversy for Article III purpose. . . , that case or controversy does not cease to exist once the application is *granted*; to the contrary, it exists for so long as the government is *acting* under the relevant application.<sup>163</sup>

Professor Vladeck believed that “*if* there is a case or controversy in the FISA Court, it should follow that the FISA Court

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<sup>160</sup> Steve Vladeck, *Article III, Appellate Review, and the Leahy Bill: A Response to Orin Kerr*, LAWFARE (July 31, 2014, 10:54 AM), <https://www.lawfareblog.com/article-iii-appellate-review-and-leahy-bill-response-orin-kerr>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (emphasis in the original). Professor Kerr cites *California Medical Association v. Federal Election Commission* to support his position that federal courts do not have the authority to decide cases “unless the justiciability requirements of Article III have been met.” Kerr, *supra* note 153 (citing *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 192 n.14 (1981)). In response, Professor Vladeck points out that *California Medical* stands for the proposition that, under the certification provision at issue in that case, a party must first have standing in the underlying case before it can certify a question in that case to another court for review. In other words, Professor Vladeck reads *California Medical* to mean that the justiciability requirement for certification is satisfied if the requirements for justiciability (*e.g.*, standing; case and controversy; matter before the court is not frivolous, hypothetical) are met in the underlying case. Vladeck, *supra* note 160.

has the power to certify relevant questions of law to the FISA Court of Review (and it, in turn, to the Supreme Court).”<sup>164</sup>

A review of the structure of the FISC and its rules supports Professor Vladeck’s position that a justiciable case or controversy continues after the FISC authorizes surveillance.<sup>165</sup> As recognized by Professor Vladeck, FISC decisions authorize the government to conduct surveillance prospectively. The ongoing surveillance conducted by the government is subject to FISC rules.<sup>166</sup> For example, pursuant to FISC Rule 13, after the FISC approves an application for surveillance, the government has a continuing obligation to immediately notify the FISC if the government learns that it violated the FISC order or applicable statute while conducting the surveillance.<sup>167</sup> This is a continuing responsibility for the duration of the approved application. If, for instance, the FISC authorizes the government to conduct electronic surveillance on a certain target for sixty days, the government must notify the court of any unauthorized collection that might occur during that 60-day period. Thus, FISC oversight continues even after the requested surveillance sought in an application is authorized.

As another example, after the FISC approves an application for a physical search, it continues to oversee that application. Pursuant to FISC Rule 16, after a FISC-authorized search is conducted, a search return must be submitted to the FISC within a certain amount of

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<sup>164</sup> Vladeck, *supra* note 160 (emphasis in the original).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> FISA Ct. R.P. 13 (Correction of Misstatement or Omission; Disclosure of Non-Compliance). Under FISC Rule 13(b), if “the government discovers that any authority or approval granted by the Court has been implemented in a manner that did not comply with the Court’s authorization or approval or with applicable law, the government, in writing, must immediately” notify the FISC of such non-compliance. *Id.*

time.<sup>168</sup> As such, after an application for physical search is approved, the FISC continues to monitor the government's conduct in at least two ways. First, under FISC Rule 13, if the government exceeds FISC authorization while conducting the search, the government must notify the court of the compliance mistake. Second, pursuant to FISC Rule 16, the government must file a search return with the FISC after it conducts the physical search. As demonstrated by these rules, and consistent with Professor Vladeck's position, FISC control of an application continues, *e.g.*, is "*prospective*," after the FISC approves the application.

Moreover, if the FISC certifies a question to the FISCER, and the FISCER subsequently determines that the application should not have been approved, the government would be bound by the latter court's determination. Again, this assertion lends support to the position that a FISCER opinion would not be advisory, but rather would address an ongoing case or controversy. For example, in May 2006, pursuant to Section 215 of the USA PATRIOT Act, the FISC authorized the bulk collection of all telephone metadata from a certain communications service provider.<sup>169</sup> Under this FISC order, the provider was required "to produce call detail records, every day, on all telephone calls made through its systems or using its services where one or both ends of the call are located in the United States."<sup>170</sup> This collection was part of a "broader program of bulk collection of telephone metadata from other telecommunications providers carried out pursuant to §215."<sup>171</sup>

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<sup>168</sup> FISA Ct. R.P. 16 (Returns). Under FISC Rule 16, a search return "must be made and filed either at the time of submission of a proposed renewal application or within 90 days of the execution of a search order, whichever is sooner." *Id.*

<sup>169</sup> *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 795 (2d Cir. 2015).

<sup>170</sup> *Id.* at 795-96 (quoting *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things From Verizon Bus. Network Servs., Inc.*, No. BR 13-80, slip op. at 2 (FISA Ct. Apr. 25, 2013)).

<sup>171</sup> *Id.* at 796.

Hypothetically, if certified question jurisdiction had been an option in 2006, the FISC could have certified this novel legal question to the FISCER. In its certification to the FISCER, the FISC could have asked whether, as a matter of law, this type of bulk collection was consistent with the statutory language of Section 215 and the Constitution. It is uncertain what the FISCER would have decided.<sup>172</sup> If, however, the FISCER determined that the program was beyond the scope of what was permitted by the statute or was unconstitutional, and ordered the collection to cease, the government would have been required to stop collection. The FISCER decision would have been binding on the ongoing FISC-authorized surveillance rather than advisory.<sup>173</sup>

Taking this hypothetical one step further, under the current certification procedures, regardless of what had been decided, the FISCER could have stayed its decision and certified the legal question to the Supreme Court. Again, while it is unclear how the Supreme Court would have ruled, or whether it would have accepted the issue at all, a process would have been in place for the Supreme Court to consider the issue. If the Supreme Court accepted review and determined that the program complied with the statute and the Constitution, such decision would have deflected future legal disputes as to the legality of the Section 215 bulk collection program. It also

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<sup>172</sup> See e.g., *Obama v. Klayman*, 800 F.3d 559 (D.C. Cir. 2015) (reversing the U.S. District Court for the District of Columbia and finding that subscribers failed to establish a substantial likelihood of success on the merits on the issue of standing with respect to the government's bulk collection under FISA); *Clapper*, 785 F.3d at 787 (concluding that the collection of telephone metadata was not relevant to authorized counterterrorism investigations, and thus, collection of information exceeded authority granted by FISA); *In re Application of the F.B.I.*, No. BR 15-75, 2015 WL 5637562, at \*13 (FISA Ct. June 29, 2015) (concluding the government's acquisition of non-content call detail records did not violate FISA or the Fourth Amendment).

<sup>173</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 212-13 (2000).

would have provided the government with definitive guidance as to the legality of this Section 215 program and would have decided “a real and substantial controversy.”<sup>174</sup>

Conversely, if the Supreme Court concluded that the Section 215 bulk collection program violated a statute or the Constitution, the government would have been ordered to cease the collection. Again, this would have protected the government against future criticism about acquisition of this type of information under Section 215. Regardless of the outcome, as demonstrated by this example, the Supreme Court’s decision would have been more than an advisory opinion. It would have been binding on the government and would have affected a current collection. As such, certifying a legal question from the FISC to the FISCER, and from the FISCER to the Supreme Court, is consistent with Article III.

Significantly, some of Professor Kerr’s suggestions to improve the Leahy bill were codified in the USA FREEDOM Act.<sup>175</sup> In his article, Professor Kerr recommended adding language that would “make clear that the certification [standard] is limited to legal questions that are outcome-determinative to some aspect of the order issued, not just any legal issues that strike the FISC as interesting.”<sup>176</sup> The USA FREEDOM Act includes this recommendation. The USA FREEDOM Act requires that the FISC “shall certify for review” to the FISCER only “question[s] of law that *may affect resolution of the matter in controversy*.”<sup>177</sup>

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<sup>174</sup> *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937))).

<sup>175</sup> See 50 U.S.C. § 1803; Kerr, *supra* note 153; Wittes & Liu, *supra* note 4.

<sup>176</sup> Kerr, *supra* note 153.

<sup>177</sup> 50 U.S.C. § 1803(j) (emphasis added). See Wittes & Liu, *supra* note 4. (“[T]he scope of appellate review of FISA Court decisions is slightly narrower under the new House bill [the USA FREEDOM Act] than the Leahy bill. For one thing, the new

Professor Kerr further recommended that legislation should require that the FISC send up the entire application to the FISC with recommended legal issues for the higher court's consideration "rather than certifying abstract questions."<sup>178</sup> Professor Kerr believed that this was necessary so that the FISC would be able to exercise *de novo* review of the complete application.<sup>179</sup> However, to some extent, this recommendation was present in the Leahy bill, and was also included in the USA FREEDOM Act. With respect to this recommendation, both the Leahy bill and the USA FREEDOM Act state in pertinent part that when a question of law is certified to the FISC, the FISC "may give binding instructions or *require the entire record to be sent up for decision of the entire matter in controversy.*"<sup>180</sup> This language provides the FISC with the option of reviewing the entire application as recommended by Professor Kerr. As such, if the FISC believes that this type of an in-depth review is necessary, it is within the higher court's discretion to grant it.

It is noted that if the FISC were to deny the government's application for surveillance, certified question jurisdiction would not be an option for the FISC. If an application for surveillance is denied, the government would not have the legal authority to begin the requested surveillance. The Article III case or controversy requirement is present only if the government's application for surveillance is approved by the FISC, allowing the government to conduct surveillance. In other words, as stated by Professor Vladeck, the case or controversy requirement "exists for so long as the

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House bill adds a limitation not present in the Leahy bill that the FISA Court shall certify for appellate review (by the FISA Court of Review) only those questions of law 'that may affect resolution of the matter in controversy.' This limitation is in addition to the requirements originally set out in the Leahy bill that certification for review be made when the FISA Court determines there is a 'need for uniformity' or review 'would serve the interests of justice.'").

<sup>178</sup> Kerr, *supra* note 153.

<sup>179</sup> *Id.*

<sup>180</sup> 50 U.S.C. § 1803(j) (2015) (emphasis added).

government is *acting* under the relevant application.”<sup>181</sup> Under Article III, courts may not issue advisory opinions, and may not consider a matter “if, subsequent to its initiation, the dispute loses ‘its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law.’”<sup>182</sup> Without a FISC-authorized surveillance, the FISCR would be issuing an advisory opinion in contravention of the Article III mandate. However, if the government’s request for surveillance were denied, while certified question jurisdiction would not be available, the government would have the options of requesting a rehearing before the entire FISC sitting *en banc* or appealing the adverse FISC decision to the FISCR.<sup>183</sup>

In sum, a review of the certification process supports the position that it complies with the mandates of Article III of the Constitution. The FISC procedural rules, such as FISC Rules 13 and 16, support the contention that, once an application for surveillance is approved, it remains a “live controversy.”<sup>184</sup> Moreover, the FISCR opinions are not advisory opinions,<sup>185</sup> but rather would address an ongoing case or controversy. If the FISC certifies a question to the FISCR, and the FISCR subsequently determines that the application should not have been approved, the ongoing surveillance would be affected by the latter court’s determination. Finally, the language of

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<sup>181</sup> Vladeck, *supra* note 160 (emphasis in original).

<sup>182</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 212-13 (2000) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)).

<sup>183</sup> 50 U.S.C. §1803(a)(2)(A)(2015) (providing that the FISC may “hold a hearing or rehearing, *en banc*, when ordered by a majority of the judges that constitute such court upon a determination that-- (i) *en banc* consideration is necessary to secure or maintain uniformity of the court’s decisions; or (ii) the proceeding involves a question of exceptional importance”); under FISC Rules 54 through 59, a party may file an appeal to the FISCR. FISCR R.P. 54-59 (APPEALS) (Nov. 1, 2010).

<sup>184</sup> *Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000).

<sup>185</sup> *Id.*

the USA FREEDOM Act itself provides that the FISC certify to the FISCER only “question[s] of law that *may affect resolution of the matter in controversy*.”<sup>186</sup> These factors, taken together, demonstrate that the paradigm set forth in the USA FREEDOM Act for the certification process satisfies the case or controversy requirement of Article III.<sup>187</sup>

V. CERTIFIED QUESTION JURISDICTION ADDRESSES CONCERNS  
RAISED ABOUT THE LACK OF APPELLATE REVIEW

A. *Three Known Appellate Decisions Issued by the FISCER*

Prior to the USA FREEDOM Act, if the FISC issued an adverse judgment against a party, two options for review were available. First, the FISC could reconsider the issue in a rehearing before the entire FISC, sitting *en banc*.<sup>188</sup> Publicly released FISC decisions suggest that the FISC has sat *en banc* in only one known proceeding.<sup>189</sup> Second, a party could appeal an adverse decision to the FISCER.<sup>190</sup> With respect to the latter option, since the creation of the FISC and FISCER in 1978, parties have appealed adverse decisions to

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<sup>186</sup> 50 U.S.C. § 1803(j) (2015) (emphasis added); see Wittes & Liu, *supra* note 4.

<sup>187</sup> See *Preiser*, 422 U.S. at 401.

<sup>188</sup> 50 U.S.C. §1803(a)(2)(A)(2015); see Vladeck, *supra* note 27, at 1166.

<sup>189</sup> Jack Boeglin & Julius Taranto, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L. J. 2189, 2193 (2015). In *All Matters Submitted to the Foreign Intelligence Surveillance Court*, all seven FISC judges concurred in court’s decision. In *re* All Matters Submitted to the FISA Court, 218 F. Supp. 2d 611 (FISA Ct. Rev. 2002). On appeal, the FISCER referred to the May 17, 2002, FISC decision as an “*en banc* order.” However, the FISCER noted that at the time this FISC decision was made, the statute did not provide for *en banc* proceedings. In *re* Sealed Case, 310 F.3d 717, 721 n.5 (FISA Ct. Rev. 2002). Specifically, the FISCER wrote: “The argument before all of the district judges, some of whose terms have since expired, was referred to as an ‘*en banc*’ although the statute does not contemplate such a proceeding. In fact, it specifically provides that if one judge declines to approve an application the government may not seek approval from another district judge, but only appeal to the Court of Review. 50 U.S.C. §§ 1803(a), (b).” *Id.*

<sup>190</sup> Vladeck, *supra* note 27, at 1166.



the FISC in only two publicly known matters. The first publicly known appeal from a FISC decision was in 2002 in *In re Sealed Case*, approximately 24 years after the FISC and FISCER were established.<sup>191</sup> In this case, the FISC issued an adverse finding against the government, imposing restrictions between intelligence investigations and law enforcement investigations, referred to as “the wall.”<sup>192</sup> The government believed that these restrictions exceeded the scope of what was mandated by FISA and the Constitution, and appealed the FISC’s decision.<sup>193</sup> After reviewing the government’s legal arguments, the FISCER agreed with the government’s position, finding that the “restrictions imposed by the FISA court are not required by FISA or the Constitution.”<sup>194</sup> Accordingly, the FISCER remanded the case to the FISC for further proceedings consistent with its decision.<sup>195</sup>

The second publicly known appeal to the FISCER occurred in 2008 in *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*.<sup>196</sup> In this case, the government issued directives to a certain communications service provider pursuant to amendments to FISA known as the Protect America Act of 2007 (“PAA”).<sup>197</sup> The now

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<sup>191</sup> *In re Sealed Case*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002).

<sup>192</sup> *Id.* at 721.

<sup>193</sup> *Id.* at 721-22. The FISC concluded that FISA did not require the government to “demonstrate to the FISA court that its primary purpose in conducting electronic surveillance was not criminal prosecution.” *In re Sealed Case* ended the “wall” between criminal and foreign intelligence investigations that arose through the interpretation of the primary purpose test set forth in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982)). *Id.* at 736.

<sup>194</sup> *Id.* at 720 (“But the court neither refers to any FISA language supporting that view, nor does it reference the Patriot Act amendments, which the government contends specifically altered FISA to make clear that an application could be obtained even if criminal prosecution is the primary counter mechanism.”).

<sup>195</sup> *Id.* at 719-21

<sup>196</sup> *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1006 (FISA Ct. Rev. 2008).

<sup>197</sup> *Id.* See Protect America Act of 2007, Pub.L. No. 110–55, 121 Stat. 552. The PAA expired in February 2008. On July 10, 2008, the successor statute to the PAA, the

expired PAA authorized the United States to direct communications service providers to provide foreign intelligence concerning individuals reasonably believed to be located outside the United States.<sup>198</sup> When the communications service provider received the directives from the government, it challenged their legality before the FISC. The FISC upheld the directives and ordered the communications service provider to respond to the government.<sup>199</sup> The communications service provider appealed the FISC decision.<sup>200</sup> The FISC, after balancing “the nation’s security interests against the Fourth Amendment privacy interests of United States persons,” agreed with the FISC and concluded that the directives were lawful.<sup>201</sup> Accordingly, the FISC affirmed the lower court’s decision and ordered the provider to comply with the directives.<sup>202</sup>

Following the enactment of the USA FREEDOM Act, another option now exists for appellate review: the FISC or FISC can certify a question of law to a higher court. Since the creation of this procedural tool at the FISC and FISC, the FISC already has certified a question of law order to the FISC, and the FISC has issued a response to the certification.<sup>203</sup> In *In re Certification of Question of*

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FISA Amendments Act of 2008, was enacted. 50 U.S.C. § 1881(a)-(g). For an in-depth discussion of the history of the FAA, see Gannon, *supra* note 24.

<sup>198</sup> *In re Directives*, 551 F.3d at 1006.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1016-18.

<sup>203</sup> On August 22, 2016, the Office of the Director of National Intelligence publicly released the certified question of law order from the FISC to the FISC, and the corresponding FISC opinion in response to the FISC certification. IC ON THE RECORD, *Release of FISC Question of Law & FISC Opinion* (Aug. 22, 2016), <https://icontherecord.tumblr.com>. Under 50 U.S.C § 1872, “the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 1871(e) of this title) that includes a significant

*Law to the Foreign Intelligence Court of Review*, the FISC asked the FISCER to determine whether FISA permitted a certain technique associated with the use of pen register and trap and trace devices (“PR/TT”).<sup>204</sup> Specifically, the FISC certified the following legal issue to the FISCER:

Whether an order issued under 50 U.S.C. § 1842,<sup>205</sup> may authorize the Government to obtain all post-cut through digits,<sup>206</sup> subject to a prohibition on the affirmative investigative use of any contents thereby acquired, when there is not technology reasonably available to the Government that would permit:

- (1) a PR/TT device to acquire post-cut-through digits that are non-content DRAS [dialing, routing, addressing, or signaling]

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construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term ‘specific selection term’, and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion.” 50 U.S.C. § 1872 (2015).

<sup>204</sup> *In re* Certification of Question of Law to the FISCER, Docket No. PR/TT 2016-[redacted], at 2 (FISA Ct. Feb. 12, 2016), <https://www.dni.gov/files/icotr/PCTD%20FISCER%20Certification%2020160818%20pdf>.

<sup>205</sup> Under 50 U.S.C. § 1842, the government may seek authorization from the FISC for “the installation and use of a pen register or trap and trace device for any investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.” 50 U.S.C. § 1842 (2016).

<sup>206</sup> As explained by the FISC, “Post-cut through digits are digits entered by a caller after a phone call has been initially placed (or ‘cut-through’). Sometimes those digits represent instructions about processing the call to the number the caller is ultimately trying to reach: for example, a caller connects with an international calling card service, then is prompted to enter the number of the person with whom the caller actually wants to speak. Other times, those digits can represent substantive content unrelated to processing a phone call: for example, a caller connects with a bank’s automated service and, in response to prompts, enters digits that signify, “Transfer \$1000 from my savings account to my checking account.”” *In re* Certification of Question of Law to the FISCER, Docket No. PR/TT 2016-[redacted], at 3.

information, while not acquiring post-cut-through digits that are contents of a communication; or

(2) the Government, at the time it receives information acquired by a PR/TT device, to discard post-cut-through digits that are contents of a communication, while retaining those digits that are non-content DRAS information.<sup>207</sup>

The FISC explained that, since 2006, and most recently on January 21, 2016, it had authorized the government to “record and decode all post-cut through digits” acquired by a PR/TT device.<sup>208</sup> The FISC prohibited, however, “any affirmative investigative use of post-cut through digits acquired through pen register authorization that do not constitute call dialing, routing, addressing, or signaling information, unless separately authorized” by the FISC.<sup>209</sup> In contrast, other courts have decided “similar, if not identical, issues differently.”<sup>210</sup> These other courts have denied government requests to obtain post-cut through digits that are considered content in

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<sup>207</sup> *Id.* at 14.

<sup>208</sup> *Id.* at 2.

<sup>209</sup> *Id.* The FISC noted that the “Government has never sought FISC authorization to use such information. The FISC-imposed prohibition on use varies from the language typically proposed by the Government, which would prohibit ‘any affirmative investigative use of post-cut-through digits acquired through pen register authorization that do not constitute call dialing, routing, addressing, or signaling information, except in rare cases in order to prevent an immediate danger of death, serious physical injury, or harm to national security.’” *Id.* at 2-3 n.1 (citing Jan. 21, 2016, Application at 28).

<sup>210</sup> *Id.* at 9-10 (citing *In re Applications of the United States*, 515 F. Supp. 2d 325 (E.D.N.Y. 2007); *In re Application of the United States*, 622 F. Supp. 2d 411 (S.D. Tex. 2007) ; *In re Application of the United States*, 441 F. Supp. 2d 816 (S.D. Tex. 2006); *In re Application of the United States*, No. 6:06-mj-1130 (M.D. Fla. May 23, 2006) (Spaulding, Mag. J.), *aff’d*, No. 6:06-mj-1130 (M.D. Fla. June 20, 2006) (Conway, J.)) (“Other courts, however, have seen similar, if not identical, issues differently and denied Government requests to acquire post-cut-through digits that constitute contents in applications for the installment and use of PR/TT devices in support of law enforcement investigations under 18 U.S.C. § 3122.”).

applications for the installation and use of PR/TT devices in support of criminal (as opposed to foreign intelligence) investigations.<sup>211</sup> Moreover, the FISC noted that, recently, some FISC judges have “expressed concerns about continuing to authorize acquisition of such digits under PR/TT orders.”<sup>212</sup>

In its request for certification, the FISC noted that due to differing legal conclusions by the FISC and other courts, a “significant interpretation of the law may well be presented.”<sup>213</sup> The FISC believed that these divergent opinions met the standard for certifying the legal issue to the FISC and that FISC review “would serve the interests of justice.”<sup>214</sup> After reviewing the FISC’s certification order, the FISC accepted the certified question.<sup>215</sup> In addition, the FISC determined that the certified question presented a significant interpretation of law, and appointed an amicus curiae to contribute to the interpretation of the issue.<sup>216</sup> After thoroughly analyzing the legal issue before it, taking into account the legal arguments of both the amicus curiae and the government, the FISC concluded that the order described in the

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<sup>211</sup> *Id.*

<sup>212</sup> *In re Certification of Question of Law to the FISC*, Docket No. PR/TT 2016-[redacted], at 13. “. . . FISC judges discussed the issues presented by post-cut-through digits at their semi-annual conference on October 27, 2015. Following that discussing, it was the consensus of the judges that further briefing was warranted in view of concerns expressed by some judges about continuing to authorize the acquisition of post-cut-through digits under PR/TT orders.” *Id.* at 5 (citations omitted).

<sup>213</sup> *Id.* at 12.

<sup>214</sup> *Id.* at 13. Specifically, the FISC believed that the “disagreement between the FISC and other courts provides reason to believe that consideration of these issues by the FISC would serve the interests of justice.” *Id.*

<sup>215</sup> *In re Certified Question of Law*, Docket No. 16-01, at 7 (FISA Ct. Rev. 2016).

<sup>216</sup> IC on the Record, *supra* note 203.

FISC's certification complied with both the applicable statute and the Constitution.<sup>217</sup>

*B. Certified Question Jurisdiction Will Help Alleviate Concerns about the FISC*

Certified question jurisdiction will help improve public confidence in FISC and FISCR processes. A recurring criticism of the FISC is that it is a “rubber stamp” court; critics state that only an extremely small percentage of government requests are denied.<sup>218</sup> Appellate review of FISC decisions, as demonstrated by the detailed analysis conducted in *In re Sealed Case*, *In re Directives*, and *In re Certification of Question of Law*, will further dispel the “rubber stamp” misperception. Appellate scrutiny of FISC opinions will ensure that the bases for FISC decisions are evaluated for legal accuracy. As an example, assume that the FISC approves a novel, complex technique for conducting surveillance. The FISC believes that appellate review of its decision “would serve the interests of justice.” With certified question jurisdiction, the FISC now has a procedural tool to seek review of its decision.<sup>219</sup> The FISCR accepts review of the legal issue and affirms the lower court’s decision. In this hypothetical scenario, the novel technique will receive scrutiny from both a federal district court judge at the FISC, and from a three-judge panel composed of federal district and/or appellate court judges at the FISCR. Even if the surveillance is ultimately approved, both the FISC and FISCR evaluated the surveillance to ensure compliance with FISA and the Constitution.

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<sup>217</sup> *In re Certified Question of Law*, Docket No. 16-01, at 2. Specifically, the FISCR concluded that “section 1842 authorizes, and the Fourth Amendment does not prohibit, an order of the kind described in the FISC’s certification.” *Id.*

<sup>218</sup> Lin, *supra* note 56.

<sup>219</sup> 50 U.S.C. § 1803(j) (2015).

Government officials familiar with FISC procedures have explained why the FISC is not a “rubber stamp” court. Timothy Edgar, formerly a senior attorney with the American Civil Liberties Union and later with Office of the Director of National Intelligence, “believed the FISA court was a rubber stamp until he saw the process firsthand when he became a senior civil-liberties official in the Office of the Director of National Intelligence in 2006.”<sup>220</sup> After seeing how the process works, Mr. Edgar stated: “It’s definitely not a rubber stamp” court.<sup>221</sup> Mr. Edgar explained:

The reason so many orders are approved . . . is that the Justice Department office that manages the process vets the applications rigorously. The lawyers there see themselves not as government advocates so much as neutral arbiters of the law between the executive branch and the courts . . . so getting the order approved by the Justice Department lawyers is perhaps the biggest hurdle to approval.<sup>222</sup>

Likewise, a July 29, 2013, letter from FISC Judge Reggie Walton to Senator Patrick Leahy further dispels the “rubber stamp” misperception.<sup>223</sup> Judge Walton explained that the FISC’s approval rates of applications “reflect only the number of final applications submitted to and acted on by the Court. These statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that a judge would not approve them.”<sup>224</sup> In fact, “the approval rating for Title III wiretap applications . . . is higher than the approval rate

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<sup>220</sup> Evan Perez, *Secret Court's Oversight Gets Scrutiny*, WALL ST. J. (June 9, 2013), <http://www.wsj.com/articles/SB10001424127887324904004578535670310514616>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Letter from Judge Reggie Walton, *supra* note 21, at 1. In the July 29, 2013, letter, Judge Walton described the internal operations of the FISC and noted that “matters before the Court are thoroughly reviewed and analyzed by the Court.” *Id.*

<sup>224</sup> *Id.* at 1-2.

for FISA applications. . . . [F]rom 2008 through 2012, only five of 13,593 Title III wiretap applications were requested but not authorized.”<sup>225</sup>

Concerns were also raised about the lack of transparency of FISC decisions; critics pointed out that “nearly all of [the FISC’s] decisions are classified.”<sup>226</sup> They believed that the classification of FISC opinions “hampers democratic self-government and sound policymaking.”<sup>227</sup> The USA FREEDOM Act addresses this concern as well. Under the USA FREEDOM Act, the government must make “publicly available to the greatest extent practicable” each FISC or FISCER decision “that includes a significant construction or interpretation of any provision of law.”<sup>228</sup> Notably, the three FISCER decision—*In re Sealed Case*, *In re Directives*, and *In re Certification of Question of Law*—have all been declassified, to the extent possible, and publicly released. The public release of FISC and FISCER decisions, as practicable, will increase transparency of the court and provide insight

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<sup>225</sup> *Id.* at 3 n.6 (citing Administrative Office of the United States Courts, *Wiretap Report 2012*, Table 7) (referring to Title III of the Omnibus Crime Control and Safe Streets act of 1968, as amended, which is codified at 18 U.S.C. §§ 2510-2522)). Likewise, the PCLOB wrote: “[T]he approval rate for wiretap applications in ordinary criminal cases is higher than the approval rate for FISA applications. Moreover, the FISA statistics do not take into account the changes to the final applications that are ultimately submitted, made as a result of the back and forth between the FISC legal staff and government attorneys. Nor does the percentage of approvals take into account the applications that are withdrawn or never submitted in final form due to concerns raised by the court or its legal staff. The FISA court has recently kept track of such actions and has found that, during the three month period from July through September 2013, 24.4% of matters submitted to the FISA court ultimately involved substantive changes to the information provided by the government or to the authorities granted as a result of court inquiry or action.” PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 179-80 (citing Letter from Reggie Walton, then-Presidenting Judge of the FISC, to Chairman Leahy, Committee on the Judiciary, U.S. Senate (Oct. 11, 2013)).

<sup>226</sup> Goitein & Patel, *supra* note 10, at 46.

<sup>227</sup> *Id.*

<sup>228</sup> 50 U.S.C. § 1872 (2015).



into the legal rationale for the government's collection of information under FISA.<sup>229</sup> As more decisions are released, public knowledge of the judicial branch's legal reasoning may improve the general perception of the government's surveillance programs.

Finally, critics asserted that attorneys, such as special legal advocates, should be appointed in FISC proceedings, especially in ones involving novel legal issues, to provide opposing legal views.<sup>230</sup> Responding to the concerns raised about the lack of adversarial proceedings, pursuant to the USA FREEDOM Act, the FISC or FISCRC can appoint an amicus curiae to assist in the consideration of certain matters, including questions of law that are certified to a higher court. Specifically, if a certified question of law involves "a novel or significant interpretation of the law," which it likely will, the FISC or FISCRC has the discretion to appoint an amicus curiae to aid in such proceeding.<sup>231</sup> Indeed, as noted above, in *In re Certification Question of Law*, the FISCRC determined that the certified question presented a significant interpretation of law, and appointed an amicus curiae to

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<sup>229</sup> Additional FISC filings and opinions that have been released are available at U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., *Public Filings - U.S. Foreign Intelligence Surveillance Court* (beginning June 2013), <http://www.fisc.uscourts.gov/public-filings>. For example, on April 19, 2016, the Director of National Intelligence, in consultation with the Attorney General, publicly released three FISC opinions, in redacted form, including: (1) a June 18, 2015, FISC Memorandum Opinion associated with a pen register and trap-and-trace case; (2) a November 6, 2015 FISC Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications; and (3) a December 31, 2015, FISC Memorandum Opinion approving the Government's first application for orders requiring the production of call detail records under the new business records standards set forth in Sections 101 and 103 of the USA FREEDOM Act. IC ON THE RECORD, *Release of Three Opinions Issued by the Foreign Intelligence Surveillance Court* (Apr. 19, 2016), <https://icontherecord.tumblr.com/post/143070924983/release-of-three-opinions-issued-by-the-foreign>.

<sup>230</sup> See, e.g., Carr, *supra* note 44; see Goitein & Patel, *supra* note 10 (clarifying that an "adversarial system . . . ensures that all relevant facts and legal arguments are aired, which in turn enables the tribunal to reach an accurate decision.").

<sup>231</sup> 50 U.S.C. § 1803(i)(2)(A) (2015).

assist with the legal interpretation of the issue.<sup>232</sup> Similarly, for certifications from the FISC to the Supreme Court, the USA FREEDOM Act provides that the Supreme Court “may appoint an amicus curiae” or “other person, to provide briefing or other assistance.”<sup>233</sup> Consideration of certified questions of law, by a three-judge appellate panel, and perhaps even by the Supreme Court, likely in an adversarial proceeding, will help create a more robust body of decisional law, enhancing the overall soundness of the FISC.

VI. GUIDANCE CAN BE DEVELOPED FROM *IN RE* CERTIFICATION  
OF QUESTION OF LAW

As discussed in the previous section, the FISC recently accepted a certified question of law and issued an opinion regarding whether the government was permitted to obtain all post-cut-through digits associated with the use of PR/TT devices. This matter is instructive in establishing standards for the process of certifying questions of law to a higher court. Based upon this matter, as well as the language in FISA, the following eight factors should be considered in deciding whether a legal question should be certified to a higher court, and whether that court should accept the certified question: (1) whether the issue presents a question of law;<sup>234</sup> (2) whether there is a lack of uniformity between the FISC and other courts or the FISC and other federal appellate courts;<sup>235</sup> (3) whether there are varying

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<sup>232</sup> IC on the Record, *supra* note 203.

<sup>233</sup> 50 U.S.C. § 1803(k)(2) (2015).

<sup>234</sup> The FISC “shall certify for review . . . any question of law that may affect resolution of the matter in controversy.” 50 U.S.C. § 1803(j) (2015) (emphasis added).

<sup>235</sup> The FISC “shall certify for review . . . any question of law that may affect resolution of the matter in controversy that the court determines warrants such review *because of a need for uniformity*.” *Id.* (emphasis added). See *In re Certification of Question of Law to the FISC*, Docket No. PR/TT 2016-[redacted], at 13 (believing that the “disagreement between the FISC and other courts provides reason to believe that consideration of these issues by the FISC would serve the interests of justice.”).

opinions among FISC and/or FISCER judges themselves about the legality of a surveillance technique;<sup>236</sup> (4) whether the decision was reached in an ex parte proceeding or with the assistance of an amicus curiae;<sup>237</sup> (5) whether the legal issue was novel or significant;<sup>238</sup> (6) whether an application of a new or complex technology is needed to conduct surveillance;<sup>239</sup> (7) whether the privacy interests of U.S.

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<sup>236</sup> See *id.* at 13. “FISC judges discussed the issues presented by post-cut-through digits at their semi-annual conference on October 27, 2015. Following that discussing, it was the consensus of the judges that further briefing was warranted in view of *concerns expressed by some judges* about continuing to authorize the acquisition of post-cut-through digits under PR/TT orders.” *Id.* at 5 (emphasis added) (citations omitted).

<sup>237</sup> In considering the government’s application in the post-cut-through digits matter, the FISC “did not appoint an amicus curiae pursuant to § 1803(i)(2)(A) because it found that it was not appropriate to do so under applicable time constraints and in view of the requirement under § 1803(c) to proceed as expeditiously as possible.” *Id.* at 12.

<sup>238</sup> The PCLOB recognized that the structure of the FISC could be improved by “facilitating appellate review” of such decisions involving “novel and significant issues.” PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 182. Further, considering whether a legal issue is novel or significant mirrors the statutory language of when an amicus curiae may be appointed to assist with a pending legal issue before the FISC. The USA FREEDOM Act states that the FISC or FISCER can appoint an amicus curiae to assist with “any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law.” 50 U.S.C. § 1803(i)(2)(A) (2015). In this matter, however, the FISC noted that the issue was not novel because the same issue had been considered since 2006. The FISC wrote: “[F]rom the FISC’s perspective, this matter does not present a ‘novel . . . interpretation of law.’” *In re Certification of Question of Law to the FISCER*, Docket No. PR/TT 2016-[redacted], at 12.

<sup>239</sup> As noted in the legislative history to the USA FREEDOM Act, as “technology evolves, we cannot say with certainty what the next big privacy issue will be.” 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Sen. Blumenthal). Likewise, Justice Samuel Alito has observed that “[r]ecent years have seen the emergence of many new devices that permit the monitoring of a person’s movements.” *U.S. v. Jones*, 132 S. Ct. 945, 963 (Alito, J., concurring). For example, in *Jones*, Justice Alito noted that: “In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of

persons are impacted and, if so, to what extent;<sup>240</sup> and (8) whether consideration of the legal issue by a higher court would “serve the interests of justice.”<sup>241</sup> Not all factors must be present to warrant certification as long as the statutory requirements are met.

In addition to the substantive consideration of when to certify a question of law to a higher court, the FISCER should develop procedural guidelines. Currently, the FISCER rule for certification provides: “Where the FISC certifies for review a question of law under 50 U.S.C. § 1803(j), the FISCER will certify, by appropriate order, the procedures to be followed.”<sup>242</sup> In developing procedural guidelines, the FISCER could model its rules on the Supreme Court’s procedures for certified question jurisdiction. For example, a FISCER rule could provide in part:

The FISC may certify to the FISCER a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be

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that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car’s location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen. Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States.” *Id.* at 963 (Alito, J., concurring).

<sup>240</sup> 18 U.S.C. § 1801(i)(2015); *In re* Certified Question of Law, Docket No. 16-01, at 3 (reviewing whether a FISC order considered “the investigative needs of the government and the privacy interests of the people.”).

<sup>241</sup> 50 U.S.C. § 1803(j) (2015). The FISC “shall certify for review . . . any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because . . . consideration by the [FISCER] . . . would serve the interests of justice.” *Id.* (emphasis added).

<sup>242</sup> FISA Ct. Rev. R.P. 5(b) (MEANS OF REQUESTING RELIEF FROM THE COURT).

certified, and they shall be stated separately and with precision.<sup>243</sup>

The FISCER could also develop procedural rules based upon the language of the statute. For example, additional procedural rules could state:

The FISC shall certify for review by the FISCER any question of law that may affect resolution of the matter in controversy that the FISC determines warrants such review because of a need for uniformity or because consideration by the FISCER would serve the interests of justice.<sup>244</sup>

Upon certification of a question of law, the FISCER may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.<sup>245</sup>

To demonstrate how the eight factors set forth above can be applied, and how the certification process works, consider the following hypothetical.

The FBI recently developed a surveillance technique using new technology. Soon thereafter, the FBI learned of an individual named Sam living in Ohio who is believed to be planning terrorist activities that may pose an immediate and serious threat to the security of the United States and many individuals. The FBI believes that there is an urgent need to use this new technology to conduct electronic surveillance of Sam as expeditiously as possible to protect numerous people. Conversely, however, in using this new technology, it is likely

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<sup>243</sup> Proposed rule based on SUP. CT. R. 19 (PROCEDURE ON A CERTIFIED QUESTION).

<sup>244</sup> 50 U.S.C. § 1803(j) (2015). Pursuant to the FISCER Rules of Procedures, when “the FISC certifies for review a question of law under 50 U.S.C. § 1803(j), the FISCER will certify, by appropriate order, the procedures to be followed.” FISA Ct. Rev. R.P. 5(b) (MEANS OF REQUESTING RELIEF FROM THE COURT). Proposed rule based in large part on 50 U.S.C. § 1803(j) (2015).

<sup>245</sup> *Id.*; proposed rule based in large part on 50 U.S.C. § 1803(j).

that the FBI will also acquire information concerning individuals, including U.S. persons, likely not associated with Sam.

The FBI submits an application to the FISC seeking the use of this new technology to conduct electronic surveillance of Sam. The FISC recognizes that the use of this new technology may infringe upon the privacy interests of U.S. persons. The FISC also believes, however, that the use of this new technology will provide the FBI with critical foreign intelligence information. The FISC agrees with the assessment that immediate use of this new technology is vital to our national security interests and the protection of individuals in our country, and decides this legal issue quickly. Due to the exigency of the matter, there is no time for the FISC to appoint an *amicus curiae*.

After balancing privacy and national security interests, the FISC, in an *ex parte* proceeding, approves the FBI's use of this new technology to conduct electronic surveillance of Sam. As part of its order, the FISC mandates procedures to protect U.S. privacy interests. Specifically, the FISC requires that any information collected concerning U.S. persons, other than Sam, may not be used or disseminated unless additional procedural safeguards are satisfied. The FISC authorizes the surveillance to begin immediately; the FBI begins its surveillance.

Meanwhile, the FISC, following the guidance set forth in the revised FISCR procedural rules, concludes that consideration of this legal issue by the FISCR "would serve the interests of justice" and certifies this legal issue for appellate review. Specifically, the FISC asks whether this new surveillance technique is permissible under FISA and the Fourth Amendment.

The FISCR determines that it is appropriate to consider the certified question. Further, because the issue presents a novel and significant question of law, pursuant to 50 U.S.C. §1803(i), the FISCR appoints an *amicus curiae* to provide written and

oral legal arguments as to the legality of this new technique. After considering the legal positions of both the *amicus curiae* and the government, and weighing the privacy and national security interests involved, a three-judge panel on the FISC concludes that the new surveillance technique is permissible under FISA and the Fourth Amendment. The FISC affirms the lower court's decision.

Because this new technology may impact the privacy interests of many U.S. persons, may have far-reaching legal implications beyond the current electronic surveillance of Sam, and presents novel legal issues, the FISC certifies the question of law to the Supreme Court. In a break from its tradition since 1981, the Supreme Court accepts the certified question of law. Similar to the FISC, the Supreme Court appoints an *amicus curiae* to present oral and written argument. Additionally, the Supreme Court permits other *amici curiae* to submit briefs. After fully deliberating the novel legal issues, and considering the impact on both privacy and national security interests, the Supreme Court upholds the decision of the FISC.

In this hypothetical, the FISC's determination to certify the question is consistent with the eight factors set forth above. For example, the legal issue was significant and involved a new technology that may have impacted the privacy interests of many U.S. persons. Additionally, due to the necessity of beginning surveillance immediately, the FISC did not have time to appoint an *amicus curiae*. Consequently, the FISC proceedings were *ex parte* and only the government's view was presented to the court. Because the government received a favorable decision in these *ex parte* proceedings, certified question jurisdiction was the only avenue for FISC review. It would have been senseless for the government to appeal a favorable decision. Without certified question jurisdiction, the FISC's decision—made in an *ex parte* proceeding and involving novel questions of law impacting the privacy interests of many U.S. persons—would have been final.

Once the FISC accepted the question for review, it appointed an amicus curiae to address the novel and significant legal issues. The amicus curiae provided an opposing view concerning the legality of the surveillance technique. This, in turn, enabled the FISC to consider the constitutional and statutory issues from different perspectives. The FISC, with the assistance of an amicus curiae and a sufficient amount of time, thoroughly considered the legality of the matter. Following careful deliberations by a three-judge panel, the FISC issued a thoughtful opinion upholding the FISC's decision. In contrast to the lower court, the FISC was able to appoint an amicus curiae and consider the legal issues in an adversarial proceeding.

Similarly, the Supreme Court considered written briefs and oral argument in an adversarial proceeding. Going forward, the Supreme Court's decision will provide valuable guidance concerning this new surveillance technique and possibly similar surveillance programs. For example, as technology evolves, the Supreme Court's opinion will guide the executive branch in developing future investigative methods. The decision will also provide insight to Congress in drafting new legislation regarding the scope of surveillance authorities. With respect to the judicial branch, the Supreme Court's decision will provide direction to FISC and FISC judges, as well as all courts, when analogous legal issues are presented. Moreover, the Supreme Court decision may help instill public confidence that the executive branch had been acting within its statutory and constitutional mandates. As demonstrated by this hypothetical, because the legal issues were considered by the FISC and Supreme Court in adversarial proceedings, the use of certified question jurisdiction may lead to greater public confidence in the integrity of FISC and FISC processes in authorizing surveillance techniques.<sup>246</sup>

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<sup>246</sup> See, e.g., 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Sen. Blumenthal) ("We need a FISA Court that we can trust to get the question right.



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VII. CONCLUSION

The FISC handles some of the most complex national security cases in our country. On an almost daily basis, it decides whether surveillance is permissible and against whom the surveillance can be conducted. In making its decisions, the FISC continually balances the privacy interests of individuals with the need to safeguard the security of our country and the American public. As eloquently described by the FISC in *In re Directives*:

Our government is tasked with protecting an interest of utmost significance to the nation—the safety and security of its people. But the Constitution is the cornerstone of our freedoms, and government cannot unilaterally sacrifice constitutional rights on the altar of national security. Thus, in carrying out its national security mission, the government must simultaneously fulfill its constitutional responsibility to provide reasonable protections for the privacy of United States persons. The judiciary's duty is to hold that delicate balance steady and true.<sup>247</sup>

The use of certified question jurisdiction will aid in the adjudication of these challenging legal issues.

If the FISC certifies more legal issues for appellate review, the FISC, and perhaps even the Supreme Court, will develop guidance on how to evaluate the legality of complex and novel surveillance techniques. Well-defined and thorough judicial guidance is essential to ensure that acquisition of foreign intelligence information is consistent with the Constitution and FISA. In a society where technology is evolving at a rapid pace, further judicial guidance will

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Trust, confidence, and the integrity of the judicial system that authorizes the surveillance of Americans' private lives is at issue here.”).

<sup>247</sup> *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1016 (FISA Ct. Rev. 2008).

help the government develop future surveillance programs consistent with the law. Moreover, appellate review of difficult legal issues, through the use of certified question jurisdiction, may lead to greater public confidence in the integrity of the FISC and FISCR processes.<sup>248</sup> Trust of our judicial system, especially one that regularly balances our fundamental interests of privacy and national security, is fundamental to our democratic principles.<sup>249</sup>



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<sup>248</sup> 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Sen. Blumenthal).

<sup>249</sup> *Id.*



## LEGAL IMPERATIVE? DECONSTRUCTING ACQUIESCENCE IN FREEDOM OF NAVIGATION OPERATIONS

**Ryan Santicola\***

*For over 30 years, the United States has conducted freedom of navigation operations (“FONOPs”) in protest of excessive maritime claims by states around the globe. As tensions surrounding the maritime disputes in the South China Sea have escalated, so too has attention on these previously subtle military operations. Yet, despite that attention, the legal rationale posited by the United States as to why FONOPs are necessary as a matter of international law has largely escaped critical examination. In exploring the international law of protest and the principle of acquiescence, this paper concludes that the argument in favor of FONOPs as a legal imperative is unpersuasive and that the United States would be well-served to uncouple these military operations from the international law of protest.*

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## INTRODUCTION

On October 27, 2015, the U.S. Navy engaged in a much-anticipated “freedom of navigation operation” (“FONOP”) near disputed maritime features in the South China Sea (“SCS”).<sup>1</sup> This FONOP involved the USS *Lassen* (DDG-82), a guided missile destroyer, sailing within 12 nautical miles of Subi Reef,<sup>2</sup> a feature that, in its natural state, is totally submerged at high tide.<sup>3</sup> According to

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<sup>1</sup> Ben Blanchard & Andrea Shalal, *Angry China Shadows U.S. Warship Near Man-Made Islands*, REUTERS (Oct. 27, 2015, 7:21 PM), <http://www.reuters.com/article/2015/10/27/us-southchinasea-usa-idUSKCN0SK2AC20151027>. The “Freedom of Navigation Program” exercised by the United States will be explained *infra* pp. 2-4.

<sup>2</sup> Sam LaGrone, *U.S. Destroyer Comes Within 12 Nautical Miles of Chinese South China Sea Artificial Island, Beijing Threatens Response*, U.S. NAVAL INST. NEWS (Oct. 27, 2015, 8:09 AM), <http://news.usni.org/2015/10/27/u-s-destroyer-comes-within-12-nautical-miles-of-chinese-south-china-sea-artificial-island-beijing-threatens-response>.

<sup>3</sup> *Subi Reef Tracker*, ASIA MAR. TRANSPARENCY INITIATIVE, <http://amti.csis.org/subi-reef-tracker/> (last visited Feb. 11, 2017).

U.S. officials, this operation was intended to reinforce the navigational freedoms guaranteed to all states by international law.<sup>4</sup>

China responded strongly to the *Lassen* FONOP. Labeling it a “severe political provocation,”<sup>5</sup> China asserted that the operation represented a violation of international and Chinese law that “threatened China’s sovereignty and security interests, put the personnel and facilities on the islands and reefs at risk and endangered regional peace and stability.”<sup>6</sup> Statements from the Chinese government indicated that it was prepared to “take any measures necessary to safeguard” the security interests it claims in the disputed features and waters of the SCS.<sup>7</sup> The United States has followed its *Lassen* FONOP with several more in the SCS in the last year, often challenging different Chinese claims in the region – all of which were met with reprobation by the Chinese government.<sup>8</sup>

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<sup>4</sup> Eric Schultz, Deputy Press Secretary for The White House, Remarks at Press Gaggle Aboard Air Force One (Oct. 27, 2015, 12:38 PM), <https://www.whitehouse.gov/the-press-office/2015/10/27/press-gaggle-principal-deputy-press-secretary-eric-schultz-en-route> (stating that “freedom of navigation operations serve to protect the rights, freedoms, and lawful uses of the sea and airspace guaranteed to all nations under international law. Our freedom of navigation operations do not assert any special U.S.-specific rights.”).

<sup>5</sup> *Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (Oct. 28, 2015), [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1309900.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1309900.shtml).

<sup>6</sup> *Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (Oct. 27, 2015), [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1309625.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1309625.shtml).

<sup>7</sup> Tom Phillips, *South China Sea: Beijing “not frightened to fight a war” after US move*, THE GUARDIAN (Oct. 28, 2015, 3:16 PM), <http://www.theguardian.com/world/2015/oct/28/china-not-frightened-fight-war-south-china-sea-uss-lassen> (quoting an official from the Chinese Ministry of Defense).

<sup>8</sup> See Ridzwan Rahmat, *Beijing Vows to Increase South China Sea Presence after USN’s Latest FONOP*, IHS JANE’S DEFENCE WEEKLY (May 12, 2016), <http://www.janes.com/article/60213/beijing-vows-to-increase-south-china-sea-presence-after-usn-s-latest-fonop>.

Since 1979, the United States government has maintained a “Freedom of Navigation” (“FON”) program.<sup>9</sup> This program aims to dispute the maritime claims of other states that the United States has determined to exceed the state’s entitlement under international law and it consists of both diplomatic and physical protests, like that of the *Lassen*.<sup>10</sup> These physical assertions, often referred to as “freedom of navigation operations” or FONOPs, are carried out both on and above the oceans by the U.S. Navy and U.S. Air Force.<sup>11</sup>

The legal premise most often advanced for FONOPs is that physical objections are necessary to avoid “acquiescence” in these excessive maritime claims.<sup>12</sup> For example, the U.S. Navy’s Commander’s Handbook on the Law of Naval Operations states:

When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace.<sup>13</sup>

In other words, the United States believes that diplomatic protests alone are insufficient to preserve its objection to the claim at

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<sup>9</sup> William J. Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, 68 INT’L. STUD. 243, 244 (1993).

<sup>10</sup> The U.S. Government refers to these claims as “excessive maritime claims.” See generally U.S. DEP’T OF STATE, LIMITS IN THE SEAS, NO. 112, UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS (Mar. 9, 1992).

<sup>11</sup> Jonathan G. Odom, *How the U.S. FON Program is Lawful and Legitimate*, ASIA MAR. TRANSPARENCY INITIATIVE (Oct. 30, 2015), <http://amti.csis.org/how-the-u-s-fon-program-is-lawful-and-legitimate>.

<sup>12</sup> *Id.* U.S. DEP’T OF NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, at 2-14 (July 2007), [http://www.jag.navy.mil/documents/NWP\\_1-14M\\_Commanders\\_Handbook.pdf](http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf) [hereinafter COMMANDER’S HANDBOOK].

<sup>13</sup> COMMANDER’S HANDBOOK, *supra* note 12.

issue, and that physical assertions in contravention of the claimed water and airspace are necessary to truly preserve the legal objection.

While commentators have questioned the use of FONOPs, those criticisms have generally focused on perceived political and strategic shortfalls in the program.<sup>14</sup> Most notably, critics charge that FONOPs can be unnecessarily provocative because they involve military assets operating in areas over which another state asserts disputed rights.<sup>15</sup> But critiques of the legal merits of FONOPs are uncommon and do not examine the principle of acquiescence in public international law as a justification for the program.

In an effort to fill this gap, this paper will explore the relationship between FONOPs and acquiescence, and critique the reliance on the latter as a basis for the former. In doing so, it will consider to what extent failing to engage in physical protests of excessive maritime claims risks acquiescing to those perceived violations of international norms, and the role of physical protests in the development of customary norms. It will also consider the effectiveness of physical protests in bringing states into conformity with international norms.

Part I will review the history of the FON program and the legal justification advanced for the program. Part II will consider the principle of acquiescence in international law, its treatment by international tribunals, and its significance for the development of customary international law. Part III will consider the legal significance of FONOPs in light of the discussion of acquiescence and will also empirically examine the success of FONOPs in altering the challenged excessive claims. Ultimately, this paper will conclude that

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<sup>14</sup> See Sam Bateman, *Why U.S. South China Sea FON Operations Don't Make Sense*, THE DIPLOMAT (Oct. 22, 2015), <http://thediplomat.com/2015/10/why-us-south-china-sea-fon-operations-dont-make-sense>.

<sup>15</sup> *Id.* (labeling FONOPs “deliberate provocations”).

FONOPs are not a legal imperative for the protection of U.S. interests, but rather a strictly political tool for advancing strategic interests, and that characterizing them as a legal imperative undermines their effectiveness and sets an untenable precedent for both maritime and land disputes globally.

#### I. THE U.S. FREEDOM OF NAVIGATION PROGRAM

The United States has maintained a FON program for over 30 years, beginning with the administration of President Jimmy Carter.<sup>16</sup> President Ronald Reagan formally introduced the FON program in 1982, the same year that the United States first indicated it would not accede to the United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>17</sup> At the time, President Reagan stated that the FON program was designed to “protect U.S. navigation, overflight, and related security interests in the seas through the vigorous exercise of its rights against excessive maritime claims.”<sup>18</sup> The program was renewed by President Reagan in his 1983 Oceans Policy Statement, as well as in a subsequent directive in 1987, and again by President George Bush in 1990, where it was also provided that the Department of Defense (“DOD”) would submit an annual report on the

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<sup>16</sup> See *U.S. Department of Defense Freedom of Navigation Program: Fact Sheet*, U.S. DEP’T OF DEF. (Mar. 2015), [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20\(March%202015\).pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf) [hereinafter *U.S. DOD Fact Sheet*].

<sup>17</sup> Nat’l Security Decision Directive No. 72, President Ronald Reagan (Dec. 13, 1982), <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDS/NSDD72.pdf> [hereinafter NSDD No. 72]. This program had been alluded to in an earlier directive from President Reagan in which, in anticipation of UNCLOS not being ratified, he directed the Department of Defense to “review the United States navigation and overflight program focusing on protecting United States rights and directing the practice of states toward the U.S. interpretation of the navigation and overflight provisions of the Law of the Sea Convention.” Nat’l Security Decision Directive No. 43, President Ronald Reagan (Jul. 9, 1982), <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDS/NSDD43.pdf>.

<sup>18</sup> *Id.*



operational assertions that occurred each year.<sup>19</sup> The program is still in operation today.

The FON program generally focuses on maritime claims assessed by the United States to not be in conformance with international law, with specific emphasis on the following categories of excessive claims: historic waters; excessive straight baselines; excessive territorial sea claims and unlawful restrictions on uses of the territorial sea; excessive claims over the uses of waters beyond the territorial sea; and excessive archipelagic claims.<sup>20</sup> Early on, the Presidential directives acknowledged a “possibility of damage to bilateral or other relations” resulting from FONOPs. Therefore, the program provided roles for both the DOD and Department of State (“DOS”), with the DOS continuing a parallel process of diplomatic protests of excessive claims.<sup>21</sup>

As such, the FON program includes diplomatic protests, bilateral and multilateral engagements, and the “operational assertions” of FONOPs.<sup>22</sup> While the DOS manages the diplomatic process, the DOD manages the operational component of the program

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<sup>19</sup> Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983) [hereinafter Oceans Policy]; Proclamation No. 5030, 48 Fed. Reg. 10,601 (1983), reprinted in 16 U.S.C.A. 1453; Nat’l Security Decision Directive No. 265, President Ronald Reagan (Mar. 16, 1987), <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDD%20265.pdf> [hereinafter NSDD No. 265]; Nat’l Security Decision Directive No. 49, President George Bush (Oct. 12, 1990), <http://fas.org/irp/offdocs/nsd/nsd49.pdf> [hereinafter NSDD No. 49].

<sup>20</sup> NSDD No. 72, *supra* note 17.

<sup>21</sup> *Id.*

<sup>22</sup> See James Kraska, *Commentary: Defend Freedom of Navigation*, DEFENSENEWS (Jun. 8, 2015), <http://www.defensenews.com/story/defense/commentary/2015/06/08/defend-freedom-navigation-china-pacific-islands-ships-intercept-sovereignty/28685409/> (stating that “[t]he program contains three elements: military-to-military engagement, official State Department diplomatic demarches, and operational assertions by ships and aircraft into areas purportedly claimed by coastal states”).

and FONOPs.<sup>23</sup> FONOPs generally refer to purposeful military operations by U.S. military ships and aircraft that enter into and conduct maneuvers within areas that are the subject of maritime claims that the United States deems excessive, but they may also include military operations conducted for other purposes that have the indirect result of challenging such maritime claims.<sup>24</sup> Examples of FONOPs might include operating an aircraft over an excessive territorial sea claim (overflight rights do not exist beyond the twelve nautical mile territorial sea) or operating a warship in a zone for which the coastal state requires warships to obtain advance permission.<sup>25</sup> Although the United States is not a party to UNCLOS, the FON program is linked to the U.S. general acceptance of the navigational rights and freedoms protected in the Convention, and the U.S. interest in exercising them.<sup>26</sup>

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<sup>23</sup> U.S. DOD Fact Sheet, *supra* note 16.

<sup>24</sup> See *id.* (stating that “[t]he Program includes both FON operations (i.e., operations that have the primary purpose of challenging excessive maritime claims) and other FON-related activities (i.e., operations that have some other primary purpose, but have a secondary effect of challenging excessive claims), in order to gain efficiencies in a fiscally- constrained environment”).

<sup>25</sup> See generally, Julian Ku, *The U.S. Navy’s Innocent Passage in the South China Sea May Have Actually Strengthened China’s Sketchy Territorial Claims*, LAWFARE (Nov. 4, 2015, 11:10 AM), <https://www.lawfareblog.com/us-navys-innocent-passage-south-china-sea-may-have-actually-strengthened-chinas-sketchy-territorial> (observing that the launching of a helicopter in a claimed territorial sea could challenge that claim); Raul Pedrozo & James Kraska, *Can’t Anybody Play this Game? US FON Operations and Law of the Sea*, LAWFARE (Nov. 17, 2015, 10:57 AM), <https://www.lawfareblog.com/cant-anybody-play-game-us-fon-operations-and-law-sea> (noting that FON Operations may challenge requirements for advance notice).

<sup>26</sup> NSDD No. 265, *supra* note 19 (stating that “the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention”); see also Oceans Policy, *supra* note 19 (stating that “the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states”).

The 1983 Oceans Policy provided the first clear expression of the U.S. position that FONOPs were necessary to avoid “acquiescence” in excessive maritime claims, stating that “the United States will not . . . acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”<sup>27</sup> This perspective on acquiescence has continued to appear in U.S. policy statements and scholarly works on the FON program.<sup>28</sup> In all of these, the term “acquiescence” clearly suggests that the United States believes that there is an actual risk that its rights will be abridged and norms solidified if it fails to engage in physical protests like FONOPs. In other words, the United States believes that FONOPs represent a legal

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<sup>27</sup> Oceans Policy, *supra* note 19. This same language was repeated in President Reagan’s 1987 directive and again in President Bush’s 1990 directive. See NSDD No. 265, *supra* note 19; NSDD No. 49, *supra* note 19.

<sup>28</sup> See, e.g., U.S. DOD Fact Sheet, *supra* note 16, at 2 (stating that FONOPs “are intended to demonstrate transparently the U.S. non-acquiescence to excessive maritime claims”); DEP’T OF DEF., INSTRUCTION 4540.01: USE OF INT’L AIRSPACE BY U.S. MILITARY AIRCRAFT AND FOR MISSILE AND PROJECTILE FIRINGS 2 (2015), <http://www.dtic.mil/whs/directives/corres/pdf/454001p.pdf> (providing that “U.S. military aircraft will not acquiesce in excessive maritime claims by other States, including their claims to airspace, that, if left unchallenged, could limit the rights, freedoms, and lawful uses of airspace recognized in international law”); James Kraska, *The Law of the Sea Convention: A National Security Success – Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT’L L. REV. 543, 569 (2008) (stating that the purpose of the FON program is to “tangibly exhibit the U.S. determination not to acquiesce to coastal states’ excessive maritime claims”); Sean P. Henseler, *Why We Need South China Sea Freedom of Navigation Patrols*, THE DIPLOMAT (Oct. 6, 2015), <http://thediplomat.com/2015/10/why-we-need-south-china-sea-freedom-of-navigation-patrols/> (arguing that “[i]f the United States, the only nation that uses military forces to assert freedom of navigation, doesn’t step up and act now, it may well be construed by the Chinese and others that Washington is in effect . . . acquiescing to China’s assertion of sovereignty over their man-made islands”); Dennis Mandsager, *The U.S. Freedom of Navigation Program: Policy, Procedure, and Future*, 72 INT’L L. LAW STUDIES 113, 115 (stating that “[i]f maritime nations acquiesce in an excessive claim by failing to exercise their rights, then the claims may eventually be considered to have been accepted as binding law”).

imperative and not just a policy one. But does this accord with the understanding of physical acts and acquiescence in international law?

## II. ACQUIESCENCE IN INTERNATIONAL LAW

### A. Customary International Law

Customary international law develops through a combination of state practice and a sense of legal obligation, referred to as *opinio juris*.<sup>29</sup> Often referred to as the “two-element approach,” “a rule of customary international law may be said to exist where there is ‘a general practice’ that is ‘accepted as law.’”<sup>30</sup> Customary international law, as elucidated through general practice and *opinio juris*, is “binding on all States, even new ones and those new to a type of activity, as well as those existing States which played no part in the new custom, neither engaging in the practice concerned nor acquiescing in any real sense.”<sup>31</sup>

Conduct by states in violation of customary international law implicates a number of interests and triggers a number of options for lawful response. A state generally has three possible avenues it can

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<sup>29</sup> See *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 55 (Feb. 3) (stating that “in particular ... the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*”); see also, *North Sea Continental Shelf* (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20) (holding that “two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”).

<sup>30</sup> Michael Wood (Special Rapporteur on Identification of Customary International Law), *Second Report on Identification Of Customary International Law*, U.N. Doc. A/CN.4/672 at 7 (May 22, 2014).

<sup>31</sup> Int’l L. Ass’n, Comm. On the Formation of Customary (Gen.) Int’l L., *Statement of Principles Applicable to the Formation of General Customary International Law*, at 25 (2000) [hereinafter *Statement of Principles*].

pursue in this regard: recognition, protest, or acquiescence.<sup>32</sup> Recognition is defined as “a public acknowledgement by a state of the existence of another state,<sup>33</sup> law, or situation.”<sup>34</sup> It may be a unilateral act by the responding state,<sup>35</sup> perhaps through a diplomatic statement,<sup>36</sup> or a bilateral or even multilateral expression of acceptance of the conduct.<sup>37</sup> Such endorsements, even when consisting exclusively of verbal statements, may be considered sufficient evidence of state practice regarding the acceptance of emerging customary norms.<sup>38</sup>

### B. *The Law of Protest*

Conversely, a state may react to an unlawful act with an official protest. In fact, if a state objects to another state’s conduct it

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<sup>32</sup> See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 143 (8th ed. 2012).

<sup>33</sup> While “recognition” is often associated as a term-of-art with recognizing another entity as a state or another government as the lawful and legitimate government of a state, it is used in a more general sense here to describe affirmative acknowledgement of a state’s conduct. See CRAWFORD, *supra* note 32.

<sup>34</sup> Thomas W. Donovan, *Challenges to the Territorial Integrity of Guyana: A Legal Analysis*, 32 GA. J. INT’L & COMP. L., 661, 711 (2004) (citing IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 165 (3d ed. 1979)).

<sup>35</sup> CRAWFORD, *supra* note 32.

<sup>36</sup> See, e.g., *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 47 (Sept. 5) (holding that the statement by the Foreign Minister of Norway in recognition of Danish sovereignty over Greenland, also known as the “Ihlen Declaration,” constituted recognition of Denmark’s claim under international law).

<sup>37</sup> See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 205 (2010) (stating that “if a nation wants to engage in a practice contrary to an established [customary international law] rule, it must either violate the rule or enter into a treaty that overrides the rule as between the parties to the treaty.”). Another example of a multilateral expression of acceptance is a declaration from a body of the United Nations, as occurred when the United Nations Security Council reaffirmed the territorial sovereignty and independence of Cyprus. S.C. Res. 355 ¶ 5 (Aug. 1, 1974).

<sup>38</sup> *Statement of Principles*, *supra* note 31, at 41.

can be said to have a duty to protest, both to preserve the objection and to put the offending state on notice of the objection.<sup>39</sup> A protest is “a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter.”<sup>40</sup> Protests are generally marked by formality and clarity and, in diplomatic parlance, are often referred to as “demarches.”<sup>41</sup> To have legal effect, the communications must be issued by an authority competent to act as a representative of the respondent state, and must be public in nature.<sup>42</sup> Critically, “the care with which a statement is made is a relevant factor; less significance may be given to off-the-cuff remarks made in the heat of the moment.”<sup>43</sup>

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<sup>39</sup> See Hersch Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L. 376, 396 (1950). Professor Lauterpacht states the following regarding a state's duty to protest:

It is an essential requirement of stability—a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very states.

*Id.*

<sup>40</sup> I.C. MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y.B. INT'L 293, 294 (1953) (citing Oppenheim, *International Law*, vol. I (7th ed., by Lauterpacht, 1948)).

<sup>41</sup> *Id.*; *Foreign Affairs Manual, Correspondence Handbook*, Vol. 5 FAH-1 H-613.1, U.S. DEPARTMENT OF STATE (May 20, 2013), <https://fam.state.gov> (stating that demarches are designed to “protest or object to actions of a foreign government” as well as “persuade, inform, or gather information” from those governments).

<sup>42</sup> *Statement of Principles*, *supra* note 31, at 15; see generally Richard B. Lillich, John Norton Moore, & John R. Brock, *Archipelago Concept of Limits of Territorial Seas*, 61 INT'L L. STUD. 328 (1980).

<sup>43</sup> Wood, *supra* note 30 at 14.

As with recognition, a protest may be made by states acting individually or collectively.<sup>44</sup> By protesting, a state, or a group of states, indicates its objection to the specific conduct or claim in question and its unwillingness to abandon its rights on the subject.<sup>45</sup> A protest also contributes to the establishment or preservation of customary international law.<sup>46</sup> In this sense, a protest is relevant for both old and nascent customs, because “instances of State conduct inconsistent with a particular customary norm could be treated not only as ‘breaches’ of the rule, but also ‘indications of the recognition of a new rule.’”<sup>47</sup>

It is said that, to be effective, a protest must be repeated as long as the disputed conduct or claim persists and a “one-off” protest may not sufficiently protect a protesting state’s rights.<sup>48</sup> This view is not without criticism, with one commentator arguing that the requirement for repeated protest creates an unnecessary “tit-for-tat” in international relations that is both juvenile and provocative.<sup>49</sup> But

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<sup>44</sup> See, e.g., S.C. Res. 502 (April 3, 1982) (objecting to the invasion of the Falkland Island (Islas Malvinas) by Argentine military forces and demanding immediate withdrawal).

<sup>45</sup> MacGibbon, *supra* note 40, at 307.

<sup>46</sup> See generally MacGibbon, *supra* note 40, at 293 (stating that, “in addition to providing evidence of what States consider to be the law, protests are apt to influence the development of customary rules of international law either as showing the extent of the generality of the custom in question or by assisting in the appreciation of the existence of the *opinio juris sive necessitatis* in respect of any particular practice”).

<sup>47</sup> David J. Bederman, *Acquiescence, Objection, and the Death of Customary International Law*, 21 DUKE J. COMP. & INT’L L. 31, 37 (2010) (quoting Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14, p. 186 (June 27)).

<sup>48</sup> See MacGibbon, *supra* note 40, at 310 (stating that “in the event of repetition of the acts protested against or the continuation of the situation created by them, it is clear that scant regard will be paid to the isolated protest of a State which takes no further action to combat continued infringements of its rights.”). See also *Statement of Principles*, *supra* note 31, at 28 (asserting that an objection “must be repeated as often as circumstances require”). This requirement forms the basis of the “persistent objector” dynamic discussed *infra*.

<sup>49</sup> David A. Colson, *How Persistent Must the Persistent Objector Be*, 61 WASH. L.

the view that states must persist in their objections cannot be totally ignored. The “persistent objector” doctrine holds that “a state that has persistently objected to a rule of customary international law during the course of the rule’s emergence is not bound by the rule.”<sup>50</sup> Persistent objection can take any of the many forms available to states in protesting. Yet, for the principle to apply, the state wishing to oppose application of the norm must persistently object “during the process of crystalizing;” opposition only after general acceptance of the norm is insufficient.<sup>51</sup> “It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage.”<sup>52</sup> Moreover, a state cannot unilaterally exempt itself from a customary norm without having established a record of objection prior to the rule achieving general acceptance.<sup>53</sup>

However, despite widespread acceptance of the persistent objector principle, there is scant evidence of the doctrine being invoked as the basis to exempt a state from a customary norm.<sup>54</sup> It should also be noted that persistent objection is not the method by which a state avoids the force of a treaty-based rule. Rather, in the context of treaty law application, withdrawal or, where permissible,

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REV. 957, 964 (1986).

<sup>50</sup> Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 457 (1985). An underlying premise of the persistent objector principle would seem to be that customary international law is consent-based, an arguable topic which will not be addressed in this paper; see generally Bradley & Gulati, *supra* note 37, at 233 (discussing the emergence of the principle); *Statement of Principles*, *supra* note 30, at 40 (observing the opposing perspectives on consent and customary international law and stating that “it would not be correct to say that consent or will play no part at all in the formation of customary rules. But equally, it would not be accurate to say that it is only through consent that customary law is created.”).

<sup>51</sup> Bederman, *supra* note 47, at 35.

<sup>52</sup> *STATEMENT OF PRINCIPLES*, *supra* note 31, at 27.

<sup>53</sup> Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 2 (1985).

<sup>54</sup> See Bradley & Gulati, *supra* note 37, at 239-40.



reservation is the appropriate manner by which a state gains exemption from a rule.<sup>55</sup> As one commentary on the subject succinctly observed:

If the objecting state has signed a treaty which covers the issue (even if they have signed and later withdraw) they are no longer a persistent objector. They have consented, at least for a time, and should be bound by the norm if it has the status of international custom.<sup>56</sup>

Returning to the issue of protests more generally, protests may be buttressed by state practice, such as “verbal acts” expressing an explicit objection or “physical acts” intended to represent an objection.<sup>57</sup> While “verbal acts” in this sense would include diplomatic protests, they would also extend to “policy statements, press releases, official manuals (e.g. on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt.”<sup>58</sup> “Physical acts,” on the other hand, could consist of such tangible actions as arrest of individuals, seizure of property,<sup>59</sup> publicly flouting a claimed right,<sup>60</sup> economic

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<sup>55</sup> See generally Bradley & Gulati, *supra* note 37, at 233 (discussing both the express and implied withdrawal rights from treaties).

<sup>56</sup> Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT’L L. & POL’Y 147, 163 (1996).

<sup>57</sup> STATEMENT OF PRINCIPLES, *supra* note 31, at 14.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *infra* notes 1-27, and accompanying text.

boycott or embargo,<sup>61</sup> or the referral of a dispute to an international tribunal for resolution.<sup>62</sup>

The extent to which a protest must be supported by “physical acts” to adequately preserve the rights in question is a crucial consideration. The International Law Association (“ILA”) has declared that “[v]erbal protests are sufficient: there is no rule that States have to take physical action to preserve their rights.”<sup>63</sup> This appears to be the majority view and one recognized by the International Court of Justice (“ICJ”) in its *Nicaragua* ruling.<sup>64</sup> Nonetheless, some commentators emphasize the “visible, real and significant” impact of physical acts in asserting a right internationally.<sup>65</sup> Refuting this point, the ILA asserts that “talk is not always cheap.” “[V]erbal acts can constitute a form of State practice, and not all verbal acts carry little weight.”<sup>66</sup>

In its defense of the sufficiency of verbal acts in establishing state practice, the ILA points to three important practical factors. First, verbal acts are a more common form of state practice than physical conduct.<sup>67</sup> Second, verbal acts may be the only means of

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<sup>61</sup> See generally Hersch Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125, 130 (1933) (explaining that “[i]n the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory”).

<sup>62</sup> MacGibbon, *supra* note 40 (stating that “protests may not of themselves be sufficient...and that courts will require evidence of the assumption by the protesting State of some positive initiative towards settlement of the dispute in the form of an attempt to utilize all available and appropriate international machinery for that purpose”).

<sup>63</sup> STATEMENT OF PRINCIPLES, *supra* note 31, at 28.

<sup>64</sup> HCM Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT'L L. 28 (1991).

<sup>65</sup> Benjamin Langille, *It's “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 148 (2003).

<sup>66</sup> STATEMENT OF PRINCIPLES, *supra* note 31, at 13.

<sup>67</sup> *Id.* at 14.

practice available to states that are relatively weak or without resources to engage in physical acts, yet those states have the right and duty to protest. Space must exist in the law for such states to effectively protest despite their relative powerlessness.<sup>68</sup> Third, physical acts “are not always formal and deliberate manifestations of State practice” and, in terms of *opinio juris*, “verbal acts are probably more likely to embody the beliefs of the State (or what it says it believes) than physical acts, from which belief may need to be inferred by others.”<sup>69</sup> Ultimately, “both forms of conduct are manifestations of State will.”<sup>70</sup>

Arguably just as relevant as the form of the protest in developing customary international law is the source of the protest. In this sense, there is both a quantitative and qualitative dimension. Quantitatively, general participation or acquiescence by states collectively is thought to provide strong evidence of the accepted nature of a norm for purposes of crystallization.<sup>71</sup> But the quantity of states accepting of the practice is not the only measure; the interests of the particular states objecting is also significant. Often referred to as the “specially affected state” doctrine,<sup>72</sup> an examination of state practice must “include[] that of states whose interests are specially affected” by the issue at hand.<sup>73</sup> This doctrine has been interpreted to mean that recognition or protest from states with a unique interest in the dispute, either due to geography or subject matter, is particularly

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<sup>68</sup> *Id.* at 61.

<sup>69</sup> *Id.* at 14.

<sup>70</sup> *Id.*

<sup>71</sup> See I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115, 117 (1957). According to this argument, customary international law “may most readily and objectively be gauged by estimating the degree of general consent, or, failing express consent, the degree of general acquiescence which the practice has encountered.” *Id.* at 119.

<sup>72</sup> STATEMENT OF PRINCIPLES, *supra* note 31, AT 26.

<sup>73</sup> North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 20).

important in assessing recognition or protest by the international community.<sup>74</sup>

C. *Failure to Protest*

Notwithstanding the question of how a state must protest and which states must do so to resist creation of a norm, the consequences of withholding an international protest are clear, and are summed up by Sir Hersch Lauterpacht in the following comment:

[T]he absence of protest in the past can be adduced not only as showing that in the view of the complaining state itself the act which is now being made the subject of challenge was not inconsistent with international law. The absence of protest may, in addition, in itself become a source of legal right inasmuch as it is related to – or forms a constituent element of – estoppel or prescription.<sup>75</sup>

In other words, a state that fails to protest may be determined to have acquiesced in the offending state's conduct, potentially leading to application of the principle of estoppel or crystallization of a norm as customary.

Acquiescence has been described as “the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights ... tak[ing] the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.”<sup>76</sup> “The primary purpose of acquiescence is evidential; but

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<sup>74</sup> See, e.g., U.S. Dep't of State, Office of the Legal Advisor, *Law of the Sea and International Waterways*, 1973 DIG. U.S. PRAC. INT'L L. 239, 245 (1973) (contending that, “the consent or opposition of some States (i.e. neighboring or interested States) may be more important in establishing acquiescence than the actions of uninterested States”).

<sup>75</sup> Lauterpacht, *supra* note 39, at 395.

<sup>76</sup> I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143, 143 (1954).

its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical.”<sup>77</sup> Acquiescence in the realm of international relations primarily has force in two contexts: first, acquiescence may lead to estoppel during international adjudication of a dispute; and second, it may provide important evidence as to the general acceptance of international norms and customs.<sup>78</sup>

Looking first at estoppel, a state’s silence in the face of unlawful conduct may preclude a later objection to that conduct before international tribunals.<sup>79</sup> In this regard, acquiescence is viewed narrowly and “operates to bind only parties to the representation . . . giving rise to the estoppel, whereas acquiescence by the international community generally may in time create a rule of customary international law binding on all States.”<sup>80</sup> Like acquiescence more generally, estoppel is an equitable principle that flows from the expectation of good faith in the international relations of states and reflects “the requirement that a State ought to be consistent in its

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<sup>77</sup> *Id.* at 145.

<sup>78</sup> See generally *id.* at 146-51. Acquiescence can also be utilized as evidence for purposes of interpreting a legally-binding agreement or treaty to which both states are parties. While acquiescence in the realm of treaty interpretation is not the focus of this paper, it may be relevant to the FON Program insofar as that program is related to interpretation of the United Nations Convention on the Law of the Sea (UNCLOS). In that regard, the following is informative: “[t]he failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of their respective rights and obligations under the treaty.” *Id.* at 146.

<sup>79</sup> See *In re the Chagos Marine Protected Area Arbitration* (Mauritius v. U.K.), PCA Case Repository 1, 172 (Perm. Ct. Arb. 2015).

<sup>80</sup> Phil C.W. Chan, *Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited*, 3 CHINESE J. INT’L L. 421, 424 (2004). “[T]he plea of estoppel is made inter partes (or their privies); it affects the position between the parties without regard to the question whether the claim is recognized or acquiesced in by the community generally.” D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT’L L. 176, 200 (1957).

attitude to a given factual or legal situation.”<sup>81</sup> The principle may be invoked when the following conditions are present:

(a) a State has made clear and consistent representations, by word, conduct, or *silence*; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely.<sup>82</sup>

The preclusive effect of estoppel has been frequently invoked in international proceedings, but the contours of the principle continue to develop.<sup>83</sup> As recently observed by one tribunal, “the forms of representation capable of giving rise to estoppel are not strictly defined in international law.”<sup>84</sup> These forms may include declarations of states as well as persistent conduct evidencing an official position upon which other states can reasonably rely.<sup>85</sup>

For purposes of examining the U.S. FON program, estoppel is not the focus. This is primarily the case because the United States is not a party to the UNCLOS or its compulsory dispute resolution provisions and, as such, there is no indication that it exercises FONOPs as a means of strengthening its position before an

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<sup>81</sup> See generally I.C. MacGibbon, *Estoppel in International Law*, 7 INT’L & COMP. L.Q. 468, 468-69 (1958) (stating that “[s]uch a demand may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct.”).

<sup>82</sup> Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Perm. Ct. Arb. at 174.

<sup>83</sup> See MacGibbon, *supra* note 81, at 168.

<sup>84</sup> Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Perm. Ct. Arb. at 174.

<sup>85</sup> See *id.* (citing Temple of Preah Vihear (Cambodia v. Thailand), Judgment of 15 June 1962, Separate Opinion of Sir Gerald Fitzmaurice, I.C.J. Reports 1962, p. 52 at p. 63).

international tribunal. Rather, the U.S. focus is on the preservation of the rights and duties it believes to be rooted in customary international law.<sup>86</sup> That makes the significance of acquiescence in the development of customary law much more relevant for this discussion.

Beyond the unfairness of a state maintaining inconsistent positions, the principle of acquiescence in the development of customary international law attempts to ascribe meaning to a state's silence and provides that such silence may be interpreted as "tacit recognition" or consent to the offending conduct.<sup>87</sup> In this sense, a state's acquiescence to a controversial interpretation of a treaty may be viewed as an indication of acceptance. Similarly, acquiescence can lead to the implicit acceptance of the legality of a state's conduct, potentially contributing to the development of customary international law or exempting the violating state from a customary norm already in existence.<sup>88</sup> In this regard, acquiescence is interpreted as a kind of "inferred consent."<sup>89</sup>

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<sup>86</sup> Raul Pedrozo, *Freedom of Navigation Exercises Essential to Preserve Rights*, THE STRAITS TIMES (Oct. 30, 2015, 5:00 AM), <http://www.straitstimes.com/opinion/freedom-of-navigation-exercises-essential-to-preserve-rights> (arguing that FONOPs "are a necessary measure to preserve enduring and non-negotiable rights at sea").

<sup>87</sup> See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), Judgment, 1984 I.C.J. 246, ¶ 130 (Oct. 12); Michael Byers, *Custom, Power, and the Power of Rules Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 165 (1995) (observing that acquiescence is representative of ambivalence by states and functions as tacit consent in the development of customary international law).

<sup>88</sup> JOHN P. GRANT & J. CRAIG BARKER, PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 137 (2009) (observing that a customary international legal rule can emerge from "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law").

<sup>89</sup> Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT'L L. 523 (2004).

In the context of the larger scheme of developing customary international law, the process revolves around “the assertion of a right, on the one hand, and consent to or acquiescence in that assertion, on the other.”<sup>90</sup> Herein lies the strategic importance of acquiescence for the scheme of “action and reaction” that characterizes the development of customary international law.<sup>91</sup> When reaction is replaced by inaction, a state may be interpreted as acquiescing to the customary norm in question. As the International Law Commission (“ILC”) has observed in considering how customary international law is identified, state practice includes not only physical and verbal acts, but also inaction when “[s]tates were in a position to react and the circumstances called for some reaction.”<sup>92</sup>

#### D. Clarifying “Inaction”

There is no support for the conclusion that a state’s verbal acts in response to circumstances warranting a reaction constitute, as a matter of international law, “inaction,” either with respect to the application of estoppel or the development of a customary norm. For instance, in the ICJ’s 1984 ruling in the *Gulf of Maine* case, the Court recognized that the maritime delimitation dispute between the United States and Canada crystallized when diplomatic notes were exchanged in which both parties refused to alter their positions.<sup>93</sup> In other words, the Court found that verbal acts were sufficient to preserve the dispute and declined to apply estoppel, despite the fact that over the course of its dispute with Canada, the United States intentionally avoided

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<sup>90</sup> MacGibbon, *supra* note 71, at 117.

<sup>91</sup> *Id.* at 118.

<sup>92</sup> INT’L LAW COMM’N, *Identification of Customary International Law*, ¶¶6, 10 U.N. Doc. A/CN.4/L.869 (Jul. 14, 2015) (draft conclusions) <http://legal.un.org/docs/?symbol=A/CN.4/L.869> (last visited Jan. 6, 2017).

<sup>93</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), Judgment, 1984 I.C.J. 246, ¶ 64 (Oct. 12).



physical acts that might have more forcefully asserted its rights.<sup>94</sup> The ICJ did not penalize the United States for not choosing to physically assert its claimed rights. This comports with the ICJ's jurisprudence elsewhere in the context of maritime delimitation in that the Court underemphasizes the significance of physical acts of the parties to the dispute in determining their official position.<sup>95</sup>

While the ICJ has certainly acknowledged the availability of physical assertions as a method of preserving a state's rights, it has not held that a state *must* engage in such assertions to avoid acquiescing. Reference has been made to the *Corfu Channel* case in support of the proposition that it is appropriate to challenge excessive maritime claims through physical acts.<sup>96</sup> However, the ICJ's holding that the United Kingdom had no duty to abstain from a physical assertion against Albania's claim is quite different from suggesting that the United Kingdom would have been held to have acquiesced in the excessive claim had it elected instead to stand on its verbal protest.<sup>97</sup> Rather, the Court gave consideration to a series of diplomatic protests

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<sup>94</sup> See, e.g., *id.* at ¶ 67 (observing that the United States exercised a "policy of restraint" by not granting leases of oil/gas tracts in disputed portions of Georges Bank).

<sup>95</sup> Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, ¶ 220 (Nov. 19) (stating that "[w]hile it cannot be ruled out that conduct might need to be taken into account as a relevant circumstance in an appropriate case, the jurisprudence of the Court and of arbitral tribunals shows that conduct will not normally have such an effect.").

<sup>96</sup> See, e.g., Lynn Kuok, *The U.S. FON Program in the South China Sea: A lawful and necessary response to China's Strategic Ambiguity*, CTR. FOR E. ASIA POL'Y STUD., 14 (Jun. 2016), <https://www.brookings.edu/wp-content/uploads/2016/07/The-US-FON-Program-in-the-South-China-Sea.pdf> (citing the holding in the *Corfu Channel* case as supportive of the argument in favor of FONOPs).

<sup>97</sup> See *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 30 (Apr. 9) (stating that "[t]he 'mission' was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.").

from both the United Kingdom and Albania to one another's positions, reflecting again that verbal acts can preserve the dispute.<sup>98</sup>

It is telling that Judge Read's position in the 1951 *Fisheries* case arguing "the only convincing evidence of State practice is to be found in seizures" was a dissenting one and not adopted by the majority of the Court.<sup>99</sup> There, the Court was convinced by the absence of *any* protest, either physical or verbal, that states had acquiesced to Norway's claims.<sup>100</sup> The Court was also particularly persuaded by France's exchange of notes with Norway that ultimately appeared to accept Norway's claim, but it did not imply that, had France or any other state rested its objection on a verbal protest, it would have been insufficient to prevent crystallization of Norway's claim.<sup>101</sup>

Similarly, while the ILC has acknowledged the potential significance of inaction in the development of customary norms, it has explicitly declined to endorse the notion that physical acts are necessary to avoid acquiescence.<sup>102</sup> To be sure, the ILC takes the perspective that state practice that is relevant to the development of customary international law includes diplomatic correspondence and "operational conduct 'on the ground,'" but it clarifies that "there is no predetermined hierarchy among the various forms of practice."<sup>103</sup> This perspective was promoted by the ILC's Special Rapporteur, Sir

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<sup>98</sup> *Id.* at 27.

<sup>99</sup> *Fisheries (U.K. v. Norway)*, Judgment, 1951 I.C.J. 115, 191 (Dec. 18) (separate opinion by Read, J.). Judge Read's position on this point is also somewhat inconsistent on the question of a requirement for physical acts in that he discounted those seizures of fishing vessels by Norway that immediately met with verbal protest from the United Kingdom, implying that the U.K.'s verbal act was sufficient and it did not have to engage in physical acts itself to preserve its rights. *Id.*

<sup>100</sup> *Id.* at 138 (holding that "[t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it.").

<sup>101</sup> *Id.* at 135-36.

<sup>102</sup> INT'L LAW COMM'N, *supra* note 92, at 2 (Draft Conclusion 6).

<sup>103</sup> *Id.*

Michael Woods, in his report on customary international law, in which he stated that “no one manifestation of practice is *a priori* more important than the other; its weight depends on the circumstances as well as on the nature of the rule in question.”<sup>104</sup> In other words, physical acts are not necessarily more persuasive on the question of state practice than are verbal acts. In this regard, the Special Rapporteur expressly departs from the apparent minority notion advanced by Judge Read, and other scholars, that physical acts are the fulcrum on which international protests rest.

### III. ASSESSING THE U.S. POSITION ON ACQUIESCENCE IN THE LOS

As the discussion above demonstrates, the United States’ suggestion that failure to engage in physical acts of protest constitutes acquiescence appears to exaggerate the legal value of physical acts over other means of protest. Neither the judicial nor the scholarly opinions in this field support the conclusion that a state must, as a matter of law, physically protest claims by other states to either preserve its own rights and objections or to prevent the claims of the other state from crystallizing into customary law. Rather, verbal acts are sufficient to record a state’s protest. For three reasons, this fact should be embraced by the United States.

First, this conclusion is logical. If a state can recognize emerging norms or conduct by other states exclusively through verbal acts,<sup>105</sup> certainly states should be able to rely exclusively on verbal acts to protest such norms. Additionally, as described below, rational policy reasons favor verbal acts over physical protests.

Second, reliance on physical acts undermines clarity in international communications.<sup>106</sup> A physical act by a warship or

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<sup>104</sup> Wood, *supra* note 30, at 35.

<sup>105</sup> See Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

<sup>106</sup> *Statement of Principles*, *supra* note 31, at 13-14.

aircraft conducting a FONOP overtly communicates very little on its own. Only through verbal communication of some kind, such as radio communications during the operation or later diplomatic notes, does the protesting state express the physical act's intentions. Even then, however, the communications may not clarify the intention of the mission or the rights asserted. This fact was displayed recently when a maritime patrol and reconnaissance aircraft from Australia was operating in the SCS.<sup>107</sup> During that operation, the aircraft was queried by a Chinese ground station and communicated that it was operating in international airspace and exercising its rights under international law.<sup>108</sup> What this meant in an area with overlapping and excessive maritime claims, however, was ambiguous and left doubt as to whether the Australian aircraft was conducting a FONOP to refute a specific maritime claim or engaging in a routine patrol in an undisputed area.<sup>109</sup>

Even when physical acts are accompanied by diplomatic and public statements by senior government officials, clarity can remain elusive. The FONOP by the USS *Lassen*, introduced above, highlights this point. Despite multiple statements from U.S. officials and countless examinations by experienced scholars and commentators, the exact nature of the operation and the excessive claim being challenged remained unclear.<sup>110</sup> Even a U.S. government agency, the U.S.-China Economic and Security Review Commission, struggled to

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<sup>107</sup> Shannon Tiezzi, *Did Australia Secretly Conduct Its Own Freedom of Navigation Operation in the South China Sea?*, THE DIPLOMAT (Dec. 16, 2015), <http://thediplomat.com/2015/12/did-australia-secretly-conduct-its-own-freedom-of-navigation-operation-in-the-south-china-sea/>.

<sup>108</sup> *Id.*

<sup>109</sup> Nick Bisley, *Australia's Air Force in the South China Sea: Flying Quietly and Carrying a Medium-Sized Stick*, THE INTERPRETER (Dec. 16, 2015, 08:57 AM), <http://www.lowyinterpreter.org/post/2015/12/16/Australias-air-force-in-the-South-China-Sea-Flying-quietly-and-carrying-a-medium-sized-stick.aspx>.

<sup>110</sup> Adam Klein & Mira Rapp-Hooper, *What Did the Navy Do in the South China Sea?*, LAWFARE (Nov. 4, 2015, 11:21 AM), <https://www.lawfareblog.com/what-did-navy-do-south-china-sea>.

ascertain the message being communicated through the FONOP.<sup>111</sup> Incredibly, it was not until the U.S. Secretary of Defense responded to a formal inquiry by a U.S. Senator,<sup>112</sup> over two months after the *Lassen* FONOP, that a clear description emerged as to what excessive claims were protested and what rights were asserted by the operation. There is no indication that a similar letter or detailed legal analysis was sent to the People's Republic of China.

The confusion surrounding this operation arguably eviscerated any immediate value that it may have had in protesting a claim,<sup>113</sup> a result that seems unlikely to have occurred had a formal demarche been utilized instead. In fact, past U.S. diplomatic correspondence concerning freedom of navigation demonstrates its superior value in clearly communicating the U.S. position. For example, in January 2007, the United States submitted an *aide memoire* to the Chinese government concerning military survey activities in China's Exclusive Economic Zone ("EEZ").<sup>114</sup> In six paragraphs, the communiqué disputed China's assertion of a requirement for prior notification of such activities in its EEZ and provided detailed legal reasoning for the U.S. position on the subject.<sup>115</sup> The muddled message regarding freedom of navigation put forth by the USS *Lassen* stands in stark contrast to the one provided in this 2007 memorandum.

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<sup>111</sup> See, e.g., Matthew Southerland, *U.S. Freedom of Navigation Patrol in the South China Sea: What Happened, What it Means, and What's Next?*, U.S.-CHINA ECON. & SEC. REV. COMM'N (Nov. 5, 2015), [www.uscc.gov/sites/default/files/Research/US%20Freedom%20of%20Navigation%20Patrol%20in%20the%20South%20China%20Sea.pdf](http://www.uscc.gov/sites/default/files/Research/US%20Freedom%20of%20Navigation%20Patrol%20in%20the%20South%20China%20Sea.pdf) (using qualified phrases like "appears" and "apparently" to decipher the possible messages of the FONOP).

<sup>112</sup> Letter from Ash Carter, U.S. Sec. of Def., to Sen. John McCain (Dec. 22, 2015), <https://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>.

<sup>113</sup> Pedrozo & Kraska, *supra* note 25.

<sup>114</sup> J. Ashley Roach & Robert W. Smith, EXCESSIVE MARITIME CLAIMS 384 (2012).

<sup>115</sup> *Id.* at 384-85.

The emphasis on physical acts also erodes clarity in international relations because it expands the field of practice that a state must interpret in ascertaining a fellow state's position, potentially leading to reliance on non-authoritative acts. A recent example of this dilemma involved two U.S. military B-52 bomber aircraft that mistakenly overflowed the territorial sea of a land feature in the SCS.<sup>116</sup> While the Chinese government issued a demarche to the United States over this incident,<sup>117</sup> the U.S. over-emphasis on physical acts could invite other states to attribute unjustified significance to this sort of navigational error.

Third, the emphasis on physical acts is potentially in tension with the U.N. Charter and the peaceful resolution of disputes.<sup>118</sup> This point was affirmed by Sir Michael Wood in his report to the ILC, in which he refuted the focus on physical acts and instead stated that:

Accepting such views [advocating physical acts] could also be seen as encouraging confrontation and, in some cases, even the use of force. In any event, it appears undeniable that the method of communication between States has widened. The beloved "real" acts become less frequent because international

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<sup>116</sup> Jeremy Page & Gordon Lubold, *U.S. Bomber Flies Over Waters Claimed by China*, WALL ST. J. (Dec. 18, 2015, 7:11 PM), <http://www.wsj.com/articles/u-s-jet-flies-over-waters-claimed-by-china-1450466358>.

<sup>117</sup> *Id.*

<sup>118</sup> U.N. Charter art. 2, ¶ 3 (stating that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."); see also BERNARD H. OXMAN & JOHN F. MURPHY, NON-VIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS: THE CASES OF DISPUTED MARITIME CLAIMS AND STATE-SPONSORED TERRORISM 3 (1991) (stating that "[t]heories of international law that require either a coastal state or a maritime state to take affirmative action that may entail a risk of armed conflict, solely to preserve its contested claims of right at sea, are in tension with the underlying principles and purposes of the Charter of the United Nations.").

law, and the Charter of the UN in particular, place more and more restraints on States in this respect.<sup>119</sup>

In fact, in the *Gulf of Maine* case, the United States did indeed exercise restraint by avoiding physical acts to assert rights, part of a concerted effort to promote the peaceful resolution of the dispute.<sup>120</sup>

In contrast to the restraint exercised by the United States in not selling leases to oil tracts in the Gulf of Maine, FONOPs are not only physical acts, but are conducted by warships and military aircraft. Notwithstanding reassurances from the United States to the contrary, one can understand how a coastal state might interpret FONOPs as provocative or intended as a “show of force” - not the legal statement they are intended to be.<sup>121</sup> This point was made quite persuasively by the American Society of International Law’s (“ASIL”) Special Working Committee on Disputed Maritime Claims when it stated the following:

When either a coastal state or a maritime state explicitly or implicitly dares the other to “enforce” its view of the law, it is being provocative. While we believe that neither is compelled to yield its legal position pending an authoritative resolution of the matter, each should seek to minimize, rather than maximize, the chances of a violent reaction by the other.<sup>122</sup>

The history of FONOPs themselves confirm the risks involved in executing them and the possibility for provocative military interactions. In 1981, for instance, during FONOPs in the Gulf of Sidra to protest Libya’s excessive claim of sovereignty over those

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<sup>119</sup> Wood, *supra* note 30, at 20.

<sup>120</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Counter-Memorial of U.S., 1983 I.C.J. 141 (June 28).

<sup>121</sup> *Commentary: Planned U.S. Provocative Move in the S. China Sea Risks Destabilizing Region*, XINHUANET (Oct. 15, 2015, 2:13 PM), [http://news.xinhuanet.com/english/2015-10/16/c\\_134720306.htm](http://news.xinhuanet.com/english/2015-10/16/c_134720306.htm).

<sup>122</sup> OXMAN & MURPHY, *supra* note 118, at 4.

waters, U.S. fighter aircraft were repeatedly intercepted and once fired upon by Libyan aircraft.<sup>123</sup> Two Libyan aircraft were ultimately shot down by U.S. aircraft acting, justifiably, in self-defense during these operations.<sup>124</sup>

Similarly, while conducting a FONOP in the Black Sea in 1988, two U.S. warships were shouldered and bumped by ships of the Union of Soviet Socialist Republics ("U.S.S.R.").<sup>125</sup> Both U.S. ships were asserting rights to innocent passage in the U.S.S.R.'s territorial sea and each suffered damage as a result of the incident.<sup>126</sup> To be sure, this incident prompted bilateral negotiations between the United States and U.S.S.R. that ultimately resulted in the Agreement on the Prevention of Dangerous Military Activities and the 1989 Uniform Interpretation of Rules of International Law Governing Innocent Passage,<sup>127</sup> but that later success does not confirm the legal necessity of the FONOP or the ensuing short-term escalation of Cold War tensions.

Moreover, the precedent that states must engage in physical acts to protect their rights is untenable from the perspective of global and regional stability. Territorial and maritime disputes are ubiquitous, and easing the tensions involved in these disputes is in the interests of the international community, including the United States. Two such disputes highlight this point: the Sino-Indian border dispute and the United Kingdom-Mauritius dispute over the Chagos

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<sup>123</sup> Bernard Gwertzman, *U.S. Reports Shooting Down 2 Libya Jets that Attacked F-14's Over Mediterranean*, N.Y. TIMES (Aug. 20, 1981), <http://www.nytimes.com/1981/08/20/world/us-reports-shooting-down-2-libya-jets-that-attacked-f-14-s-over-mediterrane.html?pagewanted=all>.

<sup>124</sup> *Id.*

<sup>125</sup> John H. Cushman, Jr., *2 Soviet Warships Reportedly Bump U.S. Navy Vessels*, N.Y. TIMES (Feb. 13, 1988), <http://www.nytimes.com/1988/02/13/us/2-soviet-warships-reportedly-bump-us-navy-vessels.html>.

<sup>126</sup> *Id.*

<sup>127</sup> See generally Aceves, *supra* note 9 (discussing the Black Sea incident and the agreements concluded following it).



Archipelago.<sup>128</sup> The United States has strategic interests in both disputes, either because of what or who is involved.<sup>129</sup> Yet demanding that either India or Mauritius engage in physical acts to avoid acquiescence in the potentially excessive claims of China or the United Kingdom, respectively, would pose substantial challenges to regional stability and would not be in the interests of the United States.

This point reveals an additional and troubling challenge to the emphasis on physical acts to assert international rights—it implies that the only acceptable manner in which a state with excessive claims may effectively preserve a legal right is through its own physical acts. In other words, if physical acts are essential to avoid acquiescence, then the only effective way that a state could counter-protest a FONOP and assert its arguably excessive rights is to engage in physical acts itself. As an initial observation, this would be an unworkable expectation for many states that may simply be incapable, either due to a lack of resources or other factors beyond their control, of asserting their rights through physical acts. But more importantly, this principle sets a risky precedent.

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<sup>128</sup> *Id.* The Chagos Archipelago was the subject of a Permanent Court of Arbitration judgment in March of 2015 in which the tribunal ruled that the United Kingdom, which refers to the territory as the British Indian Ocean Territory (BIOT), had violated the terms of its agreement with Mauritius regarding use of the archipelago. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, Case No. 2011-03 (Perm. Ct. Arb. 2015), <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>.

<sup>129</sup> See Lisa Curtis & Dean Cheng, *The China Challenge: A Strategic Vision for U.S.-India Relations*, THE HERITAGE FOUND. (Jul. 18, 2011), <http://www.heritage.org/research/reports/2011/07/the-china-challenge-a-strategic-vision-for-us-india-relations> (arguing that “the U.S. must keep a watchful eye on the trend lines in Sino-Indian relations and factor these into its overall strategies in the broader Asia region.”); Peter Harris, *U.S. Naval Base is Under Threat . . . And It’s Britain’s Fault*, THE NAT’L INTEREST (Mar. 24, 2015), <http://nationalinterest.org/blog/the-buzz/us-naval-base-under-threat-and-its-britains-fault-12473> (describing Diego Garcia, the U.S. base located on the Chagos Archipelago, as “one of the most strategically important U.S. military installations in the world”).

Take, for instance, the scenario involving the U.S. B-52s mistakenly overflying disputed features in the SCS. The U.S. position could be interpreted to have required China to engage in a physical act in response to the incursion into its claimed sovereign airspace in order to avoid acquiescing in that incursion, an unpalatable result if that physical act entailed a use of force.

Examples certainly abound of states using force and risking the escalation of a conflict merely in response to incursions of maritime or territorial boundaries. For instance, in December 2015, the Republic of Korea Navy (ROK-N) fired warning shots at a Chinese patrol boat that allegedly crossed the disputed maritime boundary between the Republic of Korea and the Democratic People's Republic of Korea ("DPRK").<sup>130</sup> Warning shots were also fired by the ROK-N in October 2015, on that occasion toward a DPRK patrol boat in response to a similar boundary incursion,<sup>131</sup> and the same two states also exchanged warning shots in October of 2014.<sup>132</sup>

Similarly, in November 2015, as evidence of the stakes involved when states rely on physical acts to defend rights, Turkey shot down a Russian SU-24 fighter aircraft that was conducting operations over Syria after it apparently violated Turkish airspace and failed to heed warnings (i.e., verbal protests) to depart.<sup>133</sup> Ultimately, it was

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<sup>130</sup> *South Korean Navy Fires Warning Shot at Chinese Patrol Boat*, DEFENSENEWS (Dec. 8, 2015), <http://www.defensenews.com/story/defense/2015/12/08/south-korean-navy-fires-warning-shots-chinese-patrol-boat/76988690/>.

<sup>131</sup> *South Korea Fires Warning Shots at North Patrol Boat Near Border*, REUTERS (Oct. 25, 2015, 5:47 AM), <http://uk.reuters.com/article/uk-northkorea-southkorea-shooting-idUKKCN0SJ03J20151025>.

<sup>132</sup> Kim Tong-Hyung, *Warships of rival Koreas exchange warning shots*, USA TODAY (Oct. 7, 2014, 10:49 PM), <http://www.usatoday.com/story/news/world/2014/10/06/koreas-exchange-warning-shots/16839959/>.

<sup>133</sup> Matthew Chance & Michael Martinez, *5 Things You Need to Know About Russian Jet Shot Down by Turkey*, CNN (Nov. 24, 2015, 7:15 PM), <http://www.cnn.com/2015/11/24/middleeast/russia-turkey-jet-downed-syria/index.html>; The U.S. and North Atlantic Treaty Organization (NATO) both

Turkey that formally apologized for the physical act in defense of its national airspace.<sup>134</sup>

Whether or not the Korean or Turkish actions were motivated by a belief that the state was defending a legal right or claim, the actions of these states represent a logical product of the view that physical acts are necessary to avoid acquiescence. States are hardly shy in using force to protest incursions into claimed maritime and territorial spaces, and the legal interpretation of acquiescence with respect to FONOPs tends to endorse such behavior. This approach to international protests promotes the escalation of tensions associated with numerous maritime and territorial disputes around the world, a result that conflicts with the strategic interests of the United States in peace and stability.<sup>135</sup> It also exposes U.S. global military operations to potentially hostile physical assertions of rights and claims if the notion that such assertions are necessary to maintain a state's interests was to become widely accepted.<sup>136</sup>

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defended Turkey's use of force in enforcing its national airspace. Kevin Liptak, *Obama: Turkey Has the Right to Defend Itself and Its Airspace*, CNN (Nov. 24, 2015, 8:51 PM), <http://www.cnn.com/2015/11/24/politics/obama-francois-hollande-white-house-meeting/>; Press Release, North Atlantic Treaty Org., Statement by the NATO Secretary General After the Extraordinary NAC Meeting (Nov. 24, 2015, 10:32 PM), [http://www.nato.int/cps/en/natohq/news\\_125052.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/news_125052.htm?selectedLocale=en).

<sup>134</sup> Vladimir Putin received a letter from President of Turkey Recep Tayyip Erdogan, PRESIDENT OF RUSSIA (June 27, 2016, 3:55 PM), <http://en.kremlin.ru/events/president/news/52282>.

<sup>135</sup> See generally *Mar. Territorial Disputes and Sovereignty Issues in Asia, Before the S. Foreign Relations Comm. Subcomm. on E. Asian and Pac. Affairs*, 112<sup>th</sup> Cong. 6 (2012) (statement of Kurt M. Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs) (stating that the U.S. has a national interest in peace and stability).

<sup>136</sup> See, e.g., U.S. JOINT CHIEFS OF STAFF, *THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2015* (June 2015) (envisioning that the U.S. military will continue to operate globally).

Finally, while it has been suggested that the FON program is useful in a normative sense in persuading other states to give up their excessive claims,<sup>137</sup> there is little evidence that FONOPs have had this effect. For example, in 1991, the first year that the annual FONOP report was publicly released, 13 excessive claims were challenged by the United States.<sup>138</sup> Today, 10 of those claims still persist.<sup>139</sup> Of the five claims challenged through FONOPs in 2006,<sup>140</sup> all five remain in force.<sup>141</sup> In fact, a recent study of FONOPs concluded that, as it relates to those maritime claims studied, “[i]f success is determined by whether states have rolled back their black letter excessive maritime claims following FON operations, the program is arguably a failure.”<sup>142</sup> What is more, even if these states were to repeal their excessive claims, it is hardly clear that FONOPs are the driving force for such decisions, as opposed to other international or domestic considerations.<sup>143</sup>

#### IV. CONCLUSION

The thrust of the U.S. argument is that a lack of physical protests will result in a surrender of its rights and the crystallization of unacceptable binding norms. As stated by the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, John Negroponte, in his 1986 explanation of FONOPs, “[i]f

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<sup>137</sup> See generally Mandsager, *supra* note 28 (stating that “the FON Program seeks to encourage coastal States to conform their ocean claims to international law”).

<sup>138</sup> 1992 Sec’y of Def. Ann. Rep. at 77-78.

<sup>139</sup> See U.S. NAVY JUDGE ADVOCATE GEN.’S CORPS, MARITIME CLAIMS REFERENCE MANUAL (2014).

<sup>140</sup> Freedom of Navigation (FON) FY 06 Operational Assertions, U.S. DEPT. OF DEF., [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON\\_Annual\\_Report\\_2006.pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Annual_Report_2006.pdf)

<sup>141</sup> MARITIME CLAIMS REFERENCE MANUAL, *supra* note 139.

<sup>142</sup> Joshua L. Root, *The Freedom of Navigation Program: Assessing 35 Years of Effort*, 43 SYRACUSE J. INT’L L. & COM. 321, 347 (2016) (specifically examining “roll backs” of claims by the Philippines, Indonesia, Burma, and Libya).

<sup>143</sup> See, e.g., Roach & Smith, *supra* note 114, at 638 (observing that the fact that UNCLOS has been in force for over two decades itself motivates states to conform their practices to the Convention).

the United States and other maritime states do not assert international rights in the face of claims by others that do not conform with the present status of the law, they will be said to acquiesce in those claims to their disadvantage.”<sup>144</sup> In other words, FONOPs are presented as having intrinsic legal value.<sup>145</sup> Yet, this interpretation of the international law of acquiescence finds little support in either judicial or scholarly consideration of the law of protest.

Further challenging the utility of FONOPs as a legal tool is the hyped political character they have recently assumed in the disputes over maritime claims in the South China Sea (SCS). While FONOPs had been traditionally reported with little fanfare in an annual report issued by the DOD,<sup>146</sup> FONOPs directed against China’s excessive claims in the SCS have been trumpeted with almost real-time press releases,<sup>147</sup> significant political posturing,<sup>148</sup> and unprecedented academic examination.<sup>149</sup> Meanwhile, FONOPs directed at other

<sup>144</sup> Aceves, *supra* note 9, at 246 (quoting John Negroponte, *Who Will Protect Freedom of the Seas?*, 855 CURRENT POLICY 3 (1986)).

<sup>145</sup> See, e.g., Sam LaGrone, *U.S. Warship Conducts South China Sea Freedom of Navigation Operation*, U.S. NAVAL INST. (Oct. 22, 2016, 11:11 AM), <https://news.usni.org/2016/10/21/u-s-warship-conducts-south-china-sea-freedom-navigation-operation> (quoting Professor James Kraska as stating that FONOPS can “provide[] an unambiguous legal record that China’s purported straight baselines are not valid.”).

<sup>146</sup> See generally DOD ANNUAL FREEDOM OF NAVIGATION (FON) REPORTS, U.S. DEP’T. OF DEF., <http://policy.defense.gov/OUSDP-Offices/FON>.

<sup>147</sup> See LaGrone, *supra* note 145 (reporting that a DOD statement was released the same day as an October 2016 FONOP conducted by the USS *Decatur* (DDG-73) in the South China Sea).

<sup>148</sup> See Sydney J. Freedberg, Jr., *McCain, Forbes Praise New Navy Challenge to China in Paracel Islands*, BREAKING DEF. (Jan. 30, 2016, 2:06 PM), <http://breakingdefense.com/2016/01/mccain-praises-new-navy-challenge-to-china-in-paracel-islands/> (reporting on the statements released by United States politicians in support of increased FONOPs in the South China Sea as a strong signal of “America’s enduring commitment to Asia and the rule of law”).

<sup>149</sup> See Bonnie S. Glaser & Peter A. Dutton, *The U.S. Navy’s Freedom of Navigation Operation Around Subi Reef: Deciphering U.S. Signaling*, THE NAT’L INTEREST

states, both in the Asia-Pacific and elsewhere,<sup>150</sup> have occurred with the standard subtlety generally characterizing the FON program.<sup>151</sup> This divergent approach to FONOPs emphasizes that the imperative at play is international strategy, influenced by the practical political considerations of the states involved, and not the international law principle of acquiescence.<sup>152</sup>

This is not to say that, even if they were viewed as a political rather than a legal imperative, the tension that FONOPs may create between peaceful dispute resolution and the consistent desire for states to preserve their rights is necessarily relieved. As the ASIL Special Working Committee observed, there is a circular problem inherent in the perceived necessity to actually exercise claimed maritime rights. “Such exercise may lead to and indeed may be seen by one claimant or the other as requiring physical confrontation, which – again – they

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(Nov. 6, 2015), <http://nationalinterest.org/feature/the-us-navy's-freedom-navigation-operation-around-subi-reef-14272> (scrutinizing the possible explanations for why the United States Navy conducted the *Lassen* FONOP in the way that it did). See also Julian Ku, *The Latest US Freedom of Navigation Operation Opens the Legal Door to More Aggressive US Challenges to China's Artificial Islands*, LAWFARE (Oct 24, 2016, 2:51 PM), <https://www.lawfareblog.com/latest-us-freedom-navigation-operation-opens-legal-door-more-aggressive-us-challenges-chinas> (arguing that the United States should pursue “more aggressive” challenges to China’s activities in the South China Sea.”).

<sup>150</sup> Freedom of Navigation (FON) Report for Fiscal Year (FY) 2015, U.S. DEP’T. OF DEF., [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON\\_Report\\_FY15.pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf) (including FONOPs directed at Indonesia, Taiwan, Vietnam, and the Philippines, among others).

<sup>151</sup> See, e.g., *A Freedom of Navigation Primer for the Spratly Islands*, ASIA MAR. TRANSPARENCY INITIATIVE (Nov. 2, 2015), <https://amti.csis.org/fonops-primer/> (noting that “[t]he Lassen’s patrol through the Spratlys has suddenly pushed the little-known U.S. FON program into the spotlight”); Chong Ja Ian, *Freedom of Navigation Operations: Better Quiet Resolve*, RSIS COMMENTARY, No. 236 (Nov. 6, 2015), <https://www.rsis.edu.sg/wp-content/uploads/2015/11/CO15236.pdf> (arguing that “[a] more effective American approach to FONOPs in the South China Sea may be to conduct such activities regularly and without fanfare.”).

<sup>152</sup> This is despite efforts to characterize FONOPs as “politically neutral.” COMMANDER’S HANDBOOK, *supra* note 12.

may each see as lawfully supportable by the use or threats of force, on grounds of self-defense and perhaps other grounds.”<sup>153</sup> While “[i]t is unlikely that we will ever witness a time when coastal states are not tempted to expand their assertions of control over waters off their coast beyond what is generally regarded as permissible,”<sup>154</sup> states should challenge such excessive claims in a manner that promotes both the law of the sea as well as the law of protest.

Admittedly, FONOPs may have practical strategic and political value insofar as they normalize a U.S. military presence in certain regions or signal and reinforce existing alliances. But those substantial benefits should not be conflated with the requirements of international law to preserve rights and freedoms. The U.S. linkage of FONOPs to the international law principle of acquiescence overstates the importance of physical acts in the realm of international protest. In advancing this view, the United States has staked out a potentially untenable interpretation of how states must enforce rights and duties guaranteed by international law. The question is whether the strategic and political benefits realized through FONOPs are worth the promotion of this view of international law.



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<sup>153</sup> OXMAN & MURPHY, *supra* note 118, at vi.

<sup>154</sup> *Id.* at 3.



## BOOK REVIEW

### WHAT NATURAL LAW TEACHES ABOUT THE RIGHTS OF WAR

THE RIGHT TO WAGE WAR (*JUS AD BELLUM*): THE  
GERMAN RECEPTION OF GROTIUS 50 YEARS AFTER DE  
IURE BELLI AC PACIS. By Andreas Harald Aure. Berlin,  
Ger.: Berliner Wissenschafts-Verlag. 2015. Pp. 220.  
\$31.99.

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**Reviewed by Jeremy A. Rabkin\***

At first glance, the title of this book looks inflammatory, or at least belligerent. Is there really a “right” to “make war”? Major states had agreed to “outlaw war” some ninety years ago, in the Kellogg-Briand Pact. The United Nations (“U.N.”) Charter allows only a limited “right of self-defense.”

At second glance, the subtitle might suggest the book is a highly specialized, technical study. It focuses on the writings of three German scholars of the late 17th century: Konrad Friedlieb (1633-1713) of the University of Griefswald; Valentin Alberti (1635-1697) of the University of Leipzig; and Johann Wolfgang Textor (1637-1701)

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of the University of Heidelberg. None of the three achieved much recognition at the time. Nor do they seem to have aroused much posthumous interest in the centuries since then. Who now would care what they said, other than specialists in intellectual history working on that precise era?

Yet Aure's short book does offer rewards for readers who simply have a general interest in international law or international relations. As explained in the opening pages, the book grew out of the author's doctoral dissertation in legal studies at Humboldt University in Berlin. Aure, himself, is from Norway and composed the work in English. His English is always comprehensible, though occasionally a bit clumsy or deficient in word choice. That weakness is more than compensated by his other language skills, enabling him to study the original texts (almost all in Latin), along with current scholarship in German, French, Dutch, and Norwegian, as well as English.

Aure sometimes invokes modern scholarship to illuminate the context of these writings, but here that means philosophical context—comparisons with other thinkers and scholars. He provides cursory biographical sketches of the German scholars he discusses. He offers no thematic analysis of European politics in that era. Aure keeps his focus on the actual arguments of the writers, starting with the great Dutch jurist of the early 17th century, Hugo Grotius. He then offers a brief look at the most prominent natural law thinker in late 17th century Germany, Samuel Pufendorf, before moving on to the three, lesser known German scholars of that period.

Aure does not assess how much the views of these scholars comport with prevalent doctrines today. He leaves that to the reader. But Aure remains aware of contemporary debates regarding justice and order in international affairs, as indicated by asides in the text and references in the footnotes. History, he says in a "methodological remark," can be "of value to us in various ways, even in providing

material for helping us to solve perennial or timeless questions.”<sup>1</sup> That awareness no doubt influenced the choice of topics treated here.

Grotius caught the attention of scholars in his time and has remained a fixture in scholarly discussion. The Dutch jurist has been called the father of international law, since his great treatise *De Jure Belli ac Pacis* ("On the Law of War and Peace") was the first work offering a systematic analysis of how law between states could be identified and recognized as binding. When that work was first published (in Latin) in 1625, the Protestant Dutch were still fighting to establish their independence from the Spanish empire, as they had been for six decades. Meanwhile, the Dutch struggle had become one front in a more general war pitting small Protestant states against the Catholic empires of Spain and Austria—a conflict that came to be known as the Thirty Years War.

The Thirty Years War finally ended with the Peace of Westphalia (1648). Since that settlement established mutual recognition of sovereign states, without regard to religion, it has come to be seen as the foundation of modern international politics. It put an end to wars of religion in Europe. The text of Grotius could be seen as an anticipation or justification for a world in which wars could no longer be justified by papal endorsement or by opposition to papal rulings.

The scholars at the heart of Aure's book were writing about half a century after Grotius, a few decades after the Peace of Westphalia. It was still a time of tension and insecurity in Central Europe, so they remained intensely interested in arguments about war. These scholars were professors at universities in Protestant states of Germany, so they had reasons to embrace the Grotian promise of a law transcending sectarian differences between Catholics and

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<sup>1</sup> ANDREAS HARALD AURE, *THE RIGHT TO WAGE WAR (JUS AD BELLUM): THE GERMAN RECEPTION OF GROTIUS 50 YEARS AFTER DE IURE BELLI AC PACIS* 32 (2015).

Protestants. But they could not simply treat arguments of Grotius as settled law, since their world remained fraught with ideological tensions.

We might say the same of our world today. Aure's scholars stimulate thought on questions that are no longer so actively discussed in our time, but may remain quite relevant and revealing. The rest of this review will demonstrate the latter claim by comparing the issues discussed in Aure's 17th century treatises with disputed practices or doctrines of recent decades.

### WHAT IS A JUST WAR?

With each of the writers he discusses, Aure starts with a definitional question: what is war? Grotius distinguishes private war and public war. His treatise acknowledges a place for legitimate war, even when the fighting is not officially authorized by sovereign authority (or not conducted between sovereigns on both sides).<sup>2</sup> A half century later, all three of Aure's German scholars insist that war, in the proper sense, is only a contest between sovereign princes or independent commonwealths.

The complication is worth noticing. At first sight the position of the German scholars seems rather contradictory. Sovereign states, they all agree, can make war to defend themselves against an aggressor. So, too, they agree, states can make war to take back what is rightly theirs but has been wrongly withheld, such as territorial possessions or rights of access to the sea. Why, then, can't private citizens fight their government when it disregards their rights? Or at least when it

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<sup>2</sup> HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. I, ch. iii, at § 2 (Francis Kelsey trans., 1925) ("[A]ccording to the law of nature not all private war is impermissible."); *id.* at bk. I, ch. iii, at § 3 ("[P]rivate war in some cases is permissible even according to the law of the Gospel.").

disregards agreed limits on governmental authority, limits that might be regarded as fundamental elements of the “social contract”?

These scholars were, of course, well aware that people had often taken up arms without public authority to do so—as in revolutions or civil wars. The question for all of them was the definition of a just war, a war which would be acceptable or proper. For Grotius, it was still plausible to claim some sort of legal right to act without authorization—or even against authorities.<sup>3</sup> Even Grotius, however, goes to some trouble to limit resort to force to situations in which the internal law acknowledges competing authorities.<sup>4</sup> He denies that there is any general right of citizens to take up arms against their government, even if it is abusive, and (though Aure does not mention it), he went so far as to deny that there is a universal obligation for governments to act in the interest of those they govern.<sup>5</sup> From what Aure says about them, the German writers seem to take for granted that war is a unique prerogative of the sovereign. Put more succinctly: they do not recognize any inherent right of resistance among the governed.

That seems directly at odds with the doctrines of writers better known to us today, most notably the English philosopher John Locke. The American Declaration of Independence invokes Locke’s central doctrine, regarding a right of revolution.<sup>6</sup> But the 17th century writers

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<sup>3</sup> *Id.* at bk. I, ch. iii, at § 2 (“[A]ccording to the law of nature, not all private war is impermissible [even] since the establishment of courts.”).

<sup>4</sup> *Id.* at bk. I, ch. iv, at § 2 (“[A]s a general rule rebellion is not permitted by the law of nature.”).

<sup>5</sup> *Id.* at bk. I, ch. iii, at § 8 (“The opinion that sovereignty always resides in the people is rejected.”); *id.* (“But it is not universally true, that all government was constituted for the benefit of the governed.”).

<sup>6</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 149 (1689) (“And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish or so wicked, as to lay and carry on designs against the liberties and properties of the subject: . . . they will always have a right to preserve, what they

were still struggling to define and defend limits on the right to war. A sharp version of the question might be: what does an oppressed people—or at least, a disgruntled people—have to show to claim that its resort to arms against its own government is a just war? And when the revolt is just, does that mean that resistance by the previously established government is not just?

The assumptions of Aure's scholars may not, after all, be so remote from generally prevailing views in our time. The U.N. Charter seems to side with existing governments. It requires member states to "refrain from the threat or use of force against the territorial integrity or political independence of any state."<sup>7</sup> That seems to prohibit states from deploying (or threatening) force on behalf of rebellions within another state, regardless of how well justified the rebel claims. On the other hand, that prohibition applies only to actions of states "in their international relations"—so it does not restrain existing governments from deploying force to suppress rebellions. Indeed, the text of the Charter seems to indicate that the use of force against a rebellion is excluded from the U.N.'s jurisdiction: "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ."<sup>8</sup>

Even humanitarian law, regarding the conduct of war, distinguishes international armed conflicts from internal force. The Geneva Conventions on prisoner of war status of 1929 and 1949 applied only to international conflicts: signatories were required to provide humane treatment to enemy soldiers captured in such

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have not a power to part with, and to rid themselves of those, who invade this fundamental, sacred, and unalterable law of self-preservation, for which they entered into society.").

<sup>7</sup> U.N. Charter art. 2, § 4.

<sup>8</sup> U.N. Charter art. 2, § 7.

conflicts and release them at the end of the conflict.<sup>9</sup> In domestic rebellions, states remained free to impose harsher penalties on rebel fighters. Even the most recent major conventions on the law of armed conflict distinguish “international armed conflicts” (“Additional Protocol I” or “AP I”) from “non-international conflicts” (“Additional Protocol II” or “AP II”).<sup>10</sup>

AP II appears to authorize more destructive measures to suppress internal uprisings than AP I allows in international conflicts. As a notable example, AP I forbids attacks which “may be expected to cause . . . injury to civilians, damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>11</sup> There is no counterpart restriction in AP II, which is less than half as long as AP I. A comparison of the two conventions suggests that the world finds it easier to agree on close regulation of international conflicts. Perhaps that reflects the view that suppression of domestic uprisings is more urgent. Or perhaps it simply reflects the priority given to preserving international peace, by limiting interference with internal actions of sovereign states.

It is true that the U.N. has sponsored international conventions on human rights which might seem to limit what

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<sup>9</sup> “When belligerents conclude a convention of armistice, they must, in principle, have therein stipulations regarding the repatriation of prisoners of war.” Geneva Convention Relative to the Treatment of Prisoners of War art. 75, July 27, 1929. “Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.” Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75, U.N.T.S. 135. Article 3 offers a brief list of prohibitions applying to non-international conflicts but does not mention release of prisoners at the conclusion of the conflict. *Id.* at art. 3.

<sup>10</sup> See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977.

<sup>11</sup> Additional Protocol I, *supra* note 10, at art. 51, ¶ 5b.

governments can do to their own citizens. But it is notable that none of the international human rights conventions expressly stipulates—as the American Declaration of Independence does—a right of people to overthrow their government when it acts oppressively. The Covenant on Civil and Political Rights of 1966 starts by asserting not the rights of individuals but the right of "peoples" to "self-determination:" "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>12</sup> This seems to mean that organized states may "freely" (without outside interference) infringe the rights of individuals (as regards rights to liberty and private property, for notable examples), even if other states regard such "political" or "economic" measures as oppressive. The least one can say is that human rights conventions do not provide reliable measures to enforce the rights they proclaim.

Nor does the U.N. Charter. The Security Council, established by the U.N. Charter as the primary enforcement arm of the U.N., is given authority to impose sanctions and ultimately to authorize military measures "to maintain or restore international peace and security,"<sup>13</sup> but not to defend the human rights of individuals. When the Charter was drafted, the Soviet Union was recognized as a totalitarian state, which accorded no respect to individual rights in the western understanding of the term.<sup>14</sup> Even so, it was given a permanent seat on the Security Council, assuring it the capacity to veto any Council resolution of which it disapproved.<sup>15</sup> Authoritarian

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<sup>12</sup> International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>13</sup> U.N. Charter art. 42.

<sup>14</sup> On May 13, 1945, a week after Germany's surrender, at a time when diplomats were still negotiating the Charter of the United Nations in San Francisco, Winston Churchill made a public speech, broadcast by the BBC, warning that territories occupied by the Soviet Union were in danger of falling under "totalitarian or police governments ... to take the place of the German invaders." MARTIN GILBERT, WINSTON S. CHURCHILL, VOL. VIII: NEVER DESPAIR 1945-1965 13 (1988).

<sup>15</sup> U.N. Charter art. 23, ¶ 1; *id.* at art. 27, ¶ 3.

Russia and Communist China retain this veto power on the Council to this day.

There are still armed uprisings against established governments, of course, and they still sometimes lead to civil wars. Since the advent of the U.N. system, there have been far more civilian deaths from internal than international conflicts.<sup>16</sup> Sometimes, outside powers intervene—as Britain, France, and the United States recently did in Libya, and as Russia and Iran have done in Syria.

Is the world as comfortable with major states taking sides in internal conflicts as in defending allies against external aggression? The U.N. Charter authorizes member states to participate in "regional arrangements or agencies for dealing with . . . the maintenance of international peace and security."<sup>17</sup> States are authorized, that is, to coordinate regional military capacities to maintain "*international* peace" but not to uphold domestic authority against internal rebels. The intervention of North Atlantic Treaty Organization ("NATO") states in Libya on the side of the rebels provoked much protest from Russia. The Russian and Iranian interventions in Syria, on the side of the established government, provoke disapproving comments in western capitals.

So, the modern view may not be quite so removed from that of Aure's 17th century scholars. There are always plausible claims that a particular situation should be seen as an exception—on humanitarian grounds or security grounds or some other special

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<sup>16</sup> See generally Human Security Report Project, *Human Security Report 2013: The Decline in Global Violence: Evidence, Explanation, and Contestation* (Vancouver, Human Security Press 2013) (reporting studies estimating 80 per cent of deaths attributed to armed conflicts since 1945 have occurred in internal (non-international) conflicts).

<sup>17</sup> U.N. Charter art. 52, ¶ 1.



grounds. Do we trust the claims of states when they invoke special circumstances?

### THE OBLIGATION TO ACT WITH GOOD INTENTIONS

Aure gives separate attention with each of his scholars to the question of whether states are obligated to act with the right intention. Thomas Aquinas emphasized this obligation in defining just war: it matters why a state decides to act (and whether its ruler is sincere in his claims).<sup>18</sup> Aure notes that Texor and Friedlieb rejected this element of the Thomistic definition. Grotius also did so, though with much more equivocation.<sup>19</sup>

Of the scholars surveyed by Aure, only Alberti still retained this concern. As Aure explains, he held to a much more explicitly religious view, disavowing the notion that sinful men could find their way to rules independent of biblical authority.<sup>20</sup> Aure's other two scholars seem to have had more confidence that accepted rules could replace inner searching of conscience: outsiders can assess whether a state's resort to war is justified by looking at the actual circumstances, rather than speculating about intentions.

From Aure's account, most 17th century scholars had come to regard "war" as closer to action within a legal system than a crusade for justice in the fullest sense. They did not insist that war be seen as a contest between the righteous and the wicked. They depicted war, at least in many situations, as something akin to the vindication of rights against the denial or impairment of rights. What lay juries are asked to decide in complicated disputes, third party states might be asked to judge when other states resorted to war: who was in the right

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<sup>18</sup> THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. II-II, at Q 40.

<sup>19</sup> GROTIUS, *supra* note 2, bk. II, ch. xxii, at § 17 ("[W]hen a justifiable cause is not wanting, bad motivations do indeed convict of wrong the party that makes war, yet they do not render the war itself, properly speaking, unlawful.").

<sup>20</sup> AURE, *supra* note 1, at 107-09.

and who was not as judged by outward facts rather than inner intentions.

In today's world, this may seem a naive or reckless approach. We may be most inclined to that dismissive view if we forget that, without using the term "war," contemporary states still do deploy armed forces to protest legal delinquencies by other states. For example, President Clinton used cruise missile strikes against Iraq to protest Saddam Hussein's refusal to cooperate with U.N. weapons inspectors, as required by the 1991 ceasefire agreement.<sup>21</sup>

Perhaps more striking, however, is the recurrence, in our world, to diplomatic measures designed to demonstrate good intentions. The Clinton administration was anxious to show that attacks on Serbia were endorsed by "NATO nations," though few members of NATO contributed any quantum of force that could not be readily supplied by the U.S. military on its own.<sup>22</sup> The Bush administration touted 49 "partners" supposed to be cooperating in action against Saddam's regime in 2003, though most such allies made contributions that were so limited they could be fairly described as "symbolic."<sup>23</sup> The Obama administration, when intervening against Muammar Gadhafi in 2011, touted a resolution of the Arab League urging protection for civilians in Benghazi.<sup>24</sup>

In all such cases—and others that could be cited—appeals to the endorsement of other states were not, strictly speaking, legal arguments. If the interventions were not lawful, the approval of

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<sup>21</sup> On acceptance of such measures by European governments in the 1990s, despite questioning from European scholars, see Lothar Brock, *The Use of Force in the Post-Cold War Era: From Collective Action to Pre-Charter Self-Defense*, in MICHAEL BOTHE ET AL., *REDEFINING SOVEREIGNTY* 33-34 (2005).

<sup>22</sup> STEPHEN SESTANOVICH, *THE MAXIMALIST: AMERICA IN THE WORLD FROM TRUMAN TO OBAMA* 267-69 (2014).

<sup>23</sup> Press Release, The White House, Operation Iraqi Freedom, Coalition Members (Mar. 27, 2003).

<sup>24</sup> President Barack Obama, Address to the Nation (Mar. 28, 2011).

additional states (not themselves victims of the original delinquency) could not make them so. Rather, endorsements from third-party states performed much the same function as character witnesses in a lawsuit. They were deployed as evidence of good intentions on the part of the main power (in these cases, the United States) or at least of its incumbent administration at the time of the action.

That we still see the potential advantage of such diplomatic measures should remind us that there was practical logic in medieval concerns about good intentions. One who acts from good intentions may sometimes act wrongly, but may be less blameworthy than if he acted with brazen contempt for law or justice. Among other things, a government that cares about law and justice in general—one that acts from good intentions—will usually be thought more trustworthy. At least, it will seem less threatening to other governments.

That tempered assessment could apply, even when other states think the intervening government relied on false or mistaken claims for its intervention. Many western governments criticized the U.S. decision to invade Iraq in 2003, even with four dozen partners. These censorious governments did not act, however, as if they feared the Bush administration would turn its military forces on their territories in reprisal. The Bush administration was seen as badly mistaken, even on the relevant legal issues, but not irrational or malevolent. Probably that was because the Bush administration tried to reassure critics of its sincerity and good intentions, and the United States had a proven record of self-restraint.

Our domestic law recognizes the distinction when, in most circumstances, we require *mens rea* for criminal conviction. An action that hurts others is usually unlawful but not usually criminal unless undertaken from bad motives or in willful disregard of ordinary obligations of care. So it might seem quite natural and reasonable to stress the intentions of states when sorting through the rights and wrongs of their disputes, particularly when they resort to force.

Except that citizens within a state are bound to trust each other to some degree, because they are obligated to accept a common authority and a very detailed and comprehensive set of common laws. We can talk of the "international community" (or as Grotius and his successors did, the "great society of states"<sup>25</sup>) but it is not a "community" in the same sense. There is bound to be less trust among members, when all are sovereign and many are heavily armed.

Aure's 17th century scholars seem to have relied on that distinction when they viewed "war" (or as we would now say, "armed conflict") as an expected and frequently lawful and just element in the relations between states—but as presumptively unlawful and unjust within an established state.

If that is right, then it might be more reasonable to think of disputes between states as akin to tort claims: victims are entitled to claim compensation, perpetrators should be liable to pay it, because otherwise there will be no end to lawless infliction of injuries. But because there is no deeply shared sense of community among states, it would be straining analogies to think that states or nations can be subject to criminal punishment. International law cannot, on this view, impose "moral correction," let alone "penance" in the sense that our domestic criminal justice systems aspire to do (with "penitentiaries," "departments of corrections," and prisoner "rehabilitation" programs).

Aure's German scholars in the 17th century assumed that the international community did not have the moral authority to impose punishments. Yet that was not, even then, a conclusion that all commentators took for granted. That conclusion is not entirely accepted today.

#### A RIGHT TO PUNISH?

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<sup>25</sup> GROTIUS, *supra* note 2, at Prolegomena, ¶ 17.

When Grotius set out the possible grounds for a just war, he included—apart from claims to self-defense against injury and recovery of rights—a separate right to punish those who act wrongly. As Grotius explains it, the right applies to anyone who wants to punish malefactors. It is not necessary, in his account, for a state to claim that it is punishing abuses from which it has, itself, suffered. The avenging state does not even have to claim that it is acting at the request of (or at least, on behalf of) an ally or client-state which has suffered by the perpetrator's wrongful acts. All of these justifications would be more aptly invoked for wars grounded in self-defense. Grotius went out of his way to indicate that there was an entirely separate claim to resort to war simply to punish a state that is guilty of wrongful conduct.<sup>26</sup>

Modern readers might be tempted to see this doctrine as somehow a secular version of doctrines associated with medieval Crusades. In fact, it was, as Aure says, "one of the most innovative novelties within Grotius' system of thought."<sup>27</sup> Grotius himself cautions that it should not be exercised unless the wrongfulness of conduct was very clear—so it should not, he says, be used against people who adhere to mistaken religious doctrines.<sup>28</sup> On the other hand, Grotius does regard the doctrine as applicable to abuses that, while very widely condemned, might not seem to present any immediate threat to neighboring states—such as "impiety toward parents" or "adultery" (regarding marriage).<sup>29</sup>

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<sup>26</sup> GROTIUS, *supra* note 2, bk. II, at ch. xx-xxi (elaborating natural law theory of punishment at great length).

<sup>27</sup> AURE, *supra* note 1, at 165.

<sup>28</sup> GROTIUS, *supra* note 2, bk. II, ch. xx, at § xlviii ("Wars cannot justly be waged against those who are unwilling to accept the Christian religion."); *id.* bk. II, ch. xx, at § xlviii ("Wars may not be justly waged against those who err in the interpretation of Divine Law.").

<sup>29</sup> GROTIUS, *supra* note 2, bk. II, at ch. xx, xl ("[W]ars are justly waged against those who act with impiety toward their parents."); *id.* at bk. II, at ch. xliii ("against those who feed on human flesh" and "accepting marriage we cannot admit adultery"); *id.* ("adultery is punished everywhere").

The next impulse of a modern reader might be to dismiss the whole doctrine as something idiosyncratic to one Dutch jurist of the early 17th century. But that is also wrong. As Aure points out, the doctrine was embraced by John Locke. Locke deployed it to lend credibility to his social contract doctrine. If individuals in a state of nature (that is, prior to the establishment of government) have a general right to punish offenses against natural law, then it makes sense that they can establish government by delegating this power to a common authority.<sup>30</sup>

With a bit more reflection, even skeptical modern readers might notice that something not so different does still appeal to the moral intuition of many contemporary scholars and even some government officials. To take the most obvious example, in 1994 the government of Rwanda incited mass murder against the minority Tutsi tribe.<sup>31</sup> The resulting death toll reached close to a million people.<sup>32</sup> There was much recrimination about the failure of the United States and other western governments to intervene to stop this attempted genocide. This terrible episode helped spur proposals for a new doctrine, the "Responsibility to Protect." The "Responsibility to Protect" doctrine posits that if a state fails in its responsibilities to repress or resist the most terrible human rights abuses, other states should feel authorized—or morally obliged—to intervene.<sup>33</sup>

Talk of a "responsibility to protect" might sound quite different from a "right to punish." But even Grotius acknowledged

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<sup>30</sup> LOCKE, *supra* note 6, at § 7 (everyone in state of nature has the right to punish violations of the law of nature); *id.* at § 11 (from the "right of punishing the crime for restraint [of perpetrators] . . . comes it to pass that the magistrate . . . hath the common right of punishing put into his hands").

<sup>31</sup> See generally PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES (2000).

<sup>32</sup> *Id.*

<sup>33</sup> See generally Alex J. Bellamy, *The Responsibility to Protect: A Wide or Narrow Conception*, in THE RESPONSIBILITY TO PROTECT: A NEW PARADIGM OF INTERNATIONAL LAW? 38 (Peter Hilpold ed., 2014).

that no state could be obligated to intervene when it was doubtful about its capacity to prevail: the claim to punish was contingent on favorable circumstances, so closer to a right (an acceptable choice) than a "responsibility."<sup>34</sup> It would be hard to "protect," moreover, without at least displacing the murderous government that was the target of the intervention. The targeted tyrants would surely see that result as punishment. It would likely lead to more serious personal consequences for them than peaceful retirement.

In fact, as some advocates have argued for military interventions on humanitarian grounds, others in our time have argued that bystander states should have the right to pursue criminal proceedings in their own courts against the worst violators of human rights. Advocates of the latter kind insist that there is universal jurisdiction to try perpetrators of the worst human rights abuses, so any state that gains custody of the abuser can put him on trial. Desire to uphold or strengthen international human rights norms is, under this theory, sufficient basis to organize a trial, even if there is no other connection between the trying state and the crimes or the home state of the accused.<sup>35</sup> Does it make sense to authorize subsequent criminal liability while repudiating any right of intervention to stop horrendous abuses while they occur?

At all events, the right to try is inextricably connected with a right to punish: the main purpose of a criminal trial, in a just legal system, is to determine whether it is lawful to impose punishment. The right to try may also be inextricably connected with a right to deploy force. When there is a right to try, we normally think there is

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<sup>34</sup> GROTIUS, *supra* note 2, bk. III, ch. xxiv, at § ii ("Especially the right to inflict punishment ought to be given up in order to avoid war" (that is, "at times")); *id.* at § vii ("He who is not much the stronger ought to refrain from exacting penalties.").

<sup>35</sup> See *generally* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephan Macedo ed., 2003); LUC REYDAM, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2004).

a right to apprehend, so that the trial may go forward. We might say that association does not apply when apprehension requires the exercise of force in a foreign jurisdiction. But even proceeding with a trial will often affront the home state of the accused or the home state of the crime. What if the home state threatens to retaliate for the trial? Perhaps the right to punish is inherently entangled with a right to make war or at least a right to deploy military force to secure this right to punish.

These considerations might suggest that the Grotian doctrine in this area is not unthinkable, even today. As Aure points out, however, it was "not widely received" even when Grotius was at the height of his prestige.<sup>36</sup> In particular, the three German scholars at the heart of Aure's study each rejected this doctrine. They endorsed "wars of vengeance"—inflicting harm in retaliation for harms received. They even endorsed such measures as preemptive defense against a would-be aggressor. But as Aure argues, war for security or for "restitution or recovery of loss" was different in their eyes: "They all denied that punishment could serve as a primary cause, or as a justification for intervening in other states."<sup>37</sup>

Aure does not speculate about their reasons for breaking with Grotius. But an obvious consideration might be that the Grotian doctrine assumes too much consensus about the sorts of evils that would justify intervention. Or to put the point another way, the Grotian doctrine assumes that other states would accept the claim of an intervening state to be acting on behalf of shared norms—rather than some particular, self-serving scheme. Aure's scholars seem to have placed a higher priority on preserving peace.

Perhaps that looks selfish. But most governments still seem to think that way. The "Responsibility to Protect" doctrine has not

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<sup>36</sup> AURE, *supra* note 1, at 166.

<sup>37</sup> *Id.*



been widely endorsed—if one takes governments as the authorized electors.<sup>38</sup> It has been acted on even less often. One of the very few applications of the doctrine was the intervention of western states to protect civilians in Libya in 2011.<sup>39</sup> It was authorized by the Security Council as a humanitarian measure for threatened civilians in Benghazi, and then it somehow shifted into an intervention aimed at overthrowing the government of Muammar Gadhafi and installing rebel forces in its place.<sup>40</sup> The aftermath has not inspired trust in the motives or the capacities of outside interveners.

### INNOCENT PASSAGE

Aure also devotes attention to another specialized question where the comparisons look somewhat different. Grotius had argued that each state is, in general, obliged to let others pass through its territory, when the passage is merely for the sake of transit and not a direct threat to the "host" state.

It is not, even today, an altogether anachronistic issue. The U.N. Convention on the Law of the Sea sets out a right of innocent passage through coastal waters and then enumerates permissible grounds on which the coastal state can deny such passage (principally when it might threaten the peace and order of the coastal state).<sup>41</sup> But 17th century writers had a broader view. They envisioned a right to

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<sup>38</sup> Oliver Diggelmann, *Ethical Dilemmas Connected with the "Responsibility to Protect,"* in THE RESPONSIBILITY TO PROTECT: A NEW PARADIGM OF INTERNATIONAL LAW? 405 (Peter Hilpold ed., 2014).

<sup>39</sup> Alan J. Kuperman, *Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFFAIRS (2015).

<sup>40</sup> *Id.*

<sup>41</sup> United Nations Convention on the Law of the Sea art. 19, Dec. 10, 1982, 1833 U.N.T.S. 397 ("Meaning of innocent passage," specifying limitations on maritime transit to ensure it is "not prejudicial to the peace, good order or security of the coastal State").

march an army through a neutral state to reach the borders of a state they wanted to attack in wartime.

Even that sort of claim is not unknown to the modern world. In 1942, the United States landed troops in Morocco and Algeria, the former a colonial dependency of France, the latter a full colony of France.<sup>42</sup> The United States was not at war with France and did not officially declare war against it, even then.<sup>43</sup> The idea was to march armies through French North Africa to engage the German forces then fighting in Egypt or Libya.<sup>44</sup> U.S. forces took care not to enter Spanish Morocco, evidently to avoid antagonizing more neutrals than necessary.<sup>45</sup> But it was surely relevant that France was not able to resist, while the Allies worried that Spain might respond to such provocation by inviting German forces to oust British control on Gibraltar.<sup>46</sup>

On the other hand, in 1973, when the United States sought to use European air bases to refuel cargo planes delivering military supplies to Israel during the Yom Kippur war, governments in Western Europe, fearful of offending Arab governments, refused to cooperate.<sup>47</sup> The United States arranged for refueling at Portuguese

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<sup>42</sup> For a detailed and colorful account of the initial military operations, the first great venture of American land forces in the Second World War, *see* RICK ATKINSON, *AN ARMY AT DAWN* 21-160 (2002).

<sup>43</sup> "Vichy France was a neutral country and during the entire period of the war [up until November 1942] the United States had maintained diplomatic connection with the French Government. Never, in all its history, had the United States been a party to an unprovoked attack upon a neutral country and even though Vichy was avowedly collaborating with Hitler, there is no doubt that American political leaders regarded the projected operation, from this viewpoint, with considerable distaste." DWIGHT D. EISENHOWER, *CRUSADE IN EUROPE* 86 (1948).

<sup>44</sup> On the larger strategic considerations leading to this action, *see* WINSTON S. CHURCHILL, *THE HINGE OF FATE, VOL. IV OF THE SECOND WORLD WAR* 432-51 (1950).

<sup>45</sup> BASIL LIDDEL HART, *HISTORY OF WORLD WAR II* 333 (1970).

<sup>46</sup> EISENHOWER, *supra* note 43, at 79-80; CHURCHILL, *supra* note 44, at 528, 544.

<sup>47</sup> HENRY KISSINGER, *YEARS OF UPHEAVAL* 708-18 (1982).

islands in the Atlantic and avoided flying through the air space of protesting states.<sup>48</sup> In 2003, when the United States was organizing an invasion of Iraq, it sought Turkish permission to deploy troops for an invasion from the north.<sup>49</sup> When the Turks refused, all the invading forces were launched from Kuwait, which did agree to cooperate.<sup>50</sup>

If we don't recognize a general right of innocent passage—that is, a duty to provide it, even on land, even to armies preparing for battle—the reason is probably that the modern world takes for granted that such "passage" will generally present a threat to the state asked to "host" such passage. Large contingents of young men, perhaps not very well disciplined, can inflict damage and inflame local feelings, quite apart from the aims of the governments involved. The larger problem is a state which makes its territory available to an attacking force, or a force assisting an attacking force, is taking sides in the conflict, inviting retaliation from the opposing side in that conflict.

As Aure reports, the most influential German thinker of the late 17th century, Samuel Pufendorf, rejected the notion of a right of innocent passage on the ground that it was asking the would-be host to accept too much risk.<sup>51</sup> So it is notable that lesser scholars in that era did embrace this right.

Why? Aure does not report their reasoning in much detail but it seems, from what he says, that his 17th century scholars thought all states had some stake in helping victims of aggression defend themselves. They did not think all other states were obligated to rush

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<sup>48</sup> *Id.* at 709

<sup>49</sup> Dexter Filkins, *Threats and Responses: Ankara; Turkish Deputies Refuse to Accept American Troops*, N.Y. TIMES (Mar. 2, 2003), <http://www.nytimes.com/2003/03/02/world/threats-and-responses-ankara-turkish-deputies-refuse-to-accept-american-troops.html>.

<sup>50</sup> DOUGLAS FEITH, *WAR AND DECISION: INSIDE THE PENTAGON AT THE DAWN OF THE WAR ON TERRORISM* 200 (2008).

<sup>51</sup> AURE, *supra* note 1, at 164-65.

to the aid of victims. They did not think it was reasonable for a state to take great risks on behalf of others. But they thought third-parties had some obligation to help victims defend themselves, especially when there was not too much risk to the third-party state in doing so.

Part of the reason, it seems, is that the scholars assumed the world would be safer—or at least, end up with more reliable rules—if aggression could be confronted with effective force. That meant, of course, that they also assumed bystanders could be relied on to recognize, in any particular conflict, which side was the aggressor and which the victim.

Still, it is notable where their priorities were. The scholars did not assume that the world could reliably judge when revolution was a justified resort of oppressed people and when it should be seen as a reckless scheme of power-seeking adventurers. They saw potential for mischief if states interfered in each other's internal affairs. Yet they thought states could judge which side to take in international conflicts. They thought states would usually do so on the merits, not simply on the basis of which side they hoped would prevail, given the resulting advantage for their own interests. States would make themselves more secure, the scholars thought, by refraining from interference in the internal affairs of other states, while maintaining solidarity with states that were victims of aggression. Is that the prompting of reason or merely of contingent calculations of advantage?

#### NATURAL LAW AND THE LAW OF NATIONS

Aure devotes much attention to the background understandings of his writers, when it comes to the grounding and the implications of natural law. They all assumed a fundamental analogy between the interactions of states and the interactions of individual human beings. Put succinctly, they assumed that basic legal norms—property, contract, tort—could be applied to the rights and duties of states.

We still reason that way, at least some of the time. If one looks at the Vienna Convention on the Law of Treaties, for example, many provisions track the law of contract—just as Grotius proposed in the 17th century.<sup>52</sup>

We make exceptions and qualifications, as did they. It is a fair question whether we have as much confidence, even in domestic law, that the rules (or the exceptions and qualifications) are grounded in reason and justice. Were the 17th century scholars naive? Smug? Self-serving or self-deluded?

At least when it comes to international relations or international law, we are apt to be blinded or distracted by one or another of the quick answers that have become prevalent in our own time, even though they inhibit honest and serious thought. Or perhaps we embrace these "answers" precisely to avoid the burden of honest thought.

The first such answer invokes a version of legal positivism. The U.N. Charter, say many commentators, forbids resort to force in all but two circumstances: when authorized by the U.N. Security Council or in self-defense "when an armed attack occurs."<sup>53</sup> That's what it says, so that is the law. We might prefer different rules, but the rules we have are the rules we have.

Call it positivism. It can only stop appeals beyond the text for people determined not to listen or not to look. The very brief formulations in the text are subject to interpretation. One of many interpretive aids is to look at what states actually do. What they do both when resorting to force and when condemning or not

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<sup>52</sup> Compare Vienna Convention on the Law of Treaties art. 42-64, May 23, 1969, 1155 U.N.T.S. 331 ("invalidity, termination and suspension" of treaty provisions), with GROTIUS, *supra* note 2, bk. II, at ch. xii ("on natural law basis of contract obligation").

<sup>53</sup> See OLIVER CORTEN, *THE LAW AGAINST WAR* 402-70 (2010).

condemning resorts to force by others has not been consistent with the most literal readings of the Charter prohibitions. Some nonliteral readings are widely accepted by commentators. For notable example, many commentators embrace a right to preemptive defense when an attack is imminent.<sup>54</sup> If that is a reasonable interpretation, it is not because the language of the Charter requires it but because we read it with some sense of what is reasonable. It is not obvious where such appeals to reason should be closed off.

An alternative approach is to insist that there is a moral obligation to refrain from force and the hope for peace requires all states to embrace this moral imperative. A moral state must do so, on this view, as an example to others, even if it cannot be sure that others will follow. This kind of moralism is often called "Kantian" and seems to have much appeal to international law scholars.<sup>55</sup> The Prussian philosopher Immanuel Kant was quite insistent that true morality requires that we act on the basis of universal rules—with a sense of obligation that is "categorical"—so that we disregard likely consequences in any particular case.<sup>56</sup> Kant was quite explicit in decrying the most influential international law scholars (e.g., Grotius, Pufendorf, Vattel) as "cold comforters" whose prescriptions would not assure "perpetual peace" because they opened the way to so many exceptions and deviations from the path of peace.<sup>57</sup>

Reasonable people may doubt whether this sort of moralism is at all reasonable, or even morally serious. Disregarding

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<sup>54</sup> YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENSE, 194-98 (5th ed., 2011) (reviewing sources advocating for legality of preemptive action in self-defense); THOMAS FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 97-108 (2002) (reviewing arguments with more sympathy than Dinstein).

<sup>55</sup> See generally Amanda Perreau-Saussine, *Immanuel Kant on International Law in Philosophy of International Law* (Samantha Besson & John Tasioulas eds., 1998) (Kant is the only modern thinker treated at length and individually in this volume).

<sup>56</sup> *Id.* at 74.

<sup>57</sup> Immanuel Kant, *To Perpetual Peace in PERPETUAL PEACE AND OTHER ESSAYS* 116 (Ted Humphrey trans., 1983).

consequences may put a state at risk of utter destruction particularly today, with weapons of mass destruction in the hands of malevolent actors across the world. We do not, of course, rely on such moralism when we implement law in domestic settings. Instead, we rely on prosecutorial discretion, on an executive pardon power, on general standards rather than precise rules and many other devices that allow law to accommodate particular circumstances. The usual reason for such adjustments is to avoid unwanted consequences. If we reject Kantian moralism in international affairs, we must consider what rules would be best and when those rules should accommodate exceptions or authorized deviations.

When it comes to international affairs, some advocates are tempted to go to the opposite extreme—embracing a world without rules or standards, just "pragmatic" responses to circumstances, case by case. But it is hard to think of a particular challenge without thinking about general obligations and general constraints. At some point, a "pragmatic" approach to international law will degenerate into lawlessness. To defend any particular action, it is necessary to explain why it is (or can be seen as) proper—and that requires appeal to more general standards.

Aure's 17th century scholars called such general standards "natural law." The term was in general use into the late 19th century but dropped out of philosophical debate thereafter. Still, what the 17th century called "natural law" were conclusions drawn from "reason," which included a reasonable assessment of recurrent patterns in human affairs. Even if we decline to embrace the old terminology, we may still face the obligation to think. As Aure says, once we acknowledge that we cannot leave all questions to authority—whether of the U.N. Security Council (which is often paralyzed) or the International Court of Justice (often divided and politicized) or of academic scholars (ditto)—"it will again become necessary for anyone

and any nation to think for themselves about right and wrong."<sup>58</sup> He proceeds to explain how that will likely unfold:

In the process, they [those who think for themselves about right and wrong] will ask for orientation in other sources of authority and indeed in substantive moral principles based on empirical reality. And here the history of natural law, I believe, will be a rich source of inspiration and even have persuasive power. Historical ideas of natural law may not be adaptable one to one, but they serve as doctrines and reasoning that can fuel and inspire one's own thinking and discourse on moral ideas. Their ideas can help us (by the process of differentiation) to fully grasp (integrate) our own ideas.<sup>59</sup>

The chief value of Aure's brief study is that it makes this claim plausible.



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<sup>58</sup> AURE, *supra* note 1, at 158.

<sup>59</sup> *Id.*





## SYMPOSIUM: TABLETOP EXERCISE

### DATA BREACH AT A UNIVERSITY: PREPARING OUR NETWORKS

**Summary Prepared by Chelsea Smith, Alexandra Diaz, and  
Richard Sterns\***

*On Wednesday, April 13, 2016, the Antonin Scalia Law School at George Mason University, the Law and Economics Center, and the National Security Law Journal co-sponsored a full-day cybersecurity tabletop legal exercise entitled, "Data Breach at a University: Preparing Our Networks."*

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#### OVERVIEW

On Wednesday, April 13, 2016, the Antonin Scalia Law School at George Mason University, the Law and Economics Center, and the National Security Law Journal ("NSLJ") co-sponsored a full-day cybersecurity tabletop legal exercise entitled, "Data Breach at a University: Preparing Our Networks." The event included 45 participants from the Department of Homeland Security ("DHS"), Department of Justice, Department of Defense ("DOD"), Department of Education, state governments, private sector partners, the Multi-

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\* Chelsea Smith, Editor in Chief, National Security Law Journal; Alexandra Diaz, Executive Editor, National Security Law Journal; Richard Sterns, Managing Editor, National Security Law Journal.

State Information and Analysis Center (“MS-ISAC”), University of Maryland, and George Mason University. The exercise consisted of four scenarios of data breaches involving universities. The scenarios, crafted by experienced cybersecurity professionals, allowed the participants to explore issues pertaining to data breaches involving the loss of personally identifiable information, cyber intrusions involving companies that have contracts with the government, the exfiltration of sensitive research, attacks on .mil networks, and ransomware.

#### OBJECTIVES

While the exercise centered on data breaches involving universities, the event had a broader goal of focusing on how lawyers can better understand their roles, responsibilities, and duties in response to cyber incidents. The opportunity to bring together a wide range of diverse professionals to seek concrete cybersecurity policy improvements was also an underlying objective.

The four overarching goals for the exercise were as follows:

1. All participants would develop a greater understanding of the various actors at play upon the occurrence of a significant cyber incident, including the roles and responsibilities of various federal agencies, and the capabilities of private sector organizations. Attorneys for the federal agencies and the private sector would have a greater understanding of roles and responsibilities in information sharing and incident response following the identification of a cyber incident.
2. Attorneys for federal agencies would develop a deeper knowledge of their agency’s protocols for addressing and responding to data breaches. They would also brainstorm ideas for improvements to these protocols, including identifying areas where current protocols may be deficient or lacking in adequate guidance.
3. Attorneys for federal agencies and private sector entities would have a greater appreciation of how the contractual

relationship that defines their interactions governs data breaches. They would also understand where beneficial changes might be made to these types of contracts and the relevant statutory and regulatory issues at play in attempting to alter these contractual relationships.

4. Attorneys for the Coast Guard, the DOD, and DHS would have a greater understanding of how data breaches effect the .mil and .edu environments within their jurisdiction and how they can respond to those breaches. They would also understand where improvements to departmental policy may be made and which areas are most ripe for beneficial change.

#### SUMMARY OF DISCUSSION

Key points raised in the discussion include:

- Universities, like many companies in the private sector, often have a mistrust of government, particularly when responding to data breaches. However, universities, and others in the private sector, need to have a solid understanding of the broader context of cyber threats, and of the government resources that are available to help if they are willing to seek them. By engaging a larger community of partners, both in the public and private sectors, universities and other institutions may be better able to address the threat(s) that they face and build a more trustworthy relationship with government agencies.
- University networks are often decentralized and include many different networks. Chief Information Security Officers (“CISOs”) in universities generally do not have a comprehensive view of their network(s), making identifying data breaches more difficult. Universities must manage a constant tension between facilitating an open network environment that promotes academic freedom and

maintaining quality cybersecurity. Universities, as a consequence of their missions to provide the highest quality education to their students, foster a robust “bring your own device” environment and the institution is incentivized by faculty to avoid restricting their access to data and research.

- Some universities have direct access to the Department of Education’s outsized data systems with enormous amounts of valuable information such as the financial aid information of students. Further, many institutions of higher education are beginning to connect their systems, effectively broadening their networks into small cyber-cities and potentially creating more vulnerabilities.
- Many universities lack the privacy offices common in large corporations with huge amounts of personal information and instead utilize resources across multiple program offices to ensure compliance with state and federal law.
- Despite this increasingly complex environment, many universities lack cybersecurity response plans and those that have one in place underutilize it. This is not unique to universities and applies to most companies in the private sector. In addition, government agencies are in the midst of revising incident response plans and carefully reviewing protocols following the U.S. Office of Personnel Management data breach discovered in June 2015.
- Key elements of successful data breach plans include: mechanisms to connect technical personnel attempting to repair a network with policy, legal, privacy, and public affairs professionals who all have unique roles to fulfil; policies on notification, and the content of notifications given to students, professors, and other stakeholders; established plans to offer credit monitoring, and other mitigation options; plans to create call centers that can handle the inevitable flow of

questions; and, regular training exercises practicing implementation of the plan.

- Discussions were held about the appropriate time for a university to contact law enforcement; when remediation of compromised networks should take precedence over a law enforcement inquiry; when attribution questions should be explored; and when notice should be given to regulators, government officials (such as a Governor's office and individuals impacted by the breach).
- CISOs attempt to segment networks to prevent lateral movement throughout the network. Minimal resources mean that the universities must manage risk and prioritize cybersecurity along with other school necessities. DHS established Memorandums of Agreement with various partners (including those dependent on industrial controls systems) to allow for quick response/remediation assistance. Something similar may be established with universities.
- DHS Centers of Excellence ("COE") are set up under public service grant authority, requiring information generated by the COE to be made public. If a breach occurs, DHS does not instruct the COE how to respond, but DHS is allowed to engage. Grant sections have been used for physical safety for some COEs. This requires the COE to implement and share a safety plan that DHS may provide feedback on with options to address any deficiencies. Similar clauses can be used for cybersecurity, requiring the university to maintain certain cybersecurity response plans.
- Special contracting relationships must be established for research universities to accept sensitive and/or classified research. Many research institutions are not interested in classified research because it is expensive to establish and maintain the proper classified environment, and because

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academics seek to publically disseminate and publish their work.

- Ransomware remains a difficult issue. The financial incentives favor the bad actors. Focus should be placed on reducing vulnerabilities (back-ups) and raising the cost of partaking in these activities for criminals.

#### CONCLUSION

The event met its goal of facilitating a dialogue between government agencies, universities, and private sector partners. George Mason University, the Antonin Scalia Law School, the Law and Economics Center, and DHS hope to partner and facilitate more tabletop events of this nature on a variety of national security issues in the future.





## COMMENT

### AMBER WAVES OF GRAIN: ARE NATIONAL SECURITY INTERESTS DESTROYING THE LAND THEY FIGHT TO PRESERVE?

**T. Jaren Stanton\***

*The National Environmental Policy Act of 1969 (NEPA) requires government agencies to consider the potential environmental impact of significant actions prior to their undertaking and to publically disclose the results of those deliberations. In contrast to other environmental legislation, Congress did not include a national security exemption in NEPA that would allow agencies engaged in national security efforts to bypass the consideration and disclosure requirements. Since NEPA's passage, courts have struggled to balance the requirements of NEPA with the need to protect national security secrets. In NEPA compliance cases, a number of courts have sided with the government although the agencies failed to adhere to the procedures mandated by NEPA. As a result, scholars have claimed the courts have created a national security exemption that the legislature never intended. This concern heightened when the government increased national security efforts after the terrorist attacks on September 11, 2001.*

*Various proposals have been suggested to correct this perceived threat to NEPA. These include in-camera review of government*

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\*Antonin Scalia Law School, George Mason University, J.D. Candidate, May 2017; University of Utah, B.S., 2013. A special thanks to my wonderful mother for all the time she spent editing this Comment and my supportive wife.

*environmental documents, the creation of specialized courts to hear security sensitive NEPA compliance challenges, and limitations on the public disclosure requirement. However, such changes are unnecessary. A sampling of recent NEPA compliance cases involving national security illustrates that while courts work to protect the disclosure of national security secrets, no real threat to the purpose of NEPA exists.*

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## INTRODUCTION

In the ten years following the September 11, 2001 terrorist attacks (“9/11”), the United States spent nearly \$8 trillion on national security, almost double the amount spent for the same purpose in the preceding decade.<sup>1</sup> The cost of the Iraq and Afghanistan conflicts totaled \$1.36 trillion,<sup>2</sup> the newly created Department of Homeland Security received \$791 billion,<sup>3</sup> and billions more were spent on government facilities dedicated to keeping America safe,<sup>4</sup> including the “Country’s Biggest Spy Center,” a newly built National Security Agency (“NSA”) data center in the heart of Utah’s Wasatch Front Region.<sup>5</sup> The \$2 billion data center, completed in 2013, has the capacity to pump 1.7 million gallons of water per day to cool massive data servers.<sup>6</sup> Although this type of water usage is common for data storage facilities,<sup>7</sup> it is no small matter for Utah, a desert state where residents are extremely cognizant of water usage.<sup>8</sup> When Salt Lake

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<sup>1</sup> Chris Hellman, *Has the Pentagon’s Post-9/11 Spending Spree Made Us Safer?*, THE NATION (Aug. 16, 2011), <http://www.thenation.com/article/has-pentagons-post-911-spending-spree-made-us-safer>.

<sup>2</sup> *Id.*

<sup>3</sup> Ned Resnikoff, *‘Homeland Security’ has received \$791 billion since 9/11*, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/the-ed-show/homeland-security-has-received-791-billion>.

<sup>4</sup> James Bamford, *The NSA Is Building the Country’s Biggest Spy Center (Watch What You Say)*, WIRED MAG. (Mar. 15, 2012, 7:24 PM), [https://www.wired.com/2012/03/ff\\_nsadatacenter](https://www.wired.com/2012/03/ff_nsadatacenter) (explaining the setup of the NSA’s data network and the money that has been spent on new or renovated buildings to complete the network).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Drew FitzGerald, *Data Centers and Hidden Water Use*, WALL ST. J. (June 24, 2015, 3:20 PM), <http://www.wsj.com/articles/SB10007111583511843695404581067903126039290> (explaining how water is used to cool large data centers and the growing problem for centers in California and other western states because of water shortage due to drought).

<sup>8</sup> Amy Joi O’Donoghue, *Water world: Can a solution to Utah’s thirst be found?*, THE DESERET NEWS (Dec. 15, 2014, 3:45 PM), <http://www.deseretnews.com/article>

Tribune reporter Nate Carlisle filed a request for local records relating to the data center, he was surprised that the NSA had redacted data about water usage at the facility.<sup>9</sup> The NSA claimed that the redactions were for national security purposes because, “[a]rmed with [the information regarding the facility’s water usage], one could then deduce how much intelligence NSA is collecting and maintaining.”<sup>10</sup> However, after an appeal, the Utah State Records Committee ruled that the NSA’s data center water usage should not be classified, even post-9/11, and ordered the records released.<sup>11</sup>

For years, government agencies like the NSA have sought to withhold information from the public about government facilities and actions in the name of national security.<sup>12</sup> Nevertheless, the National Environmental Policy Act (“NEPA”), among other laws and regulations, requires disclosures before the government takes significant action.<sup>13</sup> While there have been obvious changes to the

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/865617766/Water-world-Can-a-solution-to-Utahs-thirst-be-found.html?pg=all (explaining how questions about the uncertain future of water in Utah have driven numerous groups, including the state, to seek for solutions to the coming problems).

<sup>9</sup> Robert McMillan, *Why Does the NSA Want to Keep Its Water Usage A Secret?*, WIRED MAG. (Mar. 19, 2014, 6:30 AM), <http://www.wired.com/2014/03/nsa-water>.

<sup>10</sup> Letter from David Sherman, Associate Director for Policy and Records, National Security Administration, to Bluffdale City, Utah (undated) (on file with the author).

<sup>11</sup> McMillan, *supra* note 9.

<sup>12</sup> See, e.g., *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981).

<sup>13</sup> 42 U.S.C. § 102(2)(C) (2012). Significantly [or significant] as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

American way of life in the aftermath of 9/11, including a limitation on freedoms in furtherance of security,<sup>14</sup> authors of recent scholarly

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.
2. The degree to which the proposed action affects public health or safety.
3. Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27 (2012).

<sup>14</sup> See, e.g., The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001).

articles contend that not only individual freedoms, but also the natural environment, are being compromised.<sup>15</sup> These authors believe that courts have erred by allowing agencies to limit the availability of documents required under NEPA in the name of national security.<sup>16</sup> While some of these documents and the actions they contemplate have negligible impact, such as those detailing actual water usage of a data storage facility, other environmental documents required under NEPA contain much more serious information relating to proposals for weapon storage, including nuclear weapons, which could have significant impacts on the public and the environment.<sup>17</sup> Each of these scholarly authors proposes ways to simultaneously protect both public interest and national security.<sup>18</sup> However, a study of recent cases involving alleged violations of NEPA in the interest of national security show that the judiciary has not merely deferred to agencies' assertions of compliance with NEPA regulations, but has instead subjected the decisions to thorough judicial review while still protecting the interests of national security.<sup>19</sup> Accordingly, this Comment argues that the judiciary has already ensured that the goals of NEPA are accomplished, and that protection of the natural

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<sup>15</sup> E.g., Major Charles J. Gartland, *At War and Peace with the National Environmental Policy Act: When Political Questions and the Environment Collide*, 68 A.F. L. REV. 27 (2012).

<sup>16</sup> William Mendelsohn, Comment, *In Camera Review of Classified Environmental Impact Statements: A Threatened Opportunity?*, 23 B.C. ENVTL. AFF. L. REV. 679 (1996); Stephen Dycus, *NEPA Secrets*, 2 N.Y.U. ENVTL. L.J. 300 (1993).

<sup>17</sup> See, e.g., *Catholic Action*, 454 U.S. at 141; *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at \*4-5 (W.D. Wash. 2014).

<sup>18</sup> Amanda Mott, Comment, *Should the Threat of a Terrorist Attack on a Nuclear Power Plant Be Considered Under NEPA Review?*, 12 UCLA J. INT'L L. & FOREIGN AFF. 333, 356-57 (2007); Mendelsohn, *supra* note 16, at 695; Dycus, *supra* note 16, at 310.

<sup>19</sup> *Ground Zero*, 2014 U.S. Dist. LEXIS 2752, at \*29-37 (examining the Navy's unredacted NEPA documents in-camera to ensure compliance).

environment does not require the changes to NEPA proposed by recent scholarly articles.

Part I of this Comment contains a brief history of NEPA and explains the requirements that the Act imposes on government agencies. Part II examines national security exemptions to other environmental laws and how courts have applied the national security exemption in the Freedom of Information Act (“FOIA”) to NEPA challenges. Part III examines the proposals various authors have made to combat a perceived threat to NEPA. Finally, Part IV contends that no threat to NEPA exists and that courts are already employing the proposed changes to NEPA without congressional intervention. This Comment further acknowledges that the cases cited are possibly the best examples of agencies working with the courts to reach a viable solution to alleged NEPA violations. Although such coordination is not always present and sensitive national security issues are at stake, it is within the existing power of the judicial branch to require agencies to conform with NEPA regulations.

#### I. THE NATIONAL ENVIRONMENTAL POLICY ACT

On January 28, 1969, more than three million gallons of crude oil spilled into the Santa Barbara Channel off the coast of Southern California.<sup>20</sup> The devastation of “oil-soaked birds” and “beaches coated with thick sludge”<sup>21</sup> captured national attention and became a catalyst for the passage of the National Environmental Policy Act of 1969.<sup>22</sup> Congress intended the Act “to foster and promote the general welfare, to create and maintain conditions under which man and

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<sup>20</sup> Miles Corwin, *The Oil Spill Heard ‘Round the Country*, L. A. TIMES (Jan. 28, 1989), [http://articles.latimes.com/1989-01-28/news/mn-1162\\_1\\_oil-spill](http://articles.latimes.com/1989-01-28/news/mn-1162_1_oil-spill).

<sup>21</sup> *Id.*

<sup>22</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012); *see also* Corwin, *supra* note 20 (explaining that the oil spill created ‘the spark’ that led to the passage of NEPA in addition to similar state legislation in California and doubts about the safety of oil drilling on the environment).

nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>23</sup> To accomplish this goal, section 102(2)(C)<sup>24</sup> of NEPA requires that agencies perform a series of procedural steps to ensure that they take a “hard look” at the environmental impact of their

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<sup>23</sup> National Environmental Policy Act of 1969 § 101(a), 42 U.S.C. § 4321 (2012).

<sup>24</sup> 42 U.S.C. § 4332 (2012).

All agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided

should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

proposed action.<sup>25</sup> NEPA covers a broad range of agency actions that significantly affect the quality of the human environment, including constructing roads and publicly-owned facilities.<sup>26</sup> Regardless of the specific action, agencies must document their considerations by preparing a detailed statement of the impacts of their proposed action before commencing the action.<sup>27</sup> The Supreme Court has stated that this documentation requirement is “the heart of NEPA.”<sup>28</sup>

There are varying levels of environmental review, and the extent of review and documentation required is contingent on the perceived level of impact.<sup>29</sup> The Council on Environmental Quality (“CEQ”) offers guidance on the selection of the applicable level of analysis.<sup>30</sup> First, an agency prepares a Categorical Exclusion (“CATEX”) if they believe that the proposed action will not “individually or cumulatively have a significant effect on the human environment.”<sup>31</sup> For instance, a CATEX may be sufficient for a federally funded project to repave an existing road, because the proposed action will not have any significant new effect on the environment. In most cases, however, an agency will complete an Environmental Assessment (“EA”) to determine the environmental impact of their proposed action.<sup>32</sup> The EA may either result in a Finding of No Significant Impact (“FONSI”), allowing the project to

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<sup>25</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>26</sup> *What is the National Environmental Policy Act?*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Aug. 14, 2016).

<sup>27</sup> *Id.*

<sup>28</sup> *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

<sup>29</sup> *See National Environmental Policy Act Review Process*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Oct. 16, 2016).

<sup>30</sup> COUNCIL ON ENVTL. QUALITY NEPA RULES, 40 C.F.R. § 1501.4 (2014) (explaining the criteria for determining which level of analysis and documentation is required).

<sup>31</sup> 40 C.F.R. 1508.4; *see also* 40 C.F.R. § 1508.27 (defining significant as it relates to NEPA).

<sup>32</sup> *National Environmental Policy Act Review Process*, *supra* note 29.

proceed without further analysis, or a determination that an Environmental Impact Statement (“EIS”) is required.<sup>33</sup> Courts

examine the EA with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion.<sup>34</sup>

In an EIS, agencies consider the adverse effects of the project, ways to mitigate possible damage, possible alternatives, and even the implications of taking no action.<sup>35</sup> There are two purposes behind the EIS requirement: first, to “provide decision makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with a project in light of its environmental consequences,”<sup>36</sup> and second, to inform the public that the agency has considered the environmental impacts associated with the project.<sup>37</sup> Government agencies often accomplish these goals by working with stakeholders throughout the NEPA process, and agencies are required to publish a draft EIS for a 45-day comment period.<sup>38</sup> At the conclusion of the comment period, agencies release a final EIS, and NEPA requires that it “shall be made available to the

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<sup>33</sup> *Id.*

<sup>34</sup> *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1215 (9th Cir. 2008).

<sup>35</sup> *See* 40 C.F.R. § 1502.14 (2014).

<sup>36</sup> *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *see also* *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981).

<sup>37</sup> *Catholic Action*, 454 U.S. at 143; *see also*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (stating that NEPA “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision”).

<sup>38</sup> 40 C.F.R. § 1506.10 (2016); 40 C.F.R. § 1503.1(a)(4) (2016).



President, the Council on Environmental Quality and to the public.”<sup>39</sup> A final EIS is used to show that the decision makers have considered the implications of their proposed actions,<sup>40</sup> including responding to concerns raised by stakeholders during the comment period for the draft EIS.<sup>41</sup> Nevertheless, an agency may proceed with environmentally harmful actions and still comply with NEPA, because NEPA does not mandate particular results; it “merely prohibits uninformed – rather than unwise – agency action.”<sup>42</sup>

Both an agency’s decision about the required level of analysis and the results of the analysis are reviewable.<sup>43</sup> The Supreme Court has held that the section of NEPA that dictates the steps agencies must take in forming decisions is procedural,<sup>44</sup> and although Congress has granted agencies a wide breadth of discretion,<sup>45</sup> an agency’s decision making process is subject to judicial review under the Administrative Procedure Act.<sup>46</sup> Therefore, citizens with standing who feel that the NEPA process was not properly followed can sue the applicable

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<sup>39</sup> 42 U.S.C. §4332 (2016).

<sup>40</sup> *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973). *See also Johnston v. Davis*, 698 F.2d 1088, 1091 (10th Cir. 1983); *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1029 (2d Cir. 1983).

<sup>41</sup> 40 C.F.R. § 1503.4(a) (2016).

<sup>42</sup> *Robertson*, 490 U.S. at 350-51.

<sup>43</sup> *See e.g., Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1153-54 (D.C. Cir. 2011).

<sup>44</sup> *See Marsh v. Oregon Nat. Res. Council*, 109 S. Ct. 1851 (1989); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978).

<sup>45</sup> *See Susannah T. French, Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 930 (1993) (explaining how “administrative agencies are presumed [by Congress] to have special knowledge in the fields that they regulate” and are generally given “significant authority and discretion to use their expertise to serve the broader public good”).

<sup>46</sup> 5 U.S.C. § 702 (2012).

agency,<sup>47</sup> and reviewing courts can enjoin a project if they concur with the plaintiffs.<sup>48</sup>

Courts, however, have traditionally struggled when determining the proper scope of their judicial review and have been highly deferential to agency decisions. In general, courts must grant substantial deference to agency expertise and will defer to an agency's "reasoned decision based on the evaluation of the evidence."<sup>49</sup> Accordingly, when an agency conducts an environmental process and makes a determination based on their analysis of the facts, a reviewing court should only determine whether the decision was "arbitrary or capricious."<sup>50</sup> The Supreme Court explained this standard, stating that the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment."<sup>51</sup> Courts employ this level of deference by reviewing only the materials considered by the agency at the time the final decision was made.<sup>52</sup>

While courts should not substitute their own judgment for that of the agency,<sup>53</sup> they must effectuate a balance that allows for

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<sup>47</sup> *Id.* (stating "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof").

<sup>48</sup> See *Karlen*, 444 U.S. at 227-28 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) ("Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken.") (internal quotation marks omitted).

<sup>49</sup> *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003).

<sup>50</sup> 5 U.S.C. § 706(2)(A).

<sup>51</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>52</sup> See French, *supra* note 45, at 931 (explaining that courts have adopted the "Record Rule" which only allows for review of documents considered by the agency at the time of their final decision).

<sup>53</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

deference to agency expertise but ensures that the law is followed. Interested parties usually allege that the agency has not properly analyzed all relevant information or did not prepare a NEPA document.<sup>54</sup> Consequently, when an agency does not publish an environmental document, or restricts access to portions of that document for national security purposes, challengers are left in the dark, and must argue that they do not have enough information to understand the potential impacts of the agency's actions.<sup>55</sup> The problem intensifies when courts are likewise unable to determine whether an agency has followed the requirements of NEPA because they lack the clearance to be briefed regarding the full scope of the agency's actions or are not privy to classified portions of the agency's environmental documents.<sup>56</sup>

## II. EXEMPTIONS FOR NATIONAL SECURITY AND PAST LITIGATION

Although NEPA is not the only law enacted for the purpose of protecting the environment, it is the most well-known, and is commonly referred to as the Magna Carta of environmental laws.<sup>57</sup> Despite NEPA's importance in environmental law, since its passage more than thirty years ago, Congress has not enacted any significant changes to it, and it remains the only environmental Act without a

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<sup>54</sup> See e.g., *Winter v. NRDC, Inc.* 555 U.S. 7, 16-17 (2008) (examining the plaintiff's contention that the Navy's actions violated NEPA).

<sup>55</sup> See e.g., *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at \*10 (W.D. Wash. Jan. 8, 2014).

<sup>56</sup> See e.g., *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981) (explaining why the Court would not require the Navy to prepare an EIS which considered the impact of nuclear weapons because the Navy was restricted by statute from disclosing to the Court if the site would be used for nuclear storage).

<sup>57</sup> Amanda Jahshan, *NEPA: The Magna Carta of Environmental Law*, SWITCHBOARD NAT'L RESOURCE DEF. COUNCIL STAFF BLOG: AMANDA JAHSHAN'S BLOG (July 26, 2013), [http://switchboard.nrdc.org/blogs/ajahshan/nepa\\_the\\_magna\\_carta\\_of\\_enviro\\_1.html](http://switchboard.nrdc.org/blogs/ajahshan/nepa_the_magna_carta_of_enviro_1.html).

national security exception.<sup>58</sup> Consequently, in the wake of the 9/11 attacks, the Pentagon announced an initiative that included proposed amendments to several environmental statutes to allow for “proper training of American military forces and the development of new weapons” for national security purposes,<sup>59</sup> but did not request amendments to NEPA. Instead, the Pentagon sought to enact the desired changes while adhering to the current NEPA framework.<sup>60</sup>

*A. National Security Exemptions in Environmental Regulations*

A number of environmental statutes do contain the written national security exception that NEPA lacks. First, the Endangered Species Act (“ESA”), passed in 1973, seeks to prevent the extinction of at-risk animals and plant species by protecting not only the animals and plants but also critical habitats.<sup>61</sup> The U.S. Fish and Wildlife Service is charged with enforcing ESA and is given wide reach and power because of the geographical size of critical habitat in need of protection.<sup>62</sup> The ESA requires federal agencies to ensure that their actions are not “likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or

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<sup>58</sup> See e.g., 16 U.S.C. § 1536(j) (2012) (allowing the Secretary of Defense to grant an exception to Endangered Species Act for national security purposes).

<sup>59</sup> See Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 2 (2005) (explaining that the DoD sought amendments to the “Clean Air Act, the Resource Conservation and Recovery Act, the Endangered Species Act, the Marine Mammal Protection Act, the Migratory Bird Treaty Act, the Superfund law, and perhaps even the Clean Water Act.”).

<sup>60</sup> See Migratory Bird Permits; Take of Migratory Birds by the Department of Defense, 69 Fed. Reg. 31,074, 31,079, 31,083-84 (Jun. 2, 2004) (stating “Department of Defense will use the NEPA process to determine whether any ongoing or proposed military readiness activity is likely to result in a significant adverse effect on the population of a migratory bird species of concern,” and also that the Interior Department determined that the proposed regulations would be “categorically excluded” from the extensive NEPA analysis).

<sup>61</sup> The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012).

<sup>62</sup> *Id.*

adverse modification” of critical habitat.<sup>63</sup> However, ESA does allow the Secretary of Defense to grant an exemption to this requirement to any agency for the purpose of national security.<sup>64</sup> Such an exemption was granted in 1979 for the Grey Rocks Dam Project in Wyoming after the project had stalled due to the potential threat to whooping cranes.<sup>65</sup> Additionally, the National Defense Authorization Act for Fiscal Year 2004 amended ESA to limit the designation of military lands as critical habitat,<sup>66</sup> in an attempt to make it easier for the Department of Defense (“DoD”) to comply with environmental statutes.<sup>67</sup>

Next, the Clean Air Act (“CAA”) regulates air emissions from stationary sources, such as factories, and mobile sources, like cars,<sup>68</sup> in order “to protect and enhance the quality of the Nation’s air . . . so as to promote public health and welfare.”<sup>69</sup> The CAA requires that federal agencies comply with federal, state, and local regulations regarding air quality.<sup>70</sup> Yet these regulations do not apply to “military

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<sup>63</sup> 16 U.S.C. § 1536(a)(2) (1988).

<sup>64</sup> 16 U.S.C. § 1536(j) (1988) (“Exemption for national security reasons. Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.”). The provision grants the Secretary an unqualified privilege.

<sup>65</sup> Col. E. G. Willard, Lt. Col. Tom Zimmerman & Lt. Col. Eric Bee, *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and Operational Prerogatives without New Legislation?*, 54 A.F. L. REV. 65, 75 (2004) (explaining that after the national security exception was added, several projects were considered for exemption from the ESA while an exception was granted for the Grey Rocks Dam Project).

<sup>66</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318, 117 Stat. 1392, 1433 (2003).

<sup>67</sup> Dycus, *supra* note 59 (“The [Act] amends six federal environmental statutes to make it easier for DoD to comply with the statutes”).

<sup>68</sup> The Clean Air Act, 42 U.S.C. § 7401 et seq. (2012).

<sup>69</sup> 42 U.S.C. § 7401(b)(1).

<sup>70</sup> 42 U.S.C. § 7418(a).

tactical vehicles,”<sup>71</sup> primarily because the DoD was concerned about the compliance cost of the regulations when they were enacted.<sup>72</sup> Further, the President may exempt any stationary source for national security purposes for a period of two years.<sup>73</sup>

Finally, the Marine Mammal Protection Act (“MMPA”), enacted on October 21, 1972 to protect all marine mammals,<sup>74</sup> was amended by the 108th Congress to add a broad national defense exemption.<sup>75</sup> Specifically, the amendment changed the definition of “harassment” of marine mammals, as applied to military readiness activities, to allow the Navy to conduct sonar testing.<sup>76</sup> This exemption was the subject of the 2008 Supreme Court case *Winter v. National Resources Defense Council*, where the Court overturned an injunction against the Navy’s use of sonar off the coast of Southern California.<sup>77</sup>

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<sup>71</sup> 42 U.S.C. § 7418(c). Although tactical vehicles are not defined in the statute, the DoD has defined non-tactical vehicles as “any commercial motor vehicle, trailer, material handling or engineering equipment that carries passengers or cargo acquired for administrative, direct mission, or operational support of military functions.” All DoD sedans, station wagons, carryalls, vans, and buses are considered “non-tactical.” U.S. DEP’T OF DEF., INSTR. 4500.36, ACQUISITION, MANAGEMENT, AND USE OF NON-TACTICAL VEHICLES (NTVs) glossary, part 2 (11 Dec. 2012).

<sup>72</sup> 20 Env’t Rep. (BNA) 1932 (Apr. 6, 1990).

<sup>73</sup> 42 U.S.C. § 7412(i)(4) (“The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so”).

<sup>74</sup> Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. (2012).

<sup>75</sup> 16 U.S.C. §§ 1362, 1371 (2012); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1433-35 (2003); see also Julie G. Yap, Note, *Just Keep Swimming- Guiding Environmental Stewardship Out of the Riptide of National Security*, 73 FORDHAM L. REV. 1289, 1292-93 (2004).

<sup>76</sup> 16 U.S.C. § 1362 (2012).

<sup>77</sup> *Winter v. NRDC, Inc.*, 555 U.S. 7, 42-43 (2008).

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### B. National Security and NEPA

Rather than make an exemption for national security when enacting NEPA,<sup>78</sup> Congress provided that all documents must be released unless exempted by FOIA.<sup>79</sup> Congress passed FOIA in 1976, granting the public a legal right to access federal government records from any agency.<sup>80</sup> Nevertheless, if the documents sought by the public (including an EIS) contain classified information, FOIA allows the agency to withhold the information in the interest of national security.<sup>81</sup> Exemption 1, the primary FOIA exemption for national security, allows an agency to withhold documents only when specifically authorized by an executive order in the interest of national defense.<sup>82</sup> Exemption 3, which allows agencies to withhold documents “specifically exempted from disclosure by statute,” can also apply to national security matters.<sup>83</sup> Therefore, it has been left to the courts to decide whether one of the FOIA exemptions is applicable when an agency argues against disclosure of an EIS to the public based on its classified nature.

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<sup>78</sup> There is no explicit national security exemption in NEPA, but in *Winter v. NRDC, Inc.*, Justice Roberts held “any such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.” 555 U.S. 7 at 23 (2008). Additionally, the Council on Environmental Quality has authority to issue exemptions in emergency situations. See 40 C.F.R. § 1506.11 (2013).

<sup>79</sup> See 42 U.S.C. § 4332(2)(C) (2012), which explains that an agency should make an EIS available to the public except as “as provided by [FOIA].”

<sup>80</sup> *What is FOIA?*, U.S. DEP’T OF JUSTICE, <http://www.foia.gov/about.html> (last visited Nov. 8, 2016).

<sup>81</sup> 5 U.S.C. § 552(b) (2012). Although there are nine exemptions to disclosure under FOIA, the following specifically relate to national security.

<sup>82</sup> 5 U.S.C. § 552(b)(1) (2012).

<sup>83</sup> See *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 141 (1981), (explaining that Exemption 3 might apply in the case because distributing an EIS would could conflict with the Atomic Energy Act, 42 U.S.C. § 2014(y), but conducting the analysis was not needed because of the application of Exemption 1).

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*C. NEPA Litigation*

Immediately after the passage of NEPA, courts began to consider the conflict between NEPA and national security.<sup>84</sup> However, the Supreme Court did not decide the most significant case on the issue, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, until 14 years after the enactment of NEPA in 1981, when it considered the application of a FOIA exemption to NEPA in the context of building a naval weapons storage facility.<sup>85</sup> Prior to the construction of a facility for the storage of ammunition and weapons, the Navy conducted an environmental impact assessment (“EIA”),<sup>86</sup> similar to an EA, and concluded that there would be no significant environmental impact, so an EIS was not prepared.<sup>87</sup> Although the missile magazines constructed at the facility were capable of storing nuclear weapons, their potential environmental impacts were not covered in the EIA, and for “national security reasons, the Navy’s regulations forbid it either to admit or to deny that nuclear weapons [were] actually stored at [the facility].”<sup>88</sup>

The *Weinberger* plaintiff argued that, in the EIA, the Navy had ignored the increased risk of a nuclear accident should a plane from one of the nearby airports crash into the site.<sup>89</sup> Even though the district

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<sup>84</sup> See e.g., *McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir. 1971). Here, the court acknowledged that federal agencies are not exempt from the disclosure requirements of NEPA, but stated that “[p]ublic disclosure relating to military-defense facilities creates serious problems involving national security.” *Id.* Thus, the court implied that due to national security concerns, agencies may be exempt from the requirements of NEPA and would not enjoin the military’s action. *Id.*

<sup>85</sup> *Catholic Action*, 454 U.S. at 139.

<sup>86</sup> A preliminary document used to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” Council on Environmental Quality Terminology and Index, 40 C.F.R. § 1508.9 (2012).

<sup>87</sup> *Catholic Action*, 454 U.S. at 141.

<sup>88</sup> *Id.* at 146.

<sup>89</sup> *Id.* at 142.



court agreed with the plaintiffs that the Navy had taken a significant action within the meaning of NEPA,<sup>90</sup> the court found that an EIS would conflict with a number of national security provisions.<sup>91</sup> The court of appeals subsequently reversed the district court's holding, finding that, without revealing exact details, the Navy could provide a hypothetical EIS that would generally assess the impact of nuclear storage at the facility without conceding whether or not such items were stored there.<sup>92</sup>

On appeal, the Supreme Court, however, did not feel that Congress intended the creation of a hypothetical EIS when it enacted NEPA.<sup>93</sup> Rather, the Court found that section 102(2)(C) only required that federal agencies complete the NEPA process and prepare the applicable documentation "to the fullest extent possible."<sup>94</sup> Referencing the text of NEPA, which states that a document resulting from the NEPA process "shall be made available to the President, the Council on Environmental Quality and to the public, *as provided by [FOIA]*,"<sup>95</sup> the Court found that the Navy was potentially protected from disclosing the requested information by two FOIA exemptions.<sup>96</sup>

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<sup>90</sup> Although not directly stated by the court, it can be inferred that they were not satisfied with the Navy's preparation of an EIA and would have required an EIS if not for their later finding. See *Catholic Action of Haw./Peace Educ. Project v. Brown*, 468 F. Supp. 190, 193 (D. Haw. 1979). See also *Catholic Action of Haw./Peace Educ. Project v. Brown*, 643 F.2d 569, 572 (9th Cir. 1980) (holding that NEPA required the preparation of an EIS in the case).

<sup>91</sup> *Catholic Action*, 468 F. Supp. at 193 (stating that preparing an EIS would "conflict with security data provisions of the Atomic Energy Act, 42 U.S.C. § 2014(y); with security classification guides prepared jointly by the DoD and the Department of Energy, CG-W-4, JOINT ERDA/DOD NUCLEAR WEAPONS CLASSIFICATION GUIDE; and with United States Navy implementation of the joint guide, SWOP 55-1, NAVY SECURITY CLASSIFICATION GUIDE FOR NUCLEAR WEAPONS").

<sup>92</sup> *Catholic Action*, 643 F.2d at 572.

<sup>93</sup> *Catholic Action*, 454 U.S. at 142.

<sup>94</sup> *Id.*; 42 U.S.C. § 4332(2)(C) (2012).

<sup>95</sup> 42 U.S.C. § 4332(2)(C) (2012)(emphasis added).

<sup>96</sup> *Catholic Action*, 454 U.S. at 144.

The Court found that Exemption 3,<sup>97</sup> which authorizes the government to withhold documents specifically exempted from disclosure by statute, could apply because of the Atomic Energy Act,<sup>98</sup> but declined to fully consider the question because of the apparent applicability of Exemption 1 to the case.<sup>99</sup> Exemption 1 prohibits disclosure of documents that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”<sup>100</sup> The Court held that Exemption 1 applied and that the Navy was free from the obligation to disclose an EIS because “[v]irtually all information relating to the storage of nuclear weapons is classified.”<sup>101</sup>

Ultimately, the Court determined that the Navy did not necessarily need to prepare such an internal EIS in this case, because NEPA only requires an EIS for proposed actions, not those that are merely contemplated.<sup>102</sup> While the Court stated that, if the Navy proposed to store nuclear weapons at the facility, it should prepare an internal EIS that would not be released to the public but would fulfill the Navy’s NEPA obligation to consider the environmental impacts,<sup>103</sup> such action was not needed at the time. Because “it ha[d] not been and *cannot be established* that the Navy has proposed [storing nuclear weapons at the site],” the Court concluded that an EIS was not required.<sup>104</sup> The Court finished by declaring, “[W]hether or not the Navy has complied with NEPA . . . is beyond judicial scrutiny in this case,” because public policy would not allow a trial “which would inevitably lead to the disclosure of matters which the law itself regards

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<sup>97</sup> 5 U.S.C. § 552(b)(3) (2012).

<sup>98</sup> 42 U.S.C. § 2011 (2012).

<sup>99</sup> *Catholic Action*, 454 U.S. at 144.

<sup>100</sup> 5 U.S.C. § 552(b)(1) (2012).

<sup>101</sup> *Catholic Action*, 454 U.S. at 144-45.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 146.

<sup>104</sup> *Id.* (emphasis added).

as confidential.”<sup>105</sup> By its ruling, the Court acknowledged that there is potential for government agencies to avoid the requirements of NEPA, since agencies would be able to avoid disclosure through an adversarial trial if there was any link to national security.<sup>106</sup>

Justice Blackmun’s concurring opinion acknowledged the potential loophole that the Court created.<sup>107</sup> While he agreed that confidential information may be withheld from the public, he noted that one of the goals of NEPA was to inform the public of agencies’ actions.<sup>108</sup> To resolve this problem, he argued that agencies should organize the EIS in such a way that the classified portions could be protected through redaction or removal under FOIA, while the unclassified portions could be disseminated to the applicable parties, including the public at large.<sup>109</sup>

### III. THE RESULTING ALARM

In the years following the Court’s decision in *Catholic Action*, a number of authors have written about the harm that would result if agencies were able to avoid public disclosure of an EIS.<sup>110</sup> One author, Amy Sauber, argued that an even greater harm would occur when agencies failed to even prepare an EIS because *Catholic Action* deemed such challenges beyond judicial review.<sup>111</sup> Sauber maintained that this predicted harm was realized soon after *Catholic Action*, when the court in *Laine v. Weinberger* deemed the Navy’s decision to not prepare an EIS beyond judicial review because it could not be

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<sup>105</sup> *Id.* (quoting *Totten v. United States*, 92 U.S. 105, 107 (1876)).

<sup>106</sup> *Catholic Action*, 454 U.S. at 146-47.

<sup>107</sup> *Id.* at 147-48.

<sup>108</sup> *Id.* at 145 (citing 42 U.S.C. § 4332(2)(C) (2012)).

<sup>109</sup> *Catholic Action*, 454 U.S. at 149.

<sup>110</sup> See, e.g., Joseph Farris, *Mothers for Peace and the Need to Develop Classified NEPA Procedures*, 34 *ECOLOGY L.Q.* 955, 968 (2007).

<sup>111</sup> Amy Sauber, *The Application of NEPA To Nuclear Weapons Production, Storage, and Testing*; *Weinberger v. Catholic Action of Haw./Peace Education Project*, 11 B.C. ENVTL. AFF. L. REV. 805, 832 (1983-1984).

established whether the Navy proposed to store nuclear weapons at the site under review.<sup>112</sup> This general alarm regarding the judiciary's application of a non-congressionally authorized exception to NEPA has grown in the years following the 9/11 attacks and the judiciary's increased deference to agency action regarding national security.<sup>113</sup> Therefore, several authors of scholarly articles have proposed a number of different ways to "bridge the gap between NEPA's mandate for accountability and public involvement, and the need to keep information secure."<sup>114</sup>

A. *EIS Released with Portions Withheld*

The first approach considered here was first posed by Justice Blackmun in his *Catholic Action* concurrence. Justice Blackmun argued that agencies should organize the EIS document in such a way that the classified portions could be protected under FOIA while unclassified portions could be disseminated to the applicable parties, including the public at large.<sup>115</sup> Amanda Mott also considered this approach:

Information pertinent to national security may be set out in a classified annex to the EIS, rather than in the EIS itself. Including classified information in an annex would allow for information to

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<sup>112</sup> *Laine v. Weinberger*, 541 F. Supp. 599, 604 (C.D. Cal. 1982) (stating that application of the ruling in *Catholic Action* would not allow the court to consider the challenge because District Courts are not the proper forum for resolving such sensitive issues).

<sup>113</sup> Thirty-one of the forty articles found by this author relating to the subject were published after 9/11. See, e.g., PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in 8-50 U.S.C.) (limiting specific rights/freedoms in an effort to ensure public safety and security).

<sup>114</sup> See, e.g., Joseph Farris, *Mothers for Peace and the Need to Develop Classified NEPA Procedures*, 34 *ECOLOGY L.Q.* 955, 968 (2007).

<sup>115</sup> *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 149 (1981).

be read by a government official who would require clarification on anything that might be of public concern.<sup>116</sup>

The CEQ adopted this approach in its NEPA regulations, stating that the NEPA document “may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.”<sup>117</sup>

However, author Joseph Farris criticized this approach, questioning whether a classified EIS could accomplish NEPA’s goal of requiring agencies to take a hard look at the environmental consequences.<sup>118</sup> Farris argued that allowing agencies to classify portions of their EIS would leave the determination of whether the requirements of NEPA had been accomplished to the agency.<sup>119</sup> Furthermore, Farris pointed out that a goal of NEPA is to allow the stakeholders, including the public, to participate in the planning process.<sup>120</sup> While an agency conducting a normal environmental review would release a draft EIS, which allows for a discussion between the public and the agency regarding the information contained within, Farris argued that such a result could not be accomplished under the classified EIS approach.<sup>121</sup> Farris contended that “useful public contribution hinges upon the ability to have a real dialogue between the agency and the public,” and that this method would not allow the public to comment on classified portions of the document.<sup>122</sup>

### B. *In Camera* Review

In the second approach considered here, authors have advocated for the use of *in camera* judicial review of classified EIS

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<sup>116</sup> Mott, *supra* note 18, at 356-57.

<sup>117</sup> 40 C.F.R. § 1507.3(c) (2016).

<sup>118</sup> Farris, *supra* note 111, at 970.

<sup>119</sup> *Id.* at 968.

<sup>120</sup> *Id.* at 967-68.

<sup>121</sup> *Id.* at 968.

<sup>122</sup> *Id.*

documents.<sup>123</sup> This approach would help to fulfill both goals of NEPA while keeping classified information from the eyes of the public. William Mendelsohn advocated for this approach while considering *Hudson River Sloop Clearwater v. Department of Navy*.<sup>124</sup> In *Hudson River*, the plaintiffs filed suit against the Navy after it announced plans to build a port in New York Harbor.<sup>125</sup> The plaintiffs alleged that the Navy violated NEPA by not producing an internal EIS to consider the implications of storing nuclear weapons at the port, and they petitioned the court to perform an *in camera* review for sufficiency of any documents produced during the NEPA process.<sup>126</sup> The district court denied the plaintiff's request, stating that even if the court kept the material confidential, the result of the case could indirectly confirm whether nuclear weapons were stored at the site.<sup>127</sup> Although on appeal the circuit court affirmed the case on different grounds, Mendelsohn argued that the court "abdicated its duty to ensure that the Navy had complied with NEPA" because it did not conduct an *in camera* review.<sup>128</sup>

Mendelsohn asserted that *in camera* review should be comprised of two tests.<sup>129</sup> The court would first review whether the agency qualified for an exemption under FOIA, and then whether the agency's EIS was sufficient to meet the requirements of NEPA.<sup>130</sup> Mendelsohn believed that "[c]ourts have granted such a review in those instances in which both parties already are familiar with the classified information."<sup>131</sup> Mendelsohn acknowledged that this is not a

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<sup>123</sup> See e.g., Mendelsohn, *supra* note 16, at 695.

<sup>124</sup> *Id.*

<sup>125</sup> *Hudson River Sloop Clearwater, Inc. v. U.S. Dep't of Navy*, 891 F.2d 414, 416-17 (2d Cir. 1989).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 417.

<sup>128</sup> Mendelsohn, *supra* note 16, at 695.

<sup>129</sup> *Id.* at 696.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

perfect solution to the *Hudson River* problem because it “lack[s] the benefits of a normal adversarial trial, but it at least imposes some form of outside review of an agency’s compliance with NEPA.”<sup>132</sup>

*C. Congressionally Created Court*

The final method considered here was suggested by Vermont Law School professor Stephen Dycus, who argued for Congress to create a special court that would hear classified information in cases in which NEPA compliance was challenged.<sup>133</sup> This specialized court would adhere to the security concerns of the proposing agencies while developing expertise in the application of NEPA to such projects.<sup>134</sup> Professor Dycus envisioned a court similar to the Foreign Intelligence Surveillance Court (“FISC”) created by the Foreign Intelligence Surveillance Act of 1978 (“FISA”).<sup>135</sup> The FISC is composed of eleven district court judges who are appointed by the Chief Justice of the Supreme Court; the hearings are conducted in closed chambers and the FISC maintains secret records.<sup>136</sup>

Professor Dycus also proposed, as an alternative to a special court, that Congress create a “special independent environmental attorney.”<sup>137</sup> This attorney would have a security clearance and the ability to prosecute cases for plaintiff groups.<sup>138</sup> However, Professor Dycus failed to detail specifically how the process would work, leaving many unanswered questions that would need to be resolved before this approach could be fully considered. For instance, a venue would need to be selected where the special attorney would bring cases, and that

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<sup>132</sup> *Id.* at 697.

<sup>133</sup> Dycus, *supra* note 16, at 310.

<sup>134</sup> *Id.*

<sup>135</sup> Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (2016).

<sup>136</sup> 50 U.S.C. § 1803 (2015).

<sup>137</sup> Dycus, *supra* note 16, at 310.

<sup>138</sup> *Id.*

court would also have to be given security clearance so that they could hear the cases.

#### IV. THE JUDICIARY'S BALANCED APPROACH

This Comment acknowledges that while the current system is not a perfect solution to the oft-opposing demands of NEPA and national security, the revisions suggested by the authors cited above are not possible due to the current polarized political climate in Congress. Furthermore, such actions are not necessary because courts have taken sufficient individual action, without congressional direction, to satisfy the demands of NEPA while protecting national security interests. A study of recent court decisions shows that, even post-9/11, courts have not allowed national security concerns to cripple the application of NEPA.<sup>139</sup>

Although *Catholic Action* was decided more than thirty years ago, many of the scholarly articles demanding changes to the NEPA process continue to address the case.<sup>140</sup> However, recent decisions relying on *Catholic Action* have been able to satisfy both the national security and NEPA concerns without the congressional action that the previously cited proposals would require.

For instance, in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, the court relied on *Catholic Action* when considering the plaintiff's claim under NEPA that the U.S. Nuclear Regulatory Commission's EIS must consider the potential of terrorist attacks.<sup>141</sup> The court rejected the assertion that agencies were exempt from NEPA requirements because of national security concerns, and

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<sup>139</sup> See, e.g., *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at \*6-8 (W.D. Wash. Jan. 8, 2014).

<sup>140</sup> See, e.g., Farris, *supra* note 111, at 959-60 (considering the relationship between NEPA, FOIA, and the decision in *Catholic Action*).

<sup>141</sup> *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 635 F.3d 1109, 1112, 1116 (9th Cir. 2011).



stated that while situations involving national security could require certain changes to regular NEPA procedures, the agency's "inability to comply with some of NEPA's purposes did not absolve it of its duty to fulfill others."<sup>142</sup> Furthermore, the court cited *Catholic Action* for the proposition that agencies are "required [under NEPA] to perform a NEPA review and to factor its results into [their] decision making even where the sensitivity of the information involved [means] that the NEPA results [can]not be publicized."<sup>143</sup> Nevertheless, while the *Catholic Action* Court determined that whether the agency had complied with this requirement and prepared an internal EIS was not justiciable in national security cases,<sup>144</sup> the *Mothers for Peace* Court cited their ruling as a requirement that agencies prepare a NEPA document that is reviewable by the court.<sup>145</sup> Thus, a recent ruling has reinterpreted the holding in *Catholic Action* to close the national security loophole that the authors cited above contended was eroding the NEPA requirements.

Additionally, in *Ground Zero Center for Nonviolent Action v. United States Department of the Navy*, the court's application of *Catholic Action* was even more restrictive. In *Ground Zero*, the Navy proposed to build a second explosive-handling wharf to handle the excessive demand on the existing wharf.<sup>146</sup> In accordance with NEPA, the Navy conducted the appropriate environmental reviews and published a final EIS that extensively covered the potential impacts.<sup>147</sup>

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<sup>142</sup> *Id.* at 1112.

<sup>143</sup> *Id.* at 1116 (citing *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1034 (9th Cir. 2007) (internal quotation marks omitted)).

<sup>144</sup> *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981).

<sup>145</sup> *Mothers for Peace*, 635 F.3d at 116.

<sup>146</sup> *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at \*4-5 (W.D. Wash. Jan. 8, 2014).

<sup>147</sup> *Id.* at \*6-8 (stating the following:)

The EIS disclosed that underwater construction noise may cause levels of sound injurious to fish. The Navy also considered mitigation measures to reduce potential damage caused by construction, including: (1) efforts to

Even though the EIS contained numerous documents disclosed to the public, the plaintiffs argued that the Navy withheld information critical to their review process and required under NEPA.<sup>148</sup> During litigation, the Navy released redacted copies of the five documents previously withheld and allowed the court to review unredacted copies *in camera*.<sup>149</sup> However, the Navy's eventual disclosure of these redacted copies during litigation led the plaintiffs to argue that the Navy should have released them during the public comment period.<sup>150</sup> Nevertheless, by reviewing the documents *in camera*, the court

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protect marine water quality and seafloor during construction; (2) a limited in-water work window; (3) efforts to protect upland water quality during construction; (4) efforts to protect water quality during operation; (5) noise attenuation techniques during construction; (6) monitoring noise impacts; and (7) mitigation measures for biological, cultural, and other resources. Additional mitigation measures include limiting the use of impact hammering, which creates higher levels of injurious sound, and a "soft-start approach" for pile driving to provide a warning to fish prior to the drivers operating at full capacity.

Additionally, the Navy considered five alternative forms for the new wharf: (1) a combined trestle with large pile wharf (the preferred alternative); (2) a combined trestle with conventional pile wharf; (3) separate trestles with large pile wharf; (4) separate trestles with conventional pile wharf; and (5) a combined trestle with floating wharf.

The Navy identified these alternatives based upon (1) their capability of meeting Trident mission requirements; (2) the ability to avoid or minimize environmental consequences; (3) siting requirements, including proximity to existing infrastructure; (4) the availability of waterfront property; (5) the ability to construct essential project features; and (6) master planning issues, such as explosive safety restrictions. The Navy also considered a "no-action alternative," but as outlined above, the Navy argued that the need for increased operational days mandates action.

<sup>148</sup> *Id.* at \*10.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*16.

concluded that the purposes of NEPA had been fulfilled and that the public had not missed a significant opportunity to comment.<sup>151</sup>

This ruling demonstrates that the purposes of NEPA can be fulfilled within the current judicial system without legislative action. And by its inaction, Congress has shown its implied support for the recent course of NEPA litigation.<sup>152</sup> Although the Navy did not release every document to the public that could have potentially been considered, NEPA only demands that agencies comply “to the fullest extent possible.”<sup>153</sup>

A. *Limited Disclosure Does Not Close Dialogue or Release Agency Obligation*

Without congressional action, the court in *Ground Zero* successfully implemented the approach suggested by Justice Blackmun in *Catholic Action*.<sup>154</sup> The Navy released both a draft and final EIS to the public that contained extensive information regarding their proposed plan, but withheld sensitive portions of the EIS from disclosure.<sup>155</sup> One of the chief concerns Farris voiced against this method is that the public would not be able to have an informed dialogue with the proposing agency regarding the action because they would lack vital information.<sup>156</sup> Nevertheless, after reviewing all of the Navy’s NEPA documents *in camera*, the court determined that the documents released to the public provided enough information for the

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<sup>151</sup> *Id.* at \*24-25.

<sup>152</sup> See generally, Sharon Buccino, *Colloquium Article: NEPA Under Assault: Congressional And Administrative Proposals Would Weaken Environmental Review And Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 50-51 (2003) (stating that Congress has not made any significant changes to NEPA since it was first passed in 1969).

<sup>153</sup> 42 U.S.C. § 4332(2)(C) (2016).

<sup>154</sup> *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 149 (1981).

<sup>155</sup> *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at \*10-11.

<sup>156</sup> Farris, *supra* note 111, at 967.

public to make informed choices,<sup>157</sup> effectively stating that the required dialogue between the public and the Navy had taken place. While the Navy might have released redacted copies of the documents withheld in the EIS to the public at the time of the final EIS, rather than doing so at trial, they were released to the public nonetheless.<sup>158</sup>

Additionally, the courts' process in *Ground Zero* and holding in *Mothers for Peace* illustrate that the judiciary has not allowed agencies to subvert the goals of NEPA, but that courts have required agencies to fully consider the impact of their actions.<sup>159</sup> Furthermore, the agencies are not seeking to limit their obligation under NEPA. The Navy's own NEPA regulations state, "The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with NEPA and the CEQ regulations."<sup>160</sup> However, the Navy's regulation does allow for sensitive information to be safeguarded.<sup>161</sup> Thus, as suggested by some commentators, the Navy "set out [information] in a classified annex to the EIS, rather than in the EIS itself."<sup>162</sup> This action fulfilled the requirements of NEPA because it showed that environmental concerns had been integrated into the decision making process and it was an "outward sign that environmental values and consequences [had] been considered during the planning stage of agency actions."<sup>163</sup>

#### B. *The Occurrence of In Camera Review*

While the *Hudson River* court would not conduct an *in camera* review of classified materials, the court in *Ground Zero*

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<sup>157</sup> *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at \*20-21.

<sup>158</sup> *Id.* at \*10.

<sup>159</sup> *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 635 F.3d 1109, 1116 (9th Cir. 2011); *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at \*37.

<sup>160</sup> Classified Actions, 32 C.F.R. § 775.5(a) (2016).

<sup>161</sup> *Id.*

<sup>162</sup> Mott, *supra* note 18, at 356.

<sup>163</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

successfully conducted *in camera* review of all the NEPA documents prepared by the Navy and was able to establish that the requirements of NEPA had been met.<sup>164</sup> *In camera* review is contingent upon the cooperation of the agency with the court. However, the Navy's own regulations state that the classified portions of an EIS serve the same purpose as the unclassified, and should be reviewed by the decision maker in the case.<sup>165</sup> Similarly, the CEQ regulations state:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government. . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.<sup>166</sup>

By providing the court with unredacted copies of the documents held back from public disclosure, the Navy gave the court an opportunity to judge whether it had fully complied with NEPA. Thus, the Navy was able to prove that it had complied with the CEQ regulations.

Although some may be correct that this practice “lack[s] the benefits of a normal adversarial trial,”<sup>167</sup> it provides at least one check against the potential for agencies to subvert the law. The Constitution, in establishing the judicial branch as a check on the legislative and executive branches, trusted judges to ensure that federal agencies comply with the law, which is possible through *in camera* review.<sup>168</sup>

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<sup>164</sup> *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at \*29-37.

<sup>165</sup> 32 C.F.R. § 775.5(a) (2016).

<sup>166</sup> 40 C.F.R. § 1502.1 (2016).

<sup>167</sup> Mendelsohn, *supra* note 16, at 697.

<sup>168</sup> U.S. CONST. art. III, § 2.

C. *Congressionally Created Courts are Unlikely and Unneeded*

A congressionally created court would provide many advantages, as outlined by Professor Dycus.<sup>169</sup> First and foremost, such a court would have the clearance to be briefed regarding the full extent of the agency's actions and ensure that they had considered the effects of those actions on the environment by completing an EIS. The court would also be well versed in handling the concerns of both NEPA and national security. Because of the court's high security clearance, it would have the ability to make an informed decision based on all the facts. However, in the current political climate, where Congress struggles to pass even the most fundamental legislation,<sup>170</sup> the creation of such a court is unlikely. Although similar courts have been created in the past,<sup>171</sup> no significant changes to NEPA have been made in over thirty years.<sup>172</sup> Lack of congressional action regarding NEPA not only foreshadows that significant new action is unlikely, but also that Congress is satisfied with the way courts are currently dealing with challenges to NEPA.

Furthermore, the outcome of *Ground Zero* showed that congressional action is not required to achieve the desired results. In that case, the Navy produced unredacted copies of the documents withheld for national security to the court, which was able to review them and make a decision based on all the facts.<sup>173</sup> When district court judges can fulfill this rule, with cooperation from the applicable

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<sup>169</sup> Dycus, *supra* note 16, at 310.

<sup>170</sup> See e.g., Tom Cohen, *U.S. government shuts down as Congress can't agree on spending bill*, CNN (Oct. 1, 2013, 12:43 AM), <http://www.cnn.com/2013/09/30/politics/shutdown-showdown> (explaining the inability of Congress to agree on a spending bill that would allow the government to remain open).

<sup>171</sup> Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1802-1805 (2016).

<sup>172</sup> See generally Buccino, *supra* note 154, at 50-51.

<sup>173</sup> *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at \*10 (W.D. Wash. Jan. 8, 2014).

agency, there is no need to add additional levels of bureaucracy and create more judicial bodies.

*D. The Balance of Powers*

While *Mothers for Peace* and *Ground Zero* provide useful examples of legal challenges that allowed both the goals of NEPA and the interests of national security to be satisfied, the possibility remains that agencies will refuse to submit classified documents prepared during the NEPA process for judicial review. If judicial review of agency decisions is to be successful, courts must balance security and disclosure while also allowing an agency to have adequate discretion to perform its duties.<sup>174</sup> Courts should not undermine an agency's expertise with the courts' own less experienced opinions; rather, the court should only determine whether the decision is supported by substantial evidence in the record.<sup>175</sup> Nevertheless, successful judicial review requires that courts have a full record to review, including potentially classified information.

The Court in *Catholic Action* failed to employ the required level of judicial review to make the NEPA process effective while still protecting national security concerns. The Court stated that if the Navy proposed to store nuclear weapons at the facility, it should prepare an internal EIS.<sup>176</sup> The Court would not require that the Navy release the EIS to the public, but would fulfill the Navy's NEPA obligation to consider the environmental impacts.<sup>177</sup> However, the Court did not require such an EIS to even be completed or reviewed by a court.<sup>178</sup> Rather, the Court determined that the Navy was free from the requirements of NEPA because it could not be established

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<sup>174</sup> See Bernard Schwartz, ADMINISTRATIVE LAW § 10.1, at 624–25 (3d ed. 1991).

<sup>175</sup> Scope of Review, 5 U.S.C. § 706(2)(E) (2016).

<sup>176</sup> *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

whether the Navy was storing nuclear weapons at the site.<sup>179</sup> The Court allowed the Navy an exception to the requirements of NEPA based on the Navy's own assertion that they could not acknowledge or deny the presence of nuclear weapons at the facility.<sup>180</sup> The Court further stated that the matter was beyond judicial review.<sup>181</sup> Conversely, thirty years later, the *Mothers for Peace* and *Ground Zero* courts each considered similar situations and found that their respective cases were not beyond judicial review, with the court in *Ground Zero* requiring the review of the full record *in camera* before ruling on the asserted NEPA violations.<sup>182</sup>

Thus, the fault of the *Catholic Action* Court was the failure to consider whether the agency had complied with the requirements of NEPA by requiring that a classified EIS be completed which considered the full extent of the agency's actions. In contrast, following the methodology of *Ground Zero*, future courts will be able to preserve the applicable balance of power while ensuring compliance with NEPA and protecting the interests of national security.

#### CONCLUSION

The security of the nation and protection of the natural resources within its borders are both important objectives, but one should not prevail at the expense of the other. The NSA's Utah data center, designed to support the Intelligence Community's efforts to monitor, strengthen, and protect the nation,<sup>183</sup> would ultimately be unsuccessful at achieving its stated purpose if the massive amounts of

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<sup>179</sup> *Id.* (emphasis added).

<sup>180</sup> *Id.* at 146-47.

<sup>181</sup> *Id.* at 146.

<sup>182</sup> *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752 (W.D. Wash. Jan. 8, 2014).

<sup>183</sup> Press Release, U.S. NAT'L SEC. ADMIN., Groundbreaking Ceremony Held for \$1.2 Billion Utah Data Center (Jan. 6, 2011), <https://www.nsa.gov/news-features/press-room/press-releases/2011/utah-groundbreaking-ceremony.shtml>.



water used to keep it running had a detrimental effect on the local environment.

Nevertheless, the anxiety that is caused by the idea that national security interests are undermining environmental protections is unnecessary. By performing a number of the functions suggested by the various authors cited above, without congressional action, the courts in *Mothers for Peace* and *Ground Zero* show that NEPA protections will not necessarily succumb to the interest of national security in the current judicial system. These courts prove that even post-9/11, the judicial branch has ensured that agencies conduct a full NEPA review to certify that they are accurately considering the implications of their actions. Finally, the court's rulings prove that there is no need to enact extensive procedural changes to NEPA because the judiciary can perform these suggested actions without direction from Congress. Therefore, the public should be assured that both "man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."<sup>184</sup>



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<sup>184</sup> 42 U.S.C. § 4331(a) (2016).



## COMMENT

### UNREGULATED AND UNDER THE RADAR: THE NATIONAL SECURITY CASE FOR FEDERAL REGULATION OF CERTAIN SMALL MARITIME VESSELS

**Richard Q. Sterns\***

*While other forms of terrorist attack have received far more media attention, the threat of an attack utilizing a small maritime vessel remains a credible threat to American national security. In addition, while other potential conveyances for terrorist attacks have received extensive review and increased regulation in the post 9/11 security environment, small vessels have remained largely unregulated at the federal level as states have continued their traditional role as the primary regulator of small vessels. Examples of small vessel attacks on U.S. interests abroad illustrate the acknowledged vulnerabilities of American maritime interests in ports both at home and abroad. Despite these vulnerabilities, the advancement of potential legal regimes to combat them has been slow to develop at the federal level. This comment argues that a federal regulatory regime for certain small vessels that takes into account the concerns of all stakeholders is necessary to combat this evolving national security threat.*

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## INTRODUCTION

On October 6, 2002, in the early morning hours, a small vessel charted course toward the MV *Limburg*, an oil tanker flying a French flag in the Gulf of Aden off the coast of Yemen.<sup>1</sup> As one sailor recounted, he saw the small vessel move towards the MV *Limburg* and then ram the ship, causing a massive explosion and fire while also spilling about 90,000 barrels of oil into the sea.<sup>2</sup> The event, later ruled a terrorist attack, killed one sailor and injured twelve.<sup>3</sup> Osama Bin Laden and Al-Qaeda eventually claimed responsibility for the attack, stating that the attack had “hit the umbilical cord and lifeline of the crusader community.”<sup>4</sup> The attack on the MV *Limburg* was all the more devastating because it was a reminder of how vulnerable American interests are to a small vessel attack. Just two years, pre the attacks of September 11, 2001 (“9/11”), the USS *Cole* was also attacked by Al-Qaeda operatives while refueling in the Gulf of Aden.<sup>5</sup> This shocking attack killed 17 American sailors and injured another 39.<sup>6</sup> Although these attacks occurred halfway around the world, the threat of a small vessel attack is not limited to American interests in the Middle East and other conflict regions. Rather, the examples of the USS *Cole* and MV *Limburg* illustrate why these small vessel attacks are such a threat to American interests everywhere: they can be completed with relatively little funding and they do not require sophisticated

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<sup>1</sup> Sebastian Rotella & Esther Schrader, *Tanker Blast Likely a Terror Attack*, *French Say*, L.A. TIMES (Oct. 11, 2002), <http://articles.latimes.com/2002/oct/11/world/fg-tanker11>.

<sup>2</sup> *Id.*

<sup>3</sup> *Al-Qaeda Fugitive Killed in Yemen*, BBC NEWS (Oct. 1, 2006, 12:50 PM), [http://news.bbc.co.uk/2/hi/middle\\_east/5396862.stm](http://news.bbc.co.uk/2/hi/middle_east/5396862.stm).

<sup>4</sup> Ewen MacAskill & Brian Whitaker, *Alleged Bin Laden letter revels in recent attacks*, THE GUARDIAN (Oct. 15, 2002, 3:56 AM), <https://www.theguardian.com/world/2002/oct/15/alqaida.terrorism>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

technology.<sup>7</sup> Given the obvious vulnerability, the threat of a small vessel attack in American waters and ports has been widely acknowledged by the American national security community, specifically the United States Coast Guard (“USCG”).<sup>8</sup>

The risk of a small vessel security incident is also far broader than simply the threat of a terrorist attack with a small vessel in American waters or ports. The threat of transnational criminal organizations trafficking in illicit contraband with small vessels is another great threat to American national security.<sup>9</sup> This threat is a daily one in American ports as small vessels are, for the most part, unregulated, and are not required to announce arrivals in advance, make initial landing at a designated port of entry, or continually broadcast their position via transponder.<sup>10</sup> This phenomenon creates a difficult enforcement environment for the USCG and other agencies charged with securing American maritime borders. Moreover, although the threat of transnational criminal organizations using small vessels to traffic in illicit contraband is acknowledged, most federal policy has focused on regulating the entrance of weapons and people into the country, not conveyances such as small vessels.<sup>11</sup>

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<sup>7</sup> Akiva Lorenz, *The Threat of Maritime Security to Israel*, INT’L INST. FOR COUNTER-TERRORISM (Sept. 24, 2007), <http://www.ict.org.il/Article.aspx?ID=983> (noting that Al-Qaeda needed only about 40,000 American dollars in funding to carry out the USS *Cole*).

<sup>8</sup> See U.S. COAST GUARD, *Western Hemisphere Strategy* (Sept. 2014) [hereinafter *USCG Western Hemisphere Strategy*]; U.S. DEP’T OF HOMELAND SEC., *Small Vessel Security Strategy* (Apr. 2008) [hereinafter *U.S. DHS Small Vessel Security Strategy*].

<sup>9</sup> See *Securing the Border: Understanding Threats and Strategies for the Maritime Border: Hearing before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong., 3-4 (2015) (statement of Randolph D. Alles, Assistant Comm’r, Office of Air & Marine, U.S. Customs & Border Prot., Dep’t of Homeland Sec.) (discussing the threat of small vessels being used by transnational criminal organizations to traffic illicit contraband) [hereinafter *Securing the Border*].

<sup>10</sup> *Id.*

<sup>11</sup> See generally U.S. CUSTOMS AND BORDER PROT., PROHIBITED AND RESTRICTED ITEMS (2015), <https://www.cbp.gov/travel/us-citizens/know-before-you-go/prohibited-and-restricted-items> (last visited Aug. 24, 2016). See generally U.S. DEP’T OF

However, a 2009 study conducted by the Customs-Trade Partnership Against Terrorism (“C-TPAT”) found that 34-percent of security breaches were due to a lack of conveyance security and inspection.<sup>12</sup> Further, given the sheer amount of vessels and people that must be inspected every year, the transnational criminal threat is constant. In 2014, the USCG screened 124,000 vessel Notices of Arrival (“NOA”) and 32.7 million crew and passenger records, illustrating the tremendous amount of opportunities available for transnational criminal organizations to traffic illicit goods into the United States.<sup>13</sup> Although progress has been made in the area of small vessel security since 9/11, there is still no federal statute requiring small recreational vessels that leave American territorial waters and their operators to meet any uniform standards or federal regulations.<sup>14</sup> Instead, small vessel licensing and regulation has been left almost exclusively to the states, which view vessel registration requirements as mainly a revenue generating enterprise, not a means of enhancing maritime security.<sup>15</sup>

This Comment argues that these growing national security threats from small vessels necessitate a federal statute. The statute would govern certain small vessels and preempt state regulations, which are insufficient given the increased risk of terrorist attack and the increased threat of illicit trafficking from transnational criminal

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HOMELAND SEC., CROSS U.S. BORDERS (2015), <http://www.dhs.gov/how-do-i/cross-us-borders> (last visited Aug. 24, 2016).

<sup>12</sup> U.S. CUSTOMS-TRADE P'SHIP AGAINST TERRORISM, 5 STEP RISK ASSESSMENT PROCESS GUIDE 7 (2010).

<sup>13</sup> *Prevention of and Response to the Arrival of a Dirty Bomb at a U.S. Port: Hearing before the H. Subcomm. on Coast Guard and Mar. Transp.*, 114th Cong. 3 (2015) (statement of Rear Admiral Peter. J. Brown, Assistant Commandant for Response Policy, U.S. Coast Guard).

<sup>14</sup> See U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at i.

<sup>15</sup> See generally *Registration Related Fees*, STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES (2016), [https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv\\_content\\_en/dmv/pubs/brochures/fast\\_facts/ffvr34](https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv_content_en/dmv/pubs/brochures/fast_facts/ffvr34) (illustrating that the State of California's Fee Structure for Vessel Registration lacks a security component) [hereinafter *Registration Related Fees*].

organizations. Part I of this Comment examines the acknowledged threat of terrorist attack from small vessels in American coastal waters and the policy that has been enacted in the wake of the terrorist attacks of 9/11. This section also explores the danger of transnational criminal organizations using small vessels to engage in illicit activities and the policy that has been enacted in this area. Part II provides an overview of the current USCG, Environmental Protection Agency (“EPA”), state, and local regulations surrounding small vessels. Part III discusses the federal preemption of state law in the maritime sphere, examine other areas of maritime law in which the federal government has preempted state regulation, and demonstrates why federal preemption in the area of small vessels is a valid exercise of federal power under the Constitution’s Admiralty Clause (Article III, Section 2). Part IV lays out this Comment’s solution: an enabling statute to increase regulation of small vessels at the federal level, which would give the USCG the power to promulgate regulations related to any small vessels traveling outside the territorial seas of the United States, or 12 nautical miles.

This Comment argues that the United States should use a version of Singapore’s current regime as a model for regulating small vessels that wish to travel outside U.S. territorial seas and mandate that: (1) operators of these small vessels must maintain an operator’s license similar to the Transportation Worker Identification Credential (“TWIC”) required for transportation workers; and (2) require these small vessels to be tagged with a Harbor Craft Transponder System (“HARTS”), which transmits each vessel’s position, course, and speed. In addition, this Comment argues that the enacting statute should require states with access points to waters beyond U.S. territorial seas to enter into new Memoranda of Agreement (“MOA”) involving all maritime law enforcement in order to provide clarity in the enforcement of these new regulations and to ensure information sharing between federal, state, and local maritime law enforcement. The ultimate goal is to articulate a legal regime that can respond to the

increased threat from small vessels while taking into account the concerns of all stakeholders.

I. BACKGROUND: THE SMALL VESSEL THREAT

As is evident from responses to the USS *Cole* and the MV *Limburg*, the threat of a small vessel attack has been acknowledged by the national security community in the United States.<sup>16</sup> In assessing this threat, the national security community has prescribed a variety of policies in an attempt to ensure the security of American ports and coastal waters.<sup>17</sup> Additionally, the use of small vessels by transnational criminal organizations to traffic in illicit contraband is also well recognized.<sup>18</sup> Thus, there has been a movement among policy makers to respond to the security threat of unregulated small vessels.

A. *The Recognized Threat of a Small Vessel Terrorist Attack*

Over 17 million small vessels operate in American waters.<sup>19</sup> Every one of them is a potential bomb that could be used to inflict harm on an American port, industrial vessel, or military ship.<sup>20</sup> Although, at the time of this Comment, estimates state that as many as 22 million small vessels are operating in American waters, the threat of a small vessel attack is predominately from vessels near border regions and high-value targets.<sup>21</sup> Therefore, although the characterization of small vessels as 17 million potential bombs may be

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<sup>16</sup> See USCG WESTERN HEMISPHERE STRATEGY, *supra* note 8; U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8.

<sup>17</sup> See *id.*

<sup>18</sup> See *Securing the Border*, *supra* note 9

<sup>19</sup> Ben Iannotta, *17 Million Potential Bombs*, C4ISR DIG. ED. (Apr. 7, 2008), <http://archive.defensenews.com/article/20080407/C4ISR01/804070305/17-million-potential-bombs>.

<sup>20</sup> *Id.*

<sup>21</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-32, MARITIME SECURITY: DHS COULD BENEFIT FROM TRACKING PROGRESS IN IMPLEMENTING THE *SMALL VESSEL SECURITY STRATEGY*, Highlights of GAO 14-32 (2013) [hereinafter GAO 14-32].



somewhat far-fetched, the threat of small vessel attacks and smuggling operations is a genuine one that has been acknowledged by the highest ranking national security officials in the United States.<sup>22</sup>

As former Department of Homeland Security (“DHS”) Secretary Michael Chertoff warned at the National Small Vessel Security Summit in 2007, “The enemy is not wasting time . . . This attack technique [using a small vessel] is one they have used before [and] it is one that they will likely use again.”<sup>23</sup> In 2008, USCG Admiral Thad Allen cautioned that small vessel security is an “asymmetric threat” and that small vessels exposed “inherent vulnerabilities” in our maritime security apparatus.<sup>24</sup> In July 2015, the chairman of the Senate Committee on Homeland Security and Governmental Affairs, Rob Johnson (R-WI), acknowledged the threat that small vessels pose on the Great Lakes in his home state because of their ability to “blend in with commercial trade and recreational boaters,” creating “a challenging enforcement environment.”<sup>25</sup> Even President Obama has acknowledged the threat, specifically in a declaration entered into with Canada in 2011 entitled *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*, which includes the goal of implementing the DHS *Small Vessel Security Implementation Plan*.<sup>26</sup> In addition to the general threat of a small vessel attack, the DHS *Small Vessel Security Strategy* recognizes two specific scenarios as the gravest small vessel threats: (1) domestic use of waterborne improvised explosive devices (“WBIED”); and (2) waterborne platforms for conducting a standoff attack (e.g., man-portable air

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<sup>22</sup> U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 31 (quoting DHS Secretary Michael Chertoff on the threat of a small vessel terrorist attack).

<sup>23</sup> *Id.*

<sup>24</sup> Admiral Thad Allen, *Friend or Foe? Tough to Tell*, PROCEEDINGS 15, 18 (2008).

<sup>25</sup> See *Securing the Border*, *supra* note 9 at 1.

<sup>26</sup> *Leveraging Law Enforcement Cooperation to Enhance Security Along America's Coasts: Hearing Before the H. Subcomm. on Border & Mar. Sec. 112th Cong.* 17-18 (2011) (statement of Rear Admiral Paul Zukunft, Assistant Commandant for Marine Safety, Sec., & Stewardship, U.S. Coast Guard).

defense system (“MANPADS”) attacks).<sup>27</sup> These are noteworthy both for the destruction they can cause and the fact that they have been carried out by terrorists internationally in the past.<sup>28</sup>

The loss of human life following a small vessel attack is an obvious and serious concern, but the hidden cost is the effect that a small vessel attack would have on our port system. Even if a major American port was shut down for only a few days following a small vessel attack, the economic costs could be in the billions.<sup>29</sup> A 2006 study cited in the DHS *Small Vessel Security Strategy* estimated that the economic impact of a 15-day closure at the Port of Los Angeles/Long Beach due to a radiological bomb would be approximately \$34 billion.<sup>30</sup> A more recent 2014 study on the national impact of a west coast port stoppage found that the reduced economic output for a stoppage of 5 days would be \$9.4 billion (.05% of GDP); a stoppage of 10 days would result in a .12% loss of GDP, or \$21.2 billion.<sup>31</sup> Despite other more high-profile security threats, the threat of a small vessel attack has been acknowledged at the highest levels of government because of its clear potential for human and economic loss. This concern is also warranted because a small vessel attack has

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<sup>27</sup> U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 11.

<sup>28</sup> *Id.* at 12, 14 (citing the USS *Cole* attack as an example of a WBIED attack and citing Somali pirate attack as an example of a MANPADS Attack).

<sup>29</sup> Brian Patrick Hill, *Maritime Terrorism and the Small Boat Threat to the United States: A Proposed Response* (Mar. 2009) (unpublished Master’s Thesis, Naval Postgraduate School) (on file with Naval Postgraduate School) (citing Alex Viega, *Los Angeles Ports Facing Strike Threat*, ASSOCIATED PRESS (July 16, 2007)) (noting that, in 2002, a Longshore Workers Union 10-day strike on the west coast cost the U.S. economy an average of \$1 billion dollars per day in losses).

<sup>30</sup> U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 11 (citing *The Economic Impact of a Terrorist Attack on the Twin Ports of Los-Angeles-Long Beach*, in THE ECONOMIC IMPACTS OF TERRORIST ATTACKS (2006)).

<sup>31</sup> *The National Impact of a West Coast Port Stoppage*, NAT’L ASS’N OF MFRS. & NAT’L RETAIL FED’N 5 (June 2014), <https://nrf.com/sites/default/files/Port%20Closure%20Full%20Report.pdf>.

several characteristics that make it appealing to terrorist organizations of all sizes and capabilities.

### 1. Low Startup Costs

The costs associated with a small vessel attack are relatively low, with the USS *Cole* attack costing Al-Qaeda only about \$40,000.<sup>32</sup> The security community has recognized that small boat attacks are preferred by terrorist organizations because of these low costs in comparison to more sophisticated means of maritime terrorism.<sup>33</sup> As maritime security scholars have illustrated, obtaining a vessel capable of carrying out a small vessel attack is simply not cost prohibitive to terrorist organizations.<sup>34</sup> For instance, in discussing the low startup costs associated with transnational criminal organizations obtaining vessels to illegally fish, Anastasia Telesetsky noted that an organization could obtain a 152-foot vessel with tons of storage capacity on the open market for a mere \$200,000.<sup>35</sup> Even more concerning, the size of the vessel in this example is much larger than the vessels that were used to carry out the USS *Cole* and MV *Limburg* attacks. A terrorist organization could use something as low-cost as a small fiberglass boat (as Al-Qaeda did in the USS *Cole* attacks).<sup>36</sup> The cost prohibitive aspects of other forms of terrorism do not apply to the small boat threat.

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<sup>32</sup> Akiva Lorenz, *The Threat of Maritime Security to Israel*, INT'L INST. FOR COUNTER-TERRORISM (Oct. 1, 2007), <http://www.ict.org.il/Article.aspx?ID=983>.

<sup>33</sup> Philip Guy, *Maritime Terrorism*, CTR. FOR SEC. STUDIES 5 (2011).

<sup>34</sup> Anastasia Telesetsky, *Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime*, 41 ECOLOGY L.Q. 939, 951-52 (2014) (discussing the ease with which transnational criminal organizations can obtain fishing vessels for IUU fishing).

<sup>35</sup> *Id.* at 939, 952.

<sup>36</sup> CINDY C. COMBS & MARTIN W. SLANN, ENCYCLOPEDIA OF TERRORISM 353 (2009) (discussing USS *Cole* attack).

## 2. Potential for Attacks by Unsophisticated Actors

Another central reason why small vessel attacks are a continuing threat is that they do not entail a great deal of organizational or operational sophistication. The example of Somali piracy off the coast of Africa illustrates this point.<sup>37</sup> As former Senator John D. Rockefeller (D-WV) stated in 2009 during a subcommittee hearing on the growing piracy issue, the situation was frustratingly akin to “men in speed boats” abusing “the most powerful and advanced Navy in the world.”<sup>38</sup> The frustration with the Somali piracy issue is well documented, and numerous solutions have been offered as practical steps that can be taken against the threat of a small boat attack on a commercial ship.<sup>39</sup>

Unfortunately, certain inherent characteristics of small vessel attacks make them more accessible to unsophisticated actors. One is that there is a very low barrier to entry in terms of the skills necessary to operate a small vessel.<sup>40</sup> While other types of attacks require a higher level of sophistication, such as the skills associated with the 9/11 hijackings, operating a small boat does not require extensive skills or experience, and few regulations limit unsophisticated actors from obtaining these skills.<sup>41</sup> A second characteristic is that a small vessel

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<sup>37</sup> *Piracy on the High Seas: Protecting Our Ships, Crews, and Passengers: Hearing before S. Subcomm. on Surface Trans. and Merch. Marine, Infrastructure, Safety, and Sec.*, 111th Cong. Appx. (2009) (prepared statement of Sen. John D. Rockefeller IV) (discussing the unsophisticated nature of Somali piracy).

<sup>38</sup> *Id.*

<sup>39</sup> See generally Theodore T. Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Against Piracy*, 39 PUB. CONT. L.J. 411 (2010) (discussing private security solution to Somali piracy); see also Martin N. Murphy, *Suppression of Piracy and Maritime Terrorism--A Suitable Role for a Navy?* NAVAL WAR C. REV. (2007) (discussing whether the suppression of piracy is best carried out by a Navy or other means).

<sup>40</sup> U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 5 (discussing the low barriers to entry in the small vessel community).

<sup>41</sup> *Id.*

attack requires very little planning and can be coordinated fairly quickly. The alleged mastermind behind the USS *Cole* and MV *Limburg* attacks, Abd al-Rahim al-Nashiri, was able to plan and execute the USS *Cole* attack a mere 10 months after the failed small vessel attack on the USS *The Sullivans*, illustrating the ease with which the materials and personnel necessary to carry out the attack could be acquired.<sup>42</sup> Although al-Nashiri was known as “the Prince of the Sea” for his maritime terrorism activities, it is up for debate whether he was truly a sophisticated operative, considering that one U.S. intelligence official charged with interrogating him called him “the dumbest terrorist I have ever met.”<sup>43</sup> These two characteristics demonstrate that the small boat threat presents a unique array of vulnerabilities due to its unsophisticated methods and the low skill barrier to entry.

*B. Transnational Organized Crime: Small Vessels and the Trafficking of Illicit Contraband*

Aside from the threat of a terrorist attack, unregulated small vessels also present an appealing avenue for transnational criminal organizations to traffic illicit contraband into the United States.<sup>44</sup> The DHS *Small Vessel Security Strategy* identifies two of the gravest threats from small vessels: (1) A conveyance for smuggling weapons (including Weapons of Mass Destruction (“WMDs”)) into the United States; and (2) A Conveyance for smuggling terrorists (or other illegal

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<sup>42</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9-11 COMMISSION REPORT: AL QAEDA AIMS AT THE AMERICAN HOMELAND (2004).

<sup>43</sup> Patrick Hill, *supra* note 29, at 28; See Ali H. Soufan, *Will a CIA Veteran's Book Save a Terrorist*, BLOOMBERG VIEW (May 8, 2012, 7:00 PM), <http://www.bloombergvew.com/articles/2012-05-08/will-a-cia-veteran-s-book-save-a-terrorist-> (noting CIA official Jose Rodriguez in his book endorsed a colleague's characterization of Al-Nashiri as “the dumbest terrorist I have ever met”).

<sup>44</sup> U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 12-13 (noting two of the gravest threats from a small vessel are the smuggling of people into the United States and the smuggling of illegal weapons or nuclear material into the United States).

maritime migrants) into the United States.<sup>45</sup> The documented links between terrorist organizations and transnational criminal organizations that have become evident in recent years make these two threats even more troubling.<sup>46</sup>

One example of these two threats converging is the danger that transnational criminal organizations may engage in human trafficking aboard small vessels. In 2010, the USCG detained 2,088 illegal migrants attempting to enter the United States by sea, and it is suspected that thousands still attempt to journey to the United States by sea every year.<sup>47</sup> Many of these migrants also pay thousands of dollars to illegal smugglers in an attempt to make this journey; exacerbating the human costs of this phenomenon.<sup>48</sup> In addition to the threats from terrorism previously noted, this example illustrates the threat that small vessels being used by transnational criminal organizations pose to the security of the United States. After examining the current federal policy with regards to small vessels, it seems clear that the current regime comes up short in countering the threats of a terrorist attack and transnational organized crime.

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<sup>45</sup> *Id.*

<sup>46</sup> See Tamara Makarenko, *The Crime-Terror Continuum: Tracing the Interplay between Transnational Organized Crime and Terrorism*, 6 GLOBAL CRIME 1, 129-45 (2004) (arguing that the 1990's can be seen as the decade where crime-terror nexus was consolidated); see also Louise I. Shelley & John T. Picarelli, *Methods and Motives: Exploring Links Between Transnational Organized Crime and International Terrorism*, 9 TRENDS IN ORGANIZED CRIME 2, 52-67 (2005) (arguing that the methods not motives approach to analyzing the relationship between terrorism and transnational organized crime has become restrictive in the 21st century).

<sup>47</sup> Ray Walser, Jena Baker McNeil, & Jessica Zuckerman, *The Human Tragedy of Illegal Immigration: Greater Efforts Needed to Combat Smuggling and Violence*, THE HERITAGE FOUND. (June 22, 2011), <http://www.heritage.org/research/reports/2011/06/the-human-tragedy-of-illegal-immigration-greater-efforts-needed-to-combat-smuggling-and-violence>.

<sup>48</sup> *Id.*

C. *Current Federal Policy on Preventing Terrorist Attacks and Transnational Crime by Small Vessels*

Regulation surrounding the small vessel community spans across 18 federal agencies and is a difficult area in which to articulate a coherent federal policy.<sup>49</sup> However, in 2008, DHS published the *Small Vessel Security Strategy*, a comprehensive small vessel security plan for the country. When publishing this plan, DHS envisioned “a coordinated effort of Federal, state, local, and tribal authorities, together with international partners, private industry, and recreational users of the waterways” to improve maritime security and safety.<sup>50</sup>

In addition to identifying potential threats and laying out a strategic vision, the strategy also identified four major goals: (1) developing and leveraging a strong partnership with the small vessel community, and public and private sectors, in order to enhance maritime domain awareness; (2) enhancing maritime security and safety; (3) leveraging technology to enhance the ability to detect, determine intent, and when necessary, interdict small vessels based on a coherent plan with a layered, innovative approach; and (4) enhancing coordination, cooperation, and communications between federal, state, local, tribal partners, and the private sector as well as international partners.<sup>51</sup> In essence, DHS sought to enhance security as much as it could within the current federal regulatory framework for small vessels. Although these are all worthy goals, as with many strategies and policies without a specific authorizing statute,

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<sup>49</sup> U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 5.

<sup>50</sup> *Id.* at i.

<sup>51</sup> *Id.* at 16-21.

implementation has lagged<sup>52</sup> It took until 2011 for the USCG to release the *Small Vessel Security Implementation Plan*.<sup>53</sup>

In addition to the general theme of state and local cooperation in the *Small Vessel Security Strategy*, DHS and the USCG lay out some substantive implementation measures in the *Small Vessel Security Implementation Plan*. The most significant regulation mandated automatic identification system (“AIS”) carriage on commercial vessels 65 feet and longer, tugs of 26 feet and longer with over 600 horsepower, and certain passenger carrying vessels.<sup>54</sup> The USCG did finally issue a final regulation on AIS carriage pertaining only to commercial vessels in January 2015 and included small vessels, under 300 gross tons, which “come from a foreign port or place.”<sup>55</sup> However, this regulation does not apply to noncommercial small vessels, any commercial vessels under 300 gross tons, or any commercial vessels permanently in the United States.<sup>56</sup> As this overview demonstrates, steps have been taken in line with the 2008 *Small Vessel Security Strategy* to improve small vessel security. However, as the following part of this Comment illustrates, much of the regulation concerning small vessels still falls to the states.

## II. THE CURRENT REGULATORY REGIME CONCERNING SMALL VESSELS

Before implementing a new federal regulatory regime, it is important to identify what regulations currently exist and why they

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<sup>52</sup> GAO 14-32, *supra* note 21 (stating that DHS should begin to track progress in implementing the small vessel security strategy).

<sup>53</sup> See U.S. DEP’T OF HOMELAND SEC., SMALL VESSEL SECURITY IMPLEMENTATION PLAN REPORT TO THE PUBLIC (2011) [hereinafter SMALL VESSEL SECURITY IMPLEMENTATION PLAN]

<sup>54</sup> *Id.* at 6.

<sup>55</sup> Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System, 80 Fed. Reg. 5,283 (Jan. 30, 2015) (to be codified at 46 C.F.R. pts. 4, 148, 33 C.F.R. pts. 62, 66, 101, 110, 117, 118, 151, 160, 161, 164, 165).

<sup>56</sup> *Id.*



fail to meet security needs. This portion of the Comment provides an overview of current state regulations on small vessels and their jurisdiction, the USGC's current minimal regulations on small vessels, and the EPA's movement to regulate small vessels in recent years.

*A. Review of Current State Regulations on Small Vessels and their Jurisdiction*

This section reviews small vessel regulations for four jurisdictions: California, Texas, Florida, and New York. These states are chosen for their high boating populations and because they are highly populated coastal areas that could be appealing targets for terrorist groups and for transnational criminal organizations.

In California, all vessels over eight feet in length and every motor vessel that is not documented by the USCG and is used principally in California must be registered in the state.<sup>57</sup> There are several exemptions to registration: (1) vessels registered in another state and not principally used in California; (2) non-motorized surf boards; and (3) vessels propelled solely by paddles or oars.<sup>58</sup> Floating structures designed to be used as stationary waterborne dwellings (houseboats) are also exempt, provided they have a permanent and continuous hookup to a shoreside sewage system.<sup>59</sup> At first glance, this appears to be a fairly comprehensive regulatory regime, since every motorized vessel in the state must be registered. However, the fact that vessels registered in another state and not principally used in California are exempt is problematic, given that the California Department of Motor Vehicles would be expected to determine whether a vessel is principally used in California. One way to identify

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<sup>57</sup> *Vessel Boat Registration and Information*, STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, [https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv\\_content\\_en/dmv/boatsinfo/boatreg](https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv_content_en/dmv/boatsinfo/boatreg) (last visited Aug. 30, 2016) [hereinafter *Vessel Boat Registration and Information*].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

out-of-state vessels is through the International Justice and Public Safety Network (“NLETS”), a nonprofit organization owned by states that facilitates information sharing between law enforcement and offers a “Coast Guard Vessel Transaction” to assist maritime law enforcement in identifying out-of-state vessels.<sup>60</sup> However, states must have an MOA with the USCG and the requesting state in order to obtain state vessel data through this transaction; as of 2010, only 25 states and 6 territories had such an arrangement.<sup>61</sup> More importantly, the California regulations do not include Global Positioning System (“GPS”) tagging, AIS, or boating license requirements, with the exception of rules against minors operating some types of motorized vessels.<sup>62</sup> The absence of GPS Tagging and boating license requirements means that almost anyone can operate a boat and also ensures that most vessel remain under the radar of maritime law enforcement.

In Texas, all motorized boats, sailboats over 14 feet, and sailboats with an auxiliary engine must be registered.<sup>63</sup> However, as in California, there are no GPS tagging, AIS, or boating license requirements and until September 2016 (when certain federal regulations were implemented) one could register a vessel in Texas without even presenting a driver’s license.<sup>64</sup>

In Florida, all motorized vessels, and all non-motorized vessels over 16 feet in length must also be registered.<sup>65</sup> Florida also

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<sup>60</sup> Chelsea S. Keefer, *Coast Guard Vessel Transaction*, PSC ONLINE (Apr. 30, 2010), [http://psc.apcointl.org/2010/04/30/nlets\\_coast\\_guard\\_vessel\\_transaction](http://psc.apcointl.org/2010/04/30/nlets_coast_guard_vessel_transaction).

<sup>61</sup> *Id.*

<sup>62</sup> *Vessel Boat Registration and Information*, *supra* note 57.

<sup>63</sup> TEX. PARKS AND WILD. CODE ANN. § 31.045 (West 2015) [hereinafter TEX. § 31.045]; 33 C.F.R. § 174 (2016) mandates that a valid driver’s license be presented for boat registration by individuals.

<sup>64</sup> *Id.*

<sup>65</sup> *Vessel Registration & Titles*, FLORIDA DEP’T OF HIGHWAY SAFETY AND MOTOR VEHICLES (2015), <https://www.flhsmv.gov/safety-center/consumer-awareness/vessel-registration-titles>.

exempts out-of-state owners from registering, provided they are registered in another state and the owner plans to return within a reasonable amount of time, which is not defined in the statute.<sup>66</sup> As noted in the above discussion of California's regulations, there are currently ways in which maritime law enforcement in Florida could potentially identify an out-of-state vessel.<sup>67</sup> One way for law enforcement to identify out-of-state vessels is the USCG's Maritime Information Exchange platform, which provides USCG maritime information publicly on the internet through searchable databases.<sup>68</sup> However, participation by states is voluntary; thus, not every small vessel is included in these databases currently.<sup>69</sup> As in Texas and California, there are no provisions for GPS tagging, AIS, or boating license requirements in Florida.<sup>70</sup>

Finally, in New York, all vessels must be registered, with the exception of kayaks and non-motorized canoes.<sup>71</sup> Exemptions include lifeboats, any vessel registered in another state and not kept in New York, commercial vessels registered in foreign countries, and American vessels registered with the USCG.<sup>72</sup> New York does have a licensing requirement for motorboat operators under the age of 18, but again, there are no provisions for GPS tracking, AIS, or general boating license requirements.<sup>73</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> See Keefer, *supra* note 60.

<sup>68</sup> *Maritime Information Exchange*, U.S. COAST GUARD (2015), (last visited Aug. 30, 2016) <https://cgmix.uscg.mil/Default.aspx>.

<sup>69</sup> See U.S. DHS, *PRIVACY IMPACT ASSESSMENT FOR THE COAST GUARD MARITIME EXCHANGE 2* (2015).

<sup>70</sup> See *Vessel Registration & Titles*, FLORIDA DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES (2015), <https://www.flhsmv.gov/safety-center/consumer-awareness/vessel-registration-titles/>.

<sup>71</sup> *Register a Boat*, NEW YORK DEP'T OF MOTOR VEHICLES (2015), <http://dmv.ny.gov/registration/register-boat> [hereinafter *Register a Boat*].

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

As shown through these examples, states regulate small vessels in a very limited way, and the limited regulations in place exist for purposes other than enhancing security.<sup>74</sup> In addition, all the states listed have a registration exemption for small vessels registered in another state, making tracking small vessels problematic even when the state has an MOA with the USCG.<sup>75</sup> As the DHS *Small Vessel Security Strategy* notes, states ought to take responsibility in facilitating small vessel regulations for certain vessels “under certain threat conditions.”<sup>76</sup> However, the registration fees for these small vessels, ranging from 26 to 93 dollars in New York, become a fairly significant source of revenue for state governments when multiplied by thousands and thus create a disincentive for states to take action that might decrease that revenue.<sup>77</sup>

*B. The United States Coast Guard’s Current Regulation of Small Vessels*

Although largely absent from the regulation of small recreational vessels, the USCG does regulate certain small passenger and commercial vessels. Title 46 of the Code of Federal Regulations regulates various types of vessels based on size and use in the form of registration, inspection, and certification requirements.<sup>78</sup> At the most rudimentary level, all motorized small vessels under 300 gross tons are not required to register with the USCG.<sup>79</sup> Moreover, all non-self-propelled vessels under 100 gross tons, all sail vessels under 700 gross

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<sup>74</sup> See *Registration Related Fees*, *supra* note 15; *Register a Boat*, *supra* note 70.

<sup>75</sup> See generally *Vessel Boat Registration and Information*, *supra* note 57; TEX. § 31.045, *supra* note 63; *Register a Boat*, *supra* note 70.

<sup>76</sup> U.S. DHS SMALL VESSEL SECURITY STRATEGY, *supra* note 8, at 25.

<sup>77</sup> See *Register a Boat*, *supra* note 70.

<sup>78</sup> Vessel Inspections, 46 C.F.R. § 2.01-7 (2014).

<sup>79</sup> *Id.*

tons, and all steam vessels under 65 feet are also exempt from USCG regulation.<sup>80</sup>

However, there are several ways in which a small vessel may be subject to USCG regulations. All vessels, regardless of method of propulsion, carrying combustible or flammable liquid cargo in bulk are subject to inspection and must be certified by the USCG, as are all manned barges and all vessels carrying dangerous cargos as defined by 46 C.F.R. § 98.<sup>81</sup> For passenger vessels, all motorized vessels that carry more than 12 passengers on an international voyage, all motorized vessels over 100 gross tons that carry more than 12 passengers for hire, all submersible motorized vessels that carry at least 1 passenger for hire, and all motorized vessels under 100 gross tons that carry more than 6 passengers for hire are required to be certified and are subject to inspection.<sup>82</sup> The key exception here is that all recreational vessels not engaged in trade, and all fishing vessels not engaged in ocean or coastwise service, are exempt from these registration, inspection, and certification requirements.<sup>83</sup> For sailing passenger vessels, all vessels under 700 gross tons carrying any passengers for hire are subject to inspection and certification requirements, while sailing passenger vessels over 700 gross tons are subject to the same requirements and exceptions as motorized vessels.<sup>84</sup> Steam vessels under 65 feet carrying passengers are also subject to the same requirements and exceptions as motorized vessels.<sup>85</sup> All ferries, regardless of propulsion method, are subject to certification and inspection requirements if they carry at

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<sup>80</sup> *Id.*

<sup>81</sup> Vessel Inspections, 46 C.F.R. § 2.01-7.; Special Construction, Arrangement, and Other Provisions for Certain Dangerous Cargoes in Bulk, 46 C.F.R. § 98 (2014) (including various items such as combustible liquids, chemical cargos, and corrosive toxic liquids among others).

<sup>82</sup> 46 C.F.R. § 2.01-7.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

least one passenger for hire.<sup>86</sup> The most important takeaway from an analysis of these regulations for purposes of small vessel security is that all recreational vessels not engaged in trade, and all fishing vessels not engaged in ocean or coastwise service, are categorically exempt from all of these regulations, regardless of propulsion method.<sup>87</sup>

All vessels not subject to the certification and inspection requirements of 46 C.F.R. § 2.01-2.07 are considered uninspected vessels and are thus subject to the requirements of Subchapter C of Title 46, with the notable exception of vessels operating exclusively in inland waters, which are not navigable waters of the United States.<sup>88</sup> However, the requirements for uninspected vessels laid out in 46 U.S.C. § 25 are not licensing or registration requirements.<sup>89</sup> These regulations only require that vessels meet certain requirements related to navigation lights, life preservers, fire extinguishing equipment, and other systems aboard vessels.<sup>90</sup>

Section 25 does include provisions mandating that certain commercial fishing and passenger vessels not covered by 46 C.F.R. § 2.01-2.07 have Emergency Positioning Indicating Radio Beacons (“EPIRB”).<sup>91</sup> These devices can track a ship if it is distressed and can be manually engaged in an emergency situation or automatically engaged if they touch water.<sup>92</sup> However, these devices are not as useful

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Vessels Subject to the Requirement of This Subchapter, 46 C.F.R. § 24.05-1 (2014).

<sup>89</sup> 46 CFR §§ 25.01-25.50 (2015).

<sup>90</sup> *See id.*

<sup>91</sup> Emergency Position Indicating Radio Beacons (EPIRB), 46 CFR § 25.26-5 to -10 (2015).

<sup>92</sup> NOAA – SEARCH AND RESCUE SATELLITE AIDED TRACKING, *Emergency Position Indicating Radio Beacon (EPIRB)*, <http://www.sarsat.noaa.gov/emercns.html> (last visited Aug. 30, 2016).

from a national security perspective because they do not track a vessel's position until an emergency situation has occurred.<sup>93</sup>

This discussion of USCG regulations illustrates the many exemptions that allow small vessels to avoid any licensing, registration, or inspection requirements outside of those in Section 25, which still has various exemptions. With the exception of the recently promulgated AIS requirement for small vessels under 300 gross tons from foreign ports discussed in Part I of this Comment, nearly all small vessels remain unregulated.

*C. The Environmental Protection Agency's Foray into the Regulation of Small Vessels*

Although small vessels have generally been regulated by individual states, the EPA's recent decision illustrates that there is precedent for such regulation, and also demonstrates the difficulties that arise when attempting to regulate small vessels.<sup>94</sup> The EPA's regulations focus on the discharge of ballast water by vessels under 79 feet.<sup>95</sup> Their first attempt to regulate small vessels in 2005, which actually excluded normal discharges incidental to operation of a vessel from the National Pollutant Discharge Elimination System ("NPDES"), was held to exceed the agency's authority under the Clean Water Act ("CWA").<sup>96</sup> The district court found that the CWA did not give the EPA authority to exempt certain discharges from regulation while regulating others.<sup>97</sup> This decision was upheld by the Ninth Circuit in 2008.<sup>98</sup> In response, the EPA developed two different

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<sup>93</sup> See *id.*

<sup>94</sup> See *Vessels Program History National Pollutant Discharge Elimination System (NPDES)*, U.S. EPA, <https://www.epa.gov/npdes/vessels-program-history> (last visited Sept. 3, 2016) [hereinafter *Vessels Program History*].

<sup>95</sup> *Id.*

<sup>96</sup> *Northwest Env'tl. Advocates v. EPA*, 2006 WL 2669042, 5-6 (N.D. Cal. 2006).

<sup>97</sup> *Id.* at 15.

<sup>98</sup> *Northwest Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1022 (9th Cir. 2008).

proposed permits to regulate discharges from vessels that did not exempt normal discharges incidental to operation of a vessel, in line with the Ninth Circuit's holding.<sup>99</sup> One of these was the Recreational Vessel General Permit, which would have applied to recreational vessels, but to which the recreational boating lobby was vehemently opposed.<sup>100</sup> However, Congress responded by passing the Clean Boating Act of 2008, which stated that recreational vessels would not be subject to the requirement of obtaining the NPDES to authorize discharges incidental to their normal operation, and directed the EPA to evaluate recreational vessel discharges and develop appropriate management practices for appropriate discharges.<sup>101</sup>

One of the central reasons for the inclusion of this exemption was pressure from the recreational boating lobby. Several industry groups, including the National Marine Manufacturers Association, pushed for this exemption because they believed the EPA's previous promulgation of regulations under the NPDES had "left a cloud hanging over the industry."<sup>102</sup> Further illustrating the recreational boating lobby's influence, in 2010, Congress imposed a moratorium on the EPA, or the states requiring NPDES, permitting for discharges incidental to operation of non-recreational, commercial fishing vessels, and commercial vessels less than 79 feet.<sup>103</sup> However, vessels under 79 feet with ballast water discharges were not exempt from NPDES permitting.<sup>104</sup> The moratorium on requiring NPDES permitting for discharges incidental to the operation of all vessels less

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<sup>99</sup> *Vessels Program History*, *supra* note 93.

<sup>100</sup> *Id.*; *Trade Groups Lobby Support for Clean Boating Act of 2008*, PONTON AND DOCK BOAT MAGAZINE (Mar. 25, 2008), <http://www.pdbmagazine.com/2008/03/trade-groups-lobby-support-for> [hereinafter *Trade Groups Lobby Support for Clean Boating Act*].

<sup>101</sup> Clean Boating Act of 2008, 33 U.S.C. § 1251 (2008)

<sup>102</sup> *Trade Groups Lobby Support for Clean Boating Act*, *supra* note 99.

<sup>103</sup> See Pub. L. No. 110-299 (2010) (codified as 33 U.S.C. 1342).

<sup>104</sup> Pub. L. No. 110-299, 122 Stat. 2995 (2008) (codified as amended at 33 U.S.C. 1342 note).



than 79 feet that do not have ballast water discharges has been extended twice, and is now in place until December 2017.<sup>105</sup> However, the EPA estimates that 61,000 domestically flagged commercial vessels are still subject to the NPDES permitting requirements, including thousands of small vessels under 300 gross tons.<sup>106</sup>

As the EPA's foray into the regulation of small vessels illustrates, regulating small vessels is no easy task. Small recreational vessels in particular are difficult to regulate because of the recreational boating lobby's efforts to fight regulation, fueled by fears that regulation will chill recreational boating in the United States.<sup>107</sup> However, this overview demonstrates that the EPA, despite an extended moratorium on the regulation of certain small vessels, has been able to regulate certain discharges of small vessels under 300 gross tons and under 79 feet.<sup>108</sup> Moreover, given that this Comment's proposed solution would only apply to operators and vessels wishing to travel outside the territorial sea (12 nautical miles), it would affect a smaller number of vessels than the EPA's regulations and would withstand pressure from the recreational boating lobby.<sup>109</sup> The EPA's regulatory actions also show that the federal government does have the authority to regulate small vessels with a well-crafted enacting statute from Congress. Finally, Congress may be more inclined to give the USCG power to regulate small vessels, rather than the EPA. One provision of the Clean Boating Act of 2008 directs the EPA to conduct

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<sup>105</sup> Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213 § 703, 126 Stat. 1540, 1580 (2012) (extending moratorium until Dec. 2014); Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281 § 602, 128 Stat. 3022, 3061 (2014) (extending moratorium until Dec. 2017).

<sup>106</sup> *Vessels Program History*, *supra* note 93.

<sup>107</sup> *Trade Groups Lobby Support for Clean Boating Act*, *supra* note 99 (noting that the cost of proposed EPA permitting could be as high as 2,000 dollars per boat per state).

<sup>108</sup> *Vessels Program History*, *supra* note 93.

<sup>109</sup> *Maritime Zones and Boundaries*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. OFFICE OF GEN. COUNSEL, [http://www.gc.noaa.gov/gcil\\_maritime.html](http://www.gc.noaa.gov/gcil_maritime.html) (last visited Aug. 26, 2015) (noting that the territorial sea of the United States has been twelve miles since 1988).

a study on vessel discharges, but then would have the USCG promulgate regulations requiring recreational boater compliance with the study's recommended practices.<sup>110</sup> This legislative history suggests that Congress is more comfortable giving the USCG regulatory authority over small vessels given its maritime expertise as opposed to the EPA, an agency that is often portrayed as an overzealous regulator. However, regardless of what agency is issuing regulations pertaining to small vessels, the relationship between federal and state law continues to play a vital role.

### III. FEDERAL PREEMPTION OF STATE LAW IN THE MARITIME ARENA

In assessing whether the USCG can regulate small vessels in a more substantial way, it is important to look to other ways federal regulation has preempted state regulation in the maritime sphere. Substantial case law supports the position that the USCG may, with congressional authority, preempt state regulations of vessels, as the courts have given substantial deference to Congress in this area. This section gives a historical overview of federal regulation in the maritime arena and reviews several areas in which federal regulations have preempted state law, including regulations concerning oil tankers, recreational vessels, and regulation enacted based on a state's police power. This section also responds to potential critiques of increased federal regulation, including state sovereignty and privacy concerns.

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<sup>110</sup> *Clean Boating Act (CBA): About*, US ENVTL. PROT. AGENCY: *About*, <https://www.epa.gov/vessels-marinas-and-ports/clean-boating-act-cba-about> (last updated Oct. 22, 2015).

A. *Historical Overview of Federal Regulation in the Maritime Arena*

Courts have a long history of recognizing federal supremacy in the maritime arena.<sup>111</sup> In the seminal case of *Gibbons v. Ogden*, the Supreme Court struck down a New York law granting an exclusive license to one operator to navigate steamboats on state waters, holding that the federal license preempted the state's regulation under the Commerce Clause.<sup>112</sup> The Court again invalidated a state statute regulating maritime activity in *Sinnot v. Davenport*, where the Court held that the federal license granted to the vessel contained the only restraints that Congress had seen fit to impose on vessels engaged in the coastal fishing trade, and that the state could not add or detract from federal regulations on vessels.<sup>113</sup> These cases illustrate that the Supreme Court recognized the federal government's supremacy in the maritime arena early in the development of American maritime law, particularly as it related to state laws that directly conflicted with congressional action.

Furthermore, the Court has held that in the absence of federal regulation, states may exercise a localized police power in the maritime sphere. In *Cooley v. Board of Warrens*, the Court upheld a Pennsylvania state law that required ships with a federal license to employ a local pilot for navigation in the Port of Philadelphia because it was not in conflict with the law of Congress and did not interfere with any system of federal regulation.<sup>114</sup> Additionally, the Court upheld the constitutionality of the State of Washington's regulation of tugboats in *Kelly v. Washington* because tugboats under 65 feet in length were not regulated by the USCG; thus, the Court determined

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<sup>111</sup> For a comprehensive overview of USCG regulations and federal preemption, see generally David E. O'Connell & Frederick J. Kenney Jr., *United States Coast Guard Vessel Regulations and Federal Preemption*, 88 TUL. L. REV. 677 (2014).

<sup>112</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>113</sup> *Sinnot v. Davenport*, 63 U.S. 227, 241-44 (1859).

<sup>114</sup> *Cooley v. Bd. of Warrens*, 53 U.S. 299, 321 (1851).

that Congress had not intended to occupy the entire field of regulation.<sup>115</sup>

In assessing the Supreme Court's view of congressional power in the maritime arena, it is evident from these cases that federal regulation will preempt state regulation in cases where Congress intends to occupy the entire regulatory field. Thus, the relevant inquiry when assessing a federal maritime statute is whether Congress has intended to occupy the entire field, or whether it has left room for the states to regulate "outside that limited field."<sup>116</sup> In essence, the Court in *Kelly* endorsed a regime of concurrent powers, unless federal regulation and state regulation came into direct conflict to the point that they could not be reconciled.<sup>117</sup> The point at which a conflict between state and federal regulation becomes direct has been assessed by the Court in several areas of vessel regulation.

*B. Regulations Related to Oil Tankers and Oil Spills*

The case for federal preemption of state regulations has only grown stronger in more modern cases, particularly those concerning the regulation of oil tankers and oil spills. In *Ray v. Atlantic Richfield Co.*, the Court held that the state of Washington's attempts to regulate the design, size, and movement of oil tankers in Puget Sound was preempted by the Ports and Waterways Safety Act of 1978 ("PWSA") because state regulation "would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers."<sup>118</sup> The Court expanded this regime as it relates to oil tankers in *United States v. Locke*, holding that the state of Washington's regulations concerning tanker design, equipment, and operating requirements were again preempted by the PWSA because, in cases where state laws concern national and

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<sup>115</sup> *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978).

international maritime commerce, “there is no beginning assumption that concurrent regulation by the state is a valid exercise of its police powers.”<sup>119</sup> The Court further applied the field preemption doctrine to the Washington statute because the PWSA clearly stated that Congress had left no room for state regulation in matters related to the design of oil tankers.<sup>120</sup> The oil tanker cases demonstrate that the Court is inclined to allow federal preemption in the maritime sphere under the doctrine of field preemption when the statute in question demands uniformity.<sup>121</sup> In enacting a statute to regulate small vessels for the purposes of national security, Congress would need to ensure that the statute demands uniformity in order for it be upheld. However, the oil tanker cases clearly demonstrate how expansive the doctrine of federal preemption is in the maritime arena when Congress intends to occupy the entire field of regulation.<sup>122</sup>

### *C. Regulations Related to Recreational Vessels*

One key provision of the Small Vessel Security Act (“SVSA”) this Comment proposes is the regulation of recreational vessels and their operators, an area where the federal government has traditionally left regulation to the states. However, the Federal Boat Safety Act of 1971 (“FBSA”) illustrates one instance where the federal government has regulated small recreational vessels, as the act expressly preempts state law unless the USCG gives states permission to regulate.<sup>123</sup> In contrast to the PWSA, the USCG is under no obligation under the FBSA to issue regulations pertaining to recreational vessels.<sup>124</sup> Regardless of this difference in statutory construction, any regulations issued by the USCG under the FBSA would almost certainly “be field

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<sup>119</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000).

<sup>120</sup> *Id.* at 111 (citing *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982) (explaining field preemption)).

<sup>121</sup> *Id.* at 110 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978)).

<sup>122</sup> *Id.*

<sup>123</sup> 46 U.S.C. § 4306 (1983).

<sup>124</sup> *See* 46 U.S.C. § 4302 (2016).

preemptive of any identical state regulation.” because of the explicit preemption clause contained in the statute<sup>125</sup>

The seminal case in this area, *Sprietsma v. Mercury Marine*, concerned whether the USCG’s decision not to promulgate regulations requiring propeller guards on recreational boats prohibited state tort claims from a plaintiff who had been killed by a vessel’s propeller.<sup>126</sup> The Supreme Court examined three distinct theories that could have supported the preemption defense: (1) the FBSA expressly preempts common law claims; (2) the USCG’s decision not to regulate propeller guards preempts the claims; and (3) the potential conflict between diverse state rules and the federal interest in a uniform system of regulation impliedly preempts such claims.<sup>127</sup> The Court found that the FBSA plainly did not expressly preempt state common law claims because the statutory language applied only to a state/local regulation, which the Court naturally read not to include common law claims as it would have been superfluous for Congress to include the word “regulation” had it intended the FBSA to preempt state common law claims.<sup>128</sup>

In addition, the FBSA contains a clause stating that compliance does not relieve a person from liability at common law or under state law.<sup>129</sup> In assessing whether the USCG’s decision not to promulgate propeller guard regulations constituted implied preemption, the Court held that the USCG would have had to issue an “authoritative” message against the regulation of propeller guards in order for implied preemption to occur.<sup>130</sup> Finally, in addressing whether the statute as a whole implicitly preempted state common law claims, the Court held that the Act’s lack of a requirement for the

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<sup>125</sup> O’Connell et. al., *supra* note 111, at 706.

<sup>126</sup> *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 (2002).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 63.

<sup>129</sup> 46 U.S.C. § 4311(g) (2015).

<sup>130</sup> *Sprietsma*, 537 U.S. at 67.

USCG to promulgate regulations pertaining to all aspects of recreational boating meant the act did not preempt state common claims, since the FBSA specially reserves such claims (unlike the PWSA in the Oil Tanker Cases, which was silent on the issue).<sup>131</sup> The analysis of this case is important in enacting a small vessel security statute because it illustrates that Congress must explicitly occupy the regulatory field in order for field preemption to take effect without needing to resort to implied or implicit preemption, which is far more likely to fail before the Court. Therefore, any version of the Small Vessel Security Act must require that the USCG promulgate regulations related to certain aspects of vessels and their operations, not simply give the USCG the option of doing so, as in the FBSA.

*D. Regulations Preempting State Regulation Based on a State's Police Power*

Another issue that could arise after enacting the SVSA might come in the form of a state attempting to subvert the Act by exercising its police power to regulate preempted categories, claiming the regulation is aimed at another purpose. In *Huron Portland Cement Co. v. City of Detroit*, a shipping company appealed a criminal fine, arguing that Detroit's smoke abatement ordinance was preempted because the vessel was engaged in interstate commerce and only subject to federal regulations regarding its smoke emissions.<sup>132</sup> The Court held that there was no overlap between Detroit's ordinance and the federal statute because Congress did not intend to supersede the state's police power in areas not covered by the federal legislation; the Court found that regulating air pollution was not covered by Congress in the statute in question.<sup>133</sup> Further, the Court held that the federal licensing scheme did not immunize the vessel from a local ordinance because the ordinance did not constitute a direct regulation

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<sup>131</sup> *Id.* at 69.

<sup>132</sup> *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 441-42 (1960).

<sup>133</sup> *Id.* at 445-46.

of commerce, citing *Cooley* and *Kelly*.<sup>134</sup> Again, this example demonstrates that any action to regulate small vessels must explicitly occupy the entire regulatory field and not leave open the opportunity for states to circumvent federal regulation by arguing that the regulation is aimed at another purpose. Although commentators have argued that a *Huron* analysis would be unlikely in today's regulatory environment, it would be unwise to rely on the Courts holding in this way.<sup>135</sup>

Another issue that could arise in relation to the enforcement of the SVSA is privacy concerns related to the Fourth Amendment, as it is an open legal question whether operators of small vessels have greater Fourth Amendment protections than their larger counterparts.<sup>136</sup> However, the institution of a system that monitors small vessels' course, speed, and location, as discussed in Part IV of this Comment, would not alter the fact that this remains a disputed area of the law that is unrelated to whether vessels can be tracked, but is more concerned with the physical search of the vessel after it is detained.<sup>137</sup>

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<sup>134</sup> *Id.* at 447-48.

<sup>135</sup> O'Connell et. al., *supra* note 111, at 720-21 (arguing that a *Huron* analysis is unlikely to prevail today because of the extent of federal regulation in the maritime sphere).

<sup>136</sup> See *United States v. Cardona Sandoval*, 6 F.3d 15 (1st Cir. 1993) (holding that the search of a small vessel with drug sniffing dogs after it had been brought to port for safety reasons was in violation of the Fourth Amendment); *but see United States v. Lopez*, 761 F.2d 632 (11th Cir. 1985) (holding that defendants on a small vessel did not have a reasonable expectation of privacy in a secret compartment in the hull of their ship and thus Coast Guard's search was legal).

<sup>137</sup> See generally Pamela E. Antonopoulos, *Crew Members of Small Vessels Have Greater Privacy Interests Under Fourth Amendment to Challenge Unreasonable Searches—United States v. Cardona Sandoval*, 6 F.3d 15 (1st Cir. 1993), 28 SUFFOLK U. L. REV. 866 (1994) (discussing circuit split regarding small vessels and Fourth Amendment protections).



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#### IV. PROPOSING A SOLUTION: THE SMALL VESSEL SECURITY ACT

This section of the Comment proposes a solution to the issue of small vessel security as it relates to the threat of terrorist attack and transnational organized crime: a statute referred to as the Small Vessel Security Act (“SVSA” or “Act”) in this Comment. This section argues that Congress should enact legislation explicitly authorizing and commanding the USCG to promulgate the following regulations: (1) all operators of motorized vessels in the United States who intend to use their vessel beyond the limits of the territorial sea of the United States are required to maintain a boating license similar to the Transportation Worker Identification Credential (“TWIC”); (2) the USCG must require the installation of a small vessel tagging system on those motorized vessels wishing to travel beyond the limits of the territorial sea, similar to the Harbor Craft Transponder System (“HARTS”) implemented in Singapore; and (3) the USCG and each state with access points to waters beyond the territorial sea of the United States must enter into MOAs to ensure cooperation between state and federal authorities in enforcing the licensing and tagging requirements of the first two provisions of the Act. If Congress were to enact this type of statute, it would be a major step towards combating the threat of a terrorist attack and transnational criminal activity from small vessels.

##### *A. Maintenance of a Boating/Operator License*

The SVSA would require that all operators of motorized vessels wishing to travel beyond the limits of the territorial seas of the United States maintain a boating operator license. This license would be similar to the TWIC, which provides a biometric credential to maritime workers requiring unescorted access to secure areas of port facilities, outer continental shelf facilities, and vessels regulated under

the Maritime Transportation Security Act of 2002.<sup>138</sup> All USCG credentialed Coast Guard mariners must also obtain a TWIC.<sup>139</sup> Under the SVSA, the boating license credential would be the same biometric credential needed for the TWIC. The chief practical reason for implementing this type of credential is that it is something the federal government has done before and, therefore, its costs are known and the resources to produce it have previously been employed.

In response to implementing this requirement for small vessel operators who wish to travel beyond the limits of the territorial sea, some may argue that the costs will simply outweigh any security benefit. The Transportation Security Administration (“TSA”) and Federal Emergency Management Agency (“FEMA”) received funding amounting to \$420 million from 2002 through 2010 to implement the TWIC program, and the agencies estimated in 2011 that they would need between \$694.3 million and \$3.2 billion over the next 10 years to continue implementing the program.<sup>140</sup> In addition, this estimate did not include costs associated with biometric card readers or related access control systems.<sup>141</sup> The maritime transportation industry also bore a substantial cost from purchasing TWICs – an estimated \$185.7 million to \$234 million as of 2011.<sup>142</sup> Although these numbers may seem outlandish for implementing a security program, it is likely that they would be far lower for the SVSA. Most American recreational vessels do not travel beyond the limits of the territorial sea and thus would not be subject to the regulations (unlike the TWIC which, as of May 2014, had issued nearly two million TWIC cards).<sup>143</sup> Also, since

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<sup>138</sup> TWIC, TRANSP. SEC. ADMIN., <https://www.tsa.gov/for-industry/twic> (last visited Oct. 14, 2016) [hereinafter TWIC CREDENTIAL].

<sup>139</sup> *Id.*

<sup>140</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-657, TWIC SECURITY REVIEW: INTERNAL CONTROL WEAKNESSES NEED TO BE CORRECTED TO HELP ACHIEVE SECURITY OBJECTIVES 46 (2011).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> TWIC CREDENTIAL, *supra* note 138.

the capability to produce the cards already exists, it will be far easier to roll out the cards for the SVSA as opposed to the TWIC credential. Further, the benefits to law enforcement would be tremendous. It would allow maritime law enforcement to know instantly whether someone detained aboard a vessel entering back into the American territorial waters was correctly credentialed, since the ID would have a biometric component. Moreover, the credential would be far more difficult to counterfeit than a traditional driver's license because of the biometric component.

*B. Small Vessel Tagging: Implementing Singapore's HARTS*

Singapore provides an example of effective vessel regulation for the purposes of national security. Singapore has a heightened interest in securing its ports and waterways because its strategic location and natural deep water ports have made it a global maritime transportation hub.<sup>144</sup> The straits of Malacca and Singapore are some of the busiest shipping routes in the world, with more than 60,000 vessels passing through the straits annually.<sup>145</sup>

After the terrorist attacks of 9/11, with this interest in mind, Singapore began taking steps to enhance the security of its ports by further regulating vessels of all kinds.<sup>146</sup> In 2002, after the new International Ship and Port Facility Code ("ISPS Code") was adopted, Singapore moved quickly to implement the standards.<sup>147</sup> In 2005, recognizing the threat of a small boat terrorist attack, Singapore began requiring that all small vessels have HARTS, similar to the Automatic

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<sup>144</sup> Robert Beckman, *Singapore Strives to Enhance Safety, Security, and Environmental Protection in its Ports and in the Straits of Malacca and Singapore*, 14 OCEAN & COASTAL L.J. 167, 168 (2009).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 176-77.

<sup>147</sup> *Id.* at 177.

Identification System (“AIS”) already required on larger vessels.<sup>148</sup> The HARTS requirement now applies to all motorized harbor and pleasure crafts in Singapore’s waters.<sup>149</sup> The HARTS transmits a signal identifying its position, course, and speed to the Maritime and Port Authority of Singapore (“MPA”).<sup>150</sup> Importantly, when first implemented, the Singapore government paid for the equipment and installation costs on small vessels, which significantly increased support for the measure from the recreational boating industry.<sup>151</sup> The cost of 120 Singapore dollars, about 85 American dollars, is now borne by the owner of the vessel.<sup>152</sup> The MPA now focuses its security efforts on vessels without identification.<sup>153</sup>

This review of Singapore’s HARTS regime illustrates how the simple use of an AIS-like transmitter can increase security at a relatively low cost to the owner. Moreover, it also demonstrates how this type of regime could be beneficial to the USCG and state law enforcement, because it would allow them to focus on vessels without proper identification and lower overall security costs in the long run.

In implementing the HARTS requirement in the United States, it would be wise to implement a nearly identical regime to Singapore, with the exception that it would only require the operators of small vessels who wish to travel beyond the territorial seas of the United States to obtain the credential. The reason for this major difference is twofold: (1) As discussed extensively in Part I of this

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<sup>148</sup> *Singapore Beefs up Maritime Security; Installs Transponders on Small Vessels*, AGENCE FRANCE PRESSE, (July 1, 2005), [www.singaporewindow.org/sw05/050701a1.htm](http://www.singaporewindow.org/sw05/050701a1.htm). [hereinafter *Singapore Beefs up Maritime Security*].

<sup>149</sup> *Harbor Craft Transponder System*, MAR. AND PORT AUTH. OF SINGAPORE, <http://www.mpa.gov.sg/web/portal/home/port-of-singapore/port-operations/licensing-of-craft/harbour-craft/harbour-craft-transponder-system-harts> (last updated Jan. 7, 2016) [hereinafter HARTS System].

<sup>150</sup> *Singapore Beefs up Maritime Security*, *supra* note 148.

<sup>151</sup> *Id.*

<sup>152</sup> HARTS System, *supra* note 149.

<sup>153</sup> *Id.*

Comment, the threat from a small vessel attack or transnational criminal activity is likely to involve an offshore component; and (2) the costs associated with implementing this type of regulatory regime on all small motorized vessels would be far greater for the United States than Singapore. However, there are several aspects of Singapore's regime that the United States should certainly implement.

First, the federal government should cover the costs of the implementation for a period of time after the SVSA takes effect. This would limit the backlash from the recreational boating industry for implementing new regulations and make compliance with the new law as easy as possible for recreational boaters who wish to travel beyond the territorial sea limits.

Second, the implementation of these requirements would also need to be delayed for a reasonable period of time so that owners of motorized vessels would have sufficient time to comply with the new regulations. In Singapore, the process of full implementation took about three years and the process may take even longer in the United States given the larger geographic area involved and the number of potential vessels that may be required to comply with the new regulations.<sup>154</sup>

However, the enhanced security that implementing HARTS brings to American law enforcement would be just as beneficial, if not more so, as it has been in Singapore. With the focus on untagged vessels without proper identification that either leave or enter the territorial sea of the United States, the USCG and state law enforcement would have a greater ability to thwart criminal activity and potential national security threats while lowering costs in the long run. Also, even if vessels engaged in potentially threatening activity were in compliance with tagging requirements, it would allow law

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<sup>154</sup> Teo Chee Bang, Chang Keng Nee & Sunny Lee Chwee Thiam, *Introducing Harbour Craft Transponder System (HARTS) in the Port of Singapore*, 29 PORT TECH. INT'L 47, 49 (2012).

enforcement to obtain their location far more quickly than under the current regime, where most small vessels cannot be tracked at all.

*C. MOAs between States and the USCG*

The final prong of the SVSA will seek to enhance the effectiveness of implementing the HARTS by requiring that each state enter into MOAs with the USCG to ensure that federal, state, and local law enforcement can use the system effectively. A MOA is a tool frequently used by government agencies that lays out ground rules for positive cooperation to meet an agreed upon goal (in this case, implementing the HARTS effectively and enhancing maritime security generally).<sup>155</sup> The final portion of the SVSA would specifically require each state to enter into a MOA with the USCG, within a certain period of time following the Act's passage, in order to implement the HARTS system and effectively share the information that the HARTS system would provide law enforcement. Several states have already entered into MOAs for cooperative maritime law enforcement, with Maine being the first to do so.<sup>156</sup>

Major John C. Fetterman, Vice President of the National Association of State Boating Law Administrators and a veteran maritime patrolman in Maine, pushed for states to enter into MOAs with the USCG at the 2007 Small Vessel Security Summit.<sup>157</sup> He explained that entering into these agreements would promote a comprehensive maritime law enforcement strategy across jurisdictional boundaries and noted other benefits that the MOA had provided Maine, including the ability to identify as a sub-grantee

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<sup>155</sup> U.S. DEP'T OF HOMELAND SEC., REPORT OF THE DHS NATIONAL SMALL VESSEL SECURITY SUMMIT, 69 (2007) (noting that MOAs are already used by some states for the enforcement and safety of security zones) [hereinafter SMALL VESSEL SECURITY REPORT]; Patrick Hill, *supra* note 29, at 81 (recommending the use of MOAs for extending patrol and presence capabilities of maritime law enforcement).

<sup>156</sup> SMALL VESSEL SECURITY REPORT, *supra* note 155.

<sup>157</sup> *Id.*

under a comprehensive and standardized security program.<sup>158</sup> MOAs would be even more important in implementing the HARTS; they would be necessary to ensure that agreements were in place and that information from HARTS tracking could be easily shared between federal, state, and local law enforcement. The statute would allow for flexibility in the terms of the MOA between each state and the USCG, but would mandate certain minimum requirements, including the sharing of information under the newly implemented HARTS.

Finally, drafting and implementing these MOAs is a fairly low cost way of enhancing maritime security, as MOA forms have already been endorsed by the USCG for establishing a single Vessel Identification System (“VIS”) database for vessels that must currently register with the USCG.<sup>159</sup> Entering into new MOAs would simply extend these types of agreements to all motorized vessels that wish to navigate beyond the territorial seas of the United States, and would thus be monitored using the HARTS system.

#### *D. A Suspicious Small Vessel: The SVSA in Action*

An example illustrates how the SVSA could potentially benefit law enforcement. The USCG offers several examples of suspicious activities involving small vessels on its America’s Waterway Watch program webpage, which is designed to assist the boating public in identifying suspicious activity on the water.<sup>160</sup> One particular example demonstrates the potential benefits of the SVSA:

You work at a business that rents small boats by the hour. In the process of renting a boat for the day “to do some fishing,” two

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<sup>158</sup> *Id.*

<sup>159</sup> See *Sample Memorandum of Agreement Between United States Coast Guard and State Regarding Exchange of Vessel Data*, AM. BAR ASS’N (2015), [http://apps.americanbar.org/dch/thedl.cfm?/otherlinks\\_files/VIS\\_MOA.pdf](http://apps.americanbar.org/dch/thedl.cfm?/otherlinks_files/VIS_MOA.pdf).

<sup>160</sup> America’s Waterway Watch, *Suspicious Activity*, U.S. COAST GUARD (2012), [http://americaswaterwaywatch.uscg.mil/Suspicious\\_Activity.html](http://americaswaterwaywatch.uscg.mil/Suspicious_Activity.html) [hereinafter *Suspicious Activity*].

men ask about the “best fishing spots” on the bay and, pointing in the direction of the Navy Base to the north, ask if that might not be a good place to fish. You tell them, “No, the best fishing is in the South Bay area.” They fill out the paperwork, and pay you the required deposit and “full day” rate with a credit card. Neither of them seems all that interested in the terms of the contract, nor in the fact that they are not entitled to a partial refund if they return before the end of the day. You then help them load the boat with obviously brand-new fishing equipment and two large coolers, and take the time to remind them, “It might be a good idea to buy some bait.” After you check them out on operation of the boat, they leave the dock and head north in the direction of the Navy Base. The whole situation starts to seem strange to you, including the fact that the person's recently-issued driver's license provided as proof of identity, the bank credit card used for payment, and the license plate on their vehicle were from three different states.<sup>161</sup>

For purposes of our scenario, we assume that the men in question wish to travel in this recreational small vessel beyond the territorial seas of the United States and meet up with another vessel to obtain supplies for a terrorist attack.<sup>162</sup> Under the current regulatory regime, the person renting out the vessel, the USCG, or other maritime law enforcement, can do little about a situation like the one described above. The USCG would deem the totality of the oddities in this situation as “suspicious activity,” but would have to rely on the person or company renting out the vessel to report it before they could take action.<sup>163</sup>

In this scenario, the SVSA would provide several stopgap measures that would allow this suspicious activity to be investigated

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<sup>161</sup> *Id.*

<sup>162</sup> This portion of the scenario has been added by the author to best illustrate all aspects of the Small Vessel Security Act. It is not included in the U.S. Coast Guard's scenario on American Waterway Watch Website.

<sup>163</sup> *Suspicious Activity*, *supra* note 160.



by maritime law enforcement without needing the person renting out the boat to recognize the suspicious activity and report it. First, the men attempting to rent the boat in this scenario would need to have the boater's license necessary to travel beyond the limits of the territorial sea. If they did not, and were detained for venturing beyond the limits of the territorial sea, they would be in violation of the SVSA immediately, and the USCG or other maritime law enforcement could perform a search and find the supplies they had obtained from another vessel. It is likely that if the SVSA were enacted and implemented, persons seeking to commit a terrorist attack or obtain supplies for a terrorist attack with a small vessel would likely not rent from a licensed operator bound to follow the law. However, this would further benefit law enforcement looking for potential attacks or criminal activity. If persons seeking to carry out terrorist attacks or criminal activity with small vessels are forced to buy their own vessels or obtain vessels through illegal means, it would allow law enforcement more chances to recognize the suspicious activity and thwart it before a terrorist attack or other illicit activity occurred.

Second, even if the men in the above scenario somehow fabricated the biometric boater's license, the vessel in question (if it was a rental) would not be equipped with a HARTS under the SVSA, which would identify the vessel's position, course, and speed to the relevant maritime law enforcement.<sup>164</sup> Therefore, if the men in the above scenario charted a course at high speed beyond the territorial seas of the United States, maritime law enforcement monitoring vessel activity in the area would be able to identify the suspicious behavior quickly.

In addition, the third prong of the SVSA would also be beneficial in this scenario. If the USCG were monitoring the HARTS under a MOA with the state in which the activity was occurring, the USCG could share the position, course, and speed information of the

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<sup>164</sup> *Singapore Beefs up Maritime Security*, *supra* note 148.

suspicious vessel with state law enforcement. This type of information sharing would be of particular importance in cases where state or local law enforcement was better positioned to quickly reach the suspicious vessel in question.

As the analysis of the above the scenario demonstrates, the SVSA would provide many benefits to maritime law enforcement attempting to stop terrorist or translational criminal activities.

V. CONCLUSION: A FEDERAL SOLUTION TO A NATIONAL  
THREAT

The question of small vessel security is, of course, a complex one. However, the SVSA proposed by this Comment would certainly be a step towards securing American waters and maritime borders from small vessel threats, whether from terrorist attacks or transnational criminal organizations trafficking in illicit contraband. As this Comment acknowledges, enacting such a statute would certainly face obstacles in the current political and regulatory climate. Proposing federal preemption in an area in which states have traditionally exercised exclusive domain is a policy that is sure to spark debates about the way the American federal system ought to operate. Moreover, the most pragmatic objection that is likely to be raised in response to the SVSA is a simple one: Why do we need this statute now if we haven't experienced a large scale small vessel attack in American waters? Although this objection is a reasonable one, if the United States were to approach national security law and policy in this manner, history tell us that vulnerabilities will occur and will be exploited. The three prongs of the SVSA present a workable regulatory framework to address the small vessel security threat while also taking into account state sovereignty, individual privacy, and the economic benefits that recreational boating brings to American coastal communities. The chances of this act or a similar one becoming law in the coming years may be unlikely, but small vessels can only remain unregulated for so long in a world where the threat is so well

documented. Where the common defense requires preemptive solutions, the United States must enact a federal solution to combat such a national threat. The SVSA is such a solution.

