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FREE PEOPLE OVER FREE MARKETS: ADDRESSING THE SUPPRESSION OF ENVIRONMENTAL DISSENT THROUGH TRADE AGREEMENTS IN MEXICO AND THE UNITED STATES

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I. INTRODUCTION

On the evening of January 15, 2023, Ricardo Arturo Lagunes Gasca, a renowned human rights lawyer, and Antonio Díaz Valencia, an Aquila Indigenous leader, went missing hours after leaving an anti-mining community meeting in western Mexico.[1] The pair were

† J.D. 2023, The George Washington University Law School. The author would like to thank Dean Randall Abate, who invested an incredible amount of time and attention to this article and the author's development as a lawyer.

1. *Disappearance of Human Rights Defenders Antonio Díaz Valencia and Ricardo Arturo Lagunes Gasca*, FRONT LINE DEFS. (Jan. 19, 2023), https://www.frontlinedefenders.org/

prominent environmental defenders critical of the nearby Ternium ore mine and its associated pollution.[2] Later that same evening, their truck was found riddled with bullets.[3] While their loved ones demanded accountability from Ternium,[4] the company announced its plans to build another mill in Mexico worth $2.2 billion.[5] As Ternium continues its production and pollution, Ricardo Arturo Lagunes Gasca and Antonio Díaz Valencia have joined a tragic statistic: four human rights defenders are murdered every week.[6]

Unfortunately, the murder of human rights defenders ("HRDs")[7] and the suppression of environmental dissent is all too common in today's globalized world. Throughout the past decade, 1,700 HRD killings have been reported,[8] averaging one every other day.[9] The number of attacks will likely increase with the climate crisis and as "more land is grabbed, [and] more forests are felled in the interest of short-term profits."[10] The world needs environmental defenders now more than ever, but as their importance increases, so do the

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en/case/disappearance-human-rights-defenders-antonio-d%C3%ADaz-valencia-and-ricardo-arturo-lagunes-gasca-0; *see also Ternium Complex Still Ground to a Halt Over Disappearance of Activists*, BNAMERICAS (Feb. 7, 2023), https://www.bnamericas.com/en/news/ternium-complex-has-been-paralyzed-for-16-days-in-protest-of-the-disappearance-of-activists; *Ternium is Collaborating with Mexican Authorities in the Case of Messrs. Antonio Diaz Valencia and Ricardo Arturo Lagunes Gasca of the Community of Aquila*, TERNIUM (Feb. 20, 2023), https://us.ternium.com/en/media/news/aquila-eng--06455353923.

2. BNAMERICAS, *supra* note 1; *see also Environmental Impact of Steel*, THE WORLD COUNTS, https://www.theworldcounts.com/challenges/planet-earth/mining/environmental-impact-of-steel-production (last visited Apr. 15, 2023) (asserting that the mining of ore causes air, water, and acid pollution, which could lead to cancer).

3. BNAMERICAS, *supra* note 1.

4. *See Mexico: Defenders' Families Believe in Alleged Involvement of Mining Company Ternium in Their Disappearances*, BUS. & HUM. RTS. RES. CTR. (Jan. 20, 2023), https://www.business-humanrights.org/en/latest-news/mexico-defenders-families-believe-in-alleged-involvement-of-mining-company-ternium-in-their-disappearances.

5. *See New Projects on the Horizon*, TERNIUM (Feb. 15, 2023), https://www.ternium.com/en/media/news/new-projects-on-the-horizon.

6. *See Global Witness Reports 227 Land and Environmental Activists Murdered in a Single Year, the Worst Figure on Record*, GLOB. WITNESS (Sept. 13, 2021), https://www.globalwitness.org/en/press-releases/global-witness-reports-227-land-and-environmental-activists-murdered-single-year-worst-figure-record.

7. Although this paper focuses on environmental defenders, data gathered on violence against defenders is based on the broader category of HRDs.

8. *Decade of Defiance: Ten Years of Reporting Land and Environmental Activism Worldwide*, GLOB. WITNESS, Sept. 2022, at 16, https://www.globalwitness.org/en/campaigns/environmental-activists/decade-defiance [hereinafter *Decade of Defiance Report*]; *At What Cost? Irresponsible Business and the Murder of Land and Environmental Defenders in 2017*, GLOB. WITNESS, Jan. 2019, at 11, https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost [hereinafter "At What Cost?"] (explaining that this number is likely an underestimate because the "strict set of criteria" to categorize a killing as an HRD killing is not always obtainable through newspapers or local contacts).

9. *See Decade of Defiance Report*, *supra* note 8, at 16.

10. *Last Line of Defence* [sic], GLOB. WITNESS (Sept. 13, 2021), https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence.

risks.[11] From 2015 to 2021, the rate of HRDs murdered rose from three a week to four a week.[12]

Foreign direct investment ("FDI") plays a central role in the violence.[13] Almost 70% of the HRDs killed in 2017 were defending land, environment, and indigenous rights, and nearly all of them were defending against an extractive industry or big business mega project.[14] In a global economy based on transnational corporations, small and vulnerable communities are pitted against an extensive and powerful value chain.[15]

Rampant killings are just the tip of the iceberg. Environmental defenders routinely confront "violent attacks and threats to their families, enforced disappearances,[16] illegal surveillance, travel bans, blackmail, sexual harassment, judicial harassment, and use of force to dispel peaceful protests."[17] In addition to physical violence, criminalization is often directed against defenders around the world

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11. *See Second Report on the Situation of Human Rights Defenders in the Americas*, INTER-AM. COMM'N H. R., OEA/Ser.L/V/II, doc.66, Dec. 31, 2011, at 132–33 ¶ 311 [hereinafter "IACHR Second Report"] ("[D]efenders play an essential role in ensuring the balance between environmental protection and the development of the countries of the region.").

12. *See On Dangerous Ground*, GLOB. WITNESS, June 20, 2016, at 4, https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground; *see also Decade of Defiance Report*, *supra* note 8, at 10, 39 (explaining that this number is also likely to be higher as many murders go unreported).

13. *See* Adam Hayes, *Direct Foreign Investment (FDI): What It Is, Types, and Examples*, INVESTOPEDIA (Mar. 27, 2023), https://www.investopedia.com/terms/f/fdi.asp ("Foreign Direct Investment (FDI) is an ownership stake in a foreign company or project made by an investor, company, or government from another country.").

14. Andrew Anderson, *What is Happening Now Across the World is Nothing Less than a Systematic Attack on Peasant Communities and Indigenous People*, THEY SHOULD HAVE KNOWN BETTER: FRONT LINE DEFS. BLOG, https://www.theyshouldhaveknownbetter.com/blog-front-line-defenders (last visited Apr. 9, 2023).

15. Nicola Phillips, *Power and Inequality in the Global Political Economy*, 93 INT'L AFF. 429, 431, 432 (2017), (discussing how a global economy based almost entirely [80%] on the value and production chains of transnational corporations is organized around an inherently unequal system where powerful economic and political interests "exploit vastly asymmetrical power relations between firms and other actors within value chains, in order to control how, where and by whom value is *created*, and how, where and by whom it is *captured*").

16. *About Enforced Disappearance*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance (last visited Apr. 15, 2023) ("An enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.").

17. U.N. Secretary-General, *Situation of Human Rights Defenders*, ¶ 30, U.N. Doc. A/71/281 (Aug. 3, 2016).

and can constitute intimidating legal threats,[18] costly legal battles, and controlling the media to tarnish reputations.[19]

State parties are often incentivized to put profits first as well.[20] In many instances, state parties are legally bound by international investment agreements that restrict their ability to make significant policy changes that would protect people but cut into profits.[21] Unlike human rights treaties, the legal obligations contained in these economic treaties include enforceable financial damages.[22] When states are obligated to prioritize business interests, their citizens become "obstacles instead of [] citizens with needs."[23] This means state parties are "more swayed by powerful economic interests than by the life chances of their citizens" and are choosing to "shoot the messenger" by criminalizing nonviolent protest rather than protecting dissenters.[24]

Due to the deep-rooted connection between profit and violence, this article examines the relationship between investment agreements protecting FDI and abuse directed at environmental defenders through the lens of Mexico and the United States' trade relationship. Part II analyzes the wide range of challenges and threats environmental defenders face and the role FDI plays in perpetuating violence. Part III reviews the rights of environmental defenders, the obligation of states, and the rights of FDI under the current Investor-state dispute settlement ("ISDS") regime. Part IV proposes assigning liability for abuse against environmental defenders directly in international agreements, incorporating an independent and specialized review mechanism, and eliminating the ISDS system in international agreements.

II. FOREIGN DIRECT INVESTMENT AND THE SUPPRESSION OF DISSENT

Despite environmental defenders' essential role in protecting the planet and its people, abuse and attempts to silence them are increasing.[25] Part II defines environmental defenders and the

18. Ali Hines, *Responsible Sourcing*, 17 SUR - INT'L J. HUM. RTS. 109, 111 (2020) (asserting that because the legal resources are asymmetrical, even simple suits can greatly interfere with an environmental defender's work).

19. *Id.*

20. *Id.* at 110.

21. *See* discussion *infra* Part II.B.

22. *See generally* Tamlyn Mills & Andrew Battisson, *Recognition, Enforcement and Recovery of Investment Treaty Awards: Part I*, INT'L ARB. R. (May 2022).

23. Moira Birss, *Criminalizing Environmental Activism*, 49:3 NACLA REPORT ON THE AMERICAS 315, 316–317 (2017).

24. Matthew Taylor, *Environment Protest Being Criminalized Around the World, Say Experts*, THE GUARDIAN (Apr. 29, 2021), https://www.theguardian.com/environment/2021/apr/19/environment-protest-being-criminalised-around-world-say-experts.

25. *IACHR: Increased Violence Against Human Rights Defenders During the First Four Months of 2022 Makes It More Urgent for States to Protect Their Lives and Work*, ORG. OF AM. ST. (May 25, 2022), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/

relevance of the trade relationship between Mexico and the United States as a case study and then explains the role FDI plays in various methods of suppressing environmental defenders.

A. Environmental Defenders in Mexico and the U.S.

The work of those who defend our most basic freedoms is "fundamental for the universal implementation of human rights, the existence of full and lasting democracies, and the consolidation of the rule of law."[26] An HRD includes any individual, group, or association that peacefully "promotes or seeks the realization of human rights and fundamental freedoms at the local, national and/or international levels."[27] When an HRD works to protect environmental or land rights, they are more narrowly defined as an environmental defender.[28]

Environmental defenders work to prevent pollution that impacts the environment, the rights of indigenous groups to their territory, the right to water, and other issues that threaten the land, the environment, livelihoods, and health.[29] Environmental defenders who oppose land-intensive industries[30] are three times more likely to be attacked than other HRDs.[31] Of the HRDs killed in 2018, 77% were protecting indigenous peoples, land, and environmental rights.[32]

In addition to the high number of environmental defenders targeted, vulnerable groups experience a disproportionate number of attacks.[33] Indigenous environmental defenders are

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2022/114.asp.

26. *Towards Effective Integral Protection Policies for Human Rights Defenders*, INTER-AM. COMM'N ON HUM. RTS. OEA/SER.L/V/II., DOC. 207 REV., Dec. 29, 2017, at 22.

27. *Id.* at 21 (finding that HRDs include people from a wide variety of backgrounds such as journalists, lawyers, indigenous leaders, government workers, community leaders, and anyone else who monitors, reports, disseminates, educates, advocates, or defends human rights).

28. *Who are Environmental Defenders?*, U.N. ENV'T PROGRAMME https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights (referring to environmental human rights defenders (EHRD) as those who, "in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna."); *see generally* JUDITH VERWEIJEN ET AL., *Environmental Defenders: The Power/Disempowerment of a Loaded Term*, ENVIRONMENTAL DEFENDERS: DEADLY STRUGGLES FOR LIFE AND TERRITORY 37 (Mary Menton & Philippe Le Billon eds., 2021).

29. *See generally* VERWEIJEN ET AL., *supra* note 28.

30. *See* Daniel Braaten, *Why Environmental Defenders are Under Threat*, POL. VIOLENCE AT A GLANCE (Aug. 5, 2022), https://politicalviolenceataglance.org/2022/08/05/the-vulnerabilities-land-and-environmental-defenders-face-and-how-to-counteract-them.

31. *UN Resolution Recognizes Environmental Defenders*, INT'L NETWORK FOR ECON., SOC. AND CULTURAL RTS. (Apr. 10, 2019), https://www.escr-net.org/news/2019/un-resolution-recognizes-environmental-defenders.

32. *Id.*

33. Braaten, *supra* note 30.

disproportionately attacked due to their resource-rich lands.[34] Although indigenous people only make up about 5% of the global population, they suffer about 40% of the fatal attacks against environmental defenders.[35] Similarly, communities of African descent are vulnerable because they have inadequate access to resources and occupy valuable land.[36] Women also face distinct challenges in their advocacy work, including exclusion from land ownership and negotiations, criticism and ostracization for deviating from domestic care, domestic violence, and threats of divorce from the men in their communities for their activism.[37] Furthermore, the attacks on women are often sexualized, and rape is used as a form of social control.[38] Despite challenges, these groups commonly serve as activists for the environment.

The experiences of environmental defenders in Mexico and the United States are used in this article as case studies because of the importance and volume of trade between the two countries and their relevant successes and failures in defending free speech. Due to the United States-Mexico-Canada Agreement ("USMCA") and geographical proximity, Mexico and the United States are frequent trading partners.[39] Mexico is the United States' second-largest export market and third-largest trading partner in goods and services.[40] Bilateral trade between the two countries has grown almost 500% in the past three decades, and the United States is Mexico's top source of FDI.[41] Recent reforms liberalized FDI access to Mexican markets, which piqued the interest of international oil companies and indicates the probable growth of the extractives sector.[42] Not only does Mexico host a great deal of FDI from the United States, but the

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34. *See The Role of Business and States in Violations Against Human Rights Defenders of Land Rights, the Right to Territory and Rights Related to the Environment*, INT'L SERV. FOR HUM. RTS., Oct. 2015, at 18–19, 55 [hereinafter "*The Role of Business*"] (noting that especially as the extractive industry expands to more remote locations, indigenous land is increasingly violated).

35. Gillian Caldwell, *Environmental Defenders are Under Threat. Here's What USAID Can Do to Help*, LANDLINKS (Jan. 17, 2023), https://www.land-links.org/2023/01/environmental-defenders-are-under-threat-heres-what-usaid-can-do-to-help; *see also* Braaten, *supra* note 30 (suppressing indigenous opposition to land management concerns is especially troubling considering that the forests indigenous and tribal peoples manage communally are better conserved, improve food security, and combat climate change. Much of the world's remaining biodiversity is on indigenous land and they "are often the last line of defense against the exploitation of land that serves important biodiversity functions and/or operates as significant carbon sinks." Instead of receiving protection for this important role, they are "subject to intimidation and violence to get them to move off their land or acquiesce to the demands of global capital").

36. *The Role of Business*, *supra* note 34, at 39.

37. *See Decade of Defiance Report*, *supra* note 8.

38. *The Role of Business*, *supra* note 34, at 38.

39. *See 2021 Investment Climate Statements: Mexico*, U.S. DEP'T OF STATE (2021), https://www.state.gov/reports/2021-investment-climate-statements/mexico.

40. *Id.*

41. *Id.*

42. *Id.*

United States—which brought one-fifth of all ISDS claims from 2011 to 2020—also actively uses the protections its investors enjoy.[43]

In terms of dissent, both nations have increased criminalization and Mexico has seen rampant murders of environmental defenders.[44] Despite signing an international treaty to protect defenders, the number of killings in Mexico continues to rise.[45] It is consistently one of the deadliest countries for human rights defenders with 131 killings between 2017 and 2021, two-thirds of which took place in regions with significant foreign mining investments.[46]

Similarly, despite being the "land of the free," criminalization of environmental defenders is increasing in the United States, and the first environmental defender killing in the country occurred in January 2023 when an environmental activist was shot fifty-seven times while defending a forest in Georgia.[47] These economic and reputational factors combine to make Mexico and the United States' treatment of environmental dissenters in connection with FDI a helpful focus point for this global issue.

B. Role of Foreign Direct Investment in Suppressing Dissent

Although states are the usual suspect in free speech and human rights abuses, private interests drive and share in the abuse with increasing force.[48] The IACHR observed that harassment and targeting of defenders has become more pronounced where "there are serious tensions" between extractive industries which "have enormous economic interests at stake."[49] One study found that global demand for resources was one of the three factors behind the growing vulnerability of environmental defenders, while another associated higher levels of FDI, mineral rents, and forest rents with environmental defender killings.[50] Considering that large scale

43. *See* U.N. Conference on Trade and Development, *Investor-State Dispute Settlement Cases: Facts and Figures 2020*, IIA ISSUES NOTE, ISSUE 4 (Sept. 2021).

44. *See Last Line of Defence*, *supra* note 10.

45. *See Decade of Defiance Report*, *supra* note 8.

46. *Id.*

47. *See generally* Nick Valencia et al., *Climate Activist Killed in 'Cop City' Protest Sustained 57 Gunshot Wounds, Official Autopsy Says, But Questions About Gunpowder Residue Remain*, CNN (Apr. 20, 2023, 7:57 PM), https://www.cnn.com/2023/04/20/us/cop-city-activist-killed-dekalb-county-medical-examiner/index.html (describing how Tortuguita [the chosen name of Manuel Esteban Paez Terán] was shot by police officers on January 18, 2023 while camping to protect a local forest from "cop city," which is a $90 million police training complex in Atlanta).

48. *Last Line of Defence*, *supra* note 10, at 16–17.

49. IACHR Second Report, *supra* note 11, at ¶ 312.

50. *See* Daniel Braaten, *A Triangle of Vulnerability: Global Demand for Resources, Political Marginalization, and a Culture of Impunity as Causes of Environmental Defender Killings*, 44 HUM. RTS. Q. 537, 541, 544 (Aug. 2022) (recognizing that another two factors

investments can cost billions of additional dollars if operations are disrupted by local opposition, there is a substantial amount of money at stake.[51] The extractive model of mining, logging, and oil and gas production "overwhelmingly prioritizes profit over human and environmental harm," and environmental defenders "are seen as a threat to profit as well as power."[52] The connection between FDI and increased environmental defender risk is clear: areas with more extractive or development projects correlate to more attacks.[53]

This is especially true in Mexico, where foreign-owned institutions control 70% of the total assets.[54] Two-thirds of the lethal attacks in Mexico are linked to conflicts over land and mining and in 2019 alone, there were 572 threats and attacks towards human rights defenders working against "business-related activities."[55]

Despite states looking to extractive industries to increase development, the wealth gained from foreign investment is highly concentrated and does not benefit the people who bear its burden.[56] One estimate found that, on average, only one job is created for every million dollars invested into mining.[57] Regardless of the minimal direct benefit to local people, large-scale economic projects have continued to expand rapidly.[58] Governments and public actors are

behind the growing vulnerability of environmental defenders are the marginalization of affected populations from the political process and a culture of impunity).

51. *See Responsible Sourcing: The Business Case for Protecting Land and Environmental Defenders and Indigenous Communities' Rights to Land and Resources*, GLOB. WITNESS (Apr. 28, 2020), https://www.globalwitness.org/en/campaigns/environmental-activists/responsible-sourcing (illustrating the risks of large-scale investments, with the example of the Dakota Access Pipeline which cost an additional $4.4 billion as a result of protests by the local indigenous community).

52. *Last Line of Defence*, *supra* note 10, at 17; *At What Cost?*, *supra* note 8, at 38.

53. *See* Amiel Ian A. Valdez, *Defending the Defenders: Upholding the Right to Effective Remedy of Environmental Defenders in the Philippines*, 66 ATENEO L. J. 176, 184; *see also Business and Human Rights Defenders in Colombia*, BUS. & HUM. RTS. RES. CTR. (Feb. 24, 2020), https://www.business-humanrights.org/en/from-us/briefings/business-and-human-rights-defenders-in-colombia (describing attacks on Colombian defenders who were raising concerns about businesses); *see also Decade of Defiance Report*, *supra* note 8, at 19 (describing the killings in the Philippines in the past decade relating to protests of company operations).

54. *See 2021 Investment Climate Statements: Mexico*, *supra* note 39.

55. *See* Paloma Muñoz Quick et al., *Safeguarding Human Rights Defenders: Practical Guidance for Investors*, BUS. & HUM. RTS. RES. CTR. 4 (Apr. 28, 2020), https://media.business-humanrights.org/media/documents/files/Safeguarding_Human_Rights_Defenders_Practical_Guidance_for_Investors_FINAL.pdf; *Mexico Was the Deadliest Country for Environmental Activists in 2021*, MEX. NEWS DAILY (Sept. 29, 2022), https://mexiconewsdaily.com/news/mexico-was-the-deadliest-country-for-environmental-activists-in-2021.

56. *See Honduras: The Deadliest Place to Defend the Planet*, GLOB. WITNESS 5 (Jan. 2017), https://www.globalwitness.org/en/campaigns/environmental-activists/honduras-deadliest-country-world-environmental-activism.

57. *The Time is Ripe for a Global Tax Agreement on Extractive Industries*, U.N. ECLAC (May 25, 2021), https://www.cepal.org/en/news/time-ripe-global-tax-agreement-extractive-industries-eclac.

58. *The Role of Business*, *supra* note 34, at 7.

incentivized to collude[59] or engage in outright corruption[60] when exploiting natural resources in the pursuit of development. Therefore, governments, bilateral aid and trade partners, private banks, development banks, and pension funds that finance projects contribute to and are also culpable for the human rights abuses FDI brings.[61]

i. Violence and Impunity

Environmental defenders' work is often suppressed by threats of murder, extrajudicial killings, and forced disappearances, where the victim may be kidnapped and murdered in their home, while driving along the highway, or even while seeking protection from authorities.[62] Both public and private security forces actively support the corporate agenda of violence against dissenters.

Often, multinational corporations use private security companies to engage in violence and threats against environmental defenders who oppose certain projects.[63] Approximately 8,000 of Mexico's total security forces—80%—are private security forces with no oversight.[64] Furthermore, the state has demonstrated it is

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59. *See* Morgan Simon, *Cops and Donuts Go Together More Than You Thought: The Corporations Funding Cop City in Atlanta*, FORBES (Mar. 14, 2023, 2:26 PM), https://www.forbes.com/sites/morgansimon/2023/03/14/cops-and-donuts-go-together-more-than-you-thought-the-corporations-funding-cop-city-in-atlanta (highlighting how state-run projects also often derive their funding from private investors and foundations, further blurring the lines between state interests and private interests. For example, the Atlanta Police Foundation's Board, which is funding the "cop city" in which an environmental defender died trying to stop, is funded by a "who's-who" of corporate Atlanta including Delta, Waffle House, Home Depot, Wells Fargo, Bank of America, and many others who made the project possible).

60. *See* Braaten, *supra* note 50, at 541 ("They find that strong incentives for governments or public actors to exploit natural resources, marginalization of those who depend on, or live in, the areas where natural resource exploitation occurs, and weak rule of law and corruption lead to greater numbers of environmental defenders being killed."); *see also* Anderson, *supra* note 14 ("Political and economic power across these countries is controlled and manipulated by an entrenched elite, with close links to the army and the security services, who block reform initiatives to protect their own interests, and are often behind targeted attacks on HRDs who expose their corruption or oppose their exploitation.").

61. *See* Quick et al., *supra* note 55, at 14–15 (noting there are essentially three categories through which businesses harm human rights: the first is directly though the entity's actions or failure to act, the second is where it contributes to an adverse impact in parallel with another entity—such as the state—and, finally, the third is when the products, services, or business relationships it fosters are linked to an adverse impact).

62. *See generally Decade of Defiance Report*, *supra* note 8 (describing the large number of murders of land and environmental defenders in various countries around the world).

63. *See* Stefanie Eschenbacher, *Mexico Private Security Boom Adds to Corruption, Use of Force: Study*, REUTERS (Mar. 27, 2018, 6:38 PM), https://www.reuters.com/article/us-mexico-security/mexico-private-security-boom-adds-to-corruption-use-of-force-study-idUSKBN1H339B; *see also* IACHR Second Report, *supra* note 11, at ¶ 51; *see also The Role of Business*, *supra* note 34.

64. Eschenbacher, *supra* note 63; *see The Effect of Unregulated LatAm PMSCs on Crime*, SILENT PROS., https://silentprofessionals.org/unregulated-latin-american-private-security-companies (last visited Sept. 22, 2023) (stating that in Latin America more generally, there

more than willing to assist in suppression to protect foreign businesses with the state's own forces by its own volition as well.[65] For example, the United States permitted its public police to be essentially transformed into a private security force through private funding during the Pipeline 3 protests.[66] When justifying the police involvement in protecting the pipeline at the expense of protestors, the County Sheriff stated that "Enbridge is a big taxpayer in Hubbard County and we would be doing an injustice if we didn't support them as well."[67] Through private security or state collusion, professional forces directly engage in silencing environmental dissent.

Furthermore, when a defender is murdered, attacked, or threatened, there is rarely any recourse and the government seldom investigates or prosecutes the crime.[68] Ninety-four percent of crimes in Mexico go unreported, and less than 1% are resolved.[69] Authorities have also been known to actively cover up cases.[70] As the UN Special Rapporteur stated after a 2017 country visit to Mexico, "the failure to investigate and sanction perpetrators . . . sends a dangerous message that such crimes have zero consequences, creating an environment conducive to serial violations."[71] Mexico is one of the only states with a national protection system to respond

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are over 16,000 private military and security companies which collectively employ more people than the police).

65. *See At What Cost?*, *supra* note 8, at 36 ("With the expansion of mining and oil extraction, military and police forces have moved in to back up the companies. They use violence and sexual violence to intimidate local women and girls and repress resistance. In some cases, soldiers or police gang-rape women as a form of punishment, [for example] for 'trespassing' on diamond fields that were once their ancestral lands."); *Ecuador-Canada Free Trade Agreement: A New Attack on Communities, Indigenous Peoples, and the Environment*, MINING WATCH CAN. (Mar. 1, 2023, 2:25 PM), https://miningwatch.ca/news/2023/3/1/ecuador-canada-free-trade-agreement-new-attack-communities-indigenous-peoples-and (describing how provinces in Ecuador with exploration activities for concession agreements saw increased militarization).

66. *See* Kaylana Mueller-Hsia, *How an Oil Company Pays Police to Target Pipeline Protesters*, BRENNAN CTR. FOR JUST. (Oct. 7, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-oil-company-pays-police-target-pipeline-protesters ("Enbridge has given Minnesota law enforcement over $2 million to crack down on Native American and environmental protesters at Line 3 pipeline construction sites.").

67. Alleen Brown & John McCracken, *Documents Show How a Pipeline Company Paid Minnesota Millions to Police Protests*, EXPOSEDBYCMD (Feb. 9, 2023, 5:45 AM), https://www.exposedbycmd.org/2023/02/09/documents-show-how-a-pipeline-company-paid-minnesota-millions-to-police-protests.

68. *Decade of Defiance Report*, *supra* note 8, at 26.

69. *Id.* at 12.

70. *See UN Rights Office Condemns Death of Mexico Anti-Dam Activist*, AP NEWS (Oct. 28, 2022, 1:39 PM), https://apnews.com/article/mexico-caribbean-climate-and-environment-c63d2093a2e1eb51a2c8f1b2631c2485 (providing that, for example, the UN Human Rights office in Mexico reported that Filogonio Martínez Merino, a key environmental defender, was shot to death in 2022, while the Mexican prosecutors reported there were no signs of violence).

71. *Their Faces: Defenders on the Frontline*, GLOB. WITNESS, https://www.globalwitness.org/en/campaigns/environmental-activists/their-faces-defenders-frontline/?accessible=true (last visited Sept. 22, 2023).

to threats and offer protection.[72] Still, it is largely ineffective due to budgetary changes and a lack of resources.[73] Multiple environmental defenders have died while in the program and many—for good reason— "don't trust the government to protect them" and refuse to use it.[74]

Violent attacks send "a terrible message to those fighting for a better society," and, unfortunately, the message works.[75] HRDs have, "to a large extent," refrained from activism, stepped down from the public eye, and left their communities due to violence and threats.[76]

ii. Criminalization and Stigmatization

In contrast to rampant impunity for aggressors, environmental defenders themselves face widespread criminalization and arbitrary arrest. All over the world, anti-protest laws are expanding to cover more actions and increase penalties.[77] In Mexico, charges such as "crimes against consumption and national wealth" have been filed against environmental defenders, highlighting the connection between lucrative development and state complicity.[78] Research suggests that states respond to the financial incentive of foreign investment by designing commodity-based laws that are "designed to attract investments and financialize the environment" rather than protect the rights of its citizens.[79]

A recent law passed in Tabasco, a Mexican state, includes prison sentences of up to twenty years for "street protesting and

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72. *The Role of Business*, *supra* note 34, at 55.

73. *Id.*

74. *See Their Faces: Defenders on the Frontline*, *supra* note 71.

75. Jan Jarab, *Violence That Does Not Stop, Protection That is Not Enough*, FRONT LINE DEFS. (May 16, 2017), https://www.frontlinedefenders.org/en/news/violence-does-not-stop-protection-not-enough.

76. Juan Velez Rojas, *Colombia: Human Rights Defenders Continue to Face Pressure and Attacks*, INT'L COMM'N OF JURISTS (Feb. 3, 2023), https://www.icj.org/colombia-human-rights-defenders-continue-to-face-pressure-and-attacks.

77. *See* Jennifer M. Gleason & Elizabeth Mitchell, *Will the Confluence Between Human Rights and the Environment Continue to Flow? Threats to the Rights of Environmental Defenders to Collaborate and Speak Out*, 11 OR. REV. INT'L L. 267, 284 (2009) (noting that after the 9/11 terrorist attacks of 2001, laws around the world began increasing penalties on terrorism and expanding language to include vague definitions which have now "extended well beyond the original intention of targeting terrorists" and can be used against environmental dissenters); *see also* Eleni Polymenopoulou, *Expressing Dissent: Gag Laws, Human Rights Activism and the Right to Protest*, 32 FLA. J. INT'L L. 337, 361 (2021) (providing that for instance, Canada's Anti-Terrorism Act of 2015 "broadly expanded" the definition of national security to include "the economic or financial stability of Canada," and Australian lawmakers increased penalties on protesters who disrupt economic activities); *see also* Kristoffer Tigue, *Bold Climate Protests are Triggering Even Bolder Anti-Protest Laws*, INSIDE CLIMATE NEWS (Nov. 22, 2022), https://insideclimatenews.org/todaysclimate/bold-climate-protests-are-triggering-even-bolder-anti-protest-laws (finding an increase in an Australian fine from a maximum of $400 to $15,000 and two years in jail).

78. *The Role of Business*, *supra* note 34, at 23.

79. Valdez, *supra* note 53, at 209.

blockages."[80] Furthermore, defenders who protest in front of institutions that happen to have a government official inside can be charged with "illegal deprivation of liberty."[81] This is especially ironic considering that 141 defenders in Oaxaca, another Mexican state, were arbitrarily detained between 2013 and 2018.[82] The reputational damage to defenders that results from these types of charges—even without any conviction—may "severely curtail, or even render impossible, future environmental defense work."[83] The time, energy, and resources it takes to defend oneself is a continued obstacle to ongoing work.[84] These conditions environmental defenders work under has been described as "psychological torture."[85]

In the United States, there has also been a significant trend in increasing anti-protest laws over the past five years.[86] Since 2017, state and federal lawmakers have introduced numerous bills intended to limit the right to protest.[87] Legislative initiatives aiming to criminalize or stiffen penalties for certain forms of protest, or to shield perpetrators of violence against protesters, have been proposed in most states.[88] Specifically, eighteen states have enacted anti-terrorism laws that enhance criminal penalties for "damaging," "tampering," or "impeding" critical "infrastructure sites, including oil refineries and pipelines."[89] The laws focus more on gas and oil because companies, including the previously mentioned Enbridge

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80. *See* Valeria Guarneros-Meza & Gisela Zaremberg, *Mapping Violent Conflicts in the Mexican Extractive Industry*, OPEN DEMOCRACY (Oct. 28, 2019, 12:01 AM), https://www.opendemocracy.net/en/democraciaabierta/ilustrando-conflictos-en-la-industria-extractiva-de-m%C3%A9xico-en.

81. *The Role of Business*, *supra* note 34, at 29.

82. *See* Ligimat Perez, *The Case of Pablo Lopez: A Murder Trial That Could Shape the Future of Mexican Forests*, FRONT LINE DEFS. (Nov. 6, 2019), https://www.frontlinedefenders.org/en/blog/post/case-pablo-lopez-murder-trial-could-shape-future-mexican-forests.

83. *See* Birss, *supra* note 23 at 319–20.

84. *See* Submission to the UN Special Rapporteur on Human Rights and the Environment, *Environmental Human Rights Defenders and Healthy Ecosystems and Biodiversity*, NOT ONE MORE (May 29, 2020), https://www.ohchr.org/sites/default/files/Not1MoreInputs.docx.

85. *Id.*

86. *See generally USA: Penalties for Protestors Increasing*, CIVICUS (Aug. 9, 2021), https://monitor.civicus.org/updates/2021/09/08/penalties-protestors-increasing-undermining-freedoms-assembly-and-expression.

87. *Analysis of US Anti-Protest Bills*, INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/post/news/analysis-of-anti-protest-bills (last updated Feb. 25, 2023).

88. *See US Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker (last updated Sept. 25, 2023).

89. Gabriella Sanchez & Rachel Levinson-Waldman, *Police Social Media Monitoring Chills Activism*, BRENNAN CTR FOR JUST. (Nov. 18, 2022), https://www.brennancenter.org/our-work/analysis-opinion/police-social-media-monitoring-chills-activism ("The laws — supported by energy companies — generally rely on vague and broad language that could suggest even benign actions, like knocking down safety cones near a critical site, warrant prosecution.").

Canadian company of Line 3, have been instrumental in lobbying for these laws.[90]

Environmental defenders can also be criminalized in the court of public opinion through efforts to stigmatize them and their work. Authorities can harm environmental defenders' reputations through media and messaging which impairs environmental defenders' ability to garner community support.[91] Environmental defenders are often described as violent, undemocratic,[92] anti-development, anti-capitalist,[93] and "foreign agents."[94] This type of messaging can turn the community away and force the environmental defender to spend time and resources defending their reputations rather than furthering their environmental cause.[95]

iii. Procedural Barriers

Procedural processes are also weaponized to impede an environmental defender's work. Perhaps the most critical procedural protection against FDI violence is free, prior, and informed consent ("FPIC") which permits indigenous peoples to give or withhold consent to a project that may affect them or their

90. *See id.*

91. *See* Eduardo Mosqueda, *Making Good on Promises: How Mexico Can Transform the Lives of Environmental Defenders by Implementing the Escazú Agreement*, GLOB. WITNESS (Jan. 24, 2023), https://www.globalwitness.org/en/blog/making-good-on-promises-how-mexico-can-transform-the-lives-of-environmental-defenders-by-implementing-the-escaz%C3%BA-agreement (emphasizing that the UN Special Rapporteur on Human Rights has stated that "to control the message is also to control the possibility that these agents of change can do their work").

92. *See Honduras: The Deadliest Place to Defend the Planet*, *supra* note 56, at 16 (providing an example of how the Honduras government described internationally renowned and subsequently murdered activist Berta Cáceres and her colleagues as violent extremists "seeking 'the downfall of the government and of private enterprise'" and then brought a case against them for "attempting to undermine the democratic order.").

93. *See* Braaten, *supra* note 50, at 538 (explaining the term "red-tagging," which refers to accusing environmental sympathizers as communists).

94. Mark Stevenson, *Mexican President Calls Opponents Foreign Agents, Traitors*, ASSOCIATED PRESS (July 26, 2022, 11:33 AM), https://apnews.com/article/mexico-caribbean-city-national-security (providing that President Andrés Manuel López Obrador stated "Pseudo environmentalists come from Mexico City and other parts of the country, financed by the government of the United States"); *see also* Ruairi Casey, *Climate Activists: How States are Cracking Down on Protests*, DW (Dec. 10, 2022), https://www.dw.com/en/climate-activists-how-states-are-cracking-down-on-protests/a-64049601 (finding that stigmatization of environmental defenders by governments is a global problem. The French Interior Minister accused 4,000 activists protesting water grabbing of being "eco-terrorists" and the German Interior Minister called a protest stopping traffic "Green RAF").

95. *See generally How Land and Environmental Defenders Protect the Planet and How We Can Protect Them*, GLOB. WITNESS (June 4, 2021), https://www.globalwitness.org/en/blog/how-land-and-environmental-defenders-protect-planet-and-how-we-can-protect-them (discussing the dangers of being an environmental defender).

territories.[96] When communities agree to the project and accept compensation through this process, the environmental engagement is "likely to be non-violent."[97] In contrast, the absence of FPIC is a "root cause" of the violence against Mexican [environmental] defenders."[98] In 2013, the Inter-American Commission on Human Rights estimated that 2,600 mining concessions were operating on ancestral territories in Mexico without proper FPIC.[99] In the cases FPIC was attempted, it was a mere formality for projects that had already begun.[100] When communities are not consulted, dissent around the project is higher, and violence toward environmental defenders increases.[101]

This is just one procedural mechanism among many that are manipulated and abused to suppress the will of the people. Others include imposing additional procedural requirements such as organizational registrations and fees,[102] surveillance,[103] strategic lawsuits against public participation ("SLAPP"),[104] or some other interference intended to quiet dissent by making an environmental defender's work harder and more dangerous. This is only a small representation of all the challenges environmental defenders face as space is limited and the tactics employed are endless.[105] Suffice it to say that powerful entities can be creative and effective in

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96. *See* discussion *infra*, Part III.B.; *Guidelines for Applying Free, Prior and Informed Consent*, CONSERVATION INT'L, https://www.conservation.org/projects/free-prior-and-informed-consent-in-context (last visited Oct. 2, 2023).

97. Guarneros-Meza & Zaremberg, *supra* note 80.

98. *Their Faces*, *supra* note 71.

99. *Id.*

100. Rep. of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Mexico, U.N. Doc. A/HRC/37/51/Add.2, ¶ 69.

101. *See generally* Arnim Scheidel et al., *Environmental Conflicts and Defenders: A Global Overview*, 63 GLOB. ENV'T CHANGE, 2020 (discussing how violence against environmental defenders may be decreased with more support and better understanding).

102. *See generally* Polymenopoulou, *supra* note 77 (analyzing illegitimate repression of protest through prior restraints such as permit systems); *see* Gleason & Mitchell, *supra* note 77, at 277 (analyzing how some countries restrict where a nongovernmental organization's funding may come from or enact laws that give the government wide discretion to deny registration for organizations).

103. *Mexico to Investigate Alleged Human Rights Abuses by Military After Spying Claims*, THE GUARDIAN (Mar. 15, 2023), https://www.theguardian.com/world/2023/mar/15/mexico-to-investigate-alleged-human-rights-abuses-by-military-after-spying-claims (giving an example of how in March 2023, Mexico's military came under investigation for using Pegasus—a powerful spyware—to spy on prominent human rights activists).

104. Matthew Hale, *The Critical Role of Environmental Rights Defenders—and the Risks They Face*, FREEDOM HOUSE (Nov. 10, 2022), https://freedomhouse.org/article/critical-role-environmental-rights-defenders-and-risks-they-face (stating that SLAPP suits or "strategic lawsuit against public participation" are "one of the most-used tools by governments for stymying activists." It "keep[s] civic organizations tied up in endless lawsuits based on trumped-up charges, usually with the assistance of politicized courts, with the aim of wearing the activists down—their morale or their bank accounts, or both.").

105. *See generally* Scheidel, *supra* note 101 (discussing the kinds of challenges environmental protestors can face).

suppressing dissent through formal means when financial interests are at risk.

III. GOVERNING ENVIRONMENTAL DEFENDERS, STATES, AND FOREIGN DIRECT INVESTMENT

International customary and treaty law is clear: environmental defenders have a right to dissent peacefully.[106] What is less clear is what implementing that right against state parties and corporate entities engaged in FDI looks like. Part III begins by outlining the rights afforded to defenders under public legal systems and the obligations state and private parties have in respecting those rights. The analysis then continues into private international law to explore how the ISDS system constrains state sovereignty and impairs the realization of these critical rights.

A. Public Law: Rights and Responsibilities

International, regional, and domestic law articulates the right of environmental defenders to carry out their work and imposes mandatory and voluntary obligations upon state parties and private entities to protect, respect, and remedy this established right.[107]

i. International Right to Environmental Dissent

The United Nations Declaration on Human Rights Defenders ("UN DHRD") is the governing framework for environmental defenders.[108] The UN General Assembly adopted its most recent revision, the 1999 Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms, by consensus, establishing that "everyone has the right… to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."[109] This provides certain rights to defenders, such as seeking protection, conducting human rights work, meeting or assembling peacefully, making complaints about official acts and having them reviewed, and benefiting from an effective remedy and protection under national

106. *See* Universal Declaration of Human Rights (UDHR), G.A. Res. 217 A, art. 20, Dec. 10, 1948 [hereinafter UN DHRD].

107. *See Environmental Human Right Defenders Must Be Heard and Protected*, U.N. OFF. OF THE HIGH COMM'R (Mar. 9, 2022), https://www.ohchr.org/en/stories/2022/03/environmental-human-rights-defenders-must-be-heard-and-protected.

108. *See* UDHR, *supra* note 106.

109. G.A. Res. 53/144, art. 1 (Mar. 8, 1999).

law.[110] It also imposes on states the responsibility to protect, promote, and implement all human rights, adopt necessary legislative steps, conduct prompt and impartial investigations, and take all necessary measures to ensure protection.[111] Lastly, and unusually, the resolution includes private actors by emphasizing that "*everyone* has duties towards and within the community," and all have a duty to promote human rights and safeguard democracy, especially those with professions that can affect the human rights of others.[112]

Although the resolution is non-binding, it bases the rights and responsibilities it establishes on international instruments that are legally binding.[113] Namely, it reiterates the rights of freedom of expression, opinion, association, and peaceful assembly enshrined in the International Covenant on Civil and Political Rights ("ICCPR").[114] The United Nations Special Rapporteur on the situation of human rights defenders observed that, taken together, these rights underpin the right to protest and an extensive list of General Assembly resolutions reiterates that these covenants apply to the protection of human rights defenders.[115]

ii. Regional Right to Protection

Regional human rights instruments and case law also confirm the right to protest. The Inter-American Commission on Human Rights recognizes that the right to protest is derived from the "collective form of expression" and applies the principles of proportionality and strict necessity to any derogation of that right.[116]

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110. *Id.* at arts. 1, 5, 8, 9.

111. *Id.* at arts. 2, 9, 12.

112. *Id.* at art. 18 (emphasis added); Special Rapporteur on the Human Rights Defenders, *Declaration on Human Rights Defenders*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders (last visited Mar. 24, 2023).

113. Special Rapporteur on the Human Rights Defenders, *supra* note 112.

114. G.A. Res. 53/144, arts. 5, 6, 9 (Mar. 8, 1999); G.A. Res. 2200A (XXI), arts. 19, 21, 22 (Dec. 16, 1966).

115. *See* Polymenopoulou, *supra* note 77, at 342; G.A. Res. A/HRC/22/6 (May 23, 2013) (explaining that the Human Rights Council "urges States to create a safe and enabling environment in which human rights defenders can operate free from hindrance and insecurity"); *see generally* G.A. Res. 68/181 (Dec. 18, 2013) (calling on States to prevent abuses against defenders committed by non-State actors); Human Rights Council, Margaret Sekaggya (Special Rapporteur), Rep. of the Special Rapporteur on the Situation of Human Rights Defenders, U.N. Doc. A/HRC/25/55 (Dec. 23, 2013); G.A. Res. 25/18 (Apr. 11, 2014); G.A. Res. 68/181 (Dec. 18, 2014); Org. of Am. States AG/RES.1671 (June 7, 1999); Org. of Am. States AG/RES.1818 (June 5, 2001).

116. *See* Org. of Am. States, Office of the Special Rapporteur on Freedom of Expression, *The Inter-American Legal Framework Regarding the Right to Freedom of Expression*, at 103, OEA/Ser.L/V/II (Dec. 30, 2009).

The crown jewel for environmental defenders in Latin America and the Caribbean is the legally binding Escazú Agreement.[117] It was ratified by Mexico and entered into force on International Mother Earth Day on April 22, 2021.[118] It is the first treaty in the world to explicitly provide binding protection to environmental defenders.[119] The stated objective of the agreement is to:

> guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.[120]

The agreement provides procedural rights to information,[121] public participation,[122] and access to justice.[123] Most importantly for the purposes here, Article 9 explicitly addresses environmental defenders and mandates that state parties "guarantee a safe and enabling environment" so environmental defenders can act "free from threat, restriction and insecurity."[124] Furthermore, state parties "*shall* take adequate and effective measures" to recognize and protect the right and "*shall* also take appropriate, effective and timely measures to prevent, investigate and punish" threats.[125] These obligations are reinforced by the requirement that states adopt necessary laws in their domestic provisions[126] and provide resources to these goals "to the extent of its ability and in accordance with its national priorities."[127] Lastly, the Escazú Agreement invokes the "principle of permanent sovereignty of States over their natural

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117. *See generally* Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean art. 19 (Apr. 3, 2018) XXVII-18 [hereinafter Escazú Agreement].

118. *See* Attila Panovics, *The Escazú Agreement and the Protection of Environmental Human Rights Defenders*, 2021 PECS J. INT'L & EUR. L. 23 (2021) (noting this treaty also stands out as a regional environmental treaty in Latin America and the Caribbean and a Multilateral Environmental Agreement under the UN).

119. *See id.* at 24.

120. Escazú Agreement, *supra* note 117, at art. 1.

121. *Id.* arts. 5, 6 (including the principle of maximum publicity to guarantee disclosure that interested parties will be able to access and understand).

122. *Id.* art. 7 (stating that the right to public participation in environmental decision making requires states to guarantee open, timely, and inclusive participation where the decision-maker adequately considers the insights provided.

123. *Id.* art. 8 (stating that the access to environmental justice pillar provides interested parties the right to request precautionary measures to prevent, mitigate or compensate the damages from alleged wrongdoing).

124. *Id.* art. 9.

125. *Id.* (emphasis added).

126. *Id.* art. 4, ¶ 3.

127. *Id.* art. 13.

resources" which calls into question the state's ability to enter into agreements that actively limit its sovereignty.[128]

Although the Escazú Agreement puts forth significant procedural advancements, the challenge of domestic implementation remains.[129] It is too soon to tell how Mexico will choose to implement the treaty into its domestic law, but initial progress is not encouraging.[130] There were fourteen environmental defender killings in 2018 when Mexico signed the agreement and thirty in 2020 when it ratified the instrument before Congress.[131] Although the treaty requires adequate funds for its protection mechanisms, Mexico subsequently defunded the National Protection Mechanism which works to protect environmental defenders.[132] Ultimately, the Escazú Agreement reinforces the rights that environmental defenders already enjoyed under international law, but that Mexico has historically not protected, respected, or remedied.[133]

State compliance with human rights standards is measured through due diligence.[134] The Inter-American Court of Human Rights held that a state may be liable in international courts if it supports or condones a pattern of abuse, does not take measures to prevent it, or fails to investigate or punish the third party's action.[135] This applies

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128. *Id.* art. 3(i).

129. *See* Laura Cahier, *Environmental Justice in the United Nations Human Rights System: Challenges and Opportunities for the Protection of Indigenous Women's Rights Against Environmental Violence*, 13 GEO. WASH. J. ENERGY & ENV'T L. 37, 54 (2022) (noting that "the biggest challenge of the Escazú Agreement is ensuring its domestic implementation").

130. *See* Mosqueda, *supra* note 91.

131. *Id.*

132. *See* José Miguel Vivanco, *Another Blow to Mexican Journalists and Human Rights Defenders*, HUM. RTS. WATCH (Nov. 3, 2020, 6:40 PM), https://www.hrw.org/news/2020/11/03/another-blow-mexican-journalists-and-human-rights-defenders (providing that in 2012, Mexico established the Protection Mechanism for Human Rights Defenders and Journalists, which worked to "quickly and independently decide how and when to assign bodyguards, panic buttons, armored cars, and relocation assistance" to help protect 1,300 people under threat. The little protection it previously provided was severely restricted when Mexico's Congress voted to close the independent public trusts that funded the program. The vote occurred only a year after the UN Office of the High Commissioner for Human Rights reiterated the importance of sufficient funding for the program); *see also* José Miguel Vivanco, *Mexican Journalism in Mourning*, HUM. RTS. WATCH (June 11, 2020, 5:28 PM), https://www.hrw.org/news/2020/06/11/mexican-journalism-mourning (stating that a UN study found that 90% of crimes against journalists go unpunished in Mexico).

133. Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, ECLAC Implementation Guide, table I.4, 6 Apr. 2022, LC/TS.2021/221.

134. G.A. Res. 56/83, art. 12 (Dec. 12, 2001) (declaring that a state has breached its international obligation "when an act of that State is not in conformity with what is required of it by that obligation."); *see also* Pulp Mills on the River Uruguay (Arg. V. Uru.), Judgement, I.C.J. Reports 2010, ¶¶ 197, 223 (Apr. 2010) (articulating that the standard of due diligence owed is determined by the primary legal obligation, which is usually established by a treaty but may also be guided by soft law instruments).

135. *See* Velásquez Rodríguez v. Honduras, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 173–74 (July 29, 1988).

to state actions regarding third parties as well,[136] as outlined by the United Nations Guiding Principles on Business and Human Rights ("UNGPs"), which establishes how states and private entities should pursue the fulfillment of these rights in the context of third parties.[137] The business responsibility established includes "refraining from harming defenders, restricting their rights or interfering with their activities" and "engag[ing] with defenders to identify, mitigate and remedy any adverse human rights violations that may arise from their operations."[138] However, because the instrument is not binding on private parties and cannot directly regulate FDI, the enforcement and oversight of private parties' due diligence falls to domestic courts.[139]

The state has a parallel "duty to protect [environmental] human rights defenders from threats and violence by State and non-State actors" and is liable to due diligence principles in international courts.[140] Due diligence includes the following: public support for the work of defenders,[141] a legal, institutional, and administrative framework,[142] strong, independent, and effective national human rights institutions,[143] effective prevention policies and mechanisms, and policies and practices against impunity.[144] In practice, this means that Mexico is not only responsible for its own abuse of environmental defenders, but could also be held liable for a breach of due diligence where it fails to adequately regulate FDI and private parties that abuse environmental defenders.[145]

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136. Workers of the Fireworks Factory in Santo Antonio de Jesus and their Families v. Brazil, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 407, ¶ 204 (July 15, 2020) (holding that Brazil was responsible for the death of sixty-four workers at a private factory explosion because it did not carry out the proper regulation, monitoring, and supervision of the factory's activities, despite being aware of the hazardous and dangerous nature); *see also* IACHR Second Report, *supra* note 11, at ¶ 315 ("Effective enforcement of the environmental protection measures in relation to private parties, particularly extractive companies and industries, is essential to avoid the State's international responsibility for violating the human rights of the communities affected by activities detrimental to the environment.").

137. *See The UN Guiding Principles on Business and Human Rights: An Introduction*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. 1, 2–3 (2011), https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.

138. Hines, *supra* note 18, at 111.

139. *See id.*

140. *The Role of Business*, *supra* note 34, at 14.

141. Margaret Sekaggya, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 84, U.N. Doc A/ HRC/25/55 (Dec. 23, 2013).

142. *Id.* at ¶ 62.

143. *Id.* at ¶¶ 78–79.

144. Merits, Reparations, and Costs (Huilca Tecse v. Peru), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 82 (Mar. 3, 2005).

145. *See id.*; *see generally* Sekaggya, *supra* note 141.

iii. Domestic Implementation

The rights of environmental defenders are protected domestically in law, if not in practice.[146] Article 7 of Mexico's Constitution provides freedom of expression, speech, opinion, and ideas, and Article 9 guarantees the right to peaceful assembly.[147] However, these rights exist where crimes in Mexico suffer a 95% impunity rate and are rarely investigated or prosecuted so are seldom realized.[148]

Similarly, the U.S. Constitution provides for "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[149] Additionally, international due diligence obligations apply to state conduct that creates effects outside of its borders as well, which means the United States must ensure its citizens—including corporate actors—do not perpetuate abuse abroad.[150] However, this domestic right and international obligation is territorially restricted by the recent narrowing of the Alien Tort Statute, which generally no longer applies to a corporation's foreign conduct.[151] In practice, this means that U.S. corporations engaged in FDI are not subject to suit in the United States for abuses committed against environmental defenders abroad, even if the same actions against U.S. citizens would be actionable.[152]

Between Mexico's almost complete regime of impunity and the United States' refusal to hear claims concerning human rights abuses that corporations commit abroad, Mexican environmental defenders whom FDI projects have victimized essentially have no effective recourse through domestic courts.[153]

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146. *See* Mosqueda, *supra* note 91 ("Why does this happen in Mexico? Is it because there are no laws? No. This is a country that signs onto almost every international human rights instrument and recognizes human rights at the highest level of law but lacks the capacity[—]and the political will[—]to implement them.").

147. *Mexico's Constitution of 1917 with Amendments Through 2015*, COMPAR. CONSTS. PROJECT (Apr. 23, 2023), https://www.constituteproject.org/constitution/Mexico_2015.pdf.

148. Albinson Linares, *Violent Crimes Rise in Mexico; 94.8% Go Unpunished*, NBC NEWS (Oct. 12, 2021, 1:21 PM), https://www.nbcnews.com/news/latino/violent-crimes-rise-mexico-948-go-unpunished-rcna2846.

149. U.S. CONST. amend. I.

150. *See generally* Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598 (2007) (discussing how actions by large transnational corporations abroad can become the responsibility of the home country).

151. Jacqueline Lewis, *Making the Case for a U.S. Corporate Accountability Agenda*, ICAR (May 19, 2022), https://icar.ngo/making-the-case-for-a-u-s-corporate-accountability-agenda ("Additionally, although laws like the Alien Tort Statute (ATS) allow non-citizens to sue in federal court for certain human rights violations, the Supreme Court has interpreted the statute so narrowly over the last 20 years that corporations are often shielded from liability for even the most egregious of abuses.").

152. *See id.*

153. *See id.*; Linares, *supra* note 148.

B. Private Law: The Rights of Foreign Direct Investment and ISDS

The main obstacle to realizing the rights of environmental defenders is not a lack of law, as Mexico has signed on to the highest instruments of protection, but rather the political will to implement them.[154] This section seeks to explore the reason for the disconnect between law and practice by analyzing the relevant trade and investment treaties found in private international law that influence domestic implementation.

FDI falls within a complex system of bilateral and multilateral treaties that protect the private right to future profits over a state's sovereignty and community interests.[155] The Inter-American Human Rights Commission concluded that "many of the projects developed by the extractive industries are the result of free-trade agreements and commitments made to increase foreign investment in some [s]tates."[156] These trade deals move states towards a more liberalized economy and places state power in the hands of corporations, at the expense of those who oppose them.[157]

There are 3,300 investment agreements or clauses in treaties where state parties waive their sovereign immunity and provide foreign investors with extensive protections for their investments.[158] Two common inclusions are protections from regulatory takings and the requirement of fair and equitable treatment.[159] The terms of International Investment Agreements ("IIAs") usually differ, but generally, indirect or regulatory expropriation "occurs when a state takes effective control of or otherwise interferes with the use, enjoyment or benefit of, an investment, strongly depreciating its economic value, *even without a direct taking of property*."[160] This vague categorization can be just as broad as it sounds. Regulatory changes such as a higher minimum wage, cancellation of waste disposal contracts, denying mining permits, or implementing environmental standards have all been the basis of multi-million and even billion-dollar claims.[161] Essentially, these clauses take private investor risk and insure it by "grant[ing] . . . investors the right to

154. *See Their Faces: Defenders on the Frontline*, *supra* note 71.

155. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 209 n.36, 221 (2008).

156. IACHR Second Report, *supra* note 11, at 133 ¶ 313.

157. *See id.*

158. *See* Sarah Lazare, *How Biden Can End Secretive Corporate Tribunals*, THE AM. PROSPECT (Feb. 2, 2023), https://prospect.org/world/2023-02-02-investor-state-dispute-settlement.

159. *Id.*

160. *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda*, IISD, https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-4-indirect-expropriation-regulatory-taking (last visited Mar. 13, 2023).

161. *See* Lazare, *supra* note 158.

continued profits,"[162] with taxpayers ultimately footing the bill when investors challenge state policies.[163] Colonial ties and neocolonialist effects further exacerbate the injustice of this corporate protection system.[164]

Only investors may bring claims, and they are heard through a private arbitration panel known as ISDS.[165] The average award in ISDS ranges from $10 to $100 million dollars, and the investor prevails 56% of the time when the case is decided on the merits.[166] This leads states to favor compliance with investment agreements over human rights treaties because they face financial penalties for noncompliance in investment treaties which are highly enforceable while breaches of human rights treaties are not.[167] For example, Guatemala did not comply with an Inter-American Human Rights Commission order requiring it to shut down a mine for water, health, and indigenous rights reasons because the cost of possible damage awards in ISDS arbitration was prohibitively high.[168] States facing

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162. Okechukwu Ejims, *Using Investment Treaties to Hold Companies Accountable: A Case Study of The Morocco-Nigeria Bilateral Investment Treaty*, BUS. & HUM. RTS. RES. CTR. (Oct. 5, 2022), https://www.business-humanrights.org/en/blog/using-investment-treaties-to-hold-companies-accountable-a-case-study-of-the-morocco-nigeria-bilateral-investment-treaty.

163. *See* Jen Moore & Manuel Perez-Rocha, *Extraction Casino: Mining Companies Gambling with Latin American Lives and Sovereignty Through Supranational Arbitration*, INST. FOR POL'Y STUD. 15, Apr. 2019, at 3 ("[T]he low risk that corporations face to gamble on a case valued in the millions, or even billions of dollars, along with the increasing availability of third-party funding and rules biased in their favor, provide strong incentives for ever more outrageous suits.").

164. *See* Howard W. French, *Ghana's 'Success' Exposes the West's Toxic Development Model*, FOREIGN POL'Y, https://foreignpolicy.com/2022/07/22/ghana-economic-development-mining-gold-cocoa-oil (last visited Apr. 16, 2023) ("The game of international economics is as heavily rigged in favor of rich countries today as it was when Britain clung to its late-stage empire in the wake of World War II to fund its recovery. The most prosperous nations will continue to source their needs for fuels, minerals, and commodities from the weakest ones—which are heavily concentrated in Africa—driving environmental devastation and predatory economic behavior there that the rich countries would never countenance at home."); *see* Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L. J. 215, 222 n.25 (1996) (noting that stabilization clauses, a form of indirect expropriation protection, are especially prevalent in developing states with limited bargaining power).

165. Moore & Perez-Rocha, *supra* note 163, at 5, 11.

166. *See* Jonathan Bonnitcha et al., *Damages and ISDS Reform: Between Procedure and Substance*, 14 No. 2 J. OF INT'L DISP. SETTLEMENT 213, 219 (2021) (giving the median award for ISDS); Lazare, *supra* note 158 (explaining that large companies worth over $10 billion have approximately a seventy percent success rate).

167. *See* Waelde & Ndi, *supra* note 164, at 245–46, 248 n.134 (highlighting the enforceability of investment agreements).

168. *See* Joseph Ezzo, Comment, *The Marlin Mine, Guatemala: Environmental and Indigenous Human Rights Concerns*, 2 ARIZ J. ENV'T L. & POL'Y 1 (Apr. 2011); *see also* Lyuba Zarsky & Leonardo Stanley, *Searching for Gold in the Highlands of Guatemala: Economic Benefits and Environmental Risks of the Marlin Mine*, GLOB. DEV. AND ENV'T INST., Sept. 2011, at 12 ("In response to an order to suspend operations, Goldcorp would likely sue for compensation, arguing that the measure was 'equivalent to expropriation.'").

pressure from citizens to cancel extractive contracts face a high possibility of expensive payouts if they do and it becomes prohibitively expensive to comply with the democratic process if it does not align with the economic process.[169]

Because of this regime and the damages at stake, states may be reluctant to cancel a permit or impose procedural obligations in the face of community dissent.[170] Mining companies have filed dozens of multimillion-dollar claims in Latin America.[171] Mexico currently faces $3.5 billion in threatened or pending ISDS suits—roughly 10% of the amount it spent on healthcare at the beginning of the Covid-19 pandemic.[172] It had to pay $16.7 million after it canceled a mining permit due to pollution concerns and community protests.[173] States are having to pay exorbitant damages for trying to protect their citizens.

One environmental defender explained how "it's cheaper for governments to throw some human rights defenders in jail than pay for those million-dollar lawsuits."[174] State parties that respond to protests by taking action against an international corporation's domestic harm face trade penalties and damages.[175] Even protest itself may be considered a trade impediment justifying compensation "if it impedes the flow of goods."[176] Where a state does impose environmental restrictions on investors, such as when Ecuador required Chevron to pay $9.5 billion for remediation and health care for communities suffering from decades of pollution, the ISDS system overturned the domestic finding and invalidated the judgment.[177] To avoid trade disputes from responding to community concerns,

169. Lazare, *supra* note 158.

170. *Id.*

171. *Id.* (elaborating that Uruguay faces $3.5 billion in pending or threatened suits and Columbia faces $18 billion).

172. This number was determined using 2.5% of GDP on health with its 2020 GDP of $1,090 billion USD to find a health budget of $27.25 billion. *See Mexico GDP 1960-2023*, MACROTRENDS, https://www.macrotrends.net/countries/MEX/mexico/gdp-gross-domestic-product (last visited Apr. 16, 2023); *see* MND Staff, *Mexico Spends 2.5% of GDP on Health; At Least 6% Is Recommended*, MEX. NEWS DAILY (Aug. 28, 2020), https://mexiconewsdaily.com/news/mexico-spends-2-5-of-gdp-on-health-at-least-6-is-recommended; *see also* Lazare, *supra* note 158.

173. Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 131 (Aug. 30, 2000), 5 ICISD Rep. 212 (2002).

174. Moira Birss, *When Defending the Land Becomes a Crime*, LAND PORTAL (Sept. 7, 2018), https://landportal.org/node/76014.

175. Lazare, *supra* note 158.

176. Birss, *supra* note 174.

177. *Ecuador's Highest Court vs. a Foreign Tribunal: Who Will Have the Final Say on Whether Chevron Must Pay a $9.5 Billion Judgment for Amazon Devastation?*, PUBLIC CITIZEN 1, 1 (Dec. 2013), https://www.citizen.org/sites/default/files/chevron-decision-2013.pdf; Aldo Orellana López, *Chevron vs Ecuador: International Arbitration and Corporate Impunity*, OPEN DEMOCRACY (Mar. 27, 2019, 12:01 AM), https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity.

"governments outlaw protest and criminalize activism" which heightens the danger environmental defenders face.[178]

IV. INCREASING THE PROTECTION OF ENVIRONMENTAL DEFENDERS IN IIAS

The robust international legal regime protecting environmental defenders has proven insufficient. Especially when pitted against enforceable and expensive trade obligations to FDI, states continually fail to protect environmental defenders. Current proposals to address the issue encourage corporate actors to respect human rights through voluntary corporate social responsibility commitments and due diligence.[179] They put the onus of doing the right thing on the same private entity that profits enormously by doing the wrong thing.

Corporate social responsibility is based on the private actor's self-regulation to make a concerted effort to do business in a way that enhances rather than degrades society.[180] The plethora of global corporate social responsibility initiatives, such as the Extractive Industries Transparency Initiative, the Global Compact, and the Global Reporting Indicators are "more effective at public relations than at changing real-life outcomes" because the initiatives depend on voluntary corporate action.[181] Critics have emphasized that these obligations are often ideology-driven, too vague to apply, and, ultimately, that there is no monetary benefit to incentivize or payment to avoid, so corporations do not substantially change their behavior.[182]

Even compulsory corporate standards fall short. Mandatory due diligence laws create binding obligations on companies to manage their processes in compliance with human rights law.[183] However, a process-based focus rather than a results-based focus may only ensure "cosmetic compliance" and shield corporations from liability because a company that goes through the recommended steps but does not resolve the problem can show due diligence compliance (rather than substantive compliance) to avoid liability.[184]

178. Birss, *supra* note 174.

179. Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L. J. 37 (2008).

180. *See* Ejims, *supra* note 162.

181. *See* Andy Hira, *Corporate Social Responsibility Commitments: All Talk, No Action*, THE CONVERSATION (Oct. 21, 2020, 11:43 AM), https://theconversation.com/corporate-social-responsibility-commitments-all-talk-no-action-146511.

182. *See id.*

183. Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*, 36 LEIDEN J. INT'L L. 389, 389 (2023) ("Mandatory human rights due diligence (HRDD) laws in the European Union (EU)—both enacted and in the making—seem to be a promising tool to harden soft international standards in the business and human rights (BHR) field.").

184. *See id.* at 390.

Furthermore, due diligence laws are once again implemented by the state party and may fall victim to the same domestic enforcement issues described above when faced with international investment pressure.[185]

As this article demonstrates, Mexico and the United States are not fulfilling their own due diligence obligations of providing public support for the work of defenders, establishing strong, independent, and effective enforcement institutions, and engaging effective prevention and investigation policies.[186] The robust set of international protections already in place—and recently added by the Escazú Agreement—signify that the problem of state compliance to regulating harmful and dangerous FDI is not for lack of international obligations or domestic law, but rather a state's inability to effectively implement the law, due in large part to the chilling effect of FDI suits.[187]

The following proposals seek to remedy this through binding obligations that go beyond voluntary commitments and look to alleviate the chilling effect ISDS suits have by separating a state's enforcement and regulation of FDI from ISDS claims. The first two proposals use labor provisions in the USMCA as an example which could be replicated with environmental defender human rights. The first proposal calls for binding obligations and interpretive guidance within the IIA that would obligate states and FDI to adhere to specific standards. The second proposal gives that obligation teeth by integrating an independent and specialized complaint mechanism which includes independent review, public access, and trade penalties. The final proposal is more ambitious, but also more comprehensive: eliminate ISDS in trade agreements to preserve states' sovereignty and improve their ability to meet their due diligence obligations.

A. Include Interpretive and Enforceable Obligations

Investment agreements and ISDS are "one of the most prominent sources of enforceable hard law for business," which makes the IIA

185. *Id.* at 403.

186. *See* González v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 497 (Nov. 16, 2009); *see also* IACHR Second Report, *supra* note 11, at 137–38 ¶ 318; Margaret Sekaggya (Special Rapporteur on the Situation of Human Rights Defenders), *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 89, U.N. Doc. A/HRC/22/47 (Jan. 16, 2013); Margaret Sekaggya (Special Rapporteur on the Situation of Human Rights Defenders), *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 62, U.N. Doc. A/HRC/25/55 (Dec. 23, 2013) ("[E]xistence of laws and provisions at all levels, including administrative provisions, that protect, support, and empower defenders.").

187. *See generally* Deva, *supra* note 183.

itself the best avenue for enforceable human rights obligations.[188] Rather than promulgate more human rights instruments that depend on discretionary state enforcement, human rights obligations for both investors and state parties should be included in the IIA directly.[189] Including human rights in an IIA can impose obligations onto multinational corporations, offer a robust enforcement mechanism, and ensure that "norm development in [the] business area[] does not undermine human rights issues" by making the corporate rights found in IIAs to be parallel with corporate ethical obligations abroad.[190]

It is beyond the scope of this article to delineate the specific and highly technical ways that environmental defenders could, and should, be protected. The Esperanza Protocol is an eighty-three page document that explicitly lists the way state parties should implement effective investigations and meaningful legal protections for environmental defenders.[191] Rather than reiterate the specific accountability practices that should be implemented, this article seeks to propose a different way of promulgating these principles so that corporate and state actors are more likely to adhere.

There are already efforts to include other human rights obligations in IIAs. The most salient example between the United States and Mexico is the incorporation of labor rights into the recently negotiated USMCA, effective in 2020.[192] Due in part to the United States' protectionist posture,[193] labor rights have broken the barrier between established human rights obligations in trade and

188. *See* Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements*, 38 U. PA. J. INT'L L. 425, 464 (2017).

189. *See id.* at 465–67 (discussing incorporating the obligation into the preamble to signify the objectives of the treaty, including substantive obligations in the text, requiring human rights impact assessments, due diligence in supply chains, codes of conduct, and remedy systems, etc.); *see also* Winibaldus S. Mere, *Recent Trend toward a Balanced Business and Human Rights Responsibility in Investment Treaties and Arbitrations*, 4 HOMA PUBLICA 1, 6 (2020) (explaining how the voluntary nature of a due diligence obligation such as the OECD Guidelines and UN Guiding Principle soft laws can be incorporated into investment agreements to become binding).

190. Choudhury, *supra* note 188, at 430.

191. *See generally* CTR. JUST. INT'L L., THE ESPERANZA PROTOCOL (2021), https://esperanzaprotocol.net/wp-content/uploads/2022/06/Esperanza-Protocol-EN-2.pdf (stating the standards that can be used to protect human rights defenders) [hereinafter ESPERANZA PROTOCOL].

192. Agreement Between the United States of America, the United Mexican States, and Canada, ch. 23, July 1, 2020, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA].

193. *See* Desiree LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORDHAM L. REV. 1, 1 (2021) ("[P]olicymakers incorporate some rights into U.S. trade agreements because they view those rights as critical to protecting national industries and citizens from unfair trade conditions."); *see also* Alvaro Santos, *Reimagining Trade Agreements for Workers: Lessons from the USMCA*, 113 AM. J. INT'L L UNBOUND 407, 411 (2019); *see also* Walter Bonne, Note, *Unresolved Labor Disputes under the USMCA's Rapid Response Mechanism: Probing the Applicability of the ATS in Light of Nestlé v. Doe*, 19 N.Y.U. J. L. & BUS. 189, 189, 191–92 (2022).

investment treaties.[194] Although protecting workers is not entirely analogous to protecting environmental dissenters because promoting worker rights abroad is thought to preserve equity for domestic workers,[195] the language and approach used to enforce labor rights is a groundbreaking example that illustrates how this practice may be expanded to include protections for environmental defenders.[196]

The USMCA creates substantive obligations on state parties to adopt and maintain the International Labor Organization's labor standards and explicitly states that "it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws."[197] It is the first U.S. trade agreement that imposes binding rights and obligations and enables enforcement against private corporations through trade.[198]

To implement a similar structure that protects environmental defenders, states would need to define the binding obligations upon the state parties and investors clearly.[199] There is some concern that outlining specific human rights obligations in thousands of disparate treaties may create fragmentation and risk exporting domestic standards abroad.[200] One of the best ways to work around this is incorporating international guidelines, such as how the International Labor Organization's standards were used in the USMCA.[201]

For protecting human rights defenders, this would mean incorporating the community-led Esperanza Protocol into a binding obligation within the trade agreement.[202] Incorporating the international protocol would be a way to bolster the community-led work that has already been done to create effective standards while providing an effective enforcement mechanism.[203] When a foreign

194. Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights*, 60 INT'L & COMPAR. L.Q. 573, 581 (2011) (""[I]nnovative trend in the 'new generation' of renegotiated or recently concluded IIAs, where States are 'strik[ing] a balance between maintaining a comprehensive definition of investment . . . [and] address[ing] a broader range of issues . . . ." (*quoting* United Nations Conference on Trade and Development, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (2007), at 71)).

195. *See* LeClercq, *supra* note 193, at 4.

196. *See* Choudhury, *supra* note 188, at 425–26; *see also* Simma, *supra* note 195, at 581.

197. USMCA, *supra* note 192, arts. 23.3–23.4.

198. LeClercq, *supra* note 193, at 26; Santos, *supra* note 194, at 408.

199. *See* Choudhury, *supra* note 188, at 426, 453–54.

200. LeClercq, *supra* note 193, at 9, 38–40 (noting that "the unilateral definitions and interpretations assigned to those rights through trade may obstruct cohesive international rights governance").

201. *See id.* at 36.

202. *See* Choudhury, *supra* note 188, at 425–26; *see also About the Esperanza Protocol*, ESPERANZA PROTOCOL, https://esperanzaprotocol.net/about-the-esperanza-protocol (last visited Apr. 2, 2023) ("[P]rovide[ing] useful guidance for government officials, prosecutors, judges, human rights defenders (HRDs), journalists, and others" as well as a "roadmap for establishing public policies to effectively address threats as well as guidelines for the prosecution of threats." It goes beyond "general standards of due diligence to create "concrete guidelines.").

203. *See About the Esperanza Protocol*, *supra* note 202.

company attempts to sue a state party for enforcing free speech and protections for environmental defenders, the state will have a substantive and legitimate counterclaim against the corporation to negate damages.[204]

Ultimately, the most important substantive obligation to include in the IIA regarding human rights provisions is to specify a trade remedy for noncompliance such as an exclusion of the goods, tariffs, or other economic-based trade remedies.[205] By creating substantive obligations with economic damages, investors that benefit from the opening of foreign markets through IIAs will have an obligation to respect, protect, and remedy the human rights of environmental defenders as well.[206]

B. Incorporate an Independent and Specialized Review Mechanism

The second aspect of the labor provisions in the USMCA is the independent and specialized review mechanism that empowers local claims.[207] A similar provision should be replicated to protect against the abuse of environmental defenders tied to FDI. The rapid response mechanism ("RRM") reviews violations against the "rights of free association, collective bargaining, and other labor rights" apart from the ISDS arbitration system.[208] It is innovative because members of the public may also submit petitions rather than just state parties, and it provides an expedited review process that can result in direct financial damages to the FDI corporation.[209] A claim goes to the Interagency Labor Committee, which has thirty days to determine whether it is "sufficient, credible evidence of a denial of rights."[210] If it is, then the government of the facility has forty-five days to conduct its investigation.[211] If they do not find a violation, the other party may still request an independent review.[212] This may result in a "consultation period between the parties for remediation" or, where a denial of rights has occurred, in tariffs, penalties, and a denial of entry for the goods.[213]

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204. *See* Choudhury, *supra* note 188, at 437; *see generally* ESPERANZA PROTOCOL, *supra* note 192.

205. *See* Choudhury, *supra* note 188, at 474–75.

206. *Id.* at 464.

207. *See* LeClercq, *supra* note 193, at 25–26; USMCA, *supra* note 192, at arts. 23.15–23.16.

208. *See* Bonne, *supra* note 193, at 205.

209. *Id.*

210. *Id.* at 204 (quoting Aaron R. Hutman, *The U.S.M.C.A.'s Rapid Response Mechanism for Labor Complaints: What to Expect Starting July 1, 2020*, GLOB. TRADE & SANCTIONS L. (July 1, 2020), https://www.globaltradeandsanctionslaw.com/the-usmca-rapid-response-mechanism-for-labor-complaints.

211. *Id.*

212. *Id.*

213. *Id.* at 204–05 ("[States] may impose remedies including (a) suspension of preferential treatment of goods manufactured at the covered facility; (b) imposition of

The benefit to the RRM in the USMCA for labor rights is multi-fold. First, it provides access to the ISDS system for non-state parties and an effective remedy that can be enforced directly against the economic actor at fault. The RRM has the advantage of independent monitoring that is not contingent on state parties.[214] Effective monitoring systems will "facilitate a two-way dialogue between the relevant authorities and stakeholders; enhancing transparency and creating opportunities for direct feedback by members of the public . . . ."[215] As previously established, state parties have conflicting interests in their treatment of environmental defenders, but the RRM creates an enforcement mechanism outside of state control and directly against the offending corporation.

By removing state intermediaries, local communities are more empowered to negotiate directly with the FDI firm and sit at the table rather than depend on the state for protection.[216] Furthermore, the obligation also applies to individual economic actors, which increases accountability for the parties directly responsible.[217] Especially because the negligence of FPIC has excluded affected communities from the decision-making process, these communities must be centered in the resolution process.[218] They must have an opportunity to engage with the investor in a setting that encompasses actual remedies for investor non-compliance.[219]

By fashioning a similar mechanism used for labor abuses to environmental defender abuse, those most affected can access more powerful and independent opportunities for redress. Both cases of abuse emerge from the power imbalance FDI enjoys over the local community, resulting in violence and suppression of opposition to

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'penalties' on the covered facility; and (c) denial of entry for such goods, which can be invoked if a covered facility has received at least two prior denial of rights determinations.") (quoting Aaron R. Hutman, *The U.S.M.C.A.'s Rapid Response Mechanism for Labor Complaints: What to Expect Starting July 1, 2020*, GLOB. TRADE & SANCTIONS L. (July 1, 2020), https://www.globaltradeandsanctionslaw.com/the-usmca-rapid-response-mechanism-for-labor-complaints).

214. *See id.* at 203–04; *see* Jennifer Zerk & Rosie Beacock, *Advancing Human Rights Through Trade*, INT'L L. PROG., May 2021, at 41–60 (reviewing previous attempts at monitoring mechanisms in trade agreements and how they can be improved).

215. Zerk & Beacock, *supra* note 214, at 8–9.

216. *See id.* at 44–45.

217. *See* Mere, *supra* note 189, at 10 (examining a recent ICSID tribunal that dismissed a counterclaim by the state against an investor based on a violation of the right to water because the duty to ensure water is only imposed on the state).

218. *See generally* Agnes Portalewska, *Free, Prior and Informed Consent: Protecting Indigenous Peoples' Rights to Self-Determination, Participation, and Decision-Making*, CULTURAL SURVIVAL (Nov. 27, 2012), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous (discussing the limits of FPIC).

219. *See* Chao Wang et al., *International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020*, 18 INT'L J. ENV'T RSCH. PUB. HEALTH 7798, 7806 (2021).

their potential profits.[220] Moving enforcement directly onto an FDI entity rather than the state party increases independent review, rather than trying to get unwilling states to risk expensive judgments.[221]

In addition to an independent review body, another important characteristic of the RRM that would need to be included for the protection of environmental defenders is a specialized review body.[222] Traditional investor-state arbitration is conducted by arbitration panelists who have limited experience in public international or human rights law and are, instead, practitioners in trade and investment.[223] Subjecting human rights suits to experts in international economic law may disadvantage those depending on complex and nuanced human rights laws for protection.[224] Instead, the IIA should include a specialized mechanism to hear and resolve these complaints similar to how potential panelists for the RRM are selected for their subject matter background.[225]

By solidifying the articulated rights of the treaty with an independent and specialized review process as well as trade penalties directly applicable to the FDI corporation, private actors would have a greater incentive to comply with recognized human rights standards, and the state party would not be forced to choose between people's rights and protecting investor's profits.[226] This approach is not a panacea to solving all business and human rights abuses, but it would be an innovative way for international law to hold companies directly accountable for their human rights abuses toward environmental defenders and impose enforceable judgments against them using the same treaties that have enabled the abuse for so long.[227]

At the very least, the IIA should include language which declares investors seeking to operate under the protection of the agreement as having presumptively assented to the obligations regarding environmental defenders' human rights.[228] That way, the same investors that benefit from foreign operations will be subject to and

220. *See The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755, 1778 (2016).

221. *See CFIUS Enforcement and Penalty Guidelines*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines (last visited Oct. 5, 2023) (authorizing the Committee on Foreign Investment in the United State to impose penalties).

222. *See* Bonne, *supra* note 193, at 205.

223. *See* Choudhury, *supra* note 188, at 479.

224. *See id.*

225. Kevin Kolben, *Labor Chapters Improve Supply Chain Resilience: The Case of the USMCA*, BROOKINGS (2023), https://www.brookings.edu/articles/usmca-forward-2023-chapter-7-labor-standards.

226. *See* Bonne, *supra* note 193, at 227.

227. *See* Choudhury, *supra* note 188, at 476.

228. *See id.* at 479.

bound to robust protections towards environmental defenders and to ISDS litigation through *ex ante* consent.[229]

Alternatively, to address the United States' unwillingness to provide accountability abroad, the IIA should specify that FDI will be subject to civil actions for liability in their home state and that the host state "ensures that its laws allow for the adjudication of extra-territorial disputes" regarding the IIA's subject matter.[230] Ultimately, the substantive obligations in the IIA should be bolstered through an embedded enforcement mechanism and/or extended jurisdiction to address the governance gap of enforcing the obligations that currently pervade human rights protections.[231]

C. Eliminate Investor-State Dispute Settlement in IIAs

The link between FDI and suppression of environmental defenders' right to peaceful dissent is well established, and a system that encourages states to disregard threats against environmental defenders for fear of ISDS suit is out of compliance with the binding obligations of the UN DHRD, Escazú Agreement, and customary due diligence.[232] Indeed, the Escazú Agreement specifically identifies the principle of "permanent sovereignty of States over their natural resources" in implementing the agreement.[233] To preserve the state's ability to effectively regulate FDI and uphold their international obligations, ISDS should be eliminated from IIAs. Without the threat of million-dollar suits for interfering with future profits, state officials would regain much-needed independence regarding the FDI industries that are killing, threatening, and suppressing their citizens.[234]

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229. *See id.*

230. *See id.* at 472–73 (describing how the 2015 Indian Model BIT included a provision stating this effect).

231. *See id.* at 481.

232. *See generally* Jessica Evans, AT YOUR OWN RISK: REPRISALS AGAINST CRITICS OF WORLD BANK GROUP PROJECTS, HUM. RTS. WATCH (2015), https://www.hrw.org/sites/default/files/report_pdf/worldbank0615_4up.pdf (giving an example of the link between FDI and suppression of the speech rights of environmental activists); *see also* Ari MacKinnon, Katie L. Gonzalez & Gustavo F. Vaughn, *ESG-Related Disputes in Latin America: The Evolution of the Litigation and Arbitration Landscape*, LATIN LAW. (Dec. 16, 2022), https://latinlawyer.com/guide/the-guide-environmental-social-and-corporate-governance/first-edition/article/esg-related-disputes-in-latin-america-the-evolution-of-the-litigation-and-arbitration-landscape (explaining the protection for free speech and public participation provided by the Escazú Agreement).

233. Escazú Agreement, *supra* note 117, at art. 3(i).

234. *See* Geoffrey Gertz, *Why Mexico Should Not Fear Losing NAFTA's Investment Rules*, BROOKINGS (Mar. 20, 2018), https://www.brookings.edu/articles/why-mexico-should-not-fear-losing-naftas-investment-rules (noting that ISDS is criticized as limiting the sovereignty of nations and preventing them from protecting their environments and natural resources).

There is a growing movement to abolish ISDS provisions.[235] Ecuador, Venezuela, and Bolivia have exited the IIA system altogether.[236] The Biden Administration pledged to stop including ISDS agreements in future disputes[237], progressive U.S. lawmakers are throwing support behind dismantling the system,[238] and the European Union is renegotiating and considering a coordinated withdrawal from the infamous Energy Charter Treaty and its ISDS clause.[239] Even ICSID, the designated arbitral body in many IIAs, has been searching for reforms due to its legitimacy crisis.[240] Abolishing a system that restricts states' ability to effectively govern around modern emergencies—especially the climate crisis—is no longer a radical proposal.

The most difficult aspect of this solution is the methodology of abolishing ISDS.[241] Unsurprisingly, extracting a state from a mechanism specifically designed to bind it for the benefit of investors is not easy.[242] Even when states withdraw, 95% of IIAs include sunset clauses that preserve the investor's right of action for ten to twenty

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235. *See, e.g.*, Ella Merrill & Martin Dietrich Brauch, *U.S. Climate Leadership Must Reject ISDS: As the United States Faces Another $15 Billion Suit from the Fossil Fuel Industry, it's Time for President Biden to Take a Decisive Stance*, COLUM. CTR. ON SUSTAINABLE INV. (July 13, 2021), https://ccsi.columbia.edu/news/us-climate-leadership-must-reject-isds-united-states-faces-another-15-billion-suit-fossil-fuel (giving an example of the growing movement that rejects ISDS).

236. Choudhury, *supra* note 188, at 477; *see also Number of Land Activists and Environmental Defenders Murdered in Selected Countries in Latin America in 2020*, STATISTA.COM (2023), https://www.statista.com/statistics/884020/number-activists-murdered-latin-america-country (showing that despite most killings taking place in Latin America generally, none of the countries that exited the ISDS system were in the top nine in 2020).

237. Lazare, *supra* note 158.

238. *See* Doug Palmer, Warren, *Fellow Progressives Call for End of Investor-State Dispute Settlement*, POLITICO (Nov. 2, 2023), https://subscriber.politicopro.com/article/2023/11/warren-and-friends-call-for-death-of-investor-state-dispute-settlement-00124892.

239. *See* Carsten Wendler & Laura Lozano, *Spain and Other EU Member States Announce Their Withdrawal From the ECT: What are the Implications for Investors and Arbitrations?*, LEXOLOGY (Nov. 1, 2022), https://www.lexology.com/library/detail.aspx?g=c90f5c5d-aa48-4728-8ce1-bfa313fbe28b; *see also* Tania Voon & Andrew D. Mitchell, *Ending International Investment Agreements: Russia's Withdrawal from Participation in the Energy Charter Treaty*, 111 AM. J. INT'L L. UNBOUND 461, 461 (2017–18).

240. *See generally* Shuping Li & Wei Shen, *Legitimacy Crisis and the ISDS Reform in a Political Economy Context*, 15 J. E. ASIA & INT'L. L. 31 (2022) (providing more information on the ISDS system's changing public opinion and internal direction).

241. *See generally* Surya Deva & Tara Van Ho, *Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism*, 24 J. WORLD INV. & TRADE 398 (2023) (noting that the abolishment of ISDS is likely so difficult as to possibly be infeasible).

242. *See, e.g.*, Lise Johnson, Jesse Coleman & Brooke Güven, *Withdrawal of Consent to Investor–State Arbitration and Termination of Investment Treaties*, INVESTMENT TREATY NEWS (Apr. 24, 2018), https://www.iisd.org/itn/en/2018/04/24/withdrawal-of-consent-to-investor-state-arbitration-and-termination-of-investment-treaties-lise-johnson-jesse-coleman-brooke-guven (describing the problems with nations attempting to withdraw from ISDS).

years after termination or withdrawal.[243] Mexico has thirteen trade agreements with fifty other countries and would have to individually negotiate withdrawal or termination in each one, exposing itself to the very suits it would be trying to avoid.[244]

But it is not impossible, and the United Nations Conference on Trade and Development ("UNCTAD") reports that opportunities to revoke IIAs before expiration or to terminate them unilaterally are increasing.[245] State parties can begin by refraining from including it in future trade or investment agreements and seek mutual renegotiation in the standing agreements.

ISDS provisions have been heavily criticized for restricting states' ability to address environmental harms, namely the climate crisis,[246] and this article strives to add yet another reason to the long list of reasons to seek withdrawal: protecting environmental defenders from suppression and violence. The ISDS system encourages states to listen to foreign investors with a profit-driven agenda rather than its own people. It blocks the state's ability to respond adequately to public opinion and limits its sovereignty to regulate a private entity that abuses human rights. Unless states work towards abolishing the ISDS system altogether, they will be unable to maintain the level of independence and regulatory power needed to adequately protect environmental defenders, as they are obligated to do under international law.

V. CONCLUSION

The situation of human rights defenders is increasingly dire. Community leaders seeking to protect their homes and lands are beaten, threatened, killed, criminalized, stigmatized, and barred from justice. The causes of this abuse are increasingly complex as the world continues to globalize, supply chains become more opaque, and multinational corporations become more influential. States have found themselves in a bind: they have international and regional

243. Antonios Kouroutakis, SUNSET CLAUSES IN INTERNATIONAL LAW AND THEIR CONSEQUENCES FOR EU LAW 29–31 (2022).

244. *See 2021 Investment Climate Statements: Mexico*, *supra* note 39.

245. *See* Choudhury, *supra* note 188, at 465; *see also, e.g.*, Anti-Tobacco Trade Litigation Fund, BLOOMBERG PHILANTHROPIES, https://www.bloomberg.org/public-health/reducing-tobacco-use/anti-tobacco-trade-litigation-fund (last visited Sept. 19, 2023) (showing that in the past there have been philanthropic efforts to support state parties experiencing increased exposure to ISDS suits, such as here, where Bloomberg Philanthropies initiated a "Anti-Tobacco Trade Litigation Fund" to support middle- and low-income countries passing anti-tobacco laws from costly legal suits initiated by foreign tobacco corporations through financial support, expertise, and resources).

246. *See, e.g.*, *ISDS and Climate Change: What Happens Next?*, WATSON FARLEY & WILLIAMS (Dec. 22, 2022), https://www.wfw.com/articles/isds-and-climate-change-what-happens-next (noting that ISDS favors investors and makes it more difficult for nations to address the climate crisis).

human rights commitments to uphold the protection of environmental defenders from private abuse, as well as a legally binding and prohibitively expensive obligation to private parties to do the exact opposite. States are unable or unwilling to respond to public dissent out of financial constraints, so they are increasingly incentivized to help suppress that dissent instead.

But there is an opportunity to use the same binding tools that restrict sovereignty to reinforce human rights obligations. By including binding and interpretive obligations, implementing an independent review system that is directly accessible by those affected, and ultimately restricting the use of ISDS mechanisms in IIAs, states can more effectively protect environmental defenders from profit-driven private entities and fulfill their human rights obligations. To reduce state complicity in environmental defender abuse, we must address a root cause of that priority: FDI and the investment-state dispute resolution mechanisms that protect it.

STRANGE BEDFELLOWS: THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED STATES

CALEB H. WHEELER†

ABSTRACT

The United States and the International Criminal Court ("ICC" or "Court") have had a tempestuous relationship since the Court's founding in 1998. Although the United States was heavily involved in negotiating and drafting the ICC's Statute ("Rome Statute"), it was one of seven countries to vote against the final agreement. Since then, the United States has resisted calls to become a member of the Court due to its persistent objections to certain aspects of the Rome Statute, many of which focus on the way in which the ICC can exercise its jurisdiction. This article examines the legitimacy of the United States' objections to the ICC to establish whether the United States would be a suitable State Party should it wish to join the Court at some later date. It does this in two substantive parts. First, this article appraises the relationships each of the last five presidential administrations have had with the ICC. Through this it identifies the different approaches taken by each administration toward the Court and the nature of their objections to the ICC. Next, this article reviews three different aspects of the negotiations leading to the Court's establishment to determine whether there is any basis for the United States' position vis-à-vis the Court. This article concludes that the way the United States would like the Rome Statute to be applied is not consistent with the ICC's object and purpose. As a result, if the ICC were to welcome the United States as a member, it would likely have to sacrifice success in its overall mission to do so.

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I. Introduction

The International Criminal Court ("ICC" or "Court") has had a tumultuous history with the United States of America ("United States" or "USA"). The United States played a very active role in the arduous process of negotiating the ICC's Statute ("Rome Statute"), but ultimately voted against the final agreement.[1] The United States objected to the agreed version of the Rome Statute for several reasons, the most significant being the ICC's potential ability to exercise jurisdiction over American citizens in some circumstances.[2] Due to this, and other concerns, the United States has resisted calls to join the ICC.[3]

The United States' refusal to join the ICC inhibits the Court's ability to achieve its long-term goal of having every global state become a member of the Court.[4] The importance of universal membership was identified even before the ICC's formation.[5] The *ad hoc* committee set up by the UN General Assembly in 1995 to review the Draft Statute for an ICC asserted that universal participation in the Court was necessary to further the interests of the international community.[6] The Court continued to pursue that goal after its creation.[7] In 2006, the ICC's Assembly of States Parties adopted a plan of action for achieving universality and full implementation of the Rome Statute.[8] That plan remains under review, and a report is prepared annually about the efforts being made to reach universal ratification.[9]

While the United States is not alone amongst states that are non-members of the ICC, its absence is significant. The United States' intelligence community, military might, and financial power could be

1. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHTS (Aug. 11, 1998), https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court.

2. *Id.* ("[T]he Administration feared that an independent ICC Prosecutor might single out U.S. military personnel and officials.").

3. *See generally* Adam Taylor, *The United States and ICC Have an Awkward History*, WASH. POST, (Mar. 16, 2023, 12:00 AM), https://www.washingtonpost.com/world/2023/03/16/icc-us-cooperation-international-criminal-court-history (describing the "poor relationship" between the U.S. and ICC since 1998).

4. Resolution ICC-ASP/5/Res.3: Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

5. *Id.*

6. *Id.*

7. *See generally* INT'L CRIM. CT., *Complementarity*, https://asp.icc-cpi.int/complementarity (listing relevant resolutions to the continuing goal of universal membership) (last visited Sept. 22, 2023 at 6:00 PM).

8. Resolution ICC-ASP/5/Res.3, *supra* note 4.

9. Resolution ICC-ASP/21/Res.2: Strengthening the International Criminal Court and the Assembly of States Parties; INT'L CRIM. CT., *supra* note 7.

a great asset to the Court if the country were to become a member.[10] Evidence of this can be found in several past interactions between the United States and the ICC, particularly the role played by the United States' military and intelligence community in facilitating the surrender and transfer of Bosco Ntaganda and Dominic Ongwen to the ICC.[11] American military intelligence has also been instrumental in allowing the United States to conclude that Russian troops committed war crimes during the 2022 invasion of Ukraine.[12] That determination has led to greater cooperation between the United States and the ICC in investigating possible war crimes committed in Ukraine.[13] Further, if the United States were to become a member of the ICC, its global influence could encourage other non-members to join the Court.[14]

For much of the ICC's history, the possibility of the United States joining the ICC has seemed remote.[15] The reaction of successive American presidents to the Court has ranged from cautiousness to open hostility and at no time has it appeared that their concerns about the Court were likely to be overcome.[16] This approach has changed slightly following Russia's invasion of Ukraine and the United States' subsequent willingness to cooperate with the ICC's investigation into possible Russian criminality.[17] Some view this conflict as an opportunity for the United States to join the Court so that it can provide even greater support to the ongoing accountability efforts being made in the Ukrainian context.[18]

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10. *See, e.g.*, Stephen J. Rapp, *Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court*, U.S. DEP'T OF STATE (Nov. 21, 2013), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2013/218069.htm (describing the impact of the U.S. War Crimes Rewards Program aiding capture of persons subject to ICC arrest warrants).

11. *See, e.g.*, *id.*; Ned Price, *Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity*, U.S. DEP'T OF STATE (Feb. 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity.

12. Press Statement, Anthony J. Blinken, Sec'y of State, *War Crimes by Russia's Forces in Ukraine* (Mar. 23, 2022), https://www.state.gov/war-crimes-by-russias-forces-in-ukraine.

13. Beth van Schaack, *War Crimes and Accountability in Ukraine,* U.S. DEP'T OF STATE (June 15, 2022), https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine.

14. *See, e.g.*, Proposal for the "Global Criminal Justice Act" (Dec. 7, 2021), https://omar.house.gov/sites/evo-subsites/omar-evo.house.gov/files/OMARMN_082_xml.pdf (proposing the creation of an office to "[w]ork with . . . international organizations . . . to establish and assist . . . commissions of inquiry . . . and prosecute atrocities around the world.").

15. *See* Taylor, *supra* note 3 ("The key problem with the court, as made clear by successive administrations . . . .").

16. *Id.*

17. *See* van Schaak, *supra* note 13.

18. *See, e.g.*, H.R. 1058, 117th Cong. (2d Sess. 2022) (proposing the United States become a full member of the International Criminal Court); H.R. 7523, 117th Cong. (2d Sess. 2022) (proposing the repeal of the American Servicemembers' Protection Act of 2002).

Numerous efforts have been made to convince the United States to join the Court.[19] The United States has resisted those calls, citing the same problems with the Rome Statute that prevented the United States from voting for it at the Rome Conference.[20] Much of the commentary on the issue of whether the United States should become a member of the ICC has assumed that the Court would welcome United States membership should the country wish to join.[21] This perspective overlooks that the United States wants the Court to function in a way that is fundamentally different from what was agreed at the time of its formation.[22] Therefore, the Court would have to make fundamental changes that may be incompatible with its object and purpose if it welcomed the United States as a member.

This article examines the adversarial relationship between the United States and the ICC in two parts. First, it tracks the different positions each American presidential administration has taken toward the Court and discusses the objections raised by different administrations. Consideration is also given to whether some compromised position might be found that could overcome those objections, making the ICC and the United States more harmonious partners. Second, the article will examine the *travaux preparatoires* to the Rome Statute and the text of the Rome Statute itself in an effort to identify the Court's purpose. That is followed by an assessment about whether that purpose is compatible with how the United States wants the ICC to function. The article concludes that while universal ratification is desirable to ensure maximum accountability, the ICC should not compromise its basic principles to achieve such ratification. Should this occur, the ICC will undermine its core mission and essentially render itself ineffective.[23]

II. THE POSITION OF THE UNITED STATES TOWARD THE ICC

There have been five United States presidents since the ICC was created in 1998. All five opposed the United States becoming a

19. *See, e.g.*, Benjamin B. Ferencz, Remarks Made at the Opening of the ICC (Mar. 2003), https://benferencz.org/articles/2000-2004/remarks-made-at-the-opening-of-the-icc; Elizabeth Evenson & Esti Tambay, *The US Should Respect the ICC's Founding Mandate*, HUM. RTS. WATCH (May 19, 2021, 1:13 PM), https://www.hrw.org/news/2021/05/19/us-should-respect-iccs-founding-mandate.

20. *See* Todd Buchwald, *Unpacking New Legislation on US Support for the International Criminal Court*, JUST SECURITY (Mar. 9, 2023), https://www.justsecurity.org/85408/unpacking-new-legislation-on-us-support-for-the-international-criminal-court (analyzing the ongoing concern that the ICC would gain jurisdiction to prosecute U.S. nationals).

21. *See, e.g.*, Evenson & Tambay, *supra* note 19 (expressing concern that United States' involvement with the ICC may be contrary to the ICC's goals).

22. *Id.*

23. *Id.*

member of the Court.[24] The vehemence of that opposition has varied, with some condemning the ICC as a rogue organization that threatens American sovereignty to others seeking a more cooperative relationship with the Court.[25] These differences obscure the fact that all five presidential administrations had the same objections toward the Court. Each administration was concerned that the Rome Statute, as written, could allow the ICC to exercise its jurisdiction to prosecute American citizens or the citizens of its allies.[26] Of particular concern to the United States was its inability, either as a non-party to the Rome Statute or as a permanent member of the UN Security Council, to halt those possible prosecutions.[27]

The next section will look at the ways each presidential administration voiced those concerns and the arguments used to support their positions. It will also consider the validity of their objections and whether some compromise position might be found.

A. The Clinton Administration's Tepid Acceptance of the ICC

Of the five American presidents to serve since the ICC's creation, Bill Clintonwas probably the one most interested in providing American support for the ICC. Throughout his presidency, Clinton represented himself as a staunch advocate of establishing a permanent international criminal court.[28] In his 1997 address to the UN General Assembly, he called on the nations of the world to establish such an international criminal court by the end of the twentieth century.[29] Clinton again backed the creation of an international criminal court in the months leading up to the Rome Conference, suggesting that it was the best way to guarantee that future *génocidaires* would be held accountable for their actions.[30] Clinton viewed a permanent international criminal court as an extension of his overall approach to foreign policy and his emphasis on the importance of rule of law enforcement and the protection of human rights.[31]

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24. Buchwald, *supra* note 20.

25. *See, e.g.*, CONG. RSCH. SERV., RL 31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (2006).

26. Buchwald, *supra* note 20.

27. *Id.*

28. Eric Schwartz, *U.S Policy Toward the International Criminal Court: The Case of Ambivalent Multilateralism*, WILSON CTR. (July 2, 2001, 12:00 AM), https://www.wilsoncenter.org/event/us-policy-toward-the-international-criminal-court-the-case-ambivalent-multilateralism.

29. William J. Clinton, Address by President Bill Clinton to the UN General Assembly (Sept. 22, 1997).

30. William J. Clinton, *Text of Clinton's Address to Genocide Survivors in Rwanda*, CBS NEWS (Mar. 25, 1998), https://www.cbsnews.com/news/text-of-clintons-rwanda-speech.

31. David J. Scheffer, An International Criminal Court: The Challenge of Enforcing International Humanitarian Law, An Address Before the Southern California Working Group

Despite President Clinton's enthusiasm for a permanent international criminal court, the United States ultimately did not support the Rome Statute in the form agreed upon during the Rome Conference.[32] This made it one of seven countries present at the Conference to vote against the Rome Statute's adoption.[33] David J. Scheffer, the United States' chief negotiator at the Rome Conference, later explained that the United States' primary objection to the Rome Statute lay in the provisions relating to jurisdiction found in Article 12.[34] Scheffer would call Article 12 "the single most problematic part of the Rome Statute," and felt that resolving the issues contained in the Article was the key to overcoming American opposition to joining the ICC.[35] Those objections to Article 12 were shared by subsequent presidential administrations. Both the Bush and Trump administrations contended that the Article's jurisdictional approach did not align with American constitutionalism, and, as such, was a threat to the nation's sovereignty.[36] The jurisdictional arrangement found in Article 12 remains the most significant barrier to United States' membership in the Court.

The United States' specific concerns about Article 12 centered on Subsection 2, which permits the ICC to exercise jurisdiction when either: (1) crimes are allegedly committed in the territory of a State Party or that of a state that has accepted the jurisdiction of the Court; or (2) the alleged perpetrator is a national of a State Party or state that has accepted the ICC's jurisdiction.[37] The United States disagreed with the decision to allow the Court to exercise jurisdiction if only one of the Article 12(2) conditions were met, taking the position that both should exist before the Court could proceed against a suspect.[38] The U.S. government believed that individual nations should have greater control over when and if its citizens were prosecuted by the ICC.[39]

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on the International Criminal Court (Feb. 26, 1998), https://1997-2001.state.gov/policy_remarks/1998/980226_scheffer_hum_law.html.

32. Scharf, *supra* note 1.

33. *Id.*

34. David J. Scheffer, Testimony Before the Senate Foreign Relations Committee (July 23, 1998), https://1997-2001.state.gov/policy_remarks/1998/980723_scheffer_icc.html.

35. David J. Scheffer, An International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999), https://1997-2001.state.gov/policy_remarks/1999/990326_scheffer_icc.html; David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19 (1999).

36. Marc Grossman, *Remarks to the Center for Strategic and International Studies*, U.S. DEP'T OF STATE (May 6, 2002), https://2001-2009.state.gov/p/us/rm/9949.html; *see also* John Bolton, Text of John Bolton's Speech to the Federalist Society (Sept. 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html.

37. Rome Statute of the International Criminal Court art. 12(2).

38. Scheffer, *supra* note 35, at 20.

39. *Id.* at 19.

The United States also challenged Article 12 of the Rome Statute on the basis that it violates Article 34 of the Vienna Convention on the Law of Treaties ("VCLT").[40] The VCLT was adopted in 1969 for the purpose of codifying the rules to be applied when interpreting international treaties.[41] Article 34 of the VCLT states that a treaty cannot bind or obligate a third state unless that state consents to the treaty.[42] The United States claimed that Article 12(2) of the Rome Statute does just that by authorizing the ICC to investigate and prosecute citizens of non-States Parties who were alleged to have committed crimes on territory controlled by a State Party.[43] This was interpreted as an effort to impose jurisdiction on citizens of states that had not joined the Court so as to give the ICC a type of quasi-universal jurisdiction over international crimes.[44]

There are several flaws with the argument advanced by the United States. First, as Article 1 of the VCLT makes clear, the VCLT is designed to govern the treaty relations between states.[45] There is nothing in the VCLT to support the suggestion that it is applicable to individuals or that it can protect them from international treaty obligations. This is further borne out in Article 2 of the VCLT, which defines a "third state" as a state that is not party to a treaty.[46] The VCLT contains no language that could be reasonably construed to mean that individuals might be considered "third states" for Article 34 purposes.

Since Article 34 specifically states that a treaty cannot create obligations or rights for a third state absent consent, it cannot also protect individuals under the same provision.[47] Further, the VCLT does not stand for the proposition that individuals are relieved of treaty rights or obligations when their nation of origin has not signed the relevant treaty. If that were the case, rights and obligations which are held by individuals by virtue of their humanity could become dependent upon one's nationality. Therefore, the United States' argument in opposition to Article 12 of the Rome Statute based on the Vienna Convention is without merit. This conclusion is further reinforced by the fact that the United States has not ratified the VCLT.[48] It is rather hubristic to claim the benefits of Article 34 of the VCLT, such as protection from the jurisdictional provisions of the Rome Statute, without joining the treaty regime that would entitle the United States to those protections.

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40. *Id.* at 18.

41. Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 437 (2004).

42. Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1151 U.N.T.S. 331.

43. Scheffer, *supra* note 35, at 18.

44. *Id.*

45. *See supra* note 42, at art. 1.

46. *Id.* at art. 2.

47. *Id.* at art. 34.

48. Daniel L. Hynton, *Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations*, 27 VAND. J. INT'L L. 419, 421 (1994).

Article 12(2)(a) of the Rome Statute is better understood as an expression of the territorial principle of jurisdiction rather than one based in treaty law.[49] Considered the most basic jurisdictional principle in international law, the territorial principle is the concept that a state has the sovereign right to exercise jurisdiction over any crimes that occur or are committed on its territory, regardless of the nationality of the perpetrator.[50] That means that if a crime is committed in a state, regardless of who committed it, the state has the right to investigate and prosecute that crime.[51] There is nothing controversial about this proposition, and the United States practices the same principle when foreign nationals commit crimes in the territory of the United States.[52]

In addition to the ability to exercise jurisdiction over crimes committed on its territory, a state also possesses the sovereign power to voluntarily delegate some of its territorial jurisdiction to international organizations or tribunals.[53] The ICC derives the right to exercise territorial jurisdiction in relation to atrocity crimes occurring within the territory of a State Party or of a state that makes such a delegation.[54] When a state delegates some part of its jurisdiction to an international organization, that entity can then exercise jurisdiction in a way that is consistent with the power previously held by the state and in accordance with the agreement that instigated the delegation.[55] In essence, the ICC's exercise of jurisdiction under Article 12(2)(a) is an extension of the delegating state's already existing authority over its territory and its right to investigate and prosecute crimes that occur within that territory.[56] The state has simply allotted part of that right to the ICC by ratifying the Rome Statute and grants the Court a portion of the power to investigate and prosecute atrocity crimes that were previously held exclusively by the state.[57] No new right or obligation has been created; instead, Article 12(2) constitutes the expression of an

49. Dapo Akande & Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, 29 EUR. J. INT'L L. 938, 950 (2018).

50. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 42 (1st ed. 2008).

51. KENNETH S. GALLANT, INTERNATIONAL CRIMINAL JURISDICTION 181 (2022).

52. *Id.*

53. Monique Cormier, *Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?*, 16 J. INT'L CRIM. JUST. 1043, 1052-53 (2018); 5 ALEXANDRE SKANDER GALAND, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT 16 (Carsten Stahn et al. eds., 2019).

54. *How the ICC Works*, ABA-ICC, https://how-the-icc-works.aba-icc.org (last visited Sept. 29, 2023).

55. Galand, *supra* note 53, at 17.

56. Rome Statute of the International Criminal Court, art. 12, ¶ 2(a), July 17, 1998, 2187 U.N.T.S. 38544; 5 Galand, *supra* note 53, at 13–14, 16.

57. *Id.*

already existing right.[58] As such, there is no need for third party consent under Article 34 of the VCLT.[59]

Scheffer recognized the relevance of the territoriality principle to Article 12(2) when explaining the United States' reasons for not joining the ICC, but he dismissed it as "the blind application of territorial jurisdiction."[60] Quoting from the work of Madeline Morris, Scheffer argued that it is dubious whether a state can delegate to another state the authority to try a suspect without the consent of the accused's state of nationality.[61] From that, Scheffer extrapolated that it is even less clear whether a state can delegate that authority to an international court.[62] Scheffer, again relying on Morris, noted that there is no precedent in international law of a state delegating territorial jurisdiction to an international court and that doing so has no basis in the customary international law of territorial jurisdiction.[63] In essence, Scheffer argued that, because the jurisdictional arrangement of the ICC has no existing basis, then it is presumptively invalid.[64]

Of course, the same could be said of the Nuremberg Tribunal. Its jurisdictional basis was defined in the 1945 London Agreement, in which it was agreed that trials should be held to prosecute and punish war criminals acting on behalf of the Axis powers, and in the Charter of the International Military Tribunal, establishing the rules by which the Nuremberg trials were held.[65] The Charter granted the Tribunal jurisdiction to punish the "major war criminals" of the European Axis countries for crimes against peace, war crimes, and crimes against humanity.[66] This was seen, even at the time, as a legitimate exercise of the right of any state to prosecute and punish individuals accused of committing war crimes and crimes against humanity.[67]

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58. Utkarsh Dubey, *Jurisdiction of the International Criminal Court Over Non-Party States: Legitimate or Ultra Vires?*, JURIST (May 19, 2021, 9:00 AM), https://www.jurist.org/commentary/2021/05/utkarsh-dubey-icc-jurisdiction-over-nonparty-states.

59. *See* Vienna Convention on the Law of Treaties, *supra* note 42, at 13; *see also* 1155 U.N.T.S. 331.

60. Scheffer, *The United States and the International Criminal Court*, *supra* note 35, at 18.

61. David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) (citing Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-State Parties*, 64 L. CONTEMP. PROBS. 13 (2001)) (Scheffer's comments were based on a pre-publication draft of Professor Morris' article. The wording of the published version differs somewhat from the version Scheffer relied on. However, the crux of the arguments is identical in both.).

62. *Id.*

63. *Id.*

64. Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of The U.S. Position*, 64 L. CONTEMP. PROBS. 67, 69-72 (2001).

65. Trial of the Major War Criminals, 22 Libr. Of Cong. 460 (Int'l Mil. Trib., Nuremberg 14 Nov. 1945 – 1 Oct. 1946).

66. U.N. Charter of the Int'l Mil. Trib. art. 6, Aug. 8, 1945, 82 U.N.T.S 251.

67. Willard B Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. J. 177, 218 (1945).

However, the Nuremberg Tribunal was not the result of a single state exercising jurisdiction over war crimes; rather, it was formed through the cooperation of multiple states jointly exercising the sovereignty granted to them as occupying powers following Germany's unconditional surrender.[68] In so doing, they were acting in place of the then defunct German government, making the establishment of the Nuremberg Tribunal a delegation of the criminal jurisdiction of German domestic courts to an international court.[69] While the Tribunal never referred to itself as an international court, President Harry S. Truman did, when he called the Nuremberg Tribunal "the first international criminal assize in history."[70] As Truman's statement illustrates, the Tribunal was unique and as such would not have met the test Scheffer imposed on the ICC.[71]

The United States also objected to Article 12 out of a fear that it could discourage non-States Parties from participating in peacekeeping activities.[72] The United States was particularly concerned that Article 12 might expose the servicemembers of non-States Parties to politically motivated prosecutions launched by belligerent states.[73] The U.S. government argued that greater protections should be afforded when those individuals were engaging in "official actions" attributable to the non-States Parties.[74] In addressing this point, Scheffer later clarified that "official state actions" included humanitarian interventions, peacekeeping solutions, or defensive actions to eliminate weapons of mass destruction.[75] Adopting the American perspective on this would essentially mean that troops from non-States Parties could commit Rome Statute crimes on the territory of States Parties without facing any sort of accountability for their actions so long as they were engaging in an official state action when the violation occurred.[76] Creating that sort of exception to the ICC's jurisdiction would be antithetical to the purpose of the ICC as will be discussed in the second part of his article.[77]

The above approach ignores the obvious answers to that problem: the U.S. government could either make a stronger effort to prevent its soldiers from committing Rome Statute crimes or it could

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68. *See* Trial of the Major War Criminals, *supra* note 65, at 461.

69. Galand, *supra* note 53, at 17–18.

70. Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 38 (1947); Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 39 (2004).

71. *See* Wright, *supra* note 70, at 38.

72. Scheffer, *The United States and the International Criminal Court*, *supra* note 35, at 20.

73. *Id.*

74. *Id.*

75. David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Dep't of State, Address at American University (Sept. 14, 2000).

76. *Id.*

77. *See generally* Rome Statute of the Int'l Criminal Court, July 17, 1998, 2187 U.N.T.S 3.

adequately investigate and prosecute those crimes when they are committed. As made clear in the Preamble to the Rome Statute, the jurisdiction of the ICC is complementary to national jurisdiction.[78] As such, domestic courts retain primary jurisdiction over crimes that fall under the Rome Statute.[79] Under this system, the ICC can only exercise its jurisdiction in the absence of meaningful action on the part of state-run justice institutions.[80] This principle is fully explained in Article 17 of the Rome Statute, which sets out the four grounds for finding that a case is inadmissible at the ICC due to a lack of complementarity.[81] These grounds are when: (1) the case is being investigated or prosecuted by a state with jurisdiction over the alleged conduct; (2) the case has been investigated by a state and it chose not to prosecute; (3) the person concerned has already been tried by a state for the same conduct described in the complaint against them; and (4) the case is not of sufficient gravity to justify further action.[82] Under this principle, citizens of the United States suspected of committing Rome Statute crimes are only vulnerable to investigation and prosecution by the ICC in the absence of meaningful domestic proceedings.[83] To prevent this, all the United States must do is investigate alleged crimes that may have been committed and prosecute the suspected perpetrators if warranted.[84]

Instead, the United States dismissed the complementarity regime described in Article 17 as deficient.[85] It suggested that even if the United States were to investigate crimes allegedly committed by its troops, the Court could still find those efforts inadequate and launch its own investigation.[86] While it is true that the ICC could still proceed following an inadequate investigation, there are no examples in more than twenty years of ICC practice of the Court dismissing a legitimate national investigation and launching its own proceedings against an accused.[87] To the extent this was ever a legitimate reason for criticizing Article 17, the clear practice of the Court suggests that this is not a reasonable basis for challenging the Article's approach to jurisdiction.[88]

Despite these numerous and varied objections to the Rome Statute's jurisdictional arrangement, the Clinton administration nonetheless signed the Statute prior to the December 31, 2000,

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78. *Id.*

79. William A. Schabas, THE INTERNATIONAL CRIMINAL COURT: COMMENTARY ON THE ROME STATUTE (2nd ed., 2016), at 447.

80. *See* Rome Statute, *supra* note 77, at art. 17.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Scheffer, *The United States and the International Criminal Court*, *supra* note 35, at 19.

86. *Id.*

87. *See generally* Scheffer, *The United States and the International Criminal Court*, *supra* note 35.

88. *See* Rome Statute, *supra* note 77, at art. 3.

signing deadline.[89] In a statement accompanying the signing, President Clinton identified the importance of holding accountable those individuals accused of committing crimes under the Rome Statute and the United States' "tradition of moral leadership" when it comes to those efforts.[90] Moreover, he highlighted that the ICC is a court of complementary jurisdiction, although his explanation of how complementarity works was somewhat lacking.[91] Despite these positive aspects of the Rome Statute, President Clinton also identified several negative aspects that militated against the United States signing the Rome Statute.[92] This included a fear that the Court would prosecute citizens of non-member states (i.e., the United States) and that trials at the Court would become politicized.[93] President Clinton counselled his successor, President George W. Bush, to exercise caution regarding the ICC and to not submit the Rome Statute to the Senate for ratification until the United States' myriad concerns were addressed.[94]

B. President Bush's Stance Against the ICC

President Bush shared President Clinton's concerns about the ICC and quickly established himself as a firm opponent of the Court.[95] The Bush Administration's first significant policy decision regarding the ICC was to inform the United Nations that the United States had no intention of becoming a member of the ICC.[96] It viewed this declaration as effectively undoing the decision of the Clinton Administration to sign the Rome Statute in December 2000.[97] When announcing that the United States was "un-signing" the Rome Statute, a Bush Administration official identified a number of different beliefs that the Administration held about the Court.[98] These beliefs were: (1) the ICC's approach to jurisdiction threatens American sovereignty; (2) the ICC undermines the role of the UN Security Council; (3) the ("Prosecutor") power of the ICC's Prosecutor is unchecked; and (4) the ICC is built on a flawed foundation that leaves it open to exploitation and politically

89. William J. Clinton, *Statement on Signature of the International Criminal Court Treaty*, (Dec. 31, 2000), https://1997-2001.state.gov/global/swci/001231_clinton_icc.html.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. John B. Bellinger, Legal Advisor, Remarks to the DePaul Univ. Coll. of Law: The U.S. and the Int'l Crim. Ct.: Where We've Been and Where We're Going (Apr. 25, 2008).

96. *See* Grossman, Remarks to the Center for Strategic and International Studies, *supra* note 36.

97. *Id.*

98. *Id.*

motivated prosecutions.[99] All four of the Bush Administration's stated reasons for rejecting membership in the Court are interconnected, and they all relate to the concern that the United States would be unable to prevent its citizens from prosecution by the Court.

Much of the Bush administration's argument against Article 12 jurisdiction runs along the same lines as the Clinton administration's critiques of the Rome Statute.[100] Like its predecessor, the Bush administration claimed to be concerned that jurisdiction could be exercised against American citizens in the absence of the United States agreeing to be bound by the Rome Statute.[101] Moreover, the Bush administration suggested that any exercise of jurisdiction by the ICC is presumptively invalid because there is no precedent for an international organization to do so in the absence of a Security Council mandate.[102] This unease about the lack of potential oversight from the Security Council would become a running theme in administration officials' statements about the ICC.[103] The Bush administration did little to expand on its reasons for taking these positions beyond what had already been expressed by Clinton administration officials.[104]

The Bush administration's remaining concerns were more novel and relate to the fear that the Rome Statute dilutes the power of the UN Security Council ("Security Council" or "UNSC") by assuming some of its authority over peacekeeping activities.[105] In particular, the administration felt the Rome Statute permitted the Court to identify threats to and infringements upon global peace despite the fact that Article 39 of the UN Charter grants that authority exclusively to the Security Council.[106] Further, the administration also believed that the Prosecutor's ability to conduct investigations of its own volition (*proprio motu*) created the possibility that it would interfere with the work already being done by the Security Council.[107] The administration's objection to the Prosecutor's *proprio motu* power was compounded by a concern that the Prosecutor would misuse their power by engaging in politically motivated investigations aimed at the United States.[108] From the United States' standpoint, the Rome Statute did too little to prevent this from happening, and the

99. *Id.*

100. Andrea Birdsall, *The "Monster That We Need to Slay"? Glob. Governance, the United States, and the Int'l Crim. Ct*, 16 GLOB. GOVERNANCE, 451, 453 (2010).

101. *Id.*

102. *Id.* at 453–55.

103. Special Research Report, Security Council, Security Council Action Under Chapter VII: Myths and Realities, 2008 No.1 (June 28, 2001).

104. Bellinger, *supra* note 95.

105. *Id.*; *see also* John R. Bolton, Under Secretary for Arms Control and International Security, Remarks to the Federalist Society (Nov. 14, 2002).

106. *Id.*; *see also* U.N. Charter art. 39, ¶ 0.

107. Bolton, *supra* note 105.

108. *See generally id.*

lack of greater Security Council oversight over the Court meant that insufficient external control existed to thwart vexatious prosecutions.[109]

John Bolton, the Secretary of State for Arms Control, played a formative role in determining the nation's policy toward the ICC during President Bush's first term.[110] Bolton was already an outspoken critic of the Rome Statute before joining the Bush Administration, particularly demonstrated by his belief that the Rome Statute was incompatible with "American standards of constitutional order" and that it constituted a "stealth approach to erode [American] constitutionalism."[111] These rather grandiose claims are consistent with Bolton's general worldview—that a global agenda exists to constrain the United States through the application of international law.[112]

Bolton's arguments about the Court rest on the assertion that the ICC is both substantively and structurally flawed.[113] The substantive argument is based on the idea that the Court's authority is not clearly defined in the Rome Statute and that its power to interpret the meaning of different crimes is so broad that it makes its decisions political and legislative in nature.[114] Structurally, Bolton felt that the Court's authority is an incoherent constitutional arrangement that does not clearly delineate how laws are made, adjudicated, or enforced.[115] In Bolton's view, this is all worsened by the fact that the Court's Prosecutor and judiciary are not subject to popular accountability or an elected executive or legislative branch, which Bolton interprets as a crucial check on their power.[116]

Bolton's criticisms of the Court's structure do not really engage with several statutory safeguards that exist to prevent the Prosecutor or individual judges from abusing their power. The Rome Statute contains explicit provisions whereby the Assembly of States Parties can remove the Prosecutor or a Judge from office for serious misconduct or a breach of their duties.[117] The Rome Statute also includes a mechanism for disqualifying the Prosecutor or a Judge from acting in individual cases should there be any questions about their impartiality in the matter.[118] Further, the Rome Statute has a provision prohibiting the Court from initiating or continuing an

109. *Id.*

110. *See generally id.*

111. John R. Bolton, *The Risks and Weaknesses of The International Criminal Court from America's Perspective*, 64(1) L. & CONTEMP. PROBS. 167, 169 (2000).

112. John R. Bolton, *Is There Really Law in International Affairs*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 9 (2000).

113. *See* Bolton, Remarks, *supra* note 105; *see also* Bolton, *supra* note 111, at 169.

114. *See* Bolton, Remarks, *supra* note 105.

115. *Id.*

116. *Id.*

117. *See* Rome Statute, *supra* note 37, at art. 46.

118. *Id.* at arts. 41(2)(a), 42(7).

investigation or prosecution in a particular situation for twelve months following the Security Council's adoption of a resolution requesting the Court to defer those activities.[119] Despite the existence of these clear checks on the power of the Prosecutor and Judges, the Bush administration felt they offered insufficient protections.[120] In 2002, President Bush clarified this in a speech delivered to active members of the U.S. Army when he explicitly referenced the ICC's perceived lack of accountability.[121]

Like its predecessor, the Bush administration's approach to the ICC was motivated by the concern that the Court could be used as a tool to hold American citizens accountable for their actions.[122] The United States viewed that responsibility as being solely domestic and that matters concerning possible American criminality were the exclusive domain of the country itself.[123] Furthermore, the Bush administration also feared that the prospect of investigation and prosecution by the ICC could impair America's "global security commitments."[124] This argument is connected to the concern raised during the Clinton era that the effectiveness of the U.S. military would be compromised if some of the security decisions it made would later be subject to international investigation and prosecution.[125] However, the Bush administration took that argument a step further by alleging that it was principally concerned that U.S. military leaders would be exposed to prosecution as part of an "agenda to restrain American discretion."[126] The administration believed that the possible danger would only be exacerbated when such prosecutions arose out of actions considered legitimate under the United States' domestic constitutional system.[127]

With this understanding of the ICC in mind, President Bush specifically rejected the idea that the ICC could exercise jurisdiction over American citizens and announced a two-part plan to protect them from prosecution by the Court.[128] The first part was to negotiate and conclude more than one hundred bilateral agreements with other states, commonly referred to as Article 98 agreements in reference to the relevant portion of the Rome Statute.[129] The Article 98 agreements were designed to prevent the surrender of Americans

119. *Id.* at art. 16.

120. *See generally* Bolton, Remarks, *supra* note 105; *see also* Bolton, *supra* note 111.

121. George W. Bush, Remarks to the 10th Mountain Division at Fort Drum, New York (July 19, 2002).

122. *Id.*

123. *Id.*

124. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 31 (2002).

125. *See* Scheffer, Testimony Before the Senate Foreign Relations Committee, *supra* note 34.

126. *See* Bolton, *supra* note 105.

127. *Id.*

128. *Id.*

129. Article 98 Agreements, U.S. DEP'T OF STATE, https://www.state.gov/subjects/article-98/ (last visited June 1, 2022).

to the ICC should an arrest warrant be issued against them.[130] States Parties to the ICC are expected to comply with requests by the Court to arrest and surrender individuals within the state's territory.[131] Article 98(2) prevents the ICC from making those requests when an obligation contained in an international agreement prevents the surrender of the individual without the surrendering state first agreeing to it.[132] A typical Article 98 agreement, which qualifies as an international agreement for the purposes of the Rome Statute, contains a clause under which states agree not to extradite American citizens to the ICC, or to a third state that might then transfer the person to the ICC, without first receiving the express permission of the United States.[133] These agreements effectively solved the jurisdictional problem that prevented the Clinton Administration from joining the ICC by making the exercise of jurisdiction over American citizens contingent on American consent.[134] They also run in direct opposition to the ICC's stated goal of ending impunity as they protect American citizens from being held accountable for their actions.[135]

The second part of the United States' plan involved adopting the American Servicemembers' Protection Act ("ASPA").[136] Signed by President Bush in August 2002, ASPA prohibited federal courts, state and local courts, and state and local governments from cooperating with any requests for cooperation made by the ICC.[137] ASPA also included a provision forbidding the direct or indirect transfer of national security information or law enforcement information to the ICC for the purpose of facilitating an investigation, arrest, or prosecution.[138] This section of ASPA was not limited to information that might be used to investigate and prosecute Americans for atrocity crimes but extended to all investigations and prosecutions.[139] That means that no part of the United States government, at any level, could provide the ICC with information that might help to convict any individual accused of Rome Statute crimes regardless of whether they or their alleged crimes have any connection to the United States.[140] Both provisions represent a significant obstruction of accountability efforts as they prioritize

130. Antoinette Pick-Jones, *Towards Permanently Delegitimizing Article 98 Agreements: Exercising the Jurisdiction of the International Criminal Court over American Citizens*, 93 N.Y.U. L. REV. 1779 (2018).

131. *See* Rome Statute, *supra* note 37, at Preamble.

132. *Id.* at art. 98(2).

133. *E.g.*, Agreement on the International Criminal Court and Rome Statute Article 98, Republic of Chad-U.S. June 30, 2003.

134. *Id.*

135. *See* Rome Statute, *supra* note 37, at Preamble.

136. American Servicemembers Act (2002) 22 U.S.C. §7401-7433.

137. *Id.* at § 7423.

138. *Id.* at § 7425.

139. *Id.*

140. *Id.*

interfering with the ICC's work and ability to successfully conclude investigations and prosecutions.[141]

Perhaps the most controversial part of ASPA is the provision which authorizes the president to use "any means necessary" to bring about the release of American service members, U.S. government officials, or other government employees being detained by the ICC or at its request.[142] Those powers also extend to freeing people occupying similar positions within NATO and other allied states.[143] The term "any means necessary" as used in this clause is limited only to the extent that ASPA specifically prohibits the president from using bribery to effectuate the release of American citizens or citizens of its allies.[144] It does appear to allow the president to authorize military action against the seat of the Court in the Netherlands, should doing so prove necessary to further the aims of ASPA.[145] This led some to refer to ASPA as the "Hague Invasion Act."[146] Unsurprisingly, this clause of the ASPA angered the Dutch government because it represented a threat against the territorial integrity of the Netherlands, which was particularly unwarranted considering its long-term alliance with the United States and the Netherlands' support of the U.S.-led war in Afghanistan.[147]

ASPA also limited American military involvement in a variety of different international contexts.[148] In a clause that was later repealed, ASPA prohibited the U.S. military from assisting any country, including financially, that was a party to the Rome Statute unless it was in the national interest of the United States to do so, the state had entered into an Article 98 agreement with the United States, or the state was allied with the United States.[149] American servicemembers were also prevented from being deployed in international peacekeeping missions unless: (1) the Security Council resolution authorizing the action specifically exempted them from prosecution by the ICC; (2) none of the states involved in the operation were members of the Court or had accepted its jurisdiction; (3) those states that were subject to the ICC's jurisdiction had concluded Article 98 agreements with the United States; or (4) the national interests of the U.S. justified its

141. 22 U.S.C. §§ 7421–7433; Article 98 Agreements, *supra* note 130.

142. 22 U.S.C. § 7427; *see also* 22 U.S.C. §7432(4).

143. *Id.*

144. *Id.*

145. Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. LEGIS. 537, 546 (2003).

146. *Id.*; *see also* H.R. 7523, 117th Cong. (2022).

147. Giles Scott-Smith, *Testing the Limits of a Special Relationship: US Unilateralism and Dutch Multilateralism in the Twenty-First Century*, in *AMERICA'S 'SPECIAL RELATIONSHIPS': FOREIGN AND DOMESTIC ASPECTS OF THE POLITICS OF ALLIANCE* 119 (John Dumbrell & Axel R. Schäfer eds., 2009).

148. *See generally* 22 U.S.C. §§ 7421–7433.

149. 22 U.S.C. §7 426, *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110–181, div. A, Title XII, § 1212(a) 122 Stat. 371.

involvement in the absence of any protections against prosecution.[150] The United States used the latter two provisions to influence states to enter into Article 98 agreements with it. Ultimately, several states were cajoled into agreeing to Article 98 agreements to ensure the continued cooperation and participation of the U.S. military.[151] Consequently, the Bush administration significantly reduced the threat of American servicemembers might be subject to by limiting the likelihood that they would be found in situations that could result in accountability for their commission of any Rome Statute crimes.[152]

The Bush administration maintained its hardline stance against the ICC throughout its first term.[153] While its efforts were primarily directed at protecting Americans from investigation and prosecution by the Court, some measures were also adopted that disrupted the function of the Court in general.[154] The administration's approach to the ICC slightly softened after Bush's re-election in 2004.[155] Evidence of this can be found in the administration's decision not to oppose the Security Council's referral in 2005 of the situation in Darfur to the ICC.[156] In so doing, the United States voiced its support for justice in Darfur and the need to hold accountable those individuals committing war crimes and genocide.[157] The decision not to veto the resolution should not, however, be seen as an implicit endorsement of the ICC. Rather, the United States made clear that it disagreed with the choice of the ICC as a venue through which accountability should be pursued and that it was only acting as it did because it was important for the Security Council to speak with one voice on the issue.[158] The United States then reiterated its objection to the ways in which the ICC can exercise its jurisdiction and indicated that it abstained from voting because the resolution contained language protecting U.S. nationals from prosecution.[159]

Although the United States' statement during the Security Council debate on the Darfur resolution unequivocally rejected the ICC's authority, the language it used represented a shift from the Administration's earlier assertions about the ICC. While it briefly mentioned the danger of politically motivated investigations and trials, it lacked any reference to the "unaccountable" Prosecutor or

150. *Id.* at § 7424.

151. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 688 (2003).

152. *Id.* at 688–89.

153. *Id.* at 683.

154. *Id.* at 687–89.

155. *See, e.g.*, U.N. SCOR, 60th Sess., 5158th mtg. at U.N. Doc. S/PV.5158 (Mar. 31, 2005).

156. *Id.* at 3.

157. *Id.*

158. *Id.*

159. *Id.*

their "unchecked" powers.[160] Instead, the focus was on the jurisdictional issues first raised during the Clinton administration and the protection from prosecution granted to American nationals in the Security Council resolution's text.[161] The United States also advanced the proposition that future investigations of non-States Parties' citizens should only occur following the agreement of the state of which the individual is a national or by Security Council resolution.[162] This would give the United States its desired control over prosecutions and allow it to thwart any actions taken against American citizens.[163] The administration's concerns about the ICC's alleged lack of accountability, as well as the accompanying danger that the Court could be politicized, were less pressing when there was no risk that American citizens or the citizens of its allies might be prosecuted.[164]

The United States did not entirely back away from its criticisms of the ICC during Bush's second term, but it certainly moderated them and gave some indication that it could work with the Court under the right circumstances.[165] This continued in the following years, which saw changes to ASPA including relaxing and later repealing the prohibition against providing financial support to the militaries of governments who did not enter into Article 98 agreements.[166] Bush administration officials recognize that in some instances, like Darfur, the United States wished to see the ICC succeed and that it could have an interest in facilitating and assisting the Court's work in that area.[167] Although these changes in approach did not signal acceptance of the ICC, it suggested a move toward developing a constructive relationship with the Court more akin to what existed under the Clinton administration.[168] This should come as no real surprise as the sticking points for the Bush administration's two terms were almost identical to those that impeded Clinton from agreeing that the United States should become a member state of the ICC.[169]

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 4.
164. *Id.* at 3.
165. Kathryn Sikkink, *From "Invade the Hague" to "Support the ICC": America's Shifting Stance on the International Criminal Court*, HARV. UNIV. BLOG (Apr. 27, 2022), https://scholar.harvard.edu/ksikkink/blog.
166. 22 U.S.C. §7426; *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110–181, div. A, Title XII, § 1212(a) 122 Stat. 371.
167. John Bellinger, Legal Adviser to the Bush Administration, Remarks to the DePaul University College of Law (Apr. 25, 2008).
168. *Id.*
169. *Id.* at 2.

C. President Obama Builds Bridges with the ICC

Even before taking office, the Obama administration, unlike its predecessors, signaled its intent to work more closely with the ICC.[170] During the process of being confirmed as Obama's Secretary of State, Hillary Clinton indicated that the administration would end hostility toward the ICC and encourage the Court to act when doing so would promote the interests of the United States.[171] Throughout its first two years, Obama's administration demonstrated this newfound commitment to cooperation with the ICC.[172] In that time, the United States directly participated in ICC activities by attending the ICC's Assembly of States Parties as an observer and participating in the Review Conference of the Rome Statute held in Kampala, Uganda.[173]

During the ICC's Assembly of States Parties in 2009, Stephen J. Rapp, the U.S. Ambassador-at-Large for War Crimes Issues, set out the new administration's support for international tribunals as accountability mechanisms.[174] He stated that there are times when international cooperation is necessary to combat criminality and that to do that the United States needed to better understand how the ICC worked and the issues it faced.[175]

However, the following year, the Obama administration was more tepid in its support of the ICC in its National Security Strategy ("2010 NSS").[176] While the 2010 NSS again recognized the importance of accountability and the need to support institutions that achieve that goal, it qualified its support for the ICC.[177] Rather than back all ICC prosecutions, it limited its support to those that "advance U.S. interests and values" and that are in compliance with U.S. law.[178] This approach to the ICC aligns more closely with previous administrations and shows a preference for international accountability that does not apply to American citizens.

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170. Howard Salter, *Global Cooperation: The Candidates Speak*, FPIF (Mar. 26, 2008), https://fpif.org/global_cooperation_the_candidates_speak.

171. WALTER PINCUS, *Clinton's Goals Detailed,* WASH. POST (Jan. 19, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/01/18/AR2009011802268.html.

172. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Annual Meeting of the American Society of International Law*:* The Obama Administration and International Law (Mar. 25, 2010).

173*. Id.*

174. Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State, Address to Assembly of States Parties (Nov. 19, 2009).

175*. Id.*

176. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 48 (2010).

177*. Id.*

178*. Id.*

The United States next participated in an ICC meeting in 2010 when it attended the ICC Review Conference in Kampala, Uganda.[179] The United States was actively involved in discussions around how the crime of aggression should be defined in order to activate the Court's jurisdiction over such acts of aggression.[180] In a statement delivered at the conclusion of the conference, a legal advisor to the Secretary of State, Harold Koh, remarkably claimed that the United States does not commit acts of aggression and therefore it was unlikely that an American would be prosecuted for such an act.[181] This viewpoint is instructive in understanding the United States' interpretation of how the Rome Statute should be applied. Specifically, it reflects the belief that American troops are responsive to the atrocity crimes of others but that they do not initiate them, despite much evidence to the contrary.[182] Thus, the United States concluded that atrocity crimes that are responsive to aggressive crimes are of lesser severity and should not result in investigation and prosecution by the Court.[183] In essence, the United States' position is that crimes committed in an effort to stop other crimes are excusable and should not be subject to criminal sanction.[184] How this formulation of the ICC's purpose conforms to other interpretations will be explored in greater detail later in this article.

The United States continued its engagement with the ICC throughout the remainder of the Obama presidency.[185] In so doing, it directly supported the Court in holding accountable individuals who were either enemies of the United States or about whom the United States was largely indifferent.[186] In 2011, the United States voted in favor of a unanimous Security Council resolution referring the situation in Libya to the ICC.[187] Susan Rice, then the United States Ambassador to the United Nations, described the resolution as an example of the world speaking with one voice, echoing the statement made by the United States when it abstained from voting for the Darfur resolution.[188] Later that year, President Obama deployed U.S. military personnel to Uganda to assist local forces in finding Joseph

179. S. REP. NO. 111-55, at v (Conf. Rep.).

180. *Id*. at 5.

181. Harold Hongiu Koh, Legal Advisor for U.S. Dep't of State & Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Special Briefing: U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010).

182. *Id*.

183. UNITED STATES PRESIDENT, *supra* note 176.

184. *Id.*

185. *The US-ICC Relationship*, INT'L CRIM. CT. PROJECT, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship (last visited Sept. 22, 2023).

186. S. REP. NO. 111-55, *supra* note 179, at 5-4.

187. Kevin Heller, *Security Council Refers the Situation in Libya to the ICC*, OPINIO JURIS (Feb. 27, 2011), https://opiniojuris.org/2011/02/27/security-council-refers-the-situation-in-libya-to-the-icc.

188. UN Security Council, Transcript of the 6491st Meeting, Doc No S/PV.6491 (Feb. 26, 2011), at 3.

Kony, who was (and still is) subject to an ICC arrest warrant.[189] Obama did not directly connect the deployment to the ICC's efforts to arrest Kony, although Rapp did in a statement to the Court's Assembly of States Parties.[190] This signaled a new commitment by the United States to assisting in the apprehension of suspects wanted by the ICC.[191] In 2013, Obama authorized the expansion of the State Department's Awards Program and enhanced the government's ability to offer monetary rewards for information leading to the arrest and conviction of individuals wanted by international criminal tribunals.[192] Later, the United States helped facilitate the surrender and subsequent transfer into ICC custody of Bosco Ntaganda and Dominic Ongwen, two suspects for whom rewards had been offered.[193]

Despite these efforts to positively cooperate with the Court, the Obama Administration did not always support the work of the ICC. In 2014, following the deployment of American troops as peacekeepers in Mali, President Obama issued a memorandum in which he asserted that those troops would not be subject to criminal prosecution or other assertions of the ICC's jurisdiction due to an existing Article 98 agreement between the United States and Mali.[194] This accorded with the approach set out in the National Security Strategy in 2015 ("2015 NSS"). The 2015 NSS supported the work of the ICC in holding accountable those responsible for "the worst human rights abuses."[195] It also qualified that support by stating that it must be consistent with the United States' commitment to

189. Betsy Reed, *Obama Sends 100 Troops to Combat LRA in Uganda*, GUARDIAN (Oct. 14, 2011), https://www.theguardian.com/world/2011/oct/14/obama-sends-troops-uganda.

190. Letter from President Barack Obama to the Speaker of the House of Representatives and President Pro Tempore of the Senate, (Oct. 14, 2011); *see also* Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues U.S. Statement to the Assembly of States Parties of the International Criminal Court (Dec. 14, 2011).

191. *See The US-ICC Relationship*, *supra* note 185.

192. Press Release, Barack Obama, President of the United States, Obama Statement on Enhanced State Department Rewards Program (Jan. 15, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/01/15/statement-president-enhanced-state-department-rewards-program.

193. Stephen J Rapp, Ambassador-at-Large for War Crimes Issues, Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (Nov. 21, 2013); Press Statement, Ned Price, Senior Advisory to the Secretary of State, Price Statement on the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity (Feb. 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity.

194. Memorandum from President Barack Obama to Secretary of State, Concerning U.S. Participation in the United Nations Multidimensional Integrated Stabilization Mission in Mali Consistent with Section 2005 of the American Servicemembers' Protection Act (Jan. 31, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/31/presidential-memorandum-certification-concerning-us-participation-united.

195. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 22 (2015).

protecting its own personnel.[196] This is reminiscent of earlier policies designed to protect American citizens from being held accountable for their actions.[197]

Like President Bush, Obama's interest in supporting the ICC largely extended to using it as a mechanism to hold accountable those individuals America considered its enemies or about whom they were indifferent.[198] This is evident in similar statements made by American officials during the debates surrounding the two Security Council referrals to the ICC.[199] However, any suggestion that an American could be held responsible was met with strong resistance and efforts to shield them from the jurisdiction of the Court.[200] The persistence of these ideas through multiple presidencies suggests that the American position had coalesced around the notion that the ICC should be selective when deciding how its jurisdiction would apply.[201] This demonstrates the United States' determination to prioritize its own interests over the ICC's goal of full accountability for atrocity crimes. In taking this position, the United States called into question its suitability as a state party to the Rome Statute.

D. President Trump's Strident Opposition to the ICC

In a departure from the Bush administration's antagonistic relationship with the ICC and the Obama administration's more cooperative approach, the Trump administration was openly hostile to the Court.[202] Initially, the administration had little to say about the ICC. It was not mentioned in the 2017 National Security Strategy, and the administration made no major statements about the Court before 2018.[203] However, that all changed following the appointment of John Bolton as National Security Advisor in March 2018.[204] On September 10, 2018, Bolton launched a blistering attack against the Court, calling it "illegitimate" and claiming that "for all intents and

196. *Id.*

197. UNITED STATES PRESIDENT, *supra* note 176, at 48.

198. Mark Kersten, *Unfortunate but Unsurprising? Obama Undermines the ICC*, JUSTICE IN CONFLICT (Feb. 4, 2014), https://justiceinconflict.org/2014/02/04/unfortunate-but-unsurprising-obama-undermines-the-icc.

199. Press Release, UNITED NATIONS, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court (Jan. 3, 2005).

200. *Id.*

201. *See, e.g.*, *id.*

202. Elizabeth Evenson, *Donald Trump's Attack on the ICC Shows His Contempt for the Global Rule of Law*, HUM. RTS. WATCH (July 6, 2020, 8:04 AM), https://www.hrw.org/news/2020/07/06/donald-trumps-attack-icc-shows-his-contempt-global-rule-law.

203. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017) (containing no mention of the ICC).

204. Mark Landler and Maggie Haberman, *Trump Chooses Bolton for 3rd Security Adviser as Shake-Up Continues*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/us/politics/hr-mcmaster-trump-bolton.html.

purposes, the ICC is already dead to us."[205] The substance of his comments was largely a replay of his Bush-era allegations, although the rhetoric used to express them was even more inflammatory.[206] Bolton described the ICC as an assault on the U.S. Constitution and the sovereignty of the United States and the "worst nightmare come to life" for the country's founders.[207] He also set out the framework for the Trump administration's approach to the ICC in no uncertain terms.[208] Bolton invoked the language of ASPA and declared that the United States would use "any means necessary" to protect Americans and the citizens of its allies from prosecution by the ICC.[209] He announced that the United States would not cooperate with, engage with, fund, or assist the Court in any way.[210] He then proceeded to threaten the ICC by suggesting that the administration would ban the Court's Judges and Prosecutors from entering the country, sanction any financial assets they held in the United States, and prosecute them criminally in American courts.[211] He extended those threats to any company or state that assisted the ICC in investigating or prosecuting American citizens.[212] Bolton's extreme response showed that a new and altogether negative phase was beginning in the relationship between the United States and the ICC. Trump reinforced Bolton's contentions in his address to the UN General Assembly two weeks later.[213] There, he asserted that "the ICC has no jurisdiction, no legitimacy[,] and no authority."[214]

The United States followed through on some of Bolton's threats in 2019.[215] That April, Secretary of State Michael Pompeo revoked the entry visa of ICC Prosecutor, Fatou Bensouda, effectively barring her from entering the United States.[216] The Trump administration

205. John Bolton, Text of John Bolton's Speech to the Federalist Society (Sept. 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html.

206. Rebecca Gordon, *Why Are We Above International Law?*, THE NATION (Mar. 26, 2019), https://www.thenation.com/article/archive/rebecca-gordon-international-criminal-court-john-bolton.

207. Bolton, *supra* note 205.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See Remarks by President Trump to the 73rd Session of the United Nations General Assembly*, WHITE HOUSE (Sept. 25, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny (showing former President Trump's strong stance against the ICC).

214. *Id.*

215. Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html (illustrating that the U.S. government carried out Bolton's threat by revoking the visa of an ICC prosecutor who was investigating Afghan war crimes).

216. *Id.*

further escalated its attack on the Court in 2020, when it introduced economic and travel sanctions against Bensouda and Phakiso Mochochoko, the Head of the Court's Jurisdiction, Complementarity and Cooperation Division.[217] The administration justified the sanctions on the basis that Bensouda and Mochochoko were engaging in the "politically motivated" targeting of American soldiers who served in Afghanistan.[218] The sanctions order called the investigation "unjust and illegitimate" without elaborating on either claim.[219] However, an earlier Executive Order issued by Trump authorizing the use of sanctions against ICC employees linked sanctions to the ICC's assertion of jurisdiction over possible criminality occurring in Afghanistan, a State Party to the Rome Statute.[220]

The imposition of sanctions against Bensouda and Mochochoko was driven by the decision of the ICC Appeals Chamber to authorize the Prosecutor to investigate the situation in Afghanistan.[221] That decision infuriated the Trump administration—particularly Secretary of State Pompeo—because it carried with it the possibility that the Court might scrutinize the criminality of American soldiers.[222] Following the opinion's release, Pompeo referred to the ICC as an "unaccountable political institution masquerading as a legal body" and as a renegade court.[223] The following day, he called the Court a "crazy, renegade body" and "this thing they call a court."[224] Two months later, he would refer to the ICC as "corrupted."[225] Despite the vitriol, the Trump administration, like the Obama and Bush administrations, clearly saw the Court as an entity designed to prosecute rogue political regimes and any effort to do otherwise was

217. Michael R. Pompeo, Sec'y of State, Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court (Sept. 2, 2020), https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/index.html.

218. *Id.*

219. *Id.*

220. Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

221. ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020), https://www.icc-cpi.int/court-record/icc-02/17-t-004-fra.

222. Press Remarks, Michael R. Pompeo, Secretary Pompeo's Remarks to the Press, U.S. DEP'T OF STATE (Mar. 5, 2020), https://2017-2021.state.gov/secretary-pompeos-remarks-to-the-press/index.html [hereinafter Pompeo Remarks].

223. *Id.*

224. Interview by Steve Doocy, Jedediah Bila, and Pete Hegseth of Fox and Friends with Michael R. Pompeo, Sec'y of State, U.S. DEP'T OF STATE (Mar. 6, 2020), https://2017-2021.state.gov/secretary-michael-r-pompeo-with-steve-doocy-jedediah-bila-and-pete-hegseth-of-fox-and-friends/index.html [hereinafter Pompeo with Doocy et al.].

225. Interview by Marc Thiessen and Danielle Pletka of AEI's 'What the Hell Is Going On' Podcast with Michael R. Pompeo, Sec'y of State, U.S. DEP'T OF STATE (May 29, 2020), https://2017-2021.state.gov/secretary-michael-r-pompeo-with-marc-thiessen-and-danielle-pletka-of-aeis-what-the-hell-is-going-on-podcast/index.html [hereinafter Pompeo with Thiessen and Pletka].

viewed as exceeding the limits of that mission.[226] When seen from that perspective, any effort by the ICC to hold Americans accountable would necessarily be illegitimate as doing so would transcend the Court's purpose.[227]

Pompeo's statements also suggest that the Trump administration, much like earlier administrations, did not understand the ICC's complementarity regime.[228] In the aftermath of the ICC Appeals Chamber's Afghanistan decision, Pompeo repeatedly stated that American servicemembers accused of crimes committed in the context of military operations are investigated and prosecuted within the context of the American justice system.[229] To the extent that is true, the United States has nothing to worry about from the ICC. The ICC is a court of complementary jurisdiction, and as long as a genuine investigation is carried out by a state, then the case will be inadmissible before the ICC.[230] Despite this, Pompeo believed the investigation carried with it the implication that the United States was failing to properly investigate the actions of its own servicemembers and that the ICC was going to "haul these young men and women in" to Court.[231] Pompeo's assertions disregard the fact that simply because an investigation is being conducted does not mean it will lead to charges or prosecution.[232] The Prosecutor can decline to proceed with a case following an investigation on both substantive and procedural grounds, including on a finding that it lacks jurisdiction due to complementarity.[233] An investigation also does not prevent individual suspects or states with jurisdiction over the matter from challenging its admissibility.[234] Therefore, it is an error to presume that an investigation will necessarily result in arrest and prosecution.

The Trump Administration's belligerence toward the ICC seems more deeply rooted in politics than in law. The Administration appears to have been attempting to cast the Court as an independent, multinational, international entity that stood in direct opposition to Trump's "America First" mantra.[235] Rather than develop meaningful criticisms of the ICC, the administration portrayed the court as an existential threat to the sovereignty of the United States and its

226. *See id.* (arguing that the U.S. can address situations involving its wrongdoers).

227. *See id.*

228. *See generally* Nicole Jones, *Sanctioning the ICC: Is This the Right Move for the United States?*, 39 WIS. INT'L L. J. 175, 182 (2021) (discussing how different presidential administrations viewed the ICC).

229. *See* Pompeo Remarks, *supra* note 222; s*ee also* Pompeo with Doocy et al., *supra* note 224.

230. *See* Rome Statute, *supra* note 37, at art. 17.

231. *See* Pompeo w/ Thiessen and Pletka, *supra* note 225.

232. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Oct. 2, 2023).

233. *See* Rome Statute, *supra* note 37, at art. 53(2).

234. *Id.* at art. 19.

235. *See generally* Pompeo Remarks, *supra* note 222.

constitutional form of government.[236] As a result, it departed from the approaches Trump's predecessors took to the ICC and instead placed itself in opposition to the Court's very existence.[237] Instead of advocating for the country's interests as past presidents did, the Trump presidency tried to delegitimize the ICC.[238] This may have played well to Trump's political base, but it failed to meaningfully disrupt the Court's work or to advance the United States' existing concerns about the Rome Statute.[239]

E. President Biden and a Possible New Dawn in the United States' Relationship with the ICC

Following Joe Biden's election in 2020 and Russia's invasion of Ukraine in 2022, the relationship between the ICC and the United States experienced something of a reset. Within a month of the invasion, President Joe Biden identified Russian President Vladimir Putin as a "war criminal," a claim he reiterated several weeks later.[240] Biden also publicly indicated that there was a need to gather evidence to be used during a "war crimes" trial.[241] Biden followed that statement with a declaration that Putin was committing a genocide in Ukraine and that it would be up to international lawyers to decide whether Putin's actions legally qualified as genocide.[242]

Despite this, Biden has stopped short of explicitly endorsing greater cooperation between the United States and the ICC despite using the language of the Court when calling for Putin's prosecution as a war criminal.[243] Further, officials in his administration have sent mixed messages about the extent to which the United States wishes to engage with the Court in efforts to conduct trials from crimes committed in the Ukrainian context.[244] One of Biden's Deputy

236. *See generally* Pompeo with Doocy et al., *supra* note 224.

237. *See* Jones, *supra* note 228, at 182.

238. *Id.* at 182–83.

239. *See U.S. Lifts Trump's Sanctions on ICC Prosecutor, Court Official*, REUTERS (Apr. 2, 2021), https://www.reuters.com/article/us-usa-icc-sanctions/u-s-lifts-trumps-sanctions-on-icc-prosecutor-court-official-idUSKBN2BP1GY; *see also* Pranshu Verma, *Trump's Sanctions on International Court May Do Little Beyond Alienating Allies*, N.Y. TIMES (Oct. 18, 2020), https://www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html.

240. '*Unforgivable': Russia Decries Putin 'War Criminal' Allegation*, AL JAZEERA (Mar. 17, 2022), https://www.aljazeera.com/news/2022/3/17/unforgivable-russia-decries-putin-war-criminal-allegation; *Bucha Atrocities Show Putin Is 'War Criminal', Biden Says*, AL JAZEERA (Apr. 4, 2022), https://www.aljazeera.com/news/2022/4/4/bucha-atrocities-show-putin-is-war-criminal-biden-says [hereinafter *Bucha Atrocities*].

241. *See Bucha Atrocities*, *supra* note 240.

242. Julian Borger, *Joe Biden Accuses Vladimir Putin of Committing Genocide in Ukraine*, THE GUARDIAN (Apr. 12, 2022), https://www.theguardian.com/world/2022/apr/13/joe-biden-accuses-vladimir-putin-of-committing-genocide-in-ukraine.

243. *Id.*

244. Laura Dickinson, *US Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges*, JUST SECURITY (June 20, 2023), https://www.justsecurity.org/86959/us-cooperation-with-the-icc-to-investigate-and

National Security Advisers, Jon Finer, called holding a trial at the ICC "a challenging option," citing jurisdictional and membership issues as roadblocks.[245] Conversely, Beth van Schaack, the United States' Ambassador-at-Large for Global Criminal Justice, has stated that the administration is prepared to assist the Ukrainian government should it wish to pursue accountability efforts at the ICC.[246] The United States has also joined with the European Union and the United Kingdom to create the Atrocity Crimes Advisory Group ("ACAG"), a mechanism designed to coordinate support for accountability efforts.[247] While the stated aim of the ACAG is to support the accountability efforts being pursued by the Ukrainian Office of the Prosecutor General, the group is working in conjunction with a variety of other groups, including the ICC, to gather evidence.[248] A statement made when the ACAG was formed also expressly indicates that the United States and its partners support a range of accountability efforts, including those being conducted by the ICC.[249] This suggests that while there is some ongoing hesitancy on the part of the Biden administration to directly collaborate with the Court, it is willing to support the Court's efforts through, and in conjunction with, other partners.

Perhaps more significantly, the war in Ukraine has broken down some of the pre-existing congressional opposition to the ICC.[250] On March 15, 2022, the U.S. Senate unanimously passed a resolution calling on the member states of the ICC to petition the Court to investigate war crimes and crimes against humanity being committed by and at the direction of Vladimir Putin.[251] The resolution was sponsored by Senator Lindsey Graham, a self-described "conservative problem-solver."[252] In the weeks following the vote, Graham proclaimed that Putin had "rehabilitate[d] the ICC in the eyes of the Republican party and the American people."[253]

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prosecute-atrocities-in-ukraine-possibilities-and-challenges.

245. Morning Edition, *The U.S. Insists that Russia Should Be Held Accountable for War Crimes*, NAT'L PUB. RADIO (Apr. 5, 2022), https://www.npr.org/2022/04/05/1090992292/the-u-s-insists-that-russia-should-be-held-accountable-for-war-crimes?t=1655393068640.

246. Press Briefing, Beth Van Schaack, Ambassador-at-Large for Glob. Crim. Just., War Crimes and Accountability in Ukraine, U.S. DEP'T OF STATE (June 15, 2022), https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine.

247. *The European Union, the United States, and the United Kingdom Establish the Atrocity Crimes Advisory Group (ACA) for Ukraine*, U.S. DEP'T OF STATE (May 25, 2022), https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine.

248. *Id.*

249. *Id.*

250. *See* Teresa Young Reeves, *A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification*, 8 HUM. RTS. BRIEF 15, 16 (2000).

251. S. RES. 546, 117th Cong. § 1 (2022).

252. *Biography*, U.S. SEN. LINDSEY GRAHAM, https://www.lgraham.senate.gov/public/index.cfm/biography (last visited June 16, 2022).

253. Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2023), https://www.nytimes.com/2022/04/11/us/politics/

Graham, joined by several fellow senators from both sides of the aisle, has since continued to encourage President Biden to support the ICC's investigation of crimes committed by Russian forces in Ukraine.[254]

The support offered by Senator Graham and other Senate republicans to the ICC is an important development as American conservatives have traditionally rejected the ICC as an impermissible intrusion on American sovereignty.[255] Former Republican Senator Jesse Helms, one of the early architects of conservative opposition to the Court, once commented during a sub-committee hearing of the Senate Committee on Foreign Relations that the ICC represents a threat to the national interests of the United States and that the country should actively oppose the ICC ever coming into being.[256] During the same meeting, another conservative, Senator Rod Grams, referred to the Court as "a monster" that needed to be slain.[257] These views reflect the thinking of many American conservatives about the ICC, and the criticisms levelled against the Court during the Bush and Trump Administrations were largely an espousal of that longstanding conservative position.[258] For a self-described conservative to sponsor a resolution supporting the ICC, and to continue to advocate on behalf of the court as Senator Graham has done, indicates the severity with which the situation in Ukraine is being viewed in Washington and a willingness amongst conservatives to engage with an entity that they had traditionally shunned.[259]

The House of Representatives has also shown an interest in supporting investigations into war crimes committed by Russia in Ukraine.[260] Several weeks after the Senate Resolution was passed, the House passed its own bill with bilateral support, directing the

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us-russia-ukraine-war-crimes.html.

254. Lindsey Graham and Dick Durbin, *Durbin, Graham Statement Following Biden Administration's Decision to Support the ICC's Investigation into Atrocities in Ukraine*, U.S. Senate Committee on the Judiciary (07.26.2023), https://www.judiciary.senate.gov/press/releases/durbin-graham-statement-following-biden-administrations-decision-to-support-the-iccs-investigation-into-atrocities-in-ukraine.

255. *See* Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 696 (2003).

256. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing on S. HRG. 105–724 Before the S. Comm. on Int'l Operations of the Comm. on Foreign Rels.*, 105th Cong. 2-6 (1998) (statement of Sen. Jesse Helms, Chairman, S. Comm. on Foreign Rels.).

257. 105th Cong. 2-6 (statement of Sen. Rod Grams, S. Comm. on Foreign Rels.).

258. Elizabeth Evenson, *Donald Trump's Attack on the ICC Shows His Contempt for the Global Rule of Law*, HUM. RTS. WATCH (June 6, 2020, 8:04 AM), https://www.hrw.org/news/2020/07/06/donald-trumps-attack-icc-shows-his-contempt-global-rule-law.

259. Press Release, Lindsey Graham, U.S. Sen., Graham on ICC Issuing Arrest Warrant for Putin, U.S. SEN. LINDSEY GRAHAM (Mar. 17, 2023), https://www.lgraham.senate.gov/public/index.cfm/press-releases.

260. David Scheffer, *The United States Should Ratify the Rome Statute*, LIEBER INST. W. POINT (July 17, 2023), https://lieber.westpoint.edu/united-states-should-ratify-rome-statute.

President to report on efforts the United States was making to collect, analyze and preserve evidence of Russian crimes committed in Ukraine for use in any future domestic, foreign, or international proceedings.[261] While the bill does not refer directly to the International Criminal Court, one of the bill's co-sponsors, Representative Ilhan Omar, stated in a press release that the bill would help support proceedings at the ICC.[262] Representative Omar is a longstanding supporter of the ICC, having introduced a Resolution in 2020 encouraging the United States to ratify the Rome Statute.[263] She followed up by introducing additional legislation in April 2022, once again calling on the United States to join the ICC and to repeal ASPA.[264]

Clearly, the current mood in the United States is in favor of greater cooperation with the ICC.[265] Presently, the Court is viewed as a tool to punish Russian officials, including President Putin, for their perceived misdeeds in Ukraine.[266] While there is no consensus as to what form that cooperation might take, it has been suggested that the United States should join the ICC so that it might play a greater role in the accountability efforts being made in the context of Ukraine.[267] The problem with this suggestion is that it does not propose how to address the United States' longstanding objections to Article 12(2) of the Rome Statute.

The United States' jurisdictional disagreement with the ICC remains intractable as the United States' position on Article 12 is in direct opposition to the plain text of the Rome Statute.[268] A resolution of this matter would require the occurrence of one of the following:

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261. Ukraine Invasion War Crimes Deterrence and Accountability Act, H.R. 7276, 117th Cong. (2022).

262. Press Release, Ilhan Omar, Rep., House of Reps., Rep. Omar Statement on Ukraine War Crime Deterrence and Accountability Act (Apr. 5, 2022), https://omar.house.gov/media/press-releases/rep-omar-statement-ukraine-war-crime-deterrence-and-accountability-act.

263. H.R. 855, 116th Cong. (2020).

264. H.R. 7523, 117th Cong. (2022).

265. Laura Dickinson, *US Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges*, JUST SECURITY (June 20, 2023), https://www.justsecurity.org/86959/us-cooperation-with-the-icc-to-investigate-and-prosecute-atrocities-in-ukraine-possibilities-and-challenges.

266. *See generally International Criminal Court Issues Arrest Warrant for Putin over Ukraine War Crimes*, PBS (Mar. 17, 2023), https://www.pbs.org/newshour/world/international-criminal-court-issues-arrest-warrant-for-putin-over-ukraine-war-crimes (explaining that the International Criminal Court is fulfilling its duties as a court of law by arresting Vladimir Putin and Maria Alekseyevna Lvova-Belova for war crimes in Ukraine).

267. Ilhan Omar, *For Putin to Face Justice, We Must Join the International Criminal Court*, WASH. POST (Apr. 13, 2022), https://www.washingtonpost.com/opinions/2022/04/13/icc-war-crimes-putin-russia-us-should-join.

268. *See generally* Reeves, *supra* note 250 (discussing U.S. opposition to the Rome Statute and how Article 12 sets for the preconditions to exercise jurisdiction but the U.S. is concerned with having to surrender a citizen to the jurisdiction of the ICC).

(1) the United States accepts the jurisdiction of the Court as currently formulated; (2) the Rome Statute is amended to conform with the American position; or (3) Article 12 is given a meaning unsupported by its text. None of these three options seem likely in the current climate. The United States has maintained the same position for twenty-five years, and has not indicated that it will change.[269] Amendments to the Rome Statute are rare, and those that have passed tended to increase, rather than decrease, the Court's jurisdiction over certain types of crime.[270] Amending or interpreting the Rome Statute in line with the American position would result in changing the fundamental meaning of it so that a state's non-membership in the ICC would shield its citizens from ICC prosecution.[271] Construing the Rome Statute in that way could disincentivize states from joining—or remaining members of—the Court. If accepted, this approach would increase impunity, decrease the ICC's membership, and undermine the Court's very *raison d'être*.[272] Therefore, other options must be pursued if the ICC and the United States are to find sufficient common ground to enable the United States to become a member of the Court.[273]

III. UNDERSTANDING THE PURPOSE OF THE ICC

Much of the United States' opposition to the ICC relates to its understanding of the Court's purpose.[274] The ICC was founded on the principle of ending impunity for individuals committing war crimes, crimes against humanity, genocide, and the crime of aggression regardless of their official position or national affiliation.[275] The principle of ending impunity can be found in the Preamble to the Rome Statute, which states that States Parties to the ICC are "determined to end impunity for the perpetrators of unimaginable atrocities that deeply shock the conscience of humanity and threaten

269. Omar, *supra* note 267.

270. *See* Assembly of State Parties RC/Res. 6, U.N. Doc. RC/11, at 17 (June 11, 2010); Assembly of State Parties ICC-ASP/16/Res. 4, U.N. Doc. ICC-ASP/16/20, at 32 (Dec. 14, 2017); Assembly of State Parties ICC-ASP/18/Res. 5, U.N. Doc. R5-E-270820, at 1 (Dec. 6, 2019).

271. *See* Adrian T. Delmont, *The International Criminal Court: The United States Should Ratify the Rome Statute Despite Its Objections*, 27 NOTRE DAME L. SCH. J. LEGIS. 335, 358 (2001).

272. *Id.*

273. *See generally* Oona Hathaway, *The U.S. Finally Sees the Point of the International Criminal Court*, WASH. POST (Apr. 13, 2022, 11:46 AM), https://www.washingtonpost.com/outlook/2022/04/13/war-crimes-russia-ukraine-icc (explaining the unlikelihood that the U.S. will formally join the ICC with current options despite the possibility of compromise in the future).

274. *See* Reeves *supra* note 268, at 15 (explaining that the purpose of the ICC is to serve complementary to national judicial systems, rather than being a substitute for them); *see also* JENNIFER K. ELSEA, CONG. RSCH. SERV., U.S. POL'Y REGARDING THE INT'L CRIM. CT. (Aug. 29, 2009) (discussing the U.S.'s understanding of the ICC's ability to prosecute crimes committed by citizens of non-member states to be an attack on sovereignty).

275. *See* The United Nations Rome Statute of the International Criminal Court Preamble, *opened for signature* July 17, 1998, 2187 U.N.T.S 90; *see id.* at art. 27.

the peace, security and well-being of the world."[276] The Rome Statute further elaborates on its purpose in Articles 1 and 5, which indicate that the ICC has the power to exercise its jurisdiction over individuals accused of having committed "the most serious crimes of international concern" as set out in the Rome Statute.[277] The only statutory limitations on the Court's jurisdiction are that the crimes alleged must have occurred after the Rome Statute came into force, that they took place either on the territory of a State Party or state accepting the jurisdiction of the Court or the person accused of the crimes is a national of a State Party or a state accepting the Court's jurisdiction, and no other court with jurisdiction over the matter is investigating or prosecuting the matter.[278] From the ICC's perspective, it can achieve its purpose by investigating and prosecuting individuals thought to have committed the types of crimes over which it has jurisdiction without limit as to the context in which the crime was committed.[279]

This differs from the United States' understanding of the Court's purpose. Officials representing several different presidential administrations have espoused the position that American troops should not be subject to ICC investigation or prosecution.[280] David J. Scheffer best exemplified this perspective in a statement made the week after the Rome Statute was agreed upon, in which he called it "untenable" for a U.S. servicemember to face accusations of war crimes committed when fighting to halt a genocide.[281] The Bush administration reiterated this position when it indicated that American servicemembers should be protected from ICC prosecution due to their "unique role and responsibility to help preserve international peace and security."[282] A second Bush administration official later asserted that it was not the purpose of the ICC to subject United States peacekeepers on UN-sanctioned missions to the jurisdiction of the Court.[283] The Trump administration implicitly made a similar point, when Secretary of State Michael Pompeo said, "the United States has consistently sought to uphold good and punish evil," and that it did not intend to let the threat of ICC prosecution prevent it from doing so.[284] The

276. *See id.* at pmbl.

277. *See id*. at arts. 1, 5.

278. *See id.* at arts. 11, 12, 17.

279. *See* INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 9 (2020).

280. *See infra* notes 282–85.

281. David Scheffer, Ambassador-at-Large for War on Crimes Issues and Head of the U.S. Delegation to the UN Preparatory Comm'n for the Int'l Crim. Ct., Statement before the Congressional Human Rights Caucus (Sept. 15, 2000), https://1997-2001.state.gov/policy_remarks/2000/000915_scheffer_hrcaucus.html.

282. *See* Grossman, *supra* note 36.

283. John Negroponte, U.S. Permanent Representative to the UN, Statement in the UN Security Council (July 10, 2002), https://2001-2009.state.gov/p/io/rls/rm/2002/11756.htm.

284. Pompeo, *supra* note 217.

common thread running through these statements is the concern that American servicemembers could be held criminally responsible for crimes committed during peacekeeping missions or when halting or responding to the atrocity crimes of others.[285]

All these statements, to varying or lesser degrees, advance the idea that the ICC's purpose is limited and that some atrocity crimes are justified and should be excused. This contradicts the ICC's stated purpose of ending impunity which does not, on its face, seem to accommodate the limitations suggested by the United States.[286] Settling this dispute and identifying a constructive way forward for the relationship between the United States and the ICC necessitates an inquiry into the *travaux préparatoires* of the Rome Statute to determine whether there is any basis for the United States' position. The focus will be on three different textual issues that could provide the support necessary for the United States' position. They are whether: (1) the purpose of the ICC is to only prosecute and punish aggressive crimes; (2) the gravity requirement found in Article 17 of the Rome Statute prevents prosecution for defensive atrocity crimes; or (3) certain defenses can limit criminal responsibility for defensive crimes.

A. The Overarching Purpose of the ICC

Little evidence exists in the *travaux préparatoires* to the Rome Statute to suggest that the ICC was designed to only punish aggressive forms of criminal behavior.[287] The United Nations' efforts to establish an international criminal court began in earnest in 1947 when the UN General Assembly passed a Resolution creating the International Law Commission ("ILC").[288] The ILC was initially assigned two tasks: (1) to formulate the Nürnberg Principles of international law; and (2) to prepare a draft code of offences against the peace and security of mankind.[289] Soon after, the General Assembly passed a Resolution establishing the Committee on International Criminal Jurisdiction ("CICJ").[290] The CICJ was charged with preparing proposals and a preliminary draft for the establishment of an international criminal court.[291]

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285. *See infra* notes 282–85.

286. *See* INT'L CRIM. CT., *supra* note 279, at 6.

287. *See generally* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 211–51 (Stefan Barriga & Claus Kreß eds., 2012) (providing documents and reports from the six meetings prior to the Rome Statute).

288. *See* G.A. Res. 174 (II), at 105 (Nov. 21, 1947); *see also* G.A. Res. 177 (II), at 111 (Nov. 21, 1947).

289. *See* G.A. Res. 177 (II), at 112 (The International Law Commission used the German spelling of "Nürnberg," rather than the anglicized spelling of "Nuremberg." The principles authored by the ILC are referred to in this article as the "Nürnberg Principles" as that was their official name. "Nuremberg" will be used in all other instances in this article.).

290. G.A. Res. 489 (V), at 78 (Dec. 12, 1950).

291. *Id.*

The first drafts of the ILC's code of offences against the peace and security of mankind and the CICJ's statute for an international criminal court were presented in 1951.[292] The ILC's draft code outlines what constitutes a crime against peace and security and does not contain a blanket exemption from prosecution for individuals accused of committing atrocity crimes in response to crimes being committed by others.[293] Instead, it focuses on identifying the sorts of behavior that constitutes international criminality. For example, the article on war crimes simply states that "acts in violation of the laws or customs of war" constitute a crime.[294] It is not qualified in a way that excludes any group from prosecution, making clear that anyone who commits a war crime can be held liable for their actions.[295] The CICJ's draft statute takes a similar approach, indicating that the purpose of the proposed permanent international criminal court is to "try persons accused of crimes under international law" as identified in treaty law or by agreement amongst the States Parties to the Rome Statute.[296] The ability of the prospective court to act is in no way limited to suspects thought to have committed aggressive criminal acts.[297]

The approaches taken by the ILC and the CICJ are consistent with the Nürnberg Principles identified by the ILC in 1950. The purpose of the Nürnberg Principles was to identify the international legal principles established in the Charter and Judgment of the Nuremberg Tribunal.[298] Principle 1 unequivocally states that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor (sic) and liable to punishment."[299] The commentary appended to the principles recognizes that Principle 1 draws from the text of Article 6 of the Nuremberg Charter.[300] Although Article 6 specifically limits criminality to people acting in the interests of the Axis Powers, the commentary explains that the Principle has been expressed in general terms "as a matter of course."[301] The members of the ILC believed it was appropriate to broaden the scope of the Article and to expand it to include the

292. *Report of the International Law Commission to the General Assembly*, Y.B. Int'l L. Comm'n 1951, 134, U.N. Sales No. 1957. V. 6, Vol. II; *see* Comm. on the Int'l Crim. Jurisdiction, Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, U.N. Doc. A/2136 at 1 (1952).

293. *See Report of the International Law Commission to the General Assembly*, *supra* note 292, at 135–37.

294. *Id.* at 136.

295. *See id*. at 135–36.

296. Comm. on the Int'l Crim. Jurisdiction, *supra* note 292, at 21.

297. *Id.*

298. G.A. Res. 177(II), *supra* note 289, at 111–12.

299. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries*, *reprinted in* [1950] 2 Y.B. INT'L L. COMM'N 374, UN Doc. A/CN.4/SER.A/1950/Add. 1.

300. *Id.*

301. *Id.*

criminality of all sides to a conflict so as to avoid the perception that trials like those held at Nuremberg were nothing more than victor's justice.[302]

The Americans' position on the purpose of the ICC may be rooted in this discrepancy between the Nürnberg Principles and the Charters of the Post-World War II Tribunals.[303] Limiting the personal jurisdiction of those individuals who could be tried by the Nuremberg Tribunal to people acting in the interests of the Axis countries meant that the Tribunal lacked the competence to try citizens of the Allied countries for any crimes they may have committed during the War.[304] Like the Nuremberg Charter, the Charter of the Tokyo Tribunal also contained a jurisdictional limit, albeit one worded in a somewhat confusing way.[305] Article 1 of the Tokyo Charter states that the Tribunal was established for the purpose of trying and punishing "the major war criminals in the Far East."[306]

This phrase can be understood in two ways. Broadly interpreted, the Tokyo Charter could refer to anyone alleged to have committed war crimes in the Pacific theatre of the war. When given a narrower meaning it may refer to individuals accused of war crimes who are nationals of a country located in the Far East. It would seem the latter reading is more likely the correct interpretation when read in conjunction with other parts of the Charter, particularly Article 5, which states that the Tribunal has the power to try and punish "Far Eastern war criminals."[307] Although the meaning of this term is not definitive, it lends itself to being understood to refer to people of Far Eastern origin. Perhaps even more persuasive is the fact that all the accused at the Tokyo Tribunal were of Japanese descent. While it is possible that the Charter permitted the Tribunal to prosecute crimes committed by people from outside of the Far East, it was never used in that way.[308]

Limiting who could be tried by the Post-World War II Tribunals to German and Japanese nationals implies that there was a qualitative difference between crimes committed by the Axis

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302. *Report on the 43rd Meeting of the International Law Commission*, *reprinted in* [1950] 1 Y.B. INT'L L. COMM'N 20, U.N. Doc. A/CN.4/SER.A/1950.

303. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 559–60 (2006) (noting that the post-WWII tribunals arose from war as opposed to more modern human rights proceedings).

304. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 251 U.N.T.S. 286 [hereinafter London Agreement].

305. Charter of the International Military Tribunal for the Far East, art. 1, Jan. 19, 1946, T.I.A.S. No. 1589, at 21–22 [hereinafter Tokyo Charter].

306. *Id.*

307. *Id.* at 22.

308. *See* Ann Marie Prèvost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 315 (1992) (stating that trials under the Tokyo Charter occurred only in Tokyo and Yokohama).

countries and the Allied countries.[309] Distinguishing the criminality of people acting on behalf of the Axis powers from those working to further Allied interests, as well as making only the Axis side subject to prosecution, suggests their crimes were of such severity that they require a legal response.[310] Further, it serves to absolve citizens of Allied countries of responsibility for crimes they may have committed during the war, even where those crimes were aggressive in nature. As a result, it leads to the conclusion that criminal responsibility only lies with one side of the conflict as they were primarily responsible for the war. This understanding of post-conflict prosecutions aligns with the United States' interpretation of the ICC's purpose.[311]

The practice of limiting who may be exposed to criminal prosecution was carried forward into the ad hoc tribunals set up for Rwanda and the former Yugoslavia.[312] The International Criminal Tribunal for Rwanda avoided investigating and prosecuting crimes committed by members of the Tutsi ethnic group, nor did it consider any possible criminality arising from the inaction of international peacekeeping forces during the genocide.[313] Prosecutions at the International Criminal Tribunal for the former Yugoslavia were similarly limited, as the Tribunal did not investigate crimes allegedly committed by NATO or the role played by the Dutch government in the Srebrenica genocide.[314] This should come as no surprise as the United States was heavily involved in establishing both ad hoc Tribunals and its past practice indicates that it generally approves of the idea that only citizens from particular States should be subject to international criminal jurisdiction.[315] It logically follows that if the United States believed in limited accountability in the context of

309. Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 337 (2013) (noting that the idea of war crimes emerged directly as a response to the "massive" atrocities of the Nazi regime).

310. *See id.*

311. *See* Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 54–55 (2004) (noting the contradictions between American policy toward the ICC and its support of the post-war tribunals).

312. RONEN STEINKE, POLITICS OF INTERNATIONAL CRIMINAL JUSTICE: GERMAN PERSPECTIVE FROM NUREMBERG TO HAGUE 13 (2012).

313. Megan A Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34(1) CAL. W. INT'L L. J. 47, 57–58 (2003) (discussing the pressure the Rwandan government brought upon the Tribunal); Roger S. Clark, *Doing Justice to History: Confronting the Past in International Criminal Trials by Barry Sander*, 91 NORDIC J. INT'L 265 (2022) (book review).

314. VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND BALKANS, 33–34 (Cambridge University Press 2008); *see* Steinke, *supra* note 312 at 16; Janine Natalya Clark, *The Limits of Retributive Justice*, 7(3) J. INT'L CRIM. JUST. 463, 472 (2009).

315. *The US-ICC Relationship*, INT'L CRIM. CT. PROJECT, https://aba-icc.org/about-the-icc/the-us-icc-relationship (last visited Sept. 21, 2023); *The United States and International Criminal Justice: A Complex and Challenging Relationship,* PARLIAMENTARIANS FOR GLOB. ACTION, https://www.pgaction.org/ilhr/rome-statute/united-states-and-international-criminal-justice.html (last visited Sept. 21, 2023).

Nuremberg, Tokyo, and the ad hoc Tribunals, then it would also be interested in having the ICC pursue a similar approach.

It does not appear that the states negotiating the Rome Statute followed the lead of the international criminal courts and tribunals that preceded the ICC. The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("Rome Conference") began in Rome on June 15, 1998.[316] UN Secretary-General Kofi Annan opened the Conference with a speech, indicating that people all over the world were interested in a court where anyone committing atrocity crimes could be held accountable regardless of their official position in the government or military.[317] These comments largely accord with his earlier thoughts on the Court, when he expressed his desire for a court that would ensure no state, army, ruler, or junta could commit human rights violations with impunity and that would provide a venue for all such crimes to be punished.[318] The Secretary-General clearly envisioned a court that would prosecute all types of human rights violations, regardless of the reasons they were committed.[319] This viewpoint was further reinforced during the opening of the Rome Conference when its President, Giovanni Conso, proclaimed that the establishment of the ICC was important because it ensured that justice would no longer be selective.[320] This too suggests that the purpose of the ICC is to try all crimes falling under its jurisdiction.

This opinion was shared by the leaders of some of the national delegations to the Rome Conference. Boris Frlec of Slovenia and Didier Opertti of Uruguay both indicated that the perpetrators of atrocity crimes must be brought to justice without qualification.[321] Similarly, the Syrian representative, Mohammad Said Al Bunny, believed that all individuals who violate international law should be prosecuted.[322] Implicit in these statements is the idea that all perpetrators of atrocity crimes should be eligible for prosecution by the Court. By comparison, Hisashi Owada of Japan and Elena Zamifrescu of Romania took the position that prosecutions should be reserved for "the most heinous crimes," while other delegates spoke of prosecuting the most serious violations of international law.[323] These assertions suggest a more limited purpose for the ICC and that

316. Summary of Records of United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc A/CONF.183/13 (Vol. II), at 61 (2002) [hereinafter UN Diplomatic Conference].

317. *Id.*

318. Kofi Annan, *Advocating for an International Criminal Court*, 21 FORDHAM INT'L L. J. 363, 366 (1997).

319. *See id.*

320. *See* Summary of Records of United Nations Diplomatic Conference, *supra* note 316, at 63.

321. *Id.* at 70, 115.

322. *Id.* at 83.

323. *Id.* at 67, 76, 91.

the severity of the crimes alleged is important when determining whether the Court is authorized to act.[324]

The latter viewpoints prioritizing the severity of crimes align with the text of the Rome Statute.[325] The Rome Statute repeatedly refers to the idea that the Court's jurisdiction extends to "the most serious crimes of international concern" and that it has a responsibility to ensure that those crimes do not go unpunished.[326] Two important and related questions arise from these statements and statutory provisions. First, are references to the severity of the crime a reflection of the idea that the crimes falling under the Rome Statute are all necessarily severe and therefore investigations and prosecutions are appropriate whenever such a crime is committed? Or, does severity relate to the circumstances under which crimes are committed, meaning that prosecutions should only take place when the statutory crimes are committed in a particularly severe manner? If it is the former, then the statements are of the same type as those made without qualification and simply reflect a desire to ensure that anyone who commits an atrocity crime can be subject to prosecution. However, if it is the latter, it could offer support for the United States' position to the extent that crimes committed in response to other crimes are often less severe than the acts they are responding to.[327] A result of following the latter approach could lead to the interpretation that crimes committed during peacekeeping operations or in response to other crimes may not be sufficiently grave to warrant attention from the ICC.[328] While there is no clear evidence in the Rome Statute to conclude that the ICC is only intended to prosecute international crimes resulting from aggressive behavior, the requirement that crimes be particularly serious to be eligible for prosecution may bolster the United States' interpretation of the Court's purpose.[329] For that reason, it is necessary to examine whether the gravity requirement found in Article 17(1)(d) mandates that crimes meet a particular seriousness threshold.

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324. Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOB. STUD. L. REV. 1, 5 (2017).

325. *See id.* at 6.

326. *See* Rome Statute *supra*, note 37, at pmbl., arts. 1, 5.

327. *See generally* Melissa De Witte, *In a War Perceived As Just, Many Americans Excuse Soldiers Who Commit War Crimes, Stanford Scholar Finds*, STAN. NEWS (Dec. 9, 2019), https://news.stanford.edu/2019/12/09/war-perceived-just-many-americans-excuse-war-criminals ("According to his data, Sagan found that Americans believe that soldiers who fight for the just side of conflict—in this case, defending against an aggressor who invaded their country—should be allowed more leeway than soldiers who fought on an unjust side—that is, the side who carried out the act of aggression.").

328. *See* Rome Statute, *supra* note 37, at arts. 5, 17.

329. *Id.*

B. Gravity of the Crimes

The severity of alleged crimes may be an important consideration when determining which perpetrators should be prosecuted by the ICC.[330] In the parlance of the Rome Statute, this is referred to as "the gravity of the crime."[331] The notion of gravity was first introduced in 1994 in the draft statute for an international criminal court adopted by the ILC.[332] The draft statute references gravity briefly in draft article 35, which states that the Court may decide not to proceed with a case if it is not of sufficient gravity to justify further action.[333] The commentary to draft article 35 instructs that the gravity of a crime is determined by referencing the purposes of the draft statute as stated in the Preamble.[334] Unfortunately, the Preamble is not particularly instructive in this regard. It simply indicates that the Court's jurisdiction is limited to "the most serious crimes of interest to the international community as a whole."[335]

Instead, it is necessary to refer to draft article 20, which identifies the crimes over which the proposed Court would have jurisdiction.[336] They include: genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and a catch-all provision encompassing treaty-based crimes of particular seriousness.[337] While the article itself is silent about gravity, the use of the adjective "serious" to modify the crimes of violating the laws of war and the catch-all provision relating to treaty-based crimes indicates that not all acts are of sufficient seriousness and that a severity threshold must be met before an alleged crime is eligible for investigation and prosecution.[338] This is more explicitly reinforced in the commentary to draft article 20, which indicates that not all war crimes are of sufficient gravity to be subject to the jurisdiction of the Court.[339] Further, the term "serious violations" was used intentionally to avoid confusion with the term "grave breaches" as employed by the 1949 Geneva Conventions and the 1977 Additional Protocol thereto when describing contraventions of the laws of war.[340] The ILC emphasized that the terms are not synonymous and that not all grave breaches

330. *Id.*
331. *See id.* at arts. 53(1)(c), 17(1)(d).
332. *Draft Statute for an International Criminal Court*, [1994] 2 Y.B. Int'l L. Comm'n 52, A/49/10.
333. *Id.*
334. *Id.*
335. *Id.* at 27.
336. *Id.* at 38.
337. *Id.*
338. *See id.* at 38–39.
339. *Id.* at 39.
340. *Id.*

are serious violations.[341] The commentary on the draft statute does not, however, contain an explanation of how to identify those violations that are sufficiently grave so as to warrant attention from the Court.

The gravity requirement in draft article 35 of the ILC's draft statute was retained in future drafts and was ultimately included in the Rome Statute itself.[342] Article 17 of the Rome Statute contains a provision under which the Court can decide that a matter is inadmissible because it lacks sufficient gravity to justify further action.[343] There appears to have been little discussion about the gravity principle during the Rome Conference.[344] The delegations that did address it mostly questioned the inclusion of the provision in the final Statute, with the Chilean delegation suggesting that the term "gravity" was vague and in need of further explanation.[345] Despite these objections, the provision incorporated into the Rome Statute is almost identical to the one first introduced by the ILC in 1994.[346]

The Rome Conference also failed to clarify what threshold must be met to demonstrate that criminal behavior is sufficiently grave to fall under the jurisdiction of the ICC.[347] Several delegates referenced the need to establish responsibility for serious crimes threatening international peace or of the greatest concern to the international community.[348] That could be interpreted to mean that those two criteria should be the baseline against which gravity should be judged and that criminality can only be investigated and prosecuted if at least one of them is met. Alternatively, other delegations took the position that the gravity of a crime relates to the circumstances surrounding its commission.[349] Bill Richardson, the American Ambassador to the United Nations, spoke during the conference about the need for the ICC to focus on "atrocities of significant magnitude."[350] Similarly, Ljerka Hodak of Croatia insisted that the matters brought before the ICC must be of "sufficient gravity and significance" to avoid burdening the Court with "minor violations."[351]

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341. *Id.* at 39–40.

342. *See* Rome Statute, *supra* note 37, at art. 17.

343. *Id.*

344. *See* Susana SáCouto & Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. U. INT'L L. REV. 807, 821–22 (2008) (discussing broad acceptance of the gravity principle during negotiations).

345. *See* UN Diplomatic Conference Summary, *supra* note 316, at 215.

346. *Id.*; *see also Draft Statute for an International Criminal Court with Commentaries*, *supra* note 332.

347. *See* Summary of Records of United Nations Diplomatic Conference, *supra* note 316, at 106.

348. *See id.* at 102, 106, 115.

349. *Id.* at 123.

350. *Id.* at 95.

351. *Id.* at 94.

This approach adds a contextual consideration to gravity missing from other interpretations of the gravity threshold.

Other delegations argued that the crimes covered by the Rome Statute were already of sufficient gravity, which was signaled by the decision to include them in the first place.[352] That reading of the gravity requirement was exemplified by the Moroccan representative, Moustafa Meddah, when he indicated that the Rome Statute should only include crimes of extreme gravity, suggesting that all of the crimes included in the Rome Statute met the gravity requirement of Article 17.[353] Didier Opertti from the Uruguayan delegation felt that at least two categories of crimes, genocide and war crimes, were of sufficient gravity, and left open the possibility that other types of crimes could be grouped with them.[354] He also insisted that no international crime rising to that level of gravity should go unpunished.[355] Not all of the delegations agreed that a crime's inclusion in the Rome Statute demonstrated the requisite gravity to warrant investigation and prosecution.[356] Israel voted against the Rome Statute because it felt that the war crime of an occupying state transferring its own citizens into occupied territory was not of sufficient gravity to warrant inclusion in the Rome Statute.[357] This suggests that, at least from the perspective of some delegations, the crimes contained in the Rome Statute are not of equal gravity.

This diversity of opinions from the delegates indicates that there was no consensus at the Rome Conference about how or when the gravity threshold should apply.[358] However, the very existence of the threshold signifies that the severity of a particular crime is relevant. Different Pre-Trial Chambers have confirmed this and attempted to make sense of the gravity threshold.[359] In *Prosecutor v. Lubanga*, Pre-Trial Chamber I considered the meaning of the Article 17(1)(d) gravity threshold.[360] There, the Pre-Trial Chamber found that the gravity threshold found in Article 17(1)(d) exists in addition to the inherent gravity of the crimes contained in the Rome Statute and that to meet the threshold there must be a showing that the conduct under consideration is "especially grave."[361] To meet that standard, conduct must be either systematic or large-scale and due

352. *See id.* at 298.
353. *Id.*
354. *See id.* at 116.
355. *Id.*
356. *Id.* at 123.
357. *Id.*
358. *See id.* at 102, 106, 115, 123.
359. Prosecutor v. Lubanga, ICC-01/04-01/06-1-Corr-Red 17-03-2006, Decision on Prosecutor's Application for Warrant of Arrest pursuant to Art. 58 of the Statute, ¶¶ 42–45 (Feb. 10, 2006); Situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 55–57 (Mar. 31, 2010).
360. *Lubanga*, ICC-01/04-01/-06-8-Corr, ¶ 42.
361. *Id.* at ¶ 45.

consideration must be given to the social alarm the behavior causes in the international community.[362] However, the inquiry does not end there.[363] Pre-Trial Chamber I further explained that gravity considerations are not only limited to the nature of the conduct but are also concerned with the identity of the person alleged to have engaged in the criminal behavior.[364] In particular, gravity requires that the person against whom charges may be brought is a senior leader in the situation under investigation and that they are most responsible for the alleged criminality.[365]

Pre-Trial Chamber II followed a similar approach when considering whether crimes committed in the context of the *Situation in Kenya* were of sufficient gravity to warrant prosecution.[366] It found that all of the Rome Statute crimes were severe and the purpose of the gravity threshold was to prevent the ICC from pursuing matters that fall under the Rome Statute but are peripheral to other matters.[367] As a result, gravity is to be assessed by considering whether the people who are likely to be the object of the investigation are most responsible for the crimes committed and by evaluating the context in which the crime was committed.[368] The contextual aspect should be considered both quantitatively and qualitatively and include aggravating factors, such as the scale of the crimes, the nature of their commission, the means by which they were committed, and their impact.[369]

The approaches to gravity taken by Pre-Trial Chambers I and II support the United States' position that crimes committed by peacekeeping forces or that are otherwise responsive to atrocity crimes are not the ICC's intended focus. Those crimes can be seen as peripheral to other crimes because they are not the dominant source of criminality; rather, they are a response to that criminality.[370] When considering the factors applied by the Court, it is entirely possible that responsive atrocity crimes may lack sufficient gravity rendering them appropriate for investigation or prosecution. However, that conclusion should not lead to the assumption that individuals committing Rome Statute crimes for defensive purposes will necessarily avoid ICC scrutiny. Any future Chamber confronted with crimes of this nature may still consider the factors identified by

362. *Id.* at ¶ 46.

363. *Id.* at ¶ 49.

364. *Id.* at ¶ 50.

365. *Id.* at ¶ 63.

366. Situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 55–57 (March 31, 2010).

367. *Id.* at ¶ 56.

368. *Id.* at ¶¶ 59–61.

369. *Id.* at ¶ 62; *see also* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L. J. 1400, 1451–54 (2009).

370. *See* deGuzman, *supra* note 369, at 1457.

Pre-Trial Chambers I and II before reaching a decision about whether a case will proceed and leave open the possibility that individuals who committed responsive atrocity crimes will be held accountable for them.[371]

C. Grounds for Excluding Responsibility

After remaining dormant for nearly thirty years, interest in international criminal justice saw a revival in 1981, when the U.N. General Assembly invited the ILC to resume its work on the draft code of offences against the peace and security of mankind.[372] Doudou Thiam, a Senegalese lawyer and diplomat, was appointed Special Rapporteur to lead the project, and in 1983, he produced a report raising a number of issues for discussion about how to reform the existing draft code, including whether under international law responsive behavior, such as self-defense, could be used as a basis to excuse otherwise criminal behavior.[373] The report did not reach a conclusion on the issue, nor did it clarify whether it would extend to all of the forms of self-defense discussed in Article 51 of the UN Charter.[374] During the ensuing debate, some ILC members suggested that the draft code should contain a separate section addressing exceptions to criminal responsibility arising out of self-defense or actions taken pursuant to decisions made under Chapter VII of the UN Charter.[375] In 1984, Thiam prepared a subsequent report in which he revisited the issue of exculpatory pleas.[376] There, he explained that pleading self-defense or the defense of others would not relieve the accused of criminal responsibility; however, it could mitigate their punishment should they be convicted.[377]

In 1991, the ILC provisionally adopted its Draft Code of Offences Against the Peace and Security of Mankind.[378] This version contained an article permitting trial courts to decide what defenses would be applicable during trial and how extenuating circumstances should be taken into account during sentencing.[379] The ILC intentionally chose to leave this provision vague because it was unable to select more specific wording with any consensus amongst the Committee's members.[380] It left open the possibility that more specific wording

371. *Id.*
372. G.A. Res. 36/106, ¶ 1 (Dec. 10, 1981).
373. *Id.* at 147.
374. *Id.*
375. Int'l Law Comm'n, Rep. on the Work of Its Thirty-Fifth Session, U.N. Doc. A/CN.4/L.369 at 29 (1984).
376. *See* Doudou Thiam, *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, [1986] 2 Y.B. INT'L L. COMM'N 81, U.N. Doc. A/CN.4/398.
377. *See id.* at 73.
378. *See Draft Code of Crimes Against the Peace and Security of Mankind*, [1991] 2 Y.B. Int'l L. Comm'n 94, U.N. Doc. A/CN.4/SER.A/1991/Add. 1.
379. *See id.* at 95.
380. *See id.* at 100.

would be agreed to regarding what types of defenses and extenuating circumstances might be relevant, although it again reiterated the need to consider criminal law concepts including: self-defense, necessity, force majeure, coercion, and error.[381]

An effort was made to identify more specific wording in the years leading up to the Rome Conference.[382] In 1995, the UN General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court to expedite the creation of a permanent international criminal court.[383] Through its Working Group on General Principles of Criminal Law, the Preparatory Committee explored a number of different ways to formulate the concepts of self-defense and the defense of others.[384] The Preparatory Committee was unable to reach a conclusion, and it remained an open issue for the delegates at the Rome Conference to resolve.[385]

Unlike the gravity provision, the clause on excluding criminal responsibility was a topic of significant discussion during the Rome Conference.[386] This is highlighted by a note in the draft article on this topic that was transmitted by the Working Group on General Principles of Criminal Law to the Committee of the Whole.[387] It indicated that the draft article "was the subject of extensive negotiations" and that the wording of it was the result of "quite delicate compromises."[388] The United States submitted a particularly contentious proposal during those discussions that was designed to expand the types of behavior for which criminal responsibility could be excluded.[389] In addition to the provisions on self-defense and the defense of others that appeared in earlier drafts of the Rome Statute, the United States also proposed excluding the criminal responsibility of people serving as members of the armed forces whose actions were the result of a government or military order.[390] Under this proposal, a member of the military would be excluded from criminal responsibility unless they knew the orders were unlawful or where

381. *See id.*

382. *See* G.A. Res. 50/47, ¶ 2 (Dec. 18, 1995).

383. *Id.*

384. *See* Preparatory Comm. On the Establishment of an Int'l Crim. Ct., Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, at 16–17, U.N. Doc. A/AC.249/1997/L.9/Rev. 1 (Dec. 18, 1997).

385. *See id.* at 16, 18.

386. *See* U.N. Diplomatic Conference of Plenipotentiaries, on the Establishment of an International Criminal Court, at 255 n. 57, U.N. Doc. A/CONF.183/13 (Vol. III).

387. *See id.*

388. *Id.*

389. *See* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *United States of America: Proposal Regarding a Single Provision Covering Issues Currently Governed by Articles 31 to 34*, at 259, U.N. Doc. A/CONF.183/C.1/WGGP/L.2 (Vol. III) (June 16, 1998) [hereinafter American Proposal].

390. *Id.*

the orders were manifestly unlawful.[391] Ultimately, this sweeping provision that would have permitted the defense of superior orders was not adopted. Instead, the delegates to the Rome Conference included a more limited form of the defense of superior orders in Article 33 of the final Statute.[392] While it contains some of the same limitations proposed by the United States, Article 33 is framed in negative terms and forbids the assertion of superior orders unless certain exceptions apply.[393] Self-defense and the defense of others were retained as defenses in the agreed Statute.[394]

If the United States' proposal had been adopted, it would have created the sort of exception from prosecution the United States continues to advocate for.[395] The understanding that the delegates to the Rome Conference could have expanded the principle of protecting military personnel acting under orders from prosecution—and declined to do so—undermines the United States' argument that it is outside the ICC's purpose to prosecute members of the military who commit defensive atrocity crimes.[396] This is further reinforced by the plain language of Article 31(1)(c).[397] It states that an individual is not excluded from responsibility under the Rome Statute solely by virtue of their involvement in a defensive operation at the time of their alleged criminality.[398] This rejects the notion that the ICC's purpose is limited to only prosecuting aggressively-committed atrocity crimes.

While it is apparent that the ICC's purpose may include prosecuting members of the military engaged in defensive operations, the defenses of self-defense and the defense of others could still shield them from responsibility in some circumstances.[399] Self-defense and the defense of others are described in the Rome Statute as "grounds for excluding criminal responsibility," meaning that when either is adequately proven they protect the accused from being held accountable for their otherwise criminal acts.[400] These defenses are established through the presentation of testamentary and documentary evidence proving three elements: (1) the accused was protecting themself or another (or property under certain circumstances); (2) from imminent and unlawful attack; and (3) the actions taken in defense were proportionate to the degree of danger threatened.[401] Whether that burden has been met is decided by the

391. *Id.*
392. *See* Rome Statute, *supra* note 37, at art. 33.
393. *Id.*
394. *Id.* at art. 31(1)(c).
395. *See* American Proposal, *supra* note 391.
396. *See id.*
397. *See* Rome Statute, *supra* note 37, at art. 31(1)(c).
398. *Id.*
399. *Id.*
400. *Id.*; *see also* Kai Ambos, *Defences in International Criminal Law*, RSCH. HANDBOOK ON INT'L CRIM. L. 299, 307 (2011).
401. *See* Rome Statute, *supra* note372, at art. 31(1)(c).

Chamber of the Court considering the matter, and that assessment can only be made during the confirmation of charges hearing or the trial itself.[402] Consequently, a case must be initiated and proceed at least to the confirmation of charges hearing before criminal responsibility is excluded on these grounds.[403] This demonstrates that the requirements of Article 31(1)(c) fall short of the total immunity from prosecution advocated for by the United States.[404]

D. Conclusion

The ICC's aim of ending impunity for all serious crimes of international concern is seemingly at odds with the United States' depiction of it as a Court only for "would-be tyrants and mass murderers."[405] The *travaux préparatoires* describes a court with jurisdiction over war crimes, crimes against humanity, and genocide, with the possibility of expanding its jurisdiction in the future to include crimes of aggression.[406] No effort is made to rank those crimes or to suggest that any one is objectively more serious than the others.[407] This leaves open the possibility of investigating and prosecuting anyone committing a Rome Statute crime. It also undermines the American position that the ICC's purpose is to prosecute individuals associated with rogue regimes who commit aggressive criminal acts and not those people committing responsive atrocity crimes.

Nonetheless, some support for the United States' position that the ICC's jurisdiction is limited to aggressive crimes can be found in the *travaux préparatoires* and the Rome Statute itself.[408] The gravity provision in Article 17(1)(d) demonstrates that the severity of the alleged criminal behavior must be considered before the Court can exercise jurisdiction over a matter.[409] It can be argued that defensive crimes are inherently less severe than offensive ones; they are therefore less likely to meet the gravity threshold.[410] However, the

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402. *See* Rome Statute, *supra* note 37, at art. 31(2); *see also* ICC Rules of Procedure and Evidence 80 & 121(9), reproduced from *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York*, 3-10 Sept. 2002 (ICC-ASP/1/3 and Corr.1), part II.A.

403. *See* Rome Statute, *supra* note 37, at art. 31(2).

404. *See* American Proposal, *supra* note 391.

405. *See* UN Diplomatic Conference, *supra* note 316, at 95.

406. *See* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 287, at 211–12, 248.

407. *See id.* at 248.

408. *Id.*; *see* Rome Statute, *supra* note 37, at art. 5.

409. Susana SáCouto & Katherine Cleary, supra note 344, at 808.

410. *See Briefing of the European Parliament Members' Research Service on the International Criminal Court Achievements and Challenges 20 Years After the Adoption of the Rome Statute*, at 3, PE 625.127 (Jul. 2018), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI(2018)625127_EN.pdf.

crimes alleged must be evaluated against all of the gravity criteria and just because they are defensive will not necessarily mean that a prosecution will not result.[411]

Further, Article 31's provision on excluding liability could support the United States' position.[412] It confirms that an accused acting in self-defense or the defense of others may be shielded from responsibility for their otherwise criminal acts.[413] However, it does not prevent the Court from investigating and prosecuting them, and it does not offer a member of the military protection from prosecution solely due to their involvement in a defensive operation.[414] A determination of whether someone acted in self-defense or the defense of others is a judicial decision made during the trial or the confirmation of charges hearing.[415] In other words, a proceeding must first be instituted before an accused can benefit from Article 31.[416] This undermines the argument that the ICC's purpose is limited to prosecuting atrocity crimes resulting from aggressive acts.

Despite some textual support for its position, the United States' conception of the ICC must also fail on policy grounds. Adopting the American approach would disrupt the functioning of the Court and limit its overall effectiveness. It would effectively authorize people to commit atrocity crimes far out of proportion with the harms they are trying to prevent because their criminality could be excused on the basis that it was the only way to respond to other crimes. A strict interpretation of the proposed principle could theoretically lead to a genocide going unprosecuted so long as its perpetrators could link its commission to stopping other atrocity crimes. Further, the solutions to the United States' concerns are already being pursued by the ICC in other forms. By considering the gravity of the alleged crimes before pursuing prosecutions and excluding responsibility under certain circumstances, the ICC is taking a reasonable approach to the problem. Implementing further protections from prosecution based on the context in which a crime is committed would be fundamentally incompatible with the ICC's goal of ending impunity.

IV. CONCLUSION

Since its inception, the ICC has sought universal ratification of its Statute. In that context, significant pressure has been placed on the

411. *See* SáCouto & Cleary, *supra* note 344, at 808.

412. Jérémie Gilbert, *Justice Not Revenge: The International Criminal Court and the 'Grounds to Exclude Criminal Responsibility' – Defences or Negation of Criminality?*, 10 INT'L J. HUM. RTS. 143, 146 (2006).

413. *Id.*

414. Hannah Tonkin, *Defensive Force Under the Rome Statute*, 6 MELB. J. INT'L L. (2005).

415. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 16, 2023).

416. *Id.*

United States to join the Court. The United States has consistently resisted those calls, citing a host of concerns about the Rome Statute and the perceived dangers it poses to American citizens. Despite this longstanding opposition to ICC membership, the United States joining the ICC seems more likely now than at any time in recent history. The Russian invasion of Ukraine shifted American sentiment in favor of the ICC, manifesting itself in the somewhat sympathetic Biden Administration and bilateral support from Congress. However, calls for American membership in the Court have largely failed to consider whether the ICC would welcome the United States as a member.[417]

The United States' longstanding concerns about the Court must be resolved before it can be considered a viable member. That leaves the Court with a choice if it wants to accomplish its stated goal of achieving universality: it can either change its mission in order to secure American membership by adopting mechanisms shielding some people from prosecution or stay the course and relinquish hope of universal ratification. Pursuing the first course would likely give the ICC greater access to the United States' political, financial, and intelligence resources. That, in turn, would make it easier for the Court to investigate the crimes falling under its jurisdiction and possibly lead to more successful prosecutions. However, the benefit of using American resources would almost certainly come at the cost of agreeing to immunize or exempt American citizens from prosecution in some or all situations. Other state parties, particularly those who also regularly deploy their troops in peacekeeping missions, could take exception to this and seek similar special treatment for their own citizens. Should the Court follow that approach it would find itself in danger of creating a two-tiered jurisdictional structure under which the apportionment of criminal responsibility would be as dependent on the accused's citizenship as their actions relating to their alleged criminality.

The Court's other option is to continue on its present path, accept that the United States is not a good candidate for membership, and concede that it should remain outside of the ICC structure. Should the Court maintain course, the integrity of its purpose remains intact, but it will also relinquish the possibility of additional support from the United States that could further its mission in other areas, particularly its oft-stated goal of ending impunity. The experience with the ICC's investigation of Russian crimes in Ukraine bears this out. Even in a situation where the interests of the United States and the ICC appear to largely align, the United States has been reticent about working too closely with the ICC. There is no reason to think that approach will change so long as the United States

417. *See generally* Yevgeny Vindman, *It's Time for the United States to Join the ICC*, FOREIGN POL'Y (Apr. 11, 2023, 11:11 AM), https://foreignpolicy.com/2023/04/11/russia-putin-ukraine-war-icc-united-states-crimes-arrest-warrant; *see also* Omar, supra note 267.

remains outside the ICC regime. What is clear from this is that neither of these options is a perfect solution and both require compromise and sacrifice on the part of the ICC. In the end, whichever route the Court takes will keep its overarching goal of ending impunity stubbornly out of reach.

WINNING BY FORFEIT?: A DISCUSSION OF NORTH CAROLINA'S FORFEITURE OF THE RIGHT TO COUNSEL SANCTION AND MENTALLY ILL DEFENDANTS

AJ FITZGERALD†

I. INTRODUCTION

Under the Sixth Amendment to the United States Constitution, an accused enjoys the right to retain counsel at critical stages of criminal proceedings.[1] While this right is fundamental to the American criminal justice system,[2] it can be overcome in two ways.[3] First, the right to counsel can be waived.[4] Waiver involves a voluntary, knowing, and intelligent relinquishment of the right to counsel.[5] Second, and more importantly, the right to counsel can be forfeited.[6] Forfeiture of the right to counsel is involuntary and occurs "when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic combine to justify a forfeiture of that right."[7] In other words, forfeiture of the right to counsel "results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right."[8]

While the doctrine of waiver of the right to counsel has long been recognized by the United States Supreme Court, the doctrine of forfeiture of the right to counsel has not yet been decided, nor has it ever reached the Supreme Court.[9] Instead, several state supreme

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1. U.S. CONST. amend. VI.
2. United States v. Cronic, 466 U.S. 648, 653 (1984) ("An accused's right to be represented by counsel is fundamental component of our criminal justice system.").
3. *See* State v. Wray, 698 S.E.2d 137, 140 (N.C. Ct. App. 2010).
4. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 786 (2009).
5. *See id.*
6. *See Wray*, 698 S.E.2d at 140.
7. State v. Leyshon, 710 S.E.2d 282, 288 (N.C. Ct. App. 2011) (quoting State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000)).
8. *Montgomery*, 530 S.E.2d at 69 (quoting United States v. Goldberg, 67 F.3d 1092, 1100 (3d. Cir. 1995)).
9. *See generally* Stephen A. Gerst, *Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution*, 58 CLEV. ST. L. REV. 97, 98 (2010).

courts have recognized forfeiture as a sanction after two federal cases from 1995 referred to forfeiture in dicta.[10] One of the states that has implemented the sanction of forfeiture is North Carolina.[11] North Carolina formally recognized forfeiture in 2020.[12]

Before a defendant's waiver of the right to counsel is valid in North Carolina, a colloquy must occur between the trial judge and the defendant to ascertain whether the defendant is capable of proceeding pro se by conducting a thorough inquiry.[13] While the colloquy addresses aspects of the defendant's competency and mental health in a waiver situation, there is no such colloquy or test regarding a defendant's mental health in a forfeiture situation.[14] This is significant because forfeiture is usually applied in instances where a defendant engages in disruptive behavior during court proceedings.[15] Thus, North Carolina should employ a test for forfeiture that encapsulates a mentally ill defendant's mental health to vindicate his rights before he loses his right to counsel involuntarily.[16]

Part II of this Comment will introduce and explain the background of the right to counsel, waiver, and forfeiture in more detail. Part III will provide the analysis of a new test for forfeiture of the right to counsel that North Carolina should adopt that contemplates a defendant's mental health. Part IV will conclude that this new test is needed for a more equitable criminal justice system in North Carolina.

II. BACKGROUND

A. The Right to Counsel

The right to counsel was first recognized as a federal constitutional right in *Powell v. Alabama*.[17] In *Powell*, the United States Supreme Court overturned the conviction of nine African American adolescents after they were sentenced to death without being afforded counsel at any point throughout their trial.[18] The

10. *Id.*

11. *See* State v. Simpkins, 838 S.E.2d 439, 449 (N.C. 2020) ("A trial court may find that a criminal defendant has forfeited the right to counsel.").

12. *Id.*

13. *See* N.C. GEN. STAT. § 15A-1242 (1977); State v. Moore, 661 S.E.2d 722, 727 (N.C. 2008) (listing a fourteen-question checklist to satisfy the question of whether a defendant can proceed pro se).

14. *See* State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000) ("Defendant, by his own conduct, forfeited his right to counsel and the trial court was not required to determine, pursuant to G.S. § 15A–1242, that defendant had knowingly, understandingly, and voluntarily waived such right before requiring him to proceed pro se.").

15. *Id.*

16. *See generally* Gerst, *supra* note 9.

17. Powell v. Alabama, 287 U.S. 45 (1932).

18. *See id.* at 65.

Supreme Court specifically held that the denial of the right to counsel not only violated due process but also disregarded the "fundamental nature of that right."[19]

While the decision in *Powell* was the first step in recognizing that the right to counsel was fundamental, later Supreme Court decisions expounded on its reasoning and continued its result.[20] In *Johnson v. Zerbst*, the Supreme Court reasoned that the right to counsel is "one of the safeguards of the Sixth Amendment deemed necessary to [e]nsure fundamental human rights of life and liberty."[21] Further, the Supreme Court held in *Hamilton v. Alabama* that a defendant in a capital case is not required to show prejudice resulting from the absence of counsel prior to the overturning of his conviction.[22]

Although these early cases seemingly show a strong fundamental character of the right to counsel under both the Sixth and Fourteenth Amendments, this right was initially very limited in scope.[23] The tradition at common law was that the accused did not have the right to counsel when he was charged with treason or a felony.[24] The holdings in *Powell*, *Zerbst*, and *Hamilton* all relied on the fact that the Sixth Amendment expands the right to counsel exclusively to capital defendants, specifically by changing the dimensions of the common law.[25]

The Supreme Court holdings during these early decisions that the right to counsel only applied to capital cases was justified.[26] Several states already had an early version of the right to counsel in their respective state constitutions or statutes.[27] For instance, Georgia, in its 1798 Constitution, provided that "no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both."[28] Further, there was a general assumption under Georgia common law that the right to counsel even applied in petty crime cases.[29] This strong state protection of constitutional rights ultimately led the Supreme Court to ignore *Powell* and its progeny in its decision in *Betts v. Brady*.[30]

In *Betts*, the defendant was indicted for robbery but could not afford counsel to represent him.[31] When the defendant requested that the trial court appoint him counsel, the judge stated it was not

19. *Id.*
20. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 9 (2013).
21. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
22. *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Gerst, *supra* note 9, at 99.
23. *See* Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 168 (2012).
24. *Id.*
25. *Id.* at 168 n.15.
26. *Id.*
27. *Id.* at 169.
28. *Id.*
29. *Id.* at 168.
30. Betts v. Brady, 316 U.S. 455 (1942).
31. *Id.* at 456–57.

the practice of that county to appoint defendants counsel unless they were on trial for murder or rape.[32] On appeal, the Supreme Court held that the right to counsel did not apply to defendants in state court.[33] *Betts* went even further and concluded that "in the great majority of the states, it has been the considered judgment of the people, their representatives[,] and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."[34] Consequently, the defendant was convicted of robbery partially because he was denied the right to counsel and was required to proceed pro se.[35]

In the wake of *Betts*, a defendant had to rely on his own state to provide counsel.[36] However, while many states, including North Carolina, had laws providing for the right to counsel, these laws were rarely employed.[37] It was only in federal court where a defendant was assured the right to counsel.[38] However, *Gideon v. Wainwright* changed both the right to counsel analysis and the entire legal landscape.[39]

In *Gideon*, the defendant was charged in Florida state court with a felony.[40] The defendant, who was indigent, asked the trial court for appointed counsel.[41] The trial court rejected the defendant's request, reasoning that the court could only appoint counsel in capital cases.[42] As a result, the defendant represented himself to the best of his abilities, but he was ultimately convicted.[43] On appeal, the United States Supreme Court held that the Sixth Amendment right to counsel is fundamental and applicable to the states through the Fourteenth Amendment.[44] Thus, the Supreme Court took the monumental step of overruling *Betts* by affirming the fundamental nature of the right to counsel and making it binding on the states when the crime was a felony.[45] To this day, *Gideon* has an extremely

32. *Id.* at 457.

33. *Id.* at 461–62 (holding instead that the Sixth Amendment right to counsel only applies in federal court since the common law practices were not aimed to compel the state to provide counsel for a defendant, and, thus, the right to counsel was not incorporated to the states by virtue of the Fourteenth Amendment Due Process Clause).

34. *Id.* at 471 (concluding that the matter of the right to counsel has generally been deemed one of legislative policy).

35. *Id.* at 473.

36. Paul M. Rashkind, Gideon v. Wainwright*: A 40th Birthday Celebration and the Threat of a Midlife Crisis*, FLA. B.J. 12, 12–13 (2003).

37. *See* Metze, *supra* note 23, at 169 (discussing an early North Carolina right to counsel statute providing that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to council in all matters which may be necessary for his defen[s]e, as well to the facts as to law.").

38. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932).

39. Gideon v. Wainwright, 372 U.S. 335 (1963).

40. *Id.* at 336–37.

41. *Id.* at 337.

42. *Id.*

43. *Id.*

44. *See id.* at 342.

45. *See* Rashkind, *supra* note 36, at 14.

influential legacy and provides the basic framework for the right to counsel and its fundamental character.[46]

While *Gideon* signified one of the last steps towards a fundamental right to counsel,[47] the issue of whether a defendant has the right to counsel when charged with a misdemeanor was left unanswered.[48] This was eventually answered in *Argersinger v. Hamlin*.[49] In *Argersinger*, the defendant was charged with a misdemeanor.[50] The defendant was unrepresented by counsel at trial and, as a result, was convicted.[51] The United States Supreme Court held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[52]

Thus, the Supreme Court conclusively defined the right to counsel as truly fundamental and applicable in all federal and state criminal proceedings.[53] In response to these right to counsel cases, many states, including North Carolina, amended their state constitutions to add the right to counsel or to expand it to non-felony offenses.[54] While the fundamental nature of the right to counsel was finally settled by *Gideon* and *Argersinger*, other problems regarding the right to counsel remain unresolved.[55]

B. Waiver of the Right to Counsel

One of the greatest unresolved problems regarding the right to counsel was how a defendant lost the right to counsel.[56] The first answer was the doctrine of waiver.[57] Waiver was first defined in

46. *See generally* Elizabeth Berenguer Megale, Gideon's *Legacy: Taking Pedagogical Inspiration from the Briefs that Made History*, 18 BARRY L. REV. 227 (2013) (discussing that over fifty years ago, *Gideon* recognized the "fundamental right to counsel in state criminal prosecutions.").

47. *Id.* at 227–28.

48. *See* Gerst, *supra* note 9, at 100.

49. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

50. *Id.* at 26.

51. *Id.*

52. *Id.* at 27 (overruling the Florida Supreme Court, which held "the right to court-appointed counsel extends only to trials 'for non-petty offenses punishable by more than six months imprisonment.'").

53. *See generally* Rashkind, *supra* note 36, at 14 (explaining that the right to counsel is so fundamental that "Americans accept this principle as a cornerstone of criminal jurisprudence, even though the cornerstone is only 40 years old . . . .").

54. *See, e.g.*, N.C. CONST. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense . . . .").

55. *See* Geoffrey M. Sweeney, *If You Want It, You Had Better Ask for It: How* Montejo v. Louisiana *Permits Law Enforcement to Sidestep the Sixth Amendment*, 55 LOY. L. REV. 619, 629–30 (2009) (summarizing the issues that arose regarding the right to waive counsel).

56. *Id.*

57. *Id.*

Zerbst.[58] In that case, the Supreme Court defined waiver as "an intentional relinquishment or abandonment of a known right or privilege."[59] The *Zerbst* Court also held that a trial court must indulge "every reasonable presumption against waiver."[60]

While the *Zerbst* Court defined the meaning of waiver in the right to counsel context, it failed to determine the requirements for a defendant to validly waive his Sixth Amendment right to counsel.[61] In 1975, the Supreme Court determined the requirements for a defendant to validly waive his right to counsel and the effects of doing so.[62] In *Faretta v. California*, the Supreme Court held that a defendant has the right to conduct his own defense and appear pro se, which necessarily requires a voluntary waiver of the right to counsel.[63] Specifically, before a defendant can appear pro se, he "must 'knowingly and intelligently' forgo" the benefits of the right to counsel.[64] Thus, to ensure a defendant knowingly and intelligently waives the right to counsel, he should "be made aware of the dangers and disadvantages of self-representation" by the trial court.[65]

North Carolina, through its Constitution and General Assembly, generally followed the federal government's example regarding waiver of the right to counsel by incorporating *Faretta*.[66] For example, North Carolina requires that "[t]he waiver of counsel . . . must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will."[67]

North Carolina also requires that a statutory colloquy occur between a defendant and the trial court to ascertain whether he can voluntarily waive his right to counsel and proceed pro se.[68] Specifically, the trial court judge must ask a defendant whether he has been advised of his right to counsel, whether he understands and appreciates the consequences of waiver, and whether he comprehends the nature of the charges and proceedings and the range of permissible punishments.[69]

Further, to ensure the waiver is voluntary and a defendant is competent to proceed pro se, "[the] trial court has a continuing duty to monitor the situation even after [a] defendant has elected to

58. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
59. *Id.*
60. *Id.*
61. Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After* Montejo v. Louisiana, 71 LA. L. REV. 345, 352–53 (2010) (explaining how *Faretta v. California* elaborated on the waiver standard).
62. *See* Faretta v. California, 422 U.S. 806 (1975).
63. *See id.* at 819.
64. *Id.* at 835 (citing *Zerbst*, 304 U.S. at 464–65).
65. *Id.*
66. *See* N.C. GEN. STAT. § 15A-1242 (1977); N.C. CONST. art. I, § 23.
67. State v. Thacker, 271 S.E.2d 252, 256 (N.C. 1980) (citing *Faretta*, 422 U.S. at 835).
68. *See* N.C. GEN. STAT. § 15A-1242 (1977).
69. *Id.*

proceed pro se."[70] This is because "it is possible that [a] defendant may become so emotional, agitated, or confused that the waiver should be deemed withdrawn."[71] Thus, North Carolina, like most states, seeks to protect waiver and ensure it is truly voluntary because of the exceedingly delicate nature of the process.[72]

C. Forfeiture of the Right to Counsel

While waiver represented one answer to the issue of a defendant's loss of his right to counsel, forfeiture of the right to counsel represented the other.[73] Forfeiture of the right to counsel has not explicitly been addressed at the federal level but, rather, has only appeared in dicta.[74] However, the North Carolina Supreme Court has officially recognized forfeiture of the right to counsel as a sanction against a defendant.[75] Before forfeiture of the right to counsel was officially recognized by the North Carolina Supreme Court, several North Carolina lower court decisions found that forfeiture was required.[76] In *State v. Blakeney*, the North Carolina Court of Appeals held that "a defendant who is abusive toward his attorney may forfeit his right to counsel."[77] Other North Carolina Court of Appeals cases allowed forfeiture where a defendant intentionally delayed court proceedings.[78]

After years of North Carolina lower courts employing forfeiture of the right to counsel as a sanction, the North Carolina Supreme Court formally recognized forfeiture as a sanction in *State v. Simpkins*.[79] In *Simpkins*, the defendant was arrested during a traffic stop.[80] At trial, the defendant appeared without counsel and objected to the court's jurisdiction.[81] The trial court called in standby counsel and found that the defendant waived his right to counsel for the

70. Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 68 (2003).

71. *Id.*

72. *Id.* at 65–66.

73. *See* State v. Montgomery, 530 S.E.2d 66, 68 (N.C. Ct. App. 2000) (citing United States v. Goldberg, 67 F.3d 1092, 1100 (3d. Cir. 1995)).

74. *See* Gerst, *supra* note 9, at 104–07; United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995); *Goldberg*, 67 F.3d at 1100.

75. *See generally* State v. Simpkins, 838 S.E.2d 439, 445–46 (N.C. 2000) (describing how the Court of Appeals first analyzed the applicable statute of waiver and why forfeiture of counsel was determined).

76. *Id.*

77. State v. Blakeney, 782 S.E.2d 88, 94 (N.C. Ct. App. 2016) (quoting *Montgomery*, 530 S.E.2d at 69).

78. State v. Joiner, 767 S.E.2d 557, 564 (N.C. Ct. App. 2014) ("[A] defendant may lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial." (quoting State v. Boyd, 682 S.E.2d 463, 467 (N.C. Ct. App. 2009))).

79. *Simpkins*, 838 S.E.2d at 449.

80. *Id.* at 443.

81. *Id.* at 444.

duration of the trial.[82] The defendant was ultimately convicted, and he appealed.[83] The North Carolina Supreme Court, in a matter of first impression, held that "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel."[84]

As *Simpkins* and the Court of Appeals cases demonstrate, forfeiture of the right to counsel is not as complicated as a waiver in North Carolina.[85] Forfeiture of the right to counsel in North Carolina, unlike waiver, does not require a colloquy between a trial judge and a defendant.[86] Further, forfeiture does not require a knowing and voluntary relinquishment.[87] Rather, forfeiture only requires a showing of egregious conduct by a defendant.[88] Yet, the standard of egregious conduct does not necessarily take into account a defendant's mental health and how it affects his behavior in court.[89]

III. ANALYSIS

A. "Willfulness," Mental Health, and the Problem Facing North Carolina Courts

The current test for forfeiture of the right to counsel in North Carolina is based on the serious or egregious misconduct of a defendant.[90] Egregious conduct can be open to interpretation and requires a fact-specific inquiry.[91] North Carolina has provided three situations that typically qualify as egregious conduct, including:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in

82. *Id.*

83. *Id.* at 445 (Defendant argued on appeal that the trial court erred by not thoroughly inquiring into his decision to proceed pro se, but the State argued that the inquiry was not required because Simpkins forfeited, rather than waived, his right to counsel).

84. *Id.* at 446.

85. *See, e.g.*, *Simpkins*, 838 S.E.2d at 445–46; State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000).

86. *Simpkins*, 838 S.E.2d at 447.

87. State v. Boyd, 682 S.E.2d 463, 467 (N.C. Ct. App. 2009) (quoting *Montgomery*, 530 S.E.2d at 69).

88. *Id.*

89. *See generally* Gerst, *supra* note 9, at 111 (finding that "extremely serious misconduct [is] in the eyes of the beholder" and can lead to disparate decision-making between courts).

90. *Simpkins*, 838 S.E.2d at 446.

91. *See* State v. Atwell, 862 S.E.2d 7, 13 (N.C. Ct. App. 2021) (determining the degree of misconduct required to justify forfeiture of a defendant's right to counsel is undefined and, as such, is largely subjective).

> the judicial process, or insistence on nonsensical and nonexistent legal "rights."[92]

A requirement across all these situations is some sort of willful behavior by a defendant.[93]

Since North Carolina bases its sanction of forfeiture on willful behavior, it is important to define willfulness.[94] Willfulness is defined as "[t]he quality, state, or condition of acting purposely or by design; deliberateness; intention."[95] This is significant because there has historically been a strong correlation between the lack of willful behavior, mental illness and criminal incarceration.[96] Specifically, about ten to twenty-five percent of United States prisoners suffer from serious mental illnesses, such as major affective disorders or schizophrenia.[97] Further, twenty percent of juveniles involved in the juvenile justice system have a serious mental illness, and up to forty percent of adults suffering from a serious mental illness will come into contact with the criminal justice system at some point.[98] Additionally, schizophrenia, substance abuse, and depression are the more common mental illnesses among defendants.[99] Serious mental illness can cause a defendant to engage in abnormal or disruptive behavior, which may not be indicative of how a defendant really feels.[100] If a defendant's actions in court are involuntary due to a serious mental illness, then his actions are necessarily not willful, which creates a problem if the court decides to impose forfeiture as a sanction against him.[101]

While North Carolina recognizes the confluence of mental illness and willfulness in determining competency to stand trial, there is no history of applying this competency standard or considering mental health in forfeiture of the right to counsel situations.[102] Instead,

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92. State v. Blakeney, 782 S.E.2d 88, 94 (N.C. Ct. App. 2016).

93. *See* State v. Mee, 756 S.E.2d 103, 114 (N.C. Ct. App. 2014) (quoting State v. Quick, 634 S.E.2d 915, 917 (N.C. Ct. App. 2006)).

94. *Id.*

95. *Willfulness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96. Jennifer L. Morris, *Criminal Defendants Deemed Incapable to Proceed to Trial: An Evaluation of North Carolina's Statutory Scheme*, 26 CAMPBELL L. REV. 41, 42 (2004).

97. Lorna Collier, *Incarceration Nation*, 45(9) MONITOR ON PSYCH. 56 (Oct. 2014), https://www.apa.org/monitor/2014/10/incarceration.

98. Liesel J. Danjczek, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-Violent Offender Limitation*, 24 J. CONTEMP. HEALTH L. & POL'Y 69, 76–77 (2007).

99. Joe Hennell, *Mental Illness on Appeal and the Right to Counsel*, 29 J. CONTEMP. HEALTH L. & POL'Y 350, 353 (2013).

100. *See Schizophrenia*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes/syc-20354443 (last visited Feb. 6, 2023) ("[Behavior] may show in a number of ways, from childlike silliness to unpredictable agitation . . . Behavior can [also] include resistance to instructions, inappropriate or bizarre posture, a complete lack of response, or useless and excessive movement.").

101. *See generally* Traynor v. Turnage, 485 U.S. 535, 550 (1988) (distinguishing between alcoholism caused by willful conduct and alcoholism caused by mental illness).

102. *See* Morris, *supra* note 96, at 43; N.C. GEN. STAT. § 15A-1001(a) (1973) ("No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness

North Carolina courts have only held that the competence that is required of a defendant to appear pro se is not the same as the competency required for a waiver of the right to counsel.[103] Thus, North Carolina has recognized two distinct categories of competency: competency to stand trial and competency to proceed pro se.[104] However, most mentally ill defendants fall in a gray area where they are "competent enough to stand trial but . . . still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[105] Thus, a defendant may be competent enough to proceed to trial but not to conduct his own defense because he is mentally ill.[106]

For instance, in *State v. Cureton*, the North Carolina Court of Appeals held that the Sixth Amendment prohibits the court from forcing a gray-area defendant to proceed without counsel.[107] In that case, a forensic examiner and a forensic psychologist noted the defendant's "inability to communicate," which prevented a competency determination.[108] Further, the defendant argued that his borderline mental capacity prevented him from fully understanding his Sixth Amendment rights, citing his IQ of 82 and his history of past mental illness.[109] Nonetheless, the North Carolina Court of Appeals held that forfeiture was appropriate.[110]

The problems that willfulness, gray-area defendants, and competency pose for North Carolina courts can be seen in other Court of Appeals cases.[111] For example, in *State v. Montgomery*, the defendant grew frustrated with his first attorney, which resulted in multiple replacements.[112] The defendant's right to counsel was forfeited even though he had a learning disability resulting in a third-grade education and insisted "that he needed counsel, wanted counsel, and was not competent to represent himself."[113] Similarly, in *State v. Blakeney*, the defendant still forfeited his right to counsel after repeated hiring and firing of his attorney even though he displayed a lack of understanding of key legal and factual issues and

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or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.").

103. State v. Lane, 707 S.E.2d 210, 218–19 (N.C. 2011) (quoting Godinez v. Moran, 509 U.S. 389, 399–400 (1993)).

104. *See id.* (describing the two-step process used by North Carolina courts in determining competency at both stages).

105. State v. Cureton, 734 S.E.2d 572, 582 (N.C. Ct. App. 2012) (citations omitted) (quoting State v. Lane, 669 S.E.2d 321, 322 (N.C. 2008)).

106. *Id.*

107. *Id.* at 587–88.

108. *Id.* at 576.

109. *See id.* at 580.

110. *See id.* at 588.

111. *See, e.g.*, State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000).

112. *Id.*

113. Defendant-Appellant's Brief at 15, 18, *Montgomery*, 530 S.E.2d 66 (N.C. Ct. App. 2000) (No. COA 99-757).

of the consequences of appearing pro se.[114] These cases demonstrate that North Carolina does not necessarily take into account the level of understanding a defendant has for forfeiture purposes if he engages in disruptive behavior.[115] Thus, a North Carolina defendant can lose his right to counsel through no fault of his own.[116]

B. Potential Solutions to the Forfeiture Issue

A better test for forfeiture of the right to counsel would include a different definition of competency and willfulness that involves a statutory colloquy or warning similar to N.C.G.S. § 15A-1242.[117] If a defendant is found to be infirm under this colloquy, then the court should reevaluate whether forfeiture would be appropriate through a court-ordered psychiatric evaluation.[118] While it is difficult to determine what an intentional action on behalf of a defendant is, North Carolina courts should make the effort to determine if he is a "gray-area" defendant who has the competency to stand trial but not the competency to proceed pro se.[119] If a defendant is a "gray-area" defendant, then a North Carolina trial court should be more hesitant to apply the sanction of forfeiture of the right to counsel.[120] Thus, North Carolina can better protect a defendant's constitutional rights by making it more difficult for a mentally ill criminal defendant to unknowingly waive counsel, to proceed pro se, and to forfeit the right to counsel.[121]

Another way to clarify the willfulness requirement of forfeiture is to analogize it to the civil commitment standards for competency in North Carolina.[122] Specifically, "in certain non-criminal cases involving allegations of mental infirmity, North Carolina's statutes appear to require representation by counsel."[123] In other words, if there are mere allegations of infirmity, a defendant may be

114. Defendant-Appellant's Reply Brief at 12, State v. Blakeney, 782 S.E.2d 88 (N.C. Ct. App. 2016) (No. COA 15-622).

115. *See, e.g.*, *Cureton*, 734 S.E.2d at 580 (explaining that evidence of mental illness alone is not enough for waiver or competency issues).

116. *See id.*

117. *See* Gerst, *supra* note 9, at 111–12 (discussing the efficacy of warnings on defendants facing the sanction of forfeiture).

118. *See generally* Kerrin Maureen McCormick, *The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake*, 30 AM. CRIM. L. REV. 1329 (1993).

119. *See* Jona Goldschmidt, *Autonomy and "Gray-Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J. L. & SOC. POL'Y 130, 177 (2011).

120. *See* Indiana v. Edwards, 554 U.S. 164, 178 (2008) ("States [are permitted to] insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.").

121. Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 325 (2009).

122. *See In re* Watson, 706 S.E.2d 296, 301 (N.C. Ct. App. 2011).

123. 1 RUBIN ET AL., N.C. DEF. MANUAL: PRETRIAL, § 12.6, at 12–35 (2d ed. 2013); *See* N.C. GEN. STAT. § 122C-268(d) (2021); N.C. GEN. STAT. § 35A-1107 (2003).

considered incompetent under the civil commitment system and cannot be removed.[124] This includes cases where a defendant may not want counsel but is so seriously mentally ill that counsel must be afforded to protect him.[125] This standard, while potentially infringing on the right to self-representation, would better protect a seriously mentally ill defendant from unnecessary forfeiture of the right to counsel by assuring him counsel.[126] Further, this limitation on the right to self-representation under *Faretta* has already been recognized in competency to stand trial cases involving a mentally ill defendant.[127] Similarly, there are circumstances where a North Carolina court does not necessarily have to honor a defendant's request to proceed pro se.[128] While a defendant could use this new competency standard to intentionally obstruct proceedings,[129] many more mentally ill defendants will be protected from forfeiting their right to counsel.[130] Thus, if there are allegations of mental infirmity, the trial court should hesitate before employing the sanction of forfeiture.[131]

A final way to clarify the willfulness requirement is to require some form of warning or admonition to a defendant or his counsel.[132] The best time for the court to give this warning or admonition would be at a critical stage, such as arraignment, specifically when a defendant is asked about whether he can afford an attorney.[133] Further, while giving one warning early in the proceedings may be sufficient, giving multiple warnings or signed written warnings would be best practice.[134] One or more warnings "may act to deter a defendant from acting out . . . as he then knows the right to appointment of counsel is not an unlimited right and is aware of the types of conduct that could put his right to counsel at risk."[135] If a defendant is too mentally ill, then a trial court should continually re-warn him about forfeiture whenever any counsel-related issues arise.[136] Thus, requiring a warning by a trial court could save a

124. *See* N.C. GEN. STAT. § 122C-268(d) (2021) ("The respondent *shall* be represented by counsel of his choice. . .") (emphasis added).

125. *See In re* G.G., 165 A.3d 1075, 1088 (Vt. 2017) (refusing to allow a patient to represent himself pro se, finding that due process required counsel in civil commitment hearings).

126. *See* Faretta v. California, 422 U.S. 806, 819 (1975).

127. James Vicini, *Court: Mentally Ill Defendants Can't Be Own Lawyer*, REUTERS (June 19, 2008, 10:29 AM), https://www.reuters.com/article/us-usa-court-lawyer/court-mentally-ill-defendant-cant-be-own-lawyer-idUSN1947181220080619.

128. *See* 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.5(d) (6th ed. 2017).

129. *See id.*

130. *See In re* G.G., 165 A.3d at 1088 (stopping a patient from proceeding pro se and waiving his right to counsel).

131. *See id.*

132. Gerst, *supra* note 9, at 112.

133. *Id.*

134. *Id.* at 112–13.

135. *Id.* at 113.

136. *Id.*

mentally ill defendant's fundamental right to counsel from forfeiture.[137]

C. Standby Counsel and Use of Hybrid Representation

Another potential solution for a mentally ill defendant to avoid the consequences of forfeiture of the right to counsel is to allow for hybrid representation.[138] Under North Carolina law, a defendant is allowed standby counsel when he is appearing pro se, even in cases of forfeiture.[139] However, North Carolina, like many states, generally prohibits hybrid representation between a defendant and standby counsel because this type of relationship may infringe upon the right to self-representation.[140] Hybrid representation consists of concurrent self-representation and representation by counsel, which differs considerably from the traditional standby counsel model.[141] Under the hybrid representation model, a defendant and his attorney share the role of counsel, as opposed to a pro se defendant acting as his own counsel, but consulting their standby attorney at reasonable times.[142] Further, under hybrid representation, a defendant and his attorney share responsibilities in such activities as jury selection, opening statements, examination of witnesses, and closing arguments.[143]

While having standby counsel is generally beneficial for a mentally ill defendant, it is not enough to protect him from losing the right to counsel due to forfeiture.[144] Hybrid representation is preferable because it is a "potential workable solution to the judiciary in reaching that all-important balance between the constitutional rights of the pro se defendant . . . and the competing demands of the judicial system."[145] Further, hybrid representation is also beneficial for the trial court.[146] Specifically, the court can use

137. *Id.* at 112.

138. *See* Tiffany Frigenti, *Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn Supreme Court of New York Appellate Term, Second Department*, 28 TOURO L. REV. 1019, 1039 (2012).

139. *See* N.C. GEN. STAT. § 15A-1243 (1977).

140. *See* State v. Thomas, 484 S.E. 2d 368, 370 (1997); Colquitt, *supra* note 70, at 76 (finding that both federal and state courts have found no right to hybrid representation); Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are They Phone Psychics? Theatrical Understudies? Or Both?*, 24 S. CAL. REV. L. & SOC. JUST. 133, 188–89 (2015) (discussing the distinction between the right to representation and the right to assistance).

141. *See* Colquitt, *supra* note 70, at 74.

142. *Id* at 75.

143. *Id.*

144. *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 677 (2000) (explaining that courts often provide standby counsel to alleviate the burden of presiding over the trial of a pro se criminal defendant and possibly to avert an unfair trial).

145. Kelly Rondinelli, *In Defense of Hybrid Representation: The Sword to Wield and the Shield to Protect*, 27 WM. & MARY BILL RTS. J. 1313, 1316 (2019).

146. *See id.*

hybrid representation as a shield to protect against the inherent problems of a pro se defendant, while also providing a sword to him to combat the challenges of the judiciary, particularly when he is seriously mentally ill.[147] Hybrid representation could provide a mentally ill defendant with the control needed to avoid engaging in disruptive behavior.[148]

In addition to the benefits hybrid representation would provide to both North Carolina defendants and courts, it would also shift the burden of determining mental illness for the purposes of forfeiture from the defense attorney back to the court. This would include psychiatric evaluations and interviews with the defendant.[149] The law as it is in North Carolina places the burden of determining whether a defendant has a serious mental illness on his attorney.[150] However, defense attorneys deal with heavy caseloads and are not trained to look for signs of serious mental illness.[151] Further, defense attorneys tend to only raise issues of mental illness in serious felony cases, not in the vast majority of cases.[152]

To prevent this overwhelming of defense counsel, the onus of determining a defendant's mental health should shift back to the court.[153] A defendant could have hybrid representation while the court determines whether his outburst was intentional or caused by a serious mental illness.[154] Shifting this burden back to the court would alleviate the pressure on both defense attorneys and defendants by removing stressors. It could even prevent a triggering event for a seriously mentally ill defendant that results in forfeiture of the right to counsel.[155] Thus, hybrid representation could equalize the burdens on defense attorneys, defendants, and courts, while simultaneously helping a mentally ill defendant gain access to representation by competent counsel.[156]

D. Other States' Approaches to Forfeiture of the Right to Counsel

While North Carolina's standard for the sanction of forfeiture of the right to counsel is easy to meet, several states have created their own tests that are more stringent and better protect a mentally ill

147. *Id.*
148. *Id.* at 1323–24.
149. *See* Davoli, *supra* note 121, at 321.
150. *See id.*
151. *Id.*
152. *Id.* at 320.
153. *See* Rondinelli, *supra* note 145, at 1331–32.
154. *Id*. at 1327.
155. *See generally* Adam Felman & Rachel Ann Tee-Melegrito, *What is Mental Health?*, MED. NEWS TODAY (Dec. 23, 2022) https://www.medicalnewstoday.com/articles/154543 (finding that stress, depression, and anxiety all affect mental health and disrupt a person's home).
156. *See generally* Rondinelli, *supra* note 145.

defendant's right to counsel.[157] For instance, Oregon requires that "[a] defendant must have received 'an advance warning that a repetition of behavior that amounts to misconduct will result in [a] defendant having to proceed *pro se*'" before his right to counsel is forfeited.[158] Oregon courts have reasoned that it "is necessary to alert [a] defendant to the fact that a repetition of demonstrated misconduct may result in a waiver of the right to counsel, rather than some other consequence."[159]

Similarly, Indiana also subscribes to the rule that "[o]nce [a] defendant *has been warned* that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se."[160] Florida requires both a warning and an opportunity to be heard before the right to counsel is forfeited by a defendant.[161] The approaches to forfeiture of the right to counsel in Oregon, Indiana, and Florida which require warnings and a hearing are more equitable than that of North Carolina.[162] North Carolina courts have no duty to warn a defendant that his conduct could result in the loss of counsel.[163] This puts a mentally ill defendant in North Carolina at a material disadvantage and at greater risk of forfeiture.[164] Giving warnings and an explanation of behaviors which may amount to forfeiture could help a mentally ill or gray-area defendant understand how he could lose his constitutional right.[165]

Oregon, Indiana, and Florida are just three of many states that have a more equitable test for forfeiture of the right to counsel than North Carolina.[166] For example, Virginia requires that the court "view [a] defendant's conduct in its entirety, together with all the other

157. *See, e.g.*, Frigenti, *supra* note 138, at 1030–36.

158. State v. Stanton, 511 P.3d 1, 7 (Or. 2022) (quoting State v. Langley, 273 P.3d. 901, 913 (Or. 2012)).

159. *Id.*

160. Vonhoene v. State, 165 N.E.3d 630, 636 (Ind. Ct. App. 2021) (emphasis added).

161. Oliver v. State, 283 So. 3d 829, 830 (Fla. Dist. Ct. App. 2019) ("The right to proceed pro se may be forfeited where it is determined, after proper notice and an opportunity to be heard, that the party has abused the judicial process by repeatedly filing successive or meritless collateral claims in a criminal proceeding.").

162. *See generally* Gerst, *supra* note 9, at 112 (concluding that a warning would protect defendants from the sanction of forfeiture).

163. *See* State v. Simpkins, 838 S.E.2d 439, 449 (N.C. 2020) (concluding that the trial court is not required to follow the requirements of N.C.G.S. § 15A-1242 in cases of forfeiture, "which the court would otherwise be required to do before permitting a defendant to proceed pro se").

164. *See* Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 996 (2007) (quoting "Justice Blackmun's famous assertion that 'one who is his own lawyer has a fool for a client'").

165. *See* Gerst, *supra* note 9, at 112 (concluding that an on-the-record warning would put defendants on notice about the sanction of forfeiture).

166. *See, e.g.*, People v. Settles, 385 N.E.2d 612, 616, 618 (N.Y. 1978) (concluding that the right to counsel in New York is indelible and a criminal defendant under indictment and in custody may not waive his right to counsel unless he does so in the presence of an attorney who acquiesces).

circumstances of the case, that support the conclusion his . . . conduct tended to unreasonably and unjustifiably delay trial" before forfeiture is appropriate.[167] In other words, Virginia requires a totality of the circumstances approach when determining whether forfeiture of the right to counsel is an appropriate sanction.[168] Virginia also requires that the trial court's finding of forfeiture include a specific recitation of how a defendant's conduct shows an unequivocal intent to relinquish or abandon his right to counsel.[169] Similarly, Ohio recognizes that the "right to counsel must be balanced against [a] trial court's authority to control its docket, as well as its awareness that a 'demand for counsel may be utilized as a way to delay the proceedings or trifle with [a] court.'"[170] Additionally, Connecticut recognizes that "[w]hile courts must be assiduous in their defense of an accused's right to counsel," it must be balanced with the administration of justice.[171]

North Carolina courts should employ a balancing test, a totality of the circumstances approach, or a specific recitation under North Carolina law. Presently, none of these approaches are required by law in North Carolina and, thus, it is within the discretion of an individual trial judge to determine what constitutes egregious conduct.[172] To better protect a mentally ill defendant's Sixth Amendment right to counsel, North Carolina courts should emulate the approaches taken by these states and, at a minimum, require a balancing test based on the totality of the circumstances.[173] This would necessarily take a defendant's mental illness into account.[174] If the totality of the circumstances approach uncovers evidence of mental illness in a defendant, then this would become a factual issue that should be addressed in an additional evidentiary hearing before the right to counsel is forfeited.[175]

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167. Walker v. Commonwealth, 839 S.E.2d 123, 127 (Va. Ct. App. 2020) (quoting Bailey v. Commonwealth, 568 S.E.2d 440, 445 (Va. Ct. App. 2002)).

168. *See id.* at 127–28 (viewing the record based on the totality of the circumstances and concluding that the appellant "knowingly and intentionally waived his right to counsel").

169. McNair v. Commonwealth, 561 S.E.2d 26, 31 (Va. Ct. App. 2002).

170. State v. Baskin, 137 N.E.3d 613, 621 (Ohio Ct. App. 2019) (quoting State v. Stein, No. 10-17-13, 2018 WL 3026049, at *4 (Ohio Ct. App. June 18, 2018)).

171. State v. Kukucka, 186 A.3d 1171, 1184 (Conn. App. Ct. 2018).

172. *See* State v. Boderick, 812 S.E.2d 889, 895 (N.C. Ct. App. 2018) (discussing that a certain level of misconduct will rise to the level of forfeiture).

173. *See generally* Sarah Gerwig-Moore, Gideon*'s Vuvuzela: Reconciling the Sixth Amendment's Promises with the Doctrines of Forfeiture and Implicit Waiver of Counsel*, 81 MISS. L.J. 439, 451 (2012) (discussing how several states utilize a hearing that considers the totality of the circumstances before forfeiture is appropriate).

174. *See id.* at 473 (describing a scenario in which a defendant's mental health causes him to lose his right to counsel).

175. *See* Gerst, *supra* note 9, at 113 (concluding that factual issues may need to be determined at an evidentiary hearing regarding the seriousness of a defendant's conduct before the defendant loses his or her right to counsel).

E. Policy Reasons for a New Forfeiture Test

There are also several policy reasons why North Carolina courts should be hesitant to apply the sanction of forfeiture of the right to counsel to a mentally ill defendant.[176] First, North Carolina courts have generally "applied a presumption against the casual forfeiture of U.S. Constitutional rights."[177] This is especially true for the right to counsel.[178] The right to counsel is particularly important because "[i]t guarantees that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[179] It also has the secondary effect of safeguarding "the fairness of the trial and the integrity of the factfinding process."[180] If a mentally ill defendant had his right to counsel forfeited without a thorough inquiry or warning, he would be left to his own devices in facing the prosecutorial forces of organized society.[181] In other words, a mentally ill defendant would be at a disadvantage at trial through no fault of his own, which goes against the fundamental fairness that the right to counsel is designed to protect.[182]

Second, the current forfeiture test under North Carolina law can lead to nonsensical results.[183] For instance, if a defendant is found to have forfeited his right to counsel for assaulting his defense attorney, then he will be forced to proceed pro se on the current charge, yet is entitled to the appointment of counsel on the charge of assaulting an attorney.[184] If a mentally ill defendant engages in this behavior, it is illogical to terminate his right to counsel on one charge while allowing counsel on another charge.[185]

Finally, the decision to involuntarily remove a mentally ill defendant's right to counsel could be considered arbitrary and capricious.[186] The lack of a definition of egregious conduct has created a wide disparity in what courts deem sufficient to invoke the sanction of forfeiture[187] A consistent definition of egregious conduct

176. *See id.* at 112.

177. State v. Wray, 698 S.E.2d 137, 141 (N.C. Ct. App. 2010).

178. *See id.* (acknowledging that the right to counsel has long been considered fundamental).

179. State v. Simpkins, 838 S.E.2d 439, 446 (N.C. 2020) (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)).

180. *Id.* (quoting Brewer v. Williams, 430 U.S. 387, 426 (1977) (Burger, C.J., dissenting)).

181. *Id.* at 535–36 (quoting Moran v. Burbine, 475 U.S. 412, 430 (1986)).

182. *See generally* Nannette Jolivette Brown, *75th Anniversary of* Powell v. Alabama *Commemorated*, 56 LA. B.J. 19 (2008) (discussing the right to counsel, *Powell*, and fundamental fairness).

183. Gerst, *supra* note 9, at 111.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

that considers a defendant's mental illness will help create more uniformity and fewer arbitrary results.[188]

IV. CONCLUSION

It is clear that North Carolina needs a more equitable test to determine whether a mentally ill defendant should lose his right to counsel through forfeiture. Not only is the current test poorly defined, but several states already have a better system that considers a defendant's mental illness. However, there have recently been some positive developments in North Carolina law regarding forfeiture.[189] Just last year, the North Carolina Supreme Court decided the case of *State v. Harvin*.[190] In *State v. Harvin*, the Court held that a juvenile defendant, accused and convicted of first-degree murder, did not forfeit his right to counsel, even after he fired two court-appointed attorneys and sought new counsel on the day of trial.[191] Additionally, the Court recognized that the defendant had a mental illness and that it potentially had an effect on his behavior.[192] While there was just a slight mention of mental illness, its acknowledgment by the North Carolina Supreme Court is a positive development.[193]

While *State v. Harvin* was a step toward adopting a more stringent forfeiture of the right to counsel test, this is no guarantee.[194] A new forfeiture of the right to counsel test must be employed in North Carolina to protect a mentally ill defendant's constitutional right to counsel.[195] This new test should require at least a warning, allow for hybrid representation, and follow other states' approaches. Finally, this new test will help both mentally ill defendants and the court system by creating a more equitable system of justice.[196]

188. *See id.* (explaining how the lack of a definition for "extremely serious" misconduct could result in disparate decision-making).

189. *See, e.g.*, State v. Harvin, 879 S.E.2d 147 (N.C. 2022).

190. *See id.*

191. *Id.* at 162.

192. *See id.*

193. *See id.* (recognizing that being a juvenile and having a limited educational level can also impact the right to counsel and forfeiture).

194. *Compare* State v. Harvin, 879 S.E.2d 147, 162 (N.C. 2022) (suggesting that the mental illness and limited educational level could be weighed against the sanction of forfeiture), *with* State v. Simpkins, 838 S.E.2d 439, 446 (N.C. 2020) (determining that egregious conduct is all that is required for forfeiture of the right to counsel).

195. *See generally* Gerwig-Moore, *supra* note 173 (arguing that forfeiture of the right to counsel should be more like the traditional sanction of contempt).

196. *See generally* Gerst, *supra* note 9 (discussing how forfeiture of the right to counsel is "unhinged from the Constitution" and creates inequitable results).

OUT OF SIGHT, OUT OF MIND: AMERICA'S BROKEN ADMINISTRATIVE JUDICIARY AND THE TOOLS TO FIX IT

A.SPENCER OSBORNE†

"The court is the bureaucracy of the law. If you bureaucratise popular justice then you give it the form of a court."—Michel Foucault

I. INTRODUCTION

The sheer size of America's "administrative state" is truly impressive.[1] In fact, to do anything in the United States without regulatory intervention or interference of some kind is nearly impossible.[2] And, underneath each such regulation, rule, or policy interpretation at the federal level, lies a vast network of agencies and courts largely hidden from plain view—an *imperium in imperio*. The administrative state is comprised of some 450 executive agencies and roughly three million government employees.[3] Thus, if "[t]hat government is best which governs least," perhaps the United States has some significant culling to do.[4]

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1. *See generally* DWIGHT WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION (The Ronald Press Company, 1st ed. 1948) (coining, while not expressly defining, the term "administrative state" as used today).

2. *See, e.g.,* Ryan Young, *Regulations, Regulations Everywhere*, Op-Eds/Articles, COMPETITIVE ENTER. INST. (May 7, 2010), https://cei.org/opeds_articles/regulations-regulations-everywhere ("Federal regulations cover everything from the size of holes in Swiss cheese to the label text on over-the-counter flatulence medication.").

3. *See* Charles J. Cooper, *Confronting the Administrative State*, NAT'L AFFS. No. 53 (2015), https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state.

4. HENRY DAVID THOREAU, WALDEN AND "CIVIL DISOBEDIENCE" (New York: Signet Classics 1980) (1849). Though this maxim is often spuriously attributed to Thomas Jefferson, it is properly attributed to Thoreau, who began his pamphlet with it in paraphrasing the motto of *The United States Magazine and Democratic Review*. *See* Joshua Gillin, *Mike Pence Erroneously Credits Thomas Jefferson with Small Government Quote*, POLITIFACT, (Sept. 21, 2017), https://www.politifact.com/factchecks/2017/sep/21/mike-pence/mike-pence-erroneously-credits-thomas-jefferson-sm.

This idea of overregulation and bureaucracy within the executive branch has led some to argue in favor of an amorphous "deconstruction of the administrative state."[5] It may also have played a role in the recent United States Supreme Court decision that severely restrained the United States Environmental Protection Agency's ability to regulate private sector carbon emissions.[6] Such concerns, however, are often purely *political* in nature and draw attention away from more *practical* questions surrounding the administrative state that are of equal or greater importance.[7] Namely, short of dismantling it, how might we improve the administrative state so that it functions more fairly, efficiently, and transparently?

This Comment argues that such reform must begin with sweeping changes to the administrative *judiciary* and how it operates. Part II gives a brief but crucial history of the administrative judiciary, its purpose, and its current role within the federal government. Part III identifies two representative examples of failings within the administrative judiciary and critiques earlier proposed solutions thereto. Part IV discusses viable solutions and alternatives to the modern administrative judiciary and proposes a path forward.

II. THE DEFINITION, HISTORY, PURPOSE, AND CURRENT ROLE OF THE ADMINISTRATIVE JUDICIARY

A. The Administrative Judiciary Defined

Many notable attempts have been made to define the "federal administrative judiciary," a term that at times may feel otherwise ineffable. In 1992, for example, the Administrative Conference of the United States ("ACUS") conducted an exhaustive study of the federal administrative judiciary, using the term "to highlight both the significance of the deciders involved and the scope of their decision

5. Phillip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State*,' WASH. POST (Feb. 17, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html.

6. *See generally* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

7. *See, e.g.*, Ed Kilgore, *Starving the Beast*, BLUEPRINT MAG. (June 30, 2003), https://web.archive.org/web/20041120220704/http://www.ppionline.org/ndol/print.cfm?contentid=251788 (quoting Grover Norquist who wanted a federal government so small "that it could be drowned in a bathtub").

making mandate under our federal system."[8] One author of that study, which was performed at the request of the Office of Personnel Management,[9] noted that "to define the universe of the administrative judiciary, the scope of inquiry must be limited."[10] Accordingly, the 1992 ACUS Study limited its review "to those administrative judges--whether labeled ALJs, AJs, hearing examiners or something else--who actually preside at some kind of hearing, whether formal or informal."[11]

This Comment is, by necessity, equally limited. It does not extend to those "millions of decisions that are rendered by countless other deciders who adjudicate public rights, opportunities, or obligations in other settings that are nonconfrontational and often not even face-to-face."[12] While such proceedings are important, and those who conduct them essential, this Comment addresses only those administrative proceedings bearing resemblance to procedures in Article III courts.[13] Thus, the recommendations and arguments advanced here concern federal administrative law judges ("ALJs"), the federal agencies for which they hear cases, and the processes and procedures governing their decisions rendered in "some kind of hearing."[14] Together, these institutions, people, and adjudications make up the federal administrative judiciary.

Other conceptions of the federal administrative judiciary, wrapped up in political perspectives regarding the administrative state writ large, are less charitable.[15] For example, conservative political commentator David French describes the situation as follows:

> At present, the vast and bloated executive branch—existing through its alphabet soup of agencies such as the EPA, IRS,

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8. PAUL R. VERKUIL ET AL., *The Federal Administrative Judiciary – Report for Recommendation 92–7, in* 1992 ACUS RECOMMENDATIONS & REPORTS 769, 781 (1992).

9. *See* 5 U.S.C. § 5372(c) (granting the Office of Personnel Management the authority to regulate the practices and procedures of federal administrative law judges, which have historically included hiring procedures).

10. Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341 (1992).

11. VERKUIL ET AL., *supra* note 8, at 785 (punctuation in original).

12. Verkuil *supra* note 10, at 1342.

13. *See* U.S. CONST. art. III, §§ 1–2; for influential scholarship on this topic that includes thorough discussion of nonconfrontational administrative proceedings omitted here, *see generally* Henry J. Friendly, *Some Kind of Hearing*, 123 UNIV. PA. L. REV., 1267 (1975).

14. *See generally* Friendly, *supra* note 13, at 1267 (explaining the origin of the phrase "some kind of hearing").

15. *See*, *e.g.*, David French, *Trump Wants to Deconstruct the Regulatory State? Good. Here's How You Start*, NAT'L REV. (Feb. 24, 2017, 10:36 PM), https://www.nationalreview.com/ 2017/02/administrative-state-deconstruction-trump-steve-bannon-cpac.

> DOE, ATF, and the like—intrudes into virtually every aspect of American life. It regulates your workplace, your home, your car, and your kids' school. It's staffed by legions of bureaucrats who enjoy job security that private-sector employees can only dream of, and it's granted legal authority by the Supreme Court to interpret its own governing statutes and expand the scope of its own authority. In its own spheres of influence, it often acts as legislator, prosecutor, and judge. Let's not forget, the administrative state exists in large part because Congress has intentionally *abdicated* authority.[16]

Such an uncompromising perspective, however, ignores the fact that both the administrative state, and the federal administrative judiciary within it, exist to ameliorate problems the other branches of government are ill-equipped to solve.[17] Thus, in the face of arguments in favor of more expansive federal court jurisdiction over administrative functions, proponents of the administrative state and its judiciary contend that the "[Article III] federal court system would be unable to maintain its primary role of constitutional and statutory interpretation without an extensive administrative decision system."[18]

B. The History of the Administrative Judiciary

As UCLA Professor of Law Michael Asimow once put it, "[i]t all started with the railroads."[19] As the United States industrialized, railroad companies were able to able to exert their economic power to charge low rates to big players in shipping and comparably higher rates to smaller businesses.[20] Presumably, these disadvantaged businesses, such as small farmers, could have pursued a remedy against the railroad companies in federal or state courts, but those courts often lacked either the expertise necessary to adjudicate rate disputes or the capacity to do so efficiently.[21] Thus, some states

16. *Id.*

17. *See, e.g.*, VERKUIL ET AL., *supra* note 8, at 781 ("While they are distinct from our federal judiciary in fundamental respects, these administrative deciders, whether they have the statutory appellation of administrative law judge or are known generally as administrative judges, are nevertheless a vital part of the federal decision system. Without them the federal judiciary would be unable to fulfill its constitutional function.").

18. *Id.*

19. Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 158 (2000).

20. *Id.*

21. *Id.*

created their own agencies designed exclusively to regulate the railroads and, in doing so, created "the model of the combined-function regulatory agency."[22]

It was this model that would eventually be adopted at the federal level in 1887, when Congress created America's first modern regulatory agency, the Interstate Commerce Commission ("ICC").[23] Like its state-agency predecessors, the ICC "combined functions of investigation, prosecution, and adjudication" and was "independent of executive control."[24] But the ICC was, at first, equally ineffective in dealing with the emerging problems between carriers and shippers.[25] Like the federal agencies of today, the ICC "did its business through case-by-case adjudication."[26] Those decisions, however, lacked enforceability and were accorded very little, if any, deference by Article III courts.[27] Later, as the ICC found its footing, it became a respected regulatory institution.[28] Yet, the ICC was still faced with many of the same problems that executive agencies confront today, particularly that it was tasked with a high volume of highly "technical" cases.[29] ICC commissioners were unable to hear so many matters and, in response, "deputized ICC staff members to serve as hearing examiners."[30] Those examiners "conducted trials, made a record, and, after a time, started issuing recommended decisions."[31] As they became more professionalized, "their decisions received greater deference; indeed, the examiners often worked closely with the Commissioners in producing final decisions."[32] Thus, "ICC trial examiners were the genesis of today's ALJs."[33]

This regulatory renaissance continued well into the 20th century. In 1914, the Federal Trade Commission ("FTC") was created to address monopolies.[34] Like those at the ICC, FTC examiners often served as investigators, conducted agency hearings, and worked with FTC leadership to produce final adjudicatory decisions.[35] Then, throughout the 1930s and President Franklin D. Roosevelt's New Deal initiatives, Congress created a variety of new, combined-

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 159.
27. *Id.* at 158–59.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 159.
35. *Id.*

function administrative agencies.[36] The belief, or hope, was that these agencies "would exercise their expertise to solve the problems that the market had failed to solve."[37] These initiatives were unsurprisingly met with skepticism, not only from those averse to government regulation in sectors that were once controlled only by market forces, but from the United States Supreme Court as well.[38] Because the new agencies "had no internal separation of functions . . . agency heads seemed to the private sector to be biased against them" and the fairness of agency decision making was routinely called into question.[39] These struggles raged on, eventually leading to enactment of the Administrative Procedure Act ("APA") in 1946.[40]

An additional piece of context deserves special mention. In 1939, the Roosevelt administration authorized the United States Attorney General's Committee on Administrative Procedure ("AGCAP"), tasked with scrutinizing current executive agency procedures and offering suggestions for legislative reform.[41] One year later, Congress successfully passed the Logan-Walter Bill and sent it to Roosevelt's desk.[42] Logan-Walter, most crucially, would have "subjected agency actions to judicial review of jurisdictional questions as well as whether they were supported by substantial evidence."[43] Roosevelt vetoed the Bill less than one month later.[44] The 1941 AGCAP report, which included majority and minority proposals, explained that "[s]ince this Committee was created, a measure known as the Logan-Walter Bill . . . has received much attention as a solution of the problems of administrative law and procedure . . . The veto was placed in part on the ground that this Committee was about to make its report."[45]

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36. *Id.* (noting that these new agencies were designed "to deal with the actual and perceived causes of the great depression"); *see also* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1995–1996) (tracing the early history of the administrative state from the New Deal era to enactment of the APA).

37. *Id.*

38. *Id.* 159–160.

39. *Id.*

40. *Id.*; *see* Administrative Procedure Act of 1946 § 2, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559).

41. *See* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 J. AM. ACAD. OF ARTS & SCIENCES 33, 36 (2021).

42. *Id.*; *see* Logan-Walter Bill, H.R. 6324, 76th Cong. (3d Sess. 1940).

43. Dudley, *supra* note 41, at 36 (Logan-Walter also "would have required agencies to present a record of findings supporting decisions and issue interpretive rules after notice and opportunity for hearings.").

44. *Id.*

45. Urban A. Lavery, *The Administrative Process*, 1 F.R.D. 651, 674–75 (1941) (the quoted language derives from the AGCAP).

Accordingly, having been presented with the AGCAP report, President Roosevelt justified his Logan-Walter veto in the following way:

> Despite the tremendous growth in the business of administration in recent years, I have observed that there has been a substantial improvement in the standards of administration action. That does not mean that further improvement is not needed. I am convinced, however, that in reality the effect of [Logan-Walter] would be to reverse and, to a large extent, cancel one of the most significant and useful trends of the 20th century in legal administration. That movement has its origin in the recognition even by courts themselves that the conventional processes of the court are not adapted to handling controversies in the mass. Court procedure is adapted to the intensive investigation of individual controversies. But it is *impossible* to subject the daily routine of fact-finding in many of our agencies to court procedure.[46]

The AGCAP majority's proposed Bill would have codified certain existing administrative procedures and established an Office of Administrative Procedure to propose additional changes in the future.[47] The minority's proposal went substantially further, recommending "judicial review provisions similar to the Walter-Logan bill."[48] While Congress debated both proposals following the Logan-Walter veto, the deliberations were eventually put aside due to America's entry into World War II.[49]

From all these struggles emerged the APA, which was (and still is) effectively "the bill of rights for the new regulatory state."[50] Broadly, the APA established the relationship between the combined-function agencies, those subject to their regulations and decisions, and the government responsible for their mandates and oversight.[51] Several years after its enactment, Justice Jackson

46. Franklin D. Roosevelt, *Logan-Walter Bill Fails*, 27 A.B.A. J. 52, 52 (1941) (emphasis added).

47. *See* Dudley, *supra* note 41, at 36.

48. *Id.*

49. *Id.*

50. Shepherd, *supra* note 36, at 1678.

51. *Id.* at 1558 ("the APA established the fundamental relationship between regulatory agencies and those whom they regulate-between government, on the one hand, and private citizens, business, and the economy, on the other hand. The balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications, until the present.").

described the APA as representing "a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities."[52] Today, the APA requires ALJs (or the head of a given agency) to preside "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[53] Particularly in light of the APA, the role of the administrative judiciary—and thus ALJs—within our administrative system cannot be overstated.[54] Professor Asimow contends that "the big story of the APA is that it transformed the disrespected crew of agency hearing examiners into the highly respected and highly protected corps of ALJs we know today."[55] Indeed, the APA simply preserved the combined-function agency model, sustaining those agencies' ability to regulate, investigate, prosecute, and adjudicate all under the same proverbial roof.[56] Importantly, however, "[o]n appeal from or review of the [agency's] initial decision, the agency has all the powers which it would have in making the initial decision."[57] In other words, "agency heads get the final call on *all* issues of fact, law, and discretion."[58]

52. Wong Yang Sung v. McGrath, 339 U.S. 445, 450, *modified*, 339 U.S. 908 (1950).

53. 5 U.S.C. § 554; *see also* VANESSA K. BURROWS, CONG. RSCH. SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010) (noting that, prior to 1978, ALJs were referred to in the APA as "hearing examiners," but that Congress replaced that title with "Administrative Law Judges" through P.L. 95-251, 92 Stat. 183 (1978) (amending 5 U.S.C. §§ 554(a)(2), 556(b)(3), 559, 1305, 3344, 4301, 5335, 5362, 7251)).

54. *See Qualification Standard for Administrative Law Judge Positions*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/#:~:text=ALJs%20rule%20on%20preliminary%20motions,fact%20and%20conclusions%20of%20law. (last visited Sept. 24, 2023) (highlighting the duties of an ALJ, such as serving as an impartial trier of fact, conducting hearings, and issuing decisions on cases involving Federal laws and regulations).

55. Asimow, *supra* note 19, at 163. In light of recent U.S. Supreme Court and circuit courts of appeals decisions, discussed *infra*, one must wonder whether Professor Asimow would still characterize ALJs as either highly protected or highly respected.

56. *Id.*

57. 5 U.S.C. § 557(b).

58. Asimow, *supra* note 19, at 163 (emphasis in original); *but see* Universal Camera Corp. v. N.L.R.B., 340 U.S. 456 (1951) (holding, quite famously, that courts are to review agency head decisions, not decisions made by ALJs, but that, where the agency head and the ALJ disagree, such disagreement weighs against the APA's substantial evidence standard. Thus, ALJ decisions became more significant following *Universal Camera Corp.* as agency heads became less likely to dispute such decisions upon review).

C. The Purpose and Current Status of the Administrative Judiciary

As is evident from the conflicts that defined the history described above, debates about the purpose of the administrative state and its judiciary abound.[59] Such debates are distinctly political. On one hand, progressive advocates of the administrative state as currently conceived argue that the executive agencies "serve an important practical purpose because they can address problems more quickly and, in more detail, than Congress can. Often these agencies are called upon to apply specific scientific, technical, or administrative expertise to implement the broad policy decisions made by Congress."[60] On the other hand, conservative detractors of the administrative state generally oppose its existence on a fundamental level, arguing that unelected, combined-function agencies undermine the separation of powers doctrine and other constitutional norms.[61]

Perhaps, however, a more nuanced view better describes the disagreement. Professor Jon D. Michaels, Professor of Administrative Law at UCLA, for example, discerns two opposing factions:

> those who see the modern administrative state as a threat to or an affront to the constitutional separation of powers, and those who are more or less at peace with the modern administrative state as a constitutional matter but are nevertheless deeply distressed by the highly bureaucratized administrative state in the United States, one that they view as hopelessly inefficient, rigid, and unresponsive.[62]

Thus, just as "[n]obody was happy with the" APA in 1946,[63] legal scholars and laymen alike remain mutually unimpressed with the

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59. *See generally* Dudley, *supra* note 41.

60. Cynthia Scheopner, *Administrative Procedure Act*, BRITANNICA (Dec. 1, 2017), https://www.britannica.com/topic/Administrative-Procedures-Act.

61. *See, e.g.,* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (tracing and advancing the dominant conservative arguments against administrative rulemaking and adjudication on constitutional grounds, largely on separation and nondelegation doctrine grounds); *but see* Adrian Vermeule, *'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful?'*, 93 TEX. L. REV. 1547 (2015) (disagreeing vigorously with Hamburger's arguments and contending that Hamburger "misunderstands what that body of law actually holds and how it actually works.").

62. Jon D. Michaels, *A Constitutional Defense of the Administrative State*, THE REGUL. REV. (Dec 17, 2019), https://www.theregreview.org/2019/12/17/michaels-constitutional-defense-administrative-state.

63. Asimow, *supra* note 19, at 29–30 (noting that "all sides felt they were better off with the [APA] than with the status quo," and describing the APA as a "historic compromise").

administrative state today.[64] The administrative judiciary is not insulated from these debates.[65] For instance, the fact that ALJs are independent adjudicators throughout the decision process, but "not granted the respect of automatic finality or even deference" once those decisions are rendered has served to confuse their role.[66] Moreover, the same questions surrounding the fairness of agency adjudications that preceded even the APA persist.[67] The 1992 ACUS study foreshadowed yet another concern regarding ALJs, finding that the predominant disputes had "become almost trivialized by squabbles over perquisites and benefits."[68]

The United States Supreme Court has addressed some of these questions. Relatively early on, in *Butz v. Economou*, the Court recognized ALJs' judicial status and declared that "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge within [the administrative] framework is 'functionally comparable' to that of a judge."[69] The Court's position on the status of ALJs, however, was not always so cut-and-dry, at one point describing ALJs simply as "these quasi-judicial officers."[70] Later, in its landmark *Chevron v. NRDC* decision, the Court articulated the proper standard of judicial review over an agency's construction of a federal statute that the agency is tasked with implementing.[71] Under *Chevron*, if "Congress has directly spoken to the precise question at issue," then the district court enforces that "unambiguously expressed intent."[72] If Congress is found not to have spoken directly to the question at issue, however, or if the statute is otherwise "silent" or "ambiguous," then the court defers to the agency's interpretation provided that interpretation "is based on a

64. K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1672 (2018).

65. *Id.*

66. VERKUIL ET AL., *supra* note 8, at 796.

67. *See generally*, James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1192 (2006) (analyzing the contemporary questions regarding ALJ judicial independence).

68. VERKUIL ET AL., *supra* note 8, at 796.

69. Butz v. Economou, 438 U.S. 478, 513 (1978) (further holding that, because "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process . . . those who participate in such adjudication should also be immune from suits for damages.").

70. Ramspeck v. Fed. Trial Exam'rs Conf., 345 U.S. 128, 130 (1953) ("With the rapid growth of administrative law in the last few decades, the role of these quasi-judicial officers became increasingly significant and controversial.").

71. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

72. Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 414 F.3d 50, 57 (D.C. Cir. 2005) (quoting *Chevron*, 467 U.S. 842–843).

permissible construction of the statute."[73] This judicial doctrine has become known as "*Chevron* deference."[74]

Chevron is most often thought of as a case dealing with agencies as rule makers, but it has important implications for the administrative judiciary as well.[75] Because "it best comports with democratic government that the [politically] accountable agency officials form the policy," as opposed to politically insulated members of the judiciary, it follows that greater independence for agency adjudicators such as ALJs allows for "greater comparative advantage of the agency as a source of policy decisions."[76] "Independence" in this sense merely means the absence of political accountability.[77]

The dominant view, therefore, is that ALJs—as independent, or non-politically-accountable, adjudicators—"are bound by all policy directives and rules promulgated by their agency, including the agency's interpretations of those policies and rules."[78] Put a different way, "ALJs are subordinate to the [Administrator or agency head] in matters of policy and interpretation of law."[79] And, of course, the APA itself dictates that ALJs may not perform duties inconsistent with their "responsibilities" in that appointed position.[80] The U.S. Department of Justice has also issued guidance to this effect, concluding that ALJs "must abide by the written rules and regulations adopted by the Secretary [that is, the agency head] for the conduct of administrative proceedings and by the Secretary's interpretation of such regulations."[81] Executive agency heads, however, cannot be expected to unfailingly administer the intent of Congress, or to perfectly interpret an authorizing statute in a way that stands up to

73. *Chevron*, 467 U.S. at 843.

74. *Id.*

75. *See* VERKUIL ET AL., *supra* note 8, at 989 ("The Court's reference to judges in *Chevron* was to federal district and circuit judges. The *Chevron* analysis applies equally to independent adjudicatory officers in agencies, however.").

76. *Id.*; for more on the distinctly political history of *Chevron* and the current disputes around its application today, *see* Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 621 (2021).

77. VERKUIL ET AL., *supra* note 8, at 989.

78. U.S. O.L.C., Opinion Letter on Authority of Education Department Administrative Law Judges in Conducting Hearings 1, at 2 (Jan. 12, 1990).

79. Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) (citing *Mullen v. Bowen*, 800 F.2d 535, 540–41 n. 5 (6th Cir. 1986); *see also* Ass'n of Admin. L. Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

80. Appointment of Administrative Law Judges, 5 U.S.C. § 3105.

81. U.S. O.L.C., Opinion Letter on Authority of Education Department Administrative Law Judges in Conducting Hearings 1, at 6 (Jan. 12, 1990).

Chevron deference.[82] Nonetheless, the administrative judiciary is effectively powerless in such situations.[83]

Since *Chevron*, the issue has only been further complicated. Indeed, "[a]dministrative law is experiencing a constitutional revolution unlike anything in living memory."[84] At the same time, the number of ALJs making up our administrative judiciary has also grown.[85] In May 1978, for example, there were 1,078.[86] Between 1978 and 1992, the number fluctuated between 989 and a high of 1,185.[87] Today, there appear to be nearly 2,000 ALJs and more than 10,000 administrative judges or other designated hearing officers.[88] While data on this point are unfortunately convoluted (which itself should perhaps be cause for alarm), the below table illustrates the breadth of the administrative judiciary as of March 2017.[89]

Agency	***ALJs***	**Agency**	***ALJs***	**Agency**	***ALJs***
Commodity Futures Trading Commission	*0*	Dept. of Justice - DEA	*2*	Fed. Trade Commission	*1*
Consumer Financial Protection Bureau	*1*	Dept. of Justice - EOIR	*1*	International Trade Commission	*6*
Dept. of Agriculture	*3*	Dept. of Labor	*41*	Merit Systems Protection Board	*0*
Dept. of Education	*2*	Dept. of Transportation	*3*	National Labor Relations Board	*34*
Dept. of Health and Human Services - App. Board	*5*	Environmental Protection Agency	*3*	National Transportation Safety Board	*3*
Dept. of Health and Human Services – FDA	*0*	Fed. Communications Commission	*1*	Occupational Safety and Health Review Comm.	*12*

82. *See, e.g., Id*. at 3.

83. In recent years, however, this truism has come under increasing fire from litigants in administrative proceedings before ALJs. *See infra* Part III.2.

84. Green, *supra* note 76, at 621.

85. VERKUIL ET AL., *supra* note 8, at 786 n.23.

86. *Id.*

87. *Id.*

88. *See ALJs by the Numbers,* Chart related to *Data on Administrative Law Judges,* BALLOTPEDIA, https://ballotpedia.org/Administrative_law_judge-ALJs_by_the_numbers (last visited Oct. 3, 2022).

89. *ALJs by Agency*, *Administrative Law Judges*, OPM.GOV, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (effective July 10, 2018).

Dept. of Health and Human Services - OMHA	*101*	Fed. Energy Regulatory Commission	*13*	Office of Financial Institution Adjudication	*2*
Dept. of Homeland Security - Coast Guard	*6*	Fed. Labor Relations Authority	*2*	Securities and Exchange Commission	*5*
Dept. of Housing and Urban Development	*2*	Fed. Maritime Commission	*2*	Small Business Administration	*0*
Dept. of the Interior	*9*	Fed. Mine Safety and Health Review Commission	*15*	Social Security Administration	*1,655*
				United States Postal Service	*1*
				TOTAL ALJs:	**1,931**

As the Office of Personnel Management data indicates, the majority of ALJs are concentrated in the United States Social Security Administration ("SSA").[90] The SSA hears roughly 700,000 cases each year,[91] and the hearing process takes an average of 373 days.[92] Suffice it to say that the administrative judiciary both outnumbers and handles far more cases than Article III courts.[93] If anything, this

90. *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 586–88 app. C (2010) (Breyer, J., dissenting) (indicating that the Office of Personnel Management had told the Court that there were currently 1,584 federal ALJs, 1,334 of whom worked for the SSA).

91. *Program Provisions and SSA Administrative Data*, *Annual Statistical Supplement, 2020,* SSA.GOV, https://www.ssa.gov/policy/docs/statcomps/supplement/2020/2f8-2f11.html (last visited Oct. 6, 2022).

92. Stephen Ohlemacher, *Judges Sue Social Security over Case 'Quotas,'* YAHOO! NEWS (Apr. 19, 2013), https://news.yahoo.com/judges-sue-social-security-over-075118729.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAIw1u1Ck9AgWZR63OcEIRzz48wEb5Tex9LSJ2Pk5krvcuAQA4Vy42eYP1Vw0xUydSNWyhYX52EwkzBvA2RIcVFOZV0567RUuXXlW3we3PL66cktZOBEYUety2xq2uxKq1vt4o59A-1vhssum-eyyJeI4wwtIe8XYxNCUAmfFtR9R ("The Social Security Administration says [ALJs] should decide 500 to 700 disability cases a year."); *see also* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1655 n.64 (2016) ("There is a longstanding debate over whether the SSA, which uses ALJs for its hearings, is required to engage in formal adjudication for its hearings.") (citing *Social Security Subcommittee House Ways and Means Committee* 4–5 (June 27, 2012) (statement of Professor Jeffrey S. Lubbers); *see also* Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 279, 281–82 (2002).

93. Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016) (noting that there were only 860 permanently authorized Article III judgeships as of 2014 and, compared to AJ and ALJs presiding "over more than 750,000 proceedings annually,"

makes reforming the administrative judiciary even more urgent and agreement as to its true purpose even more necessary.

III. ILLUSTRATIONS OF THE BROKEN ADMINISTRATIVE JUDICIARY

Aside from its cumbersome size and exorbitant cost,[94] the failings of the contemporary administrative judiciary are illustrated neatly by two worrying trends.

A. Lingering Ambiguity Surrounding Administrative Judicial Appointments

In June 2018, the U.S. Supreme Court held that ALJs are to be considered officers of the United States for purposes of the Appointments Clause.[95] The Appointments Clause provides:

> [The President of the United States] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such *inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[96]

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federal district courts received "only about 375,000 civil and criminal-felony case filings in 2015.").

94. Direct budgetary appropriations for ALJs and other members of the administrative judiciary are difficult to determine and often fluctuate. However, it is enough to say that such allocations have been a topic of political dispute. *See, e.g., Role Of Social Security Administrative Law Judges*: *Joint Hearing Before The Subcommittee On Courts, Commercial And Administrative Law Of The Committee On The Judiciary And The Subcommittee On Social Security Of The Committee On Ways And Means*, 112th Cong. 30 (2011) (statement of Congressman Sam Johnson, Chairman, Subcommittee on Social Security, Committee on Ways and Means) ("I hope . . . we can have a frank discussion about whether more money is the only answer or if other reforms would solve the problem more efficiently. [SSA Commissioner] insists that most ALJs are dedicated and conscientious public servants, but he acknowledges that there are a certain number who under perform, approve or deny a suspiciously high number of cases or otherwise misbehave in office. . . . [SSA] will pay OPM $2.7 million this year for personnel services related to administrative law judges. The American taxpayer has the right to know whether the Social Security Administration is getting its money's worth from OPM.").

95. *See generally* Lucia v. S.E.C., 138 S. Ct. 2044 (2018) (noting that ALJs are Officers of the United States and therefore subject to the Appointments Clause).

96. U.S. Const. art. II, § 2, cl. 2 (emphasis added).

The Court in *Lucia* relied largely on its earlier holding in *Freytag v. Commissioner*.[97] In *Freytag*, the Court held that Special Trial Judges of the United States Tax Court were officers, albeit "inferior officers," for purposes of the Appointments Clause.[98] *Lucia* similarly held that ALJs assigned to hear U.S. Securities and Exchange Commission ("SEC") enforcement actions were "Officers of the United States" within the meaning of the Appointments Clause.[99]

Illustrating the gravity of the Court's holding in *Lucia*, the SEC almost immediately issued the following Stay Order in light of the fact that many of its ALJs had apparently not been constitutionally appointed:

> In light of the Supreme Court's decision in *Lucia v. SEC*, we find it prudent to stay any pending administrative proceeding initiated by an order instituting proceedings that commenced the proceeding and set it for hearing before an administrative law judge, including any such proceeding currently pending before the commission.[100]

The *Lucia* opinion itself was silent as to whether the Court's ruling ought to be interpreted to apply to all ALJs within the executive branch or solely to those at the SEC.[101] Yet, commentators quickly noted that it "may be years before the implications of the Supreme Court's opinion are clear, but at first glance the opinion strikes a major blow at one of the centerpieces of the administrative state—the tradition of civil-service appointments of independent administrative law judges."[102] Arguably, *Lucia* may "end[ ] up invalidating all of the existing systems for appointments of ALJs"

97. Freytag v. Comm'r, 501 U.S. 868 (1991).

98. *Id.* at 892.

99. *Lucia*, 138 S. Ct. at 2055. While the SEC undertook to retroactively reappoint their ALJs in response to the *Lucia* decision, the ruling had vast implications elsewhere. *See, e.g.*,Cirko ex rel. Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 152 (3d Cir. 2020) (allowing plaintiffs to challenge SSA ALJ appointments even where plaintiffs had not satisfied APA exhaustion requirements with SSA); Green, *supra* note 76, at 697 n.477 (explaining that *Lucia* has been so disruptive as to force district courts to pause "current lawsuits concerning [the appointments issue] while awaiting the Third Circuit's [*Cirko*] decision, and all of these Social Security cases will now be remanded for adjudication by ALJs who were properly appointed.").

100. Hazel Bradford, *SEC Puts In-House Cases on Hold After Supreme Court Ruling*, PENSIONS & INV. (June 25, 2018), https://www.pionline.com/article/20180625/ONLINE/180629915/sec-puts-in-house-cases-on-hold-after-supreme-court-ruling.

101. *See Lucia*, 138 S. Ct. at 2055.

102. Ronald Mann, *Opinion Analysis: Justices Invalidate Civil-Service Appointments of Administrative Law Judges*, SCOTUSBLOG (Jun. 21, 2018), https://www.scotusblog.com/2018/06/opinion-analysis-justices-invalidate-civil-service-appointments-of-administrative-law-judges.

across the executive agencies.[103] Interestingly, the 1992 ACUS study mentioned the Appointments Clause only twice—even after *Freytag* was decided—presumably because the group saw no cause for grave concern regarding the status of ALJs on that basis.[104] The group did note, however, that the Appointments Clause could present a challenge to an effort to allocate greater decision making power to ALJs: "Decisionmaking could be allocated to give adjudicatory officers greater responsibility and authority . . . . The only constraint on Congress' discretion in this respect has its source in the Appointments Clause."[105]

But those fears have already been realized *without* the added benefit of ALJs being granted significantly greater authority to render final decisions. Instead, *Lucia* has simply taken the form of a cudgel to be used by conservative elements bent on reigning in the administrative state.[106] Even *Chevron* has been used in this way.[107] Not only is it possible for Congress to grant ALJs greater control over their decisions, but it is also preferable to an administrative judiciary left in the lurch amidst debates regarding their constitutionality.[108] The literature on this point is descriptive enough but fails to offer much in the way of prescriptive solutions.[109] It seems clear that Congress would do well to preempt any further "attacks" on the administrative judiciary on constitutional grounds by amending the APA in light of *Lucia* and later addressing the scope of ALJ authority. That is, nothing in the Constitution would prevent Congress from mandating that all ALJs, across all agencies within the executive branch, be appointed or reappointed pursuant to the Appointments Clause without delay.[110] The Supreme Court's Appointments Clause jurisprudence suggests that any "position, however labeled, is [,]in fact[,] a federal office if (1) it is invested by [a] legal authority with a portion of the sovereign powers of the federal government, and (2)

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103. *Id.*

104. VERKUIL ET AL., *supra* note 8, at 783, 1038.

105. *Id.* at 1038.

106. *See* Steven D. Schwinn, *Lucia v. SEC and the Attack on the Administrative State*, AM. CONST. SOC'Y SUP. CT. REV. 2017-2018 241, 242–43 (2018); Exec. Order No. 13,843, 83 Fed. Reg. 32, 755 (July 10, 2018) (excepting ALJs from the merit-based selection process).

107. *See, e.g.,* REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016, at 9–10 (2016) (denouncing *Chevron* deference and stating that "courts should interpret laws as written by Congress rather than allowing executive agencies to rewrite those laws to suit administration priorities.") https://www.presidency.ucsb.edu/sites/default /files/books/presidential-documents-archive-guidebook/national-political-party-platforms-of-parties-receiving-electoral-votes-1840-2016/117718.pdf.

108. VERKUIL ET AL., *supra* note 8, at 1038; Green, *supra* note 76, at 621.

109. Green, *supra* note 76, at 621.

110. Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. U. CHI. J. REG. COMPL. 22, 28–30, 51–52 (2017).

it is 'continuing.'"[111] Any person holding such a position within the executive branch—and thus conceivably all hearing officers of any stripe—could properly be deemed Officers of the United States. Indeed, *Lucia* has continued to have startling ramifications as recently as 2022 for that exact reason.[112]

The Trump Administration took action in this regard.[113] In the weeks following *Lucia*, President Trump issued Executive Order 13,843 which excepted ALJs from "competitive examination and competitive service selection procedures."[114] The Executive Order stated that "[t]he Federal Government benefits from a professional cadre [of ALJs] appointed under section 3105 of [the APA], who are impartial and committed to the rule of law."[115] *Lucia*, President Trump pointed out, illustrated that "ALJs are often called upon to discharge significant duties and exercise significant discretion in conducting proceedings under the laws of the United States."[116] In fact, the Executive Order recognized the role of ALJs "has increased over time and ALJ decisions have, with increasing frequency, become the final word of the agencies they serve."[117] It also recognized that "[r]egardless of whether [competitive service and examination] procedures would violate the Appointments Clause . . . there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing officials who discharge such significant duties and exercise such significant discretion."[118] Accordingly, the Executive Order placed ALJs within the excepted

111. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73–74 (Apr. 16, 2007).

112. *See* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 449 (5th Cir. 2022) (holding, upon a split panel, that SEC's enforcement action against hedge fund manager in administrative proceedings before ALJ violated manager's right to jury trial under Seventh Amendment, Congress failed to articulate an "intelligible principle" when it delegated the power to the commission to choose whether it brings cases before its own administrative law judges (ALJs) or in district court, and removal restrictions on ALJs violate Article II of the Constitution, which dictates the president must "take care that the laws be faithfully executed"). For a thorough analysis of *Jarkesy* and its implications prior to the Fifth Circuit's decision, see Yeatman, W., Shapiro, I. & Schulp, J., *Court Should Check the SEC's Unfair Home Court Advantage*, CATO INSTITUTE (Mar. 18, 2021), https://policycommons.net/artifacts/1428661/court-should-check-the-secs-unfair-home-court-advantage/2043583.

113. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32, 755 (July 10, 2018) (entitled "Excepting Administrative Law Judges From the Competitive Service").

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* For a useful summary of Executive Order 13,843 and its immediate impact, see U.S. Off. of Pers. Mgmt., Memorandum on executive order - Excepting Administrative Law Judges from the Competitive Service, (July 10, 2018).

service, hoping to ultimately "promote confidence in, and the durability of, agency adjudications."[119]

Thus, the executive branch has already recognized the need for ALJs to be positioned in a way that protects their unique discretionary position within the federal government.[120] Congress should similarly recognize these interests and undertake to amend the APA in light of them. Indeed, Congress "has broad discretion to allocate adjudicatory responsibilities and structure the institutional environment in which adjudicatory officers operate."[121] Congress need only exercise that power and could do so while simultaneously promoting specific policy objectives.

B. The Near Fiction of Administrative Judicial Impartiality

The APA articulates three general principles governing the role of the administrative judiciary: (1) the ALJ presides at the hearing and issues an initial decision; (2) the agency has plenary power to review the initial decision and to substitute its judgment for that of the ALJ; and (3) reviewing courts defer to the agency rather than to the ALJ.[122] In case of doubt, the Court in *Lucia* provided a useful example of precisely what this looks like in practice:

> The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. But the Commission also may, and typically does, delegate that task to an ALJ. An ALJ assigned to hear an SEC enforcement action has extensive powers [and] issues an 'initial decision.' That decision must set out "findings and conclusions" about all 'material issues of fact [and] law'; it also must include the 'appropriate order, sanction, relief, or denial thereof.'[123]

The agency head (*i.e.,* the "Commission") can then review the ALJ's decision *sua sponte* or upon request or, if not, issue an order stating that the ALJ's decision is final, at which point the ALJ's decision is treated as the final action of the agency.[124] But, because

119. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,756 (July 13, 2018).
120. *Id.* at 32,755.
121. VERKUIL ET AL., *supra* note 8, at 1038.
122. Lucia v. S.E.C., 128 S. Ct. 2044, 2049 (2018).
123. *Id.*
124. *Id.*

agency heads are political appointees appointed by the President—indeed, terminable by the President for cause[125]—what happens when agency heads or their employees selectively delegate cases to their ALJs based on political considerations?

Commentators have not sufficiently addressed a case that dealt with this very question. In *Mahoney v. Donovan*, Judge J. Jeremiah Mahoney, an ALJ at the U.S. Department of Housing and Urban Development ("HUD"), filed suit against his agency for interference with his judicial independence under the APA.[126] David Anderson was Judge Mahoney's supervisor at the time, appointed to the position of Director of HUD's Office of Hearings and Appeals by the HUD Secretary.[127] In the complaint, Judge Mahoney challenged:

> (1) the selective assignment of cases on the basis of political considerations or the Secretary's perceived interests; (2) the failure to provide docket numbers necessary for the administrative law judges to manage their cases, as well as to provide access to legal-research resources; (3) unauthorized *ex parte* communications between [Anderson] and a litigant appearing before [Judge Mahoney]; and (4) the practice of providing the Justice Department with advance warning of notices of election in certain cases.[128]

The district court ruled that Mahoney lacked standing to sue his agency to enforce his own judicial independence under the APA.[129] However, the district court "suggested that federal ALJs—rather than seek to enforce their own independence—might instead bring lawsuits against agencies for interference with their judicial independence 'on behalf of the litigants' who appear before them."[130] However, such a resolution to the standing issue would necessarily place an ALJ "in the awkward position of being the advocate for a litigant from the judge's own courtroom."[131] Indeed, "[o]ne shudders to think of the consequences to administrative adjudication if any ALJ would choose to advocate for one party over another in an Article III

125. Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

126. Mahoney v. Donovan, 824 F. Supp. 2d 49 (D.D.C. 2011), *aff'd in part*, No. 12-5016, 2012 WL 3243983 (D.C. Cir. Aug. 7, 2012), *aff'd in part on other grounds*, 721 F.3d 633 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

127. *Id*. at 53.

128. Mahoney, 721 F.3d 633, 634 (D.C. Cir. 2013).

129. Mahoney, 824 F. Supp. 2d at 53; *see also* Hon. James G. Gilbert, Hon. Robert S. Cohen, *Administrative Adjudication in the United States*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 222, 236 (2017) (describing this case and its procedural history).

130. Gilbert & Cohen, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY at 222 (citing *Mahoney*, 824 F. Supp. 2d at 49).

131. *Id.*

federal courtroom regardless of the virtue of the cause."[132] On appeal from the district court's decision, the District of Columbia Circuit Court of Appeals declined to resolve the standing issue, holding instead that Judge Mahoney's claims arose from mere "working conditions" and were thus barred by the Civil Service Reform Act of 1978 ("CSRA").[133] Moreover, the court of appeals made "the astonishing statement that *all claims of interference* with judicial decision making by ALJs are 'working conditions' under CSRA."[134] The court stated:

> The degree of independence of an administrative law judge—the extent to which an administrative law judge may exercise his independent judgment on the evidence before him, free from pressures by officials within the agency, certainly sounds like a working condition.[135]

This is a fairly stunning conclusion, especially when considering its implications for litigants in administrative proceedings. Imagine, for example, a similar but more extreme circumstance: an agency head determines which ALJs most often rule in favor of the agency, assigns all significant cases solely to those ALJs, and allows other ALJs to hear only less significant matters. Or, imagine an agency head being tasked with a specific political mandate (e.g., providing greater protection for landlords against discriminatory housing claims), and then assigning all cases implicating that mandate to ALJs that are politically aligned with the current Presidential Administration. *Mahoney* would apparently allow for each of these scenarios and bar ALJs from seeking relief on their own behalf in an Article III court.[136] This is yet another problem that Congress could directly address by amending the APA. Other commentators have recognized the need for amending the APA, but recognition of the need to do so specifically with respect to the administrative judiciary is noticeably lacking.[137] Incredibly, the APA has been amended only sixteen times

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132. *Id.*

133. *Mahoney*, 721 F.3d 633, 634 (D.C. Cir. 2013) (citing Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978)).

134. Gilbert & Cohen, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY at 222 (emphasis added).

135. *Mahoney*, 721 F.3d 633, 636–37 (D.C. Cir. 2013) (internal punctuation and citation omitted). For more on the impact of this decision and the mere existence of the litigation itself, see In Re Interstate Reality Management Company, HUDALJ 11-F022-CMP-5 (Sept. 11, 2011) (parties to HUD administrative proceeding sought to disqualify HUD ALJ's suing their agency from presiding over pending matters before the agency) available at https://www.hud.gov/sites/documents/INTERSTATEREALTYMGT09111.PDF.

136. *Mahoney,* 721 F.3d 633, 637–38 (D.C. Cir. 2013).

137. *See, e.g.*, Christopher J. Walker, *Modernizing The Administrative Procedure Act*, 69 ADMIN. L. REV., 629–70 (June 9, 2017) https://administrativelawreview.org/wp-

since its 1946 enactment—most recently in 1996—and even that figure is misleading considering that only five such amendments have been significant or substantive.[138] A Congress that fails to amend one of the most far-reaching federal statutes in existence in light of new challenges is a Congress that cannot rationally complain about judicial attacks on the administrative state.

At least some members of Congress, however, have taken the exact *opposite* course of action advanced here.[139] More than two years following President Trump's Executive Order exempting ALJs from the competitive service, and placing them instead in the excepted service, three Republican members introduced a bill that would amend the APA in the other direction.[140] Today, APA Section 3105 reads:

> Each agency shall appoint as many administrative law judges as are necessary for proceedings . . . Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.[141]

Were this Bill to pass, Section 3105 would be amended to include sixteen subsections providing for, *inter alia*: (1) the reinstatement of ALJ examinations as prerequisites for ALJ candidacy; and (2) the repositioning of ALJs within the competitive service.[142] More importantly, it would require an ALJ to:

> . . . report directly to the chief administrative law judge (if any) of the Executive agency at which the ALJ is appointed.

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content/uploads/ sites/2/2019/09/69-3-Christopher-Walker.pdf; *see also* U.S. DEPT. OF JUSTICE, OFFICE OF THE DEPUTY ATT'Y GEN., Report 20-767, MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT (2020).

138. *See* Walker, 69 ADMIN. L. REV. 634–35 (similarly describing the APA's amendment history as displayed via Westlaw's *Popular Name Table*). The author of this Comment also searched for any more recent amendments to the APA and found none. The only significant amendments to the APA throughout its entire history have been those arising from the Freedom of Information Act ("FOIA") (1966), the Privacy Act (1974), the Government in the Sunshine Act (1976), the waiver of sovereign immunity (1976), and, as discussed, the renaming of ALJs (1978).

139. *See generally* Administrative Law Judges Competitive Service Restoration Act, H.R. 4448, 117th Cong. (2021).

140. *Id.* (the Republican cosponsors are Rep. Fitzpatrick, Brian K. (R-PA-1), Rep. Bacon, Don (R-NE-2), and Rep. Smith, Christopher H. (R-NJ-4)).

141. APA §§ 556, 557 are the two provisions generally governing administrative hearings and procedure.

142. Administrative Law Judges Competitive Service Restoration Act, H.R. 4448, 117th Cong. (2021).

> If there is no chief administrative law judge, the ALJ shall report directly to the head of such Executive agency.[143]

Thus, members of the administrative judiciary are potentially poised for further disruptions that will cast doubt on their decisions and purpose. This Republican effort to amend the APA as described may well turn out to be a political play hostile to the administrative state altogether.[144] Instead of waiting for the courts to flesh out these contested provisions of the APA, progressive legislators must tackle administrative judicial reform head-on, ideally involving members of the administrative judiciary themselves. The need for such reform is made more apparent by the fact that ALJs remain powerless to scrutinize their agency's own statutory and policy interpretations.[145]

IV. RETHINKING THE ADMINISTRATIVE JUDICIARY

A robust and accountable administrative judiciary is the *sine qua non* of a viable administrative state. However, the administrative judiciary, as designed, evolved to solve problems that largely no longer exist, or at least now exist to a much lesser degree.[146] Likewise, the APA was devised as a series of compromises and capitulations following a unique period of political controversy surrounding the administrative process.[147] Times have changed, and so too should the APA.

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143. *Id.* at 3.

144. *See, e.g.*, Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J., 283, 289–90 (2007) ("Reagan was able to take advantage of changes to civil service laws during the Carter administration that expanded the number of political appointees to strategic positions within the bureaucracy.").

145. *See* VERKUIL ET AL., *supra* note 8 and accompanying text. A prominent and contemporary illustration of this problem arises from the federal government's response to the COVID-19 pandemic. Challengers of the way in which the U.S. Small Business Administration ("SBA") has administered Congress' Paycheck Protection Program ("PPP") within the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") have argued that SBA improperly excluded certain employer costs (e.g., workers' compensation insurance premiums) from eligible payroll costs under the PPP. They argue that Congress' declared policy was that "the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns" and to "maintain and strengthen the overall economy of the Nation." *Small Bus. Admin. v. McClellan*, 364 U.S. 446, 447 (1960) (citing Small Business Act, 67 Stat. 232, as amended, 15 U.S.C. §§ 631–651). This congressional intent would potentially weigh against such exclusion. However, SBA's ALJs are bound by the agency's own interpretation of the CARES Act and thus are not permitted to even hear such arguments.

146. Dudley, *supra* note 41, at 36–37.

147. McNollgast. *The Political Origins of the Administrative Procedure Act*, 15 J. OF LAW, ECON., & ORG., 180, 183 (1999) http://www.jstor.org/stable/3554948 (explaining that nine

When he vetoed Logan-Walter, Roosevelt asserted that it was "impossible to subject the daily routine of fact-finding in many of our agencies to court procedure."[148] That may well have been the case eighty years ago, as the combined-function agency model took hold, but it is not the case today.[149] Logan-Walter would have granted the United States Court of Appeals for the District of Columbia broad jurisdiction over administrative adjudications.[150] The APA allows agencies themselves to adjudicate.[151] These proffered solutions, however, likely represent conflicting extremes while a plain middle ground exists. Today, twenty-two states have implemented a "central panel" model expressly in pursuit of independent, efficient, and effective administrative adjudications.[152] Most have done so with great success.[153] In general, these central panels consist of ALJs employed not by individual agencies, but by a single and distinct government institution.[154] Were this model to be imported at the federal level, agencies could maintain their dual functions of rulemaking and prosecution while surrendering their adjudicatory power in the interest of public trust and perceived impartiality. The SSA, with its 1,655 ALJs and uniquely protracted adjudicatory procedures, could remain fully intact, leaving only 276 ALJs to make a federal central panel. If this figure sounds too cumbersome, consider that the state of Washington alone maintains a central panel of more than 120 ALJs.[155] Congress could—and should—amend the APA to reflect the modern world. Specifically, it should codify ALJs into the excepted service while heightening the prerequisite qualifications for ALJ candidates. Congress should also place agency adjudicatory functions in new and separate institutions away from the agencies themselves, ideally pursuing a central panel model as the ultimate goal.

In this sense, Congress would be wise to revisit Logan-Walter altogether. Arguably, "the dominant purpose of [Logan-Walter] was

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sperate administrative procedure bills were introduced in Congress leading up to Logan-Walter, and seven more such bills after Logan-Walter until the APA was eventually passed).

148. *See* Dudley, *supra* note 41.

149. *See generally id.* at 36–37.

150. *See* McNollgast, *supra* note 147, at 196 (describing the relevant Logan-Walter provisions).

151. 5 U.S.C. § 556.

152. *See* La. Div. of Admin. L., *2021 Comparison of States with Centralized Administrative Hearings Panels*, (2021), https://www.adminlaw.la.gov/Documents/ 2021CentralPanelStatesComparisonChart.pdf; *see also* Malcolm C. Rich and Alison C. Goldstein, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 2, 4-9 (2019).

153. Rich et al., *supra* note 152, at 74–75.

154. *Id*. at 8.

155. La. Div. of Admin. L., *supra* note 152.

to strengthen individual rights and judicial review."[156] Logan-Walter would have allowed greater opportunities for litigants to pursue remedies or defend against enforcement actions in Article III courts, thereby lightening the load for ALJs.[157] It would also ameliorate due process concerns that continue to pervade administrative proceedings.[158] In 1979, then-professor Antonin Scalia argued, quite presciently, that the most serious issue regarding the administrative judiciary was that of ensuring the quality of its adjudicators.[159] This might at first suggest that ALJs ought to be immediately placed back in the competitive service, but such a conclusion ignores the fact that other barriers could ensure ALJ quality just as well if not more so.[160] As partisan debates around the administrative state continue, reform to the administrative judiciary offers an opportunity for bipartisan amendments.

V. CONCLUSION

It is more than unfortunate that the administrative judiciary has largely been ignored in recent decades. Yet, Congress is able to prevent further decay by proactively assessing, and then legislating, in a manner that recognizes both the administrative judiciary's value as well as its inherent risks. If nothing else, good governance in the modern age suggests that adjudication should be far removed from rulemaking. Such reform must begin with sweeping changes to the administrative judiciary itself if the administrative state is to survive this period of uncertainty.

156. McNollgast, *supra* note 147, at 196–97.

157. *See* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207, 210 (2016) (explaining that the Special Committee drafted the Walter-Logan bill to address due process concerns and to create a new United States Court of Appeals for Administration that evaluates agency rulings and grants relief for affected firms and individuals).

158. *Id.*

159. *See* Antonin Scalia, *The ALJ Fiasco: A Reprise*, 47 U. CHI. L. REV., 57, 78–79 (1979).

160. One obvious step in this direction would be for Congress to immediately incorporate an administrative judicial code of conduct into the APA itself. For more on efforts to adopt such a code, *see* Steven A. Glazer, *Toward A Model Code of Judicial Conduct for Federal Administrative Law Judges*, 64 ADMIN. L. REV. 337 (2012).

THE FOURTH AMENDMENT COVERS "FOG REVEAL": NOT THE OTHER WAY AROUND

CONNOR REID†

I. INTRODUCTION

Davin Hall began working with the Greensboro Police Department ("GPD") as a crime analyst in 2014.[1] Through his analysis, Hall helped police patrol identify patterns in criminal offenses around the city.[2] During his six years with the GPD, Hall frequently relied on software applications to make his work with crime data more efficient and user-friendly.[3] Initially, Hall thought nothing of it when the GPD announced its plan to implement a software application called "Fog Reveal" as part of its crime surveillance efforts.[4] Shortly after the GPD began using Fog Reveal, Hall began to develop concerns about the privacy threats the software posed to the citizens of Greensboro.[5] Fog Reveal allowed the GPD to search through the digital information stored on every mobile device within a selected location and timeframe.[6] According to Hall, "Anyone who is in the area that's being captured can have their devices picked up by [Fog Reveal] and any device can be searched without a warrant . . . ."[7] With access to a device's digital information, law enforcement can determine where the owner of a captured mobile device lives, where they work, and with whom they associate.[8] After Hall's concerns

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1. Sayaka Matsuoka, *Public Records Request Shows Greensboro Police Department Used Mobile Tracking Surveillance Tech*, TRIAD CITY BEAT (Dec. 1, 2022), https://triad-city-beat.com/public-records-request-shows-greensboro-police-department-used-mobile-tracking-surveillance-tech.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

were dismissed by police, attorneys, and the Greensboro City Council, he resigned from the GPD in late 2020.[9] The City of Greensboro defended the GPD's use of Fog Reveal, claiming that because the mobile identification numbers Fog Reveal captures do not "contain any personally identifiable information, it was fair game as a search."[10] However, as Hall pointed out, if Fog Reveal did not provide access to personal information, law enforcement agencies "wouldn't want it."[11] As of 2022, nearly two dozen government agencies had contracts with Fog Reveal.[12]

Law enforcement's use of software applications, like Fog Reveal, is emblematic of the growing number of areas where digital data is utilized in today's rapidly advancing technological landscape. The increasing ubiquity of smartphones has placed an unprecedented economic premium on personal data. Indeed, personal information is an essential currency in the new millennium.[13] Some scholars describe this trend as "the commodification of our digital identity."[14] Recently, companies have discovered ways to use the personal data stored on smartphones for commercial purposes.[15] For example, companies use personal data to analyze consumer behavior through prediction analytics and data profiling to generate revenue.[16] These technological trends have significant implications on the expectation of privacy American citizens have over personal information stored on their mobile devices.

Whatever one's feelings about the privacy risks surrounding the commercial use of personal data, graver privacy concerns are implicated when law enforcement agencies use personal data to deprive an individual of their liberty. Part II of this Note discusses the Fourth Amendment and how government agencies use the "Data Broker Loophole" to avoid obtaining a search warrant before purchasing cell phone location information. Part III contends that current Supreme Court precedent prohibits the government's purchase of digital location information and its subsequent use in criminal investigations, focusing on constitutional and public policy arguments. Finally, Part IV proposes solutions available to the judiciary and legislature to strengthen the privacy expectations that American citizens have over their cell phone location data.

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9. *Id.*

10. *Id.*

11. *Id.*

12. Garance Burke & Jason Dearen, *Tech Tool Offers Police 'Mass Surveillance on a Budget'*, AP NEWS (Sept. 2, 2022, 5:28 PM), https://apnews.com/article/technology-police-government-surveillance-d395409ef5a8c6c3f6cdab5b1d0e27ef.

13. Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2056 (2004).

14. Milena Mursia & Carmine A. Trovato, *The Commodification of Our Digital Identity*, FILODIRITTO (May 31, 2021), https://www.filodiritto.com/commodification-our-digital-identity.

15. *Id.*

16. Blaire Rose, *The Commodification of Personal Data and the Road to Consumer Autonomy Through the CCPA*, 15 BROOK. J. CORP. FIN. & COM. L. 521, 527 (2021).

II. BACKGROUND

A. The Fourth Amendment and The Reasonable Expectation of Privacy

The Fourth Amendment recognizes in relevant part "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[17] The ratification of the Fourth Amendment was the Founders' response to the "general warrants" and "writs of assistance," which allowed British officers to rummage through homes unimpeded to search for evidence of criminal activity.[18] In 1791, the government had to physically intrude into the home to acquire personal information about an individual. Due to the technological advancements made throughout the twentieth and twenty-first centuries, law enforcement now possesses a dizzying array of sophisticated surveillance technologies to collect information about an individual without setting foot on their property or making contact with them in person.[19] As a result, the Supreme Court's Fourth Amendment jurisprudence has evolved alongside technological advancements to ensure that Fourth Amendment protections remain as robust as they were in 1791. As stated by the late Supreme Court Justice Scalia, "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[20] With these principles in mind, it is imperative that the Supreme Court's Fourth Amendment jurisprudence keeps pace with technological advancement, lest American citizens only be free from antiquated forms of government intrusion.

Generally, government agencies seeking access to Americans' personal electronic data must comply with a legal process to obtain that data.[21] "That process can be mandated by the Constitution (the Fourth Amendment's warrant and probable cause requirement) or by statute (such as the federal Electronic Communications Privacy Act, or various state laws)."[22] Ostensibly, the government's purchase of digital data that reveals an individual's physical movements is restricted by the above sources. However, as it turns out,

17. U.S. CONST. amend. IV.

18. Riley v. California, 573 U.S. 373, 403 (2014).

19. *See generally* Emily A. Vogels et al., *Tech Causes More Problems than It Solves*, PEW RSCH. CTR. (June 30, 2020), https://www.pewresearch.org/internet/2020/06/30/tech-causes-more-problems-than-it-solves.

20. Kyllo v. United States, 533 U.S. 27, 33–34 (2001).

21. Sharon Bradford Franklin et al., *Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data from Brokers*, CTR. FOR DEMOCRACY & TECH. (Dec. 9, 2021), https://cdt.org/insights/report-legal-loopholes-and-data-for-dollars-how-law-enforcement-and-intelligence-agencies-are-buying-your-data-from-brokers.

22. *Id.*

government agencies currently avoid judicial and legislative oversight by purchasing digital information from third-party data brokers.[23]

B. Supreme Court Precedent on Cellular Data

The Fourth Amendment is the most vital source of individual privacy protection against governmental intrusion. In *Katz v. United States*, the Supreme Court held that the government must obtain a warrant based on probable cause before intruding upon a person's house, papers, and effects where that person (1) exhibits an actual expectation of privacy that (2) society recognizes as reasonable.[24] The relevant question is then: over what matters do American citizens have a reasonable expectation of privacy triggering the Fourth Amendment's safeguards? More specifically, for this Note, what level of privacy protection should be afforded to digital data stored on cell phones?

Although no clear test exists to determine which expectations of privacy are entitled to protection, the Supreme Court uses two guideposts to aid in their analysis.[25] First, the Fourth Amendment "seeks to secure 'the privacies of life' against 'arbitrary power,'" and second, "a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'"[26] In *Carpenter v. United States*, the Supreme Court was asked to determine whether an individual has a reasonable expectation of privacy over the cell-site location information ("CSLI") that is generated when an individual's phone connects to a cell tower.[27] CSLI provides a cell phone's approximate location.[28] In that case, Carpenter (the "Petitioner") was charged with six counts of robbery.[29]

At trial, an FBI agent offered expert testimony about Petitioner's CSLI which placed him near four of the robberies he was charged with.[30] Petitioner was convicted on all of the robbery charges and was sentenced to more than one hundred years in prison.[31] On appeal, Petitioner argued that the FBI's use of the CSLI constituted a search and thus the FBI needed a warrant before obtaining the CSLI.[32] The Supreme Court agreed, holding that when the FBI accessed Petitioner's CSLI, it conducted a search within the meaning

23. *See id.*

24. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

25. Carpenter v. United States, 138 S. Ct. 2206, 2213–14 (2018).

26. *Carpenter*, 138 S. Ct. at 2214 (first quoting Boyd v. United States, 116 U.S. 616, 630 (1886); and then quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

27. *See Carpenter*, 138 S. Ct. at 2211–12.

28. *Cell Phone Location Tracking*, NAT'L ASS'N OF CRIM. DEF. L. (Apr. 17, 2019), https://www.nacdl.org/Document/2016-06-07_CellTrackingPrimer_Final(v2)(2).

29. *Carpenter*, 138 S. Ct. at 2212.

30. *Id.* at 2212–13.

31. *Id.* at 2213.

32. *Id.* at 2212.

of the Fourth Amendment triggering the warrant requirement.[33] In reaching its holding, the Court recognized that individuals maintain a reasonable "expectation of privacy in the record of [their] physical movements as captured through CSLI."[34] Moreover, the Court declined to apply the third-party doctrine, which states that individuals do not have a reasonable "expectation of privacy in information [they] voluntarily turn[ed] over to third parties."[35] The Court reasoned that the third-party doctrine established in *Miller* was inapplicable to CSLI because an individual maintains a reasonable expectation of privacy in the record of their physical movements, even if the government leverages the technology of a third party to obtain that information.[36]

A reasonable interpretation of the Supreme Court's holding in *Carpenter* is that law enforcement must obtain a search warrant before obtaining the location information that is created when a person uses their cell phone. However, law enforcement agencies nationwide are currently using surveillance tools that reveal more accurate and detailed location information than is revealed by CSLI without obtaining a warrant.[37]

C. The Electronic Communications Privacy Act

Another potential source of privacy protection over cellular data is the Electronic Communications Privacy Act ("ECPA").[38] Congress passed the ECPA to restrict the government's ability to access digital information without following specified legal standards.[39] In doing so, the ECPA defines categories of electronic service providers whose customer information is subject to heightened protections.[40] The Act recognizes two types of service providers: (1) a Remote Computing Service ("RCS"), and (2) an Electronic Communication Service ("ECS"). An RCS is any service that gives the public "computer storage or processing services by means of an electronic communications system."[41] An electronic bulletin board is an example of a "remote computing service" under 18 U.S.C. § 2711(2).[42] An ECS is "any service which provides to users thereof the ability to send or receive

33. *Id.* at 2217.
34. *Id.*
35. *Id.* at 2216–17 (quoting Smith v. Maryland, 442 U.S. 735, 743–44 (1979)).
36. *Id.* at 2217.
37. Burke & Dearen, *supra* note 12.
38. *See generally* 18 U.S.C. §§ 2510–23.
39. *See* Franklin et al., *supra* note 21 (listing legal protections regulating access to personal data by government agencies).
40. *See* 18 U.S.C. § 2711(2) (defining the "remote computing service" category); 18 U.S.C. § 2510(15) (defining the "electronic communication service" category).
41. 18 U.S.C. § 2711(2).
42. Steve Jackson Games, Inc. v. United States Secret Serv., 816 F. Supp. 432, 443 (W.D. Tex. 1993).

wire or electronic communications."[43] Telephone and electronic mail companies are ECS providers.[44] ECS providers cannot disclose to third parties "the contents of a communication while in electronic store by that service," while an RCS provider cannot disclose the "contents of any communication which is carried or maintained on that service."[45] RCS and ECS providers are prohibited from "knowingly divulg[ing] a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity."[46] This also prohibits these providers from selling such information to the government.[47]

The ECPA establishes a specific legal process the government must follow to access customer information from either an RCS or ECS.[48] To obtain non-content information—which includes transactional data such as the duration or size of the communication—the government must demonstrate reasonable suspicion of "'specific and articulable facts showing that there are reasonable grounds to believe' that the information [sought] is 'relevant and material to an ongoing criminal investigation.'"[49] The reasonable suspicion requirement is less stringent than the probable cause requirement.[50] Where the government wishes to access the content of an electronic communication, it must obtain a warrant supported by probable cause.[51] Despite Congress's intent to promote "the privacy expectation of citizens" in passing the ECPA, government agencies have learned to avoid the ECPA's restrictions by carefully selecting from whom the information is purchased.[52]

D. Fog Reveal

Fog Reveal is a pay-for-access web tool that enables government agencies in the U.S. to engage in warrantless surveillance of individuals, groups, and places.[53] The tool was developed by Fog Data Science ("FDS"), a limited liability company founded in 2016 by two former Department of Homeland Security

43. 18 U.S.C. § 2510(15).

44. *See* S. REP. NO. 99-541, at 2–3 (1986) (discussing the operation of telephone and electronic mail).

45. 18 U.S.C. §§ 2702(a)(1)–(a)(2).

46. 18 U.S.C. § 2702(a)(3).

47. Franklin et al., *supra* note 21.

48. *See id.*

49. *Id.* (quoting Carpenter v. United States, 138 S. Ct. 2206, 2212 (2018)).

50. Franklin et al., *supra* note 21.

51. United States v. Warshak, 631 F.3d 266, 274, 285 (6th Cir. 2010).

52. H.R. REP. NO. 99-647, at 19 (1986).

53. Anne Toomey McKenna, *What is Fog Reveal? Legal Scholar Explains App Some Police Forces Are Using to Track People Without Warrant*, STUDY FINDS (Oct. 19, 2022), https://studyfinds.org/what-is-fog-reveal.

officials under former President George W. Bush.[54] FDS currently possesses billions of data points from over 250 million U.S. mobile devices.[55] The way Fog Reveal works is simple: FDS purchases location data from smartphone applications that target ads based on a person's movements and interests, and then offers that data to law enforcement agencies for a subscription fee.[56] Once the subscription fee is paid, the subscriber gains access to Fog Reveal.[57] Law enforcement agencies that have Fog Reveal subscriptions gain access to the identification of every mobile device within the geographical area and timeframe specified by law enforcement.[58] The location data provides "pattern of life analysis," which reveals where a device owner "sleeps, studies, works, worships, and otherwise associates."[59] Although FDS claims that it never collects personally identifiable information, pattern of life analysis allows law enforcement to learn the identity of device owners.[60]

The location data provided by FDS and Fog Reveal reveals where a person sleeps at night, which in turn discloses where that person lives.[61] From there, it is easy to imagine how Fog Reveal might reveal one's personal identity.[62] A study conducted nearly a decade ago found that just four spatial-temporal data points were sufficient to identify ninety-five percent of the one and a half million people in the data set.[63] A Missouri official who worked closely with Fog Reveal confirmed these suspicions in 2019 when he wrote that although Fog Reveal's data does not technically reveal personal information, "if we are good at what we do, we should be able to figure out the owner."[64]

According to GovSpend, a company that tracks government spending, as of September 2022, nearly two dozen government agencies subscribed to Fog Reveal.[65] The data accessed through Fog Reveal implicates grave privacy concerns for every American citizen who uses a smartphone. Moreover, law enforcement's use of personal data in connection with criminal investigations raises serious questions about the reach of Fourth Amendment privacy protections and the sufficiency of current Supreme Court precedent and federal privacy laws.

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54. Burke & Dearen, *supra* note 12.

55. McKenna, *supra* note 53.

56. *Id.*

57. *Id.*

58. Marc Dahan, *What is Fog Data Science and Why Should You Care?*, COMPARITECH (Jan. 2, 2023), https://www.comparitech.com/blog/information-security/fog-data-science.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Yves-Alexandre de Montjoye et al., *Unique in the Crowd: The Privacy Bounds of Human Mobility*, 3:1376 SCI. REP., Mar. 2013, at 3.

64. *Thanks to Tech, Police Practice "Mass Surveillance on a Budget" – No Warrant Required*, CBS NEWS (Sep. 1, 2022, 5:34 PM), https://www.cbsnews.com/news/police-mass-surveillance-fog-reveal-tech-tool.

65. Burke & Dearen, *supra* note 12.

E. The Data Broker Loophole

Given the Supreme Court's recognition of an individual's reasonable expectation of privacy in the record of their physical movements, one would assume that a formidable constitutional hurdle confronts law enforcement agencies seeking to use surveillance tools that reveal more than simply a person's physical movements. However, the privacy protections guaranteed by the Fourth Amendment have yet to invalidate law enforcement agencies' use of software applications like Fog Reveal.[66] The critical distinction seemingly placing Fog Reveal beyond the reach of the Supreme Court's holding in *Carpenter* is the fact that when law enforcement agencies use Fog Reveal, they are purchasing data from a private third-party broker.[67] In contrast, the FBI in *Carpenter* obtained the Petitioner's CSLI through a compulsory legal process.[68] This arbitrary distinction that allows law enforcement to evade the requirements of the Fourth Amendment by purchasing data from third-party brokers has been described as the "Data Broker Loophole."[69] According to Kentucky Senator Rand Paul, the "Data Broker Loophole" allows the government to buy "its way around the Bill of Rights by purchasing the personal and location data of everyday Americans."[70] The view of the Defense Intelligence Agency ("DIA"), which admits to purchasing commercial location data, is that the Supreme Court's decision in *Carpenter* only applies to location data obtained through a compulsory legal process and not data purchased by the government.[71]

Law enforcement agencies also use the "Data Broker Loophole" to get around the ECPA requirements. The ECPA allows RCS and ECS providers to voluntarily provide non-content information to non-government third parties that are not RCS or ECS providers.[72] This loophole enables ECS and RCS providers to voluntarily sell data to private third parties like Fog Data Sciences, which are then able to sell the data to government agencies.[73] As a result, all a government

66. *See, e.g.*, *Carpenter*, 138 S. Ct at 2217.

67. McKenna, *supra* note 53.

68. *Carpenter*, 138 S. Ct at 2212.

69. *Bipartisan Coalition Responds to the FBI's New Policies Under Foreign Intelligence Surveillance Authority*, BRENNAN CTR. FOR JUST. (June 13, 2023), https://www.brennan center.org/our-work/analysis-opinion/bipartisan-coalition-responds-fbis-new-policies-under-foreign.

70. *Wyden, Paul and Bipartisan Members of Congress Introduce The Fourth Amendment Is Not For Sale Act*, RON WYDEN U.S. SENATOR FOR OR. (Apr. 21, 2021), https://www.wyden.senate.gov/news/press-releases/wyden-paul-and-bipartisan-members-of-congress-introduce-the-fourth-amendment-is-not-for-sale-act-.

71. William S. Stewart, *Clarification of Information Briefed During DIA's 1 December Briefing on CTD,* DEF. INTEL. AGENCY 1, 1–2 (Jan. 15, 2021), https://int.nyt.com/data/documenttools/dia-memo-for-wyden-on-commercially-available-smartphone-locational-data/d7d41dccdd1d46b0/full.pdf.

72. Franklin et al., *supra* note 21.

73. *See id.*

agency has to do to obtain information from RCS and ECS providers without a warrant is use a middleman like Fog Data Sciences to purchase the data first.[74]

The Supreme Court's holding in *Carpenter* and Congress's purpose in passing the ECPA reflect a fervent commitment to restricting the government's access to Americans' digital information. That government agencies across the United States can use Fog Reveal without judicial or legislative oversight flies in the face of the reasonable expectations of privacy already recognized by the Supreme Court.

III. THE DATA BROKER LOOPHOLE: A CHEAP READING OF *CARPENTER*

This section offers constitutional and social policy reasons supporting *Carpenter's* applicability to the government's use of Fog Reveal. This section also discusses solutions available to the judiciary and legislature to enhance privacy protections over digital information.

A. Carpenter and the Fourth Amendment's Warrant Requirement Apply to The Government's Use of Fog Reveal

The arguments made by Fog Data Sciences and the government agencies it contracts with in support of *Carpenter's* inapplicability to Fog Reveal are inconsistent with the *Carpenter* holding and the considerations that have long guided the Supreme Court's Fourth Amendment jurisprudence. As technological enhancements expand the government's capacity to intrude into areas normally guarded against curious eyes, the Supreme Court has sought to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[75] Interpreting *Carpenter* to not apply to law enforcement's use of Fog Reveal is antithetical to the Supreme Court's commitment to preserving privacy protections under the Fourth Amendment.[76]

B. The Fourth Amendment Protects People and Not Simply Areas

Central to modern Fourth Amendment jurisprudence is the understanding that the "Fourth Amendment protects people—and not simply 'areas'—[from] unreasonable searches and seizures."[77] As

74. *Id.*
75. *Kyllo*, 533 U.S. at 34.
76. Franklin et al., *supra* note 21.
77. *Katz*, 389 U.S. at 353.

explained in *Katz*, the emphasis on people rather than areas prevents arbitrary interpretation from eroding the safeguards of the Fourth Amendment. For example, a person who knowingly exposes information to the public has no reasonable expectation of privacy over that information under the Fourth Amendment even if the disclosure took place from the privacy of the individual's home.[78] On the other hand, a person who seeks to keep information private may be entitled to Fourth Amendment protections even when they are in a public area.[79] In other words, a person who makes a private phone call in public is entitled to the same Fourth Amendment privacy protections as someone who makes a private phone call from their bedroom. The Fourth Amendment analysis in this situation turns on whether a person has a reasonable expectation of privacy over their private telephone calls, not where they are located when making those private telephone calls.

Government agencies in favor of using applications like Fog Reveal cling to the Fourth Amendment analysis the Supreme Court rejected in *Katz*. Proponents of Fog Reveal concede that Americans have a reasonable expectation of privacy over digital data that records their physical movements.[80] However, they contend that under *Carpenter*, Americans do not have a reasonable expectation of privacy over that digital data when purchased from a third-party broker.[81] The arbitrary distinction drawn from data obtained through a compulsory legal process and that obtained from a third-party broker is analogous to the arbitrary distinction in *Katz* between telephone booth and home.[82] The Court in *Katz* focused its Fourth Amendment analysis not on *where* the telephone call occurred, but on the privacy expectations of the *person* who made the call.[83] With respect to Fog Reveal, the Fourth Amendment analysis does not turn on *where* the digital information is located when the government obtains it, but on the privacy expectations of the *person* whose information is revealed.[84] To hold otherwise would base privacy protections over digital information on the area the data is located, rather than the person who is affected. Because the Fourth Amendment protects people—and not simply areas—*Carpenter* applies to law enforcement's use of Fog Reveal.[85]

78. *Id.* at 351.
79. *Id.*
80. Burke & Dearen, *supra* note 12.
81. *See id.*
82. *See* H. Brian Holland, *A Third-Party Doctrine for Digital Metadata*, 41 CARDOZO L. REV. 1549, 1558 (2020).
83. *Katz*, 389 U.S. at 351.
84. *See id.*
85. *See Carpenter*, 138 S. Ct. at 2213.

C. The Cell Phone: A Feature of Human Anatomy

Modern cell phones and their services are such "a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[86] The Supreme Court's understanding of the ubiquity of cell phones in modern life was crucial in its Fourth Amendment analysis in *Carpenter*.[87] The fact that cell phones accompany their users almost everywhere they go—twelve percent of smartphone users admit they use their phones in the shower—ensures the intimate nature of the information cell phones store.[88] Indeed, cell phones travel with their owners to private residences, doctor's offices, political headquarters, and other revealing locales.[89] Acknowledging this reality, the Supreme Court in *Carpenter* noted that by tracking a cell phone's location, the government achieves near-perfect surveillance.[90]

Moreover, the Court emphasized the retrospective quality of CSLI.[91] CSLI enables law enforcement to travel back in time to trace a person's location as far back as the wireless carrier's records go, typically five years.[92] This means that when law enforcement identifies a suspect, the suspect has been effectively surveilled for each moment of every day for five years.[93] Another alarming aspect of CSLI is the fact that it could be used against any cell phone user. Because CSLI is "continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone."[94] The privacy concerns presented by CSLI that led the Supreme Court to impose a warrant requirement on its use exist in equal if not greater magnitude by the information captured by Fog Reveal.

While the FBI achieved near-perfect surveillance using CSLI in *Carpenter*, law enforcement agencies achieve even more precise surveillance when using location information from applications like Fog Reveal."[95] When officers obtain an individual's CSLI, they only have access to that individual's information. In contrast, Fog Reveal allows law enforcement to monitor rallies, protests, places of

86. Riley v. California, 573 U.S. 373, 385 (2014).
87. *See Carpenter*, 138 S. Ct. at 2218.
88. *Riley*, 573 U.S. at 395.
89. *See Carpenter*, 138 S. Ct. at 2218.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. McKenna, *supra* note 53.

worship, etc.[96] Even though Fog Reveal records location data differently than CSLI—which records when a phone connects to a cell tower—its tracking capabilities are more precise than CSLI.[97]

Furthermore, Fog Reveal presents the same retroactive concerns raised by CSLI. It is inaccurate to think of Fog Reveal as only revealing a person's movements beyond the time they become a person of interest. Indeed, Fog Data Science itself claims to have billions of location data points taken from millions of cell phones.[98] In *Carpenter*, the Supreme Court noted that "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalog every single movement of an individual[] . . . for a very long period."[99] Yet, Fog Reveal provides law enforcement these exact surveillance capabilities. By subscribing to Fog Reveal, law enforcement gains access to the digital trail created whenever a smartphone owner uses an application or visits a website.[100] This information allows law enforcement to establish pattern-of-life profiles on individuals, documenting where they have gone and visited.[101]

Similarly, Fog Reveal, like CSLI, can be used against anyone who owns a cell phone. Again, Fog Data Sciences purports to have billions of data points from over 250 million cellular devices.[102] Accordingly, police need not know in advance whether they want to track or follow a particular individual because the information they may eventually want to discover is harvested by brokers like Fog Reveal and made ready for law enforcement upon request.[103] Given that the information provided by Fog Reveal implicates the same, if not graver, privacy concerns than CSLI, the Supreme Court's holding in *Carpenter* should apply beyond CSLI to cover digital information provided by third-party brokers. For anyone participating in modern society, the cell phone is as much a feature of human anatomy as an arm or a leg; people bring their cell phones with them nearly everywhere they go. This reality cuts against any argument that cell phone users voluntarily relinquish their privacy expectations over the information stored on their mobile devices. In addition, the ubiquity of cell phones in modern life heightens the intimate nature of the information cell phones store. These were the precise concerns that prompted the Supreme Court to recognize a reasonable expectation of privacy over CLSI. Accordingly, the Supreme Court's

96. *Id.*

97. Bennett Cyphers & Aaron Mackey, *Fog Data Science Puts Our Fourth Amendment Rights up for Sale*, ELEC. FRONTIER FOUND. (Aug. 31, 2022), https://www.eff.org/deeplinks/2022/08/fog-data-science-puts-our-fourth-amendment-rights-sale.

98. *Id.*

99. *Carpenter*, 138 S. Ct. at 2217 (citing United States v. Jones, 565 U.S. 400, 430 (2012) (Sotomayor, J., concurring)).

100. McKenna, *supra* note 53.

101. *Id.*

102. *Id.*

103. *See id.*

holding in *Carpenter* should apply to law enforcement's use of software applications like Fog Reveal.

D. Digital Location Data Is Never Anonymous

A principal argument made in support of the government's purchase of location data is that it does not contain any personally identifiable information.[104] In contrast, the FBI in *Carpenter* knew the CSLI it obtained belonged to the Petitioner. Although the location data provided by Fog Reveal is analogous to CSLI in terms of what it reveals, Fog Data Sciences founder Robert Liscouski contends that *Carpenter* does not apply because the data it receives is "hashed and anonymized" before it is turned over to law enforcement.[105]

The "no identifiable information" argument ignores the reality that it is impossible to anonymize location data.[106] Location data reveals unique patterns of movement that make it easy to connect an "anonymous" ID to a real person.[107] A 2013 study involving fifteen months of human mobility data concluded that just four space-time data points were needed to identify ninety-five percent of individuals.[108] Were this not the case, it is unclear why law enforcement would even want access to the troves of location information collected by Fog Reveal in the first place. Moreover, analysts who use the data attest to the ease with which the device owners can be tracked.[109]

After dispensing with the "anonymized" information argument, it is unclear how else to distinguish the FBI's use of CSLI in *Carpenter* from law enforcement's purchase of location information from data brokers. Both implicate the same privacy concerns because both CSLI and location information reveal a person's physical movements and, thus, the places they visit and with whom they associate.[110] When law enforcement obtains location information through brokers like Fog Reveal, it does not know the person's identity until it has access to the data, but the result is the same. Because the data supplied by Fog Reveal and other brokers disclose the intimate details of a person's life that can be used to identify that person, location data is analogous to CSLI; thus, *Carpenter* requires law enforcement to obtain a warrant before purchasing digital location information.

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104. Cyphers & Mackey, *supra* note 97.
105. *Id.*
106. *Id.*
107. *Id.*
108. Montjoye et al., *supra* note 63, at 1.
109. Matsuoka, *supra* note 1.
110. Bennett Cyphers, *How the Federal Government Buys Our Cell Phone Location Data*, ELEC. FRONTIER FOUND. (Jun. 13, 2022), https://www.eff.org/deeplinks/2022/06/how-federal-government-buys-our-cell-phone-location-data; Robinson Meyer, *This Very Common Cellphone Surveillance Still Doesn't Require a Warrant*, THE ATLANTIC (Apr. 14, 2016), https://www.theatlantic.com/technology/archive/2016/04/sixth-circuit-cellphone-tracking-csli-warrant/478197.

E. Location Data and The Risk of Discrimination

Not only does the government's use of location data broadly threaten the privacy of everyday Americans, but its use may also lead to discrimination against marginalized communities. In 2020, the U.S. military purchased location data from two companies called Babel Street and X-Mode that, themselves, pay apps to harvest location data that it can sell.[111] Most of the data purchased by the U.S. military came from Muslim Pro, a Muslim prayer and Quran app that has more than ninety-eight million downloads worldwide.[112] After the story broke, the American Civil Liberties Union filed a Freedom of Information Act request against the U.S. government seeking the release of three years of records, alleging that the data purchases "discriminate against Muslims and violate the Fourth Amendment[]. . . ."[113]

The U.S. military's decision to target the location data of Muslims demonstrates how the use of cellular location data can be used to monitor specific communities. Unlike CSLI, which is limited to the physical movements of a specific individual, when the government contracts with data brokers like Fog Data Sciences and Babel Street, it gains access to the location data of every device within a specified area.[114] For instance, a government agency with access to Fog Reveal can log into the application to see a map.[115] It can then outline a specified area, add a time frame, and Fog Reveal "spit[s] out all of the mobile device ids within that time frame and location."[116] This capability gives the government the ability to monitor particular communities and to surveil political organizations and protests.

For example, in June 2020, Mobilewalla, a data broker that purchases phone data from apps installed on phones, published a report detailing the race, age, gender, and religion of individuals who participated in the Black Lives Matter protests during the weekend following George Floyd's killing.[117] "None of [the protesters] being tracked had any idea at the time, nor do they know now," according to Mobilewalla.[118] Essentially, the U.S. government now has access to

111. Joseph Cox, *How the U.S. Military Buys Location Data from Ordinary Apps*, VICE (Nov. 16, 2020, 10:35 AM), https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x.

112. *Id.*

113. Gabrielle Canon, *ACLU Files Request Over Data US Collected via Muslim App Used by Millions*, THE GUARDIAN (Dec. 3, 2020, 4:34 PM), https://www.theguardian.com/us-news/2020/dec/03/aclu-seeks-release-records-data-us-collected-via-muslim-app-used-millions.

114. Dahan, *supra* note 58.

115. Matsuoka, *supra* note 1.

116. *Id.*

117. Zak Doffman, *Black Lives Matters: U.S. Protesters Tracked by Secretive Phone Location Technology,* FORBES (June 26, 2020, 11:22 AM), https://www.forbes.com/sites/zakdoffman/2020/06/26/secretive-phone-tracking-company-publishes-location-data-on-black-lives-matter-protesters/?sh=a8912bf4a1ea.

118. *Id.*

a tool that allows it to monitor and disrupt political movements.[119] It is obvious why law enforcement might be tempted to use Fog Reveal to monitor individuals who are speaking out against the police. Another frightening implication of the government's newfound surveillance power comes from the Supreme Court's decision in *Dobbs*.[120] Law enforcement agencies may eventually use Fog Reveal to outline abortion clinics and track the patients seeking healthcare.[121] Although social activism related to police brutality and reproductive rights are the most salient issues at present, there is a risk that location data will be used against any political movement that draws the government's ire.

IV. SOLUTIONS

A. Options Available to The Judiciary

Until Congress passes a comprehensive data privacy law, the judiciary has two options to prevent law enforcement from evading the Fourth Amendment's warrant requirement by purchasing location information from data brokers: (1) lower courts must interpret *Carpenter* to require law enforcement to obtain a warrant before purchasing data that records an individual's physical movements; or (2) the Supreme Court should hear a case involving the government's purchase of location information and the subsequent use of that information in a criminal investigation.

The first option is the most practical solution available to the judiciary because it is a response that can be implemented immediately. Lower federal courts have far less power to decide the cases they hear, as opposed to the Supreme Court. Typically, the Supreme Court hears an issue only after it has been decided in the United States Court of Appeals or the highest Court in a given state.[122] Additionally, four of the nine Justices must vote to accept a case.[123] While waiting for the Supreme Court to clarify its holding in *Carpenter*, lower courts should read *Carpenter* to require law enforcement to obtain a warrant before purchasing location information. Specifically, lower courts must acknowledge that the *Carpenter* holding was based on the Court's concern with the

119. *Feds Deliberately Targeted BLM Protesters to Disrupt the Movement, a Report Says*, NPR (Aug. 20, 2021, 9:10 AM), https://www.npr.org/2021/08/20/1029625793/black-lives-matter-protesters-targeted.

120. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

121. Matthew Guariglia. *Members of Congress Urge FTC to Investigate Fog Data Science*, ELEC. FRONTIER FOUND. (Sept. 15, 2022), https://www.eff.org/deeplinks/2022/09/members-congress-urge-ftc-investigate-fog-data-science.

122. *Supreme Court Procedures*, UNITED STATES CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1(last visited Aug. 28, 2023).

123. *Id.*

intimate nature of the information provided by CSLI.[124] The FBI's acquisition of CSLI was a search, not because CSLI was obtained through a compulsory legal process, but because CSLI reveals a detailed history of an individual's physical movements.[125] Lower courts can close the "Data Broker Loophole" argument by clarifying that the sensitive nature of digital location information will implicate the Fourth Amendment regardless of whether it is obtained through purchase or compulsory legal process. By interpreting *Carpenter* in this way, lower courts will minimize the risk of Fourth Amendment violations against American citizens until Congress or the Supreme Court decides to act.

Lower courts requiring law enforcement agencies to obtain a warrant before accessing an individual's personal location information is a temporary solution. For American citizens to have robust privacy protections over the digital data that reveals their physical movements, the Supreme Court must act. To give American citizens certainty over their privacy expectations, the Supreme Court must clarify how the Fourth Amendment applies to third-party government data purchases. Accordingly, the Supreme Court must hear a case involving the warrantless purchase of digital location information from private third-party brokers and permanently close the "Data Broker Loophole." To close the loophole, the Court must categorically acknowledge that American citizens have a reasonable expectation of privacy over the physical record of their physical movements.[126] Further, the Court must acknowledge that the reasonable expectation of privacy over information endures regardless of how the information is obtained—save for extraordinary circumstances like consent or voluntary disclosure.

B. Options Available to The Legislature

The most robust solution is for Congress to pass legislation closing the third-party broker loophole. Passing a comprehensive federal data privacy law is the most obvious solution, but such a solution has proved untenable.[127] The proposal of the American Data Privacy and Protection Act was a step in the right direction, but

124. *See Carpenter*, 138 S. Ct. at 2217 (explaining that an individual expects privacy in daily movement and so it requires protection, with the intimate nature of that tracking data being critical to that decision).

125. *Id.* (noting that CSLI data provides a "detailed and comprehensive" history of an individual's movements).

126. *Id.*

127. *See, e.g.*, Nick Sibilia, *Congress Could Soon Ban Police from Buying Your Data Without a Warrant*, FORBES (Aug. 1, 2023, 8:00 PM), https://www.forbes.com/sites/nicksibilla/2023/08/01/congress-could-soon-ban-police-from-buying-your-data-without-a-warrant/?sh=4b3aabfc5171 (noting that Congress is attempting to deal with the issue presented by CSLI and addressed in *Carpenter* with comprehensive legislation, but also that this is the second time the bill has been introduced, so the bill passing could be unlikely).

neither the Senate nor the House of Representatives had time to consider the proposal before the conclusion of the 117th Congress.[128] Moreover, Congress has tried, unsuccessfully, for over twenty years to pass a federal privacy law, creating skepticism that it will ever succeed.[129] If Congress does pass a comprehensive federal data privacy law, it should model the General Data Protection Regulation ("GDPR") that applies to members of the European Union.[130] The GDPR requires data subjects to give explicit consent before their data is collected.[131] Such a requirement would alleviate the concerns posed by software applications like Fog Reveal.

Despite the infeasibility of Congress passing a comprehensive federal data privacy act anytime soon, Congress should exhaust its more practical options. The first is an amendment to the ECPA closing the third-party broker loophole. The ECPA should be amended to restrict private third parties who obtain customer information from ECS and RCS providers from selling that information to the government. This might require third parties who purchase data from ECS and RCS providers to be designated as a particular entity within the Act that is prohibited from selling information from the government.

Another option that would alleviate some of the concerns over the government's purchase of location information is to regulate the anonymization techniques used by third-party brokers. If, for instance, the location information Fog Reveal provided to law enforcement were truly anonymous and incapable of being traced to a person, there would be fewer privacy concerns. Law enforcement would merely have access to the digital information of an anonymous phone ID rather than a real person. Of course, this solution is predicated on the advancements of anonymization technology given how difficult it is to anonymize location information.

Aside from ensuring privacy protections via a federal data privacy law, closing the third-party broker loophole must be Congress's priority. As mentioned above, Congress could close this loophole by amending existing laws or by regulating data brokers. These are more practical options that could be implemented with greater ease than passing a federal law but would still create meaningful privacy protections for American citizens.

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128. *The American Data Privacy and Protection Act*, A.B.A. (Aug. 30, 2022), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august-22-wl/data-privacy-0822wl.

129. Jessica Rich, *After 20 Years of Debate, It's Time for Congress to Pass a Baseline Poverty Law*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/blog/techtank/2021/01/14/after-20-years-of-debate-its-time-for-congress-to-finally-pass-a-baseline-privacy-law.

130. *See* Osano Staff, *Data Privacy Laws: What You Need to Know in 2023*, OSANO (Dec. 14, 2022), https://www.osano.com/articles/data-privacy-law (explaining that GDPR applies to the EU member countries).

131. *Id.*

V. CONCLUSION

The Supreme Court's Fourth Amendment jurisprudence should keep pace with the rapid advancements of technology. When the Fourth Amendment was drafted, the primary, if not the only, way for the government to intrude into the private affairs of a citizen was to enter the individual's home forcibly. In 2023, the government possesses an unknown number of surveillance tools allowing it to learn the intimate details of an individual's life without ever alerting the individual under surveillance.[132] To preserve the privacy protections the Fourth Amendment offers, the Court and the legislature must recognize the myriad new ways the government can intrude into citizens' private affairs and react accordingly.[133]

To ensure that the protections of the Fourth Amendment are as robust as they were at its drafting, the Supreme Court must require government agencies to obtain a warrant before purchasing location data from third-party brokers.

132. *See Carpenter*, 138 S. Ct. at 2219 (noting that modern targets of surveillance are not alerted to it).

133. *See, e.g.*, Noah Chauvin, *New Legislation Would Close a Fourth Amendment Loophole*, BRENNAN CTR. FOR JUST. (July 6, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-legislation-would-close-fourth-amendment-loophole (explaining how the current state of electronic surveillance has created a Fourth Amendment issue that needs to be solved by comprehensive legislation).